OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19034563
L. GASICH	CDTFA Case ID: 858777
	CDTFA Account No. 53-013969

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: L. Gasich, Taxpayer

For Respondent: Sunny Paley, Tax Counsel

A. KWEE, Administrative Law Judge: On February 24, 2020, the Office of Tax Appeals (OTA) issued a written opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) on a petition for redetermination filed by L. Gasich (appellant).[1] CDTFA's decision denied appellant's petition of a Notice of Determination (NOD) dated December 26, 2014, for $32,083 in tax, plus accrued interest, for the period March 1, 2011, through December 31, 2011 (liability period). CDTFA's decision concluded that appellant is personally liable as a responsible person for the unpaid tax liabilities of South Bay Organic Solutions, Inc. (SBOS).

Appellant timely petitioned for a rehearing on two grounds: first, that there is insufficient evidence to support the written opinion; and second, that there is new evidence to support his contention another individual should be held solely responsible for SBOS's unpaid tax liabilities. The new evidence consists of proposed testimony from R. Saunders (whom appellant states is a former office manager of SBOS) and M. Borguese (whom appellant states is a former general manager of SBOS). In addition, appellant would like to provide SBOS's corporate income tax

[1] Administrative Law Judges A. Kwee, J. Angeja, and S. Ridenour held an oral hearing for this matter in Sacramento, California, on January 29, 2020. At the conclusion of the hearing, the record was closed and this matter was submitted for decision. Judge J. Angeja subsequently left OTA's Hearings Division, and Judge J. Aldrich took his place on the Panel.

returns to show that appellant did not benefit from any losses claimed by SBOS. We conclude that the grounds set forth in appellant's petition do not constitute a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (a) an irregularity in the proceedings that prevented the fair consideration of the appeal; (b) an accident or surprise that occurred, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law that occurred during the proceedings. (Cal. Code Regs., tit. 18, § 30604(a)-(e); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) A ground for a rehearing is material if it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764; *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319.)

Sufficiency of the Evidence

As provided in the State Board of Equalization's (SBE) precedential decision in *Appeal of Wilson Development, Inc., supra*, and as reflected in SBE's Rules for Tax Appeals, SBE has historically looked to Code of Civil Procedure section 657 for guidance in determining whether grounds for a rehearing exist. (See, e.g., Cal. Code Regs., tit. 18, §§ 5461(c)(5), 5561(a).) OTA continues to apply the same standards as SBE for granting a rehearing; thus, it is appropriate to continue looking to Code of Civil Procedure section 657, applicable caselaw, and precedential decisions for guidance in determining whether grounds exist to grant a new hearing.

In order to find that OTA's written opinion is against (or contrary to) law, OTA must determine that the opinion is "unsupported by any substantial evidence." (*Appeal of Swat-Fame, Inc., et al.*, 2020-OTA-045P; *Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) This requires a review of the opinion to indulge "in all legitimate and reasonable inferences" to uphold the opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) The question before us on a petition for rehearing does not involve examining the quality or nature of the reasoning behind OTA's opinion, but whether that opinion is valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) For example, to the extent that the evidence is undisputed or has

been accepted in the light most favorable to the prevailing party, the appeal might turn on a purely legal question. In such circumstances, there may be "doubt that [the Panel] had properly decided the legal issue." (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 187-188.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party, with all legitimate inferences to uphold the opinion, the Panel finds that the written opinion incorrectly stated or applied the law and, as such, it is contrary to law. (*Ibid*.; see also *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 922.)

In summary, we must determine whether, assuming all facts in the light most favorable to the prevailing party, the written opinion can or cannot be valid under the law. (*Appeal of NASSCO Holdings, Inc.*, *supra*.) To the extent only an application of law thereafter remains at issue, the Panel has discretion to conclude that the opinion incorrectly applied the law, on the basis that it cannot be valid under the correct legal interpretation (i.e., it is unsupported by any substantial evidence, assuming all facts in the light most favorable to the prevailing party). (See, e.g., *In re Wickersham's Estate* (1902) 138 Cal. 355, 360-361.)

In our written opinion, we concluded that appellant had the authority to pay or to cause to be paid any taxes due from SBOS. This is one of the requirements to impose personal liability on appellant. (Cal. Code Regs., tit. 18, § 1702.5(b)(2)(B).) In his petition, appellant restates his contention that he cannot be held personally liable for SBOS because another individual, T. Hill, controlled all the finances, and that all finances required pre-approval from T. Hill. In effect, appellant is claiming he lacked the requisite authority to be held personally liable. This issue was raised during briefing, during the oral hearing, and fully addressed in our written opinion. In concluding that appellant had the requisite authority, OTA considered evidence that appellant was the sole corporate officer for SBOS, the sole authorized check signer for SBOS, and that appellant did in fact sign checks for SBOS. OTA also considered business records submitted by CDTFA, which contained statements from T. Hill, asserting that he did not own SBOS, and that he merely loaned money to appellant. At the oral hearing, both parties conceded there was no documentary evidence in the record to show the corporate ownership of SBOS. Assuming the above facts in the light most favorable to the prevailing party (here, CDTFA), and indulging all reasonable and legitimate inferences, we conclude there is substantial evidence to support the finding that appellant had the requisite authority to act for SBOS.

Newly Discovered Evidence

Appellant also requests a rehearing on the grounds of newly discovered evidence which could not have been discovered and produced prior to the issuance of the written opinion. (Cal. Code Regs., tit. 18, § 30604(c); see *Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 731.) Newly discovered evidence is "material" if it is likely to produce a different result. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.) A claim of newly discovered evidence is generally regarded with distrust and disfavor; but such evidence may be deemed sufficient to warrant a new hearing if it is not primarily cumulative, would probably lead to a different result, and could not have been provided before issuance of the opinion. (See *Ulwelling v. Crown Coach Corp.* (1962) 206 Cal.App.2d 96, 127-128.)

First, with respect to the corporate tax returns, the liability period at issue occurred during 2011. Appellant offered no argument or explanation for why he was unable to produce these tax returns during the appeals process. As such, we have no basis to conclude the income tax returns from this time period (2011, and possibly 2012) could not have been discovered and produced before the written opinion was issued on February 24, 2020.

Second, with respect to the testimony of R. Saunders and M. Borguese, appellant offered no argument or explanation for why these witnesses could not have been discovered prior to the oral hearing. Their proposed testimony concerns the activities of SBOS. Both individuals worked for SBOS, which terminated its business on December 31, 2011. As such, these witnesses, and their relation to SBOS, were known to appellant for almost a decade. Furthermore, appellant did in fact identify R. Saunders as a witness for the January 29, 2020 oral hearing, however, she did not testify. Based on the above, we have no basis to conclude that these witnesses could not have been identified prior to the issuance of the written opinion on February 24, 2020.

Based on the foregoing, we find that our written opinion, concluding appellant was personally responsible for the unpaid liabilities of SBOS, was supported by substantial evidence. We further find that appellant failed to establish that the proposed new evidence could not, with reasonable diligence, have been discovered and produced prior to issuance of the written

opinion.[2] As such, we find that appellant failed to establish a ground for rehearing and appellant's petition for rehearing is denied.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

Date Issued: 8/19/2020

[2] We offer no opinion on the materiality of the evidence in question.