OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18124134
NEWELL WINDOW FURNISHINGS, INC.	CDTFA Case ID 864434
	CDTFA Account No. 99-682680

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Carley A. Roberts, Attorney
Huy "Mike" Le, Attorney

For Respondent: Chad T. Bacchus, Tax Counsel III

A. KWEE, Administrative Law Judge: On February 24, 2020, the Office of Tax Appeals (OTA) issued a written opinion in which it held, in pertinent part, that a supplemental decision issued by respondent California Department of Tax and Fee Administration (CDTFA) failed to satisfy the notice requirements of Revenue and Taxation Code (R&TC) section 6486.[1] Newell Window Furnishings, Inc. (appellant) had appealed CDTFA's supplemental decision after the 30-day timeframe set forth in OTA's Emergency Regulations to file an appeal for the time period at issue. (See former Cal. Code Regs., tit. 18, § 30807 [repealed].) OTA accepted appellant's appeal as timely, on the basis that CDTFA failed to properly mail the notice of its supplemental decision to appellant. CDTFA timely petitioned for rehearing, contending that OTA's decision to accept appellant's appeal is contrary to law (or against law) because the

[1] The written opinion was issued by Administrative Law Judge Jeffrey G. Angeja, who left OTA's Hearings Division before this appeal was concluded. This matter was thereafter reassigned to the undersigned Administrative Law Judge.

appeal was untimely.[2] We conclude that the grounds set forth therein establish a basis for granting a rehearing.[3]

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: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law that occurred during the proceedings. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)[4]

In addition to establishing that a ground for rehearing exists, the basis for rehearing must materially affect the substantial rights of the party seeking a rehearing. 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; *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.)

I. Contrary to Law

CDTFA only alleges one ground for a new hearing: OTA's written opinion is contrary to law. 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 Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892,

[2] CDTFA contends OTA made an "error of law." (See Cal. Code Regs., tit. 18, § 30604(e).) An error in law refers to a procedural error in law in the appeals hearing or proceeding. (See Code Civ. Proc., § 657(7); *Appeal of Swat-Fame, Inc., et. al.* 2020-OTA-045P.) The dispute pertains to CDTFA's disagreement with the findings of OTA's written opinion and, as such, we understand CDTFA to be arguing that our opinion is contrary to law, which is the proper grounds for such a contention. (See Cal. Code Regs., tit. 18, § 30604(d).)

[3] Neither party challenges the portion of OTA's holding concluding that CDTFA's service via U.S. Mail will always be an authorized method of service, and that a taxpayer's authorization for CDTFA to send information and notices via electronic means (see Cal. Code Regs., tit. 18, § 35002(i)) does not negate or invalidate CDTFA's service of a document via U.S. mail. In other words, we held that the regulation authorizes, but does not mandate, electronic service. We reaffirm that portion of our holding.

[4] We note that OTA's Emergency Regulations governed petitions for rehearing filed prior to January 1, 2019, and the grounds for granting a rehearing are unchanged. (See former Cal. Code Regs., tit. 18, § 30820 [repealed]; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

906 (*Sanchez-Corea*); *Appeal of Swat-Fame, Inc., et al*., 2020-OTA-045P.) 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 (PFR) 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.) 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, 923.)

In summary, deference must be given to determine whether, assuming all facts in the light most favorable to the prevailing party, the decision 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 *In Re Wickersham's Estate* (1902) 138 Cal. 355, 361.)

CDTFA asserts that our opinion is contrary to law. Specifically, CDTFA asserts that we erroneously concluded that R&TC section 6486 requires CDTFA to mail notices to every taxpayer representative of record *in addition* to mailing the notice to the taxpayer in order to satisfy the notice requirements of R&TC section 6486. In support, CDTFA argues that the authorities on which we relied (*Mulvania v. Comm'r* (9th Cir. 1985) 769 F.2d 1376, 1379 (*Mulvania*), and *Expanding Envelope and Folder Corp. v. Shotz* (3rd Cir. 1967) 385 F.2d 402, 404) do not support our conclusion that the designation of two representatives creates three addresses of record for purposes of the satisfying the notice requirements of R&TC section 6486. CDTFA goes on to assert that when two or more representatives have the same address of record, service to one representative at that address is sufficient, citing *Pacific Gas and Electric v. State Board of Equalization* (1955) 134 Cal.App.2d 149, 154 (*PG&E*).

In response, appellant asserts that we already considered and rejected CDTFA's argument regarding service to multiple people at one address when we held that both named attorneys-in-fact must be served, and raising the same argument is not a valid ground for granting a rehearing. Appellant also asserts that the language of the statute on which *PG&E* was based has changed, such that *PG&E* is not valid support for CDTFA's argument.[5]

In evaluating whether our opinion is against law, we must ascertain whether OTA's decision to accept the appeal as timely is supported by any substantial evidence. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 906.) In so doing, we must consider all factual findings in the light most favorable to the prevailing party, and indulge all legitimate and reasonable inferences therein to uphold the opinion if possible. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.)

The evidence in the written record

In the instant appeal, the pertinent facts are contained in the written record and do not appear to be disputed by either party. They are as follows:

1. On August 3, 2015, appellant submitted a power of attorney to CDTFA.[6] The power of attorney was a pre-printed form drafted by SBE, and written so as to authorize representation for appeal matters before SBE. Appellant's completed power of attorney form authorized two individuals to represent appellant in connection with sales and use tax matters before SBE. Also, SBE's Rules for Tax Appeals required appellant to specify "the tax period(s) for which the authorization is granted" and appellant identified the period as follows: "4/1/2010-9/30/2012" (i.e., the liability period). (Cal. Code Regs., tit. 18, § 5523.1(b)(3).)
2. Under the authorization section of the power of attorney form, appellant checked both the box for "general authorization" and also boxes under the section that would make the power of attorney a "specific authorization." Under the specific authorization section, appellant checked two out of ten boxes, and authorized the listed representatives to: (1) sign petitions and refund claims, and (2) delegate authority to substitute other

[5] Appellant also contends there was no error in law during the proceeding; however, as noted above, we have interpreted CDTFA's appeal as a contention that the written opinion was against law. (See footnote 2.)

[6] Sales taxes were formerly administered by SBE (State Board of Equalization). Effective July 1, 2017, functions of SBE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, the term "CDTFA" refers to CDTFA's predecessor, SBE.

representatives. The "specific authorization" section contained additional boxes that appellant did not check, such as boxes authorizing the representative to execute settlement agreements, to represent appellant for changes to its mailing address for payroll tax or benefit reporting, to resolve any assessment or claim before SBE, or to receive payments in any refund claim.

3. Also on the power of attorney form, appellant provided a mailing address in San Diego, California, for both of its representatives (both representatives had the same mailing address). On the line on the form for "Taxpayer's Mailing Address," appellant reported a mailing address in Atlanta, Georgia.
4. On November 9, 2018, CDTFA mailed the supplemental decision to appellant at appellant's mailing address as listed on the power of attorney form. Also on November 9, 2018, CDTFA mailed a copy of the supplemental decision to appellant's first listed representative, at the representative's address as reported on the power of attorney form. CDTFA did not mail a copy of the supplemental decision to appellant's second listed representative.
5. Appellant concedes that it received the supplemental decision, but contends that the document was not routed to the office of its Director of Indirect Tax until December 10, 2018, which is the date appellant contends it received notice of the supplemental decision.
6. Appellant appealed the supplemental decision on December 21, 2018.
7. OTA bifurcated the appeal into two separate matters: (1) OTA's jurisdiction regarding the timeliness of appellant's appeal; and (2) the substantive merits.
8. In a written opinion dated February 24, 2020, OTA concluded that CDTFA's service was defective, and therefore appellant's appeal should be accepted as timely, and thus OTA had jurisdiction to hear the appeal. CDTFA timely petitioned for a rehearing.

R&TC section 6486 (California's last-known address statute)

At the time the appeal was filed, OTA's Emergency Regulations provided that a taxpayer may file an appeal of a CDTFA decision within 30 days of the date the decision is issued. (See former Cal. Code Regs., tit. 18, § 30807 [repealed].) Under both OTA's Emergency Regulations, and CDTFA's regulations, the issue date is the date CDTFA's decision is mailed to the parties. (See former Cal. Code Regs., tit. 18, § 30801(c) [repealed]; Cal. Code Regs., tit. 18,

§ 35065(a).) Any notice, including issuance of a decision, must be served personally or by mail in the manner prescribed by statute for service of a notice of deficiency determination. (Cal. Code Regs., tit. 18, § 35004.) California's last-known address statute prescribes the manner for serving such a notice and provides, in pertinent part, that:

> [CDTFA] shall give to the retailer or person storing, using, or consuming tangible personal property written notice of its determination. The notice shall be placed in a sealed envelope, with postage paid, addressed to the retailer or person storing, using, or consuming tangible personal property at his or her address as it appears in the records of [CDTFA].

(R&TC, § 6486.)

The number of notices required to be mailed to appellant

As a preliminary matter, OTA's opinion concluded that CDTFA was required to issue three copies of CDTFA's supplemental decision (one to each representative, and one to appellant). We must address whether the applicable law requires service of this notice to more than one address for a taxpayer. R&TC section 6486 is clear that notice shall be mailed to the taxpayer at its "address as it appears in the records of [CDTFA]." (R&TC, § 6486.) In particular, the statute makes use of the term "address," singular, followed by "it" to require service to just *one* address. There is no language in the statute which would require service to more than one (in this case three) addresses. For example, in *PG&E*, *supra*, 134 Cal.App 2d at p. 156, the taxpayer contended that the "address as it appears in the records of [CDTFA]" language in R&TC section 6486 required service to the taxpayer's counsel of record. (*Id*. at p. 152.) Instead, the court rejected this argument and concluded while "addressing a notice to counsel contrary to or in excess of the statutory requirements might in this case have prevented the injury, due process did not require [CDTFA] to take such a measure." (*Ibid*.)

In *PG&E*, the court explained that R&TC section 6486 "permits service by mail 'addressed to the retailer or person storing, using or consuming tangible personal property at his address as it appears in the records of [CDTFA]'"[7] and, as such, the notice requirements are satisfied when "mailed correctly directed to the corporation as such at its own address." (*Id*. at p. 153.) The notice requirements of R&TC section 6486 serve to avoid imposing an unnecessary administrative burden on the state. For example, if a taxpayer were to appoint 20

[7] The language quoted by the court is the same language currently in the statute.

representatives, it would be unduly burdensome on the state to require mail or personal service to all 20 representatives in order for a tax determination to be valid. This cannot be the intent or purpose of the statute. Based on the above, and on the clear language of R&TC section 6486, we find that CDTFA is only statutorily required to mail notice to *one* address for purposes of R&TC section 6486, and the requisite address is the taxpayer's "address as it appears in the records of [CDTFA]."

Appellant contends that *PG&E* is inapplicable because R&TC section 6486 has since been amended. We find this argument unpersuasive because at the time *PG&E* was decided, R&TC section 6486 contained, in pertinent part, substantially identical language as it does today. It provided, in pertinent part: "*[CDTFA] shall give to the retailer or person storing, using, or consuming tangible personal property written notice of its determination*. The notice may be served personally or by mail . . . and shall be *addressed to the retailer or person storing, using, or consuming tangible personal property at his* [or her] *address as it appears in the records of [CDTFA]*." (*PG&E*, *supra*, 134 Cal.App.2d at p. 152, italics added to emphasize language which is the same in the current version of R&TC section 6486.) After *PG&E* was decided, R&TC section 6486 was amended to eliminate a citation to Code of Civil Procedure section 1013 (pertaining to depositing the notice in a mail box, in a sealed envelope with postage prepaid) and those same provisions from Code of Civil Procedure section 1013 (regarding depositing the notice in a mail box in a sealed envelope with postage prepaid) were instead added to R&TC section 6486. Notably, the italicized language (above) was the language at issue in *PG&E*, and it remains unchanged in R&TC section 6486. In summary, given that the substance of R&TC section 6486's language pertaining to serving notice on a taxpayer's address of record remains the same as it was when the *PG&E* opinion analyzed the statute, we find that the *PG&E* opinion remains applicable to our analysis of R&TC section 6486.

Whether CDTFA mailed notice to the last-known address

It is undisputed that appellant wrote three addresses on the power of attorney document, and CDTFA mailed the supplemental decision to two of those three addresses (i.e., to the taxpayer's address, and to the first representative's address). Therefore, we must determine whether there is any substantial evidence to support OTA's finding that CDTFA failed to mail

the supplemental decision to the correct address (of the three provided).[8] In other words, we must determine whether there is any substantial evidence to support a finding that the second listed representative's address was the taxpayer's "address as it appears in the records of [CDTFA]." If the second representative is the taxpayer's last-known address, then there is substantial evidence to conclude that CDTFA failed to timely mail notice to the taxpayer because it is undisputed that CDTFA did not mail the notice to the second representative.

R&TC section 6486 (California's last-known address statute) is substantially similar to Internal Revenue Code (IRC) section 6212 (the federal last-known address statute); therefore, we may consider law interpreting the federal last-known address statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.) It is well established that notices sent to a taxpayer's address of record are presumed to have been received (see *Appeal of Floria* (83-SBE-03) 1983 WL 15390), and are valid regardless of *when* the taxpayer eventually receives them.[9] (*Mulvania v. Comm'r*, *supra*, 769 F.2d at 1379). Under such circumstances where the taxpayer's address of record is different from that of the representative's address of record, sending copies of the statutory notice to the representatives named in a power of attorney is merely a courtesy to the taxpayer, not an obligation of the government. (See *McDonald v. Comm'r* (1981) 76 T.C. 750, 752-53; *Houghton v. Comm'r* (1967) 48 T.C. 656, 661; *Allen v. Comm'r* (1957) 29 T.C. 113, 117.) Therefore, if either the taxpayer's business mailing address in Atlanta, Georgia, or the first representative's mailing address, as listed on the power of attorney document, is appellant's address of record, then there is no substantial evidence to support a finding that appellant timely appealed CDTFA's supplemental decision because it is undisputed that appellant submitted its appeal more than 30 days after CDTFA issued the supplemental decision. Under such facts, the appeal should have been dismissed as a matter of law.

As a preliminary matter, we must turn to the power of attorney document to determine whether this was sufficient to constitute a change of address from the taxpayer's address (in Atlanta, Georgia) to the second representative's address (in San Diego, California). Here,

[8] There is no evidence or argument that some other address is the proper address.

[9] The notice is valid even if not received by the taxpayer, if it is mailed to the taxpayer's last known address. (See *U.S. v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810; see also *Appeal of Goodwin* (97-SBE-003) 1997 WL 258474 ["a notice is valid when mailed to the taxpayer's last-known address"].)

appellant used SBE's preprinted power of attorney (form BOE-392). SBE's Rules for Tax Appeals explain the purpose and scope of the power of attorney form at issue in this appeal:[10]

> (a) Requirement. The [SBE] may require a taxpayer to complete a [SBE] approved Power of Attorney in order to authorize another person or persons to act on the taxpayer's behalf. The Power of Attorney must be a standard form adopted in conjunction with the Franchise Tax Board to be used in either [SBE]or Franchise Tax Board matters.
>
> (b) Form. The Power of Attorney must shall [*sic*] include the following information:
>
> (1) Taxpayer's name, telephone number, taxpayer identification number(s), account or permit number(s) and mailing address;
>
> (2) The name, address (including e-mail, if any), and telephone and FAX number of the appointed representative(s);
>
> (3) The tax matters in which the representative is authorized to represent the taxpayer; the scope of the representative's authority; and the tax period(s) for which the authorization is granted . . . ¶
>
> (c) In lieu of the standard form [the taxpayer may submit] a statutory form power of attorney complying with the provisions of Probate Code section 4401.

(Cal. Code Regs., tit. 18, § 5523.1.)

Based on the language of the regulation, and the form, it is clear that SBE's power of attorney form merely authorizes additional courtesy copies to be sent and does not constitute a change of address of record for purposes of R&TC section 6486. First, the form and regulation require the taxpayer's "mailing address." Here, appellant wrote its address in Atlanta, Georgia, as its mailing address. (See Cal. Code Regs., tit. 18, § 5523.1(b)(1).) Second, the form asks for the representative's mailing address, but the form does not contain any statement or specific language directing CDTFA to *change* appellant's mailing address of record to the representative's mailing address for sales and use tax matters. (See Cal. Code Regs., tit. 18, § 5523.1(b)(2).)

[10] SBE's Rules for Tax Appeals governed appeals heard by SBE and specified the purpose of the SBE Power of Attorney (form BOE-392) that is at issue in this appeal. The form at issue was drafted by SBE and was submitted to SBE at the time SBE's Rules for Tax Appeals governed sales tax appeals and this form. As such, we look to SBE's Rules for Tax Appeals to ascertain the purpose of SBE's power of attorney form. As indicated previously, OTA and CDTFA, respectively, are successors to SBE. CDTFA subsequently drafted its own regulations governing internal appeals procedures (see Cal. Code Regs., tit. 18, § 35001 et. seq.); however, the appeals functions of SBE were transferred to OTA effective January 1, 2018 (Gov. Code, § 15674). To the extent applicable and not in conflict with OTA's Rules for Tax Appeals or applicable law governing OTA, SBE's Rules for Tax Appeals continue in force and may be applied to OTA. (Gov. Code, § 15679.5(a).)

Third, SBE's Rules for Tax Appeals explain the purpose of the power of attorney form (see footnote 10); those rules provide that SBE's Power of Attorney shall identify the tax matters "in which the representative *is authorized* to represent the taxpayer; the scope of the representative's *authority*; and the tax period(s) for which the *authorization is granted*." (Cal. Code Regs., tit. 18, § 5523.1 [emphasis added].) Thus, it is clear from the language in the regulation that SBE did not intend the power of attorney form at issue in this appeal to constitute a change of address form for purposes of R&TC section 6486, because such a change would have changed appellant's mailing address for all purposes, not just the liability period at issue in this appeal.

Based on the above, the evidence demonstrates that SBE's power of attorney did not constitute a change of address for appellant within the meaning of R&TC section 6486. For example, the power of attorney could not as a matter of law constitute appellant's mailing address for other tax notices, such as a Notice of Determination issued pursuant to R&TC section 6486 for the 2013 tax year, as that is outside the scope of the authority conferred by the power of attorney. In summary, we find that there is no basis in evidence to reasonably conclude that appellant authorized a change of mailing address for receiving all such notices for purposes of R&TC section 6486.[11] As such, there is no substantial evidence to conclude that appellant changed its address of record to that of the second representative.

We previously concluded that a taxpayer can only have one address of record. Thus, even if we accepted, for argument's sake, that the document authorized a change of address, there is no possible way the evidence would allow OTA to conclude that the document authorized a change of address to the *second* representative's address.[12]

Based on the above, we conclude that notice sent to appellant's mailing address in Atlanta, Georgia, as reported on the power of attorney, was sufficient to satisfy the notice requirements of R&TC section 6486, and that the notice mailed to the first representative was a

[11] We note that the power of attorney form authorizes the representatives to receive confidential tax information. This is not the same as *changing* a mailing address of record. The power of attorney form at no point states that CDTFA will even provide *courtesy copies* for all notices sent.

[12] Even for income tax matters, for which courtesy copies are generally authorized to be sent to the representative (unless specifically excepted), SBE's power of attorney form includes no option to authorize courtesy copies to be mailed to the *second* representative.

courtesy copy. It is undisputed that appellant received this notice, even if appellant's Director of Indirect Tax did not personally receive it timely.

Although the above is dispositive for purposes of concluding that OTA's written opinion is against law, we also note that our finding is consistent with federal law, and that (as discussed below) the two federal authorities cited by our written opinion subject to this PFR do not support the conclusions reached therein. For these purposes, ascertaining whether the document authorizes a change of address is dependent on the language contained in the document. For example, Revenue Procedure 2010-16, section 2.02, states that "clear and concise notification" is required in order to effectuate a change in address for purposes of the federal last-known address statute. It goes on to explain that the Internal Revenue Service (IRS) "Form 2848, *Power of Attorney and Declaration of Representative,* will not be used by the [IRS] to update the taxpayer's address of record" for purposes of the federal last-known address statute. (Rev. Proc. 2010-16, § 5.01(4).) Federal courts, interpreting Revenue Procedure 2010-16, have concluded, in pertinent part, that the IRS Power of Attorney form does not constitute a change in address because the form does not "purport[ ] to inform the IRS that it should be interpreted as a request to change the taxpayer's last known address." (*Gregory v. Comm'r* (2019) 152 T.C. 129, 135, app. pending.) To the contrary, "[i]t is well established that if a taxpayer intends for his [or her] appointed representative's address to constitute [the] 'last known address,' then the taxpayer must explicitly direct [the IRS] to send all notices and other written correspondences to the taxpayer's appointed representative" and a direction to send copies of notices and other written communications to the representative is insufficient to constitute a change of address for these purposes. (*Smith v. Comm'r*, T.C. Memo. 1989-508.) For the same reason, "copies of correspondence sent pursuant to a request in a power of attorney are a matter of courtesy and in no way affect . . . ¶ the statutory mailing requirements for notice." (*McDonald v. Comm'r*, *supra*, 76 T.C. at pp. 752-752.) Under these circumstances, the failure to mail such a copy of a notice to a representative "does not serve to extend the [statutory time] period for timely filing" an appeal. (*Smith v. Comm'r*, *supra*, T.C. Memo. 1989-508, citing *McDonald v. Comm'r*, *supra*, 76 T.C. at p. 753.)

With respect to the importance of the language in the form, in the first case relied upon in our written opinion, *Expanding Envelope & Folder Corp. v. Shotz* (3rd Cir. 1967) 385 F.2d 402 (*Expanding Envelope*), the court interpreted an earlier version of IRS Form 2848, and,

emphasizing language directing that "'all correspondence addressed to the taxpayers in proceedings'" be sent to the representative, concluded it constituted a change in address. The court found this language sufficient to constitute a change in address because the taxpayer had crossed out the words "copies of" before correspondence, and in the portion of the power of attorney form directing correspondence to be sent to their representative the taxpayer wrote "all." (*Expanding Envelope, supra*, 385 F.2d 402 at p. 404.) In contrast, in the instant case, as discussed above, there is nothing on SBE's power of attorney form, or in the handwritten text added by the taxpayer, which would indicate an intent to change appellant's address of record for all purposes to the address of the representative.

With respect to the second case cited in our written opinion, *Mulvania v. Comm'r*, *supra*, 769 F.2d 1376, this case does not stand for the proposition that a power of attorney form generally constitutes a change of address. To the contrary, the court concluded that a power of attorney which only authorizes courtesy copies was insufficient to establish that a representative is an agent of the taxpayer under the law of principal and agent. (*Id.* at p. 1379.) Under such theory, the designee of a general power of attorney may, under the law of principal and agent, be considered to impart notice on the principal for purposes of the federal last-known address rule, provided notice is served on the agent (i.e., the representative), and the agent timely provides actual notice to his or her principal (i.e., the taxpayer) of the tax deficiency. (*Ibid.*) The theory set forth in *Mulvania* is not applicable under the facts of the instant appeal because: (1) CDTFA timely mailed notice of the supplemental decision to appellant (i.e., the principal) pursuant to R&TC section 6486 and thus it is legally irrelevant if the representative also received that notice, and (2) in *Mulvania*, the government did not mail the notice to the taxpayer's last-known mailing address, and the power of attorney form did not constitute a change of address because the taxpayer had only "request[ed] that courtesy copies of all communication be sent to [the taxpayer's] representative."

In light of the foregoing authorities, we conclude that our prior opinion misconstrued the law. R&TC section 6486 requires CDTFA to mail a notice to the taxpayer at its address of record, and service is complete when CDTFA does so. Nothing in that section requires CDTFA to mail additional notices to any and all authorized representatives in order to comply with the statute, and absent a showing that a taxpayer has clearly and concisely designated a representative's address to replace the taxpayer's address of record, CDTFA need not do so.

In summary, after correcting the application of the law, there is no substantial evidence supporting our original opinion. Specifically, it is undisputed that CDTFA timely mailed its supplemental decision to appellant at appellant's last-known address in Atlanta, Georgia. Therefore, CDTFA's mailing met the legal requirements of R&TC section 6486, regardless of whether it mailed courtesy copies to one or more representatives. Furthermore, this is a material ground for a rehearing because CDTFA would have prevailed on the appeal had we correctly applied the law. Accordingly, the holding in our February 24, 2020 written opinion is contrary to law.

II. Application of OTA's internal policies and procedures

Appellant filed its appeal with OTA on December 21, 2018.[13] During the briefing process, appellant requested bifurcation to first determine whether OTA had jurisdiction over the appeal matter due to the late appeal filing. By letter dated March 5, 2019, OTA accepted appellant's bifurcation request, without objection from CDTFA, and proceeded with establishing a briefing schedule for the jurisdictional matter.[14] OTA's decision to grant the request was intended to save OTA and the parties the time and resources of addressing the substantive issue of whether appellant is liable for use tax, in the event OTA lacks jurisdiction over the appeal. Thereafter, OTA conducted an oral hearing and issued a written opinion solely on the jurisdictional matter.[15]

The dissenting opinion raises concerns with OTA's PFR process and opines that OTA should not accept a PFR at this time. The dissenting opinion would have the parties go forward with addressing the substantive issue, before ultimately dismissing the appeal for lack of jurisdiction. Neither party raised any concerns with OTA's PFR process, nor has either party been offered an opportunity to brief this issue. In an abundance of caution, we will briefly

[13] As discussed above, the parties dispute whether this appeal was timely. Our analysis has concluded that CDTFA timely served its supplemental decision to appellant on November 9, 2018; thus, appellant's deadline to timely file an appeal with OTA was December 9, 2018 (i.e., 30 days from CDTFA's supplemental decision dated November 9, 2018). (See former Cal. Code Regs., tit. 18, § 30807 [repealed].)

[14] OTA's Rules for Tax Appeals provide that: "If there is an issue regarding the timeliness of the appeal or OTA's jurisdiction to hear the appeal, the appeal may be assigned to a Panel. The Panel may: ... take other action as it deems appropriate to determine such issues." (Cal. Code Regs., tit. 18, § 30105(c).)

[15] OTA's written opinion explained that if we found in appellant's favor on the jurisdictional issue, a new hearing and attendant briefing will be scheduled in connection with the underlying substantive issue.

address the concern with OTA's PFR process because it was raised *sua sponte* in the dissenting opinion and, as such, would otherwise go unaddressed.

First, the dissent contends that it is appropriate to look to the Code of Civil Procedure because OTA's Rules for Tax Appeals are silent as to the timing of a PFR when issues are bifurcated or severed. It bears emphasizing here that this appeal does not involve a matter of ambiguity on the time for appellant to file a PFR. To the contrary, OTA's Rules for Tax Appeals provide that: "A petition for rehearing may be submitted to seek reconsideration of any written opinion issued by a Panel." (Cal. Code Regs., tit. 18, § 30505(a).) A PFR may be filed within 30 days after issuance of a written opinion. (*Id*.) A written opinion is issued on the date it is mailed to the parties. (*Id*.) The filing of a timely PFR prevents the written opinion from becoming final. (*Id*.) In summary, a PFR may be filed for any written opinion issued by a Panel, the PFR must be filed within 30 days after issuance, and the written opinion is issued on the date mailed to the parties. (*Id*.)

By letter dated February 24, 2020, OTA mailed the written opinion to the parties and notified the parties that they had 30 days to file a PFR of OTA's written opinion. CDTFA timely filed a PFR and, thereafter, the parties submitted briefing pursuant to the regular PFR briefing process. OTA is required by law to follow its own Rules for Tax Appeals and "must be faithful to its own announced regulations." (*Newco Leasing, Inc. v. State Bd. of Equalization* (1983) 143 Cal.App.3d 120, 124.) Thus, there is no question that the parties could file a PFR of the written opinion within the 30-day timeframe, as stated in the cover letter to the written opinion that OTA mailed to the parties. As such, we find that OTA was required to afford the parties an opportunity to file a PFR prior to proceeding with the second appeal matter.

Next, even if OTA's Rules for Tax Appeals were silent or ambiguous on the matter (which, as explained above, they are not), it would still not be proper to turn directly to the Code of Civil Procedure.[16] Instead, Government Code section 15679.5(a) provides that all OTA

[16] There are very limited scenarios in which OTA's Rules for Tax Appeals will look to the Code of Civil Procedure as guidance, and they are all clearly set forth by way of explicit incorporation of a specific provision from the Code of Civil Procedure. This is not the case with the PFR process. Further, it is important to keep in mind that section 657 of the Code of Civil Procedure addresses grounds for granting a new jury trial. OTA does not offer jury trials; as such, not all grounds are relevant or applicable to OTA. In addition, the Code of Civil Procedure requires that some of the grounds for a new trial must be supported by an affidavit or be made on the minutes of the court. (Code Civ. Proc., § 658.) OTA also does not follow this provision.

appeals hearings and proceedings shall be conducted pursuant to the Administrative Procedure Act (Gov. Code, § 11340 et seq.). OTA may opt out of specific provisions. (Gov. Code, § 15679(a); see Cal. Code Regs., tit. 18, § 30216(d).) OTA follows Government Code section 11415.10(a), which provides that when the governing procedure for appeals proceedings is silent, it is appropriate to look to the Administrative Procedure Act. (Cal. Code Regs., tit. 18, § 30216(d).) The Administrative Procedure Act provides that a party may petition for reconsideration of "all or part of the case." (Gov. Code, § 11521(a); see *Moyer v. State Bd. of Equalization* (1956) 140 Cal.App.2d 651, 654.)[17] In summary, there is no ambiguity regarding the time for filing a PFR in this case and, even if there were, OTA would not turn to the Code of Civil Procedure to resolve such ambiguity.

Finally, the dissenting opinion concludes that OTA follows the "aggrieved party" rule in the Code of Civil Procedure to determine the time to file a PFR for a bifurcated or severed matter. As a preliminary matter, it should be noted that the Sales and Use Tax Law does not grant any party the right to file a PFR. The PFR process, including the decision whether to allow any PFR to be filed, is entirely a regulatory construct within the discretion of OTA. In determining, as an administrative matter, to allow parties to file a PFR, OTA set forth the Rules for Tax Appeals, the pertinent provisions of which are summarized above. At no point do OTA's Rules for Tax Appeals incorporate any rules pertaining to the time to file a PFR as set forth in the Code of Civil Procedure. As such, OTA has no obligation to follow the Code of Civil Procedure during the PFR process.

As provided in SBE's 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).) As a policy matter, 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 case law, and precedential SBE decisions for guidance in determining whether a *ground* exists to grant a new hearing. (*Appeal*

[17] OTA had adopted its own rules governing the PFR process, discussed above (Cal. Code Regs., tit. 18, § 30505(a),) which clearly set forth the time to file a PFR and that is a reason why OTA does not follow this section. Government Code section 11521 is cited here only as an example to show that OTA's decision to accept a PFR of a bifurcated appeal matter is consistent with the framework of OTA's authorizing legislation (Part 9.5 of Division 3, of Title 2, of the Government Code).

of Do, 2018-OTA-002P.) In the present case, however, the grounds for a rehearing are not the issue raised by the dissent. The dissent raises the *timing* for filing a PFR.

There is no statute, regulation, policy, or procedure in which the Code of Civil Procedure is persuasive authority or otherwise relevant to OTA's determination of the timeframe for a party to file a PFR. Code of Civil Procedure section 659 sets forth the timeframe to file a motion for a new trial, and generally requires a motion for a new jury trial be filed within 15 days of the date of mailing notice of entry of judgment or within 180 days after the entry of judgement, whichever is earliest. (Code Civ. Proc., § 659(a)(2).) Caselaw further establishes the "aggrieved party" rule (cited by the dissent) and clarifies the time to file a motion for a new jury trial in civil court cases under Code of Civil Procedure sections 657 (grounds on which a motion may be based) and 659 (time to file the motion). (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 12.) Nevertheless, we must be mindful that OTA's authorizing statute expressly provides that OTA is not a court. (Gov. Code, § 15672(b).) Furthermore, the fact that OTA's Rules for Tax Appeals authorize 30 days, instead of 15 or 180 days, to file a PFR indicates that OTA has affirmatively rejected the notion that the Code of Civil Procedure is relevant to determining the timeframe to file a PFR. As such, we conclude that Code of Civil Procedure section 659 and the aggrieved party rule are not relevant in an appeal before OTA.

For all the foregoing reasons, the PFR is granted.

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Andrew J. Kwee
Administrative Law Judge

I concur:

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

A. ROSAS, Dissenting:

Appellant Newell Window Furnishings, Inc., raised two issues in its appeal. The first issue is jurisdictional.[1] The second issue is substantive.[2] The Office of Tax Appeals (OTA) agreed to bifurcate these two issues, and, during the November 19, 2019 oral hearing, OTA heard argument on the first issue only—the jurisdictional issue. In the opinion issued on February 24, 2020, OTA adjudicated the first issue, accepting appellant's appeal as timely. After adjudicating the first issue in favor of appellant, the next step in terms of proper procedure should have been to schedule and hold an oral hearing on the second, pending issue—the substantive issue. But that did not occur. Instead, respondent California Department of Tax and Fee Administration filed a premature petition for rehearing (PFR), which OTA accepted.

In discussing these PFR proceedings, it is appropriate to look to Code of Civil Procedure (CCP) section 657 and applicable caselaw. There is a long-standing rule that a premature motion for a new trial (or a rehearing) under CCP section 657 is void and of no effect. (See *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 151-153 (*Ehrler*).) It is well settled that a premature motion for a new trial (or a rehearing) is "a nullity and ineffectual for any purpose." (*Root v. Daugherty* (1927) 201 Cal. 12, 14 (*Root*); *Tabor v. Superior Court* (1946) 28 Cal.2d 505, 507 (*Tabor*); *Ehrler, supra*, at p. 152.) Indeed, a trial court that considers a premature new trial motion acts in excess of its jurisdiction. (*Tabor, supra*, at pp. 507-508; cf. *Ehrler, supra*, at p. 151.)

Under CCP section 657, the "party aggrieved" may file a motion for a new trial (or a rehearing) when one of several grounds is met and materially affects the substantial rights of the aggrieved party. However, as the California Supreme Court has pointed out, "there is no 'party aggrieved' . . . until such time as there has been a completed trial and decision, at which time nothing remains to be done except to enter judgment in favor of the prevailing party." (*City of Los Angeles v. Cole* (1946) 28 Cal.2d 509, 512 [overruled on unrelated grounds by *Los Angeles County v. Faus* (1957) 48 Cal.2d 672].) Until there is a "decision" on all issues, there is no aggrieved party. (*Auto Equity Sales, Inc. v. Sup.Ct. (Hesenflow*) (1962) 57 Cal.2d 450, 458; *Collins v. Sutter Memorial Hosp.* (2011) 196 Cal.App.4th 1, 12; *Cobb v. University of*

[1] Appellant argues that because respondent failed to properly serve its supplemental decision, appellant's appeal was timely even though it was filed more than 30 days after respondent served its supplemental decision.

[2] Appellant argues that third parties ("True Retailers") were engaged in business in California, and that these True Retailers—not appellant—are liable for the amounts in dispute.

Southern Calif. (1996) 45 Cal.App.4th 1140, 1143 (*Cobb*).) "Proceedings for a new trial taken prematurely are ineffective for any purpose . . . ." (*Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 378-379; *Cobb*, *supra*, at p. 1144; *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 132.)

Regulatory language suggests that OTA should follow the "party aggrieved" requirement: "A Panel may sever an issue or issues from an appeal for separate consideration and issue an opinion on the severed issue or issues prior to deciding the appeal. In situations where this occurs, the Panel's decision will not become final on the severed issues until the Panel's decision resolving the entire appeal becomes final." (Cal. Code Regs., tit. 18, § 30505(c).)

OTA bifurcated the two issues. OTA's regulations are silent as to the timing of a PFR when issues are bifurcated or severed. Consequently, when issues are bifurcated and tried separately, a new trial motion is premature if made before all issues have been tried. (See Cal. Rules of Court, rule 3.1591(c) ["Any motion for a new trial following a bifurcated trial must be made after all the issues are tried"] and *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 752.) Thus, a notice or motion (or petition) filed after trial of only one of the issues is premature and ineffective. (*Mays v. Disneyland* (1963) 213 Cal.App.2d 297, 299.) Furthermore, in theory, engaging in premature PFR proceedings violates OTA's one-PFR-per-appeal rule: "A party may not submit more than one petition for rehearing regarding the same appeal." (Cal. Code Regs., tit. 18, § 30605.)

Accordingly, in a bifurcated matter, a party may not file a PFR until all the issues are adjudicated. Until there is a final decision on all the issues, there is no "party aggrieved" under CCP section 657; thus, because respondent's PFR was premature, these proceedings are "a nullity and ineffectual for any purpose." (*Root*, *supra*, 201 Cal. at p. 14.) As such, I respectfully dissent because I believe the majority is acting in excess of OTA's jurisdiction.[3]

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Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

Date Issued: 9/9/2020

[3] This dissenting opinion is limited to procedural grounds and concludes that there is no jurisdiction to adjudicate this premature PFR. Therefore, it would not be appropriate for the dissenting opinion to discuss the merits or substance of this premature petition.