OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18053172
	) CDTFA Case ID 673751
SULLY GREEN, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Russell L. Davis, Esq.
Kevin Cahill, C.P.A.

For Respondent: Chad Bacchus, Tax Counsel IV

M. GEARY, Administrative Law Judge: On June 4, 2020, we issued an opinion (Opinion) in this appeal finding that respondent California Department of Tax and Fee Administration correctly redetermined appellant's sales tax liability measured by unreported taxable sales of $1,288,864 and a tax-paid purchases resold deduction of $515,653, and that appellant was not entitled to relief under Revenue and Taxation Code (R&TC) section 6596. Pursuant to the California Code of Regulations, title 18, (Regulation) section 30602, appellant filed a timely petition for rehearing (PFR). Upon consideration of the matters stated therein, we find that appellant has not established grounds for a new hearing. (See Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P.)

Regulation section 30604 provides that a rehearing may be granted where any of the five stated grounds exist and the rights of the complaining party are materially affected. (See also *Appeal of Do*, *supra*.) As relevant here, one of those grounds is that there was insufficient evidence to justify the written opinion, or the opinion was contrary to law. (Cal. Code Regs., tit. 18, § 30604(d).) This ground generally pertains to alleged errors in an opinion. Another ground is that there was an error in law. (Cal. Code Regs., tit. 18, § 30604(e).) This ground generally pertains to procedural errors that occurred in the course of the proceedings, such as an erroneous exclusion of evidence. (See *Appeal of Swat-Fame, Inc. et. al*, 2020-OTA-045P.)

Appellant's PFR cites to both of these grounds. However, its arguments indicate that it actually relies upon Regulation section 30604(d) only.

A rehearing should not be granted on the grounds of insufficiency of the evidence unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that we should have reached different conclusions. (See Cal. Code Civ. Proc., § 657.)[1] A PFR on the ground that an opinion was contrary to law cannot be granted unless, after indulging in all legitimate and reasonable inferences to uphold the opinion, we conclude that the opinion was, as a matter of law, unsupported by substantial evidence. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) The question before us on a 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 Martinez Steel Corporation*, 2020-OTA-074P.)

Appellant asserts that the Opinion erroneously interprets and applies R&TC section 6596. Its argument is essentially as follows. Section 6596 refers to a reasonable reliance by a "person." Only people or persons, not entities, have the ability to think or rely on advice or representations, which is why section 6596 refers to reliance by a "person." The "person" to whom the prior written advice was given was the same person who failed to accurately report in reliance on that advice: Robert Sullivan. Therefore, relief should be granted.

Alternatively, appellant argues that even if we find that it was not the person to whom respondent gave the written advice in the prior audit, appellant was entitled to rely on such advice because it shared accounting and common ownership with the audited person, the Sullivan Group. Appellant also argues that the Opinion is incorrect in other respects, asserting that the Opinion arrives at an erroneous conclusion that the shutter panels are fixtures by wrongly comparing the wood shutters with cabinets and by mischaracterizing the nature of the shutters and their components, and that it fails to allow an adjustment to the taxable measure based on the uncontradicted testimony of appellant's accountant and representative, Kevin Cahill.

[1] In *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654, the Board of Equalization largely adopted the grounds for granting a rehearing, including the ground of an insufficiency of evidence to justify the opinion, from Code of Civil Procedure (CCP) section 657, which sets forth the grounds for a new trial in a California trial court. Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute are relevant guidance in interpreting the provisions contained in this regulation.

In reply, respondent argues that R&TC section 6596 uses the term "person" as defined in R&TC section 6005[2] to include any individual or entity that could be deemed a taxpayer under the Sales and Use Tax Law. It contends that in the context of an application of R&TC section 6596 to the relevant facts, the term refers to the taxpayer to whom respondent gave the prior written advice and the taxpayer who seeks relief based on that advice, which were The Sullivan Group and appellant, respectively. Respondent contends that in other respects, the PFR merely repeats the arguments made at and before the hearing, all of which have been correctly addressed in the Opinion.

Appellant's argument that the Opinion misinterprets and incorrectly applies R&TC section 6596 is unpersuasive. It is clear from the language of section 6596 and Regulation section 1705 that the term "person" is a generic reference to the taxpayer and does not refer literally to an individual. It is equally clear in this context that the "person" to whom the written advice was given in the prior audit was The Sullivan Group and not Robert Sullivan or appellant. Furthermore, and as stated in the Opinion, Regulation section 1705 states that a person is considered to have shared accounting and common ownership if, *during the period(s) for which relief is sought*, the person: (1) is engaged in the same line of business as the audited person; (2) has common verifiable controlling ownership of 50% or greater ownership or has a common majority shareholder with the audited person; and (3) shares centralized accounting functions with the audited person. Finally, and as also stated in the Opinion, a "subsequent written notification stating that the advice was not valid at the time it was issued or was subsequently rendered invalid to any party with shared accounting and common ownership, including the audited party, serves as notification to all parties with shared accounting and common ownership, including the audited party, that the prior written advice may not be relied upon as of the notification date." The evidence established that respondent gave such written notification in January 2008, prior to the period for which appellant seeks relief. We conclude that the Opinion correctly denies appellant relief under R&TC section 6596.

We also are not persuaded by appellant's argument that the Opinion incorrectly analyzes whether the shutter panels were materials or fixtures. On the contrary, given the fact that

[2] R&TC section 6005 states that the term "person" includes any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this state, any county, city and county, municipality, district, or other political subdivision of the state, or any other group or combination acting as a unit.

Appendix B to Regulation section 1521, which provides examples of fixtures, refers to Venetian blinds but not to wood shutters, and because Venetian blinds are to some degree distinguishable from appellant's shutter panels, the Opinion correctly analyzes the issue in part by analogy to cabinets, which can be materials, fixtures, or a combination of both.[3] This is precisely the kind of analysis that must happen when there is no definitive guidance in the regulation. Nothing in the PFR persuades us otherwise.

Finally, appellant is mistaken in its belief that the panel of judges was required to accept the testimony of Kevin Cahill because respondent offered no evidence to rebut it. The panel found that respondent met its burden of producing evidence to show a reasonable and rational basis for its findings and that appellant had the burden of proving a more accurate measure. (Cal. Code Regs., tit. 18, §30219(a); *Appeal of Talavera* 2020-OTA-022P.) Thus, the question is whether appellant carried that burden. The three judges who were on the panel were the finders of fact. They considered all the evidence, including the testimony of Kevin Cahill and the work papers for the several audits. The panel concluded that appellant did not carry its burden of proof. While appellant clearly disagrees with the Opinion, a party's dissatisfaction with the outcome of a hearing and desire to make the same arguments again are not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

The PFR is denied.

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Michael F. Geary
Administrative Law Judge

We concur:

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Daniel K. Cho
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge

Date Issued: 12/10/2020

[3] Appellant concedes in the PFR that prefabricated shutters, like prefabricated cabinets, are fixtures.