**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

| | |
|---|---|
| In the Matter of the Appeal of: | ) OTA Case No. 18063254 |
| | ) CDTFA Case ID 539093 |
| **THOMAS CONGLOMERATE** | ) |
| | ) |
| | ) |
| | ) |

## OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: P. Thomas, Medical Director

For Respondent: Joseph Boniwell, Tax Counsel

S. BROWN, Administrative Law Judge: On July 9, 2020, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) on a petition for redetermination filed by Thomas Conglomerate dba 4D Fetal Imaging (appellant). CDTFA's decision denied appellant's petition for redetermination of a June 25, 2010 Notice of Determination (NOD) for the period January 1, 2004, through December 31, 2007 (audit period). Appellant filed a timely petition for rehearing (PFR). We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

California Code of Regulations, title 18, (Regulation) section 30604(a)-(e) provides that a rehearing may be granted where one of the following grounds exists and the substantial rights of the complaining party are materially affected: (a) irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; (b) accident or surprise that occurred during the proceedings and prior to the issuance of the written opinion, which ordinary prudence could not have guarded against; (c) newly discovered, relevant evidence, which the party could not, with reasonable diligence, have discovered and produced prior to the 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. (See also *Appeal of Do*, 2018-OTA-002P.)

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. (Cal. Code Regs., tit. 18, § 30604.) 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.[1])

*Irregularity in the Proceedings*

Generally, an irregularity in appeal proceedings warranting a rehearing includes any departure from the due and orderly method of conducting the appeals proceedings by which the substantial rights of a party have been materially affected. (See *Appeal of Graham and Smith*, 2018-OTA-154P; *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.)

Appellant argues that it requested an oral hearing to present its evidence, but no oral hearing was scheduled, and that this constitutes an irregularity in the proceedings which prevented appellant from having a fair consideration of its case. Appellant states that an earlier hearing scheduled in 2018 was cancelled by the State Board of Equalization (SBE) and appellant did not receive any explanation during the "reorganization to OTA."[2]

Regulation section 30401(a) provides that every appellant has the right to an oral hearing before a panel upon written request, and an appellant may request an oral hearing in writing at any time prior to the completion of briefing. At the close of briefing, OTA will send the appellant a form to request an oral hearing or a confirmation notice to confirm a request for an oral hearing. (Cal. Code Regs., tit. 18, § 30401(a)(1).) The appellant has 15 days from the date of the form to request or confirm a previously made request for an oral hearing in writing. (*Ibid.*) If a request for oral hearing is not received by OTA 15 days after the date of the form, the appellant will be deemed to have waived the right to an oral hearing and the matter may be determined on the written record. (*Ibid.*)

[1] Regulation section 30604 is essentially based upon the provisions of Code of Civil Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654; *Appeal of Do*, 2018-OTA-002P.) Therefore, the language of CCP section 657 and case law pertaining to the statute are relevant guidance in interpreting this regulation. (*Appeal of Wilson Development, Inc., supra*.)

[2] Sales taxes were formerly administered by SBE. In 2017, functions of SBE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) Thus, we understand that appellant's reference to "reorganization" refers to this restructuring of the appeals process.

Here, OTA has never received a written request from appellant for an oral hearing in this case.[3] In a letter dated October 12, 2018, OTA notified appellant of the option to request an oral hearing, and indicated that appellant should check the appropriate box on the form to request an oral hearing. When OTA received the form back from appellant, it bore a handwritten request for an extension to file appellant's reply brief, but did not include any request for an oral hearing. Therefore, appellant is deemed to have waived the right to an oral hearing. (Cal. Code. Regs., tit. 18, § 30401(a)(1).) Moreover, in letters to appellant dated February 20, 2019, and May 24, 2019, OTA indicated that the appeal would be decided "on the basis of the written record and without an oral hearing."[4] Given all of these facts, it is clear that the matter was properly determined on the written record. (Cal. Code Regs., tit. 18, § 30401(a)(1).) Consequently, we find that appellant has not demonstrated an irregularity in the proceedings that prevented a fair consideration of the appeal.

*Accident or Surprise*

The terms "accident" and "surprise" denote some condition or situation in which a party is unexpectedly placed, to its injury, without any default or negligence of its own, which ordinary prudence could not have guarded against. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) A new hearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (See Code Civ. Proc., § 657; *Appeal of Wilson Development* (94-SBE-007) 1994 WL 580654.)

Appellant contends that grounds for rehearing exist because appellant was surprised that neither it nor its representative received timely notice of the right to appear at an oral hearing.

[3] Appellant has not alleged that it sent OTA a written request for oral hearing. Appellant previously requested an oral hearing with SBE; however, in response to OTA's form to request an oral hearing, appellant failed to request an oral hearing in writing and failed to confirm a previously made request for an oral hearing in writing. Consequently, appellant is deemed to have waived the right to an oral hearing. (Cal. Code. Regs., tit. 18, § 30401(a)(1).)

[4] On June 8, 2020, appellant contacted OTA staff by telephone and stated that appellant had not received any notice of an oral hearing. Staff informed appellant that OTA had never received a request for oral hearing in this case, and explained that if appellant wanted an oral hearing, the request needed to be submitted in writing as soon as possible because the Opinion would be issued soon. Staff also explained that the request for oral hearing should include an explanation of why appellant had not previously requested the oral hearing. Appellant indicated it would be submitting the written request as soon as possible. Thereafter, OTA did not receive a written request for oral hearing prior to issuance of the Opinion in this case, and appellant does not allege that one was submitted.

As discussed above, OTA notified appellant in an October 12, 2018 letter that appellant should mark the appropriate box on the form to request an oral hearing, but thereafter appellant returned the letter without requesting an oral hearing. Thus, appellant did not timely submit to OTA a request for an oral hearing, and appellant was deemed to have waived the right to an oral hearing.[5] (Cal. Code Regs., tit. 18, § 30401(a)(1).) Accordingly, appellant has not established how its failure to request an oral hearing was an accident or surprise which ordinary caution could not have prevented.

*Newly Discovered, Relevant Evidence*

A party seeking a rehearing based on newly discovered, relevant evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence materially affects the substantial rights of the party. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) A ground for a rehearing is material if it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno, supra*, 202 Cal.App.4th at p. 728.) Evidence is "newly discovered" if it was not known or accessible to the party seeking rehearing prior to the issuance of the written opinion. (See *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) Newly discovered evidence is looked upon with suspicion and disfavor, and the party must make a strong showing of the necessary requirements to support a petition for rehearing on this ground. (See *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138.)

A PFR will be denied when (a) the newly discovered evidence could have been produced by the exercise of reasonable diligence, (b) the party seeking rehearing has not shown due diligence in discovering and producing the newly discovered evidence, or (c) no reason is shown for why the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the written opinion. (See *Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208.)

Appellant contends that it has newly discovered, relevant evidence in the form of "thousands of CDs and DVDs with original recordings of scans" that were never purchased by

[5] Moreover, OTA notified appellant in two subsequent letters (dated February 20, 2019, and May 24, 2019, respectively) that the appeal would be decided "on the basis of the written record and without an oral hearing," but thereafter appellant did not submit a written request for oral hearing.

appellant's customers. Appellant states that these CDs and DVDs are "from our business storage unit (closed since 2018)."

Appellant has not established that this evidence is newly discovered or that appellant exercised reasonable diligence in discovering and producing it. To the contrary, appellant appears to have mentioned these CDs and DVDs in its supplemental brief dated May 22, 2019. Moreover, appellant has not established why, with reasonable diligence, it could not have produced these CDs and DVDs that were in its own business storage unit. Thus, not only is this evidence not "newly discovered," but also appellant has failed to establish why the evidence could not have been discovered and produced prior to issuance of the written opinion, had appellant exercised reasonable diligence. Therefore, we find that the CDs and DVDs are not newly discovered evidence, which appellant could not, with reasonable diligence, have discovered and produced prior to the issuance of the written opinion. Additionally, appellant has not established that the CDs and DVDs at issue would likely produce a different result; we find that the existence of this evidence does not materially affect appellant's substantial rights.

Appellant has failed to show that the documents identified in its PFR are newly discovered, that it exercised reasonable diligence in discovering and producing these documents, or that they materially affect its substantial rights. Accordingly, we conclude that appellant has not established this as grounds for rehearing.

*Contrary to Law*

In order to find that there is insufficient evidence to justify the opinion, or the opinion is contrary to law,[6] OTA must determine that the opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith, supra*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*); *Appeals 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 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.)

[6] Appellant argues that OTA made an "error in law." An error in law refers to a procedural error in law in the appeals hearing or proceeding. (See Code Civ. Proc., § 657(7); *Appeals of Swat-Fame, Inc., et. al.*, 2020-OTA-045P.) In contrast, here appellant's disagreement concerns the findings of OTA's Opinion and, as such, appellant is actually arguing that the Opinion is contrary to law. (See Cal. Code. Regs., tit. 18, § 30604(d).)

Appellant contends that OTA's Opinion is contrary to law on the grounds that new regulations regarding ultrasound procedures were applied retroactively to the audit period at issue, and that CDTFA failed to provide regulations regarding ultrasound procedures for the period from 2004 through 2017.

Here, appellant reiterates the same arguments that were previously considered and addressed in the Opinion. As explained in the Opinion, all of the relevant law discussed in the Opinion was applicable law throughout the audit period, and there is no indication that any new law was applied retroactively to the audit period. Thus, appellant's contentions do not succeed. Appellant's dissatisfaction with the Opinion, and its attempt to reargue the same issues, are not proper grounds for reconsideration. (*Appeal of Graham and Smith*, *supra*, 2018-OTA-154P.) Accordingly, we find that OTA's Opinion was not contrary to law.

In summary, appellant has not established any grounds for a rehearing. Consequently, we deny the PFR.

DocuSigned by:
Suzanne B. Brown
47F45ABE89E34D0...

Suzanne B. Brown
Administrative Law Judge

We concur:

DocuSigned by:
Daniel Cho
7B28A07A7E0A43D...

Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Michael F. Geary
1A9B525F88AC4C7...

Michael F. Geary
Administrative Law Judge

Date Issued: 12/17/2020