

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19014157  
**B. MOSHER** ) CDTFA Case ID 780905  
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**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant: Marc Brandeis, CPA  
For Respondent: Amanda Jacobs, Tax Counsel III

S. BROWN, Administrative Law Judge: On May 22, 2020, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) holding that appellant B. Mosher (appellant) was personally liable pursuant to Revenue and Taxation Code (R&TC) section 6829 for the unpaid liabilities of Blue Velvet, LLC for the period July 1, 2006, through September 15, 2010. 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, section (Regulation) 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) an irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; (b) an 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.)

Appellant contends that a rehearing should be granted because there is insufficient evidence supporting the Opinion’s conclusion that Blue Velvet, LLC collected sales tax

reimbursement on its sales of tangible personal property during the liability period, and because the Opinion’s finding on that point was contrary to law. Appellant disputes the reliability and persuasiveness of the evidence that the Opinion relied upon for this finding. Appellant reiterates arguments he previously raised at hearing, such as his position that OTA’s finding regarding collection of sales tax reimbursement may only be based on the types of documentation listed in bold type in CDTFA’s Compliance Policy and Procedures Manual (CPPM) section 764.130. Further, appellant argues that the Opinion’s finding regarding collection of sales tax reimbursement was contrary to law because the evidence does not establish a presumption, pursuant to Regulation 1700(a), that Blue Velvet, LLC and its customers agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail. Appellant asserts that if such presumption is not established under Regulation 1700(a), personal liability cannot be imposed under R&TC section 6829(c).

In order to find that there is insufficient evidence to justify the Opinion, or that the Opinion is contrary to law, OTA must determine that the Opinion is “unsupported by any substantial evidence.” (*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. (*Ibid.*) In reviewing the evidence, we must do so “in the light most favorable to the verdict and presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from that evidence.” (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584-585.) 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.) 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.<sup>1</sup>)

Here, appellant reiterates several arguments that he previously raised in briefing and at the oral hearing, which the panel previously considered in reaching the Opinion. Appellant’s dissatisfaction with the Opinion, and his attempt to reargue the same points, are not proper grounds for reconsideration. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

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<sup>1</sup> Regulation 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, supra.*) 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.*)

Regarding appellant's contention that the evidence regarding collection of sales tax reimbursement failed to comply with CPPM section 764.130, the Opinion rejected this argument on several grounds.<sup>2</sup> The Opinion discussed the ample documentation that establishes Blue Velvet LLC's collection of sales tax reimbursement, including: daily financial reports from its point-of-sale system; two former employees' questionnaire responses confirming that the business collected sales tax reimbursement; an entry in CDTFA's computer system memorializing Blue Velvet LLC's former manager's statement to CDTFA compliance staff that sales tax was charged and collected; and audit comments stating that sales tax reimbursement was added to the sales of food and included in the selling price of bar drinks. The Opinion concluded that such documentation proved, by a preponderance of evidence, that this element of R&TC section 6829 has been met. (Cal. Code Regs., tit. 18, § 1702.5(a), (d).) Evaluation of the reliability and persuasiveness of the evidence is within the panel's discretion in considering the appropriate weight to give the evidence presented by the parties; the panel gave all evidence the weight to which it was entitled, and appellant's disagreements with those conclusions do not establish any grounds for reconsideration. Viewing the evidence in the record in the light most favorable to the prevailing party (here, CDTFA), we find that there is substantial evidence to support the Opinion's finding that Blue Velvet, LLC collected sales tax reimbursement on its sales of tangible personal property in this state during the liability period.

Finally, we find no support for appellant's view that imposition of personal liability under R&TC section 6829(c) requires that CDTFA establish a presumption under Regulation 1700(a). Imposition of responsible person liability requires establishing that the retailer collected the sales tax reimbursement from the purchaser. Regulation 1702.5 specifies that the burden of proof regarding elements of R&TC section 6829 is by a preponderance of the evidence. Nothing in the applicable law indicates that satisfying this burden of proof includes establishing a presumption under Regulation 1700(a). (See R&TC, § 6829; Cal. Code Regs., tit. 18, § 1702.5; see also *Bd. of Equalization v. Wirick* (2001) 93 Cal. App.4th 411, 417.) Because the Opinion concluded that CDTFA established by a preponderance of evidence that Blue Velvet, LLC collected sales tax

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<sup>2</sup> In addition, we note that while the CPPM is a resource that OTA may look to for guidance, it is not binding legal authority in an appeal before OTA. (See also *Micelle Laboratories, Inc.*, 2020-OTA-290P (holding that CDTFA's Audit Manual summarizes CDTFA's audit policies and procedures, but has no precedential value in an appeal before OTA).) OTA must exercise its own independent judgment in determining the weight, if any, to afford CDTFA's guidance to its staff, as set forth in the CPPM. (See also *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 25.)

reimbursement, this disputed element of section 6829 has been met, regardless of whether the purchaser is presumed to have agreed to the addition of the sales tax. Accordingly, we find that the Opinion is not contrary to law and is supported by substantial evidence.

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

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*Suzanne B. Brown*  
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Suzanne B. Brown  
Administrative Law Judge

We concur:

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*Michael F. Geary*  
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Michael F. Geary  
Administrative Law Judge

DocuSigned by:  
*Josh Lambert*  
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Date Issued: 12/28/2020