OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18012040
	) CDTFA Case ID 971602
T-M OBILE RESOURCES CORPORATION	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Elizabeth S. Cha, Attorney
Timothy A. Gustafson, Attorney
Eric S. Tresh, Attorney

For Respondent: Kevin Smith, Tax Counsel III

A. KWEE, Administrative Law Judge: On December 23, 2020, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision by respondent California Department of Tax and Fee Administration (CDTFA)[1] on a claim for refund filed by T-Mobile Resources Corporation (appellant). CDTFA's decision denied appellant's claim for refund dated July 20, 2016. Appellant claimed a refund of $301,620 in use tax paid for the period April 1, 2009, through March 31, 2013 (claim period). OTA's Opinion sustained CDTFA's action on the basis that the claim was untimely within the meaning of Revenue and Taxation Code (R&TC) section 6902.

On January 22, 2021, appellant timely petitioned for a rehearing on the basis that there is insufficient evidence to support OTA's Opinion or it is contrary to law. We conclude that the grounds set forth in this 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

[1] Sales taxes were formerly administered by the State Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board, to the extent those acts would have been performed by CDTFA on and after July 1, 2017.

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;[2] or (e) 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.)

As provided in the board's precedential decision in *Appeal of Wilson Development, Inc.*, *supra*, and as reflected in the board's Rules for Tax Appeals, the board 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) [repealed 7/30/20], 5561(a).) OTA continues to apply the same standards as the board 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 to grant a new hearing.

Appellant alleges OTA's Opinion is contrary to law or unsupported by any substantial evidence. A ground for a rehearing on such a basis 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, 779; *Trovato v. Beckman Coulter, Inc*. (2011) 192 Cal.App.4th 319, 327.)

In addition, to find that OTA's 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

[2] Effective with petitions filed on or after March 1, 2021, this subdivision was renumbered into two separate grounds for a rehearing. (Cal. Code Regs., tit. 18, § 30604(a)(4)-(5).) This is a non-substantive change.

decided the legal issue." (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 187-188 [abrogated on unrelated grounds pertaining to witness testimony].) 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 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 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.)

Appellant contends that OTA erred in concluding that CDTFA partially "denied" its prior refund claims totaling $12,001,200.35. Our Opinion summarized the pertinent facts as follows:

> 7. On September 30, 2015, CDTFA mailed a copy of the audit report, which detailed the above findings, to appellant. The audit report disallowed the refund claims as to $305,266.29 in tax (i.e., the tax allocable to the audited understatement of $3,566,202). [Fn. omitted.] The audit report allowed the balance of the $12,001,200.35 in refund claims. In summary, the audit report concluded that appellant's refund claims were allowable as to $11,695,934.06 in overpaid tax. . . .
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> 10. CDTFA's recommendation to grant only $11,695,934.06 of appellant's refund claims totaling $12,001,200.35 (i.e., net of the offset) was scheduled on the board's oral hearing calendar as a "Tax Program Nonappearance Matters – Consent" item. This matter was calendared and heard by the board on January 26, 2016. During the oral hearing, the board voted to partially grant appellant's refund claims, as recommended by CDTFA staff.
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> 11. On January 27, 2016, the board issued a Notice of Refund to appellant for $11,695,934.06 in use tax, plus credit interest, and CDTFA refunded this overpayment to appellant. The $11,695,934.06 refund was net of the $305,266.29 offset.

Appellant contends that, although CDTFA only refunded $11,695,934.06 to appellant, its $12,001,200.35 refund claim was granted in full. Appellant contends that the fact that CDTFA offset $305,266.29 from its refund claim proves that CDTFA made an informal deficiency

assessment against appellant. Furthermore, appellant asserts that the statute of limitations for appellant to file a refund claim is tolled indefinitely because CDTFA failed to issue a formal notice of deficiency as required by R&TC section 6481. Appellant also reargues its contention that the $301,620 offset constitutes an involuntary enforcement action, triggering an extended statute of limitations to file a claim for refund. Finally, appellant contends that its failure to bring an action in superior court does not constitute waiver of the refund claim because the $301,620 offset did not constitute an action by CDTFA within the meaning of R&TC section 6933.

Here, notwithstanding any technical language used, the following facts are clear. Appellant timely filed two refund claims for $12,001,200.35, covering the claim period. CDTFA audited those two refund claims and determined there were areas of overreporting (as claimed by appellant) and underreporting (as identified by CDTFA) during the claim period. CDTFA prepared an audit report, which net the overreporting with the underreporting, resulting in a net overpayment of $11,695,934.06. Thereafter, the board voted to grant the refund claims as to the $11,695,934.06. CDTFA refunded this amount to appellant. The refund was $305,266.29 less than the amount claimed. The board's decision to grant the $12,001,200.35 refund claim and to refund $11,695,934.06 (for whatever reason) was not appealed, is now final, and is not at issue in an appeal before OTA. On July 20, 2016, appellant filed a refund claim for $301,620 for the claim period.

It is undisputed that, unless the $301,620 had been collected by means of lien, levy, or other enforcement procedures, appellant's refund claim is barred by statute as untimely on this basis. (R&TC, § 6902.3.) We explained in our Opinion that the board's decision to reduce the $12,001,200.35 refund claim by $305,266.29 did not constitute a collection action by means of lien, levy, or enforcement procedure within the meaning of R&TC section 6902.3. Dissatisfaction with the outcome of this appeal and attempt to reargue an issue that we have already considered and decided are not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

The statute of limitations under R&TC section 6902(a)(1) expires, "with respect to determinations made under Article 2 (commencing with Section 6481) . . . after six months from the date the determinations become final … ." Thus, if CDTFA had issued a deficiency determination appellant would have had until six months from the date the determination became

final to timely file a claim for refund. (R&TC, § 6902.) It is undisputed that CDTFA did not issue a written notice of deficiency determination to appellant. (See generally R&TC, §§ 6481, 6486.) Here, because CDTFA did not issue a written notice of determination to appellant under Article 2, this provision is inapplicable. As such, appellant's July 20, 2016 claim for refund is untimely. The other claims are not before OTA. Based on our finding that the July 20, 2016 claim is untimely, it is immaterial whether appellant waived the right to file in superior court.

In summary, 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:

DocuSigned by:
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Andrew Wong
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 4/28/2021