OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No.: 21047617
	) CDTFA Case ID: 100-022
TORY INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Charles Lim, CPA

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: On October 26, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining a Decision issued by California Department of Tax and Fee Administration (respondent) to Tory, Inc. (appellant). Respondent's Decision denied appellant's petition for redetermination of a Notice of Determination (NOD) dated December 6, 2017. The NOD is for $184,734.01 in tax, plus applicable interest, and a penalty of $18,473.46, for the period January 1, 2014, through December 31, 2017 (liability period).

On November 24, 2021, appellant filed a timely petition for a rehearing (PFR) with OTA on the ground that there is insufficient evidence to support the Opinion. We conclude that the PFR does not establish grounds for a new hearing.

OTA may grant a rehearing where any of the following grounds exists and materially affects the substantial rights of the party seeking a rehearing: (1) there was an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) there was an accident or surprise that occurred, which ordinary caution could not have prevented; (3) there is newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written Opinion; (4) there is insufficient evidence to justify the written Opinion; (5) the Opinion is contrary to law; or (6) there was an error in law that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) To

find that the evidence is insufficient to justify the written Opinion, we must first weigh the evidence in the record, including all reasonable inferences based on that evidence, and conclude that the panel clearly should have reached a different conclusion or result. (Code Civ. Proc., § 657;[1] *Appeal of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

The pivotal factual dispute in this appeal is appellant's credit card sales ratio (hereinafter, simply the "ratio") during the liability period.[2] Because appellant did not provide guest checks, sales receipts, point-of-sale (POS) data, or any other source documents to prove sales, respondent used reliable information regarding credit card payments to appellant and appellant's POS data for 89 full days of operation to calculate a 78.16 percent credit card sales ratio. In a test to verify its audit result, respondent used the same kind of data for an additional 208 full days of operation to calculate a credit card sales ratio of 78.25 percent. Respondent used the 78.16 ratio to determine appellant's liability.

Before OTA issued the Opinion, appellant argued that it was unfair to use the 78.16 percent ratio and that OTA should, instead, use a 98.38 percent ratio calculated on the basis of respondent's one-day observation at appellant's restaurant.[3] Now in its PFR, appellant makes essentially the same argument, asserting that there is insufficient evidence that the 78.16 credit card ratio is more accurate than the 93.38 percent ratio. Respondent argues that the evidence is sufficient to support the written Opinion and that appellant has not established grounds for rehearing.

The Opinion correctly concludes that respondent satisfied its minimal burden to show that the determination was reasonable and rational. Respondent was not required to base its determination on the results of the limited observation test. (Rev. & Tax. Code, § 6481.) Respondent's calculation of the ratio was based on appellant's own records from 89 days of operation and verified by a like analysis of an additional 208 days of operation. Furthermore,

[1] As provided in *Appeal of Wilson Development, Inc., supra*, it is appropriate for OTA to look to Code of Civil Procedure section 657 and related case law as relevant guidance in determining whether a PFR establishes grounds for a new hearing.

[2] A credit card sales ratio is the ratio of credit card sales to total sales. Credit card sales may include sales for which the retailer receives some for of electronic payment, usually by credit or debit cards.

[3] As stated in the Opinion, respondent had agreed to conduct three days of observation on consecutive Tuesdays, but it abandoned the effort after one day because it believed appellant interfered with the observation and that the results were unreliable. The Opinion makes no finding on whether respondent's concerns about the observation test were substantiated.

respondent was not required then, and it is not now required, to prove that the 78.16 percent ratio was more accurate than the 98.38 percent ratio. On the contrary, when respondent satisfied its minimal burden of proof, OTA correctly shifted that burden of proof to appellant. (*Appeal of Talavera*, 2020-OTA-022P.) It then became incumbent on *appellant* to prove a more accurate measure. (*Ibid*.) Appellant did not do that prior to issuance of the Opinion, and it has not done that in its PFR.

We find that questions regarding the correct ratio were fully briefed by the parties prior to issuance of the Opinion and that those questions were thoroughly analyzed and correctly decided in the Opinion. Those questions do not require a new hearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) We also find that there is sufficient evidence to support the Opinion and that appellant has failed to establish that the panel clearly should have reached a different result. On these bases, appellant's PFR is denied.

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Michael F. Geary
Administrative Law Judge

We concur:

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Josh Aldrich
Administrative Law Judge

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Andrew J. Kwee
Administrative Law Judge

Date Issued: 3/18/2022