

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:	) OTA Case No. 21057822
	) CDTFA Case ID 1-489-966
<b>J. XIAO</b>	)
<b>dba Shop N Go Mini Mart</b>	)
	)
	)

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**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant: J. Xiao

For Respondent: Sunny Paley, Tax Counsel III

M. GEARY, Administrative Law Judge: On December 21, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by the California Department of Tax and Fee Administration (respondent). Respondent’s decision denied J. Xiao’s (appellant’s) appeal of an October 15, 2020 Notice of Decision, which upheld a \$1,000 fine for a second violation of Business and Professions Code (B&PC) section 22974 and reduced a license suspension for that same violation from 30 days to 5 days.

On January 14, 2022, appellant filed a timely petition for rehearing (PFR) with OTA. The PFR is based on the ground that there is insufficient evidence to support OTA’s Opinion. OTA concludes that appellant has not established grounds for a new hearing.

OTA may grant a rehearing where one or more of the following grounds is established and materially affects the substantial rights of the filing party: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the opinion; (4) insufficient evidence to justify the opinion; (5) the opinion is contrary to law; or (6) 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.)

When OTA reviews an opinion on a PFR to determine whether it is supported by sufficient evidence, the reconstituted panel of judges takes a fresh look at the evidence, exercising its independent judgment to weigh the evidence and draw its own reasonable inferences from the evidence.<sup>1</sup> (See *Yarrow v. State of California* (1960) 53 Cal.2d 427, 434-435.)<sup>2</sup> To find that there is an insufficiency of evidence to justify the opinion, OTA must be convinced from the entire record that the prior panel clearly should have reached a different conclusion. (See Code Civ. Proc., § 657; *Appeal of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

Appellant argues that there is insufficient evidence to justify OTA's Opinion. Appellant appears to believe there were irregularities in the inspection and reporting that resulted in issuance of the citation for a second violation of B&PC section 22974. These allegedly included dishonesty on the part of the inspectors, an inspector's failure to identify herself as such prior to the inspection, and inappropriate involvement of the inspector's supervisor in the decision to issue the citation. Appellant alleges that the inspector noted no violations and that it was not until after the supervisor got involved that the violation was identified. Appellant's reply brief also refers to mitigating circumstances but without further explanation regarding what those were. Finally, appellant appears to argue that respondent "should explain what's going on for Sam's Club website."<sup>3</sup>

Respondent argues that the Opinion is adequately supported by the evidence and that appellant has not established grounds for a rehearing.

The Factual Findings set forth in the Opinion are established by the evidence. The Opinion correctly finds that appellant did not maintain at the business premises and provide to the inspectors during normal business hours upon request purchase invoices for all cigarettes and tobacco products purchased during the 12 months preceding the January 8, 2019 inspection. Nothing in the evidence contradicts this finding. Appellant's failure to maintain and provide one

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<sup>1</sup> A PFR is assigned to a panel that includes only one administrative law judge (ALJ) who signed the original Opinion, usually the lead ALJ who authored the Opinion, and two new members who did not participate in the original panel's deliberations. (Cal. Code Regs., tit. 18, § 30606(a).)

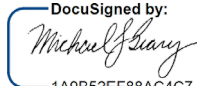
<sup>2</sup> In promulgating California Code of Regulations, title 18, (Regulation) section 30604, OTA has largely adopted the grounds for granting a rehearing, including the "insufficiency of evidence" ground, from its predecessor, the Board of Equalization, which, in turn, adopted them from Code of Civil Procedure (CCP) section 657, which sets forth the grounds for a new trial in a California trial court. (*Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) Consequently, the language of CCP section 657 and case law pertaining to the operation of that statute are relevant guidance in the interpretation and application of Regulation section 30604.

<sup>3</sup> Appellant eventually provided purchase summaries from Sam's Club.

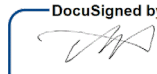
year of purchase invoices on January 8, 2019, was a violation of B&PC section 22974. Therefore, there is sufficient evidence that respondent correctly issued the citation to appellant.

It is undisputed that this was appellant’s second documented violation of B&PC section 22974. A second violation should result in a 30-day suspension or revocation and a \$1,000 fine. (Cal. Code Regs., tit. 18, §§ 4603(c), 4607(b)(2)(A).) Respondent reduced appellant’s suspension to five days based on mitigating circumstances.<sup>4</sup> Thus, there is also sufficient evidence to support the penalty.<sup>5</sup>

In summary, OTA finds that appellant has not established grounds for a rehearing.

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Michael F. Geary  
Administrative Law Judge

We concur:

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Andrew Wong  
Administrative Law Judge

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Daniel K. Cho  
Administrative Law Judge

Date Issued: 6/1/2022

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<sup>4</sup> Respondent reduced the license suspension from 30 days to 5 days due to mitigating circumstances, those apparently being that respondent chose not to seize any of the cigarettes and tobacco products for which appellant did not provide invoices.

<sup>5</sup> OTA continues to note the following: respondent could have concluded the investigation on January 8, 2019, cited appellant for additional violations, and seized product. If it had done so, there would have been no mitigating circumstance to warrant a reduction to the 30-day suspension.