OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19034460
	) CDTFA Case ID 871435
MAGPIE GRILL, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Juan Guzman, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: On August 25, 2022, the Office of Tax Appeals (OTA) issued an opinion sustaining a decision issued by the California Department of Tax and Fee Administration (respondent). The decision denied Magpie Grill, Inc.'s (appellant's) petition for redetermination of an April 9, 2015 Notice of Determination (NOD) for the period April 1, 2011, through March 31, 2014 (liability period). The NOD was for $141,511.46 in tax, plus applicable interest, and a 40 percent penalty of $56,604.61, which respondent imposed pursuant to Revenue and Taxation Code (R&TC) section 6597 for appellant's failure to timely remit sales tax reimbursement collected from customers.

On September 26, 2022, appellant filed a timely petition for a rehearing (PFR) asserting that there was insufficient evidence to support OTA's written opinion and that the Opinion is contrary to law.[1] OTA concludes that the PFR does not establish grounds for a new hearing.

OTA may grant a rehearing where one of the following grounds is established and materially affects the substantial rights of the party seeking a rehearing: (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

[1] Appellant does not specifically cite any of the recognized grounds for a PFR. OTA has therefore inferred from appellant's arguments, discussed more fully below, that these are the grounds upon which appellant relies.

issuance of the written opinion; (4) insufficient evidence to justify the written 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 following a PFR to determine whether the opinion 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.[2] (See *Yarrow v. State of California* (1960) 53 Cal.2d 427, 434-435.)[3] 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; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

It appears that appellant has two main arguments.[4] The first is that imposing only a minimal burden of proof on respondent put appellant at an unfair disadvantage, and that assigning an appropriate burden should result in a finding that respondent has not proved the accuracy of the determined deficiency. The second is that appellant accurately reported all

[2] 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).)

[3] 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.

[4] Rather than clearly stating the grounds relied upon and stating its argument to show that such grounds exist, appellant makes a number of statements, most notably the following, from which OTA has inferred appellant's arguments:

•If respondent has only a minimal burden of proving that its determination is reasonable and rational, respondent will have no reason to be fair, and it will be impossible for taxpayers to successfully challenge a determination.

•Appellant provided or offered to provide all records that the Audit Manual requires, including purchase records.

•The liability is based on the false assumption that the POS system accurately recorded sales tax reimbursement collected from customers.

•According to respondent's Audit Manual, respondent should have performed a second test to confirm that the audit results are reasonable.

•R&TC section 6481 does not apply to these facts because appellant filed its sales and use tax returns.

taxable sales and either provided or offered to provide all records that respondent required to confirm the accuracy of appellant's sales and use tax returns for the liability period.

Respondent argues that the issues were decided on the basis of the written record because appellant waived a hearing. It contends that the PFR is essentially a repeat of the arguments already made by appellant and considered by OTA and that the PFR does not establish any grounds for a rehearing.

The arguments that appellant relies on here are essentially the same ones OTA addressed in the Opinion. There is no new evidence, and appellant has not made a persuasive argument that the Opinion's conclusions are contrary to law. Regarding appellant's dispute with the parties' respective burdens of proof, it is firmly established that respondent need only show a reasonable and rational basis for its determination. (*Appeal of Talavera*, 2020-OTA-022P.) However, that showing does not automatically result in a finding against a taxpayer. It merely shifts the burden of proving a more accurate measure of tax to the taxpayer (*ibid.*), who is in the best position to know – and to have business records to prove – taxable sales. Considering the likelihood that appellant must have known – and was required to have documents to prove – its taxable sales when it reported those sales to respondent, that shift of burden is reasonable, appropriate, and not subject to reasonable dispute. In other words, the primary burden of proving the more accurate measure of tax belongs on the taxpayer, and appellant has made no persuasive argument to the contrary. Accordingly, the Opinion's assignment of burdens of proof to the parties were not contrary to law.

Appellant's argument that respondent did not prove what it was required to prove is also unpersuasive. There is no question that the Opinion correctly found that respondent proved a reasonable and rational basis for its determination. It is difficult to imagine how a transaction-by transaction examination of a taxpayer's record of sales tax reimbursement collected from its customers would not satisfy that minimal level of proof. It was patently reasonable for respondent to rely on appellant's point-of-sale (POS) records. Appellant cited no specific authority for its claim that respondent was required to do some secondary testing or analysis to verify the reasonableness of the findings, and OTA finds no support for that claim in the Sales and Use Tax Law. Similarly, appellant's spreadsheets purporting to calculate a 352 percent

average markup are not supported by verifiable source documents, such as purchase invoices.[5] As stated in the Opinion, the burden was on appellant to impeach its own records and prove a more accurate measure of tax. Appellant did not do this.

Lastly, regarding appellant's argument that it provided all necessary records to establish the accuracy of its reported taxable sales, the Opinion does not find that appellant failed to provide records. Respondent may rely on any records that come into its possession. (R&TC, § 6481.)[6] It chose to base its determination on appellant's POS records. It is immaterial to that reliance that appellant may have provided or offered to provide other records, including purchase invoices. Such other records may well have been material to appellant's arguments, but it was up to appellant to demonstrate how those records proved a more accurate measure of taxable sales. As stated above and in the Opinion, appellant has not done this, and it specifically has not proved that it accurately reported its tax due.

OTA finds that appellant has not established grounds for a new hearing.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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Eddy Y.H. Lam
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Eddy Y. H. Lam
Administrative Law Judge

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 1/3/2023

[5] We make no finding regarding whether a 352 percent markup is unlikely for a full-service bar and restaurant.

[6] Contrary to appellant's argument that R&TC section 6481 does not apply where the taxpayer files returns, the clear language of the statute indicates otherwise.