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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of: **F. SABA-SYED, ET AL. AND STAFF FOOD CONNECTIONS, LLC dba Mehran Restaurant**	OTA Case Nos. 19034461, 19034462 CDTFA Case IDs 554539, 547742

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jeffrey B. Kahn, Esq.

For Respondent: Jason Parker, Chief of Headquarters Operations

N. RALSTON Administrative Law Judge: On July 21, 2022, the Office of Tax Appeals (OTA) issued an Opinion modifying a decision issued by California Department of Tax and Fee Administration (respondent). Respondent's decision denied a petition for redetermination filed by F. Saba-Syed et. al. dba Mehran Restaurant (appellant) of a Notice of Determination (NOD) dated July 12, 2010. The NOD is for $120,320.75 in tax, plus applicable interest, and a penalty of $12,032.05, for the period July 1, 2006, through December 31, 2007 (liability period).

In a separate consolidated matter, respondent's decision denied a petition for redetermination filed by Staff Food Connections, LLC dba Mehran Restaurant (SFC)[1] of an NOD dated July 12, 2010. The NOD is for tax of $25,433.80, applicable interest, and a negligence penalty of $2,543.36, for the period January 1, 2008, through June 30, 2008.[2]

On September 15, 2022[3], appellants timely petitioned for a rehearing with OTA on the basis that there was an irregularity in the proceedings, an accident or surprise occurred at the

[1] Hereinafter this Opinion will refer to F. Saba-Syed, et. al. and SFC as appellants.

[2] Both appellants operated a restaurant dba Mehran Restaurant; F. Saba-Syed operated it from July 1, 2006, through December 31, 2007; and SFC operated it from January 1, 2008, until June 30, 2008.

[3] Appellants timely filed their petition for rehearing on August 18, 2022 and perfected it on September 15, 2022.

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hearing, appellants obtained newly discovered evidence, there is insufficient evidence to justify OTA's Opinion, OTA's Opinion is contrary to law and an error in law occurred at the hearing. OTA concludes 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: (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 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.)

As provided in *Appeal of Wilson Development, Inc., supra*, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing.

Irregularity in the proceedings

Appellants contend that there was an irregularity in the proceedings which prevented a fair consideration of the appeal because OTA erroneously partially sustained respondent's assessment. Appellants assert that respondent's assessment disregarded the gross receipts reported on appellants' 2006 and 2007 income tax returns, and instead relied on a website which was established by appellants' successor. Appellants further assert that respondent's analysis of bank deposits was erroneous.

Courts have defined an irregularity in the proceedings as "[a]ny departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected." (*Gay v. Torrance* (1904) 145 Cal. 144, 149.) Appellants are merely continuing arguments that were fully briefed and considered previously on appeal. Furthermore, appellants' contentions have failed to identify any departure by OTA from the due and orderly method of disposition of an action. Thus, appellants have not shown that an irregularity in the proceeding occurred, and therefore no rehearing is warranted under this contention.

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Accident or surprise which ordinary caution could not have prevented

Appellants also alleged that an accident or surprise, which ordinary caution could not have prevented occurred during the appeal because respondent did not make an argument at the hearing that it had made in one of its briefs. Interpreting section 657 of the Code of Civil Procedure, the California Supreme Court held that the terms "accident" and "surprise" have substantially the same meaning. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) Further, to constitute an accident or surprise, a party must be unexpectedly placed in a detrimental condition or situation without any negligence on the part of that party. (*Ibid*.) A new hearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Wilson Development*, *supra*.)

Appellants assert that they were "expecting to present testimony at the OTA proceeding to support their position but were prevented from doing so." This is incorrect. At the prehearing conference, appellants asked for approximately 20 minutes to present their arguments. However, on the day of the hearing, OTA allowed appellants to go over this time. Further, at several points during the hearing, appellants asked to make additional comments and those comments were allowed. Appellants were also given ample opportunity to submit briefs and exhibits prior to the hearing and appellants in fact submitted multiple briefs and 10 exhibits to support their contentions. Furthermore, appellants did not identify any witnesses at the prehearing conference, yet were allowed to provide testimony at the hearing.

In addition, at the prehearing conference, appellants were informed that they would present their arguments to OTA first, respondent would present second, and appellants would have an additional five minutes for rebuttal. As appellants presented their arguments first, they would not have known whether respondent was going to include all of the arguments made in their briefing at the hearing. Therefore, they cannot now claim accident or surprise based on respondent's presentation. Furthermore, had appellants taken issue with something that was not included in respondent's presentation, appellants had the opportunity to raise their concerns with OTA during their rebuttal. Thus, appellants were not prevented from making any arguments that they wished to and have failed to show that an accident or surprise occurred.

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Newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written Opinion

Appellants have failed to identify newly discovered, relevant evidence, which appellants could not have reasonably discovered and provided prior to the decision. (Cal. Code Regs., tit. 18, § 30602(c)(5)(C).) Appellants allege that they have obtained newly discovered evidence which supports appellants' contentions made at the hearing that the website respondent used as part of its analysis belonged to appellants' successor and that events listed on that website did not adequately reflect the number of patrons that attended those events. Appellants have failed to explain why this information could not have been reasonably discovered and provided prior to the issuance of the written Opinion. Further appellants made these arguments at the hearing, and they were addressed by OTA in the written Opinion.

Insufficient evidence to justify the written Opinion

Appellants further contend that there is insufficient evidence to justify OTA's Opinion. Appellants argue that had OTA reviewed all the evidence in this appeal, OTA would have allowed a greater reduction to respondent's assessment than the 20 percent adjustment granted in the Opinion.

California Code Regulations, title 18, section 30604(d) provides that a rehearing may be granted on two distinct grounds of insufficiency of the evidence to justify the Opinion, or the Opinion is contrary to law. (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.) To find that there is an insufficiency of evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the panel clearly should have reached a different opinion. (Code Civ. Proc. § 657; *Bray v. Rosen*, *supra*, 167 Cal.App.2d at p. 684.) As noted in OTA's Opinion, appellants failed to provide sufficient records to enable respondent to complete a direct audit. Respondent's audit was based on the best information available and was reasonable and rational under the circumstances. (*Appeal of Talavera*, 2020-OTA-022P.) Thus, the burden shifted to appellants to show that a result differing from respondent's determination is warranted. (*Ibid*.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Estate of Gillespie*, 2018-OTA-052P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

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Appellants failed to provide cash register z-tapes, sales summary reports, sales journals, purchase journals, journal ledgers, profit and loss statements, sales contracts or other such documents for the audit period from which a more accurate determination could be made. OTA reviewed all of the documentation available and issued an Opinion which gave appropriate consideration to the evidence and arguments presented by appellants on appeal in reaching its conclusions. Appellants' dissatisfaction with the outcome of their appeal, and the attempt to reargue the same issues a second time, is not grounds for a rehearing.

Contrary to law

Appellants contend that OTA's Opinion is against (or contrary to) law because respondent used a bank deposit analysis. To find that the Opinion is against (or contrary to) law, we must determine whether the Opinion is "unsupported by any substantial evidence." (*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 relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Appeal of Swat-Fame, Inc. et. al.* 2020-OTA-045P.) OTA must consider the evidence in the light most favorable to the prevailing party (here, respondent). (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907.)

There was substantial evidence to support OTA's Opinion. As discussed in the Opinion, respondent's determination was not based upon the bank deposit analysis but instead used the bank deposit analysis to determine that further analysis was warranted. As previously stated, OTA determined that respondent's assessment was reasonable and rational and thus the burden of proof shifted to appellants to show that a result differing from respondent's determination is warranted. Appellants failed to do so. Appellants failed to provide documentation from which a more accurate determination could be made. OTA reviewed all of the documentation and arguments provided by parties and issued an Opinion which gave appropriate consideration to the evidence and arguments presented by appellants on appeal in reaching its conclusions.

Error in the law

Lastly, appellants argue that an error in law occurred during the appeals hearing or proceeding because OTA limited what evidence and testimony appellants could provide. Courts

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have found that a new trial may be granted based on an error in law if its original ruling as a matter of law was erroneous. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17-18, citing *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 CalApp.3d 391.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong. For example, courts have found an error in law occurred when there was an erroneous denial of a jury trial (*Johnson v. Superior Court* (1932) 121 Cal.App. 288), an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp*. (1934) 137 Cal.App. 487), an erroneous application of the law by a jury (*Shapiro v. Prudential Property & Casualty Co*. (1997) 52 Cal.App.4th 722), and an erroneous instruction to a jury (*Maher v. Saad* (2000) 82 Cal.App.4th 1317).

As discussed above, appellants were not prevented from providing testimony or presenting evidence at the hearing but instead were given ample opportunity to provide evidence and arguments to support their contentions both prior to and at the hearing.

Accordingly, OTA finds that appellants have not satisfied the requirements for granting a rehearing and, as such, their petition is denied.

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

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