

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21108811
TRYONAPPS, INC.)
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OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Grace Tang, Owner

For Respondent: Christopher T. Tuttle, Tax Counsel III

J. LAMBERT, Administrative Law Judge: On October 6, 2022, the Office of Tax Appeals (OTA) issued an Opinion which sustained respondent Franchise Tax Board’s (FTB’s) action proposing additional tax of \$800, a late filing penalty of \$200, a notice and demand (demand) penalty of \$200, and a filing enforcement fee of \$83, plus applicable interest for the 2018 tax year. TryOnApps, Inc. (appellant) filed a timely petition for rehearing (PFR) under Revenue and Taxation Code (R&TC) section 19048.

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party are materially affected: (1) an irregularity in the appeal proceedings that occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion, 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 in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Appellant argues that a rehearing should be granted on the grounds that there is insufficient evidence to justify the Opinion, the Opinion is contrary to law, and because of newly discovered, relevant evidence. 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, OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

The contrary to law standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) The question of whether the Opinion is contrary to law is not one which involves a weighing of the evidence, but instead, requires a finding that the Opinion is “unsupported by any substantial evidence”; that is, the record would justify a directed verdict against the prevailing party. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.)¹ This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the Opinion if possible. (*Id.* at p. 907.) The question before OTA on a PFR does not involve examining the quality or nature of the reasoning behind OTA’s Opinion, but whether that Opinion can be valid according to the law. (*Appeal of Swat-Fame, Inc., et al., supra.*)

A party seeking a rehearing under the ground of newly discovered, relevant evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence is material to the party’s case. (*Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) Newly discovered evidence must be material in the sense that it is likely to produce a different result. (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.)

Appellant contends that it should not be subject to the minimum franchise tax because it was not doing business in California in 2018.² Appellant asserts that it was a dormant small business that was formed in Delaware. Appellant asserts that its owner did not maintain a principal residence in California in 2018, and that it used a P.O. Box address on its 2018 tax return. Appellant argues that the Opinion incorrectly holds that an out-of-state corporation is doing business in California when the owner travelled to California for a short period of time and only checked emails while in California.

¹ California Code of Regulations, title 18, (Regulation) section 30604 is based upon the provisions of Code of Civil Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 [Board of Equalization (BOE) utilizes CCP section 657 in determining grounds for rehearing]; *Appeal of Do*, 2018-OTA-002P [OTA adopts BOE’s grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute provide guidance in interpreting the provisions contained in Regulation section 30604.

² While appellant does not expressly dispute OTA’s determination as to penalties, filing enforcement fee, and interest, OTA notes that these items may not be incurred if appellant was not subject to the \$800 minimum franchise tax and was not required to file a return for the 2018 tax year.

Appellant repeats the same arguments that were previously considered and addressed in the Opinion. Appellant’s dissatisfaction with the Opinion, and its attempt to reargue the same issues a second time, do not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) The Opinion noted that every corporation “doing business” in California annually pays for the privilege of exercising its corporate franchise within California a tax according to or measured by its net income or, if greater, the minimum franchise tax of \$800. (R&TC, §§ 23151(a), 23153(b)(3), (d)(1).) The Opinion stated that a corporation is “doing business” in California where it “actively” engages in any transaction for the purposes of financial or pecuniary gain or profit. (R&TC, § 23101(a).) The Opinion examined the fact that appellant was a foreign corporation that operated out of the owner’s home office in California, and that the owner checked appellant’s emails in California in 2018. The Opinion stated that appellant’s activities in California satisfy the “doing business” standard under R&TC section 23101(a) because appellant’s activities were performed with the motivation for pecuniary gain or profit.

Appellant asserts that there should be a minimum income requirement for R&TC section 23151 so that small businesses with no income or income below a threshold are exempt from taxation. As noted in the Opinion, for purposes of R&TC section 23101(a), it is not relevant that appellant did not earn a profit; the relevant inquiry is whether the activity or transaction was motivated by a financial or pecuniary gain or profit. (See *Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.) Under R&TC section 23101(b), a taxpayer is also considered to be doing business in California if it satisfies certain bright-line nexus thresholds consisting of sales, property, or payroll amounts. However, as noted in the Opinion, a taxpayer may have a filing requirement and be subject to the minimum franchise tax if the taxpayer’s activities qualify as “doing business” in California under either R&TC section 23101(a) or (b). (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Because appellant was found to be doing business under R&TC section 23101(a), there is no need to examine the bright-line nexus thresholds in R&TC section 23101(b). (See *Appeal of Aroya Investment I, LLC*, 2020-OTA-255P.)

Appellant also provides a document from the State of Delaware website stating that appellant is a Delaware corporation. However, this evidence is not material, as it would not produce a different result. The Opinion acknowledged that appellant was a foreign corporation and explained that the minimum franchise tax can apply to a foreign corporation if it is doing business in this state. (See R&TC, § 23153(b)(3); 23151(a).) Based on the foregoing, appellant has not shown that a rehearing should be granted under the grounds of newly discovered, relevant evidence; insufficient evidence to justify the Opinion; or that the Opinion is contrary to law. Consequently, the petition for rehearing is denied.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

Date Issued: 4/13/2023