OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18053153
	) CDTFA Case ID 609861
MINCAFE COFFEE CORPORATION	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Aksel Bagheri, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: On September 27, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (respondent).[1] Respondent's decision denied a petition for redetermination filed by Mincafe Coffee Corporation (appellant) of a Notice of Determination (NOD) dated April 23, 2012. The NOD is for $224,927.87 in tax, plus applicable interest, and a 25-percent fraud penalty of $56,231.98 for the period April 1, 2007, through September 30, 2010 (liability period).

On October 27, 2022, appellant timely petitioned for a rehearing with OTA on the grounds that: (1) there is insufficient evidence to support OTA's Opinion; and (2) the Opinion is contrary to law. OTA concludes that appellant has not established grounds for a new hearing.

OTA may grant a rehearing where the party seeking a rehearing establishes one or more of the following grounds and OTA determines that the asserted grounds materially affect the substantial rights of that 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

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "respondent" refers to the board.

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); see also *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

When OTA reviews an opinion following a petition for rehearing (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] However, to find that there is insufficient evidence to justify the opinion, OTA's role is not to determine whether the prior panel's factual findings are proved by a preponderance of the evidence; rather, OTA must be convinced from the entire record that the prior panel clearly should have reached a different conclusion.[4] (See Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

When the question is whether an opinion is contrary to law, the required analysis is not one which involves a weighing of the evidence but is instead one which requires a finding that the Opinion is unsupported by any substantial evidence. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This requires OTA's review of the decision to indulge in all legitimate and reasonable inferences to uphold the decision. (*Id.* at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the decision, but whether the decision can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

Appellant argues that a new hearing is warranted because the Opinion erroneously concluded that the determination was reasonable and rational and, on that basis, shifted the

[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 panel 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, 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.*, *supra*.) 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] The requirement that the error materially affect the substantial rights of the party must also be met.

burden of proof to appellant. Appellant contends that respondent's determination was based substantially on a markup audit for which there was insufficient data. Its position is that there was so little reliable data, respondent's use of the markup methodology was clear error. It also argues that its bank records establish a measure of tax that is more accurate than the determined measure. Where respondent determined a measure of tax for unreported taxable sales of $1,487,985, appellant argues that a more accurate measure of tax from unreported taxable sales, as shown by bank records, is $602,829.

Respondent contends that that OTA's analyses and conclusions contained in the Opinion are supported by substantial evidence and that the record shows that the prior panel made the legally correct decisions on the issues presented.

The evidentiary presumptions and burdens of proof contained in the Sales and Use Tax Law exist in their current form because taxpayers are in the position to know and to document the facts upon which a correct determination of tax can be based. Respondent's ability to determine the correct tax is substantially dependent on the taxpayer's compliance with the record-keeping requirements found in R&TC sections 7053 and 7054 and California Code of Regulations, title 18, section 1698. As stated in R&TC section 6091, the presumption that all gross receipts are subject to tax until the contrary is established is necessary for the proper administration of the Sales and Use Tax Law and to prevent evasion of the sales tax. Moreover, Revenue and Taxation Code (R&TC) section 6481 states, in part, that if respondent is not satisfied with reported amounts, "it may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of *any information within its possession or that may come into its possession*." (Emphasis added.) Taxpayers, who are presumed to know the law, know what is required and why. Taxpayers who, by design or through neglect, fail to maintain and provide business records that are adequate for sales and use tax purposes do not just limit respondent's ability to determine the correct tax; they limit their own ability to rebut the presumptions that favor respondent, to establish error, and to prove a more accurate taxable measure.

The original panel's conclusions that respondent's determination following the second reaudit was reasonable and rational, and that appellant failed to establish error and a more accurate measure, are supported by substantial evidence and are legally correct.[5] In sales and use

[5] The evidence indicates that respondent's determination following the second reaudit is conservative.

tax matters, respondent has great latitude to choose its methodology and the information upon which it will rely. (R&TC, § 6481.) OTA does not dictate the use of any particular methodology or reliance on any particular data. OTA measures respondent's actions – here, its choices of audit methodology and data upon which to rely – against the reasonable and rational standard in the context of the information in respondent's possession.

Given the dearth of business records appellant provided for the audit, respondent's actions were rational and the results of the second reaudit were reasonable. Appellant failed to maintain and provide business records sufficient to enable respondent to utilize a direct audit methodology.[6] Respondent was unwilling to rely solely on bank deposits, apparently lacking confidence that appellant deposited all gross receipts in the accounts for which appellant provided records. Respondent concluded that relying solely on a markup methodology unfairly disfavored appellant. Ultimately, respondent devised a rational methodology that took into consideration both the $1,071,034 in bank deposits that were in excess of reported sales and the $416,946 in additional taxable sales determined on the basis of respondent's markup analysis. The result of that analysis was reasonable. Nothing more was required to shift to appellant the burden of proving error in respondent's analysis and a more accurate taxable measure.

[6] By "direct audit methodology," this Opinion refers to a methodology that enables respondent to calculate taxable sales from direct evidence of such sales, such as sales receipts or cash register tapes.

Appellant did not prove error or that using its bank records produce a more accurate taxable measure. Therefore, OTA finds that there is sufficient evidence to support the Opinion, and that the conclusions reached therein are not contrary to law. Accordingly, the petition for rehearing is denied.

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Michael F. Geary
Administrative Law Judge

We concur:

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Sara A. Hosey
Administrative Law Judge

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Lauren Katagihara
Administrative Law Judge

Date Issued: 5/9/2023