**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) OTA Case No. 18043017 |
| | ) CDTFA Case ID 674647 |
| **PAKWAN RESTAURANT, LLC** | ) |
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## OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Elliott R. Speiser, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

T. STANLEY, Administrative Law Judge: On January 26, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied a petition for redetermination filed by Pakwan Restaurant, LLC (appellant) of a Notice of Determination (NOD) dated October 29, 2012. The NOD is for $268,533.98 in tax, plus applicable interest, and a negligence penalty of $26,853.55 for the period October 1, 2008, through March 31, 2012 (audit period).

On February 27, 2023, appellant timely petitioned for a rehearing with OTA on the basis that there is insufficient evidence to justify the Opinion, the Opinion is contrary to law, and there was an error in law. OTA concludes that the grounds alleged in this petition do not constitute a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal 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] 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 CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

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).)

Insufficient Evidence to Justify the Written Opinion

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.)

*One-Day Observation Test*

Appellant contends that the evidence was insufficient to support OTA's finding that appellant declined to expand the observation test beyond one day and that the audit results based on that one-day observation test were reasonable and rational. Appellant asserts that it provided two months of sales records that it would prefer CDTFA use to determine unreported taxable sales. Appellant further contends that CDTFA did not inform appellant that CDTFA could still use the one-day observation test if CDTFA found the two months of sales records to be unreliable.

CDTFA asserts that, according to its August 27, 2014 decision, appellant declined additional observation tests because then-current sales were not representative of sales during the audit period. CDTFA also contends that, at the oral hearing, appellant's representative confirmed that appellant was opposed to additional observation tests. CDTFA contends that, at the oral hearing, appellant's representative confirmed that appellant rejected additional observation tests.

Appellant's arguments repeat contentions it made during briefing and at the hearing. At the hearing, appellant's representative stated that "with respect to [CDTFA's] request for an additional site observation, that's a bit nefarious" because "[appellant's] saying no, and then they're going to discuss these other issues."

The Opinion took appellant's arguments into consideration and concluded that the evidence supports CDTFA's impeachment of appellant's two-month sample of sales reports. Furthermore, CDTFA impeached several other pieces of evidence that appellant provided, such as merchandise purchase records, bank deposits, and federal income tax returns, finding them all

unreliable. Thus, the only reliable data remaining was the one-day observation test at all four of appellant's business locations. The observation test was supported by appellant's sales records for that date. After weighing the evidence in OTA's record, the panel concluded that CDTFA's use of that method was reasonable and rational. OTA agrees that typically a one-day observation test is insufficient; however, in this case it was the only reliable data available to CDTFA. Appellant's dissatisfaction with the audit method used, instead of the method preferred by appellant, does not constitute grounds for a rehearing.

*Negligence Penalty*

Appellant asserts that OTA improperly upheld the negligence penalty because the Opinion incorrectly found that: (1) the error rate exceeded 70 percent; (2) appellant's owners were experienced businesspersons, and (3) appellant did not maintain adequate books and records. With respect to the error rate, appellant rehashes its arguments regarding insufficiency of the one-day observation test to project the error rate that exceeded 70 percent. Appellant further contends that appellant's owners were immigrants who started from the ground up to build their businesses. Appellant asserts that it maintained all records necessary to determine its income and losses and provided them to CDTFA.

As discussed above, after impeachment of the records appellant provided to CDTFA, the only remaining reliable data was derived from the one-day observation test. That test supports an error rate exceeding 70 percent, as held by OTA. That appellant's owners were immigrants who worked diligently to support their goal to achieve the "American dream" does not show that the owners were inexperienced in the restaurant business by the time the businesses were audited. Appellant successfully operated restaurants at four different locations since January 1, 2005. As such, the evidence supports OTA's finding that appellant had some sophistication in the operation of the restaurant businesses. Regarding appellant's final argument that it kept sufficient records and provided those to CDTFA, OTA notes that, as discussed above, appellant's records were found to be unreliable, which strongly suggests negligence in recordkeeping.

Based on the foregoing, OTA finds that there was sufficient evidence to support the use of the one-day observation rate to project an error rate for the audit period. OTA further finds that there was sufficient evidence in the record to support the finding that appellant was negligent.

Contrary to Law

To find that the Opinion is against (or contrary to) law, OTA must determine whether the Opinion is "unsupported by any substantial evidence." (*Appeals of Swat-Fame Inc., et al.*, *supra*.) This requires a review of the Opinion to indulge in all legitimate and reasonable inferences to uphold the Opinion. (*Ibid*.) 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. (*Ibid*.) In its review, OTA considers the evidence in the light most favorable to the prevailing party (here, CDTFA). (*Ibid*.)

Appellant asserts that the Opinion is contrary to law. However, appellant made no specific allegations with respect to that ground for a rehearing. As such, appellant has not established that a rehearing is warranted on this basis.

Error in Law

Courts 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 Cal.App.3d 391, 397.)[2] 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). Error in law pursuant to Regulation section 30604(a)(6) generally refers to errors that occurred during the course of the proceedings. As stated in Code of Civil Procedure section 657, in the judicial context, an error in law "occurring at the trial and excepted to by the party making the application," is grounds for a new trial. This includes situations where, for example, the trial court made an erroneous evidentiary or procedural ruling. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138; *Ramirez v. USAA Casualty Ins. Co.*, *supra*.)

[2] 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.

Appellant alleges that an error in law occurred during OTA's proceedings but did not explain what error occurred and when it occurred. Thus, appellant has not established that a rehearing is warranted on this basis.

Accordingly, OTA finds that appellant has not established any grounds for granting a rehearing.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Andrew Wong
Administrative Law Judge

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Keith T. Long
Administrative Law Judge

Date Issued: 6/27/2023