OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of: **A. JAFARI,** **dba Corona Motors;**	OTA Case No. 19034469 CDTFA Case ID: 560002
CORONA MOTORS, INC.; AND	OTA Case No. 19034467 CDTFA Case ID: 560000
A. JAFARI, **dba First Auto Center**	OTA Case No. 19034470 CDTFA Case ID: 561320

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Joseph A. Vinatieri, Attorney
Patricia Verdugo, Attorney
Benjamin K. Lee, Attorney

For Respondent: Stephen Smith, Tax Counsel IV

M. GEARY, Administrative Law Judge: On January 11, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining decisions issued by the California Department of Tax and Fee Administration (respondent). Respondent's decisions increased the measure of unreported taxable sales by appellant Corona Motors, Inc. from $1,590,018 to $1,880,784, with a resulting increase of the fraud penalty, and granted appellant A. Jafari, dba First Auto Center, conditional relief from a finality penalty, but otherwise denied appellants' petitions for redetermination.[1]

On March 13, 2023, A. Jafari (Jafari), dba Corona Motors (appellant 1), Corona Motors, Inc. (appellant 2), and Jafari, dba First Auto Center (appellant 3) (collectively, appellants) filed a timely petition for a rehearing (PFR) with OTA. The PFR is based on the grounds that there was

[1] A. Jafari, dba Corona Motors, appeals from a December 13, 2010 Notice of Determination (NOD) for $209,404.22 in tax, plus applicable interest, and a 25 percent fraud penalty of $52,351.07 for the period July 1, 1999, through January 31, 2000. Corona Motors, Inc. appeals from a December 13, 2010 NOD for $1,660,816.03 in tax, plus applicable interest, and a 25 percent fraud penalty of $415,202.14 for the period February 1, 2000, through June 30, 2004, which was later increased to $1,683,679.95 in tax and a 25 percent fraud penalty of $420,920.10. A. Jafari, dba First Auto Center appeals from a December 10, 2010 NOD for $400,665.90 in tax, applicable interest, and a 25 percent fraud penalty of $100,166.52 for the period November 5, 2003, through December 31, 2004.

insufficient evidence to justify the written Opinion and the Opinion is contrary to law. Respondent opposes the PFR. OTA concludes that the PFR does not establish grounds for a new hearing.

OTA may grant a rehearing when a PFR establishes one or more of the following grounds for rehearing and OTA finds that the established grounds materially affected the substantial rights of the petitioning 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 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 stated in *Appeal of Wilson Development, Inc.*, *supra*, it is appropriate for OTA to look to Code of Civil Procedure section 657 and cases interpreting or applying that statute for guidance in determining whether a new hearing should be granted.

Contrary to Law

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 instead, OTA is allowed to grant the petition only if it finds 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 to indulge in all legitimate and reasonable inferences to uphold the Opinion. (*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 Martinez Steel Corporation* 2020-OTA-074P.)

There appear to be two primary assertions that appellants rely upon to support their argument that the Opinion is contrary to law. The first is that the Opinion inappropriately shifts the burden of proof to appellants. In essence, appellants argue here, as they did at the hearing, that respondent has the burden of proving fraud[2] by clear and convincing evidence and that this burden extends to every fact relied upon as proof of fraud, including the deficiencies. Appellants

[2] In this Opinion on Petition for Rehearing, references to fraudulent acts of omissions should be read to include acts or omissions intended to facilitate the evasion of tax.

assert that respondent was not entitled to the presumption established by Revenue and Taxation Code section 6091, which states that all gross receipts are subject to tax until the contrary is established, and the burden of proving that a sale is not a sale at retail subject to tax is upon the person who makes the sale unless that person takes from the purchaser a certificate to the effect that the property is purchased for resale. Appellants contend that respondent was required to prove by clear and convincing evidence the amount of tax actually due after correctly calculating total sales and giving appellants credit for all exemptions and exclusions from tax to which they were entitled, while appellants had no burden at all.

The Opinion analyzed and rejected this argument. OTA finds that the Opinion's analysis of this argument is sound, and there is no need to repeat that analysis here except, perhaps, to emphasize that OTA looks at the totality of the evidence to determine whether there is clear and convincing evidence of fraud, and to note that appellants did not prove that they were entitled to additional adjustments to the taxable measures. OTA finds that the original panel correctly rejected the argument.

The second argument that appellants rely on is the assertion that if there was any fraud, it was perpetrated by appellants' former authorized representative (Walsh). Appellants contend that they spent considerable time and effort arguing this point and providing evidence to support it. They argue that the Opinion's failure to thoroughly analyze Walsh's role – and apparently its failure to find Walsh solely responsible for the underreporting – causes the Opinion's conclusions about appellants' (i.e., Jafari's) role to be so tainted as to require a rehearing. Another of appellants' constructs for this argument is that taxpayers are entitled to rely on their advisors, and they are entitled to a presumption that such reliance was reasonable.

OTA finds that the Opinion correctly focused on the taxpayers, that is, on what Jafari knew and did, as much as that can be determined from the record.[3] OTA finds scant support for appellants' claims that appellants relied entirely on Walsh to handle all relevant sales and use tax matters and that Walsh, not Jafari, was solely responsible for the fraudulent returns.[4] These arguments are unpersuasive, and OTA again rejects them.

[3] Jafari did not testify, and much of what appellants characterize as "evidence" consisted of the unsupported statements of their representatives.

[4] Unlike the facts found by the courts in the cases cited by appellants, the Opinion found clear and convincing evidence of appellants' fraud without reference to the imputation of the agent's (in this case, Walsh's) acts or omissions.

OTA concludes that the PFR does not establish that the Opinion is contrary to law.

Insufficient Evidence

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.[5] (See *Yarrow v. State of California* (1960) 53 Cal.2d 427, 434-435.) 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 established by the evidence; rather, OTA must be convinced from the entire record that the prior panel clearly should have reached a different conclusion.[6] (See Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

Turning now to the facts shown by the evidence:

- Jafari was an experienced business owner with many years of experience with used car sales before the periods at issue.
- Jafari maintained meticulous and relatively accurate records of appellants' sales, which included an electronic sales journal containing the details for most sales.[7] These details included sales date, stock and vehicle identification numbers, Department of Motor Vehicle Report of Sale (ROS) form number, sales price, purchaser information, and taxes and fees collected.
- Some sales shown by ROS forms were not recorded in Jafari's electronic sales journal or reported to respondent.
- The determined measures of taxable sales included all recorded (and presumed taxable) sales (i.e., sales revealed by appellants' electronic sales journal supplemented by sales shown in ROS forms that appellants did not record in the

[5] To the extent possible, OTA assigns PFRs 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, one of them a presiding ALJ. (Cal. Code Regs., tit. 18, § 30606(a).)

[6] The requirement that the error materially affect the substantial rights of the party must also be met.

[7] As noted by appellants in the PFR, the Opinion incorrectly states that the many boxes of business records were seized from Jafari's home. They were seized from the business location. Therefore, that "fact" is not supported by the evidence. OTA's error, though, is immaterial to the analysis and holdings.

electronic sales journal) except sales for resale or sales in interstate (or foreign) commerce.

- Respondent did not allow deductions for claimed bad debts or tax-paid purchases (of fuel) resold because appellants did not establish an entitlement to those deductions.
- For the period July 1, 1999, through January 31, 2000, appellant 1 recorded taxable sales of $3,043,481, reported taxable sales of $380,491, and failed to report taxable sales of $2,662,990.[8]
- For the period February 1, 2000, through June 30, 2004, appellants 1 and 2 recorded taxable sales and made additional taxable sales that they did not record (i.e., sales shown by ROS forms but omitted from the electronic sales journal) of $23,908,870 and $1,880,784, respectively (totaling $25,789,654). They reported taxable sales for the same period of $4,214,109. Thus, appellants 1 and 2 failed to report taxable sales of $21,575,545 for that period.
- Jafari recorded sales totaling $8,357,432 for 2003 and deposited $7,217,224 into the business bank account during 2003, but he reported taxable sales of only $1,165,534 for 2003.
- For the first quarter of 2004 (1Q04) through 3Q04, Jafari deposited $5,073,212 into the business bank account. Audited taxable sales for that period totaled $4,739,410, but Jafari reported sales for that period totaling only $1,108,369.
- For the period November 5, 2003, through December 31, 2004, appellant 3 had taxable sales of $6,686,156. It reported taxable sales of $1,604,885 and failed to report taxable sales of $5,081,271.
- Appellant 3's seller's permit was effective November 5, 2003. According to appellant 3's profit and loss (P&L) statement for 2003, sales for that period totaled $502,968 (rounded). The audited taxable measure for 4Q03 was $943,766, and appellant 3 reported taxable sales for 4Q03 of $154,920.

[8] There was also a relatively small measure of excess tax collected for this liability period.

- Appellant 3's P&L statement for the period 1Q04 through 3Q04 indicates that sales totaled $4,774,066. Audited taxable sales for that period were $ 4,711,304, but appellant 3 reported sales for that period totaling only $1,108,369.

In addition, the evidence shows that Jafari maintained at his place of business copies of sales and use tax returns filed by appellants, every one of which reported only a small fraction of appellants' sales and at least some of which were accompanied by worksheets purporting to document the details of the reported sales, including the sales price, sales tax collected, and, in some cases, the ROS form number used for each sale included in reported amounts. Walsh provided these returns and worksheets for the audits. Walsh also provided what was at least tacitly represented to be Jafari's 1999 federal income tax return which reported amounts consistent with amounts reported on sales and use tax returns, but far different from the amounts shown on the copy of Jafari's 1999 federal income tax return that was part of the seized records.

The original panel considered the above evidence (and more) and based thereon concluded that the totality of evidence constituted clear and convincing proof of appellants' fraud for every quarter at issue. Having again reviewed the record, OTA finds that appellants have failed to demonstrate that there is insufficient evidence to justify the written Opinion and that the original panel clearly should have reached a different conclusion.

On the basis of the foregoing, OTA denies the petition for a rehearing.

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Michael F. Geary
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 7/25/2023