OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20127048
	) CDTFA Case ID 094-025
DIVINE WELLNESS CENTER, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Richard Robinson, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

J. LAMBERT, Administrative Law Judge: On January 19, 2023, the Office of Tax Appeals (OTA) issued an Opinion which partially sustained a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's Decision denied, in part, a petition for redetermination filed by appellant Divine Wellness Center, Inc. (appellant) of a Notice of Determination dated June 29, 2017, for a tax liability of $588,845.28, applicable interest, and a negligence penalty of $58,884.58, for the period April 1, 2013, through March 31, 2016. CDTFA's Decision ordered a reaudit be performed, which resulted in a reduction to the measure of tax by $2,007,994.00 from $6,542,725.00 to $4,534,731.00.

In its Opinion, OTA determined that further adjustments to the measure of tax were warranted and directed CDTFA to reduce the audited taxable sales for the second quarter of 2014 (2Q14) from $271,206 to $127,356, and to make any corresponding adjustments to the audited taxable sales for 3Q14 though 2Q15. Otherwise, OTA sustained CDTFA's action as to the measure of tax. OTA also held that appellant is liable for the negligence penalty.

Appellant filed a timely petition for rehearing (PFR). A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party are

[1] The State Board of Equalization (BOE) formerly administered the sales and use taxes. On July 1, 2017, the BOE's administrative functions relevant to this case transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, all references to "CDTFA" refer to the BOE.

materially affected: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise which 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).)

In its PFR, appellant argues there is insufficient evidence to justify the Opinion and that the Opinion is contrary to law. 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.)[2] 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. (*Appeals of Swat-Fame, Inc., et al.*, *supra*.)

Appellant contends that the Opinion improperly impeached direct evidence by using the observation test to determine sales by examining the number of people entering and leaving the business, which it asserts is circumstantial evidence. It appears that appellant is referring to the

[2] 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 [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.

statement in the Opinion that the data from the observation test demonstrated that appellant's new point-of-sales (POS) system did not record all sales transactions.

However, as stated in the Opinion, appellant did not provide source documents, such as sales invoices, cash register tapes, or any other source documentation for sales during the liability period. The Opinion noted that CDTFA may determine the amount required to be paid based on any information which is in its possession or may come into its possession. (Rev. & Tax. Code, §§ 6481, 6511.) The Opinion also noted that CDTFA performed an observation test which is a recognized and standard accounting procedure. (See *Appeal of AMG Care Collective*, 2020-OTA-173P.) Appellant had the burden to show adjustments were warranted to CDTFA's determination, pursuant to *Appeal of Talavera*, 2020-OTA-022P, and appellant did not provide source documentation to support its reported taxable sales or the POS data, which was inconsistent with the observation test.

Appellant asserts that OTA failed to consider the period when the business was shut down and produced no sales. However, as noted in the Opinion, CDTFA accounted for the change in sales due to appellant's move and the two months of closure during 1Q14, and appellant did not provide evidence to show further adjustments. Appellant also asserts that OTA improperly relied on bank statements to impeach the sales numbers, but that bank records are irrelevant because federal law prohibits dispensaries from using federal banks. However, as stated in the Opinion, the bank deposit analysis was not used in CDTFA's computation of audited taxable sales. Accordingly, appellant has not shown that there is insufficient evidence to justify the Opinion or that the Opinion is contrary to law.

Appellant also provides its federal income tax returns (FITRs) for the 2013 through 2016 tax years, plus a spreadsheet comparing gross sales as reported on sales and use tax returns (SUTRs) to FITRs. 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 has not shown why the FITRs and spreadsheet could not have been produced before the Opinion was issued. Therefore, appellant has not shown that the evidence is proper grounds for a

rehearing. In addition, appellant has not shown that the FITRs and spreadsheet are material. As stated in the Opinion, appellant asserted that POS summaries were used to prepare the general ledgers which in turn were used to report sales for the SUTRs and FITRs, but appellant did not provide source documentation, such as sales invoices or cash register tapes, to corroborate its reported sales. Likewise, in its PFR, appellant provided no source documentation to corroborate the information on the newly submitted FITRs.

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, does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Appellant has not shown that any ground exists such that a rehearing should be granted. Consequently, the PFR is denied.

DocuSigned by:
Josh Lambert
CB1F7DA37831416...

Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Josh Aldrich
48745BB806914B4...

Josh Aldrich
Administrative Law Judge

DocuSigned by:
Susana Seyller
6FE2EBECC6F6481... *for*

Andrew Wong
Administrative Law Judge

Date Issued: 7/12/2023