OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **B. SENEHI,** **dba Barefoot Café**	OTA Case Nos. 18011836, 18011949 CDTFA Case IDs: 864543, 889461

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: James Bourbeau, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: On January 24, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by the California Department of Tax and Fee Administration (respondent). Respondent's decision denied B. Senehi's (appellant's) petition for redetermination of a February 25, 2015 Notice of Determination (NOD) for $220,945.79 in tax, plus applicable interest, and a 40 percent penalty of $87,636.97 for the period July 1, 2007, through December 31, 2013 (liability period).

On February 13, 2023, appellant timely filed a petition for a rehearing (PFR) with OTA. The PFR is based on the grounds that: (1) there is newly discovered and relevant evidence; (2) there was insufficient evidence to justify the written opinion; and (3) 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.) 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 of Equalization, 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.

Newly Discovered Evidence

There are at least three conditions that must be satisfied before a rehearing can be granted on the ground of newly discovered evidence: it must appear that the petitioning party could not, with reasonable diligence, have provided the evidence at the hearing (*Bostard v. Bostard* (1968) 258 Cal.App.2d 793, 797); the newly discovered evidence cannot be merely cumulative (*Fairbairn v. Fairbairn* (1961) 194 Cal.App.2d 501, 513); and the evidence must be of such significance as to make a different result probable (*Celli v. French* (1951) 107 Cal.App.2d 599, 602). (See also *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728.)

One of appellant's arguments in this appeal is that appellant suffered from physical and mental disabilities during the liability period and that these disabilities, and a malfunctioning point-of-sale (POS) system, caused or significantly contributed to the cause of the underreporting upon which the finding of fraud was based.[1] In support of this argument, appellant offered: pharmacy records showing various psychotropic medications dispensed to appellant between early June of 2007 and late November of 2011; written statements from appellant's former

[1] A point-of-sale system typically includes one or more terminals, which are the modern equivalent of cash registers. Depending on the equipment and software, POS systems can generate reports (sometimes referred to a "Z-tapes") which summarize sales activity for the period of time selected by the operator. These reports can include breakdowns of sales by type and amount, including product or service, credit or cash, and taxable or nontaxable.

primary care physician, Dr.El-Ghoneimy;[2] a May 24, 2019 letter from Dr. El-Ghoneimy that states, "Due to multiple medical and psychiatric conditions, [appellant] has not been able to perform his work on a daily basis"; and the written report and testimony of appellant's retained medical expert witness, Dr. Field. In its Opinion, OTA found that respondent established fraud or intent to evade the payment of taxes by clear and convincing evidence, and that the evidence that the underreporting is attributable to circumstances beyond appellant's control, i.e., mental disabilities or a malfunctioning POS system, was unpersuasive.

Appellant now argues that a rehearing should be allowed to afford appellant the opportunity to offer the testimony of Dr. El-Ghoneimy. Appellant contends that OTA was "dismissive" of the testimony of its medical expert and that appellant would have preferred to call Dr. El-Ghoneimy, but the doctor had left the Marin County practice with which he had previously been affiliated, and appellant could not with reasonable diligence locate the doctor to arrange for his testimony at the hearing. Appellant asserts that he has now located the doctor, who is affiliated with a community health center in San Diego; that appellant "is confident that [Dr. El-Ghoneimy] can at least attend a rehearing by phone or video appearance"; and that "this could make all the difference."

The PFR indicates that Dr. El-Ghoneimy's former associates in Marin County would not or could not tell appellant where the doctor went after leaving that practice and that internet searches continued to identify the doctor's Marin County affiliations only. The PFR does not contain specific information about when other efforts to locate the doctor occurred or the sources relied upon, aside from a general reference to internet sources. There is nothing in the record to indicate that Dr. El-Ghoneimy stopped practicing medicine at any time since appellant's January 2020 communication with him, and it is difficult to understand why appellant could not locate a licensed physician practicing in this state. OTA is not persuaded that appellant could not with reasonable diligence locate Dr. El-Ghoneimy to request greater participation at the hearing. However, this is not the only condition that appellant's PFR does not satisfy.

As stated above, appellant must show that the proposed evidence is not likely to be cumulative and is likely to lead to a different result. The PFR does not provide a summary of the doctor's anticipated testimony, which makes it impossible to conclude that the testimony will not

[2] The statement consists of the doctor's handwritten replies to a series of written questions posed by appellant's attorney in a January 30, 2020 letter to the doctor, who is not the doctor that prescribed the psychotropic medications.

be merely cumulative. Furthermore, according to the evidence admitted thus far, Dr. El-Ghoneimy is not a psychiatrist. He was appellant's primary care physician who took appellant on as a patient sufficiently late in the liability period to cause even appellant's attorney to question the relevance of the doctor's records.[3] Under these circumstances, OTA cannot find that testimony from Dr. El-Ghoneimy will likely lead to a different result. On these bases, OTA finds that appellant has not established that newly discovered evidence warrants a rehearing.

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 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 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 NASSCO Holdings, Inc*. (2010-SBE-001) 2010 WL 5626976.)

Appellant argues that the Opinion (i.e., OTA's analysis) is contrary to law in two respects. He contends that OTA did not apply the required "clear and convincing evidence" standard of proof to respondent's assertion of fraud or intent to evade the payment of tax. Appellant also asserts that OTA instead applied a "preponderance of evidence" standard, and even then, OTA incorrectly shifted the burden of proof to appellant on Issue 3.[4]

In order for the NOD to be deemed timely for reporting periods from the third quarter of 2007 (3Q07) through 4Q11, clear and convincing evidence must have shown that appellant intended to defraud the state or evade the payment of tax for at least some portion of each of those quarterly reporting periods. (*Appeal of ISIF Madfish, Inc.*, 2019-OTA-292P.) OTA applied that standard of proof on Issue 3. Three judges unanimously agreed that there was clear and convincing evidence of fraud. The Opinion summarizes the evidence upon which OTA

[3] The exchange regarding Dr. El-Ghoneimy's records is in the Hearing Transcript, page 30, line 20 through page 31, line 25.

[4] The parties agreed that the issues for hearing were: (1) whether an adjustment to either measure of unreported taxable sales was warranted; (2) whether relief of the 40 percent penalty was warranted; and (3) whether any part of respondent's determination was barred by the statute of limitations.

based the finding. Appellant's disagreement with the finding is not grounds for granting a rehearing.

OTA did not shift the burden of proof to appellant on Issue 3. OTA found clear and convincing evidence of fraud and on that basis concluded the three-year statute of limitation was inapplicable to the NOD. To be clear, though, once OTA found fraud or intent to evade the payment of tax, it became appellant's burden to prove that the underreporting was instead the result of a malfunctioning POS system or appellant's mental disabilities that prevented appellant from accurately reporting taxable sales. The Opinion had already considered and rejected those arguments in connection with Issue 2, which is why OTA declined to revisit those analyses in connection with Issue 3.

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 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.[6] (See Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

Having reviewed the entire record, OTA concludes there is sufficient evidence to justify the various findings contained in the written Opinion. The circumstantial evidence described in the Opinion persuaded the panel of judges that appellant's underreporting was fraudulent or intended to facilitate the evasion of tax. The panel was not persuaded that the underreporting was, to any meaningful degree, the result of a malfunctioning POS system or appellant's claimed disabilities. While it was respondent's burden to prove fraud or intent to evade the payments of

[5] 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).)

[6] The requirement that the error materially affect the substantial rights of the party must also be met. (Cal. Code Regs., tit. 18, § 30604(a)(3).)

tax, respondent was not required to call witnesses or question appellant's witnesses. Respondent was entitled to rely on the documentary evidence and testimony of appellant's witnesses. OTA finds that the PFR does not establish that the panel clearly should have made different findings. Accordingly, OTA finds that the PFR does not establish any ground for a rehearing.

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Michael F. Geary
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
Administrative Law Judge

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Lauren Katagihara
Administrative Law Judge

Date Issued: 8/2/2023