OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19115516
	) CDTFA Case ID 123-047
R. FALCHE	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: R. Falche

For Respondent: Jarrett Noble, Tax Counsel IV

J. ALDRICH, Administrative Law Judge: On December 27, 2022, the Office of Tax Appeals (OTA) issued an Opinion modifying a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied a petition for redetermination filed by R. Falche (appellant) of the Notice of Determination (NOD) dated June 25, 2015. The NOD is for $1,069,916.91 in tax, plus applicable interest, and penalties of $211,183.42 for the period January 1, 2008, through December 31, 2010, and for the first and fourth quarters of 2011 (1Q11 and 4Q11) (liability period).

On January 26, 2023, appellant timely petitioned OTA for a rehearing on the basis that an error in law occurred during the appeals hearing and there is insufficient evidence to justify the Opinion. OTA concludes that the grounds set forth in appellant's petition for rehearing (PFR) do not constitute a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (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, occurring during the appeal proceedings and prior to the

[1] Sales and use taxes were formerly administered by the State Board of Equalization (Board). On July 1, 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, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to the 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 OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

ERROR IN LAW

Appellant asserts the following errors in law occurred during the appeals hearing or proceedings: (1) an error in law as to the elements required to be proved by CDTFA; (2) an error in law as to the burden of proof in a Revenue and Taxation Code (R&TC) section 6829 claim; (3) an error in law as to CDTFA's and the responsible person's obligations to retain audit records; and (4) an error as to the availability of laches and equitable estoppel.

Courts have found that a new trial may be granted based on an error in law if the trial court's 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.* (1990) 234 Cal.App.3d 391.) For example, courts have found an error in law when there is 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 jury instruction (*Maher v. Saad* (2000) 82 Cal.App.4th 1317). None of the aforementioned examples, or the logical equivalents thereof, occurred during the appeals proceeding. For example, during the appeals proceeding appellant did not object to the admission of CDTFA's exhibits into evidence, but rather appellant argued as to the appropriate weight to give the admitted evidence. Thus, OTA interprets appellant's assertions in his PFR to be arguments that the Opinion is contrary to law under California Code of Regulations, title 18, section 30604(a)(5).

CONTRARY TO LAW

A rehearing may be granted when the Opinion is contrary to law, such that the substantial rights of the complaining party were materially affected. (Cal. Code Regs., tit. 18, § 30604(a)(5).) The question before OTA does not involve examining the quality or nature of the reasoning behind the underlying Opinion, but whether the Opinion is valid according to the

law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party, with all legitimate inference to uphold the Opinion, the Panel[2] finds that the Opinion incorrectly stated or applied the law and, as such, it is contrary to law. (*Ibid*.; see also *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 922.)

Elements required to be proven by CDTFA

Appellant asserts that an error in law occurred because the Opinion only lists four elements that are required to be proven by a preponderance of the evidence when CDTFA holds a responsible person liable. Appellant contends that there is a fifth element that CDTFA must prove by a preponderance: the amount of tax due from the corporation.

Here, however, neither the statutory nor regulatory frameworks of R&TC section 6829 or California Code of Regulations, title 18, section 1702.5, respectively, require CDTFA to prove a fifth element by a preponderance (i.e., the amount of tax).[3] Likewise, OTA's precedential Opinions *Appeal of Eichler*, 2022-OTA-029P and *Appeal of Farrell*, 2023-OTA-095P only require CDTFA to prove four elements by a preponderance standard to impose R&TC section 6829 liability. Thus, the Opinion is not contrary to law.

Burden of Proof

Appellant asserts that an error in law occurred as to the burden of proof in a R&TC section 6829 appeal. Appellant contends that the Opinion ignored the fact that CDTFA's tax liability was not proved, and it improperly shifted the burden to the responsible person to prove that the amount of the liability is not true. Appellant argues that OTA's precedential Opinion *Appeal of Talavera*, 2020-OTA-022P (*Talavera*) does not apply to R&TC section 6829 appeals. Instead, appellant argues that the burden of proof was improperly shifted to appellant. Appellant, again, argues that CDTFA had the burden to prove the amount of tax due by a

[2] To the extent possible, OTA assigns a PFR 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 ALJs who did not participate in the original panel's deliberations. (Cal. Code Regs., tit. 18, § 30606(a).)

[3] California Code of Regulations, title 18, section 1702.5(e) contains an additional provision that if the person is not an officer or a member or a partner or a manager with an ownership interest in the entity, the person is presumed to not be personally liable, unless CDTFA rebuts this presumption with clear and convincing evidence. Because appellant was the president, sole shareholder, and corporate officer during the liability period, this rebuttable presumption is not applicable in the present case.

preponderance standard, citing *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 611, for the proposition that unsupported assertions are not sufficient to satisfy CDTFA's burden of proof. Furthermore, appellant contends that CDTFA failed to provide a minimal factual foundation or substantial evidence to establish a presumption of correctness.

The applicability of *Talavera*, *supra*, to a R&TC section 6829 appeal depends on whether the responsible person contests the underlying liability of the corporation on its merits.[4] Here, appellant did contest the amount of tax due from the corporation. Therefore, it was appropriate for the Opinion to use *Talavera* in examining whether adjustments were warranted. Further, the Opinion examined the available evidence regarding the tax liabilities of International Marine Fuels Group, Inc. (IMFG) and found, based on that evidence, that some adjustments were warranted. Regarding appellant's contention that the burden of proof improperly shifted to appellant or that it is CDTFA's burden to prove the amounts due by a preponderance, the Opinion properly applied the shifting burden found in *Talavera*; that is, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational, and once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. Moreover, appellant is essentially reiterating an argument he made during the oral hearing. The Opinion correctly rejected the argument, and appellant's dissatisfaction with the outcome of his appeal, and the attempt to reargue the same issue a second time, is not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Accordingly, the Opinion is not contrary to law.

Record Keeping

Appellant argues that the Opinion misconstrues the responsibilities of CDTFA and the responsible person regarding record keeping requirements. Appellant argues that CDTFA was required to maintain IMFG's point-of-sale records that CDTFA used in its audit workpapers.

Here, appellant's argument conflates appellant with IMFG. The Opinion correctly states that IMFG, the corporation, had the obligation to maintain complete and accurate records. The cited support to R&TC sections 7053 and 7054, and California Code of Regulations, title 18, section 1698(b)(1) does not impose the record keeping obligation on the responsible person, but

[4] Of note, *Talavera* is a R&TC section 6829 appeal where the sole issue was whether the taxpayer established a basis to reduce the sales and use tax liability for which the taxpayer was liable as a responsible person. (See *Talavera*, *supra*, p. 2, fn. 2.)

on the seller, user, or retailer. Furthermore, appellant cites no law for the proposition that CDTFA is required to keep copies of all records that it reviews while preparing audit workpapers and OTA is not aware of any such law. As such, the Opinion is not contrary to law.

Laches and Equitable Estoppel

Appellant argues that the Opinion inappropriately relied on *Dial v. Commissioner* (9th Cir. 1992) 968 F.2d 898, 904 (*Dial*). Appellant argues that *Dial* did not consider or mention state governments or state tax agencies but held that "laches is not a defense to the **United States'** enforcement of tax claims." (Emphasis added by appellant.) Similarly, appellant argues that *Appeals of Renshaw* (86-SBE-191) 1986 WL 22873 (*Renshaw*) does not preclude the doctrine of laches.

As the Opinion noted, the Board of Equalization (Board) stated in *Renshaw*, *supra* that laches is defined as the neglect or failure of a plaintiff to assert a right for such a period of time that results in prejudice to defendant requiring that the plaintiff's cause of action be barred in equity. In its analysis, the Board further stated "Assuming, arguendo, that this [B]oard is empowered to apply the Doctrine of Laches…" (*Renshaw*, *supra*, at p. 3.) This implies that the Board was, at least, uncertain as to whether it could even apply the doctrine. Assuming, hypothetically, that OTA were empowered to apply the doctrine, the critical element is whether there was unreasonable delay. The Opinion correctly found that since CDTFA's NOD was issued within the statute of limitations, there was no unreasonable delay for purposes of laches or equitable estoppel. Moreover, appellant did not provide any authority to support that OTA is empowered to apply equitable defenses to California business tax appeals. Furthermore, the Opinion correctly noted that equitable powers are generally only exercised by a court of general jurisdiction; and OTA, as an administrative agency, lacks the authority to exercise judicial powers. Based on the foregoing, the Opinion is not contrary to law.

INSUFFICIENT EVIDENCE

Good cause for a new hearing may be shown where there was insufficient evidence to justify the Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(4).) After briefing concludes following a perfected PFR, the Panel examines the evidentiary record. To find that there is an insufficiency of evidence to justify the opinion, the Panel must be convinced from the entire record that the

prior Panel clearly should have reached a different conclusion. (See *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-45P.)

Appellant reiterates his argument regarding the burden of proof, which OTA has addressed above. OTA also notes that its Opinion correctly rejected appellant's burden-of-proof argument, which appellant presented during the underlying appeal. Appellant also argues that when the amounts in Factual Findings (FF) nos. 36, 41, and 42 are totaled the sum is less than the amount shown on the NOD, $1,069,916.61, and contends that this shows the evidence is insufficient to prove the liability.

Appellant is correct, in a sense, that the sum of those figures does not equal the amount of tax on the NOD. However, appellant misinterprets the FFs. FF no. 36 makes findings as to how CDTFA computed the audited understatement of tax. For example, the last sentence in FF no. 36 states that "$894,266.51 of unpaid sales taxes, which were included in the NOD to appellant." Also, appellant, in his calculation, ignores footnote 24, which clarifies that only $31,331 of the $66,746 in tax on the NOD issued to IMFG is included in the NOD to appellant. The remaining amount of tax included in the NOD issued to appellant ($175,650) results from IMFG's self-assessment of tax, which IMFG failed to remit or only partially remitted.[5] Based on the foregoing, appellant has not shown there was insufficient evidence to justify the Opinion.

Accordingly, OTA finds that appellant has not established grounds for a new hearing.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

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Andrew Wong
Administrative Law Judge

Date Issued: 8/2/2023

[5] By quarter, the amounts of tax included in the $1,069,916.90 on the NOD issued to appellant are as follows: $28,951.00 for 3Q09; $19,551.50 for 1Q10; $23,405.12 for 2Q10; $16,730.38 for 3Q10; $894,266.51 for 4Q10; $55,681.00 for 1Q11; and $31,331.00 for 4Q11.