

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18032550
)
DOOMID, INC.) Date Issued: May 9, 2019
)
)
_____)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Shawn Nazari, President

For Respondent: Kevin C. Hanks, Chief,
Headquarters Operations Bureau

Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

A. KWEE, Administrative Law Judge: On December 13, 2017, the State Board of Equalization (board) voted to partially grant an appeal by Doomid, Inc. (Doomid) of a Notice of Determination (determination) for \$492,441.57 in tax, a negligence penalty of \$49,244.17, plus interest.¹ Written notice of the board’s action on the appeal was mailed out on February 26, 2018. The board’s decision reduces the amount of tax as determined by the California Department of Tax and Fee Administration (CDTFA) by \$136,819.07, deletes the \$49,244.17 negligence penalty, and sustains the balance of CDTFA’s determination. By letter dated March 23, 2018, CDTFA timely petitioned OTA to rehear this matter. We conclude there is good cause to grant a rehearing.²

¹ Revenue and Taxation Code (R&TC) section 20 provides that, unless the context requires otherwise, on and after January 1, 2018, the term “board,” with respect to an appeal, means the Office of Tax Appeals (OTA). R&TC section 40 provides that within 120 days of rendering a decision where the amount in controversy exceeds \$500,000, the board is required to publish a written opinion containing six elements. OTA is not specifically subject to section 40, which by its terms applies to “board members” and not administrative law judges. Nevertheless, in the interest of public transparency, this written opinion includes all the elements required by section 40 because the amount in controversy exceeds \$500,000.

² The board concurrently voted to deny a related claim for refund of \$532 in tax in this matter (board case 626011). CDTFA timely petitioned for a rehearing of both decisions; however, by letter dated November 8, 2018, CDTFA withdrew its petition for rehearing of the board’s decision to deny the refund claim in its entirety.

ISSUE

Whether CDTFA established good cause for a new hearing.

FACTS

The board's Appeals Division³ issued a Decision and Recommendation (D&R) in this matter on January 29, 2015, recommending a reaudit. CDTFA⁴ declined to perform a reaudit and, as such, made no changes to the determination. The board's Appeals Division subsequently issued a Supplemental D&R, recommending that the board reduce the amount of tax by \$136,819.12 (representing a measure of \$1,620,104). In its decision, the board's Appeals Division noted that Doomid was unable or unwilling to provide its books and records for the sales it made at its gas station and, as such, the board's Appeals Division estimated the amount of its recommended adjustment based, in part, on statewide average fuel selling prices reported by the United States Energy Information Administration (US EIA).

This matter was scheduled for oral hearing before the board on April 26, 2017. On the day of the oral hearing, the board continued this matter to allow Doomid additional time to provide its books and records. Before this matter was rescheduled for oral hearing, CDTFA contacted Chevron (a fuel supplier from whom Doomid purchased fuel) and obtained an actual record of Doomid's fuel purchases from Chevron, including cost per gallon. Based on this information, CDTFA compiled audit schedules to show that if the board reduced audited taxable sales by \$1,620,104, as recommended by the board's Appeals Division, Doomid would have been selling fuel at a loss during the audit period.

One of CDTFA's audit schedules was titled "Transcribed Fuel Invoice Information" and included Column M, "Profit Per Gallon." The box for the CDTFA auditor's (author's) name in this particular schedule was left blank, but his name (Robert Bidwell) appears on some of the other audit schedules prepared by CDTFA. Column M of CDTFA's "Transcribed Fuel Invoice

³ The Appeals Division was renamed and transferred to CDTFA on July 1, 2017; however, it continued to advise and serve the board in the performance of the board's appeals functions through December 31, 2017, pursuant to a contract between the board and CDTFA.

⁴ At this time, the board's Sales and Use Tax Department and/or Tax & Fee Programs Division represented staff's (now, CDTFA's) position at appeals conferences before the board's Appeals Division, and at subsequent oral hearings before the board. Additionally, the board's Appeals Division advised the board in a neutral capacity and did not represent staff's position in appeal before the board.

Information” schedule consisted almost entirely of negative figures,⁵ and established that, comparing Doomid’s cost of fuel per gallon to the selling price of fuel per gallon estimated by the board’s Appeals Division, Doomid would have had to sell its fuel at a substantial net loss to arrive at the taxable measure recommended by the board’s Appeals Division. Based on this information from its audit schedules, CDTFA continued to recommend no adjustment to its original determination. After reviewing the audit schedules, the board’s Appeals Division agreed with CDTFA, and recommended that the board make no adjustment to CDTFA’s original determination.

This matter was then rescheduled for oral hearing before the board on November 16, 2017. On the day of the oral hearing, this matter was continued to allow the board additional time to review the documentation. This matter was rescheduled as item C 12 on the board’s December 13, 2017, oral hearing calendar.⁶ At the December 13, 2017 oral hearing, the board did not provide CDTFA an opportunity to speak or to make a presentation.⁷ Instead, the Chairwoman of the board (Chair) distributed schedules to the other board members for discussion at the oral hearing. One of the schedules that the Chair distributed was titled “Transcribed Fuel Invoice Information,” which has the same title as a schedule prepared by CDTFA (described above). Additionally, the name “Robert Bidwell” (a CDTFA auditor) is printed in the box where the author’s name would appear. The information contained in Columns A through K of the schedule that the Chair distributed is the same as the information contained in Columns A through K of CDTFA’s schedule. Columns L and M contain entirely different information from Columns L and M in CDTFA’s schedule. In the schedule that the Chair distributed, Column L lists “<US EIA> Statewide Average Retail Selling Price” (instead of the audited selling price per gallon after applying the adjustment recommended by the board’s Appeals Division). Additionally, Column M lists “Difference in Selling Price Per Gallon” and contains all positive figures (instead of the almost entirely negative figures contained in CDTFA’s schedule). The bottom of Column M incorrectly totals all the rows in that column and

⁵ There are 40 invoices scheduled. Of this amount, 38 report a negative profit (loss), and 2 report profit, of \$0.01 and \$0.02, respectively, per gallon. The entries range from \$0.02 (profit) to -\$0.46 (loss) for every gallon of fuel sold.

⁶ On the day of the oral hearing, no board member disclosed receiving or making any ex parte communications in connection with this appeal.

⁷ Doomid’s representative made comments during the oral hearing.

indicates a difference in selling price of over \$17 for each gallon of fuel sold. The incorrectly totaled figure of \$17 per gallon of fuel sold was scratched out by someone using a pen. Additionally, at the bottom of Column M in another schedule that the Chair distributed, also transcribing fuel invoices (but for different dates), the phrase “Still making \$” is handwritten on the document, and directly above this handwritten phrase someone emphasized Column M (difference in average selling price per gallon) by adding a handwritten horizontal bracket.⁸

At the start of the oral hearing on this matter, the Chair explained “I gave those [schedules] to be photoed and I need them.”⁹ After confirming that the other board members had the schedules (distributed by the Chair) in front of them for discussion, the Chair explained that “the issue here are prices higher or lower than [US EIA] prices.” The Chair then described the schedules which she distributed as follows:

“These are [CDTFA’s] own audit papers and they use the [US EIA] prices which you can see are statewide average selling price in . . . Column L. Column M shows that [Doomid] was still making money. I think the [CDTFA’s] assertion was that you couldn’t have made money [if the board allowed the \$136,819.97 adjustment previously recommended by the board’s Appeal’s Division].”

CDTFA was not given an opportunity to speak or to rebut this evidence. Instead, the Chair concluded her summary of the evidence (i.e., the schedules) by stating that the \$136,819.97 adjustment “is based off of [CDTFA’s] own numbers, own audit, and what the auditor showed.” In response to a question from another board member regarding the source of the schedules, the Chair responded “[CDTFA] agreed to it, it was their own numbers.” The board then voted to make the \$136,819.97 reduction, and to delete the negligence penalty, without objection from any board member.

CDTFA petitioned for a rehearing on the basis that there was an irregularity during the board’s oral hearing process that prevented a fair consideration of CDTFA’s determination. Specifically, CDTFA contends that the Chair distributed, as evidence, misleading and factually incorrect audit schedules containing the CDTFA’s auditor’s name printed on the top of the schedules where the author’s name should appear. CDTFA states that CDTFA did not prepare

⁸ The Chair, during statements she made at the oral hearing, stated that Column M “shows that [Doomid] was still making money.”

⁹ The board’s oral hearing in this matter was recorded and is available on its website: <<http://boe.ca.gov/meetings/pubmeet17.htm>>

these schedules, refers to them repeatedly as “Harkey’s schedules,”¹⁰ and suggests that either the Chair or her staff prepared the schedules. CDTFA contends that the other board members relied upon the incorrect information in the Chair’s schedules in reaching their decision to partially grant the appeal. CDTFA further contends that the figures listed in the schedules distributed by the Chair as the “US EIA” average selling prices are overstated (which results in the “profit” Column M also being overstated) and that none of these figures, notwithstanding the Chair’s statements to the contrary, were used or applied by CDTFA. CDTFA also contends that you would need to remove taxes from the average selling prices in Column L to show profit (or loss), and if you did so, the schedules distributed by the Chair would actually show negative figures (losses) in the “profit” Column M, as opposed to the positive figures (profits) reflected in the schedule.

CDTFA separately requests a rehearing on the basis that there is insufficient evidence to support the board’s decision because the evidence upon which the decision was based (namely, the schedules distributed by the Chair) is incorrect. In support, CDTFA submitted a copy of the allegedly altered audit schedules that the Chair distributed to the board members during the oral hearing.

Appellant contends that CDTFA is “making an obscene accusation” and accusing the Chair of “altering the audit report.” Appellant states that while it “[n]ever received the schedule in question [from the board’s December 13, 2017 oral hearing] . . . [w]e firmly believe that [CDTFA’s] allegations are false and inaccurate.” In support, appellant attached the schedules prepared by CDTFA’s auditor and furnished to appellant by CDTFA.

DISCUSSION

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 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 the decision; (4) insufficient evidence to justify the decision or the decision is contrary to law; or (5) an error in law that occurred during the proceedings. (Cal. Code Regs, tit. 18, § (Regulation or

¹⁰ Ms. Harkey was the board’s Chair at the time of the oral hearing.

Reg.) 30820 [replaced by Regulation 30604, effective January 3, 2019]; *Appeal of Do*, 2018-OTA-002P, Mar. 22, 2018; *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994.)

The board’s Rules for Tax Appeals provide that the board’s staff “must provide copies of any documentary evidence that has been submitted or officially noticed,” and that each party “will be permitted to comment on or respond to [any] evidence.” (Reg. § 5523.6(a), (d).) The case before us deals with a very serious allegation that someone altered CDTFA audit schedules (which included inserting the name of a CDTFA auditor onto the schedule) prior to the oral hearing, to support a \$136,819.97 adjustment. The record does contain different versions of the same schedule. In both versions, Columns A through K are identical. In the version created by CDTFA, Columns L and M do not appear to support any further adjustments in favor of Doomid. On the other hand, Columns L and M are favorable to Doomid in the version distributed by the Chair and discussed at the oral hearing. Specifically, the allegedly altered version contains errors and misleading “profit” figures and, based thereon, might support an adjustment.

Additionally, the Chair distributed the allegedly altered version of the audit schedules to the other board members during the hearing and represented to the other board members that it was CDTFA’s own evidence and that CDTFA “agreed to it.” It appears that these representations were not correct. The Chair’s detailed representations as to the contents of the schedules during the oral hearing clearly establishes that the board members reviewed and discussed the allegedly altered version of the schedules, specifically Columns L and M, immediately before taking action on this appeal. Thus, it appears that the board members relied on an allegedly altered version of CDTFA’s audit schedules, that were apparently not submitted or created by CDTFA, in making a decision unfavorable to CDTFA. It also appears that, in making this decision, the board members believed or were led to believe that the allegedly altered audit schedules represented CDTFA’s position on appeal. Furthermore, CDTFA was not permitted to comment on or respond to such evidence as required by the board’s own regulations. Therefore, we find that there was an irregularity in the December 13, 2017 oral hearing which prevented a fair consideration of CDTFA’s position in the appeal.

Materiality

As provided in the board’s precedential decision in *Appeal of Wilson Development, Inc.*, *supra*, and as reflected in the board’s Rules for Tax Appeals, the board has historically looked to Code of Civil Procedure section 657, for guidance in determining whether grounds for a rehearing exist. (See, e.g., Regs. 5461(c)(5), 5561(a).)¹¹ OTA’s precedential decision in *Appeal of Do, supra*, and OTA’s regulations, reflect that OTA adopted the board’s established precedent of looking to Code of Civil Procedure section 657, and the applicable caselaw, for guidance in determining whether to grant a new hearing. (See Regs. 30602(c)(5) [franchise or income tax appeals, prior to January 3, 2019], 30820 [business tax appeals prior to January 3, 2019]; 30604 [appeals filed on and after January 3, 2019].)

A ground for a rehearing is material if it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764; *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319.) A presiding officer cannot ignore or overlook a material irregularity, even if it occurred at a time when the proceedings were being conducted by another presiding officer. (*Sandco American, Inc. v. Notrica* (1990) 216 Cal.App.3d 1495, 1508.) A material irregularity would generally include any departure from the due and orderly method of conducting the appeals proceedings by which the substantial rights of a party have been materially affected. (See *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) A material irregularity would also include “an overt act [by a presiding officer, fact-finder or an adverse party] violative of the right to a fair and impartial trial, amounting to misconduct.” (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 183.) The granting or denial of a new hearing “on the ground of misconduct is largely in the discretion of the” presiding officer. (*Loggie v. Interstate Transit Co.* (1930) 108 Cal.App. 165, 171.) Thus, where “[t]he evidence is clearly sufficient to support a judgment for either party . . . the conclusion [by the presiding officer] that the alleged misconduct requires a new trial is decisive.” (*Id.* at 172.)

As a preliminary matter, it is important to emphasize that we do not make a finding herein on the question of whether someone altered CDTFA’s audit schedules, or, if so, the identity of the person who submitted altered evidence for this appeal. Nevertheless, the record

¹¹ Chapter four of the board’s Rules for Tax Appeals (Regulations 5410 through 5465) is anticipated to be repealed during 2019, and chapter five is anticipated to be revised.

does reflect that there are two different versions of what otherwise appear to be the same audit schedule (but for Columns L and M). The allegedly altered version of the evidence relied upon by the board members appears to contain errors and misleading information detrimental to CDTFA. *If true*, the distribution of altered evidence by a board member, that neither party submitted, or that the opposing party submitted without informing CDTFA would establish that CDTFA did not receive a fair and impartial hearing and may constitute misconduct. (See *Gray v. Robinson, supra*, 33 Cal.App.2d at 183.) Furthermore, if the board considered altered evidence in deciding the appeal, under such circumstances as described above, a material irregularity in the proceeding has occurred within the meaning of our regulations.

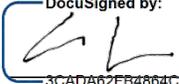
The issues concerning the evidence relied upon by the board members are material. When these issues are considered in conjunction with the very serious allegations of misconduct, they call into question the integrity and validity of the decision to grant, in part, Doomid's appeal. Under the facts of this case, these concerns can only be remedied by a new hearing which fairly and independently considers all the evidence. Therefore, we find it necessary and appropriate to grant a rehearing with respect to all issues subject to this petition on the basis that the irregularity at issue was material and establishes legitimate concerns that one of the parties did not receive a fair and impartial hearing.

HOLDING

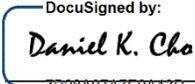
CDTFA established good cause for a new hearing.

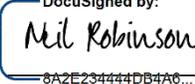
DISPOSITION

A new hearing is granted with respect to the issues subject to CDTFA’s petition for rehearing.

DocuSigned by:

3CAD462FB4884CB...
Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

7B28A07A7E0A43D...
Daniel K. Cho
Administrative Law Judge

DocuSigned by:

8A2E234441DB4A6...
Neil Robinson
Administrative Law Judge