

OFFICE OF TAX APPEALS
STATE OF CALIFORNIAIn the Matter of the Appeal of:
M. RIEDEL) OTA Case No. 220410176
) CDTFA Case ID 2-159-173
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)
)**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant: M. Riedel

For Respondent: Mari Guzman, Attorney

J. LAMBERT, Administrative Law Judge: On April 27, 2023, the Office of Tax Appeals (OTA) issued an Opinion which 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 M. Riedel (appellant) of a June 29, 2020 Notice of Determination (NOD) for the period October 1, 2018, through June 30, 2019 (liability period). The NOD reflected CDTFA’s determination that appellant is personally liable as a responsible person for the unpaid sales and use tax liabilities of Ciao Restaurants, LLC (Ciao).

After issuing the NOD but prior to this appeal to OTA, CDTFA removed the periods October 1, 2018, through December 31, 2018, and April 1, 2019, through June 30, 2019, from the liability period.² In its Opinion, OTA determined that appellant was personally liable under Revenue and Taxation Code (R&TC) section 6829 for the unpaid tax liabilities of Ciao for the period January 1, 2019, through February 24, 2019. In addition, the Opinion determined that a \$20,000 payment made by Ciao on March 29, 2019, was properly applied.

¹ The State Board of Equalization (BOE) formerly administered the sales and use taxes. On July 1, 2017, 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 BOE.

² The NOD was for tax of \$80,531.73, plus applicable interest, and penalties totaling \$8,136.10. After the adjustments, CDTFA reduced the liability to \$19,826 in tax, plus applicable interest, and penalties totaling \$2,588.60 for the period January 1, 2019, through March 31, 2019.

Appellant filed a timely petition for rehearing (PFR). A rehearing will be granted where one of the following grounds for a rehearing exists 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 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 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).)

In his PFR, appellant does not dispute the Opinion’s determination that he is personally liable for the unpaid liabilities of Ciao. Instead, appellant argues that a rehearing should be granted because there is insufficient evidence substantiating the Opinion’s determination that the payment of \$20,000 was properly applied by CDTFA, and that OTA’s determination on that issue 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. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.)³ 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. (*Ibid.*) The question before OTA on a PFR does not involve

³ 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 utilized CCP section 657 in determining grounds for rehearing]; *Appeal of Do*, 2018-OTA-002P [OTA adopted 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.

examining the quality or nature of the reasoning behind OTA’s Opinion, but whether that Opinion can be valid according to the law. (*Ibid.*)

Here, appellant argued during the appeal that a \$20,000 payment was intended to be a prepayment of Ciao’s liability for the first quarter of 2019 (1Q19), specifically, for the period February 25, 2019, through March 31, 2019, but that CDTFA misapplied the payment to the 3Q18 liability. In determining whether the payment was properly applied, the Opinion cited to Section 707.020 of CDTFA’s Compliance Policy and Procedures Manual (CPPM),⁴ which discusses how taxpayer payments are applied. As stated in the Opinion, the CPPM states that if the taxpayer does not direct CDTFA how to apply the payment, CDTFA applies the payment to the cost of collection or investigation, if any, and then applies the payment to the oldest period until that period is paid in full.

The Opinion stated that appellant paid \$20,000 to CDTFA using a Ciao business check dated March 21, 2019, and on March 29, 2019, CDTFA applied the \$20,000 payment to Ciao’s balance for 3Q18. The Opinion stated that, while appellant argued that he intended for the payment to be applied as a prepayment to Ciao’s liability for 1Q19, appellant did not submit a payment voucher with the payment, or otherwise indicate on the check how the payment was to be applied. Therefore, the Opinion concluded that CDTFA’s allocation of the payment was consistent with Section 707.020 of CPPM. Accordingly, the Opinion held, CDTFA properly applied the \$20,000 payment to the oldest period for which Ciao had an unpaid balance, consistent with CDTFA’s policies and procedures.

In his PFR, appellant asserts that he was unaware he needed to provide specific instructions to ensure the payment would be credited to the new liability. Appellant asserts that, when he took over full management of Ciao, he contacted CDTFA, but was not informed by CDTFA that Section 707.020 existed or affected the procedures for application of the payment. Appellant contends that CDTFA intentionally failed to advise him or his father, who was assisting him with Ciao’s sales and use tax matters, of the amount of Ciao’s current liability and misrepresented CDTFA’s payment procedures.

In support, appellant refers to notes from CDTFA’s Centralized Revenue Opportunity System (CROS), which describe conversations between CDTFA and appellant’s father.

⁴ CDTFA’s CPPM is not binding authority on OTA, but is an advisory publication created by CDTFA intended to provide direction to CDTFA staff in administering the Sales and Use Tax Law.

Specifically, appellant points to CROS notes dated March 28, 2019, which state: “Assisted [appellant’s father] with filing the del 3Q18 & 4Q18 returns. He said he will need to talk to his son, [appellant,] about the balance and how they can get it paid.” Appellant argues that these CROS notes establish that he was never advised of the outstanding liability when he made the \$20,000 payment. Therefore, appellant argues there is insufficient evidence to support the determination of the Opinion on this issue. Furthermore, appellant argues that the determination is contrary to law because it is an improper application of the law to allow CDTFA to engage in misconduct by misrepresenting its payment procedures.

Appellant has not established that there was insufficient evidence to justify the determination or that the determination is contrary to law. According to Section 707.020 of the CPPM, if a payment voucher is submitted with a payment, the payment will be applied according to the direction information contained in the voucher. Section 707.020 of the CPPM further states that payments not directed by the customer or any excess amounts from the directed payments, depending on the voucher type, will be applied first to any Cost of Collection/Cost of Investigation amounts due and that, if there are none, the payment will be applied to the oldest period first until that period is paid in full.⁵

It is also a statutory rule that a debtor may designate the debt to which a payment shall be applied. (See *Appeal of First Investment Service Co.* (73-SBE-037) 1973 WL 2769; *Appeal of Jhirmack Enterprises, Inc.* (79-SBE-175) 1979 WL 4216.) This rule is codified in Civil Code section 1479,⁶ which provides, in pertinent part:

Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

One - If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

Two - If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any

⁵ Section 707.020 of the CPPM also states that, when making a payment online, taxpayers may direct their payment to a specific payment type (e.g., return payment, audit payment, or period payment) or pay the account balance.

⁶ According to Section 707.020 of the CPPM, CDTFA’s Collections Support Bureau may, in accordance with CDTFA policy and Civil Code section 1479, change the payment application in some situations.

obligation, performance of which was due to him from the debtor at the time of such performance[.]⁷

This rule applies with respect to tax obligations. (See *Appeal of First Investment Service Co., supra*; *Appeal of Jhirmack Enterprises, Inc., supra*.)⁸ Therefore, a debtor taxpayer may designate the debt to which a payment shall be applied, but in the absence of such designation, the creditor tax agency, here CDTFA, may apply the payment in accordance with its CPPM.

Appellant did not submit a payment voucher with the payment, or otherwise indicate on the check the period to which the payment should apply. In addition, the CROS notes dated March 28, 2019, show that appellant's father discussed the delinquent 3Q18 and 4Q18 returns with CDTFA, and that he would discuss with appellant how to get the balance paid. CROS notes dated March 29, 2019, indicate that the \$20,000 payment was made and applied to Ciao's taxes due for 3Q18 and an account reinstatement fee. The CROS notes do not indicate any discussions demonstrating that appellant provided any guidance to CDTFA that any of the payment should be applied as a prepayment for future liabilities.⁹ Therefore, the evidence does not show that appellant directed CDTFA how to apply the payment. As a result, in accordance with Civil Code section 1479 and CDTFA's established procedure, CDTFA properly applied the payment to the earliest tax period. (See *Appeal of First Investment Service Co., supra*.)¹⁰

⁷ Furthermore, a debtor who has made a direction as to application may not change the direction so as to require application to another obligation after the creditor has made the application originally directed. The debtor simply has no right thereafter to direct a different application of the same funds. (*Appeal of Jhirmack Enterprises, Inc., supra*.)

⁸ While these opinions address tax payments made to the Franchise Tax Board, they are also applicable to tax payments made to CDTFA. As stated in *Appeal of Jhirmack Enterprises, Inc., supra*, Civil Code section 1479 applies with respect to tax obligations. (See also *Appeal of First Investment Service Co., supra*.)

⁹ In addition, the evidence, including the CROS notes, does not indicate any misrepresentation by CDTFA. OTA notes that R&TC section 6596 provides for relief of taxes, interest, and penalties under certain circumstances where a taxpayer's failure to timely pay the tax is due to reasonable reliance on written advice provided by CDTFA. (R&TC, § 6596(a).) However, R&TC section 6596 only authorizes such relief when there is reliance on written advice. (R&TC, § 6596(b)(2); Cal. Code Regs., tit. 18, § 1705(a)(1).)

¹⁰ *Appeal of First Investment Service Co., supra*, cites to cases such as *Graper v. U.S.* (1962) 206 F.Supp. 173, 179-180, and *Gemological Institute of America, Inc. v. Riddell* (1957) 149 F.Supp. 137, 138 “[T]he taxpayer, in paying the back taxes, not having designated the application of the payment to specific years and taxes, the Collector was justified in applying them as he did, both under the general law [citations] and under California law, California Civil Code § 1479, subd. 2”]

Accordingly, appellant has not shown there was insufficient evidence to justify the determination, that the determination is contrary to law, or that any ground exists such that a rehearing should be granted. Consequently, the PFR is denied.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Huy "Mike" Le
Administrative Law Judge

Date Issued: 11/9/2023