2024-OTA-285
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **ALFA TIRE & SHOP INC.**	OTA Case No. 221212161 CDTFA Case ID: 2-579-471

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Lusy Brutyan, Enrolled Agent

For Respondent: Jason Parker, Chief of Headquarters Ops.

K. LONG, Administrative Law Judge: On October 12, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining 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 Alfa Tire & Shop Inc. (appellant) of a Notice of Determination (NOD) dated January 26, 2021. The NOD is for $96,554 in tax, plus applicable interest, for the period July 1, 2016, through December 31, 2019 (liability period). After issuing the NOD, CDTFA performed a reaudit, which reduced the determination from $96,554 to $91,895.

On November 13, 2023, appellant filed a timely petition for rehearing (PFR) with OTA asserting the following: that there is insufficient evidence to justify the Opinion; and that the Opinion is contrary to law.[2] OTA may grant a rehearing where one of the following grounds is

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 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.

[2] Appellant's PFR also contends that there is an error in law in the appeals hearing or preceding. For the purposes of granting a rehearing, a procedural error in law shall mean an error in the appeals hearing or proceeding, other than a legal error in the Opinion. (Cal. Code Regs., tit. 18, § 30604(b).) A new hearing may be granted based on an error in law if its 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.* (1991) 234 Cal.App.3d 391.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong; for example, an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 Cal.App. 487.) However, appellant has not provided any argument or evidence with respect to this ground. As such, OTA finds that appellant has not established that there was an error in law in the appeals hearing or preceding, and it will not be discussed further.

met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings which occurred prior to the issuance of the Opinion that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceedings and prior to issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, relevant to the appeal, 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.) As provided in *Appeal of Wilson Development, Inc.*, *supra*, it is appropriate for OTA to look to Code of Civil Procedure (CCP) section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing. [3]

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.) 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. (*Ibid.*) 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. (*Ibid.*)

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[3] California Code of Regulations, title 18, section 30604 is based upon the provisions of CCP section 657. (See *Appeal of Wilson Development, Inc.*, *supra* [BOE utilized CCP section 657 in determining grounds for rehearing]; *Appeal of Do*, *supra* [OTA adopted BOE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute provides guidance in interpreting the provisions contained in Regulation section 30604.

In the Opinion, OTA considered whether adjustments were warranted to a deficiency determination, which resulted from CDTFA's disallowance of appellant's claimed sales for resale. Specifically, OTA considered whether CDTFA's calculation of a 71.29 percent ratio of nontaxable sales for resale was reasonable and rational. OTA also considered whether appellant met its burden of showing that the nontaxable sales ratio should be increased to 85 percent. OTA found that, during the audit, CDTFA disallowed claimed nontaxable sales for resale for which appellant failed to timely obtain resale certificates on its claimed nontaxable sales for resale.

OTA specifically addressed claimed nontaxable sales made by appellant to Quality Wholesale Tire (Quality), and Axios Truck Tire (Axios). As discussed in the Opinion, CDTFA found that Quality did not have a valid seller's permit and appellant failed to take a timely resale certificate. Similarly, CDTFA found that Axios did not have a valid seller's permit at the time of sales and that appellant did not take a timely resale certificate. CDTFA also could not verify an XYZ response letter[4] related to the sales by appellant to Axios. As such, OTA found that it was reasonable and rational for CDTFA to disallow these claimed nontaxable sales for resale.

In the PFR, appellant presents arguments, which are essentially the same as those previously presented during the underlying appeal. Appellant asserts that it is not required to investigate whether a customer has a valid seller's permit. Appellant also contends that it is not required to collect a seller's permit for consecutive sales to the same customer. However, OTA's Opinion is not based on whether appellant is required to make an investigation. Instead, OTA's conclusion is based on R&TC section 6091 and California Code of Regulations, title 18, section 1668, which require that appellant obtain a timely resale certificate or evidence that it sold tangible personal property, which was then actually resold. As addressed in the Opinion, appellant did not provide evidence to show that it met these requirements.

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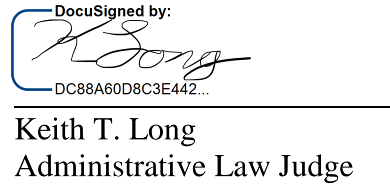
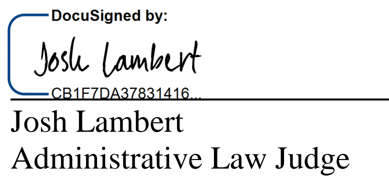
[4] XYZ letters are letters in a form approved by CDTFA which are sent to some or all of a seller's purchasers inquiring as to the purchasers' disposition of the property purchased from the seller. (Cal. Code Regs., tit. 18, § 1668(f).)

Appellant's dissatisfaction with the Opinion and attempt to reargue the same issue do not constitute a valid basis for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Accordingly, appellant's petition for rehearing is denied.

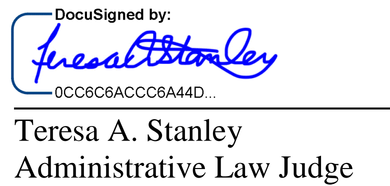


Keith T. Long
Administrative Law Judge

We concur:



Josh Lambert
Administrative Law Judge



Teresa A. Stanley
Administrative Law Judge

Date Issued: 5/1/2024