OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 21088501
	CDTFA Case ID: 188-030
THE VAN NUYS GROUP, LLC,	
dba The Green Easy	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Faith Devine, Attorney

For Respondent: Jason Parker, Chief of Headquarters Operations

J. ALDRICH, Administrative Law Judge: On November 13, 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 The Van Nuys Group, LLC, dba The Green Easy (appellant) of a Notice of Determination (NOD) dated January 24, 2018. The NOD is for $355,517.12 in tax, applicable interest, and a negligence penalty of $35,551.71 for the period October 1, 2012, through September 30, 2015.

Appellant timely petitioned for a rehearing with OTA on the basis that there is insufficient evidence to support OTA's Opinion and there is an error in law. OTA concludes that the grounds set forth in this petition do not constitute a basis for a new hearing.

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 (here, appellant): (1) an irregularity in the appeal proceedings which occurred prior to the 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

[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.

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);[2] *Appeal of Riedel*, 2024-OTA-004P.)

Insufficient Evidence to Justify the Written Opinion

To find that there is insufficient 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. (Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) OTA considers the evidence in the light most favorable to the prevailing party (here, CDTFA). (*Appeals of Swat-Fame Inc., et al.*, *supra*.)

Appellant argues that there is insufficient evidence to justify the Opinion because appellant explained a $78,319 discrepancy between its bank deposits and reported sales by providing evidence of an owner's contribution. Appellant states that it submitted documentation to show that its records matched the reported sales. Appellant further argues that the Opinion does not acknowledge reviewing or receiving these records, does not address why the records were inadequate, and instead relies on unsupported arguments from CDTFA.

In the Opinion, OTA explained that CDTFA utilized an indirect audit methodology, specifically the observation test. Based on the circumstances, OTA concluded that this approach was rational and reasonable. Appellant's explanation of the $78,319 discrepancy may have had more weight if the audited taxable measure had been calculated using a bank deposit analysis. As explained in the Opinion, CDTFA did not pursue the bank deposit analysis or other methods (e.g., markup method). Here, OTA did not ignore or give too much weight to various evidence. Rather, OTA evaluated and weighed the evidence in the record, and then made the necessary factual findings. In sum, appellant makes arguments that OTA addressed and rejected in the Opinion. OTA finds that the Opinion's analyses of these arguments are sound and there is no need to repeat them here. Appellant has not substantiated its contention that there was

[2] California Code of Regulations, title 18, section 30604 is essentially based upon the provisions of California Code of Civil Procedure section 657; therefore, the language of California Code of Civil Procedure section 657 and applicable caselaw are appropriate and relevant guidance in determining whether a ground has been met to grant a rehearing. (*Appeal of Martinez Steel Corp.*, 2020-OTA-074P.)

insufficient evidence to justify the written Opinion. Thus, OTA cannot grant a rehearing based on this ground.

Error in Law

Courts have found that a new trial 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, 397.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong.[3] As stated in Code of Civil Procedure section 657, in the judicial context, an error in law "occurring at the trial and excepted to by the party making the application," is grounds for a new trial. This includes situations where, for example, the trial court made an erroneous evidentiary or procedural ruling. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138; *Ramirez v. USAA Casualty Ins. Co.*, *supra*.) It must be "reasonably probable" that the party moving for a new trial would have obtained a more favorable result absent the error. (See, e.g., *Saxena v. Goffney* (2008) 159 Cal.App.4th 316; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283.) "'Reasonable probability' does not mean 'more likely than not'; it means merely a 'reasonable chance, more than an abstract possibility.'" (*Martin–Bragg v. Moore* (2013) 219 Cal.App.4th 367, 395, citing *College Hosp. Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Appellant contends that OTA refused to consider appellant's evidence of an owner's contribution to explain the $78,319 discrepancy between bank deposits and reported sales. Appellant argues that such refusal is an error of law that should be corrected at a rehearing.

This appeal was decided on the written record. OTA's Rules for Tax Appeals expressly provide that rules relating to evidence and witnesses contained in the California Evidence Code and California Code of Civil Procedure shall not apply to any OTA proceeding except as provided by the Rules for Tax Appeals. (Cal. Code Regs., tit. 18, § 30214(f).) Instead, all relevant evidence shall be admissible, and while any party may provide argument with respect to the evidentiary weight, the evaluation and assignment of such weight is left to the Panel. (*Ibid*.) Here, OTA did not make a ruling or otherwise exclude appellant's submissions. In fact, the

[3] For example, courts have found an error in law occurred when there was 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 instruction to a jury (*Maher v. Saad* (2000) 82 Cal.App.4th 1317).

inclusion of the information summarized in the Opinion's finding of facts, as well as discussed in the analyses, is indicative of OTA's review and consideration of the written record including appellant's evidence regarding the $78,319 discrepancy. Accordingly, appellant has not substantiated its contention that an error in law occurred. Thus, OTA cannot grant a rehearing based on this ground.

Conclusion

For the aforementioned reasons, OTA finds that appellant has not established that a ground exists for a rehearing pursuant to California Code of Regulations, title 18, section 30604(a). Furthermore, as to appellant's repeated arguments which were considered and rejected in the Opinion, they do not constitute grounds for rehearing. (*Appeal of Shanahan*, 2024-OTA-040P.) Likewise, appellant's dissatisfaction with the outcome of its appeal is not grounds for a rehearing. (*Ibid*.) Accordingly, appellant's petition for rehearing is denied.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

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Veronica I. Long
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Andrew Wong
Administrative Law Judge

Date Issued: 5/29/2024