

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 19095230
AJAY BERI CORPORATION,)	CDTFA Case IDs: 238-037, 238-039, 238-040,
dba Subway #23933, 28347, 10108,)	238-042, 238-043, 522120
10278, and 44266)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: David Dunlap Jones, Attorney

For Respondent: Sunny Paley, Attorney

S. RIDENOUR, Administrative Law Judge: On August 24, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA's decision denied appellant's respective petitions for redetermination of multiple Notices of Determination (NODs) collectively covering the period January 1, 2003, through December 31, 2010, and related claims for refund of criminal restitution payments applied towards these NODs pursuant to R&TC section 7157. Appellant timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellant's petition, OTA concludes appellant has not established a basis for a rehearing.

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 (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 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);¹ *Appeal of Riedel*, 2024-OTA-004P.)

Appellant does not explicitly state upon which grounds it files the instant petition for rehearing. However, it appears to OTA that appellant is arguing that there is insufficient evidence to justify the Opinion and that the Opinion is contrary to law.

Insufficient Evidence

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 contends that the Opinion: (1) “ignores” appellant’s counterevidence of “no fraud;” (2) gives too much weight to the guilty plea since appellant “never testified and never litigated;” and (3) ignores the declarations of employees and managers. In the Opinion, 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. OTA finds that there was sufficient evidence to justify the Opinion; therefore, OTA cannot grant a rehearing based on this ground.

Contrary to Law

The contrary to law standard of review involves reviewing the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) A holding is contrary to law “only if it was ‘unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a [holding] against the part[y] in whose favor the [holding was] returned.’” (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 (*Sanchez-Corea*), citing *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.) This requires indulging “in all legitimate and reasonable inferences” to uphold the Opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907; see

¹ 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.)

also *Appeals of Swat-Fame Inc. et al., supra.*) The question does not involve examining the quality or nature of the reasoning behind OTA’s Opinion, but whether the Opinion can or cannot be valid according to the law. (*Appeal of Shanahan, 2024-OTA-040P.*) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party (here, CDTFA), with all legitimate inferences to uphold the Opinion, the petitioning party (here, appellant) establishes that the Opinion incorrectly stated or applied the law and, therefore, is contrary to law. (*Ibid.*)

Appellant contends that: (1) the November 27, 2017 NOD is a Notice of Increase, and therefore barred by the three-year statute of limitations or, in the alternative, the November 27, 2017 NOD preempted the October 20, 2010 NOD; (2) OTA² has jurisdiction to refund criminal restitution payments since the “only evidence [before OTA] is that the restitutionary payments were made pursuant to a plea *agreement* by and between [appellant] and the government” (original italics); (3) the Opinion incorrectly held that appellant was required to demonstrate that A. Beri and R. Beri owned the various limited liability companies (LLCs) in the same proportion they owned appellant; (4) the Opinion unlawfully allowed in “illegally obtained WISRs and Control Sheets;³ and (5) the Opinion incorrectly calculated the fair market value of the restaurants transferred to the LLCs.”⁴ Appellant’s various arguments do not establish that the Opinion was contrary to law. In its petition, appellant makes arguments which OTA addressed, and rejected, in the Opinion. OTA finds that the analyses of these topics in the Opinion are sound, and there is no need to repeat them here. Accordingly, appellant has not substantiated its contention that the Opinion is contrary to law. Thus, OTA cannot grant a rehearing based on this ground.

² While appellant’s subheading in its petition states “CDTFA has jurisdiction to refund criminal restitution payments;” this appears to be a typographical error, as Issue 1 in the underlying Opinion is “Whether OTA has jurisdiction to refund criminal restitution payments” (which OTA found it did not).

³ Control Sheets detailed daily sales information, and WISRs compiled daily inventory and sales information.

⁴ Appellant also contends that the Opinion incorrectly states that A. Beri requested dismissal of the felony tax evasion charge when, instead, it was the attorney general who requested the dismissal. OTA notes that who requested the dismissal had no bearing on the Opinion’s holdings.

Conclusion

For the aforementioned reasons, OTA finds that appellant has not established that a ground exists for a rehearing pursuant to Regulation 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, supra.*) Likewise, appellant’s dissatisfaction with the outcome of its appeal is not grounds for a rehearing. (*Ibid.*) Accordingly, appellant’s petition is denied.

DocuSigned by:
Susana Seyller
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

Date Issued: 5/22/2024