OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **B & L DINERS, INC.**	OTA Case No. 19105325 CDTFA Case ID 062-162, 062-164, 062-165, 062-168, 062-167

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: David Dunlap Jones, Attorney

For Respondent: Sunny Paley, Attorney

M. GEARY, Administrative Law Judge: On February 27, 2024, the Office of Tax Appeals (OTA) issued an Opinion (the Opinion) sustaining a Decision issued by the California Department of Tax and Fee Administration (respondent). Respondent's Decision denied B & L Diners, Inc.'s (appellant's) petitions for redetermination or administrative protests of five Notices of Determination (NODs), which, combined, cover the period July 1, 2002, through December 31, 2009. The Decision also denied appellant's claims for refund of payments made toward the NODs, and its requests for relief of penalties, a collection cost recovery fee, and interest.

On March 27, 2024, appellant timely filed a petition for a rehearing (PFR). OTA may grant a rehearing where it is established that any of the following grounds 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) accident or surprise, which occurred during the appeal proceedings and prior to the issuance of the Opinion, and which ordinary caution could not have prevented; (3) newly discovered, material evidence, which the filing 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 that occurred during the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).) Appellant does not specifically

identify the grounds upon which it relies, but it appears to OTA that appellant relies on the fourth, fifth, and sixth grounds identified above.

Insufficient evidence

To find that there is insufficient evidence to justify the Opinion, OTA must find, after weighing the evidence in the record, including reasonable inferences from that evidence, that OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

Here, appellant argues that most of the Opinion's factual findings are not supported by the evidence, but appellant offers its reasoning as to just three of the 30 Factual Findings: Factual Findings 12, 14, and 15, and the finding that appellant filed fraudulent returns. This Opinion will first discuss each of these.

Appellant asserts that the Opinion concludes in Factual Finding 12, without any supporting evidence, that respondent seized appellant's weekly sales reports (WSRs) to its franchisor, Denny's, Inc., for the period October 1, 2002, through December 31, 2009.[1] This theme, that there is no credible evidence that Denny's, Inc. provided any data to respondent, is woven into and throughout its arguments in support of the PFR.[2] The argument is unpersuasive. To the extent this argument is a continuation of appellant's objection on the grounds that the data upon which respondent based its determination lacks an adequate evidentiary foundation, OTA will address it below under "error in law occurring during the proceeding." To the extent this argument goes beyond those concerns, OTA finds that the written record contains credible evidence of the sales and sales tax reimbursement data that Denny's, Inc. provided to respondent.[3] The evidence includes what respondent describes as "franchisor provided disk copy of Luthra 6449, 7585, 8097, and 8722," which appear to contain "sales tax," "adjustments," and "net sales" amounts that appellant reported weekly to the franchisor for each of the four Denny's locations. OTA found, and continues to find, that the data upon which respondent based its

[1] Appellant also states that there is no evidence that respondent seized WSRs *from appellant*. The factual finding is that respondent seized appellant's WSRs from Denny's, Inc.

[2] For example, appellant argues that respondent provided no source data to support its conclusion that appellant underreported sales tax reimbursement collected from customers, and that respondent cannot prove fraudulent underreporting because it did not provide "actual WSRs or other authentic sales tax records."

[3] Appellant should have made this argument or at least raised its concerns about the form of the data provided by the franchisor, before OTA issued the Opinion.

determination is what respondent represents it is: sales and sales tax reimbursement data reported to Denny's, Inc. by appellant. On that basis, OTA finds that Factual Finding 12 is supported by sufficient evidence.

In its discussion of Factual Finding 14, which refers to respondent's forensic examination of the cell phone of A. Beri, appellant's president and controlling shareholder, appellant argues that there was no credible evidence that the phone actually belonged to A, Beri.[4] According to the evidence: the phone in question was seized at A. Beri's home; the forensic report identifies the phone as belonging to A. Beri and states that the phone was returned to A. Beri after the examination was finished; and the content of the phone, specifically incoming messages that address the recipient by name, are persuasive evidence that the phone belonged to A. Beri. Accordingly, OTA finds that Factual Finding 14 is supported by sufficient evidence.[5]

Finally, contrary to what appellant asserts, OTA did not misstate the testimony of R. Luthra in Factual Finding 15. The statement to which appellant refers is correctly attributed in footnote 19 to the judge who presided at the preliminary hearing and is, in any event, of no real consequence to the Opinion's findings regarding what R. Luthra said about A. Beri's handling of appellant's sales and use tax compliance. Appellant's Exhibit 15, a 72-page transcript of a recorded interview with R. Luthra adequately supports those findings.

Appellant also argues more generally that the Opinion's finding of fraud is not supported by sufficient evidence.[6] The only asserted basis for this argument is appellant's contention, already discussed above, that it does not believe that the data upon which respondent based the determination is in fact data that appellant reported to its franchisor. The original panel disagreed and found clear and convincing evidence of fraud. OTA has now weighed the evidence again and drawn reasonable inferences from that evidence, and on that basis, OTA finds that the PFR does not show OTA clearly should have reached a different opinion.

[4] Appellant characterized the forensic examination report as self-serving.

[5] OTA also rejects appellant's attempt to support this argument with alleged facts concerning the criminal prosecution of A. Beri that are not in evidence.

[6] The Opinion found that the evidence as a whole established appellant's fraud by clear and convincing evidence for each of the reporting periods at issue, including all for which respondent determined a deficiency but did not timely issue an NOD.

Contrary to law

To conclude that an opinion is contrary to law, OTA must find that it is inconsistent with the law. (Cal. Code Regs., tit. 18, § 30604(b).)

The Opinion found that the following facts were true:

- A. Beri, individually, and Ajay Beri Corporation pleaded guilty to filing false sales and use tax returns for the period January 1, 2010, through December 31, 2010, with the intent to defeat or evade the tax due in violation of R&TC sections 7152(a) and 7153.5.
- A. Beri also pleaded guilty to felony tax evasion.
- A. Beri signed the plea agreement and related forms under penalty of perjury, declaring his understanding that the signed and filed forms constituted conclusive evidence of the guilty plea.
- The court ordered A. Beri to serve 270 days confinement on home monitoring on the misdemeanor count and to pay restitution to respondent *on all counts*[7] in the amount of $3,021,059 "even if any of these counts have been dismissed as part of a plea agreement."
- The plea agreement included provisions for delayed sentencing on the felony tax evasion guilty plea and dismissal of the felony tax evasion count upon payment of the restitution in full within 18 months of the plea.
- The court froze A. Beri's assets pending payment of the criminal restitution in full.
- A. Beri timely paid the restitution in full, which allowed him to successfully request dismissal of the felony charge.

Citing *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 C.2d 601 (*Teitelbaum)*, appellant argues that the Opinion incorrectly relied upon these facts from A. Beri's plea deal to establish appellant's liability for fraud. Appellant asserts that it did not plead guilty, and it appears to argue on that basis that *Teitelbaum* prohibits reliance on the plea in this instance, even as simply one of the circumstances relevant to the fraud issue.

[7] At least one of the counts alleged that appellant filed fraudulent returns.

In this instance, OTA interprets the holding in *Teitelbaum* differently. The Court held that a guilty plea is admissible as an admission by the person who entered the plea. (*Teitelbaum, supra*, at p. 605.) However, the Court also recognized that a guilty plea is not always an admission of guilt, but may be more fairly viewed, at least under some circumstances, as "only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice [citation omitted] combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." (*Teitelbaum*, *supra,* at pp. 605-606.)

The Opinion is not contrary to the holdings in *Teitelbaum*. OTA did not apply the doctrine of collateral estoppel to prevent appellant from offering evidence to contradict or explain A. Beri's guilty plea. As stated in a footnote to the Opinion, "A. Beri's plea . . . is in evidence and constitutes an admission against interest, which is clearly relevant to the issues presented in this appeal. [Citation to *Teitlebaum, supra,* at p. 605.] Appellant had an opportunity to provide evidence for OTA to consider when deciding the weight to give to that plea. It provided no such evidence." OTA thus concludes that the original panel gave the plea the weight to which it was entitled.

OTA also is not persuaded by appellant's argument that A. Beri's plea cannot be considered because it was not appellant's plea. Generally, OTA can consider any relevant evidence that is not protected from disclosure by a recognized privilege. (See Cal. Code Regs., tit. 18, § 30214(f)(1), (2).) The evidence showed that A. Beri was the majority owner and manager of appellant and of the other related entities, and that he, and employees at his direction, were responsible for sales and use tax compliance for appellant and the related entities.[8] In addition, the plea included an admission of guilt and an order of restitution that included the tax owed by appellant. Finally, the pattern of fraudulent conduct is identical for all related entities and consistent over time, at least until it should have become apparent to A. Beri that the fraud was about to be or had already been revealed. This is sufficient to demonstrate A. Beri's role in the fraud and the propriety of considering his guilty plea. OTA finds that the Opinion is consistent with the law.

[8] While it is not clear from the evidence who paid the various employees who were involved in accounting and tax-related functions for appellant and the related entities, it is clear that the 35 employees who submitted declarations considered themselves to be employees of Ajay Beri Corporation.

Error in law occurring during the proceeding

In this context, an "error in law" is an error in the OTA appeals hearing or proceeding, other than a legal error in the Opinion, such as the erroneous admission of evidence over the objection of the party petitioning for a rehearing. (Cal. Code Regs., tit. 18, § 30604(b).) Such an error, if material, can be grounds for a new hearing. (*Ibid*.)

Appellant objected to OTA's consideration of evidence containing purported sales or sales tax reimbursement data allegedly obtained from the franchisor. Appellant argued that such evidence lacked a proper evidentiary foundation. OTA overruled that objection in the Opinion, noting that rules relating to evidence and witnesses contained in the California Evidence Code and California Code of Civil Procedure do not apply to proceedings before OTA. (Cal. Code Regs., tit. 18, § 30214(f).) To the extent appellant argues that OTA's admission of the evidence was an error in law, as described in California Code of Regulations, title 18, section 30604(a)(6), OTA disagrees.

OTA looks to the totality of the evidence to determine whether respondent has met its burden of proving fraud by clear and convincing evidence, but respondent still gets the benefit of the usual presumptions in favor of its determination. (*Appeals of Jafari and Corona Motors, Inc.*, 2023-OTA-401P.) If respondent is not satisfied with the amount of tax reported by the taxpayer, respondent may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) Furthermore, in appeals to OTA, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeals of Jafari and Corona Motors, Inc.*, *supra*.)

The Opinion found that respondent's reliance on the sales and sales tax reimbursement data reportedly obtained from the franchisor was rational and reasonable. OTA agrees. The burden of proof properly shifted to appellant to show that the underlying data was inaccurate. Certainly no one, except perhaps the franchisor, has greater access to the data. Appellant has been aware of the importance of the WSR data since at least early July 2009. It could have saved copies of its WSRs or requested copies from its franchisor. In any event, appellant did not back up its argument with evidence. Consequently, OTA finds that the admission and consideration of the franchisor data was not error.

Accordingly, OTA finds that appellant has failed to establish any grounds for a new hearing. Therefore, the PFR is denied.

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Michael F. Geary
Administrative Law Judge

We concur:

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Natasha Ralston
Administrative Law Judge

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Sara A. Hosey
Administrative Law Judge

Date Issued: 7/11/2024