OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18042986
	CDTFA Case ID 812466
SPECIALIZED ORTHOPEDIC SOLUTIONS, INC., dba SOS Medical	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Marcus Allen Frishman, Representative

For Respondent: Amanda Jacobs, Attorney

J. ALDRICH, Administrative Law Judge: On December 14, 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 Specialized Orthopedic Solutions, Inc., doing business as SOS Medical (appellant) of a Notice of Determination (NOD) dated April 10, 2014. The NOD is for tax of $208,427.86, plus applicable interest, for the period July 1, 2010, through June 30, 2013 (liability period).

OTA will 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

[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.

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.)

Appellant timely petitioned for a rehearing with OTA on the basis that the following grounds have been met: (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; and (4) insufficient evidence to justify the Opinion. OTA concludes that the grounds set forth in this petition do not constitute a basis for a new hearing.

Procedural History

The pertinent procedural history is discussed as follows. A Notice of Oral Hearing was issued in this appeal on four separate occasions: December 6, 2019, August 22, 2022, December 6, 2022, and June 8, 2023. In each instance, appellant requested a postponement; each postponement request was granted. The fifth and final Notice of Oral Hearing was issued on July 6, 2023. Concurrent with the notices, OTA issued requests for Prehearing Conference Statements (PHCSR) on three occasions. As relevant here, each of these PHCSR asked the parties to identify witnesses. CDTFA responded to each of the PHSCRs, and each time CDTFA indicated that it did not plan to call a witness. Appellant did not timely respond to the PHCSRs.

On July 6, 2023, the parties participated in a prehearing conference (PHC). During the PHC, appellant indicated that it would like an employee of CDTFA, Mr. Gomez who was the original auditor (original auditor), to attend the oral hearing to provide testimony. On July 11, 2023, OTA issued Minutes and Orders that, in pertinent part, identified no witnesses for CDTFA, and established a deadline regarding witness identification. On July 18, 2023, appellant requested that CDTFA make the original auditor available as a witness during the upcoming hearing. On July 19, 2023, CDTFA responded that it did not intend to call the auditor as a witness. On July 21, 2023, appellant submitted a witness request that asked for the original auditor to be present at the hearing. OTA notified the parties in writing that it was treating the

[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.)

witness request as a request to subpoena a witness (subpoena request). OTA indicated that CDTFA would have "7 days to respond; thereafter, OTA will rule on the request." By letter dated July 26, 2023, CDTFA timely objected to the subpoena request.[3] On July 27, 2023, appellant submitted a prehearing conference statement.

On August 8, 2023, OTA issued a Prehearing Order (Prehearing Order) denying appellant's subpoena request. The Prehearing Order discussed the background and procedural history. Further, the Prehearing Order analyzed both of the party's positions, including CDTFA's position in its July 26, 2023 objection, and weighed them according to the applicable law. For example, CDTFA objected to the subpoena request based on relevance, materiality, undue burden, and undue consumption of time. CDTFA also "contend[ed] that [the original auditor's] contemporaneous thoughts and rationale are memorialized in the audit workpapers and that nine years have transpired since the March 27, 2014 audit report." Of note, the Prehearing Order did not establish a briefing schedule or solicit further information from the parties. On September 5, 2023, appellant objected to a proposed continuance of the September 14, 2023 hearing date,[4] and stated "CDTFA already said [it] would be relying on prior submissions since [it] objected to us calling the CDTFA auditor to appear and [its] objection was basically the prior submissions were sufficient." On September 14, 2023, OTA held an oral hearing for this matter. At the beginning of appellant's opening argument, appellant objected to the denial of the subpoena request. The objection was taken under submission and addressed in the Opinion.

Irregularity

When an irregularity in the proceeding is asserted, OTA must determine whether the party seeking a rehearing (here, appellant) has established that there was an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and whether that irregularity prevented fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(1).) An irregularity in the proceedings warranting a rehearing generally includes any departure from the due and orderly method of conducting the appeal proceedings by which the substantial rights of a party (here, appellant) have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Gay v. Torrance* (1904) 145 Cal. 144, 149.)

[3] Appellant is carbon copied (cc'd) on CDTFA's response; however, CDTFA appears to concede that it inadvertently did not send appellant a copy of its July 26, 2023 response.

[4] OTA proposed the continuance due to scheduling concerns.

Appellant asserts there was an irregularity in the appeal proceedings that prevented fair consideration of the appeal. Appellant argues that it did not receive CDTFA's response to appellant's subpoena request. Appellant also asserts that it did not discover that it had not received CDTFA's July 26, 2023 response until after the hearing. Appellant characterizes these events as a breach of proper notification and improper ex parte communications that denied appellant the right to question its "chief witness."

Here, appellant has not shown how its substantial rights were materially affected. As noted in the Opinion, the issue presented was a legal question; that is, whether the products at issue are exempt from tax. In other words, there was no factual dispute regarding the audit or audit report, and witness testimony from the original auditor would have led to the undue consumption of time. Thus, appellant's substantial rights were not materially affected.

Additionally, the procedural history, as discussed above, placed the parties on notice of the briefing schedule with respect to the subpoena request. The procedural history also demonstrates that appellant was notified of CDTFA's July 26, 2023 response well before the oral hearing and the procedural history demonstrates that appellant had several opportunities to present its argument in favor of subpoenaing the original auditor's attendance prior to the hearing (e.g., in response to each of the PHCSR, during the PHC, appellant's July 18, 2023 request, and appellant's July 21, 2023 request). Of particular note, appellant does not dispute that it received OTA's Prehearing Order. This is material because the background and procedural history is summarized therein, and notes that CDTFA responded on July 26, 2023, objecting to the subpoena request.[5] Thus, appellant was placed on notice that CDTFA responded. Accordingly, appellant knew or should have known that OTA received CDTFA's July 26, 2023 response no later than August 8, 2023.[6]

Here, appellant was given the opportunity to be heard regarding the subpoena request, was provided with notice of the briefing schedule, was given notice of CDTFA's response, and failed to act or request a copy. Accordingly, there was sufficient notice and opportunity to

[5] The response is dated July 26, 2023, but was referenced in the Prehearing Order as July 27, 2023 (i.e., the date of receipt). The Prehearing Order also details the nature of and reasons for CDTFA's objection to appellant's subpoena request as set forth in the response dated July 26, 2023.

[6] While appellant contends that it did not receive CDTFA's July 26, 2023 response until after the hearing, appellant was made aware of the existence of this response no later than August 8, 2023, and fails to explain why it did not request a copy.

appellant so as not to violate the rules of ex parte communications. (Gov. Code § 11430.10; Cal. Code Regs., tit. 18, § 30215(c).) Further, appellant's September 5, 2023 email, sent to OTA prior to the hearing, demonstrates that appellant was aware of CDTFA's objection regarding appellant's request to subpoena the original auditor. During the hearing, appellant raised an objection to the Prehearing Order, denying appellant's subpoena request, which was addressed in the Opinion. Therefore, appellant's characterization of the events is unsupported by the record. Further, appellant has not shown how its substantial rights were materially affected. In sum, OTA finds that appellant is not entitled to rehearing based on an irregularity.

Accident or Surprise

With respect to accident or surprise, a rehearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc. § 657; *Appeal of Wilson Development, Inc.*, (94-SBE-007) 1994 WL 580654.) Interpreting section 657 of the Code of Civil Procedure, the California Supreme Court held that the terms "accident" and "surprise" have substantially the same meaning. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) To constitute an accident or surprise, a party must be unexpectedly placed in a detrimental condition or situation without any negligence on the part of that party. (*Ibid*.)

Appellant argues that there was accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented. Appellant references three items as an accident or surprise: (1) not receiving CDTFA's July 26, 2023 response; (2) the decision to deny appellant's subpoena request was flawed; and (3) CDTFA's action in bringing an audit supervisor as "counsel" was deceiving because appellant was not notified in advance, and thus appellant was unprepared to question the audit supervisor as a witness.

OTA addressed appellant's arguments about not receiving CDTFA's July 26, 2023 response above. In addition to the discussion above, the record does not support a finding that appellant was surprised with respect to CDTFA's objection to the subpoena request or to OTA's Prehearing Order, nor does the evidence show that appellant's rights were substantially affected.

In its petition, appellant makes arguments regarding the subpoena request which OTA addressed and rejected in the Opinion. OTA finds that the analyses on this topic in the Opinion are sound, and there is no need to repeat them here.

Regarding the audit supervisor, appellant appears to misconstrue the hearing process by conflating a witness with a representative. Generally, representatives argue in favor of their client's position. A party may select a representative of a party's choosing so long as they are at least 18 years of age.[7] (Cal. Code Regs, tit. 18, § 30211(a).) Unlike a representative, a witness gives testimony that may be considered as evidence, and the testimony is generally factual in nature. Consistent with CDTFA's PHC statements, CDTFA did not call a witness. Instead, CDTFA had three representatives that appeared on its behalf, which is consistent with the hearing agenda, the official transcript, and the Minutes and Orders of Prehearing Conference dated July 11, 2023. In sum, the "audit supervisor" attended as a hearing representative to provide argument, and not as a witness. In any event, appellant has not shown how this materially affected its substantial rights. Accordingly, OTA finds that appellant is not entitled to a rehearing based on an accident or surprise.

Newly Discovered Evidence

In the context of newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728; *Appeal of Shanahan*, 2024-OTA-040P.)

Appellant reiterates its position regarding the subpoena request denial and claims that had the Prehearing Order ruled in its favor then "[t]his would have given the taxpayer the ability to question the audit methodology directly from the auditor witness which could have changed the final Opinion."

Once again, OTA notes that the audit methodology was not in dispute. Appellant's arguments in favor of subpoenaing the original auditor have been dispensed with by OTA above. Moreover, appellant did not submit any evidence, new or otherwise, with its petition. Accordingly, OTA finds appellant that appellant is not entitled to a rehearing based on newly discovered evidence.

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;

[7] There are certain other restrictions not applicable here. (Cal. Code Regs., tit. 18, § 30211(e).)

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, once again, reiterates its arguments regarding the subpoena request. Appellant's arguments do not establish that there was insufficient evidence, nor do they show how OTA clearly should have reached a different opinion. OTA finds that appellant is not entitled to a rehearing based on insufficient evidence.

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*, 2024-OTA-040P.) Likewise, appellant's dissatisfaction with the outcome of its appeal is not grounds for a rehearing. (*Ibid*.) Accordingly, appellant's petition is denied.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

DocuSigned by:
Cheryl Akin
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Cheryl L. Akin
Administrative Law Judge

DocuSigned by:
Eddy Y. H. Lam
1EAB8BDA3324477...
Eddy Y.H. Lam
Administrative Law Judge

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