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2024-OTA-640
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

BERI RESTAURANTS GROUP, INC., dba Subway #11219 and 17162

OTA Case No. 19095231
CDTFA Case IDs: 1046315; 277899

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 November 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 a petition for redetermination filed by Beri Restaurants Group, Inc. dba Subway #11219 and 17162 (appellant) of a Notice of Determination (NOD) dated April 6, 2018, and a related claim for refund of criminal restation payments applied towards the NOD pursuant to R&TC section 7157. The NOD covers the period January 1, 1998, through December 31, 2010 (liability period). The NOD is for $758,768.46 in tax, plus applicable interest. In addition, the NOD includes two penalties imposed for different portions of the liability period: a fraud penalty of $142,601.23 for the period January 1, 1998, through December 31, 2006; and a 40 percent penalty of $75,345.66 pursuant to R&TC section 6597 for the remainder of the liability period. A third penalty, an amnesty double fraud penalty of $91,225.41, was imposed for the amnesty-eligible periods: 1998 through 2002.

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.

[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.

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

Appellant does not explicitly state upon which grounds it files its petition. 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) gives too much weight to the guilty plea since appellant "never testified and never litigated the criminal matter," and because the government dismissed Count 65 upon payment of restitution "there is no felony guilty plea made or entered into by A. Beri[3] or [appellant];" (2) ignores the declarations of employees and managers; and (3) "eagerly accept[s] CDTFA's version of events" regarding ABC's records, without addressing the declarations or interviews of ABC's employees. Appellant's various arguments do not establish that the Opinion was contrary to law. In the Opinion, OTA did not ignore or give too much

[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.)

[3] A. Beri is appellant's president.

weight to various evidence. Rather, OTA evaluated and weighed the evidence in the record, and then made the necessary factual findings.

Appellant also contends that the Opinion makes findings of fact "that serve as a foundation for its findings of fraud," most of which "are erroneous, unproven or mischaracterized." Specifically, appellant contends that the Opinion: (1) inappropriately discusses audit and observation tests conducted in connection with Ajay Beri Corporation, Inc. (ABC),[4] an unrelated entity, as evidence of appellant's fraud; (2) improperly references a forensic examination of A. Beri's cellphone records, of which the California Attorney General's office was disallowed to enter into evidence; and (3) discusses seized computer hard drives without acknowledging that that they were seized in the office a business associate of A. Beri who was not an owner or officer of appellant. The 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. 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 proceedings 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.*) Accordingly, 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 also *Appeals of Swat-Fame Inc. et al.*, *supra*.) The question does not involve examining the

[4] ABC is an entity separate from appellant that also owned franchises and had A. Beri as its president.

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) OTA[5] has jurisdiction to the refund criminal restitution payments since there is no evidence that the payment "was made pursuant to a restitution order" or that the amount was "imposed by a court of competent jurisdiction;" rather, the "only evidence [before OTA] is that the restitution payments were made pursuant to a plea *agreement* by and between [A. Beri] and [ABC]" (i.e., not appellant) and the government (original italics); (2) the Opinion discussed WISRs and Control Sheets[6] that appellant contends "were totally unreliable and obtained unlawfully;" and (3) the Opinion incorrectly states that the liability at issue was calculated based on seized audit sales reports when instead, according to appellant, CDTFA used "ABC records, which it unlawfully seized" and "applied the same taxable sales percentage. . . to all entities, including [appellant], despite not having actual sales tax data to support those percentages."

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. As for appellant's additional contention that OTA made "other errors" in the Opinion,[7] OTA notes that the alleged errors had no bearing on the Opinion's holdings. Accordingly, appellant has not substantiated its contention that the Opinion is contrary to law. Thus, OTA cannot grant a rehearing based on this ground.

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[5] 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).

[6] Control Sheets detailed daily sales information, and WISRs compiled daily inventory and sales information.

[7] For example, appellant contends that the Opinion incorrectly states that CDTFA applied $43,431.96 out of $3,021,059 of the criminal restitution payments toward appellant's account, when, according to appellant, CDTFA instead allocated $760,281 to appellant; and that the Opinion "does not acknowledge that A. Beri's misdemeanor plea was later dismissed by the Court."

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:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
Lissett Cervantes
220FE53020BE441... For

Natasha Ralston
Administrative Law Judge

Date Issued: 7/25/2024