2025-OTA-083
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **INTARCIA THERAPEUTICS, INC.**	OTA Case No.: 220911369 CDTFA Case ID: 2-304-634

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: John Huk, Representative
William Loew, Representative

For Respondent: Amanda Jacobs, Attorney

S. BROWN, Administrative Law Judge: On May 14, 2024, 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, Intarcia Therapeutics, Inc.'s (appellant's) September 25, 2020 claim for refund for the period January 1, 2014, through December 31, 2019.

On June 11, 2024, appellant timely filed a petition for rehearing (PFR). The PFR contends that a rehearing is warranted on the following grounds: (1) there is newly discovered evidence, material to the appeal, which appellant could not have reasonably discovered and provided prior to issuance of the Opinion; (2) insufficient evidence to support OTA's written opinion; and (3) the Opinion is contrary to law. OTA concludes that the PFR does not establish a basis for granting a new hearing.

OTA will grant a rehearing where one of the following grounds for a rehearing 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) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have

[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" refers to the board.

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

Newly Discovered, Material Evidence

A party seeking a rehearing on the basis of newly discovered, material evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence is material to the party's case. (Cal. Code Regs., tit. 18, § 30604(a)(3); *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.[2]) Evidence is "newly discovered" if it was not known or accessible to the party seeking rehearing prior to the issuance of the Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(3); see *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) A PFR will be denied when no reason is shown for why the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the written opinion. (See *Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208.)

Newly discovered evidence must be material in the sense that it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728*; Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764.) Newly discovered evidence is looked upon with suspicion and disfavor, and the party must make a strong showing of the necessary requirements to support a PFR on this ground. (See *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138.)

The Opinion concluded that appellant was not entitled to an additional refund for use tax paid on its purchases of tangible personal property consisting of ITCA-650 components.[3] A portion of ITCA-650 components were used in clinical trials, and the remaining components were stored in Hayward, California, pending the outcome of appellant's appeal with the Food and Drug Administration (the FDA). The Opinion noted that appellant has never had the ability to sell the property as a medicine in the United States due to the lack of approval by the FDA.

[2] California Code of Regulations, title 18, section 30604 is based upon the provisions of California Civil Code of Procedure (CCP) section 657. As provided in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654), it is appropriate for OTA to look to CCP section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing.

[3] As detailed in the Opinion, ITCA-650 is a new prescription medicine and drug delivery system for the treatment of type 2 diabetes.

The Opinion found that:

> In order for OTA to grant a refund, appellant must prove by a preponderance of the evidence that it has not made a taxable use of the property. Instead, here the evidence shows either that: (1) appellant continues to hold the property for resale, which does not establish an overpayment of use tax; or (2) appellant has stored the property for purposes other than holding it for resale in the regular course of business, which would be a taxable use. Thus, under either analysis, appellant has not met its burden of proof, and accordingly has not established that an overpayment of use tax occurred.

The PFR indicates that in December 2020, appellant entered into an agreement transferring appellant's rights relating to the ITCA-650 to Intarcia (Assignment for the Benefit of Creditors), LLC (ABC). The PFR shows that appellant also entered into an agreement in December 2020 with CS Bio Co. (CS Bio) for CS Bio to store the ITCA-650. Appellant has submitted new evidence consisting of 13 additional proposed exhibits, totaling 351 pages;[4] as relevant here, appellant argues that new evidence establishes that both ABC (on behalf of appellant) and CS Bio intend to sell the property,[5] there are at least two potential buyers, and the property will be sold. Appellant alleges that previously this new evidence was not known or accessible to appellant because ABC would not disclose the evidence to appellant due to confidentiality concerns, but due to a change in personnel at ABC, ABC agreed to provide the newly discovered evidence to appellant following issuance of the Opinion.

Initially, OTA finds that appellant has not provided any evidence to support its assertion that it previously exercised reasonable diligence in attempting to obtain the newly discovered evidence from ABC prior to issuance of the Opinion. In any event, the newly discovered evidence does not show, nor does appellant contend, that the property has actually been resold. Instead, the new evidence indicates that the property remains in storage and is being held for resale; as discussed in the Opinion, such circumstances fail to establish that the property was resold and no taxable use occurred. Thus, the new evidence does not establish an overpayment of use tax; accordingly, the new evidence is not material to the appeal because it

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[4] Appellant's PFR also includes proposed new exhibits 14 and 15, which are each one page in length. However, appellant's proposed new exhibit 15 was previously admitted into the evidentiary record at the hearing; similarly, the information contained in appellant's proposed new exhibit 14 is already part of the evidentiary record.

[5] The new evidence shows that beginning in 2021, CS Bio and ABC were engaged in civil litigation in the Superior Court of California, County of San Mateo, regarding the rights to possession and ownership of the ITCA-650. The new evidence does not show the outcome of this litigation.

would not lead to a different result. Consequently, the PFR does not establish grounds for a rehearing on the basis of newly discovered, material evidence.

Insufficient Evidence

To find that there is an insufficiency of evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Opinion should have reached a different conclusion. (Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) As discussed above, appellant argues that new evidence indicates that in the future, ABC (on behalf of appellant) will sell the property. As the Opinion explains above, the evidence does not show, nor does appellant contend, that the property has actually been resold; consequently, the evidence does not establish that an overpayment of use tax occurred.[6] Therefore, appellant has not shown that there was insufficient evidence to justify the Opinion.

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).) The question of whether the Opinion is contrary to law requires a finding that the Opinion is "unsupported by any substantial evidence"; that is, the record would justify a directed verdict against the prevailing party. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging of all legitimate and reasonable inferences to uphold the Opinion. (*Ibid.*; see 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 Martinez Steel Corporation*, *supra*.)

Appellant contends that the Opinion is contrary to law because the Opinion did not sufficiently consider the significance and relevance of the word "person" in California Code of Regulations, title 18, (Regulation) section 1525(b). Appellant argues that it is entitled to a refund pursuant to Regulation section 1525(b) because appellant is a person that purchased the property for the purpose of incorporating it into the manufactured article to be sold. Appellant

[6] In addition, even if, hypothetically, the new evidence demonstrated that an overpayment of use tax occurred, appellant would nevertheless need to prove that it previously exercised reasonable diligence in attempting to obtain the newly discovered evidence prior to issuance of the Opinion; as explained above, appellant has not met that burden.

argues that it is not a condition of Regulation section 1525(b) that the raw materials and components, purchased ex-tax, are being held for resale.

Tax does not apply to sales of tangible personal property to persons who purchase it for the purpose of incorporating it into the manufactured article to be sold, as, for example, any raw material becoming an ingredient or component part of the manufactured article. (Cal. Code Regs., tit. 18, § 1525(b).) As relevant here, a claim for refund may be granted when an amount of tax, interest, or penalty has been paid more than once or has been erroneously collected. (R&TC, § 6901(a).) Every person storing, using, or otherwise consuming tangible personal property in California purchased from a retailer is liable for the use tax. (R&TC, § 6202(a).) "Storage" includes any keeping or retention in this state of tangible person property purchased from a retailer for any purpose, except for sale in the regular course of business or subsequent use solely outside this state, and "use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property. (R&TC, §§ 6008, 6009.)

Here, the issue is not whether tax applies to appellant's purchases of ITCA-650 component parts; appellant has already paid use tax on those purchases. Thus, the issue is whether appellant has established that it is entitled to a refund for the tax it paid. Consequently, appellant's arguments emphasizing that it is not a retailer are irrelevant. Appellant is a person that paid use tax on its purchases of property. (See R&TC, § 6202(a).) To establish that an overpayment occurred and a refund is warranted, appellant has the burden of proving that it has not made a taxable use of the property. As discussed above and in the Opinion, the evidence fails to establish that no taxable use occurred. Moreover, appellant is essentially reiterating an argument that it made during the oral hearing. The Opinion correctly rejected the argument, and appellant's dissatisfaction with the outcome of the appeal does not establish grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Accordingly, the Opinion is not contrary to law.

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In light of all of the above, OTA finds no basis to grant a rehearing. Consequently, the PFR is denied.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Andrew Wong
Administrative Law Judge

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

Date Issued: 12/4/2024