OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **AVA BERI RESTAURANTS GROUP, INC., dba Subway**	OTA Case No.: 20106824 CDTFA Case ID: 171-075, 171-077, 171-079, 171-081

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: A. Beri, Owner and Officer

For Respondent: Sunny Paley, Attorney

M. GEARY, Administrative Law Judge: On June 27, 2024, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision by the California Department of Tax and Fee Administration (respondent).[1] Respondent's decision denied three petitions for redetermination and one administrative protest filed by AVA Beri Restaurants Group, Inc. dba Subway (appellant) of four Notices of Determination (NODs), as follows:

- A May 13, 2016 NOD for tax of $196,314,[2] plus accrued interest, and a fraud penalty of $49,079 for the period January 1, 2004, through June 30, 2005;
- An October 20, 2010 NOD for tax of $537,034, plus accrued interest, and penalties totaling $149,425 for the period July 1, 2005, through December 31, 2009 (liability period 2);
- A July 1, 2016 NOD, which increased the liabilities for liability period 2, adding tax of $28,253, plus accrued interest, and penalties totaling $63,194; and

[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 respondent. (Gov. Code, § 15570.22.) When this Opinion refers to events that occurred before July 1, 2017, "respondent" refers to the board.

[2] This Opinion rounds amounts to the nearest dollar. This may cause immaterial differences in some totals referred to in this Opinion, but rounding is not intended to alter the rights or obligations of the parties.

- A May 13, 2016 NOD for tax of $16,906, plus accrued interest, and a 40 percent penalty of $6,762 for failure to timely remit sales tax reimbursement for the period January 1, 2010, through December 31, 2010.[3]

By letter dated July 29, 2024, appellant filed a timely petition for rehearing (petition).[4] OTA concludes that the petition 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 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.)

Appellant argues that a new hearing is warranted on the first, third, and fourth grounds stated above. This Opinion will discuss each of these three grounds below.

Irregularities in the appeal proceedings

Appellant asserts that there were two irregularities in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal. It contends that OTA improperly appointed the lead judge over appellant's objection on the ground that the judge had a conflict of interest because his spouse is employed by respondent. It also argues that the lead judge essentially conducted the hearing and decided the issues without the meaningful participation of the other two judges on the panel. In addition, there is at least a suggestion that appellant contends the three appeals should not have been consolidated for hearing.

OTA's record contains a February 10, 2022 Notice of Tax Appeals Panel, which properly disclosed the fact that the lead judge's spouse was (and remains) an employee of respondent.

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[3] Absent fraud, only the October 20, 2010 NOD was timely issued. (R&TC, § 6487.) However, because the Opinion found clear and convincing evidence of fraud for all reporting periods at issue, the statute of limitations does not apply. (*Ibid*.; *Appeal of Senehi*, 2023-OTA-446P.)

[4] Appellant's two owners were also the owners of two other entities whose appeals were consolidated with appellant's appeal for hearing: Partnership of A. Beri and V. Beri; and Taste America Foods Group, Inc. All three entities operated multiple Subway restaurants in California. All three entities have filed similar petitions.

The disclosure informed the parties that the lead judge affirmatively represented to the parties that his spouse had not represented respondent's interests in connection with this appeal and had no personal interest, financial or otherwise, in the outcome of this appeal. He further affirmatively represented to the parties that he had no knowledge regarding the facts of this appeal other than that acquired from the briefs and evidence presented by the parties therein, and that he would make findings impartially, without bias for or against either party, and based only upon such evidence.

There is no right to a peremptory challenge of a panel member. (Cal. Code Regs., tit. 18, § 30215(d).) However, any party to an appeal to OTA may file a motion to disqualify a panel member for cause. (*Ibid*.) Generally, to be successful, such a motion must at least demonstrate that: the panel member has prior relevant knowledge, having served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage (Gov. Code, § 11425.30(a)(1)); the panel member is subject to the authority, direction, or discretion of a person who has so served (Gov. Code, § 11425.30(a)(2)); or the panel member is subject to disqualification for bias, prejudice, or interest in the proceeding (Gov. Code, § 11425.40(a)).

There is nothing in OTA's file to indicate that appellant requested that Judge Geary be removed from (or not be appointed to) the panel.[5] Regardless, the fact that respondent employed the lead judge's spouse may be relevant to his qualifications to serve as a panel member on appeals to which respondent is a party, but that fact alone does not establish a basis for his disqualification. (See Formal Opinion No. 55, issued by the California Judges Association Ethics Committee in 2006.[6]) There is nothing in the petition or anywhere in the record that establishes grounds for disqualification of the lead judge, and there is nothing in the Opinion to suggest that the lead judge was biased, prejudiced, or had an interest in the outcome of this appeal. For these reasons, the appointment of Judge Geary to the panel did not constitute an irregularity in the appeal proceedings that prevented fair consideration of the appeal.

Appellant's assertion that the lead judge essentially conducted the hearing and decided the issues without the meaningful participation of the other two judges on the panel has no basis in fact. All the judges were able to ask questions and otherwise participate at the hearing; whether they chose to do so was up to them. All judges participated in deciding the issues and

[5] It seems unlikely that appellant would have requested that Judge Geary not be appointed to the panel, since appellant would have no basis upon which to anticipate panel appointments.

[6] See: https://www.caljudges.org/docs/Ethics%20Opinions/Op%2055%20Final.pdf.

all agreed to the findings and disposition, as evidenced by their respective concurrences. OTA finds that appellant's argument to the contrary is unpersuasive.

Appellant argues that the consolidation of the three appeals for hearing caused confusion. It states that the three appeals require separate hearings, but it is not clear whether appellant refers to the consolidated hearing that occurred on November 8, 2023, or to the rehearing that is the subject of the petition. To the extent appellant argues that consolidation of these matters for hearing was an irregularity that warrants a new hearing, OTA finds that the three appeals were consolidated for hearing because they were filed by three entities owned and operated by the same people, who relied on the same representative to present the same arguments and evidence in all three appeals. Furthermore, appellant's representative agreed to the consolidation, and no party objected to it.[7] OTA finds that appellant has not shown that there was an irregularity in the appeal proceedings that materially affected its substantial rights.

Newly discovered evidence

To warrant a new hearing, the petitioning party must show that the proffered evidence was newly discovered by the petitioning party, who could not have reasonably discovered and provided such evidence prior to issuance of the Opinion, and that the proffered evidence is material to the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(3).) 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*; Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.)

Appellant proposes to offer into evidence a Memorandum of Interview/Contact (MOI) in which respondent purports to summarize information obtained during a June 23, 2011 interview of M. Canales, who purportedly self-identified as a former Subway manager. This document is not newly discovered. It was attached to the brief dated October 4, 2021, and filed on behalf of appellant and the other related entities. Appellant has not identified any newly discovered evidence that would warrant a rehearing. Consequently, appellant has not established this as grounds for a new hearing.

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 based on that evidence,

[7] After appellant indicated it would be filing a consolidated brief for the three appellants, OTA informed appellant that OTA would simply consolidate the three appeals. In a February 12, 2021 email, appellant stated, "I think that these related cases should appropriately be consolidated."

that OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al*., 2020-OTA-045P.)

Much of appellant's petition is focused on what it views as misinterpretations of, unwarranted assumptions from, and inappropriate weight given to the evidence admitted in the consolidated appeals.[8] Primarily, appellant argues that respondent (and, apparently OTA) deliberately misconstrued an MOI that purports to summarize a statement taken from A. Montoya.[9] Appellant contends that OTA ignored sworn statements from several of appellant's former employees, all of which proved that there was no fraud, and instead chose to rely on a misinterpretation of the Montoya MOI and on data (obtained from appellant's franchisor) that respondent knew was inaccurate.

None of the arguments that address the substance of the admitted evidence appear to be new. They are the same arguments that were made before issuance of the Opinion. All of those arguments were fully and fairly considered by the original panel that issued the unanimous Opinion. It was not unreasonable for the Opinion to conclude that A. Beri instructed A. Montoya to falsify records. It was not unreasonable for the Opinion to conclude that statements of other former employees did not refute or adequately explain the Montoya MOI, the franchisor's records showing substantial underreporting, or the other evidence of fraud. Appellant argues that OTA should revisit these arguments in a rehearing when all were addressed in the Opinion. For example, the petition argues about the 80/80 rule and contends that the liability is based in part on a finding that 95 percent or more of the sales were taxable for some reporting periods, which, according to appellant, is impossible.[10] As stated in the Opinion,

> Appellant's argument regarding the 80/80 rule and its criticism of respondent's conclusion that over 95 percent of sales in some periods were "taxable" indicates that appellant misunderstands the bases for respondent's determination. Respondent did not conclude that over 95 percent of appellant's sales in some periods were taxable sales. Respondent simply accepted appellant's own reports to its franchisor

[8] The evidence binder for the consolidate appeals contains over 16,000 pages of evidence.

[9] Appellant also attempts to refute portions of the Montoya MOI by, for example, stating that the former employee did not leave her job voluntarily. The only evidence of the reason for A. Montoya leaving her job is in the Montoya MOI. Statements made by A. Beri in the petition are not evidence.

[10] Although sales of cold food to-go generally qualify for an exemption from tax, if over 80 percent of a retailer's gross receipts are from the sale of food products, and over 80 percent of the retailer's sales of food products are subject to tax, all food products furnished in a form suitable for consumption on the seller's premises, including cold food sold to-go, are usually subject to tax. (R&TC, § 6359(d)(6); Cal. Code Regs., tit. 18, § 1603(c)(3).)

> regarding sales tax reimbursement collected from customers and on the basis of that evidence concluded that appellant collected sales tax reimbursement on over 95 percent of its sales in some periods. The 80/80 rule is immaterial to the analysis.

(Opinion, p. 15.)

Another example is appellant's argument that the sales data obtained from the franchisor was wrong. Appellant contends that the franchisor cautioned against reliance on the data, which was purportedly the result of a software problem. The only evidence that appellant could point to in support of its argument was one email which appellant refers to in its petition.[11] The Opinion addresses that evidence, and the petition does not show that the Opinion should have found that the data was unreliable.

An appellant's dissatisfaction with an Opinion does not constitute grounds for a new hearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) The petitioning party must persuade OTA that, after weighing the evidence in the record, including all reasonable inferences therefrom, OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al.*, *supra*.) The petition does not do that. A review of OTA's record reveals that the Opinion's findings and conclusions, and, ultimately, its disposition, were based on substantial and persuasive evidence.

The petition is denied.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

Signed by:
Greg Turner
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Greg Turner
Administrative Law Judge

Date Issued: 2/7/2025

[11] There was no evidence of a software problem in OTA's record.