**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of:<br>**INTERNATIONAL GREEN AUTO, dba Mr. Kebab & Falafel** | OTA Case No.: 21017124<br>CDTFA Case ID: 240-020 |

## OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Amjad Alasad, Partner

For Respondent: Jason Parker, Chief of Headquarters Ops.

K. LONG, Administrative Law Judge: On July 17, 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 an administrative protest filed by International Green Auto, dba Mr. Kebab & Falafel (appellant) of a Notice of Determination (NOD) dated May 19, 2014. The NOD is for $14,592.89 in tax, plus applicable interest for the period October 1, 2010, through December 31, 2012 (liability period).

On August 15, 2024, appellant timely petitioned for a rehearing with OTA on the following grounds: that there was an accident or surprise caused by an illness that prevented appellant from attending the prehearing conference; that there is insufficient evidence to support OTA's written Opinion; and that the Opinion is contrary to law. OTA concludes that the grounds set forth in this petition do not constitute 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

[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.

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.)

As provided in *Appeal of Wilson Development, Inc.*, (94-SBE-007) 1994 WL 58064, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing.

*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.*, *supra*.) 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*.)

California Code of Regulations, title 18, (Regulation) section 30403 states that an appellant who wishes to have an oral hearing must provide OTA with a signed and completed response to the notice of oral hearing no later than 15 days from the date the notice of oral hearing. (Cal. Code Regs., tit. 18, § 30403.) Regulation 30404(a) provides that if the party who requested an oral hearing fails to respond to the notice of oral hearing by the deadline stated in the notice of oral hearing, OTA will notify the parties in writing that the appeal has been removed from the oral hearing calendar. The appeal will then be submitted for a decision on the basis of the written record. (Cal. Code Regs., tit. 18, § 30404(a).) If an appeal is removed from the oral hearing calendar, and the panel has not yet issued a written Opinion, OTA may, in its discretion, return the appeal to the oral hearing calendar upon a showing of good cause. (Cal. Code Regs., tit. 18, § 30404(d).)

Here, OTA initially issued a notice of hearing to appellant on February 8, 2024, requiring a response by February 23, 2024. When appellant failed to respond to the oral hearing notice, OTA removed the oral hearing from the calendar and notified appellant that an Opinion would be issued based on the written record. Thereafter, by email dated March 20, 2024, appellant asserted that he did not receive OTA's correspondence and requested that the oral hearing be rescheduled "to end of May or early June."

Responsive to appellant's request, OTA rescheduled the oral hearing for June 18, 2024. OTA notified appellant of the rescheduled hearing by email dated March 22, 2024. Thereafter, OTA issued an oral hearing notice on April 4, 2024, requiring a response by April 19, 2024. Appellant did not timely respond to the oral hearing notice. As a result, OTA removed appellant's appeal from the oral hearing calendar and informed appellant by letter dated May 13, 2024.

On petition for rehearing, appellant asserts that its representative failed to appear at the prehearing conference due to a medical emergency. Appellant provides documentation of medical services provided on May 14, 2024, which is well after the response to oral hearing due date (April 19, 2024). Appellant has not provided any evidence that its representative received medical treatment, which prevented him from submitting a response to the oral hearing notice. As such, appellant has not shown that there was an accident or surprise that placed appellant in a detrimental condition or situation. Instead, it appears that appellant simply failed to respond to the oral hearing notice.

Accordingly, appellant has failed to show that a rehearing is required based on accident or surprise.

*Insufficient Evidence to Justify the Opinion and Contrary to Law*

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*.)

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 *Krayevich 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 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.)

Appellant's petition provides no specific contention with respect to these grounds but instead generally states, "I would like to rebut the decision based on audit period, cyclical seasons in which the auditor used to determine these unjust added taxes after we opened the business."

Here, the Opinion analyzed the audit method. Specifically, OTA noted that appellant failed to provide a complete set of books and records for audit, and it was therefore reasonable and rational for CDTFA to calculate a credit card ratio based on appellant's bank deposits for the first quarter of 2011 (1Q11) through 4Q12. OTA also found that it was reasonable and rational for CDTFA to calculate an error rate based on the credit card analysis and apply that error rate (as revised on reaudit) to 4Q10. Accordingly, based on *Appeal of Talavera*, 2020-OTA-022P, OTA shifted the burden from CDTFA to appellant to prove that a different determination was warranted. However, appellant did not provide any evidence that the credit card ratio or error rate were incorrect.

OTA also previously addressed appellant's contention with respect to fluctuations in its business. Specifically, the Opinion notes that during periods where appellant's credit card sales increased, so did the taxable measure. However, in periods where appellant made zero credit card deposits (such as during periods of closure), the audit workpapers showed no additional sales. Appellant has failed to provide any evidence that there is insufficient evidence to support the Opinion or that the Opinion is contrary to law. Accordingly, appellant's request for rehearing is denied.

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Keith T. Long
Administrative Law Judge

We concur:

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

Date Issued: 1/15/2025