OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **ACRE GARDEN SUPPLY,** **dba Green Acres Hydroponics**	OTA Case No.: 231214880 CDTFA Case ID: 3-847-947

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Manny Almeida, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

G. TURNER, Administrative Law Judge: On March 19, 2025, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA's decision denied a petition for redetermination filed by Acre Garden Supply dba Green Acres Hydroponics (appellant) of a Notice of Determination (NOD) dated April 29, 2022. The NOD is for $1,639,830 in tax, plus applicable interest, and a penalty of $163,983.05 for the period July 1, 2018, through June 30, 2021 (liability period).

On April 8, 2025, appellant timely petitioned for a rehearing (PFR) with OTA on the basis that OTA's written Opinion is based on insufficient evidence and contrary to law. Specifically, appellant argues OTA misinterpreted California Code of Regulations, title 18, (Regulation) section 1668(e)(1), which excludes sales for resale even without a resale certificate if the product sold was "in fact" resold by the purchaser, and that OTA should have interpreted the regulation to apply where a customer purchases $30,000 or more in product on the basis that the purchase of that volume of product could not have been for a purpose other than resale. 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 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.)

To find that there is insufficient evidence to justify the Opinion, this panel 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; *Appeal of Swat-Fame Inc., et al*., 2020-OTA-045P.) While appellant asserts insufficient evidence as a basis for the PFR, they fail to articulate the erroneous conclusion from the evidence which this panel is intended to reexamine. There was no dispute that several sales invoices exceeded $10,000 in total (or even $30,000 as an alternative measure proposed by appellant). The question raised by appellant, whether the *amount* of such receipts should dictate whether those sales constitute "resales in fact" is a legal one not one based on the weighing of evidence.

The "contrary to law" standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) The question of whether the Opinion is contrary to law is not one which involves a weighing of the evidence but instead 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 indulge in all legitimate and reasonable inferences to uphold the Opinion. (*Ibid*.) The question before OTA on a PFR does not involve examining the quality or nature of the reasoning behind OTA's Opinion, but whether that Opinion can be valid according to the law. (*Ibid*.)

Among the issues in the appeal which appellant raises in the PFR is the application of the exemption from taxable sales and use taxes for sales for resale. A "retail sale" or "sale at retail" means a "sale for a purpose other than resale in the regular course of business . . ." (R&TC, § 6007(a)(1).) The law presumes that all gross receipts are subject to tax unless the seller timely takes from the purchaser a certificate to the effect that the property is purchased for resale. (R&TC, § 6091; Cal. Code Regs., tit. 18, § 1668(a).) The form of the certificate is not exact, it need merely establish certain facts to validate the purchaser and their intended resale of the items at issue. (See Cal. Code Regs., tit. 18, § 1668(b)(1).)

Even if the seller does not timely obtain a valid resale certificate, the seller is nevertheless relieved of liability if the seller can establish the property sold: (1) was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business; (2) is being held for resale by the purchaser and has not been used for any purpose other than retention, demonstration, or display, while being held for sale in the regular course of business; or (3) was consumed by the purchaser, and tax was reported to CDTFA by the purchaser on the purchaser's returns or in an audit of the purchaser. (Cal. Code Regs., tit. 18, § 1668(e).)

One such method is the use of XYZ letters. (Cal. Code Regs., tit. 18, § 1668(f).) XYZ letters, sent to customers in a form approved by CDTFA, inquire as to the purchaser's disposition of the property purchased from the seller; however, a response to an XYZ letter is not equivalent to a timely and valid resale certificate, and CDTFA is not required to relieve a seller from liability for sales tax or use tax collection based on a response to an XYZ letter. (Cal. Code Regs., tit. 18, § 1668(f)(3).)

Here, appellant failed to produce resale certificates, failed to produce evidence the product sold was *actually* resold (or held for resale) by the purchasers, and failed to avail themselves of XYZ letter process to validate those purchasers actually purchased product for resale. Instead, appellant relied as they do here on the argument that a substantial volume of sales, here $30,000, constitutes a "resale in fact" for the simple reason that appellant believes it not "humanly possible" to consume that volume of product per month. The Opinion concluded that such a volume threshold was essentially arbitrary; and that there was no evidence in the record to evaluate the type of products at issue or how such a dollar threshold showed that the products could not have been purchased for other than resale. Appellant's PFR is in essence a re-arguing of the case presented to OTA and reflected in the Opinion.

R&TC section 6091 presumes *all* gross receipts are subject to tax. It is the burden of the taxpayer to establish right to exemption for sales for resale. (*H.J. Heinz Company v. State Board of Equalization* (1962) 209 Cal.App.2d 1, 4.) Any taxpayer seeking exemption from the tax must establish that right using the evidence specified by the authorizing statute or regulation.[1] A mere allegation that sales are exempt is insufficient. (See *Appeal of Adventures*

[1] The courts have concluded that statutes granting exemption from taxation must be reasonably, but nevertheless strictly, construed against the taxpayer. The taxpayer has the burden of showing that they qualify for the exemption. An exemption will not be inferred from doubtful statutory language; the statute must be construed liberally in favor of the taxing authority, and strictly against the claimed exemption. (*Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 766.)

by the Sea, Inc., 2023-OTA-284P.) As acknowledged in the Opinion, Regulation section 1688(e)(1) does exclude sales that are resold "in fact" by the purchaser; however, the Opinion found appellant failed to establish credible evidence demonstrating why the arbitrary threshold of $30,000 in sales, standing alone, constituted sales for resale in fact. The amount identified by appellant lacks a reasonable basis on which to conclude the sales therein were *in fact* sales for resale beyond the mere allegation.

Appellant has failed to show that OTA clearly should have reached a different result based on the facts or that the Opinion cannot be valid according to the law. Accordingly, OTA finds that appellant has not established that a ground exists for a rehearing pursuant to Regulation section 30604(a). Appellant's dissatisfaction with the outcome of this appeal is not grounds for a rehearing. (*Appeal of Shanahan*, 2024-OTA-040P.) The PFR is denied.

Signed by:
Greg Turner
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Greg Turner
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

Signed by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 9/18/2025