OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **S. BACHOR**	OTA Case No.: 21037482 CDTFA Case ID: 718-866

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jesse W. McClellan, Attorney

For Respondent: Chad Bacchus, Attorney

J. ALDRICH, Administrative Law Judge: On May 20, 2025, 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, a petition for redetermination filed by S. Bachor, dba Carmel Mountain Cabinetry (appellant) of a Notice of Determination (NOD) dated November 13, 2018. The NOD is for $430,343 in tax, plus applicable interest, and a failure to file penalty of $43,034.25 for the period January 1, 2013, through March 31, 2018 (liability period). CDTFA's February 12, 2021 decision relieved the penalty, and it is no longer in dispute.

On June 18, 2025, appellant timely petitioned for a rehearing with OTA on the following basis: (1) an irregularity in the appeal proceedings occurred prior to the issuance of the Opinion that prevented fair consideration of the appeal; (2) newly obtained evidence that is material to the appeal; (3) insufficient evidence to justify the Opinion; (4) the Opinion is contrary to law; and (5) an error in the OTA appeals proceedings that resulted in the lack of due process. OTA concludes that the grounds set forth in this petition do not constitute a basis for granting a new hearing.

[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 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.)

Irregularity in the Appeal Proceedings

Appellant contends that there was an irregularity in the appeal proceedings which occurred prior to the issuance of the Opinion that prevented the fair consideration of the appeal. Appellant contends the finding in the Opinion that appellant's and a Mexican limited liability entity named Carmel Mountain Cabinetry's (CMEX), business operations did not change from the prior audit period to the liability period at issue in this appeal is inconsistent with prior OTA Opinions on a prior liability period.[2] Appellant also contends that the Opinion failed to properly consider the contract between appellant and CMEX. Appellant argues that it was improper for the majority to overlook the original signed copy of the contract that was written in Spanish together with the unsigned English version of the contract that was also in evidence.

OTA will grant a rehearing when an irregularity in the appeal proceedings occurs prior to the Opinion's issuance and prevents fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(1).) Generally, an irregularity includes any departure by OTA from the due and orderly method of conducting appeal proceedings that materially affects the substantial rights of a party. (*Appeal of Mather*, 2024-OTA-378P.) Courts have found that an irregularity in a proceeding is any act that: (1) violates the right of a party to a fair trial and (2) which a party cannot fully present by exceptions taken during the progress of the trial. (*Ibid*.) An overt act of the trial court or adverse party, violative of the right to a fair and impartial trial, may be regarded as an irregularity. (*Ibid*.) Examples of irregularities include the absence of a judge from the courtroom during a portion of the trial and a judge threatening to prejudge testimony unless a witness is withdrawn. (*Ibid*.)

[2] On September 26, 2023, CDTFA issued the NOD for the period January 1, 2007, through December 31, 2012.

Regarding the first contention, appellant points to the following quotes from the prior Opinions, which include:

- ”After [CMEX] completed its fabrication work, it shipped the partially-finished cabinets back to appellant in California;” (*Appeal of Bachor*, 2019-OTA-126 (Bachor PFR) at p. 3)
- “When the fabrication was completed, the materials were returned to appellant for use, and appellant used the materials to build and install custom cabinets in California;” (*Appeal of Bachor*, 2020-OTA-172P (Bachor 1) at p. 2)
- “the audit work papers indicate that after [CMEX] returned the fabricated materials to California;” (Bachor 1, at p. 7) and
- “respondent calculated the cost of materials by adding the cost of materials delivered from Mexico” (Bachor 1, at p. 8).

Of the quoted material, only the second quote pertains to a factual finding, and this panel does not find any material inconsistencies that would warrant a rehearing. The remaining quotes are from the discussion sections of Bachor PFR and Bachor 1, and likewise this panel does not find any material inconsistencies that would warrant a rehearing. In addition, each of those prior Opinions were produced by separate and distinct panels that were tasked with opining on a different liability period. Similar to each federal income tax year, each liability period typically stands on its own terms and must be separately considered. (*Appeal of Kwon et al*., 2021-OTA-296P, citing *United States v. Skelly Oil Co.* (1969) 394 U.S. 678, 684 and *Pekar v. Commissioner* (1999) 113 T.C. 158, 166.) Of note, the prior Opinions were analyzing different legal arguments than the arguments respectively raised by the parties here. While appellant points to possible inconsistencies, Bachor 1 finds that audit began based on information provided by U.S. Customs and Border Protection (U.S. Customs) that indicates appellant, not CMEX, was the importer of the fabricated materials. For the liability period at issue here, CDTFA also received information provided by U.S. Customs that indicates appellant, not CMEX, was the importer of fabricated materials with a declared value of $1,790,791 between January 8, 2013, and September 28, 2017. This continuation from Bachor 1 through the liability period, is one of the consistencies between Bachor 1 and the underlying Opinion at issue. In sum, to the extent that there are inconsistencies between Bachor PFR, Bachor 1, and the underlying Opinion here, this panel does not find them sufficiently material to be considered an irregularity warranting a rehearing.

Regarding appellant’s second contention, the panel found that the unsigned contract from 2007 was not reliable evidence of the agreement between appellant and CMEX. However, a review of the Opinion shows that the majority did not stop its analysis there. Instead, the majority separately reviewed the terms of the contract and concluded that the language of the contract was insufficient to meet appellant's burden. (See R&TC, § 6241.) While appellant objects to the scrutiny that the majority gave the contract, the record does contain some support for such scrutiny. For example, "appellant chose to treat [CMEX] as if it was simply a foreign location of his wholly-owned California cabinet business when it suited his purposes." (Bachor 1 at p. 7.) In addition, the record contains significant support that appellant had extensive control and supervision over CMEX's operations, and exercised that control, which tends to support the analysis that the contract was not made at arms-length. Appellant also previously argued, and abandoned, that there was never a sale under R&TC section 6006(b) because appellant never transferred title to CMEX. (Bachor 1 at p. 1, fn. 5.) If a sale of fabrication labor was never contemplated between the contracting parties, as appellant's prior argument suggests, then it was reasonable for the majority to conclude that the contract did not memorialize the requisite intent between appellant and CMEX (regarding the terms of when or where the sale of fabrication labor occurred). Further, appellant did not provide purchase orders, invoices, or other contemporaneous evidence to demonstrate how appellant and CMEX handled the transactions at issue, which is relevant because while a contract may show the parties' agreement, the contract does not show how the parties to the contract actually behaved. Accordingly, this panel finds that the majority properly considered the language of the contract when considered with the other evidence, or absence of evidence, in the record.

In sum, appellant has not shown there was a departure from the due and orderly method of conducting the appeals proceedings or that appellant's substantial rights were materially affected. In sum, OTA finds insufficient basis for granting a rehearing based on an irregularity.

<u>Newly Discovered Evidence</u>

Appellant contends that he should be able to introduce newly obtained material evidence (i.e., a translated copy of the executed original) because he could not have reasonably known he was required to submit the evidence.

Before OTA can consider this evidence, appellant must establish that the evidence was newly discovered, material evidence that appellant could not have reasonably discovered and provided prior to the issuance of the Opinion. (See Cal. Code Regs., tit. 18, § 30604(a)(3).) In this context, OTA considers evidence material when the evidence is likely to produce a different result. (*Appeal of Shanahan*, 2024-OTA-040P.) Appellant has not argued or shown that the evidence is newly discovered or that he exercised reasonable diligence in discovering and producing it. Also, since the majority separately reviewed the terms of the contract and concluded that the language of the contract was insufficient to meet appellant's burden, this panel need not consider the translated copy of the contract to be new evidence. Therefore, OTA finds that there is insufficient basis to grant a rehearing based on newly discovered evidence.

Insufficient Evidence

Appellant contends that the contract it submitted together with the documents in Exhibit 10 were sufficient to meet its burden of proof.[3] More specifically, appellant contends that the evidence he presented establishes not only the parties' intent that CMEX complete the sale in California but such delivery or sale in fact occurred as part of CMEX's required performance, and that there is no evidence in the record suggesting otherwise.

To find that there is insufficient evidence to justify the Opinion, the OTA Panel considering the petition for rehearing must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Opinion clearly should have reached a different result. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

As stated in the Opinion, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) The Opinion held that CDTFA's determination is reasonable and rational because, after a reaudit, the first audit item was based on appellant's federal income tax returns, P&L statements, purchase invoices, and prior audit results when business operations had not materially changed; and for audit item two, CDTFA examined appellant's books and records on an actual basis. Further, appellant bears the burden of proof as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219(a).) In addition to the burden of proof as to the facts together with the shifting burden, appellant was required to rebut the presumption found in R&TC section 6246 that tangible personal property shipped or brought into this State by the purchaser was purchased for storage, use, or other consumption in this State.

In this appeal the following is undisputed: appellant, a lump-sum construction contractor of custom cabinets, did not report or remit use tax for any of the fabricated materials used in building custom cabinets during the liability period; appellant did not register to report or remit use tax during the liability period; appellant has a 99 percent ownership interest in CMEX; appellant or his agent traveled regularly to CMEX to inspect or oversee CMEX's work; appellant

[3] Exhibit 10 consists of employment information for A. Flores who worked for CMEX as well as a sampling of Mexico and U.S. border documents showing where A. Flores was driving and that tangible personal property was destined for appellant's address.

retained title to all materials sent to CMEX; during the liability period appellant did not pay sales tax to CMEX for the fabricated materials; CMEX did not report or remit any sales tax to California on the fabricated materials; CMEX did not register for a seller's permit; and the fabricated materials were imported into California on appellant's privately owned truck (as opposed to a common carrier). In addition to the U.S. Customs information, the documents in Exhibit 10 show that appellant, not CMEX, was the owner of the imported materials before the fabricated materials entered into California.

The underlying Opinion examined the clauses of the contract. With respect to clause 4(g)[4] of the contract, the majority in the underlying Opinion found that there was conflicting information in the record on who paid "trucking charges, gasoline costs, truck maintenance expenses, custom clearance fees, or potential customs duties." The majority noted that appellant had not provided purchase orders between appellant and CMEX, which may include applicable terms. In a similar vein, clause 4(f)[5] suggests that delivery of the fabricated materials was subject to change, and that separate terms or purchase orders would modify this clause. No such purchase orders were provided by appellant. The majority also addressed the inspection clauses (i.e., 4(i) and 5(b)),[6] and noted that the contract does not define where inspection occurs or approval occurs (e.g., the majority's conclusion that inspection and approval is equally likely to occur during appellant's regular visits to CMEX as it is when appellant receives the fabricated materials), and thus the inspection clauses were insufficient to meet appellant's burden.

There is sufficient evidence to support the majority's finding that appellant did not meet his burden of proof to rebut the presumption of taxability by showing where and when each of the sales occurred. Accordingly, OTA finds that appellant has not established a basis for a rehearing based on insufficient evidence.

[4] Clause 4(g) requires CMEX to "[p]ay the expenses generated by the transportation of materials and finished products, except for those that from time back [sic] the parties agreed that must be covered or shared by [appellant]."

[5] Clause 4(f) provides: "[d]eliver the finished product to the address of [appellant], or any other addresses that he states on the dates or terms that are agreed upon in each order or manufacturing request."

[6] Clause 4(i) states that CMEX is to "[r]eturn with the finished product, any material left over or that had not been approved by the quality standards imposed by [appellant]." Clause 5(b) provides appellant the right to "[v]erify the quality of the finished products in terms of quality and compliance with the specifications."

Contrary to Law

Regarding the contrary to law ground, appellant contends that the majority's holding rests on two factual errors regarding the contract and the misapplication of *Maxwell v. Commissioner* (95 T.C. 107, 116) and *Cuthbertson v. Commissioner* (T.C. Memo. 2020-9).

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 is not one that 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 Riedel*, *supra*.) This requires a review of the Opinion in a manner most favorable to the prevailing party—here, respondent—while indulging in all reasonable inferences to uphold the Opinion. (*Ibid*.) On a petition for rehearing, the question before OTA does not involve examining the quality of the reasoning behind OTA's Opinion, but whether that Opinion can or cannot be valid according to the law. (*Ibid*.; see also *Appeals of Swat-Fame Inc., et al.*, *supra*.)

Here, OTA notes that while federal tax law may not be binding in the business taxes context, this does not preclude the panel from considering federal tax law as persuasive authority. With respect to appellant's contentions pertaining to the contract, this panel has examined the contract and the available evidence above. This panel incorporates its examinations and conclusions discussed above and need not reiterate them here. Accordingly, OTA finds that appellant has not established a basis for a rehearing under the contrary to law standard.

Error in Law

Courts have found that a new trial may be granted based on an error in law if its original ruling as a matter of law was erroneous. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17-18, citing *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391, 397.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong.[7] Error in law pursuant to California Code of Regulations, title 18, section 30604(a)(6) generally refers to errors that occurred during the course of the proceedings. As stated in Code

[7] This includes situations where, for example, the trial court made an erroneous evidentiary or procedural ruling. For example, courts have found an error in law occurred when there was an erroneous denial of a jury trial (*Johnson v. Superior Court* (1932) 121 Cal.App. 288), an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 Cal.App. 487), an erroneous application of the law by a jury (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722), and an erroneous instruction to a jury (*Maher v. Saad* (2000) 82 Cal.App.4th 1317).

of Civil Procedure section 657,[8] in the judicial context, an error in law "occurring at the trial and excepted to by the party making the application," is grounds for a new trial if it is "reasonably probable" that the party moving for a new trial would have obtained a more favorable result absent the error. (*Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367, 395, citing *College Hosp. Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715).

Here, appellant does not specify an erroneous evidentiary or procedural ruling. There were no objections from either party with respect to admitting the evidence. Instead, appellant argues that the majority gave evidence inappropriate weight, which was discussed above. Therefore, OTA finds that appellant has not established a basis for granting a rehearing based on error in law.

Based on the foregoing, appellant has not provided any valid grounds for granting a rehearing. As such, OTA denies appellant's petition.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

Signed by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Signed by:
Kim Wilson
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Kim Wilson
Hearing Officer

Date Issued: 4/21/2026

[8] As provided in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, 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.