OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **SABSV INC.,** **dba Anand Bhavan**	OTA Case No.: 21088505 CDTFA Case IDs: 345-115; 2-173-198

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Gerald J. Donnini II, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

J. ALDRICH, Administrative Law Judge: On September 23, 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 SABSV INC. (appellant) of two Notices of Determination (NODs). The first NOD was issued on April 30, 2018, for tax of $104,031.88, plus applicable interest, for the period October 1, 2014, though September 30, 2017 (first liability period). The second NOD was issued on June 9, 2020, for tax of $36,161, plus applicable interest, for the period October 1, 2017, through September 30, 2019 (second liability period).

On October 23, 2025, appellant timely petitioned for a rehearing with OTA on the basis that OTA's decision contains multiple internal inconsistencies, unsupported factual determinations, and errors of law that warrant a rehearing under California Code of Regulations, title 18, (Regulation) sections 30604(a)(3) and 30604(a)(4). 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

[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.

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.)

<u>Newly Discovered Evidence</u>

Before OTA can consider newly submitted evidence, appellant must establish that the evidence it asks to submit is newly discovered, material evidence that appellant could not have reasonably discovered and provided prior to issuance of the Opinion. (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.)

Here, appellant has not provided any argument in support of its position, nor has appellant provided any such evidence for this panel's consideration. OTA therefore finds that appellant has not established a basis for a rehearing under newly discovered evidence.

<u>Error in Law</u>

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.[2] Error in law pursuant to Regulation section 30604(a)(6) generally refers to errors that occurred during the course of the proceedings. As stated in Code of Civil Procedure section 657,[3] 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.

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[2] 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).

[3] 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.

(*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 submitted evidence. Instead, appellant argues that the majority gave certain evidence inappropriate weight, which is discussed below. Therefore, OTA finds that appellant has not established a basis for granting a rehearing based on error in law.

Insufficient Evidence

Appellant argues that the underlying OTA Opinion contains multiple internal inconsistencies and unsupported factual determinations that warrant a rehearing. More specifically, appellant makes the following contentions: (1) the 80-80 rule finding directly contradicts CDTFA's own observation data; (2) OTA found a frozen food adjustment both "warranted" and "not warranted;" (3) OTA relied on two two-hour observation tests as representative of appellant's operations across multiple years; (4) OTA misstates the record regarding appellant's documentation; and (5) OTA's numerical findings are mathematically incoherent.

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. The Opinion held that CDTFA's determination is reasonable and rational because CDTFA used an indirect audit approach based on appellant's own records, the federal income tax return (FITR) analysis, after OTA concluded that the records provided were incomplete or otherwise unreliable. (*Appeal of Talavera*, 2020-OTA-022P.) Appellant bears the burden of proof as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219(a).) In addition, appellant was required to show that its sales of cold food "to-go" qualified as exempt from tax. (R&TC, § 6359(d)(2), (d)(7); *Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 443); *Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal. App.3d 739, 744.)

Appellant's argument pertaining to the 80-80 rule largely reiterates the argument it made during the appeal. As noted in the Opinion, appellant misconstrues the observation test results. The observation test results show that appellant was not charging and collecting sales tax reimbursement on all of its taxable sales. The observation test does not show that appellant was making exempt sales of “to-go” cold food. As explained in the Opinion, appellant did not claim any exempt sales of frozen food on its sales and use tax returns during the first liability period. Appellant also did not provide a separate accounting of its sales of “to-go” cold food (e.g., point-of-sale (POS) sales reports or cash register receipt that show sales of “to-go” cold food). Throughout the appeal process, appellant had ample opportunity to provide relevant records to support its position that the 80-80 rule should not apply, and appellant either elected not to make such records available to OTA or they simply do not exist.

Appellant argues that there is a material factual error because the Opinion finds that adjustments for exempt sales of “to-go” cold food are warranted and not warranted. As is apparent on the face of the Opinion, there are two separate liability periods. There are distinguishing facts, discussions, analyses, and holdings for each liability period. As explained in the Opinion, adjustments are not warranted for the first liability period, and further adjustments are not warranted for the second liability period. In addition, as described in Factual Finding 24, CDTFA calculated a reaudit based on newly obtained information, appellant’s 2017 FITR, which shows that, even if CDTFA granted a 5 percent allowance for “to-go” cold food in the second quarter of 2017 (2Q17) and a 10 percent allowance for the same in 3Q17, appellant’s taxable measure would increase from $1,186,600 to $1,194,048. This would be to appellant’s detriment as it would result in additional taxes and interest owed. Therefore, CDTFA chose to forgo making any adjustments to the second liability period.

Next, appellant argues that OTA incorrectly relied on the observation tests and projected the results over multiple years. Here, the Opinion explained the indirect audit methodology utilized by CDTFA for each liability period. In calculating the audit liability, CDTFA did not use the observation test results and did not project those results across the liability periods.

Appellant argues that the Opinion misstates the record regarding appellant’s documentation. Appellant argues that it produced bank statements, POS data, and CPA testimony verifying reported figures, and the discussion section of the Opinion states that appellant “did not provide supporting documentation” for its claimed exempt sales. However, the Opinion correctly concluded that the documentation appellant provided was not sufficient to meet its burden to prove there were sales of exempt cold food “to-go” warranting an adjustment.

In addition, appellant argues that the Opinion’s numerical findings are mathematically incoherent. Appellant argues that the Opinion reduced the measure from $401,791 to $256,602 in the first liability period. However, the Opinion made no such reduction. The reduction or adjustments are applicable to the second liability period only.[4] Appellant also reargues that at least a 10 percent reduction should have been made for the first liability period, which is an attempt to reargue the issues previously presented. Appellant's dissatisfaction with the Opinion and attempt to reargue the same issue does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

In sum, appellant's arguments are principally attempts to reargue the same issues, and do not constitute grounds for a rehearing. (*Ibid*.) Similarly, OTA finds that none of the arguments presented are a basis for a rehearing under insufficiency of the evidence.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

Signed by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

Date Issued: 4/14/2026

[4] Appellant appears to be referring to adjustments made by CDTFA in its second reaudit. For example, the underlying OTA Opinion at Factual Finding 43 as well as the Disposition.