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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **KEEN DEVICES INC.**	)	OTA Case No. 240716940

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Robert Jacoby, President

For Respondent: Christopher T. Tuttle, Attorney

A. WONG, Administrative Law Judge: On January 23, 2026, in response to Keen Devices Inc.'s (appellant's) appeal, the Office of Tax Appeals (OTA) issued an Opinion modifying respondent Franchise Tax Board's (FTB's) action proposing a minimum franchise tax of $800, a per-shareholder late-filing penalty of $432, a notice-and-demand penalty of $200, a filing enforcement cost recovery fee of $86, and applicable interest for the 2021 tax year. Specifically, in its Opinion, OTA held that the per-shareholder late-filing penalty should be reduced from $432 to $216 in accordance with FTB's concession during the appeal's briefing period; otherwise, OTA sustained FTB's action.

On March 3, 2026, appellant timely filed a petition for rehearing (petition) with OTA pursuant to Revenue and Taxation Code (R&TC) section 19048, alleging two grounds for a rehearing: (1) there was insufficient evidence to support the Opinion; and (2) the Opinion is contrary to law. After considering appellant's petition, OTA concludes that appellant's allegations are unfounded and there are no grounds for granting a rehearing.

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).)

Insufficiency of Evidence

In its Opinion, OTA found the following facts supported FTB's finding that appellant, a Nevada corporation, was doing business in California in 2021: (1) all of appellant's officers had California addresses; (2) appellant filed a 2020 California tax return and a 2021 federal tax return, both of which listed a California address; (3) the 2020 California tax return reported that appellant provided personal services and began either conducting business in California or deriving income from California starting May 27, 2018, the date of its incorporation; and (4) appellant's president, Robert Jacoby, lived in California in 2021 and, during that time, used appellant to make an online payment to an India-based law firm. Cumulatively, these facts indicated that appellant was doing business in California during 2021, so OTA concluded that FTB's determination that appellant owed the minimum franchise tax of $800 for the 2021 tax year was presumably correct and the burden of proving otherwise shifted to appellant. OTA further found that, on appeal, appellant failed to substantiate its claim that the legal work for which its president made a payment from California related to filing a patent for a device that did not have a profit motive. OTA noted that nothing in the record indicated that appellant acquired or sought tax-exempt status under the Internal Revenue Code. Thus, OTA concluded that appellant failed to overcome the presumption that FTB's determination was correct.

In its petition for rehearing, appellant argues that the Opinion relied on an unsupported finding of a pecuniary or profit motive in determining that appellant was doing business in California during 2021. (See R&TC, § 23101(a) [a taxpayer is "doing business" in California when it is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit"].) Solely focusing on the fact that appellant's California-based president used appellant to pay a law firm in India, appellant contends that FTB did not argue, and the record contains no evidence to suggest, that appellant either filed a patent application for profit or sought financial gain from the device being patented. Appellant continues to allege that this device was not profit-motivated and argues that the Opinion's conclusion rests on inference rather than evidentiary support.

To find that there is insufficient evidence to justify the Opinion, the OTA Panel considering a 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.)

Here, the current OTA Panel has reviewed and weighed the evidence in the record and, based on the facts described above, finds that OTA reasonably inferred that appellant was doing business in California in 2021, and FTB's determination that appellant owed the minimum franchise tax for that year is presumably correct. Accordingly, as the Opinion concluded, appellant bears the burden of proving otherwise. However, in its petition, appellant attempts to escape this burden by shifting it back to FTB but has failed to cite any authority for doing so. Additionally, appellant has not pointed to any evidence in the record showing that the activities it undertook in California in 2021 were not motivated by financial or pecuniary gain or profit (e.g., documentation that appellant acquired or sought tax-exempt status under the Internal Revenue Code). Therefore, this OTA Panel concludes that appellant has failed to show that there was insufficient evidence to justify the Opinion; thus, a rehearing on that basis is not warranted.

Contrary to Law

In its petition for rehearing, appellant contends that the Opinion is contrary to law for three reasons. First, appellant argues that the Opinion establishes a rule that filing a patent application by itself constitutes an activity undertaken for financial or pecuniary gain or profit but cites no authority for such a rule, thereby expanding the statutory definition of "doing business" beyond what R&TC section 23101(a) requires. Second, appellant contends that the Opinion impermissibly collapses distinct legal concepts, namely protecting intellectual property rights through patent filing on the one hand and engaging in a profit-seeking transaction on the other hand. Appellant argues that in doing so, the Opinion broadens R&TC section 23101(a) beyond its text, removes the statutory requirement that the activity be motivated by pecuniary gain, and is contrary to law. Third, appellant argues that the Opinion's determination rests on a legal theory that FTB did not argue in its briefing, which deprived appellant of any opportunity to address it. For these reasons, appellant argues that the Opinion is contrary to law and a rehearing is warranted.

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*, 2024-OTA-004P.) This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the Opinion if possible. (*Ibid*.) On a petition for rehearing, the question before OTA 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*.; see also *Appeals of Swat-Fame Inc., et al.*, *supra*.)

Here, appellant fails to cite any authorities supporting its arguments or any law invalidating the Opinion. Specifically, regarding appellant's first argument, appellant fails to cite to any authority holding that filing a patent application does not constitute an activity undertaken for financial or pecuniary gain or profit. Similarly, regarding appellant's second argument, appellant fails to cite to any authority holding that protecting intellectual property rights through patent filing is disengaged from or unrelated to financial or pecuniary gain or profit. On the contrary, a patent rewards and encourages innovation by granting an inventor the exclusive right to use or sell an invention for a set time period, which implies some sort of financial or pecuniary gain. (See *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 229-230.) Finally, regarding appellant's third argument about lacking an opportunity to address the Opinion's "legal theory," appellant has addressed and offered arguments against the Opinion in its petition; however, the petition's arguments lack supporting authority and merit. Accordingly, after reviewing the Opinion in the light most favorable to the prevailing party (i.e., FTB), this OTA Panel concludes that the Opinion is consistent with, and not contrary to, the law, and a rehearing based on the contrary to law ground is not warranted.

Because the alleged grounds for a rehearing in appellant's petition are unfounded, OTA denies appellant's petition for rehearing.

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Andrew Wong
Administrative Law Judge

We concur:

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

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Hans Famularo
Administrative Law Judge

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