

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
) OTA Case No. 21098578
) CDTFA Case ID: 925929, 925931
STARBUZZ INTERNATIONAL, INC. AND)
STARBUZZ TOBACCO, INC. (REHEARING))
)
)

OPINION ON REHEARING

Representing the Parties:

For Appellants:	Mardiros Dakessian, Attorney Michael Penza, Attorney
For Respondent:	Courtney Daniels, Tax Counsel III Stephen Smith, Tax Counsel IV Damian Armitage, Hearing Representative

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, Starbuzz International, Inc. and Starbuzz Tobacco, Inc. (appellants) appeal decisions issued by respondent California Department of Tax and Fee Administration (CDTFA)¹ denying appellants’ claims for refund totaling \$2,818,739 for the period October 1, 2012, through September 30, 2015 (claim period).²

Office of Tax Appeals (OTA) Administrative Law Judges Andrea L.H. Long, Natasha Ralston, and Daniel K. Cho held an in-person rehearing for this matter in Cerritos, California, on January 19, 2023. At the conclusion of the rehearing, the record was closed, and this matter was submitted for an opinion.

¹ The Cigarette and Tobacco Products Tax Law was formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts of events that occurred before July 1, 2017, “CDTFA” shall refer to BOE.

² Starbuzz International, Inc. filed a claim for refund for \$1,004,309.89 for the period August 1, 2013, through September 30, 2015. Starbuzz Tobacco, Inc. filed a claim for refund for \$1,814,429.11 for the period October 1, 2012, through September 30, 2013.

ISSUES

1. Whether there were grounds for granting the petition for rehearing (PFR) in this appeal under California Code of Regulations, title 18, (Regulation) section 30604; and
2. Whether appellants' shisha distributions for the claim period are subject to the tobacco products excise tax.

FACTUAL FINDINGS

1. Appellants reported and paid tax to CDTFA on the distributions of shisha at issue in this appeal.
2. Shisha is a product containing molasses, flavorings, and tobacco.
3. Appellants' shisha contains less than 50 percent tobacco.
4. Shisha is heated and smoked in a particular type of water pipe known as a hookah.
5. Appellants filed separate claims for refund asserting that the distributions of shisha at issue in this appeal were not subject to the tobacco products excise tax. As a result, appellants argued that the tax paid to CDTFA should be refunded to appellants.
6. CDTFA denied appellants' claims for refund.
7. OTA held an electronic oral hearing on this matter on January 27, 2021. Subsequently, the original panel of three administrative law judges (Original Panel) found in favor of appellants and ordered the claims for refund to be granted in full (Original Opinion).
8. CDTFA filed a timely PFR.
9. On September 9, 2021, a majority of a new panel of three administrative law judges (PFR Panel), which comprised of two new members and one previous member of the Original Panel, decided to grant CDTFA's PFR.
10. This Opinion is now issued in response to the arguments and filings made on rehearing.

DISCUSSION

Issue 1: Whether there were grounds for granting the PFR in this appeal under Regulation section 30604.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that

occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (4) insufficient evidence to justify the written opinion; (5) the opinion is contrary to law; or (6) an error in law that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

Although CDTFA argues that there was an error of law, OTA understands that CDTFA is actually arguing that the Original Opinion was contrary to law.³ Specifically, CDTFA states that the statutory language at issue in this appeal is clear and unambiguous. As a result, the Original Panel's interpretation of the statutory language was incorrect and inconsistent with former R&TC section 30121(b). In addition, CDTFA states that the legislative intent and purpose of the former statute also align with CDTFA's interpretation of the statutory language. Finally, CDTFA argues that the Original Panel's interpretation of the former statute leads to an absurd result. For these reasons, CDTFA states that there were grounds for granting the PFR, which the PFR Panel did correctly.

Regulation section 30604(a)(5) provides that a rehearing may be granted if the opinion is contrary to law. To find that the opinion is contrary to law, OTA must determine whether the opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*)). This requires a review of the opinion to indulge "in all legitimate and reasonable inferences" to uphold the opinion. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P, citing *Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the opinion, but whether the opinion can or cannot be valid according to the law. (*Appeals of Swat-Fame Inc., et al., supra.*) In this review, the evidence must be examined in the light most favorable to the prevailing party, which is appellants. (See *Sanchez-Corea, supra*, 38 Cal.3d at p. 907.)

Here, there are no disputes as to the facts of the underlying appeal. Instead, the entire appeal focuses on how former R&TC section 30121(b) is to be interpreted. While OTA must

³ As discussed in the precedential Opinion of *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P, footnote 2, a "claim on a petition for rehearing that there was an error in law is a claim of *procedural* wrong." (Emphasis added.) CDTFA is not asserting any procedural errors with the Original Opinion. Instead, CDTFA is arguing that the Original Panel did not follow the plain language of the statute, which OTA interprets to mean that the Original Opinion was contrary to law.

determine whether the Original Opinion is supported by any substantial evidence, the relevant question is whether the Original Opinion can or cannot be valid according to the law. (See *Appeals of Swat-Fame Inc., et al., supra.*) Therefore, if the Original Opinion can be valid according to the law, then the PFR was improperly granted.

The statutory language at issue is the following: “‘Tobacco products’ includes, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50 percent, tobacco, but does not include cigarettes.” (Former R&TC, § 30121(b), added by initiative, Gen. Elec. (Nov. 8, 1988), commonly known as Prop. 99, § 4, eff. Jan. 1, 1989, and amended by initiative, Gen. Elec. (Nov. 8, 2016), commonly known as Prop. 56, § 3.1, eff. Apr. 1, 2017.) Although CDTFA argues that this statute is clear and unambiguous because the “50 percent” modifier should only apply to “other articles or products” that directly precedes the modifier, the Original Panel concluded that the statute was ambiguous. When reviewing the Original Opinion on a PFR, OTA must indulge in all legitimate and reasonable inferences to uphold the Original Opinion. (See *Appeals of Swat-Fame Inc., et al., supra.*) Thus, when examining the language at issue in light of this standard, OTA finds that the statutory language at issue is ambiguous. It cannot be stated with definite certainty that the 50 percent modifier can only be applied to the preceding item. Also, a backup letter to CDTFA’s Cigarette and Tobacco Products Tax Annotation (09/27/96) acknowledged this possibility. Furthermore, there is no defined rule on how this language must be interpreted, and OTA is unaware of any California Supreme Court or appellate court decision that dictates how this former R&TC statute is to be interpreted. Lastly, other than CDTFA’s interpretation and arguments regarding the language at issue, CDTFA did not provide any direct and binding authority on how this statutory language must be interpreted.

Based on the finding above that the language of former R&TC section 30121(b) is ambiguous and the lack of direct and binding authority on this issue, the Original Opinion cannot be found to be contrary to law. This was an issue of first impression. It is important to note that OTA’s role in a PFR is not one in which a new panel can re-evaluate the underlying appeal. Instead, Regulation section 30604 provides the only grounds in which a PFR can be granted. While the majority in the PFR Panel concluded that the Original Opinion was contrary to law, the majority based this conclusion on an independent analysis of the law. There was no finding of a directly controlling California Supreme Court or appellate court decision that rendered the

Original Opinion as being invalid according to the law. In other words, there was no discussion of whether the Original Opinion could or could not be valid. Instead, the majority of the PFR Panel relied upon their interpretation of former R&TC section 30121(b) when determining whether the Original Opinion was contrary to law. Therefore, the PFR Panel made an error in granting the PFR.

Lastly, OTA notes that all of the remaining arguments brought forth by CDTFA only reinforces the conclusion that the statutory language in former R&TC section 30121(b) is ambiguous. As stated by CDTFA, “if the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the voters.” (CDTFA’s PFR p. 3, citing *People v. Valencia* (2017) 3 Cal.5th 347, 357.) However, during the in-person rehearing and in its briefs, CDTFA stressed the importance of looking at the intent of the statute and the use of other canons of statutory construction, which would only be necessary if there was an initial finding that the language was ambiguous. Therefore, these arguments do not establish a ground for granting the rehearing.

Based on the foregoing, OTA finds that the Original Opinion can be valid according to the law, and CDTFA failed to establish that a ground for granting the rehearing exists in this appeal.

Issue 2: Whether appellants’ shisha distributions for the claim period are subject to the tobacco products excise tax.

Based on the conclusion above, this issue is moot because the conclusion fully resolves the appeal. An examination of the second issue would neither resolve the appeal nor provide any clarification as to the claims for refund at issue. Nonetheless, with respect to the second issue, this Panel would not have reached the same conclusions, holding, and disposition as the Original Panel. However, as stated above, the statutory language at issue is ambiguous, and the fact that this Panel or the PFR Panel concluded differently as to the merits of the substantive issue does not invalidate or make the Original Panel’s analysis and conclusion contrary to law.

HOLDINGS

1. There were no grounds for granting the PFR in this appeal under Regulation section 30604.
2. Issue 2 is moot in light of the holding in Issue 1.

DISPOSITION

CDTFA's actions denying appellants' claims for refund are reversed, and appellants' claims for refund are granted in full.

DocuSigned by:

Daniel Cho

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Daniel K. Cho
Administrative Law Judge

We concur:

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Natasha Ralston

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Natasha Ralston
Administrative Law Judge

DocuSigned by:

Andrea L.H. Long

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Andrea L.H. Long
Administrative Law Judge

Date Issued: 3/15/2023