OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18042567
	) CDTFA Case ID: 729474
HUKILAU, SAN FRANCISCO, LLC, dba Hukilau	) CDTFA Acct. No. 100-035105
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Eric Tao, LLC Member

For the Respondent: Kevin C. Hanks, Chief, Headquarters Operations Bureau

M. GEARY, Administrative Law Judge: On June 6, 2019, we issued an Opinion sustaining the action of respondent California Department of Tax and Fee Administration (Department), which reduced the measure of tax for unreported taxable sales from $1,596,360 to $784,804, deleted the negligence penalty, and otherwise denied appellant's petition for redetermination.

Pursuant to California Code of Regulations, title 18, section (Regulation) 30602, appellant filed a timely petition for rehearing (PFR). Upon consideration of the matters stated therein, we find that appellant has not established good cause for a new hearing. (*Appeal of Do* (2018-OTA-002P).)

Regulation 30604, subdivisions (a)-(e), provides that a rehearing may be granted where one of the following grounds exists and the rights of the complaining party are materially affected: (1) an irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; (2) an accident or surprise that occurred during the proceedings and prior to the issuance of the written opinion, which ordinary prudence could not have guarded against; (3) newly discovered, relevant evidence, which the party could not, with reasonable diligence, have discovered and produced prior to the issuance of the written opinion; (4) insufficient evidence to justify the written opinion, or the opinion is contrary to law; or (5) an

error in law during the proceedings. (*Appeal of Do*, *supra*.)

Appellant contends in its PFR that we erroneously allowed the Department to base its determination on only three months of point of sale (POS) data when 34 months of data was available. It also argues that our acceptance of the Department's determination based on such limited evidence resulted in an improper shift of the Department's burden to appellant. Appellant argues that it should be granted a rehearing to allow it an opportunity to present the other 31 months of "newly discovered" data and telephonic testimony from the witnesses whose written statements appellant submitted at hearing.[1] Appellant also disagrees with our acceptance of the Department's estimate that 30 percent of the self-consumption of food and taxable beverages was probably taxable beverages. Appellant states that it has recently discovered an employee manual that it will offer into evidence at a rehearing, along with additional testimony from LLC member Eric Tao, to prove that "the alcoholic self-consumption by employees was less than the 30% argued by the Department." We interpret these arguments to state that appellant seeks a rehearing on the grounds that (1) it has evidence, which is either newly discovered or should be deemed newly discovered; (2) there was insufficient evidence, to justify the Opinion; and (3) allowing the Department to base its determination on insufficient evidence constituted an improper shift of the burden of proof from the Department to appellant, which is contrary to law.

The Department opposed the petition, arguing that appellant has not shown that a rehearing is warranted on any grounds.

A claim of newly discovered evidence is generally regarded with distrust and disfavor; but such evidence may be deemed sufficient to warrant a new hearing if it is not primarily cumulative, would probably lead to a different result, and could not have been provided before issuance of the opinion. (See *Ulwelling v. Crown Coach Corp.* (1962) 206 Cal.App.2d 96, 127-128.

Appellant has failed to show that there is newly discovered evidence that warrants a rehearing. The POS data, even that for the months upon which the Department based its determination, are not newly discovered evidence. Appellant used some of this data at the hearing and now seeks to use all of it. The proposed telephonic testimony from the alleged witnesses who provided written but unsworn statements also are not newly discovered evidence,

[1] Appellant states that the additional data "should be considered newly discovered."

and there has been no showing that such testimony would be relevant, much less likely to lead to a different result. Appellant has not established that the alleged employee manual is newly discovered and that it could not, with reasonable diligence, have discovered and produced the manual prior to the issuance of the written opinion. Furthermore, appellant has not provided a copy of the manual or quoted any of its content, and, therefore, we cannot determine its relevance to, or potential impact on, the self-consumption issue. Finally, additional testimony from Mr. Tao is not newly discovered evidence. It appears at least likely that appellant, dissatisfied with the outcome of the hearing, simply wants an opportunity to present a different case. That is not the purpose of a petition for rehearing. We find that appellant has not established the existence of newly discovered evidence that warrants a rehearing.

We cannot grant a new hearing on the grounds of insufficient evidence unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that we clearly should have reached a different decision. (Code Civ. Proc., § 657.) We found the evidence sufficient to justify the Opinion, and appellant has not persuaded us otherwise by its PFR. We find that appellant has not shown that the evidence was insufficient to justify the Opinion.

Finally, we reject appellant's arguments that we improperly shifted the burden of proof from the Department to appellant. As stated in our Opinion, the Department's burden was to establish a reasonable and rational basis for its determination. It did that, and the burden shifted to appellant to establish a more accurate determination, which appellant did not do.

We conclude that appellant has not established any valid grounds for a new hearing. Consequently, we deny his petition.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

Date Issued: 1/2/2020