OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18032427
GOLDEN 7 LIQUOR & DELI, INC.	) CDTFA Case ID 792082
	) CDTFA Account No. 100-886151
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	Y. Feleke, President A. Sertsu, Vice-President
For Respondent:	Kevin C. Hanks, Chief, Headquarters Operations Bureau
For Office of Tax Appeals:	Richard Zellmer, Business Tax Specialist III

M. GEARY, Administrative Law Judge: On July 2, 2019, we issued an Opinion (the Opinion) sustaining the action of respondent California Department of Tax and Fee Administration (Department) partially denying appellant's petition for redetermination of the Department's Notice of Determination, which determined a liability under the California Sales and Use Tax Law consisting of a $64,297.00 tax, plus applicable interest, for the period January 1, 2009, through June 30, 2012 (liability period).[1]

Pursuant to the 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 grounds for a new hearing. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P.)

[1] Sales and use taxes (and other business taxes and fees) were formerly administered by the State Board of Equalization (BOE). In 2017, the California Legislature transferred functions of the BOE relevant to this case to the Department. (Gov. Code, § 15570.22.) The effective date of the transfer of all but adjudicatory functions was July 1, 2017. (Adjudicatory functions were transferred to the Office of Tax Appeals effective January 1, 2018.) For ease of reference, when referring to events that occurred before July 1, 2017, "Department" shall refer to the BOE.

Regulation 30604(a)-(e) provides that a rehearing may be granted where one or more 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. (See also *Appeal of Do*, *supra*.)

Appellant appears to argue in its PFR that our finding that the ratio of appellant's taxable sales to total sales was 38.79 percent and the ratio of appellant's nontaxable sales to total sales was 61.21 percent is not supported by sufficient evidence or is contrary to law, and that the error materially affected its rights. Appellant asserts the ratios of taxable sales and nontaxable sales to total sales referred to in Finding of Fact number 3 of the Opinion are wrong. Appellant does not dispute the Department's determination of appellant's total sales ($3,197,226), taxable sales ($1,240,320), or nontaxable sales ($1,956,906) for the liability period. Rather, it asserts that its nontaxable sales must be broken down into four categories, sales tax included in reported gross sales ($113,760), cigarette tax ($9,312), lottery sales ($422,741), and other nontaxable merchandise sales ($1,411,093), and that the taxable/nontaxable ratios must be calculated using only the other non-taxable merchandise sales of $1,411,093. Appellant contends that the correct ratios are 47 percent[2] taxable (as compared to the taxable sales ratio of 38.79 percent found in the Opinion), and 53 percent[3] nontaxable (as compared to the 61.21 percent non-taxable sales ratio found in the Opinion).

Respondent argues that the record on appeal fully supports the Opinion and that appellant has not established any grounds for a rehearing.

A PFR on the grounds of insufficient evidence should be granted only when, 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.) Likewise, a PFR on the ground that our decision was contrary to law cannot be granted unless we

[2] $1,240,320 + $1,411,093 = $2,651,413. $1,240,320 ÷ $2,651,413 = 47 percent.

[3] $1,240,320 + $1,411,093 = $2,651,413. $1,411,093 ÷ $2,651,413 = 53 percent.

conclude that our disposition was erroneous as a matter of law. (*Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 323.)

Initially, we note that appellant's factual contentions in its PFR find no support in the record. There is no evidence in the hearing record of $113,760 in sales tax reimbursement included in reported gross sales (other than appellant's report on its returns), $9,312 for cigarette tax, lottery sales of $422,741, or $1,411,093 for other nontaxable merchandise sales.[4] Furthermore, appellant's assertion that its lottery sales were $422,741 for the liability period is inconsistent with what is contained on the Department's schedules, which amounts are attributed to the California Lottery Commission.[5] Ultimately, though, appellant's arguments fail because none of these amounts were used by the Department to calculate the liability.

In essence, appellant's PFR reflects its disagreement with our Finding of Fact Number 3, which simply states, "Appellant reported total sales during the audit period of $3,197,226, taxable sales of $1,240,320 (38.79 percent of total sales), and nontaxable sales of $1,956,906 (61.21 percent of total sales)." Appellant appears to be under the impression that the deficiency was based on the ratio of taxable and/or nontaxable sales to total sales. It was not. As explained above, and in more detail in the Opinion, the Department used a weighted markup method, which did not involve taxable or nontaxable sales ratios. The Department used information provided by appellant to compute a weighted markup and then applied that markup to information also provided by appellant regarding its purchase of taxable merchandise. Thus, even if appellant could support the ratios that it has calculated, doing so would not require a different disposition of the appeal, and appellant has not made and supported any other argument that would lead us to a more accurate determination of its liability. Therefore, we conclude that

[4] Even if appellant had offered evidence of these amounts in support of its PFR, it is highly unlikely that it would constitute "newly discovered evidence" pursuant to Regulation 30604(c).

[5] According to the revised audit work papers, the California State Lottery Commission's report indicated lottery and scratcher sales during the audit period totaling $294,137.

the findings of fact are adequately supported by the record, and that appellant has not shown that the disposition is erroneous as a matter of law. We find that appellant has failed to establish grounds for a rehearing and, therefore, we deny the PFR.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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John O. Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

Date Issued: 3/19/2020