OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011855
	) CDTFA Account No. 100-316099
24HOURSPC.COM, INC.	) CDTFA Case ID 803446
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Dean Lloyd, Attorney

For Respondent: Mengjun He, Tax Counsel III

A. WONG, Administrative Law Judge: On February 27, 2020, the Office of Tax Appeals (OTA) issued an opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) on a petition for redetermination filed by 24HoursPC.com, Inc. (appellant). CDTFA's decision reduced the determined tax liability from $78,276.07 to $68,578.96 and the proposed negligence penalty from $7,827.70 to $6,857.95, and otherwise denied appellant's petition for redetermination. Appellant files a timely petition for rehearing (PFR). We conclude that the grounds set forth in appellant's PFR do not establish a basis for granting a rehearing.

A rehearing may be granted where at least one of the following grounds exists and materially affects the substantial rights of the party seeking a rehearing: (a) an irregularity in the appeal proceedings which occurred prior to issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Cal. Code Regs., tit. 18, § 30604(a)-(e).)

In its PFR, appellant offers four grounds for a rehearing. First, appellant alludes to an irregularity in the appeals proceeding, but fails to clearly identify what that irregularity was.[1] Second, appellant asserts that our written opinion is not supported by sufficient evidence (and, third, may be contrary to law),[2] but fails to elaborate beyond this bare assertion.[3] Lastly, appellant contends that it discovered new, relevant evidence of nontaxable out-of-state sales in the form of emailed order confirmations, shipping updates, and delivery notices (all showing that merchandise appellant had purchased was shipped to locations outside of California), as well as American Express credit card statements (allegedly showing that appellant was conducting business outside of California).[4]

We have addressed appellant's first, second, and third grounds for rehearing in footnotes.[5] For the balance of this opinion, we focus on appellant's last alleged ground for rehearing, newly discovered, relevant evidence.

A party seeking a rehearing based on newly discovered, relevant evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence materially affects the substantial rights of the

[1] In its PFR, appellant alleges that CDTFA lost documentation (including a truck travel logbook) that purportedly evidenced appellant's out-of-state sales and supported adjustments to its liability. We surmise that this is the irregularity to which appellant may be alluding. However, this loss of documentation allegedly took place during CDTFA's audit and not *in* (i.e., during) OTA's appeal proceedings. (See Cal. Code Regs., tit. 18, § 30604(a).) Further, this argument repeats one that we have already addressed and rejected in our written opinion issued on February 27, 2020. Appellant's dissatisfaction with the outcome of its appeal and attempt to reargue an issue that we have already considered and decided are not grounds for a rehearing. (*Appeal of Smith*, 2018-OTA-154P.) Accordingly, we will not address this argument, or the "irregularity" ground for rehearing, any further.

[2] We include "contrary to law" in parentheses because we are uncertain as to whether appellant is asserting it as a ground for rehearing. In its PFR, appellant appears to conflate the insufficiency of evidence with "contrary to law" when these are actually two separate grounds for rehearing. (See *Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 382-383 [the insufficiency of evidence and "against the law" grounds are stated in the disjunctive and are objections of an entirely different order].) Regardless, both grounds fail to justify a rehearing. (*Post*, fn. 3.)

[3] Every PFR must contain facts and argument explaining why the filing party believes there are grounds for rehearing. (Cal. Code Regs., tit. 18, § 30603(e).) Here, appellant's PFR lacks any facts or argument specific to its assertion that insufficient evidence justifies our written opinion (or that our opinion was contrary to law). In the absence of specific facts, argument, or an explanation, we cannot and will not address appellant's bare assertion regarding these two grounds for rehearing.

[4] With its PFR, appellant also submits its federal income tax returns (FITRs) for 2010, 2011, and 2012 to show that it reported to the Internal Revenue Service $1,432,594 in total sales for those years. This is not disputed, so we will not address these FITRs further.

[5] See footnotes 1 and 3, *ante*.

party. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.)[6] Newly discovered evidence is looked upon with suspicion and disfavor, and the party must make a strong showing of the necessary requirements to support a petition for rehearing on this ground. (See *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138.)

Newly Discovered Evidence

Evidence is "newly discovered" if it was not known or accessible to the party seeking rehearing prior to the issuance of the written opinion. (See *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) Evidence that, under the circumstances, must have been known to the party seeking rehearing prior to issuance of the written opinion may not be regarded as "newly discovered." (See *ibid*.)

Here, the emailed order confirmations, shipping updates, and delivery notices submitted with appellant's PFR were sent to the email address of T. Lee, a 50-percent shareholder of appellant. During CDTFA's audit and the ensuing appeals before CDTFA's Appeals Bureau and OTA, appellant had submitted similar documentation, as well as other emails, sent to this same email address. This indicates that the emailed documents submitted with appellant's PFR were accessible to appellant prior to the issuance of the written opinion in this appeal. Regarding the American Express credit card statements submitted with appellant's PFR, during OTA's briefing process, appellant had submitted other American Express credit card statements, which were for the same account as the allegedly newly discovered statements submitted with its PFR. Because both the previously submitted credit card statements and the allegedly newly discovered credit card statements were for the same American Express credit card account, appellant must have known of or had access to the allegedly newly discovered statements prior to the issuance of our written opinion. Accordingly, because the documents submitted with appellant's PFR were either accessible or already known to appellant prior to the issuance of the written opinion in this case, they do not qualify as newly discovered evidence.

[6] Since California Code of Regulations, title 18, section 30604 is based upon Code of Civil Procedure section 657, we find case law pertaining to its operation, as well as the language of the statute itself, to be relevant guidance in interpreting this regulation. (See *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654; see also *Appeal of Do*, 2018-OTA-002P.)

Reasonable Diligence

A PFR will be denied when (a) the newly discovered evidence could have been produced by the exercise of reasonable diligence, (b) the party seeking rehearing has not shown due diligence in discovering and producing the newly discovered evidence, or (c) no reason is shown for why the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the written opinion. (See *Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208.)

A rehearing is properly denied where the newly discovered evidence was available and could have been produced prior to issuance of the written opinion. (See *Jones v. Green* (1946) 74 Cal.App.2d 223, 232.) A party seeking a rehearing based on newly discovered evidence must show that it exercised reasonable diligence in discovering and producing it. (See *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th 1500, 1506.) The very strictest showing of diligence is required. (See *Shivers v. Palmers* (1943) 59 Cal.App.2d 572, 576.) A general averment of diligence is insufficient. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 154.) The party seeking rehearing must specify the particular acts or circumstances that establish diligence. (See *ibid*.)

Here, appellant had previously submitted documents that were either sent to the same email account or came from the same credit card company as the "newly discovered" documents it had submitted with its PFR. Because the respective sources of these documents were identical, we find that, not only were these documents *not* "newly discovered," but were also available to appellant and could have been produced prior to the issuance of the written opinion on February 27, 2020, had appellant exercised reasonable diligence. Additionally, in its PFR, appellant fails to specify any particular acts or circumstances establishing its diligence in discovering and producing the documents submitted with its PFR. Therefore, we conclude that appellant has failed to exercise reasonable diligence in discovering and producing the documents it submitted with its PFR.

Materiality

A party seeking a rehearing based on newly discovered, relevant evidence must show that the evidence materially affects the substantial rights of the party. (Cal. Code Regs., tit. 18, § 30604; see also *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th 1500, 1506 [party

seeking rehearing based on newly discovered evidence must show the evidence is material to party's case].) "Material" means likely to produce a different result. (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.)

Here, appellant has not shown how the emailed order confirmations, shipping updates, and delivery notices submitted with its PFR would likely produce a different result. Specifically, appellant has failed to show how the purchases evidenced by these documents were not already part of the $372,924 cost of merchandise used in the reaudit computations of audited nontaxable out-of-state sales. Appellant has also not shown how the out-of-state activities evidenced by its American Express credit card statements prove that appellant ceased making sales in California. Accordingly, we find that the documents appellant submitted with its PFR are not likely to produce a different result and, thus, do not materially affect appellant's substantial rights.

Appellant has failed to show that the documents submitted with its PFR are newly discovered, that it exercised reasonable diligence in discovering and producing these documents, or that they materially affect its substantial rights. Failure to show any of these three requirements is sufficient to deny appellant's petition for rehearing on the basis of newly discovered, relevant evidence—appellant has failed to show all three. Accordingly, we conclude that a rehearing on the "newly discovered, relevant evidence" ground is not warranted.

Appellant has not established the existence of any grounds for a rehearing; thus, appellant's PFR is denied.

DocuSigned by:
8A4294817A67463...
Andrew Wong
Administrative Law Judge

We concur:

DocuSigned by:
Nguyen Dang
4D46597 3EB44469...
Nguyen Dang
Administrative Law Judge

DocuSigned by:
Josh Lambert
B90E40A720E3440...
Josh Lambert
Administrative Law Judge

Date Issued: 7/13/2020