

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
MEHARRA JEWELLERS, INC.

) OTA Case No. 18073423
) CDTFA Account No. 101-583643
) CDTFA Case ID 846918
)
)
)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jack Iyer, Accountant

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: On April 21, 2020, we issued an Opinion in this matter. The Opinion sustained an action by respondent California Department of Tax and Fee Administration reducing the amount of disallowed claimed exempt sales of bullion from \$1,161,197 to \$720,983, deleting a \$165,597 measure for disallowed claimed returned taxable merchandise, deleting the negligence penalty, and otherwise denying appellant's petition for redetermination of the Notice of Determination (NOD) issued on September 8, 2014, for the period May 2, 2010, through September 30, 2013 (liability period). 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 grounds for a new hearing.¹ (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P.)

Regulation 30604 provides that a rehearing may be granted where any of the five stated grounds exist and the rights of the complaining party are materially affected. (See also *Appeal of Do, supra*.) As relevant here, one of those grounds is that there was an error in law. (Regulation 30604(e).) As explained below, appellant alleges that the Office of Tax Appeals

¹ Because Judge Jeffrey G. Angeja, who was a member of the panel that signed the Opinion, is not available to consider this PFR, Judge Natasha Ralston will take Judge Angeja's place.

(OTA) erroneously excluded evidence at the hearing and that its rights were materially affected, which constituted an error in law.²

To put this matter in the proper perspective, a brief procedural summary is required. On July 11, 2018, soon after appellant filed its appeal, OTA sent appellant a letter, which stated, in part, that appellant must submit the documents upon which it relied within thirty days. That letter also informed appellant that evidence previously provided to respondent would not become part of OTA's record unless a party timely provided them to OTA. Prior to the hearing, appellant provided approximately 35 pages of invoice copies. Just a few weeks before the hearing, on January 8, 2020, and again on January 10, 2020, OTA convened duly noticed, telephonic prehearing conferences (PHCs) in this matter.³ As noted in Regulation 30210, among the matters typically discussed at a PHC are evidence and objections to evidence. The same regulation provides that if a party expects to offer into evidence documents that have not already been provided to OTA and the opposing party, those documents should be provided no later than three days before the conference. (Cal. Code Regs., tit. 18, § 30210(g).) Appellant provided no additional documents to OTA or respondent prior to the scheduled PHCs. Respondent called in to participate in both PHCs. Appellant failed to participate on either occasion. Following the attempted PHCs, OTA issued its PHC Minutes and Orders to the parties directing them to deliver copies of their proposed evidence to OTA and the opposing party at least 15 days before the hearing. (Cal. Code Regs., tit. 18, § 30420(a).) Respondent timely provided its proposed evidence. Appellant provided no additional evidence before the hearing.

Appellant appeared at the hearing through its representative, indicating that it would not be calling any witnesses to testify. In addition to the invoice copies, appellant offered for admission approximately 22 pages of documents, including calculations and schedules, which it had not previously provided to OTA. Appellant claimed that some of the documents were simply copies of the respondent's schedules and that all of the information contained on the documents had been provided to respondent during the audit or during respondent's internal appeal process. Respondent objected to the admission of the new proposed evidence on various

² Although the PFR refers to "new evidence" as if appellant bases its PFR in part on newly discovered evidence, which could lead OTA to a different result at a rehearing (see Regulation 30604(c)), there is no newly discovered evidence, as we note below.

³ The second PHC was scheduled because appellant failed to participate in the first PHC. The date and time of the second PHC were cleared with both parties and confirmed by email.

grounds. It argued that, contrary to appellant's representations, only one of the documents was an accurate copy of one of respondent's audit work papers, and that there were no source documents to show the accuracy of the information contained on the other proposed evidence. Ultimately, appellant explained that it had prepared all but one page of the documents to illustrate what appellant asserted was the correct calculation of its liability. After considerable discussion, OTA admitted the 35 pages of invoices and the one additional page that the parties agreed was an accurate copy of one of respondent's audit schedules. The other 21 pages were not admitted into evidence, but OTA informed the parties that the exclusion of the documents would not prevent appellant from using the content of the documents at the hearing by reading from or otherwise referring to the content of any of the excluded pages as part of its argument.

Appellant argues in its PFR that it is entitled to a rehearing because there was an error of law, that error being our refusal to admit the 21 pages of documents offered by appellant to support its position, documents that allegedly had been previously provided to respondent, though in a different format. Appellant asserts that the exclusion of this "evidence" materially affected appellant's right to a fair hearing, and that the excluded documents will be the "new evidence" appellant will offer at the rehearing.

Respondent argues that the PFR does not establish any grounds for a rehearing.

To the extent appellant contends that the excluded documents constitute newly discovered evidence upon which a petition for rehearing can be based (see Regulation 30604(c)), which is what the PFR at least suggests, appellant is mistaken. The excluded documents cannot be "newly discovered evidence." The alleged evidence consisted of documents that were offered by appellant and rejected by OTA. Consequently, the sole grounds for a rehearing is the alleged erroneous exclusion of the documents referred to above.

Appellant failed to comply with the OTA's Rules for Tax Appeals.⁴ It failed to participate in two PHCs, which would have provided a forum for a discussion of the evidence that appellant planned to offer at the hearing. (See Regulation 30210(f).) Appellant failed to provide copies of the excluded evidence at least three days before the scheduled conferences. (See Regulation 30210(g).) Appellant failed to provide its additional evidence before the hearing in violation of OTA's PHC Minutes and Orders. Finally, appellant inaccurately described most of the proposed evidence while arguing for its admission at the hearing. To the extent the

⁴ See Regulations 30000, through 30707, inclusive.

evidence was excluded because of appellant's apparent disregard for OTA's Rules for Tax Appeals, such exclusion was warranted and allowable. (Cal. Code. Regs., tit. 18, § 30213(j).) But that was not the only basis for exclusion.

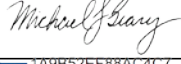
The documents that appellant offered into evidence had no tendency in reason to prove or disprove any disputed fact that was of consequence to our determination of the appeal. (Cal. Code Regs, tit. 18, §§30102(s).) According to appellant's description, and consistent with our own analysis, the documents illustrated appellant's calculations that appeared to have been in response to the original audit. During the appeals conference that occurred as part of respondent's internal appeals process and before issuance of respondent's Decision, which appellant appealed to OTA, the parties agreed to abandon the less reliable methodology used in the original audit and instead establish disallowed claimed exempt sales of bullion using a markup method. Respondent completed the reaudit as agreed, and the appealed redetermination is based on the findings of that reaudit. We found in the Opinion that respondent correctly calculated the deficiency in the reaudit, which resulted in a \$440,214 reduction of the measure of disallowed claimed exempt sales of bullion. The excluded evidence does not show that respondent's reaudit determination was wrong. It does not address the agreed-upon methodology or reaudit results at all. Instead, appellant's argument, and the excluded documents, continued to focus on the original audit, which both parties agreed to abandon. And given appellant's failure to offer testimony or other evidence to establish the accuracy of appellant's calculations, which are allegedly illustrated by the excluded documents, we are not persuaded the excluded documents had any relevance to the issue presented. But these are not the only reasons why we must conclude that appellant has failed to establish a single ground for its PFR.

In order to prevail on its PFR, appellant must show not only that our exclusion of the documents was error, but also that the exclusion materially affected its rights. As stated above, appellant was informed that, while the documents were not going to be admitted into evidence, it could read from or otherwise refer to the documents or their content. Appellant did refer to at least one of the excluded pages, and there was nothing to prevent appellant from referring to the entire content of the excluded pages.⁵ In other words, appellant created the documents to


⁵The bulk of appellant's argument focused on the invoices, which, appellant argued, showed that respondent miscalculated the deficiency. However, the panel found the invoices did not establish either an error in respondent's reaudit or a more accurate measure

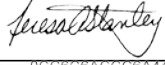
illustrate what it asserted was the correct calculation of the deficiency, and the order excluding the documents as evidence did not prevent appellant from using the content of the documents for that purpose. Appellant chose not to do that.

We find that appellant has not established grounds for a new hearing. The PFR is therefor denied.

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Michael F. Geary
Administrative Law Judge

We concur:

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Natasha Ralston
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge

Date Issued: 10/8/2020