OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18083656
	) CDTFA Case ID 0-000-165-868
Y. WUHIB	)
dba Liquorette	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Arnold Blanshard, CPA

For Respondent: Jason Parker, Chief of Headquarters Ops.

A. WONG, Administrative Law Judge: On July 21, 2020, the Office of Tax Appeals (OTA) issued an Opinion sustaining a Second Supplemental Decision (decision) issued by respondent California Department of Tax and Fee Administration (CDTFA) on a petition for redetermination filed by Y. Wuhib (appellant), dba Liquorette. CDTFA's decision reduced the determined tax liability for the period July 1, 2008, through June 30, 2011 (audit period), from $77,806.90 to $72,179.43, and otherwise denied appellant's petition for redetermination. On August 20, 2020, appellant filed 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 when 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 his PFR, appellant offers two grounds for a rehearing. First, appellant contends that, during the audit of his liquor store, the sample months CDTFA selected for its purchase segregation test were abnormal months in terms of purchases (i.e., nontaxable purchases were abnormally low),[1] thereby skewing the purchase segregation test and artificially inflating the ratio of taxable purchases to total purchases and, ultimately, unreported taxable sales. Appellant's first argument repeats one that we have already addressed and rejected in our July 21, 2020 Opinion, so we need not address it here. Appellant's dissatisfaction with the outcome of his appeal and attempt to reargue an issue that we have already considered and decided are not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Second, appellant contends that he acquired additional evidence that audited unreported taxable sales were overstated: three 1099-MISC (*Miscellaneous Income*) forms (1099 forms) issued by the California State Lottery to appellant for tax years 2009, 2010, and 2011. Specifically, appellant contends that CDTFA failed to account for commissions received from the California State Lottery (evidenced by the 1099 forms) when calculating the taxable merchandise purchase ratio (i.e., the ratio of taxable merchandise purchases to total purchases).[2] Appellant alleges that the lottery commissions would lower the taxable merchandise purchase ratio and, in turn, reduce audited unreported taxable sales. Here, we surmise that appellant seeks a rehearing on the ground of newly discovered, relevant evidence.

In response, CDTFA contends that appellant's 1099 forms are neither newly discovered nor relevant. CDTFA contends that the 1099 forms are not newly discovered because they are appellant's own records, which he could have provided at any time prior to the June 17, 2020 oral hearing or the issuance of the July 21, 2020 Opinion. CDTFA further contends that the 1099 forms are irrelevant because lottery tickets are not a class or category of merchandise purchases that factored into the mark-up method, the audit method CDTFA used to calculate appellant's audited unreported taxable sales.

[1] In a purchase segregation test, a tester schedules merchandise purchases in various product categories (such as beer, wine, liquor, soda, cigarettes, newspapers and magazines, and "other" taxable merchandise) in order to compute the percentage of taxable merchandise purchases, as well as the percentages of merchandise in each category.

[2] Appellant also asserted that he received commissions for "[c]igarette and money gram," but conceded that he could not locate documentation for these.

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 party. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.)[3] 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 PFR 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 within the knowledge of the party seeking a rehearing before the action was begun, while the case was pending, or which, 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 1099 forms issued by the California State Lottery to appellant at his address of record were for tax years 2009, 2010, and 2011. This suggests that the 1099 forms were known and accessible to appellant long before we issued the written Opinion in this appeal on July 21, 2020. Further, appellant fails to establish that the 1099 forms were unknown or inaccessible to him from when they were issued through July 21, 2020. Accordingly, we find that appellant must have known of, or had access to, the 1099 forms prior to the issuance of our written Opinion and conclude that they do not qualify as newly discovered evidence.

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

[3] 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) 1595 WL 1320; see also *Appeal of Do*, 2018-OTA-002P.)

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, in his PFR, appellant fails to specify what acts or circumstances establish his diligence in discovering and producing the 1099 forms submitted with his PFR. Therefore, we conclude that appellant has failed to show diligence in discovering and producing the 1099 forms submitted with his 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's 1099 forms evidence commissions received from the California State Lottery for tax years 2009 through 2011 for lottery ticket sales. The audit method used by CDTFA to calculate audited unreported taxable sales in this appeal—the markup method—essentially involved four steps: (1) conducting a purchase segregation test and calculating a taxable merchandise purchase ratio; (2) applying that ratio to the cost of goods sold to calculate the cost of taxable goods sold; (3) adding an audited markup to the cost of taxable goods sold to establish audited taxable sales; and then (4) subtracting reported taxable sales from audited taxable sales to arrive at audited unreported taxable sales. Our review of the audit working papers confirms that lottery commissions were *not* a factor in CDTFA's audit method, including

in the purchase segregation test or as a component of the cost of goods sold. Accordingly, appellant's 1099 forms would not change the result of CDTFA's audit and are therefore immaterial.

Appellant has failed to show that the 1099 forms submitted with his PFR are newly discovered, that he exercised reasonable diligence in discovering and producing the 1099 forms, or that the 1099 forms materially affect his substantial rights. Failure to show any of these three requirements is sufficient to deny appellant's PFR 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.

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Andrew Wong
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

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Michael F. Geary
Administrative Law Judge

Date Issued: 1/25/2021