OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19054829
	) CDTFA Case ID 930797
EAST LA AUTO, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	James L. Andion, Attorney
For Respondent:	Randolph (Randy) Suazo, Hearing Representative Jason Parker, Chief of Headquarters Operations Christopher Brooks, Tax Counsel IV
For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: On February 1, 2021, the Office of Tax Appeals (OTA) issued an Opinion in which it sustained a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by East LA Auto, Inc. (appellant). CDTFA's decision reduced the understated measure of tax from $2,559,916 to $2,512,116; deleted the negligence penalty; and otherwise denied appellant's petition for redetermination of CDTFA's Notice of Determination for $229,576.10 in tax, a 10-percent negligence penalty, plus applicable interest, for the period December 1, 2012, through March 31, 2015 (audit period). Appellant filed a timely petition for rehearing (PFR) on March 1, 2021. We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

California Code of Regulations, title 18, (Regulation) section 30604(a) provides that a rehearing may be granted where one of the following grounds exists and the substantial rights of the complaining party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the

issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding.[1] (See also *Martinez Steel Corporation*, 2020-OTA-074P and *Appeal of Do*, 2018-OTA-002P.)

Appellant contends that a rehearing should be granted based on the following five grounds: (1) there was an irregularity in the CDTFA appeals conference process, which occurred prior to the issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion; (3) newly discovered, relevant evidence which appellant could not have reasonably discovered and provided prior to the issuance of the Opinion; (4) insufficient evidence to justify the Opinion; and (5) an error of law. We address each contention below.

Appellant argues that there was an irregularity in the CDTFA appeals conference process because the appeals conference holder permitted CDTFA's Business Tax and Fee Division to produce evidence after the CDTFA appeals conference without disclosing it to appellant, which deprived appellant of its due process rights.[2] Upon review of the record, the evidence demonstrates that appellant or its representative was aware of CDTFA's use of the Consumer Motor Vehicle Recovery Corporation (CMVRC) reports, but ultimately sat on its rights to either provide additional evidence or conduct further discovery during the CDTFA appeal.[3] Nonetheless, OTA lacks jurisdiction to determine whether appellant is entitled to a remedy for CDTFA's actual or alleged violation of a substantive or procedural right to due process in connection with the CDTFA appeals conference. (Cal. Code Regs., tit. 18, § 30104(d), (d)(1).) Furthermore, Regulation section 30604(a)(1) provides grounds for a rehearing when an irregularity in the proceedings by which the party was prevented from having a fair consideration

[1] Regulation section 30604 was revised to its current form effective March 1, 2021.

[2] Appellant cited to the prior version of our regulations in its briefing. We updated the references to the current version of our regulations for clarity.

[3] In appellant's request for appeal, appellant argued that "it believes the reliance on the records provide[d] by the California Department of Motor vehicles is incorrect." In appellant's opening brief, "The CDTFA is relying on the records provided by the California Department of Motor Vehicle." In CDTFA's decision, the author notes that "[Appellant] continues to dispute unreported taxable sales of $2,431,669 based on vehicles included in the CMVRC fee reports." Likewise, CDTFA noted in its August 15, 2019 brief that appellant objects to CDTFA's use of information, namely the CMVRC reports, obtained from DMV to calculate audited understated taxable sales because appellant is unable to verify if the information is correct and accurate.

of its case before OTA. Appellant has not provided authority to support the application of OTA's regulations to CDTFA's internal appeals process. We also note that Regulation section 30104(d) limits OTA's jurisdiction to proceedings before OTA, not the underlying appeals process at CDTFA. We, therefore, find that appellant has not established grounds for a rehearing based on CDTFA's alleged or actual due process violations during CDTFA's appeals process.

Pursuant to Regulation section 30604(a)(2), appellant argues that appellant did not know that its former representative's certified public accountant (CPA) license was suspended by the California Board of Accountancy (CBA) for the period June 17, 2020, through December 16, 2020, which constitutes an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented. Appellant also argues that since the former representative's license was suspended by CBA appellant received ineffective assistance in violation of its due process.

With respect to representatives, there is no right to a licensed CPA. Rather, OTA's Rules for Tax Appeals provides in Regulation section 30211(a) that a party may be represented in an appeal by any authorized person or persons, at least 18 years of age, of the party's choosing. Generally, an appellant is the authorizing entity or individual. The only prohibition on representation in OTA's Rules for Tax Appeals are those representatives who are suspended or disbarred according to Regulation section 30211(e), but appellant did not argue or provide evidence that appellant's former representative was prohibited from representing appellant based on Regulation section 30211(e).

Appellant also has not shown how the purported surprise or suspended license materially affected the outcome of the appeal. Based on the foregoing reasons, we find that appellant did not establish grounds for a rehearing under Regulation section 30604(a)(2) based on the CPA license status of appellant's former representative or the surprise associated with the representative's license suspension.

Under Regulation section 30604(a)(3), appellant argues that it has newly discovered, relevant evidence, which appellant could not have reasonably discovered and provided prior to the issuance of the Opinion. Specifically, the Access Financial printout (Access Report) for the

period December 1, 2012, through May 31, 2015, was attached to the PFR at Exhibit A.[4] Evidence is "newly discovered" if it was not known to the party seeking a 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, appellant argues that it could not have reasonably discovered and provided the Access Report prior to the issuance of the Opinion. Nonetheless, appellant has not substantiated that argument with facts, statements, or otherwise explained why, with reasonable diligence, it was unable to produce the Access Report prior to the issuance of the written Opinion. We also note that the Access Report appears to be in response to CDTFA's argument during the hearing. (See Transcript at pp. 37, 38.) Prior to the issuance of the Opinion, appellant did not request an additional opportunity to obtain or submit the Access Report. As such, we find that appellant did not establish grounds for a rehearing under Regulation section 30604(a)(3).

Appellant argues that CDTFA wrongfully relied on the CMVRC reports. Appellant does not specifically tie this argument to one of the six grounds in Regulation section 30604(a); rather appellant argues that CDTFA has no authority to rely on CMVRC reports to determine the taxable sales of appellant. Appellant also asserts that the CMVRC was not qualified as an expert under the California Evidence Code. We note, however, that appellant made no objections to the admission of the evidence during the pre-hearing conference or during the hearing; thereby waiving the right to object. (Cal. Code Regs., tit. 18, § 30214(f); see also Evid. Code, § 353, *People v. Polk* (2010) 190 Cal.App.4th 1183, and *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253.) To the extent that this argument was intended to fall under Regulation section 30604(a)(4), we address it below.

Pursuant to Regulation section 30604(a)(4), appellant argues that there is insufficient evidence to support the Opinion's conclusions. In support of its arguments, appellant takes exception to the underlying appeals process at CDTFA by claiming that CDTFA reached its conclusions without any evidence of the actual sales made by appellant during the audit. And, that CDTFA relied on an unqualified and unauthorized private company, CMVRC, to "guess" or

[4] Appellant describes the Access Report to be "a detailed printout by Access Financial ("Access") of buy-backs by Access during the audit period. That is, Access analyzed its data and printed a report that shows Access, between December 1, 2012, and May 31, 2015, required Appellant to pay Access the amount of $145,291.46 to reconvey to Appellant [its] customers' promissory notes, related certificates of ownership ("pink slips") contracts and other documents."

"estimate" the amount of appellant's sales. Appellant also argues that the best evidence rule applies in this case; and, that CDTFA should have sought and used the best evidence, which was the exact sales prices as available to Department of Motor Vehicles (DMV) and CDTFA.

We note, as previously discussed, our jurisdiction does not include remedying the alleged due process violations that occurred during the underlying appeals process at CDTFA. (Cal. Code Regs., tit. 18, § 30104(d).) While Regulation section 30214(f)(4) permits panel members to utilize the California Rules of Evidence when evaluating the weight to give evidence, the rules of evidence are not controlling with respect to the admission of evidence in appeals before OTA. (Cal. Code Regs., tit. 18, § 30214(e)(4).) We, therefore, find that appellant failed to establish grounds for a rehearing under Regulation section 30604(a)(4) for insufficient evidence.

Pursuant to Regulation section 30604(a)(5) or (6), appellant argues that there was an error of law in the appeals hearing or proceeding because OTA applied Regulation section 1642(f), which is invalid.[5] In its argument, appellant noted that only a court can declare a quasi-legislative regulation, such as Regulation section 1642, to be invalid. We do not have jurisdiction to determine whether a promulgated regulation is invalid because OTA is an independent appeals body, not a court. (*Appeal of Talavera*, 2020-OTA-022P.) Since we do not have the jurisdiction to invalidate Regulation section 1642, the Opinion was not contrary to law for applying that regulation. Thus, appellant has failed to establish grounds for a rehearing pursuant to Regulation section 30604(a)(5) or (6).

Appellant argues that the DMV's destruction of appellant's records constitutes a taking within the meaning of the U.S. Constitution and the California State Constitution; therefore, it was an error for OTA to conclude that "Appellant did not provide records that are typically maintained by a used car dealer, such as a general ledger, sales journals, purchase journals, sales contracts, DMV Report of Sale forms, or dealer jackets." We note that OTA does not have jurisdiction to address a purported constitutional taking by the DMV under Regulation section 30104(d) and (f). Nonetheless, we find that the alleged or actual taking by DMV, of appellant's records, is not one of the enumerated grounds for granting a PFR.

Appellant argues that, but for the destruction by DMV of virtually all of appellant's vehicle sales records, it would have been able to provide additional documentation to support its

[5] This ground for a rehearing would actually be on the basis of "contrary to law" (which pertains to the legal analysis). The ground for error in law pertains to an error during the proceeding (other than the analysis in the Opinion), such as the erroneous admission of evidence. (Cal. Code Regs., tit. 18, § 30604(b).)

tax returns. Therefore, appellant argues that it was excused from performing (i.e., record retention and production). Appellant also argues that the DMV's failure to retain evidence which could have played a significant role in the appellant's defense resulted in a due process violation of appellant's rights. In support, appellant cites to *People v. Alvarez* (2014) 229 Cal.App.4th [761], *California vs. Trobetta* (1984) 467 U.S. 479, *Brady v. Maryland* (1963) 373 U.S. 83, and *Arizona v. Youngblood* (1988) 488 U.S. 51. The cases cited deal with due process issues, but as previously indicated, OTA's limited jurisdiction does not include providing a remedy for alleged or actual due process violations of another agency. (See Cal. Code Regs., tit. 18, § 30104.) We, therefore, find that appellant's theory of excused performance is not grounds for granting a PFR.

In summary, appellant has not established any grounds for a rehearing; thus, appellant's PFR is denied.

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Josh Aldrich
Administrative Law Judge

We concur:

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Andrew J. Kwee
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