OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19085140) CDTFA Case ID 997820
POLANI FINANCIALS & INVESTMENTS CORP. dba SHALIMAR RESTAURANT SUNNYVALE	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	Mo Polani, President
For Respondent:	Jarrett Noble, Tax Counsel III Monica Silva, Tax Counsel IV Jason Parker, Chief of Headquarters Operations
For Office of Tax Appeals:	Richard A. Zellmer, Business Taxes Specialist III

J. ALDRICH, Administrative Law Judge: On April 14, 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 Polani Financials & Investments, Corp. dba Shalimar Restaurant Sunnyvale (appellant). CDTFA's decision denied appellant's petition for redetermination of the Notice of Determination (NOD) issued on January 18, 2017. The NOD is for $55,311.75 in tax, plus accrued interest, and a negligence penalty of $5,531.27 for the period August 1, 2013, through March 31, 2016 (audit period). By e-mails dated May 13, 2021, and June 15, 2021, appellant filed a timely petition for rehearing (PFR). 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. (See also *Martinez Steel Corporation*, 2020-OTA-074P; *Appeal of Do*, 2018-OTA-002P.)

Appellant contends that a rehearing is warranted based on the following grounds: (1) there was an irregularity in the appeal proceeding which had occurred prior to the issuance of the Opinion and has prevented a fair trial; (2) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the Opinion; and (3) there was insufficient evidence to justify the Opinion. We address each contention below.

Appellant argues that there was an irregularity in the appeal proceedings. Appellant indicates that it does not agree with the Opinion and would like a rehearing. Appellant contends that it is on the path of truth and feels betrayed by the judicial system,[1] and that OTA failed to deliver justice. In general, appellant appears to reargue the same issues that were argued during the appeal proceedings. Appellant also suggests that the panel did not understand its Groupon, and presumably GrubHub, transactions. Appellant explains that if someone bought food for $60, appellant had to collect taxes on $60 even though it would only receive $34 in recompense from Groupon. Appellant suggests that CDTFA refund its customers money for sales tax reimbursement that appellant paid to CDTFA.

An irregularity in the proceedings warranting a rehearing would generally include any departure from the due and orderly method of conducting the appeal proceedings by which the substantial rights of a party have been materially affected. (See *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) The granting or denial of a new hearing on such basis "is largely in the discretion of the" presiding officer. (*Loggie v. Interstate Transit Co.* (1930) 108 Cal.App. 165, 171.) We find no such irregularity in our review of the record. With respect to the Groupon transactions, the issue was previously addressed in the underlying Opinion.[2] To the extent that

[1] Out of an abundance of caution, we note that OTA is not a tax court. (Gov. Code, § 15672(b).) We are an administrative appeals body with limited jurisdiction.

[2] For informational purposes, we note that appellant appears to acknowledge that it collected excess tax reimbursement on those transactions. It also appears to misunderstand the law since it asks for adjustment against

the basis for the contention of an irregularity is insufficient evidence, we address it below.[3] We find that appellant's disagreement with the Opinion does not constitute grounds for a rehearing, nor does it establish an irregularity. (*Appeal of Graham and Smith*, 2018-OTA-154P)

Appellant cites to Regulation section 30604(a)(3), newly discovered evidence, as grounds for its petition for rehearing. Attached to appellant's PFR, there appears to be a completed copy of Form CDTFA-945, otherwise referred to as a Receipt for Books & Records of Account. Appellant requests for the record to be reopened, and that the Form CDTFA-945 be admitted into evidence. Likewise, appellant requests that approximately four pages of e-mails be admitted into evidence in support of its position. CDTFA argues that appellant has not shown that the evidence is newly discovered, and that appellant had ample time to provide additional evidence.

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 has not explained: why the proposed evidence is newly discovered; why the proposed evidence was unavailable for submission prior to the issuance of the written Opinion; or how the evidence would materially impact the outcome. As such, we find that appellant did not establish grounds for a rehearing under Regulation section 30604(a)(3).

Appellant cites to Regulation section 30604(a)(4), insufficient evidence to justify the Opinion, as grounds for granting its request. Appellant argues that there was insufficient evidence submitted by CDTFA to justify the Opinion. Appellant characterizes CDTFA's audit as fake; and asserts that CDTFA declines to find the truth even though appellant provided CDTFA access to appellant's Point of Sale (POS) system as well as a box full of evidence. Appellant states that it "want[s] to challenge the [OTA] and [CDTFA] to show [it] the proof."

CDTFA's determination or for CDTFA to return the excess tax reimbursement to its customers. Regulation section 1700(b)(1) defines excess tax reimbursement as follows: "When an amount represented by a person to a customer as constituting reimbursement for sales tax is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid is excess tax reimbursement." If a retailer collects excess tax reimbursement the retailer must either refund the excess tax reimbursement directly to the customer from whom it was collected, or the retailer must pay the excess tax reimbursement to CDTFA. (Cal. Code Regs., tit. 18, § 1700(b)(2).)

[3] Appellant makes other assertions which we do not address because they are unclear or without basis.

Here, the question of whether there is insufficient evidence to justify the Opinion is not one which involves a weighing of the evidence, but instead requires a finding that the Opinion is unsupported by any substantial evidence. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) This requires a review of the Opinion to indulge "in all legitimate and reasonable inferences" to uphold the Opinion. (*Ibid.*) In reviewing the evidence, we must do so "in the light most favorable to the verdict and presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from that evidence." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584-585.) We are not persuaded by appellant's position that the audit was fake or that CDTFA declined to know the truth. We determined that CDTFA met its initial minimal burden, which shifted the burden of proof to appellant. Once the burden shifted, it was incumbent upon appellant to prove that there was an error in the determination and the correct amount of tax by using documentation or other evidence. (See *Appeal of Talavera*, 2020-OTA-022P.) Likewise, we determined that there was sufficient evidence to support the imposition of the negligence penalty. Nothing in appellant's PFR demonstrates any reason to conclude that the evidence supporting the Opinion's findings was insufficient. Appellant has not provided new evidence or pointed to any evidence within the record to show that the taxable measure should be reduced or to support the deletion of the negligence penalty. Accordingly, we find that appellant has not established that there is insufficient evidence to support the Opinion.

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

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

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Huy "Mike" Le
Administrative Law Judge

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Andrew J. Kwee
Administrative Law Judge

Date Issued: 9/14/2021