

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

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| In the Matter of the Appeal of: |) | OTA Case No. 19075087 |
| F. MARTINEZ dba EL TACO LOCO |) | CDTFA Case ID 074-075 |
| RESTAURANT |) | |
| |) | |
| |) | |

OPINION ON PETITION FOR REHEARING

Representing the Parties:

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| For Appellant: | F. Martinez |
| For Respondent: | Jason Parker, Chief of Headquarters Operations |

N. DANG, Administrative Law Judge: On March 17, 2021, the Office of Tax Appeals issued an Opinion sustaining a decision issued by the California Department of Tax and Fee Administration (respondent). Respondent's decision denied F. Martinez's (appellant's) petition for redetermination of a Notice of Determination (NOD) dated November 23, 2015. The NOD proposed a deficiency of \$20,278.77 tax, plus applicable interest, for the period April 1, 2012, through February 28, 2015 (liability period).

Appellant filed a timely petition for rehearing (PFR) asserting that there is newly discovered evidence warranting a rehearing in this matter. For the reasons stated below, we find that appellant's PFR should be denied.

A rehearing may be granted where there is newly discovered and relevant evidence which the party could not have reasonably discovered and provided prior to the issuance of the Opinion and which materially affects the substantial rights of the party seeking a rehearing. (Cal. Code Regs., tit. 18, § 30604(a)(3).) A party seeking a rehearing based on newly discovered evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing this evidence; 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.)¹

Appellant produced the following evidence which he contends is newly discovered: (1) credit card receipts; (2) catering sales invoices; (3) purchase receipts; and (4) a declaration from the business's successor (Declaration) regarding the closure date of appellant's business.

Evidence is "newly" discovered if it was not known to the party seeking rehearing prior to the issuance of the Opinion. (See *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) Evidence which under the circumstances must have been known to the party seeking rehearing, or by the use of reasonable diligence might have been known and produced, prior to the issuance of the Opinion, is not regarded as "newly" discovered. (*Ibid.*)

Except for the Declaration, the evidence produced by appellant with his PFR are contemporaneous business records from the liability period. Appellant was required to maintain and provide these records upon examination to support the amounts reported on his returns. (Cal. Code Regs., tit. 18, § 1698(b)(1).) Thus, appellant could not have been unaware of these records prior to the issuance of the Opinion.

Regarding the Declaration, some background is necessary to understand its relevance to this appeal. During the oral hearing, appellant stated twice that he was unaware of who wrote an undated letter received by respondent on June 26, 2015 (Letter), in appellant's name, claiming that the business was closed "on or about February 2015." (Oral Hearing Transcript pp. 20, 36.) Based on this letter, respondent determined that appellant closed his business on February 28, 2015, holding appellant liable for the sales tax incurred by the business through this date. Appellant disputed this determination, asserting that the business closed months earlier, on November 1, 2014. In finding against appellant on this issue, the Opinion concluded that the Letter was credible because there was ample evidence demonstrating that it was written either by appellant or his successor. For instance, the Letter was sent shortly after respondent requested this information from appellant and his successor, it contained their telephone numbers and a note to respondent to contact appellant if further information was required, and there was no incentive or reason for anyone other than appellant or his successor to submit this information to respondent.

¹ Since California Code of Regulations, title 18, section 30604 is based upon Code of Civil Procedure section 657 (setting forth the grounds for granting a new trial in a civil action), we find case law pertaining to this statute to be relevant guidance in interpreting this regulation.

After the issuance of the Opinion, appellant provided the Declaration to support his new assertion that his successor wrote the Letter, and to support his prior assertion that the business had closed on November 1, 2014.² Appellant offers no explanation for how he came to the realization that the successor wrote the Letter, or why, with reasonable diligence, he could not have made that discovery and produced the Declaration prior to the issuance of the Opinion.

For all the foregoing reasons, we find that appellant has failed to establish that the evidence produced with his PFR is “newly” discovered evidence. Accordingly, we deny appellant’s PFR.

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Nguyen Dang
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

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Suzanne B. Brown
Administrative Law Judge

Date Issued: 8/19/2021

² In the Declaration, appellant’s successor states that he wrote the Letter intentionally misstating the closure date of appellant’s business to avoid successor liability.