

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21068104
) CDTFA Case ID 1-359-222
M. KAFARAH)
dba Tobacco King)
_____)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Juan Guzman, CPA

For Respondent: Jason Parker, Chief of Headquarters Ops.

A. WONG, Administrative Law Judge: On November 24, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA’s decision denied a petition for redetermination filed by M. Kafarah (appellant), dba Tobacco King, with respect to a Notice of Determination (NOD) dated December 23, 2019. The NOD is for \$67,122 in tax, plus applicable interest, for the period April 1, 2016, through March 31, 2019 (liability period). On December 15, 2021, appellant timely filed a petition for rehearing (PFR) with OTA, but we conclude that none of the grounds set forth therein constitutes a basis for a rehearing.

OTA may grant a rehearing where one of the following six grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (4) insufficient evidence to justify the written opinion; (5) the opinion is contrary to law; or (6) an error in law that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

In his PFR, appellant offers three grounds for a rehearing: (1) appellant provided all of his books and records during the audit, but CDTFA did not examine them; (2) CDTFA ignored its own observation test, which actually supported appellant's reported taxable sales; and (3) CDTFA lacked evidentiary support for its finding that the 95.72 percent ratio of appellant's recorded taxable credit card receipts to recorded total taxable receipts (credit-card-sales ratio) was too high for a business of this type (i.e., a smoke shop).

Appellant's first ground for rehearing is contradicted by the record on appeal. Appellant failed to provide any cash register z-tapes or credit card settlement tapes for the liability period; instead, appellant only provided z-tapes for three separate test periods outside of the liability period.¹ Further, our review of the record indicates that CDTFA examined the incomplete books and records appellant provided upon audit. Thus, the record does not support appellant's first ground for rehearing.

Appellant's second ground for rehearing was analyzed and rejected in the original Opinion, so we will not address it again here. Appellant's dissatisfaction with the outcome of his appeal and attempt to reargue an issue that the original Opinion has already considered and decided is not a valid ground for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Appellant's third ground for rehearing appears to be an argument that CDTFA's determination—and the original Opinion—rested on insufficient evidence.


As relevant here, to find that there is an insufficiency of evidence to justify the original Opinion, the PFR panel must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the original panel clearly should have reached a different opinion. (*Appeal of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

Here, CDTFA analyzed the incomplete books and records for the liability period that appellant provided upon audit and found that appellant's average quarterly credit-card-sales ratio of 95.72 percent (i.e., 95.72 percent of appellant's recorded total taxable sales for the liability period were paid by credit card) was not reasonable. Per its audit working papers, CDTFA's finding was partly based on a vague reference to "the size, nature, or location of [appellant's] business" without further details. However, more concretely, CDTFA also based its finding on its examination of appellant's sales, as evidenced by z-tapes from test periods totaling 24 days


¹ A cash register z-tape is the portion of the cash register tape that summarizes sales by category for a certain time period (e.g., a day or a shift).

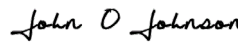
and CDTFA’s own observation test. These yielded a credit-card-sales ratio of 47.95 percent—roughly half the 95.72 percent ratio derived from appellant’s incomplete books and records for the liability period. Accordingly, we find that, contrary to appellant’s third ground for rehearing, CDTFA’s finding did not lack an evidentiary foundation. Further, based on our review of the evidence in the record, we are not convinced that the original panel clearly should have reached a different opinion.

In summary, we find that appellant has not demonstrated any irregularity, accident, or surprise in OTA’s appeals proceedings, offered new evidence that could not have been discovered and produced prior to the issuance of the original Opinion, or established that the evidence was insufficient to justify the original Opinion. Furthermore, appellant has not shown that the original Opinion is contrary to law or demonstrated any error in law. Thus, we conclude that appellant is not entitled to a rehearing and thereby deny his PFR.

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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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John O. Johnson
Administrative Law Judge

Date Issued: 3/21/2022