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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **F. BOUTROS dba Discount Cigarettes Market**	OTA Case No. 19105370 CDTFA Case ID 169-017

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Joseph A. Broyles, Attorney

For Respondent: Jason Parker, Chief of Headquarters Ops.

A. WONG, Administrative Law Judge: On August 23, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA's decision denied, in part, a petition for redetermination filed by F. Boutros (appellant) of a Notice of Determination (NOD) dated October 11, 2016. The NOD was for taxes totaling $93,187.73, plus applicable interest, and a penalty of $416.09, for the period of January 1, 2013, through February 5, 2016. CDTFA ultimately reduced the aggregate deficiency measure by $7,872.00, from $1,164,846.00 to $1,156,974.00, but otherwise denied appellant's petition.

Appellant petitioned OTA for a rehearing on two grounds: (1) an irregularity in the appeal proceedings in the form of ineffectual representation by appellant's prior representative; and (2) documentary evidence allegedly not previously provided to CDTFA or OTA that supported appellant's contentions on appeal. This documentary evidence consisted of 51 computer files in either Microsoft Excel or Adobe pdf format and one PNG image file (documents). The documents included purchase invoices, federal income tax returns, bank records (i.e., statements, canceled checks, deposit slips, etc.), and spreadsheets explaining how appellant calculated its cost of goods sold (COGS).[1] The vast majority of the documents were

[1] In its audit method, CDTFA used COGS to determine appellant's tax liability. On appeal, appellant had argued that COGS was overstated because it included the cost of nontaxable items; removing these allegedly nontaxable items from COGS would lower his tax liability.

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from the period of 2011 through 2016 (one document was from 2018). Appellant asserts that these documents are detailed, complicated, and voluminous, so require some explanation at either an in-person or electronic hearing or conference.

In response, CDTFA offers the following two contentions: (1) OTA's Rules for Tax Appeals do not allow appellant to request a rehearing based on appellant's ability to substitute a different representative who appellant believes will be more successful; and (2) the documentary evidence appellant provided in support of its petition has been previously submitted to CDTFA, but CDTFA determined that they were insufficient to prove that COGS was overstated.

OTA concludes that neither of the two grounds set forth in appellant's petition constitutes a basis for a rehearing.

OTA may grant a rehearing where at least one of the following grounds exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings that occurred prior to issuance of the Opinion and prevented the fair consideration of the appeal; (2) 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; (3) newly discovered, relevant evidence, which the filing 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 that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Irregularity in the Appeal Proceedings

Generally, an unsuccessful litigant in a civil case who selects his or her own private counsel is not entitled to a new trial on grounds that his or her counsel was incompetent, lacked either preparation or knowledge of the facts, or was ignorant of the law and procedure. (*Chevalier v. Dubin* (1980) 104 Cal.App.3d 975, 978.) Each litigant selects his or her own counsel, for better or for worse. (*Id*. at p. 979.)

Appellant selected his own representative in an unsuccessful appeal before OTA. Now, upon petitioning for rehearing, appellant asserts that this representative was ineffective and, conversely, that his new representative is more experienced, better qualified, and will be more effective going forward. However, based on the applicable law, appellant is not entitled to a rehearing on that basis. Thus, appellant's first ground for rehearing lacks merit.

Newly Discovered, Relevant Evidence

A party petitioning for a rehearing based on evidence that was allegedly not previously provided 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. (*Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.)[2] 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 rehearing on this ground. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138.)

(1) 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 Opinion. (*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 Opinion may not be regarded as "newly discovered." (*Ibid*.)

Here, appellant makes no claim or showing that the documentary evidence at issue was "newly discovered." Further, CDTFA contends that appellant had previously submitted them to CDTFA. OTA has reviewed these documents and finds that while most were also submitted to OTA, some were not. Even so, these documents were purchase invoices, federal income tax returns, and bank records—the types of documents that must have been known or accessible to appellant well before OTA issued its Opinion. Because of this, the documentary evidence at issue does not qualify as "newly discovered" evidence.

(2) *Reasonable Diligence*

A party seeking a rehearing based on newly discovered evidence must show that it exercised reasonable diligence in discovering and producing it. (*Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th at p. 1506.) The very strictest showing of diligence is required. (*Shivers v. Palmers* (1943) 59 Cal.App.2d 572, 576.) A general averment (or declaration) of diligence is

[2] OTA may look to Code of Civil Procedure section 657 and pertinent caselaw for guidance in determining whether a ground for a rehearing has been satisfied. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654).

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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. (*Ibid.*) A rehearing is properly denied where the "newly discovered" evidence was available and could have been produced prior to issuance of the Opinion. (*Jones v. Green* (1946) 74 Cal.App.2d 223, 232.) Evidence that was known to the party seeking rehearing before the Opinion was issued, or, by the use of reasonable diligence, might have been known and produced before the Opinion was issued, may not be regarded as newly discovered evidence. (*Hayutin v. Weintraub*, *supra*, 207 Cal.App.2d at p. 512.)

Here, appellant has failed to specify what acts or circumstances establish his diligence in discovering and producing the documentary evidence at issue. Thus, appellant has not made the requisite showing of diligence.

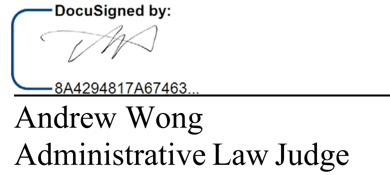
(3) *Materiality*

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(a); *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th at p. 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 alleges that the documentary evidence at issue is detailed, complicated, voluminous, and requires explanation. But rather than providing a written analysis and/or explanation, appellant requests a hearing or conference, either in-person or via electronic means, to explain them. OTA finds that appellant has not made the requisite showing of materiality.

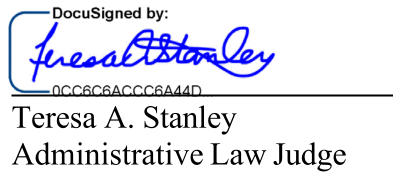
In conclusion, appellant has failed to show that the documentary evidence at issue is newly discovered, that he exercised reasonable diligence in discovering and producing it, or that it materially affected his substantial rights. Failure to show any of these three requirements is sufficient to deny appellant's petition for rehearing on the basis of newly discovered, relevant evidence—appellant has failed to show all three. Accordingly, OTA concludes that a rehearing on the "newly discovered, relevant evidence" ground is not warranted.

OTA concludes that appellant has not established any grounds for a rehearing, so appellant's petition for rehearing is denied.

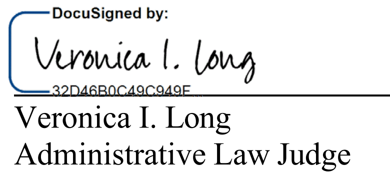


Andrew Wong
Administrative Law Judge

We concur:



Teresa A. Stanley
Administrative Law Judge



Veronica I. Long
Administrative Law Judge

Date Issued: 4/11/2023