OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. KASSAB**	OTA Case No. 220510375

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: J. Kassab

For Respondent: Paige Chang, Attorney

S. BROWN, Administrative Law Judge: On August 15, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) denying appellant's claim for refund of $2,700 for the 2016 tax year. In the Opinion, OTA held: (1) appellant had not shown error in FTB's proposed assessment of additional tax, which was based on IRS adjustments, (2) appellant had not established grounds to abate the collection cost recovery fee, and (3) appellant is not entitled to interest abatement. Appellant timely filed a petition for rehearing (PFR) under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellant's PFR, OTA concludes no basis for rehearing exists.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings which occurred prior to issuance of the Opinion and prevented the fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, 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.)

In the PFR, appellant contends that previously she "wasn't able to submit my proof of greater loss from 2016." Appellant provides a document titled "Sycuan Casino Resort Annual Activity For Calendar Year 2016," and listing her name and address; the document's section titled "Gaming Activity" shows an "Adjusted Win/Loss" total of -$96,790.56, while the "Tax Activity" section lists the "Amount Won" as $19,856.36. The document indicates that it was printed on October 13, 2021. In a declaration under penalty of perjury, appellant states that this new exhibit shows her gambling loss of $96,790.56 for the 2016 tax year, which verifies the deduction of gambling losses on her 2016 tax return and shows that she did not have a tax liability for that year.

In response, FTB contends that appellant has not submitted newly discovered evidence because she already provided a copy of the document to FTB on August 24, 2022.[1] FTB also argues that this document is not relevant since it does not demonstrate error in FTB's proposed assessment or the federal assessment on which it was based.

A party seeking a rehearing on the grounds of newly discovered, relevant evidence 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; see Cal. Code Regs, tit. 18, § 30604(a).) Failure to show any of these three requirements is sufficient to deny the PFR on this ground. (See *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th at 1506.) Newly discovered evidence must be material in the sense that it is likely to produce a different result. (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.)

Evidence is "newly discovered" if it was not known or accessible to the party seeking rehearing prior to the issuance of the Opinion. (See *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) A PFR will be denied when (a) the newly discovered evidence could have been produced by the exercise of reasonable diligence, (b) the party seeking rehearing has not shown due diligence in discovering and producing the newly discovered evidence, or (c) no reason is shown for why the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the Opinion. (See *Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208.)

[1] Neither appellant nor FTB provided the document to OTA during the underlying appeal.

Here, the new document shows a printout date of October 13, 2021, and lists appellant's name and address; this indicates that appellant likely received this document in October 2021. In addition, appellant has not shown that she exercised due diligence in discovering and producing newly discovered evidence, or why the evidence could not have been discovered and produced with reasonable diligence prior to issuance of the Opinion. Thus, appellant has not offered any newly discovered evidence, and consequently, appellant has not satisfied the requirements for granting a rehearing. For these reasons, appellant's petition is denied.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Veronica Long
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Veronica I. Long
Administrative Law Judge

DocuSigned by:
Richard Tay
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Richard Tay
Administrative Law Judge

Date Issued: 3/15/2024