OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 20106818
	CDTFA Case ID 638-422
PALMS THAI, INC.	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Michael S. Sy, Representative

For Respondent: Jason Parker, Chief of Headquarters Operations

T. STANLEY, Administrative Law Judge: On November 13, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied a petition for redetermination filed by Palms Thai, Inc. (appellant) of a Notice of Determination (NOD) dated October 18, 2018. The NOD is for tax of $150,207, plus applicable interest, and a negligence penalty of $15,020.66, for the period October 1, 2014, through September 30, 2017 (audit period).

On November 22, 2023, appellant timely petitioned for a rehearing with OTA on the basis that appellant has newly discovered, material evidence that appellant could not have reasonably discovered and provided prior to the issuance of the written Opinion; and there was insufficient evidence to justify the written Opinion. OTA concludes that the grounds set forth in appellant's petition do not constitute a basis for a new hearing.

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 appeal proceedings which 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

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

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 been reasonably discovered and provided prior to issuance of the written Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

Newly Discovered Evidence

In the context of newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728*; Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764.) The trier of fact (here, OTA) "prefer[s] a record which contains all the evidence the parties believe is relevant. However, when the evidence could have been submitted before [the Opinion], but was not, the goal of reaching the correct result must usually fall to the need to efficiently resolve matters." (*Appeal of Shanahan*, 2024-OTA-040P, quoting *Appeal of Wilson Development*, *supra*.) Thus, if a party attempts to submit evidence after the Opinion has been issued, the party must show that the proffered evidence is material to the appeal and could not have been discovered or produced prior to the issuance of the Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(3).)

In support of its contention that newly discovered evidence exists which would warrant a rehearing, appellant submits several guest checks and receipts for September 29, 2022, and August 10, 11, and 13, 2023. Appellant has not provided any explanation for the failure to provide these documents prior to the issuance of the Opinion. Instead, the record shows that appellant had the opportunity to submit documents after the hearing and did not. For example, OTA held open the record for specific post-hearing briefing, which was concluded on August 24, 2023, nearly a year after the date that appellant came into possession of the guest checks and receipts and appellant contends is newly discovered. More importantly, appellant has not explained how the guest checks and receipts for a few days in 2022 and 2023 are relevant to an audit of appellant from October 1, 2014, through September 30, 2017. Appellant states that the evidence shows that the credit card sales ratio is between 80 and 90 percent, rather than the 72.99 percent revealed in the audit. The submitted evidence that appellant asserts is newly discovered must also be material. Appellant fails to establish that the selective documents

submitted with the petition are sufficient to establish a credit card sales ratio. "OTA is not required to sort through voluminous and unorganized documentation in an attempt to find errors in CDTFA's determination." (*Appeal of Amaya*, 2021-OTA-328P.) The randomly dated documents do not show error in the data used by CDTFA's to compute the credit card sales ratio during the audit period and would not likely produce a different result. Thus, OTA cannot grant a rehearing based on this ground.

Insufficient Evidence to Justify the Opinion

To find that there is insufficient evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different opinion. (Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) As provided in *Appeal of Wilson Development, Inc., supra*, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing. OTA considers the evidence in the light most favorable to the prevailing party (here, CDTFA). (*Appeal of Shanahan, supra*.)

Appellant contends that the evidence in OTA's record is insufficient to justify the written Opinion. Appellant's assertion is based on the following allegations: (1) the point-of-sale (POS) data recorded for undercover purchases made by CDTFA was not within appellant's control; (2) appellant kept daily records but CDTFA stated that the backup data from the POS records was sufficient for audit; (3) appellant provided a menu with pricing for the audit period showing that the markup was less than 250 percent; (4) appellant was not negligent and submitted its tax returns and payments timely; and (5) interest relief is warranted during the "period of inactivity for 2 years during the pandemic period."

In the Opinion, OTA held that the backup POS data was the most reliable data, and that it was reasonable for CDTFA to use those records due to discrepancies and inaccuracies in other data provided by appellant at audit. CDTFA was not obligated to audit what appellant refers to as documents that were "voluminous and in multiple boxes." Appellant's POS system provided current data that matched appellant's reported taxable sales and backup data that did not appear to have been manipulated and showed substantial unreported sales. Appellant claims that it knew that CDTFA was making "undercover" purchases and that shows that the POS system, rather than appellant, somehow manipulated the data. Even giving appellant the benefit of the

doubt and assuming that the POS system randomly modified sales amounts and changed purchases from cash to credit sales, it does not relieve appellant of its burden to show error in CDTFA's determination. Appellant provided no evidence showing the data was manipulated or any additional evidence showing error in CDTFA's determination. Moreover, appellant's argument that the markup for the audit period was less than 250 percent is not material. CDTFA did not use the markup method to determine appellant's unreported taxable sales.

With respect to the negligence penalty, appellant contends it has always reported its taxes and paid timely. However, regardless of the timeliness of appellant's reporting and payments, appellant was negligent in both its recordkeeping and reporting, failing to report nearly 20 percent of its taxable sales during the audit period. Appellant cannot overcome its legal responsibility to *correctly* record and report its taxable sales by filing returns and paying the incorrect amount on time. OTA's Opinion considered all of appellant's contentions and determined that CDTFA properly imposed the negligence penalty.

Appellant initially requested interest abatement for the entire audit period and during the appeal proceedings. In its petition, appellant requests relief for the two-year period during the COVID-19 pandemic. The Opinion considered appellant's arguments with respect to interest abatement during the appeals proceedings and stated that "even if the OTA hearing was postponed, R&TC section 6593.5 authorizes CDTFA to grant interest relief for an unreasonable error or delay caused by a CDTFA employee. There is no authority in R&TC section 6593.5 to grant interest relief for a delay by OTA." The Opinion further indicated that OTA oral hearings were rescheduled two times, each at appellant's request.[2] As noted in the Opinion, CDTFA already agreed to abate some interest during the COVID-19 pandemic, and OTA found that no further interest relief was warranted. Appellant has not shown that there was insufficient evidence to justify the Opinion, so a hearing is not warranted on that basis.

[2] An error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).)

Accordingly, OTA finds that appellant's petition does not warrant a rehearing.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

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Josh Lambert
Administrative Law Judge

Date Issued: 6/19/2024