OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 220510435
	CDTFA Case ID: 2-026-617
RV'S-4-LESS, INC.	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Joseph J. Doerr, Attorney

For Respondent: Amanda Jacobs, Attorney

M. GEARY, Administrative Law Judge: On January 24, 2024, the Office of Tax Appeals (OTA) issued an Opinion (the Opinion) sustaining the California Department of Tax and Fee Administration's (respondent's)[1] denial, in part, of RV's-4-Less, Inc.'s (appellant's) petition for redetermination of an August 20, 2020 Notice of Determination for tax of $440,223, plus applicable interest, and a negligence penalty of $44,022 for the period January 1, 2016, through December 31, 2018 (liability period).[2] On February 23, 2024, appellant filed a timely petition for rehearing (PFR). OTA concludes that appellant has not established grounds for a new hearing.

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

[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 respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "respondent" shall refer to the board.

[2] Prior to issuance of the Opinion, respondent reduced the tax deficiency, from $440,223 to $359,583, which will reduce the negligence penalty from $44,022 to $35,958.

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 OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Appellant argues it is entitled to a new hearing because there is insufficient evidence to justify the Opinion. However, it also appears from the PFR that appellant wants OTA to consider new evidence. OTA will first address what appears to be new evidence that appellant attached to its PFR.

Newly discovered, material evidence

OTA closed the record in this appeal immediately following the hearing on October 18, 2023. Yet, appellant attaches five exhibits to its PFR, none of which are part of the hearing record. One (Exhibit A) is the Opinion and cover letter from OTA to appellant. It is of no consequence to this discussion. Three of the remaining four (Exhibits B – D) relate to appellant's former employee, J. Corcoran, and the final exhibit (Exhibit E) is a collection of respondent's summaries of payment activity for the quarters at issue.[3] While none of these documents have been admitted into evidence, appellant clearly wants OTA to consider Exhibits B through E, at least for the purpose of the PFR.

Before OTA can consider this new evidence for any purpose, the PFR must establish that the evidence was newly discovered, material evidence that appellant could not have reasonably discovered and provided prior to issuance of the Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(3).) In this context, OTA considers evidence material when the evidence is likely to produce a different result. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728.) Appellant has not established either of these elements. Consequently, OTA denies the PFR to the extent it is based on claimed newly discovered, material evidence. Furthermore, the exhibits to the PFR cannot be considered for any purpose, since an analysis of the adequacy of the evidence must consider only admitted evidence. (See Cal. Code Regs., tit. 18, § 30102(n), (w).)

[3] The summaries appear to have been accessed on and printed from respondent's website.

Insufficient evidence

To find that there is insufficient evidence to justify the Opinion, OTA must find, after weighing the evidence in the record, including reasonable inferences based on that evidence, that OTA clearly should have reached a different opinion. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

To briefly summarize some of the evidence upon which the Opinion was based: appellant had a prior audit, which revealed a tax deficiency of $1.36 million based on a comparison of recorded sales to reported sales. In other words, appellant's own records document taxable sales that appellant did not report. For the instant audit, appellant did not provide sales and use tax worksheets or any other documents to explain appellant's reporting methodology. Appellant also did not provide such business records to OTA, and neither of its witnesses explained how appellant completed its sales and use tax returns (returns) for the liability period. Appellant incurred a liability for tax totaling $359,583, which is based on a taxable measure of unreported taxable sales totaling $4,218,630 for just the last six quarters of the liability period, which represented approximately 38 percent of appellant's recorded taxable sales, and an error ratio that was higher than the one for the prior audit. That liability includes use tax due in connection with appellant's purchase and December 27, 2016 registration of a 2011 Jaguar automobile for which appellant claimed to have paid $83,200.

Generally, if any part of a liability for which a deficiency determination is made is due to negligence, respondent must add a penalty equal to 10 percent of the determined tax deficiency. (Revenue and Taxation Code (R&TC), § 6484.) A negligence finding can be based on a taxpayer's failure to maintain and provide adequate business records for audit. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)(1).) Such a finding can also be based on reporting errors. (*Independent Iron Works, Inc. v. State Bd. of Equalization* (1959) 167 Cal.App.2d 318, 321-323.)

Appellant argues that OTA erred when it disregarded evidence of J. Corcoran's fraudulent acts. It also takes issue with several statements made by OTA in the Opinion, arguing the Opinion's conclusion that appellant was negligent was based on these inaccurate statements of fact. Specifically, the Opinion states, "According to [hearing witness] D. Kuehne-Sullins, [manager and daughter of the sole shareholder] if an applicant told appellant that he or she was knowledgeable regarding sales and use tax compliance, appellant accepted the applicant's

representation and did not take any additional steps (e.g., requesting and checking references) to verify the person's actual experience or skills." Appellant does not deny that the witness gave testimony to this effect. Instead, appellant argues that it did perform adequate background checks on all employees, and in support of that assertion, appellant provided Exhibits B, C, and D to its PFR.

Appellant also disputes the accuracy of the Opinion's statement that, "Appellant could not explain how it reported its sales and use tax liability, and it did not provide business records to explain how it calculated and reported those liabilities." Appellant argues that, in fact, it maintained and made available detailed QuickBooks records and timely filed its returns and paid the tax due for the first seven quarters of the liability period.

Finally, appellant disputes the statement in the Opinion that appellant "offered no explanation for its failure to pay the tax or tax reimbursement," asserting that, aside from one return that was one day late, appellant timely "filed then paid all sales tax returns."

OTA continues to find unpersuasive appellant's argument that it exercised ordinary and reasonable care to maintain and provide adequate business records and to accurately report taxes due. The knowledge of appellant's employees is properly imputed to appellant (Civ. Code, § 2332; *O'Riordan v. Federal Kemper Life Assurance* (2005) 36 Cal.4th 281, 288), and the acts or omissions of appellant's employees, including J. Corcoran, in connection with appellant's sales and use tax compliance were the acts of appellant, even if an employee willfully failed to comply with the Sales and Use Tax Law. (Civ. Code, § 2338; see also *Alexander Shokai, Inc. v. Commissioner* (9th Cir. 1994) 34 F.3d 1480, 1488, and *Ruidoso Racing Ass'n, Inc. v. Commissioner* (10th Cir. 1973) 476 F.2d 502, 506.) OTA considered the admitted evidence regarding J. Corcoran and correctly gave it the weight to which it was entitled.

OTA's finding that appellant was negligent was based upon numerous facts established by the evidence, as outlined above. In making this finding, OTA did not rely on the evidence, first revealed during the hearing testimony by appellant's manager, regarding appellant's owners and managers consistently distancing themselves from sales and use tax compliance.

Each of the statements contained in the Opinion and with which appellant finds fault is supported by the evidentiary record. Appellant did not explain how it calculated its reported tax liability or how and why it failed to report the substantial conceded liability. Appellant was not simply careless in how it hired, trained and supervised employees to whom it delegated sales and

use tax compliance. The evidence suggests a concerted effort by appellant's owner and manager to distance themselves from such compliance matters, even though the prior audit showed substantial noncompliance.

Finally, addressing appellant's purported rebuttals to the specific statements contained in the Opinion, OTA notes: there is nothing in the hearing record that contradicts the testimony of appellant's manager regarding the lack of screening, training, and management of accounting staff; making QuickBooks data available does not constitute compliance with the requirement that a taxpayer maintain and make available for examination on request by respondent all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of the returns; and the fact that appellant filed all but one of its returns by the due date and always paid what it reported has no real bearing on the fact that appellant did not report tax of $359,583 on sales totaling $4,218,630 made in just six quarters of the liability period. OTA finds there is sufficient evidence to justify the Opinion; and on that basis, the PFR is denied.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Kim Wilson
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Kim Wilson
Business Taxes Specialist III

Date Issued: 7/17/2024