OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **Davis Ventures, Ltd. I**	)	OTA Case No. 230914305

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Robert C. Nii, Representative

For Respondent: Ariana Macedo, Graduate Legal Assistant

A. KLETTER, Administrative Law Judge: On July 29, 2024, 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 $3,456 for the 2017 tax year. In the Opinion, OTA held that appellant had not established reasonable cause to abate the per-partner late filing penalty.

On August 29, 2024, Appellant timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19334 based on newly discovered evidence consisting of two signed affidavits, notary acknowledgements verifying the respective identities of the affiants, and two identical pictures of the USPS mailbox.[1] Upon consideration of appellant's petition, OTA concludes that the ground set forth in this petition does not constitute a basis for granting a new hearing.

OTA will grant a rehearing where one of the following grounds for a rehearing exists 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 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 party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient

[1] FTB argues that the petition was untimely as it was filed on August 29, 2024, after the deadline indicated in OTA's August 28, 2024 cover letter. However, unless the law provides otherwise, the deadline for filing a petition for rehearing with OTA is extended by five days, if the notice or decision being appealed was mailed to an address within California. (Cal. Code Regs., tit. 18, § 30204(a).)

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 Shanahan*, 2024-OTA-040P.)

Appellant's petition states that it is forwarding the newly discovered evidence that is material to the appeal, which consists of two signed affidavits from appellants' representatives, two notary acknowledgments of the affiants' respective identities, and two identical pictures of the US Postal Service mailbox from which the tax return was allegedly mailed. One affidavit is from appellant's representative, and states that "I swear, under penalties of perjury, that I mailed the 2017 Davis Tax Return to the California Franchise Tax Board, by depositing it in the United States Postal Receptacle at 8530 Wilshire Boulevard, Beverly Hills, California (see attached picture) on March 29, 2018 . . . ." The second affidavit, from an employee of the representative's law firm, states that the employee "swear[s], under penalty of perjury, that I accompanied and witnessed [the representative] mail the [return]." The pictures are undated photographs that do not appear to provide any additional information.

Appellant has not shown that evidence it now provides was newly discovered and that appellant, the filing party, could not have reasonably discovered and provided it prior to issuance of the Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(3).) If a party attempts to submit evidence after the Opinion has been issued, the party must show that the proffered evidence is material and could not have been produced prior to issuance of the Opinion for OTA to grant the petition. (*Appeal of Shanahan*, 2024-OTA-040P.) FTB's opening brief addressed appellant's assertions that the 2017 return was timely filed. FTB argued that "simply claiming that [a]ppellant sent copies of its return, without more, is insufficient to constitute reasonable cause." The Opinion states that appellant "has provided no evidence that a [r]eturn was properly filed." Appellant has not shown that it could not have submitted the affidavits it now provides in reply to FTB's opening brief prior to issuance of the Opinion. Thus, the proffered new evidence is not a basis to grant appellant's petition.

Moreover, 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 Opinion stated that the burden of proof is on

the taxpayer to abate the per-partner late filing penalty.[2] A taxpayer may also provide testimonial or circumstantial evidence to prove a timely mailing.[3] The panel may use the California rules of evidence when evaluating the weight to give to evidence presented in a proceeding before OTA. (Cal. Code Regs., tit. 18, § 30214(f)(4); Gov. Code §§ 11513, 11514 [concerning hearsay evidence].)

In its petition, appellant relies on the sworn affidavits to prove the date on which appellant's return was mailed. However, appellant fails to provide or indicate evidence that corroborates the statements in the affidavit.[4] FTB contests the facts alleged by appellant and introduced records from its own system into evidence that show that no electronic or paper-filed return was received by FTB until February 3, 2021. Appellant representatives' sworn statements, by themselves, weighed against FTB's contrary assertions supported by its records, do not meet appellant's burden of proof. OTA is not obligated to accept appellant's representatives' statements at face value simply because they are notarized. Although notarizing validates that appellants representatives were the individuals who made the respective statements, it does not certify the veracity of those statements. Based on the evidence before OTA, appellant's evidence, even if newly discovered, would likely not produce a different result and is therefore not material.

[2] The Opinion states that the burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076.) To overcome the presumption of correctness attached to the penalty, appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid*.)

[3] R&TC section 21027 conforms to Treasury Regulation section 301.7502-1 as revised on January 10, 2001. The Ninth Circuit has held that Internal Revenue Code (IRC) section 7502 does not bar the admission of other evidence. (*Andersen v. U.S.* (9th Cir. 1992) 966 F.2d 487, 491-492 (superseded by statute). Treasury Regulation section 301.7502-1 was amended in 2011 to make clear that unless a taxpayer has direct proof that a document was actually delivered to the taxing agency, Internal Revenue Code section 7502 provides the exclusive means to prove delivery. (*Baldwin v. U.S.* (9th Cir. 2019) 921 F.3d 836, 841-824.) However, the R&TC does not conform to the 2011 amendment, and it is inapplicable for California tax law purposes.

[4] As the Opinion notes, a taxpayer attempting to prove that a paper return was timely mailed would have to show evidence, such as a registered or certified mail receipt, that the return was timely mailed, and thus timely filed with FTB. (*Appeal of Fisher*, 2022 OTA 337P.) Appellant's description of the mailbox's location and an undated picture of the mailbox is not evidence of timely mailing.

Based on the foregoing, appellant has not shown that there was newly discovered evidence, material to the appeal, which appellant could not have reasonably discovered and provided prior to issuance of the Opinion. Accordingly, appellant has not shown a ground exists for a new hearing, and appellant's petition is hereby denied.

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Asaf Kletter
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

Signed by:
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Seth Elsom
Hearing Officer

Date Issued: 12/18/2024