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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **R. SIMMS,** **dba Ron Simms Bay Area Custom Cycles**	OTA Case No.: 240215322 CDTFA Case ID: 4436624

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Stephen Mayer, CPA

For Respondent: Jason Parker, Chief of Headquarters Ops.

J. ALDRICH, Administrative Law Judge: On October 15, 2025, 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 R. Simms' (appellant) claim for refund of $7,586.64. Appellant's claim for refund disputes an involuntary collection by CDTFA that was applied towards a June 3, 2022 Notice of Determination (NOD) in its entirety. The NOD is for $32,494 in tax, plus applicable interest, and a negligence penalty of $3,138.73, for the period April 1, 2018, through March 31, 2021 (liability period). Pursuant to Revenue and Taxation Code (R&TC) section 6565, an additional 10 percent penalty of $3,138.70 was added to the NOD for appellant's failure to timely pay the NOD before it became final (finality penalty). On January 24, 2023, CDTFA added a $570 Collection Cost Recovery Fee (CCRF) pursuant to R&TC section 6833 because the liability had remained unpaid.

Appellant timely petitioned for a rehearing with OTA on the following basis: new evidence supports his position; insufficiency of the evidence; and the Opinion is contrary to law. OTA concludes that the grounds set forth in this petition do not constitute a basis for granting a new hearing.

[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.

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 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 Riedel*, 2024-OTA-004P.)

Newly Discovered, Material Evidence

Before OTA can consider newly submitted evidence, appellant must establish that the evidence he asks to submit is newly discovered, material evidence that appellant could not have reasonably discovered and provided prior to issuance of the Opinion. (*Appeal of Shanahan*, 2024-OTA-040P; 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. (*Ibid*.)

Here, appellant proposes a new exhibit which includes schedules regarding appellant's inventory. Appellant has not provided any argument or evidence to show that the proposed new exhibit is newly discovered evidence, material to the appeal, which appellant could not, with reasonable diligence, have discovered and provided prior to issuance of the Opinion. A party who fails to offer certain evidence because it is unaware of its relevance cannot later, upon realizing its significance, claim it is "newly discovered." (*Slemons v. Paterson* (1939) 14 Cal.2d 612, 615; see *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 14.) Accordingly, OTA finds that appellant has not established a basis for a rehearing based on the ground of newly discovered, material evidence.

Insufficient Evidence

Appellant argues that CDTFA used an insufficiently small sample size, and that appellant made available copies of full inventory purchase orders. Appellant contends that CDTFA's audit is based on inaccurate inventory numbers, and that appellant filed amended federal income tax returns (FITRs) for tax years 2018 through 2021, and CDTFA should have utilized the inventory amounts reported on his amended FITRs.

To find that there is insufficient evidence to justify the Opinion, the Panel considering the petition for rehearing must find that the Opinion clearly should have reached a different result,

after weighing the evidence in the record, including reasonable inferences based thereon. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

As stated in the Opinion, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. The Opinion held that CDTFA's determination is reasonable and rational because appellant's records could not be relied upon for a direct audit based on the low markup, the conflict between appellant's sales and use tax returns and original FITRs, as well as changes to inventory counts between the prior audit period and the liability period at issue. The underlying Panel did not find the witness testimony to be credible regarding the changes in inventory counts between the prior audit period and the liability period at issue (inventory counts were approximately 10 times higher at a smaller location than the inventory reported on appellant's original FITRs). The Opinion also found that CDTFA reasonably and rationally applied an indirect audit method (i.e., the markup method) because CDTFA utilized appellant's own purchase journals in conjunction with a shelf test based on appellant's own records. (See *Appeal of Amaya*, 2021-OTA-328P.) As noted in the Opinion, the purchase journals and the amended FITRs are in conflict. The Opinion gave more weight to the purchase journals than the amended FITRs because the purchase journals were made contemporaneously.[2] In addition, the Opinion noted that the markups based on the amended FITRs were low (19 percent for 2018, zero percent for 2019, 1.9 percent for 2020, and approximately 0 percent for 2021 for a combined markup of 2.75 percent for the period) and appellant did not provide documentation in support of his contention that he was infusing capital into the business.

On petition for rehearing, appellant's argument pertaining to the use of his FITRs largely reiterates arguments made during the appeal. As explained above, the underlying Panel did not find appellant's argument to be compelling for several reasons. In sum, CDTFA used appellant's purchase journals to calculate the audited measure, not appellant's original or amended FITRs. Based on the foregoing, OTA finds that appellant has not established a basis for granting a rehearing based on the ground of insufficient evidence.

Contrary to Law

Appellant argues that federal law requires the filing of accurate FITRs. Appellant asserts that he filed accurate amended FITRs, and that CDTFA did not use those amended FITRs in

[2] According to testimony, entries in the purchase journal were made approximately within a month of the actual purchases. The amended FITRs were prepared approximately 1 year to 4 years after appellant made the entries in his purchase journals.

making its determination. Appellant argues that it is contrary to law for CDTFA to continue to use his original FITRs when making its determination.

To find that the Opinion is contrary to law, OTA must determine whether the Opinion is unsupported by any substantial evidence. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Ibid*.)

Here, the underlying Panel considered appellant's amended FITRs but was not persuaded by that evidence. Appellant does not provide any specific arguments to show why the Opinion misapplied the law and provides no legal authorities contrary to those relied upon in the Opinion. To the contrary, the law provides that CDTFA "may compute and determine the amount required to be paid . . . upon the basis of any information within its possession or that may come into its possession." (R&TC, § 6481.) There is no legal requirement for CDTFA to use FITRs, amended FITRS, or evidence specifically identified by the taxpayer. Therefore, there is no basis to determine that a rehearing is warranted based on the ground of the Opinion being contrary to law.

Appellant's dissatisfaction with the Opinion does not constitute grounds for a new hearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Accordingly, appellant has not established that any ground exists to warrant a rehearing. As a result, appellant's petition for rehearing is denied.

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

Signed by:
Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

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Date Issued: 7/13/2026