



tit. 18, § 30602(c)(5).) Further, as provided in the *Appeal of Wilson Development, Inc.*, 94-SBE-007, October 5, 1994, good cause for granting a new hearing may be shown where one of the above identified grounds exists and the rights of the complaining party are materially affected. (See also, *Appeal of Sjofinar Do*, 2018-OTA-002P, Mar. 22, 2018.) Upon consideration of the petition for rehearing, we conclude that appellant has not established good cause for a new hearing.

In the petition for rehearing, appellant sets forth various grounds for a new hearing. First, appellant contends that BOE lacked authority to decide her appeal because BOE's authority was transferred to a different agency on July 1, 2017.<sup>2</sup> Second, appellant contends that BOE was not able to consider all of her exhibits due to the number of other complex appeals that BOE heard on the same day. Third, appellant contends that she and her representative (her husband, Mr. Le Beau, from whom she is legally separated) were prejudiced and unable to make an effective presentation because they had to drive from San Diego to Irvine to attend the hearing and, in addition, her appeal was supposed to be heard in the morning but was not heard until the afternoon. Fourth, appellant contends that she did not get a fair and impartial hearing because the State Controller (Betty Yee) participated in the oral hearing and Ms. Yee has a conflict of interest due to her "vested interest in maximizing State revenue from income taxes." Finally, appellant contends that BOE's decision to deny her innocent spouse relief is contrary to the facts and the law. She states that *Wilson v. Commissioner* (9th Cir. 2013) 705 F.3d 980 is controlling with respect to her request for equitable relief, because she believes the facts in that case are similar to her case. In support, she contends that she and her spouse were "separated"<sup>3</sup> for more than 12 months prior to the filing of her request for innocent spouse relief with FTB, and that she became legally separated from her husband on January 29, 2017.<sup>4</sup>

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<sup>2</sup> BOE heard this appeal on July 27, 2017, voted on this matter on July 28, 2017, and notified appellant of its decision on August 1, 2017.

<sup>3</sup> We note that appellant's initial one-page request for innocent spouse relief filed with FTB (Form 705), which she signed under penalty of perjury on October 12, 2015, indicated that she and her husband were still living together at the same residence, and that Mr. Le Beau pays appellant money for rent. Three weeks later, on November 2, 2015, appellant submitted a revised request for innocent spouse relief to FTB, also under penalty of perjury, listing different addresses for herself and her husband, and indicating that she and her husband were separated in 2002.

<sup>4</sup> Appellant also asserts that FTB illegally filed liens on her separate property residence. This contention is not grounds for granting a rehearing because BOE (and OTA) lack jurisdiction to review the propriety of FTB's involuntary collection actions. (See Cal. Code Regs., tit. 18, § 30102.)

First, appellant has not demonstrated an irregularity in BOE’s proceedings that prevented a fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30602(c)(5)(A).) An irregularity in the proceedings is not established by appellant asserting that BOE lacked sufficient time to review her submitted exhibits. Appellant had the opportunity to submit her exhibits to BOE before the scheduled oral hearing on July 27, 2017. The Hearing Summary expressly advised both parties that any additional evidence, i.e., exhibits, should be submitted to BOE 14 days prior to the scheduled oral hearing. In addition, the BOE members who decided her appeal waited until the day after the hearing to discuss and vote on appellant’s appeal, as reflected in BOE’s minutes.<sup>5</sup>

Government Code sections 15600 and 15674, as added by The Taxpayer Transparency and Fairness Act of 2017, provided BOE the authority to continue hearing and deciding Franchise and Income Tax appeals through December 31, 2017. (See Stats. 2017, ch. 16 (A.B. 102).) Further, the California Constitution, Article XIII, section 17, provides: “The Board of Equalization consists of 5 voting members: the Controller and 4 members elected for 4-year terms at gubernatorial elections.” Thus, the state Controller was constitutionally authorized to vote on appellant’s tax appeal, and BOE was within its statutory authority when it decided that appeal.

Second, appellant has not established an accident or surprise which ordinary caution could not have prevented. (Cal. Code Regs., tit. 18, § 30602(c)(5)(B).) Interpreting section 657 of the Code of Civil Procedure, the California Supreme Court held that the terms “accident” and “surprise” have substantially the same meaning. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) Further, to constitute an accident or surprise, a party must be unexpectedly placed in a detrimental condition or situation without any negligence on the part of that party. (*Ibid.*) A new hearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Wilson Development, supra.*) According to appellant, an alleged delay in hearing her appeal until the afternoon caused her representative and herself to be tired and unable to make an effective presentation at the oral hearing. It appears appellant is arguing that, because she allegedly was informed that BOE would hear her appeal in the morning, she was detrimentally surprised that

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<sup>5</sup> See: [www.boe.ca.gov/meetings/pdf/2017/072717-072817M.pdf](http://www.boe.ca.gov/meetings/pdf/2017/072717-072817M.pdf)

BOE did not hear her appeal until the afternoon. The Response to the Notice of Board Hearing, which appellant signed and returned on May 15, 2017, informed appellant that her matter would be heard in the afternoon session on July 27, 2017. This is consistent with BOE's Public Agenda Notice for July 27, 2017, which reflects that appellant's appeal was the last tax appeal matter calendared for the afternoon session. Furthermore, the BOE members were not obligated to hear appellant's appeal at a specific time on the scheduled oral hearing date.<sup>6</sup> While we are sympathetic to the fact that appellant and her representative were tired when appellant's appeal was heard as scheduled in the afternoon session, this does not provide a basis for a rehearing.

Third, appellant fails to identify newly discovered, relevant evidence, which appellant could not have reasonably discovered and provided prior to the decision. (Cal. Code Regs., tit. 18, § 30602(c)(5)(C).) Here, appellant states her request for legal separation was granted on July 1, 2017, retroactive to January 29, 2017, and that BOE did not consider all of her exhibits in their decision. Appellant also indicates that she intends to apply to the IRS for innocent spouse relief. However, appellant is not offering newly discovered evidence that she could not, with reasonable diligence, have discovered and produced prior to BOE's decision of her appeal. Appellant's contention that she is now legally separated from her husband, Mr. Le Beau, was raised in Exhibit B to appellant's packet titled: "Additional Information," received by BOE on July 5, 2017. Further, appellant's marital status was raised and considered by the BOE members during their deliberations, as evidenced by the transcript of their voting.<sup>7</sup>

Finally, appellant failed to demonstrate that the decision is contrary to law or there was insufficient evidence to justify the decision. (Cal. Code Regs., tit. 18, § 30602(c)(5)(D).) The question of whether a decision is contrary to law is not one that involves a weighing of the evidence, but instead requires a finding that the decision is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) The fact that appellant is dissatisfied with the outcome of her appeal is not grounds for a rehearing. Appellant also contends that the BOE's decision is contrary to *Wilson v. Commissioner, supra*, which she contends supports her position on appeal, and that she has satisfied all the statutory elements required for innocent spouse relief. Pursuant to Revenue and Taxation Code section 18533(f),

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<sup>6</sup> See: [www.boe.ca.gov/meetings/pdf/2017/072717\\_PAN\\_July\\_Irvine.pdf](http://www.boe.ca.gov/meetings/pdf/2017/072717_PAN_July_Irvine.pdf)

<sup>7</sup> See: [http://www.boe.ca.gov/meetings/transcripts/2017\\_07\\_28FA.txt](http://www.boe.ca.gov/meetings/transcripts/2017_07_28FA.txt)

equitable innocent spouse relief may be appropriate where, after taking into account all the facts and circumstances, it is inequitable to hold the individual liable for the tax. Appellant's contentions with respect to the various factors relevant to her innocent spouse claim were raised in appellant's appeal before BOE, and were discussed at great length in BOE's 36-page hearing summary.<sup>8</sup> As indicated above, appellant's revised marital status also was considered at the hearing. BOE's voting transcript of the July 28, 2017, hearing further indicates that the hearing summary was considered by the BOE members. Based on this record, we find that appellant has failed to establish that BOE's decision to deny innocent spouse relief is contrary to the law.

Regarding the sufficiency of the evidence, appellant cites a 2014 decision of the U.S. Tax Court in a matter involving appellant, determining that there were no deficiencies in federal income tax due, or overpayments due to appellant, for certain tax years from 2002 through 2007, and that there were no additions to the tax due from appellant for those same years under Internal Revenue Code section 6651 (pertaining to additions to tax and penalties for failure to file a return or to pay tax).<sup>9</sup> Appellant contends that this evidence proves, contrary to BOE's decision, that she was not liable for her husband's income tax liability for the tax years at issue here (1994, 1995, and 1997). The Tax Court decision was based on an agreement between Ms. Le Beau and the IRS, the terms of which are not specified, and does not cover any of the tax years at issue in this appeal. Therefore, this does not appear directly relevant to the issues in appeal before BOE. Consequently, we do not find this demonstrates an insufficient basis to justify the BOE's decision.

In summary, appellant has not established good cause for a new hearing under any the grounds required by Regulation 30602 and set forth in the *Appeal of Wilson Development, Inc.*, *supra*. For the foregoing reasons, appellant's petition is hereby denied.

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Andrew J. Kwee  
Administrative Law Judge

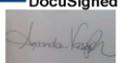
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<sup>8</sup> BOE's Hearing Summary for this case is available on BOE's website:  
[https://www.boe.ca.gov/meetings/pdf/hearingsummaries/2017/B\\_LeBeau\\_Victoria\\_Joy\\_946248\\_Sum\\_072717.pdf](https://www.boe.ca.gov/meetings/pdf/hearingsummaries/2017/B_LeBeau_Victoria_Joy_946248_Sum_072717.pdf)

<sup>9</sup> This was included as an exhibit submitted to BOE titled "Taxpayer's Additional Information," dated July 3, 2017, and received by BOE on July 10, 2017.

We concur:

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Teresa A. Stanley  
Administrative Law Judge

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Amanda Vassigh  
Administrative Law Judge