OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18012319
	)	
JAY WOLLENHAUPT	)	Date Issued: July 27, 2018
	)	
	)	
	)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jay Wollenhaupt

For Respondent: Eric R. Brown, Tax Counsel III

T. STANLEY, Administrative Law Judge: On December 11, 2017, the California State Board of Equalization (BOE) issued a decision in which it sustained respondent's proposed assessment of additional tax of $6,122 and an accuracy-related penalty of $1,224.40, plus applicable interest, for the 2009 tax year.[1] Appellant timely filed a petition for rehearing. Upon consideration of the petition, we conclude that the grounds set forth in the petition do not constitute good cause for a new hearing, as required by the *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994.[2] (See also *Appeal of Sjofinar Do*, 2018-OTA-002P, Mar. 22, 2018; Cal. Code Regs., tit. 18, § 30602(c)(5) [setting forth the showing required for a rehearing].)

In *Appeal of Wilson Development, Inc., supra*, the BOE determined that good cause for a new hearing may be shown where one of the following grounds exist, and the rights of the complaining party are materially affected: 1) irregularity in the proceedings by which the party

[1] Pursuant to Assembly Bill 102, the Taxpayer Transparency and Fairness Act of 2017, the duty of processing administrative appeals for franchise and income taxes was transferred from the BOE to the newly created Office of Tax Appeals.

[2] Precedential opinions of the BOE that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion as part of a written opinion that the panel issues pursuant to this section. (Cal. Code. Regs., tit. 18, § 30501(d)(3).) BOE's precedential opinions are available for viewing on the BOE's website: http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion.

was prevented from having a fair consideration of its case; 2) accident or surprise, which ordinary prudence could not have guarded against; 3) newly discovered, relevant evidence, which the party could not, with reasonable diligence, have discovered and produced prior to the decision; 4) insufficiency of the evidence to justify the decision, or the decision is against law; or 5) error in law.

Appellant's petition is based on his claim that he has newly discovered, relevant evidence that he could not have reasonably discovered prior to the BOE's decision of December 11, 2017, and that the new evidence materially affects his rights. In that decision, the BOE sustained a proposed assessment of additional tax and an accuracy-related penalty for tax year 2009. The assessment and penalty were based on information FTB received from the Internal Revenue Service (IRS) that the IRS had increased appellant's adjusted gross income, determined a tax deficiency, and assessed an accuracy-related penalty. In his petition for rehearing, appellant contends that the BOE decision failed to take into account the following facts: that FTB accepted his head-of-household filing status for a different tax year, 2015; that he had a spousal support obligation; and that his offer in compromise (OIC) to the IRS was accepted and paid. Appellant filed an amended 2009 tax return, but it was not processed by the IRS, and subsequently, on March 28, 2017, the IRS accepted appellant's OIC.

Appellant produced a letter dated March 28, 2017, and an additional letter dated August 15, 2017, acknowledging that appellant had met the payment provisions of the OIC agreement. However, the primary reason for the BOE denying appellant's requested relief was that he had not established that the FTB's adjustments, which were based on federal adjustments, were in error. Appellant claimed that once the IRS accepted his OIC, he was "unable to get proof that the IRS accepted [his] amended return." Thus, appellant requested that FTB accept his amended California return (Form 540X), received by FTB on February 13, 2014.

When the IRS has made a final determination changing the amount of a taxpayer's gross income, deductions, credits, penalty or tax, the taxpayer must either concede the accuracy of that determination or show wherein it is erroneous. (Rev. & Tax. Code, § 18622.) IRS acceptance of appellant's OIC agreement did not change the federal determination. Rather, it is a compromise that settles the IRS tax debt for less than the amount originally assessed. The IRS, in its OIC acceptance letter, states that if appellant failed to meet any of the terms and conditions of the agreement, that "the *original* tax, including all penalties and interest" would be immediately

reinstated and due. (Emphasis added.) An OIC may be accepted based on the taxpayer's inability to pay the tax, doubt as to whether the tax may be collected, or a dispute about the amount of the correct liability. (26 C.F.R. § 301.7122-1 (2002).) Here, there is no indication that the IRS changed its determination of appellant's income or deductions. While appellant entered into an OIC agreement with the IRS, there is nothing in the record to suggest that the IRS changed its determination, or that the OIC was based on a dispute about the correct amount of appellant's tax liability. Thus, appellant has not established that there was error in the original federal determination upon which the FTB's assessment was based.

Appellant contends that since he can no longer prove that his federal determination was incorrect, the FTB should adjust his income based on the amended 2009 return he filed in 2014. Appellant claimed on his amended return that he included an incorrect social security number for his child; therefore, upon correction, his HOH status should be accepted. The BOE's decision, however, did consider appellant's assertions, but held that he had not provided documentation establishing that he is entitled to the HOH filing status and a dependent exemption. Appellant produced a letter from respondent indicating that the FTB accepted his head of household status for tax year 2015. The August 30, 2017 letter from respondent accepting appellant's HOH status for tax year 2015 predates the BOE decision, and does not establish that appellant was entitled to that tax filing status for the 2009 tax year at issue.

Lastly, appellant produced a one-page portion of what appears to be a family court judgment, entitled "Judgment – Family Law." That document indicates a starting date for spousal support payments of June 1, 2010. The document would have been available to appellant prior to the entry of the BOE decision. It is not newly discovered evidence, and is irrelevant to the determination of a claimed spousal support deduction for the tax year prior to the commencement of the order.

In sum, appellant has neither alleged, nor has he demonstrated, irregularity in the BOE's proceedings that materially affected his rights. Furthermore, he did not provide new evidence which he could not, with reasonable diligence, have discovered and produced prior to the decision on his appeal. He did not establish that the evidence was insufficient to justify the BOE's decision.

No new, relevant documentation was submitted with appellant's petition for rehearing to support a rehearing. We, therefore, find appellant has not shown good cause for a new hearing

under any grounds set forth in the *Appeal of Wilson Development, Inc., supra,* or in Regulation section 30602 subdivision (c)(5) of title 18 of the California Code of Regulations.

For the foregoing reasons, appellant's petition for rehearing is denied.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Michael F. Geary
Administrative Law Judge

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Grant S. Thompson
Administrative Law Judge