

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No.18032477
)
ROBERT WARREN ROSENBAUM,) Date Issued: September 27, 2018
DBA: CARR BAZAAR)
_____)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Stephen L. Labiak, Attorney at Law

For Respondent: Kevin B. Smith, Tax Counsel III

T. STANLEY, Administrative Law Judge: On December 13, 2017, the Board of Equalization (BOE or Board) ordered that the tax liability of Robert Warren Rosenbaum, doing business as Carr Bazaar (appellant), be reduced from \$248,609.64 to \$144,127.05, the negligence penalty be deleted, and interest of \$28,208.87 be relieved.¹ By letter dated February 28, 2018 (supplemented by letter dated March 23, 2018),² appellant petitioned for rehearing of this matter. Upon consideration of appellant’s petition for rehearing, we conclude that the grounds set forth therein do not constitute good cause for a new hearing, as required by *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994.³

In *Appeal of Wilson Development, Inc.*, the BOE determined that good cause for a new hearing may be shown where one of the following grounds exists, and the rights of the

¹ Pursuant to Government Code section 15672, the duty of processing administrative appeals for sales and use tax matters is vested in the Office of Tax Appeals, beginning January 1, 2018.

² By letter dated March 16, 2018, appellant was notified that, although the February 28, 2018 letter was timely, it did not satisfy the requirements of California Code of Regulations, title 18, section 30820. Therefore, pursuant to California Code of Regulations, title 18, section 30821, subdivision (b), appellant was provided an additional 30 days to satisfy these requirements.

³ BOE’s precedential opinions are available for viewing on the BOE’s website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

complaining party are materially affected: 1) irregularity in the proceedings by which the party 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 evidence, material for the party making the petition for rehearing, which the party could not, with reasonable diligence, have discovered and produced prior to the decision of the appeal; 4) insufficiency of the evidence to justify the decision, or the decision is against law; or 5) error in law. (*Appeal of Wilson Development, Inc., supra*; Cal. Code of Regs., tit. 18, § 30820, subds. (a)-(d); *Appeal of Sjofinar Do*, 2018-OTA-002P, Mar. 22, 2018.)

In his petition for rehearing, appellant contends that a rehearing should be granted due to an irregularity in the proceedings which prevented a fair consideration of appellant's case. Specifically, appellant argues that he did not receive a fair hearing because only four of the five Board members were present for appellant's BOE hearing. Appellant contends that the absence of the fifth voting member prevented a motion from passing which would have resulted in a greater reduction of his tax liability than did the motion that passed.⁴ Appellant also contends that the fifth Board member could have raised issues and made motions beneficial to appellant. Additionally, appellant argues that because the Board was no longer going to hold sales and use tax hearings, appellant did not have the opportunity to postpone the hearing to a later date.

According to the BOE Rules for Tax Appeals, which apply to actions of the Board taken on sales and use tax appeals, the BOE may take action as long as any three Board members are present at a meeting. (Cal. Code Regs., tit. 18, §§ 5510, 5550, subd. (a).) Four Board members were present for appellant's hearing and, therefore, the hearing was conducted and action was taken with the requisite quorum present. Since the absence of up to two Board members from a Board hearing is authorized by regulation, the absence of only one Board member from appellant's hearing does not constitute an irregularity in the proceedings which prevented appellant from having a fair consideration of his appeal.


Furthermore, appellant has not shown that a rehearing is warranted based upon accident or surprise which ordinary prudence could not have guarded against. While accident and surprise may occur when a party is unexpectedly placed in a situation in which he or she is

⁴ The transcript of appellant's Board hearing may be accessed at: <http://www.boe.ca.gov/app/transcripts.aspx?year=2017>. It appears from the transcript that the motion appellant refers to was a motion raised and withdrawn by Member Runner that would have reduced the amount of disallowed, claimed bad debts by approximately \$1,000,000 more than in Member Ma's motion, which passed.


harmd without any negligence on his or her part (*Kauffman v. De Muttis* (1948) 31 Cal.2d 429, 432), “a new hearing is appropriate only if the accident or surprise materially affected the substantial rights of the party seeking the rehearing.” (*Appeal of NASSCO Holdings, Inc.*, 2010-SBE-001, Nov. 17, 2010; *Appeal of Wilson Development, supra.*) Therefore, even accepting that appellant was surprised by the absence of one Board member, there is no evidence in the record indicating that this absence substantially affected appellant’s ability to present his case before the Board, or that the absent Board member would have acted in a manner that would have substantively altered the Board’s determination in appellant’s favor. Rather, the fact that appellant proceeded to argue his case before the Board without objection, demonstrates that appellant was, at the time, unaware of what position or actions the absent Board member would have taken with respect to his appeal, and thus, that his contention to the contrary is no more than speculation.

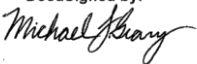
Moreover, appellant has not offered new evidence which he could not, with reasonable diligence, have discovered and produced prior to the decision of his appeal, or established that the evidence was insufficient to justify the BOE’s decision. Additionally, appellant has not demonstrated any error in law by the BOE. As indicated above, appellant has not demonstrated an irregularity in the BOE’s proceedings which prevented him having a fair consideration of his case. Accordingly, we find that appellant has not shown good cause for a new hearing.

For the foregoing reasons, appellant’s petition is hereby denied.

DocuSigned by:

Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:

Nguyen Dang
Administrative Law Judge

DocuSigned by:

Michael F. Geary
Administrative Law Judge