

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)	OTA Case No. 18012112
)	
JOANN BENINTENDE (AKA JOANN CELESTE))	Date Issued: September 19, 2018
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)	
)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	Joann Benintende
For Respondent:	Brad J. Coutinho, Tax Counsel
For Office of Tax Appeals:	Linda Frenklak, Tax Counsel III

ROBINSON, Administrative Law Judge: On October 24, 2017, the California State Board of Equalization (BOE) issued a decision sustaining Franchise Tax Board’s (FTB or respondent) denial of appellant’s refund claim for the 2009, 2010, and 2011 tax years.¹ Appellant then filed a petition for rehearing pursuant to section 19048 of the Revenue and Taxation Code only with respect to the portion of the BOE’s decision relating to appellant’s 2009 tax year. For that year, the BOE determined that the statute of limitations barred consideration of appellant’s refund claim. Upon consideration of the petition for rehearing, we conclude that the grounds set forth therein do not constitute good cause for a new hearing, as required by the *Appeal of Do*, 2018-OTA-02, March 22, 2018, and California Code of Regulations, title 18, section 30602.

In the *Appeal of Do, supra*, the Office of Tax Appeals (OTA) determined that good cause for a new hearing may be shown where one of the following grounds exists and the rights of the 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

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

ordinary prudence could not have guarded against; 3) newly discovered material evidence 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.

In her petition for rehearing, appellant argues that she is entitled to a new hearing based on newly discovered evidence. That “new” evidence appears to be a May 13, 2010 Chapter 7 bankruptcy petition filed on behalf of Joseph Benintende and appellant, which identified FTB as a creditor which held an unsecured priority claim for 2009 taxes on the Schedule E - Creditors Holding Unsecured Priority Claims, attached to the bankruptcy petition. Appellant alleges that her state tax liability for 2009 was discharged in bankruptcy. Appellant asserts that FTB nonetheless pursued involuntary collection action against her with respect to this debt by “initiating a levy of [her] personal income, pressuring payment arrangements, and withdrawing funds from [her] bank account.” She contends FTB’s collection actions violated bankruptcy guidelines and laws. Appellant also contends that the statute of limitations “guidelines do not apply to this case, as I am not requesting a ‘refund’, I am requesting a ‘return’ of money that the FTB had no right to take in the first place.” Appellant hopes that this “newly discovered evidence” will result in a decision to return to her money that FTB collected for the 2009 tax year.

Attached to the petition for rehearing are copies of a Chapter 7 bankruptcy petition filed on behalf of Joseph John Benintende Jr. and appellant in the United States Bankruptcy Court for the Southern District of California on May 13, 2010, and the Schedule E, which lists FTB as an unsecured priority claim creditor for 2009 in an unknown amount. The petition was signed by Joseph John Benintende, Jr. and appellant, as the debtors, on April 16, 2010.

Appellant’s bankruptcy filings are not “newly discovered evidence” that she could not, with reasonable diligence, have discovered and produced prior to the BOE’s decision of her appeal. In her petition for rehearing, appellant does not discuss why this bankruptcy petition could not have been produced prior to the BOE’s decision on October 24, 2017. Appellant does not contend that prior to the BOE’s decision, she was unaware of the bankruptcy petition, which she signed on April 16, 2010 and filed with the bankruptcy court on May 13, 2010.

Furthermore, appellant has not produced any documentary evidence establishing that the bankruptcy court ultimately granted her bankruptcy petition and discharged any or all of the

listed tax debts. Moreover, the OTA and the BOE lack the necessary subject matter jurisdiction to determine whether her 2009 tax liability was discharged in bankruptcy. (*Appeal of Robert G. and Jean C. Smith*, 81-SBE-145, Oct. 27, 1981.)²

Appellant contends that the statute of limitations does not apply because she is requesting a return, rather than a refund, of the money collected by FTB. However, appellant has not shown that this purported distinction renders the statute of limitations inapplicable to her claim or shown that BOE made any error in law or that the evidence was insufficient to justify the BOE’s decision. In her petition for rehearing, appellant has neither demonstrated any irregularity in the BOE’s proceedings which prevented her from having a fair consideration of her appeal, nor shown any accident or surprise that could not have been guarded against with ordinary prudence. Appellant has not established good cause for a new hearing under any grounds set forth in the *Appeal of Do, supra*.

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

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Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Grant S. Thompson
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Grant Thompson
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

² Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, title. 18, section 30501(d)(3), precedential opinions of the State Board of Equalization (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. BOE’s precedential opinions are available for viewing on the BOE’s website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>. Furthermore, the Office of Tax Appeals Rules for Tax Appeals, section 30602(c)(5) sets forth the grounds for a Petition for Rehearing.