OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **FIRST AMERICAN TITLE INSURANCE COMPANY**	OTA Case No. 18042592 Date Issued: October 31, 2018

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Joseph A. Vinatieri, Esq.

For Respondent: Robert Tucker, Assistant Chief Counsel

For Office of Tax Appeals: Andrea Long, Tax Counsel

S. HOSEY, Administrative Law Judge: On December 12, 2017, the Board of Equalization (BOE or Board) held an oral hearing on whether First American Title Insurance Company (appellant) was entitled to a refund for amounts it paid to its lessors for the period of October 1, 2007, through September 30, 2011. The BOE granted appellant's claim for refund as to Banc of America Leasing and EMC, and otherwise denied the claim. The California Department of Tax and Fee Administration (CDTFA or respondent) filed a timely petition for rehearing dated April 5, 2018. Upon consideration of respondent'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 Sjofinar Do*, 2018-OTA-002P, Mar. 22, 2018; *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994,[1] and California Code of Regulations (CCR), title 18, section 30820, subdivisions (a)-(d).

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

[1] "Precedential opinions of the [BOE] which were adopted prior to January 1, 2018…may be cited as precedential authority by OTA 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, subd. (d)(3).) The Office of Tax Appeals (OTA) opinions may be viewed at: https://ota.ca.gov/opinions. BOE opinions may be viewed on the BOE's website at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

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*; *Appeal of Sjofinar Do, supra.*) These grounds for a petition for rehearing have been adopted in the Office of Tax Appeals Rules for Tax Appeals (OTA Rules). (See CCR, tit. 18, § 30820, subds. (a)-(d).)

Appellant argues that OTA lacks jurisdiction because all issues were final when the BOE made its determination at the December 12, 2017 hearing. Appellant also contends that respondent lacks standing to file a petition for rehearing. Since appellant argues lack of jurisdiction and standing regarding the petition for rehearing, we will first consider each argument in turn before addressing respondent's petition for rehearing.[2]

Appellant asserts that OTA lacks jurisdiction because both prongs of California Government Code section 15600, subdivision (d)(1), are satisfied and, consequently, the decision became final on the date of the oral hearing. This section states that the BOE will continue to have legal authority to hear, determine, decide, or take any action in an appeal if: (1) the matter was placed on the BOE calendar before January 1, 2018; and (2) the appeal is "heard, determined, decided, or is otherwise final before January 1, 2018." (Gov. Code, § 15600, subd. (d)(1)(A)-(B).)

There is no dispute that appellant meets the first prong of Government Code section 15600, subdivision (d)(1). As to whether the case became final before January 1, 2018, appellant has not provided any legal authority in the California Government Code, the Revenue and Taxation Code, applicable regulations, or case law supporting the notion that an appeal becomes final on the date of the BOE hearing. Revenue and Taxation Code section 6564 states, "[t]he order or decision of the [BOE] upon a petition for redetermination becomes final 30 days after service upon the petitioner of notice thereof."[3] Had CDTFA mailed the BOE's decision on the

[2] Appellant also argues that the petition for rehearing should be denied for lack of good cause, as discussed below.

[3] Pursuant to Assembly Bill 102, the Taxpayer Transparency and Fairness Act of 2017, as amended by Assembly Bill 131 (2017-18 Reg. Sess.), Government Code section 15570.24 states that all references to the BOE shall be deemed to refer to the CDTFA, thereby transferring the duty to mail the BOE's decision to the CDTFA.

date of the hearing, the earliest possible date the decision could have become final was January 11, 2018. Here, CDTFA mailed the BOE's decision on March 13, 2018. Therefore, the decision was not final before January 1, 2018.

Since the BOE's decision was not final as of January 1, 2018, OTA has jurisdiction over this petition for rehearing. According to Government Code section 15600, subdivision (d)(2), in regard to those matters for which the duties, powers, and responsibilities are transferred to OTA, the BOE no longer has legal authority to "conduct an appeals hearing, make a determination, issue or publish a decision on an appeal, or take any other action with respect to an appeal heard at a meeting of the [BOE] before January 1, 2018" which was not final before that date. In addition, the OTA Rules state that OTA has jurisdiction over appeals which were heard by the BOE but for which the BOE either failed to issue a decision before January 1, 2018, or issued a decision that did not become final before January 1, 2018. (CCR, tit. 18, § 30832.) Accordingly, because the BOE's decision was not final as of January 1, 2018, OTA may exercise its transferred authority from the BOE and thereby has jurisdiction over this petition for rehearing pursuant to Government Code section 15600, subdivision (d)(2) and CCR, title 18, section 30832.

Appellant also asserts that respondent lacks standing to petition before OTA, because for most of the time that its appeal was pending before the BOE, respondent CDTFA was not in existence, and the CDTFA did not have rights to a notice of a hearing under the BOE's rules. We reject this argument. The Taxpayer Transparency and Fairness Act of 2017 (The Act) created and established a new government agency, CDTFA, which became operative on July 1, 2017. (Gov. Code, § 15570.) The Act contemporaneously vested CDTFA with "the duties, powers, and responsibilities of the [BOE]," including those in relation to the appeals process. (Gov. Code, § 15570.22.) The OTA Rules allow a party to submit a petition for rehearing where a decision was adverse to that party. (CCR, tit. 18, § 30820.) "Party" includes CDTFA. (CCR § 30801, subd. (k).) Therefore, since July 1, 2017, respondent has been a party to the appeal and, as previously discussed, has standing to petition for a rehearing of BOE's December 12, 2017 decision because its decision was not final before January 1, 2018. Accordingly, respondent's petition for rehearing is properly before OTA.

In its petition for rehearing, respondent argues that the BOE's failure to provide adequate notice of the hearing prevented the fair consideration of its case. In support of this argument,

respondent explains that the case was not ripe for an oral hearing "because it lacked crucial facts that were necessary for the Board members to decide this case," and the BOE decided the case "without affording [respondent] the opportunity to present evidence" as to whether sales tax, as opposed to use tax, applied to the transactions at issue.

Respondent argues that because the BOE issued the Notice of Board Hearing only 71 days[4] prior to the hearing, as opposed to the 75 days required by CCR, title 18, section 5522.6, the BOE failed to provide respondent timely notice of the hearing, which constituted an irregularity in the BOE's proceedings that prevented the fair consideration of its case. The grounds for rehearing listed in the OTA Rules were adopted from Code of Civil Procedure section 657, which sets forth the grounds for a new trial in a California trial court. (*Appeal of Wilson Development, supra*.) Generally, an irregularity in a proceeding broadly includes "any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected." (*Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446 [quoting 5 Witkin, Cal. Procedure (2d ed. 1971) Attack on Judgment in Trial Court, § 24, p. 3602].) To grant relief on this ground, the irregularity must have prevented respondent from having a fair consideration of its case. (*Appeal of Wilson Development, Inc., supra*; *Appeal of Sjofinar Do, supra*.)

Here, the BOE clearly failed to provide the full 75-day notice as required by its own regulations, despite a legal obligation to follow its own regulations. (See *Newco Leasing, Inc. v Board of Equalization* (1983) 143 Cal.App.3d 120, 124.) Nevertheless, respondent has not shown that the BOE's failure to provide the full notice prevented respondent from having a fair consideration of its case. Respondent rests its argument solely on the fact that it was not afforded the full 75-day notice without addressing *how this deficiency materially affected its case*. Respondent has not shown, for example, that had the BOE held the oral hearing a few days later (or provided its notice a few days earlier), respondent would have been better prepared to present its case. Rather, respondent concedes that as of the date of its petition for rehearing, it still did not have the evidence it wants to present at the hearing.[5] As respondent has not shown

[4] Appellant contends that the BOE provided 74 days' notice. However, because both parties agree that the BOE provided less than 75 days, the exact number of days is not dispositive on the outcome of this issue.

[5] "Respondent alleged that "[t]he Business Tax and Fee Division of the CDTFA has audit staff performing investigations and does not yet have sufficient information." (Respondent's Petition for Rehearing, p. 3.)

that the irregularity prevented respondent from having a fair consideration of its case, a rehearing is not warranted on this basis.

Although respondent argues that the case was not ripe for an oral hearing because the BOE lacked sufficient facts to make a determination as to the proper application of sales or use tax to the transactions at issue, these arguments do not demonstrate how the BOE's failure to provide 75 days of notice prevented fair consideration of this appeal. As noted above, respondent did not have the "crucial facts" as of the date of the petition for rehearing. Therefore, this argument does not establish that BOE's failure to provide 75 days prior notice resulted in an unfair consideration of respondent's case or how CDTFA's right to present its argument has been materially affected.

Additionally, we note that prior to the hearing, respondent was granted, on more than one occasion, additional time to obtain the evidence. The BOE initially set the hearing for June 14, 2016. However, because the Decision and Recommendation failed to state sufficient facts or expand upon applicable law, the BOE postponed the hearing to allow the BOE's Appeals Division time to issue a Supplemental Decision and Recommendation. The BOE then set the matter on the October 25, 2016 calendar. Subsequently, the parties mutually requested additional time to allow them "to complete additional verification of the claim for refund."[6] This request was granted, and the hearing was postponed to January 24, 2017. Thereafter, by letters dated April 13, 2017, and July 13, 2017, the BOE postponed the hearing again to July 13, 2017 and October 13, 2017, respectively. Throughout this period, appellant urged the BOE to set the case for a hearing. In total, respondent was afforded approximately 18 months of postponement (i.e., from June 14, 2016, the original date scheduled for the hearing, to December 12, 2017, the date of the hearing) to prepare its case before the BOE.

Despite the long postponement, along with the additional four months it took to file its petition for rehearing, respondent concedes that it still has not obtained any of the evidence it allegedly needs to obtain from appellant's vendors. Respondent is not entitled to a rehearing on the grounds of "newly discovered evidence," because no newly discovered evidence has been obtained.

[6] Respondent's Petition for Rehearing, p. 2.

For the aforementioned reasons, respondent has not demonstrated an irregularity in the BOE's proceedings that prevented respondent from having a fair consideration of it case. Accordingly, respondent's petition is hereby denied.

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Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

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Amanda Vassigh
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