OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **KEYSHAWN JOHNSON AND SHIKIRI JOHNSON**	OTA Case No. 18010057 Date Issued: February 21, 2019

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Mardiros H. Dakessian

For Respondent: Jason Riley, Tax Counsel IV

For Office of Tax Appeals: Andrea Long, Tax Counsel

S. HOSEY, Administrative Law Judge: On December 11, 2017, the Board of Equalization (BOE or the Board) held an oral hearing to decide two issues: (1) whether Franchise Tax Board's (respondent) proposed assessment for Keyshawn Johnson and Shikiri Johnson's (appellants) 1996 tax year is barred by the statute of limitations; and (2) whether income earned in the 1996 and 2000 through 2004 tax years are California taxable income based on the laws of domicile and residency. After considering the arguments and evidence presented, the BOE mailed a Notice of Board of Equalization Determination (BOE Determination) in which it sustained respondent's action for the 1996 tax year, but reversed respondent's actions for the 2000 through 2004 tax years. In a letter dated January 9, 2018, respondent filed this timely petition for rehearing pursuant to Revenue and Taxation Code (RTC) section 19048. Upon considering 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 Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994).[1]

[1] Precedential opinions of the BOE that were adopted prior to January 1, 2018, may be cited as precedential authority to the 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, div. 4.1, § 30504.) BOE opinions are generally available for viewing on the BOE's website at <www.boe.ca.gov/legal/legalopcont.htm>.

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 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*; see also *Appeal of Sjofinar Masri Do*, 2018-OTA-002P, Mar. 22, 2018.) These grounds for a petition for rehearing have been adopted in the Office of Tax Appeals Rules for Tax Appeals. (Cal. Code Regs., tit. 18, div. 4.1, § 30604.)

In its petition for rehearing, respondent sets forth the following three grounds for a new hearing: (1) an accident or surprise occurred, which ordinary prudence could not have guarded against, because appellants did not present the "Typical NFL Player Calendar Year" (NFL calendar) to respondent prior to the oral hearing; (2) an irregularity in the proceedings occurred that prevented respondent from having a fair consideration of the appeal because the BOE Determination did not specify when appellants were no longer domiciled in or residents of California; and (3) the decision was contrary to law. We consider each argument in turn.

First, respondent argues that a new hearing is warranted because appellants' failure to provide new evidence at least 14 days prior to the hearing (as was required by BOE's Rules for Tax Appeals, Cal. Code Regs., tit. 18, div. 2.1, § 5523.6(b)) was a surprise to respondent that ordinary caution could not have prevented. It was not until the day of the oral hearing, December 11, 2017, that appellants provided the NFL calendar to respondent. Respondent argues that had appellants submitted this document in a timely fashion, it would have been able to rebut its applicability to appellant-husband. Respondent argues that appellants heavily relied on the NFL calendar in their presentation, and that the BOE required respondent to opine on the validity of this document without giving it the opportunity to review the document before the hearing. Respondent includes several documents as exhibits to its petition for rehearing to show what it would have produced to the BOE had respondent received timely notice of the NFL calendar. Respondent argues that those documents contradict the information conveyed in the NFL calendar.

Appeal of Wilson Development, Inc., supra, adopted the aforementioned grounds for granting a rehearing from Code of Civil Procedure (CCP) section 657, which sets forth the grounds for a new trial in a California trial court. Interpreting CCP section 657, the California Supreme Court held that the terms "accident" and "surprise" have substantially the same meaning and denote a situation in which a party is unexpectedly placed, to his injury, without any negligence on his part. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) "Surprise" in this sense must result from "some fact or circumstance or situation occurring at the trial which could not in the nature of the case reasonably have been anticipated would arise and which is of such importance or magnitude in its influence upon the result arrived at from the trial as to have produced as against him or his rights injury or damage." (*Wilson v. Kopp* (1952) 114 Cal.App.2d 198, 206.) A new hearing is appropriate only if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Wilson Development, Inc., supra*.)

While not the ideal practice, we find that the introduction of the NFL calendar as an exhibit on the day of the hearing does not constitute an accident or surprise that ordinary prudence could not have guarded against for purposes of a petition for rehearing. Appellant-husband's NFL schedule has at all times been relevant to the issue of his residency. From the time that appellants filed their opening brief, the crux of appellants' argument has been that appellant-husband was not a resident of California because his NFL career prevented him from being within this state. Although appellants should have provided the NFL calendar 14 days before the hearing to the Board and respondent pursuant to section 5523.6(b) of the BOE's Rules for Tax Appeals, "the Board is not required to delay or postpone the hearing in order to consider evidence submitted at the hearing." (Cal. Code Regs., tit. 18, div. 2.1, § 5523.6(b).)

Moreover, respondent does not argue that the documents it produced with its petition for rehearing are new evidence. Rather, respondent could have produced those documents at any time prior to the hearing of the appeal because their relevance was not solely dependent on the presentation of the NFL calendar. Therefore, we find that appellant-husband's whereabouts in relation to the NFL schedule should have been reasonably anticipated, and accordingly does not meet the definition of accident or surprise, pursuant to *Wilson v. Kopp* (1952) 114 Cal.App.2d 198.

Second, respondent claims that a new hearing is warranted because there was an irregularity in the proceedings that prevented a fair consideration of the appeal. According to respondent, the irregularity arose because neither the BOE member's motion in favor of the appellants nor the BOE Determination addressed any of the following: (1) the date when appellants abandoned their California domicile and residency; (2) whether such action actually occurred; or (3) how the BOE applied the law to the facts to make its determination.

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, italics added.) The record shows that respondent fully participated in the appeal process by filing briefs and making its arguments at the oral hearing. Respondent has not provided any evidence indicating that there was a departure from the BOE's normal procedure in handling this appeal.[2] Respondent also has failed to demonstrate how any perceived failure by the BOE member's motion or the BOE Determination to address the items listed above prevented respondent from receiving a fair consideration of its arguments during the appeal hearing.

Finally, respondent argues that a new hearing is warranted because the BOE's decision was factually and legally insufficient, and, therefore, contrary to law or against the law. In *Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 382-383, the court of appeal explained that insufficiency of evidence to justify the decision is a separate and distinct cause from "against the law"; "[t]hey are objections of an entirely different order." As explained in *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906, "[t]he jury's verdict was 'against law' only if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a directed verdict against the part[ies] in whose favor the verdict [was] returned.' [Citations.]" This requires a review of the decision to "indulge in all legitimate and reasonable inferences" to uphold the decision. (*Id.* at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the decision, but whether the decision can or cannot be valid according to the law. (*Appeal of Nassco Holdings, Inc.*, 2010-SBE-001, Nov. 17, 2010.)

In this case, both appellants and respondent provided substantial documentary evidence and testimony regarding the whereabouts of appellant-husband during the years at issue. The

[2] The BOE routinely offered and voted on motions for a disposition of a case at the conclusion or oral arguments, as was done at this proceeding, and provided a written decision to the parties setting forth its findings of fact and conclusions of law, when required, at a later date and time.

BOE considered appellants and respondent's evidence and arguments and ultimately determined that appellants met their burden of proof for the 2000 through 2004 tax years and, accordingly, rejected respondent's proposed assessments for those years. Although we might have reached a different conclusion based on the record before us, there was sufficient evidence in the record to support the conclusion reached by the BOE.

Accordingly, applying the standard of review of *Sanchez-Corea*, *supra*, 38 Cal. 3d at p. 906, and *Appeal of Nassco Holdings, Inc.*, *supra*, we reject respondent's contention that the BOE's decision is not supported by any substantial evidence and is contrary to law.

CONCLUSION

Respondent has not shown good cause for a new hearing under *Appeal of Wilson Development, Inc.*, *supra*, nor has it made the showing required by the OTA's Rules for Tax Appeals (Code Cal. Regs., tit. 18, div. 4.1, § 30604) for obtaining a rehearing. Therefore, respondent's request for a rehearing is denied.

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Sara A Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

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Douglas Bramhall
Administrative Law Judge

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Daniel K. Cho
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Daniel K. Cho
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