OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011277
	)
GARY HIRSH AND SHARON HIRSH	) Date Issued: April 16, 2019
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Gary and Sharon Hirsh

For Respondent: Eric A. Yadao, Tax Counsel III

For the Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

M. GEARY, Administrative Law Judge: On April 23, 2018, we issued an opinion (the Opinion) in which we sustained the action of respondent Franchise Tax Board (FTB) denying appellants' claim for refund in the amount of $12,395.41 filed for the 2015 tax year. Appellants then filed a Petition for Rehearing (PFR), pursuant to Revenue and Taxation Code (R&TC) section 19334, on various grounds. Upon consideration of the PFR, we conclude that the grounds set forth therein do not constitute good cause for a rehearing, as required by *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, decided by the Board of Equalization (BOE) on October 5, 1994.

In *Appeal of Wilson Development, Inc., supra,* the BOE determined that good cause for a rehearing may be shown where one of the following grounds exists, and the rights of the complaining party are materially affected: (1) an 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 PFR, 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. These standards were recently

reaffirmed by the decision in *Appeal of Sjofinar Do*, 2018-OTA-002P, which was issued on March 22, 2018, and have been adopted in our Rules of Tax Appeals.[1] (See Cal. Code Regs., tit. 18, § 30604.)

Appellants argue the first four grounds, as stated above, in support of their PFR. Regarding the first, an irregularity in the proceedings, they argue that their file, including the medical records of Mr. Hirsh's parents, was misplaced and their appeal was delayed to their detriment due to restructuring of the BOE and the relocation and reassignment of staff.[2] Appellants argue the suddenly failing health of Mr. Hirsh's mother, and to a lesser extent the poor health of his father, constitute the "accident or surprise" that warrants a rehearing. They explain the different protocols used by them to timely file federal and state returns and pay taxes for the twenty years prior to the 2015 taxable year and argue that they should be allowed to present newly discovered evidence at a rehearing. Finally, appellants argue that they have already met their burden of proving their entitlement to relief from the penalties and, therefore, the Opinion is not supported by sufficient evidence and is contrary to law.

Appellants' contentions regarding irregularities in the proceedings lack merit. Work reassignments due to staff retirements, illness, or other causes are not irregularities. In addition, the fact that BOE and the CDTFA handled this appeal through December 31, 2017, with OTA assuming responsibility from the BOE on or after January 1, 2018, was in conformity with relevant law. Assembly Bill 102 (the Taxpayer Transparency and Fairness Act of 2017) created the California Department of Tax and Fee Administration (CDTFA) effective July 1, 2017. Most of the BOE's responsibilities and staff passed to CDTFA, which continued to assist the BOE with appeals. Pursuant to that bill and Assembly Bill 131, the exclusive authority to decide appellants' appeal (and others like it) passed from BOE to OTA effective January 1, 2018. Thus, activities and delays reasonably related to those changes do not constitute irregularities in the proceedings that prevented a fair consideration of appellants' appeal.[3] Finally, it does not appear that anyone misplaced the appeal file or any part of it. According to the file, appellants claimed

[1] Precedential opinions issued by the Office of Tax Appeals can be found on its website at <https://ota.ca.gov/opinions/>. OTA's Rules for Tax Appeals can be found on OTA's website at <https://ota.ca.gov/wp-content/uploads/sites/54/2019/01/OTAs-Rules-for-Tax-Appeals.pdf>.

[2] Although appellants refer to the restructuring of FTB, we believe they meant to refer to the restructuring of the appeal process and BOE's role in that process as discussed in more detail below.

[3] It does not appear from the record that there was unreasonable delay in this case.

they sent medical records to OTA, but OTA had no record of receiving them from appellants. Regardless, the Opinion makes clear that OTA considered all the evidence provided by the parties, including the medical records of Mr. Hirsh's parents, which FTB attached to one of its briefs. We therefore find that appellants have not established that there was an irregularity in the proceedings that prevented a fair consideration of their appeal.

Appellants' second argument is that there was an accident or surprise that warrants a rehearing. In *Appeal of Wilson Development, Inc*., *supra*, the BOE, in determining what grounds should be sufficient to grant a new rehearing, considered the standards for a new trial set forth in Code of Civil Procedure (CCP) section 657. Interpreting CCP section 657, the California Supreme Court has found that the terms "accident" and "surprise" have substantially the same meaning in legal practice, and denote some condition or 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.) Under these circumstances, a rehearing is appropriate only if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (CCP, § 657; *Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976; *Appeal of Wilson Development, supra*.) Generally, this means that something must have occurred in the course of the appeal that appellants could not have guarded against through due diligence, and which caused appellants harm. But appellants do not describe such an accident or surprise. They repeat the same facts concerning the poor health of Mr. Hirsh's parents that were discussed in the parties' briefs prior to issuance of the Opinion and appear to argue that an emergency hospitalization of his mother was a surprise that warrants the requested relief. Thus, we find that appellants have not demonstrated that they are entitled to a rehearing on the grounds of accident or surprise.

Appellants' third argument is that they are entitled to a rehearing because they have newly discovered, relevant evidence that they could not have reasonably discovered and provided for the panel's consideration prior to the issuance of the Opinion. However, appellants have not identified or submitted any such evidence. Therefore, we conclude that appellants have not established that there is newly discovered, relevant evidence that they could not have reasonably discovered and provided prior to the issuance of this Opinion, and which will materially affect appellants' rights.

Finally, regarding the fourth asserted ground for a rehearing, sufficiency of the evidence,

the question is less one that involves a weighing of the evidence, and more one that involves an analysis to determine whether the decision is supported by any substantial evidence. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This analysis requires us to consider "the evidence in the light most favorable to the prevailing party . . . indulging in all legitimate and reasonable inferences" to uphold the decision. (*Id.* at p. 907.) Here, there is no question that appellants paid their 2015 taxes late. The law required FTB to impose a late payment penalty. (R&TC, § 19132.) Likewise, there is no question that appellants underpaid their estimated taxes for 2015. The law also required FTB to impose an estimated tax penalty. (R&TC, § 19132; Int.Rev. Code, § 6654.) Appellants do not dispute the calculation of either penalty. It was appellants' burden to establish their entitlement to relief from the penalties and interest. The Opinion fairly considered the evidence and correctly sustained FTB's denial of the refund. Appellants were not ill or disabled when the payment was due. Mr. Hirsh's parents were. While we understand Mr. Hirsh's desire to be near his parents and that it may have been difficult then to focus on other matters, the failing health of his parents, and even the alleged emergency hospitalization of his mother, do not constitute reasonable cause for appellant's late payment.[4]

Furthermore, there is no evidentiary basis for granting relief of the estimated tax penalty or interest. There are only two grounds for abating the estimated tax penalty. Internal Revenue Code (IRC) section 6654(e)(3)(A), authorizes the government to waive the addition to tax if it determines that, "by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." IRC section 6654(e)(3)(B) authorizes waiver if the Internal Revenue Service (or here, the FTB) determines that (i) during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62, or became disabled, *and* (ii) the underpayment was due to "reasonable cause" and not due to willful neglect. Appellants have not contended that they satisfy either exception. FTB can abate interest when the interest is attributable to unreasonable error or delay by an FTB officer or employee while performing a ministerial or managerial act in his or her official capacity. (R&TC, § 19104(a).) Here, appellants do not allege or prove unreasonable error or delay by an FTB officer or employee.

Accordingly, we find that appellants have not shown good cause for a rehearing based on

[4] We note that, according to appellants' petition, all that was required for Mr. Hirsh to immediately send a $171,613 check to FTB was a telephone call to his accountant.

any of the grounds required by *Appeal of Wilson Development, Inc.*, *supra*, *Appeal of Sjofinar Do*, *supra*, and Regulation 30604. For the foregoing reasons, the PFR is denied.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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Grant Thompson
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Grant S. Thompson
Administrative Law Judge

DocuSigned by:
Jeffrey Margolis
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Jeffrey I. Margolis
Administrative Law Judge