OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of:	) OTA Case No. 18011282, 18011284
	)
GREGORY B. DOWNING	) Date Issued: June 7, 2019
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Gregory B. Downing

For Respondent: Brad J. Coutinho, Tax Counsel

T. STANLEY, Administrative Law Judge: On August 8, 2018, the Office of Tax Appeals (OTA) issued a decision in which it sustained the Franchise Tax Board's (FTB) proposed assessments of additional tax, penalties, and interest for the 2011 and 2013 years. By letter dated September 7, 2018, appellant petitioned for rehearing in this matter. Upon consideration of appellant's petition for rehearing, we conclude that an error in law occurred, and a rehearing must be granted. (Cal. Code Regs., tit. 18, (Regulation) § 30604(e); see also *Appeal of Sjofinar Masri Do*, 2018-OTA-002P.) The rehearing is granted on the limited issue of whether the demand-to-file penalty (Demand Penalty) was properly imposed under Regulation section 19133.

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. (*Id.*)

Appellant's Petition

In appellant's petition for rehearing, appellant sets forth various grounds for a new hearing. First, appellant argues that OTA's decision was incorrect and based on an inadequate record because appellant had been denied sufficient time to prepare his appeal. In this respect, appellant argues that these appeals arose from FTB's reliance on incorrect data listed in appellant's federal Information Returns Master File (IRMF) transcript. Appellant asserts that, "[f]or multiple years, including 2011 and 2013, the IRMF identifies 'Richard O. Schanke' as having been the source of a Roth IRA distribution." However, appellant asserts that he has never received a distribution from any Roth IRA other than his own, and the Forms 1099-R that his Roth IRA custodian, Vanguard, have sent to him do not mention Mr. Schanke. In support of these assertions, appellant enclosed with his petition for rehearing the 2011 and 2013 Forms 1099-R issued by Vanguard to appellant.[1]

Appellant also argues that OTA violated his disability rights (referring generally to the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) and the Unruh Civil Rights Act (Civ. Code, § 51)), by holding a telephone hearing on June 14, 2018, and scheduling an oral hearing for June 26, 2018. (Because appellant did not appear at the oral hearing, the decision was based on the written record.) Furthermore, appellant argues that OTA violated his right to privacy, as afforded by the California Constitution and United States Constitution, due to "[p]ublic disclosure of sensitive tax information and other personal information (disability, telephone, etc.)."[2]

Appellant further contends that FTB and OTA have violated his right to due process for the following reasons: 1) FTB and OTA failed to reliably authenticate their written communications; 2) FTB demanded that appellant respond via telephone to written notices after being informed that appellant does not have a working telephone;[3] 3) OTA scheduled an oral

[1] Appellant had previously provided the 2011 Form 1099-R with his March 12, 2015 appeal letter. The 2013 Form 1099-R was not previously provided, but it confirms that appellant received a Roth IRA distribution of $35,000 in 2013, which is the amount of income referenced on appellant's Notice of Proposed Assessment (NPA) for that year and is noted in OTA's decision.

[2] OTA is generally precluded from considering constitutional arguments. (See Cal. Const., art. III, §3.5; Regulation, § 30104.)

[3] Because this argument does not appear to concern OTA's proceedings in these appeals, but instead concerns appellant's communications with FTB prior to the filing the appeals, this contention is not relevant to our analysis of whether a rehearing is warranted, and we therefore give this argument no further consideration.

hearing that appellant could not safely attend due to the time and location of the hearing, as well as appellant's disability and lack of a working telephone; and 4) FTB and OTA demanded unreasonable tasks, such as requesting that appellant's payer "correct" an already accurate Form 1099-R.

Lastly, without explaining further, appellant asserts that OTA expected him to follow many rules that were not disclosed in advance; that OTA used legal terms in its written communications with him, which was inappropriate because appellant is not a lawyer; and that OTA and FTB inaccurately attributed statements to appellant to such an extent that appellant cannot possibly list them all.

We begin by noting that some of appellant's arguments are too vague to be analyzed with reference to the standard of review provided for in *Appeal of Sjofinar Masri Do*, *supra*, and Regulation section 30604. Appellant argues that OTA failed to "reliably authenticate" written communications, but appellant has not specifically identified the communications to which this argument pertains. Because OTA's communications to appellant bear OTA's letterhead, as well as the case identification numbers for these appeals, and the name and signature of the authoring employee, this argument lacks merit. Similarly, we cannot give any weight to appellant's accusation that OTA inaccurately attributed statements to him because appellant has not identified the statements to which this argument pertains. Furthermore, although appellant criticizes OTA's use of legal terms, appellant has not identified the terms he does not understand, and, in any event, while OTA strives to make its communications as accessible as possible, the legal analysis OTA performs inevitably requires at least some reference to applicable legal terms.

However, it is possible to interpret some arguments appellant raised in the petition for rehearing as claims that an irregularity in the proceedings occurred or that an accident or a surprise occurred against which appellant could not have guarded. Appellant contends that an irregularity in the proceedings, or an accident or surprise, occurred due to (1) his claimed lack of access to a functioning telephone or inability to safely attend the oral hearing, (2) OTA's holding the June 14, 2018 telephone conference and the June 26, 2018 oral hearing, (3) OTA's requiring him to follow many rules that were not disclosed in advance; and (4) appellant being "denied sufficient time to prepare."

Regulation section 30604(a) provides that a rehearing may be granted when an irregularity in the appeal proceedings occurred prior to the issuance of the written opinion that

prevented fair consideration of the appeal. This regulatory provision is patterned after California Code of Civil Procedure section 657(1), which has been interpreted as sufficiently broad to include any departure by the court (or, here, OTA) 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.) Additionally, the California Supreme Court has held that the terms "accident" and "surprise" have substantially the same meaning, and denote that a party was unexpectedly placed in a situation where he or she was harmed, without any negligence on his or her part. (*Kauffman v. De Mutiis* (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. (Code Civ. Proc., § 657; *Appeal of Sjofinar Masri Do, supra*.)

On April 20, 2018, OTA provided appellant with 77 days' advance notice that a hearing was scheduled for June 26, 2018. That fact that OTA did so, and then held a prehearing conference and an oral hearing does not constitute an irregularity in the proceedings or an accident or surprise. Pursuant to the emergency regulations in effect at the time of these proceedings, OTA was authorized to determine whether a prehearing conference was necessary and to establish the conditions of any prehearing conference. (Former Regulation, § 30302(a).)[4] Appellant's protest letter to FTB, dated September 26, 2014, stated "[i]f a working phone is required, please give me a date and time." Furthermore, even if appellant was unable to participate in the prehearing conference, it did not materially affect his rights on appeal because he could have made a presentation at the oral hearing.[5] Although appellant asserts that he could not safely attend the oral hearing due to its time and place, these safety concerns seem unreasonable given that the oral hearing was held during normal business hours at the Sacramento hearing location. Appellant did not specify how his safety would have been compromised at either the telephonic prehearing conference or at the hearing.

Regarding appellant's argument that a disability prevented him from attending the oral hearing, appellant has not identified the nature of this disability or the accommodations his disability requires. In fact, appellant notes in his May 2, 2018 letter that the April 20, 2018

[4] This emergency regulation has been replaced by Regulation section 30210(b), which also authorizes OTA to hold prehearing conferences, but we refer to the emergency regulation because it was in effect during the time at issue.

[5] In a facsimile communication, dated June 26, 2018, appellant acknowledged receipt of notice of the hearing, and stated that he could not attend and that "OTA should dismiss this case [and] send it back to FTB."

Notice of Oral Hearing advised him to inform OTA of any special assistance required, to which appellant stated, "I do require assistance, specifically more time." Thus, the only accommodation appellant has ever requested is additional time, and, in light of the copious amounts of time appellant has been given to submit supporting documentation, OTA has taken appropriate steps to accommodate appellant's claimed disability in the way that he specifically requested. As discussed in the decision, "[d]uring the pendency of appellant's two appeals, appellant requested extensions for briefing no less than eight times; however, he provided no further briefing." Accordingly, we reject appellant's argument that he was denied sufficient time to prepare.[6] As for appellant's argument that OTA failed to disclose rules it required him to follow, appellant has not specified the rules to which this argument pertains and, furthermore, OTA's Rules for Tax Appeals are posted on its website, and by mail upon request.

With respect to appellant's argument that the decision was incorrect and based on incorrect data listed in appellant's federal IRMF transcript, it could be that in making this argument appellant relies on the fourth and/or fifth grounds for rehearing (insufficiency of the evidence to justify the decision or the decision is against law, or error in law). However, this argument regarding incorrect data is based on a misunderstanding that FTB took steps to rectify years ago, and it has no impact on the merits of appellant's appeals.

The confusion stems from FTB's November 20, 2014 letter to appellant, which FTB issued in response to appellant's protest of the Notice of Proposed Assessment (NPA) for the 2011 tax year. In its November 20, 2014 letter, FTB states that appellant has a filing requirement based on income information received from "VANGUARD FIDUCIARY TRUST CUSTODIAN FOR RICHARD O SCHANKE IRMF 1099R PENSION & PROFIT SHARING $25,000." However, in the July 1, 2015 opening brief that FTB submitted to the Board of Equalization, FTB clarified that its November 20, 2014 letter mistakenly referred to Richard O. Schanke instead of to appellant. Subsequently, appellant provided the correct Form 1099-R from Vanguard that showed that appellant had received the $25,000 Roth IRA distribution at issue. Therefore, there is no dispute that appellant received a $25,000 Roth IRA distribution in 2011.

[6] With respect to appellant's argument that his right to privacy has been violated, we note that OTA is a public tribunal, and filings by the parties are subject to disclosure upon request. The submission of an appeal constitutes a waiver of the right to confidentiality with regard to all of the briefing and other information provided to OTA by either party or an Agency. (Regulation, § 30430(a).)

Thus, FTB's mistake in its letter from 2014 has no bearing on the validity of the NPA issued to appellant for the 2011 or 2013 taxable years, and this error is not material to these appeals.

Error in Law

An error in law may be grounds for a rehearing when the error materially affects the substantial rights of a party. (See Code Civ. Proc., § 657; Regulation, § 30604(e).) A taxpayer's rights are materially affected when his or her interests are affected by a judicial determination. (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 13.) In our opinion dated August 8, 2018, we concluded that appellant had not shown reasonable cause to abate the Demand Penalty imposed by FTB for taxable year 2013. However, we failed to analyze and determine whether the regulation related to the penalty was properly applied to the facts of this appeal. That failure materially affected appellant's interests.

For individual taxpayers, FTB may only impose a Demand Penalty if a taxpayer fails to respond to a current Demand, and FTB issues an NPA under the authority of Revenue and Taxation Code section 19087(a), after the taxpayer failed to timely respond to a request or a demand for a tax return, at any time during the four taxable years preceding the year for which the current demand is being issued. (Regulation, § 19133(b).) Appellant is an individual taxpayer; thus, the regulation controls the question of whether the Demand Penalty was correctly imposed.

The record in this appeal includes a Demand for Tax Return for taxable year 2011, which was issued on May 28, 2014. In that notice, FTB informed appellant that he must respond by July 2, 2014. On July 28, 2014, FTB issued an NPA informing appellant that it had no record of receiving his 2011 tax return, or of appellant providing information to show that he had previously filed or was not required to file. Because the dates of issuance of both the Demand for Tax Return and the NPA were subsequent to the taxable year at issue (2013), the evidence in the record does not support the imposition of the Demand Penalty.

Accordingly, we find that there was an error in law and that good cause exists for a rehearing for the 2013 taxable year (OTA case number 18011284). Appellant's petition is hereby granted for the 2013 taxable year on the limited issue of whether the Demand Penalty was properly imposed under Regulation § 19133. Although reasonable cause may be a basis for abatement of the Demand Penalty, that issue will not be reheard as it was considered fully in the

opinion issued by OTA. With respect to the 2011 taxable year (OTA case number 18011282), appellant's petition is denied.

DocuSigned by:
0CC6C6ACCC6A44D...
Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:
873D9797B9E64E1...
John O. Johnson
Administrative Law Judge

DocuSigned by:
6D3FE4A0CA514E7...
Sara A. Hosey
Administrative Law Judge