**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) OTA Case No. 18113948 |
| **OYEKUNLE OLOYEDE AND CHRISTHANNA OLOYEDE** | ) Date Issued: November 13, 2019 |

## OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Oyekunle Oloyede, Taxpayer
Christhanna Oloyede, Taxpayer

For Respondent: Rachel Abston, Senior Legal Analyst

A. KWEE, Administrative Law Judge: On August 12, 2019, we issued a written opinion sustaining the Franchise Tax Board (FTB)'s proposed assessment of $1,572 in additional tax, a late-filing penalty of $263, plus applicable interest, for the 2013 tax year. Our opinion held that Oyekunle and Christhanna Oloyede (appellants) failed to establish that any adjustments to FTB's proposed assessment are warranted. Appellants timely petitioned for a rehearing pursuant to Revenue and Taxation Code section 19048. We conclude that appellants failed to establish a basis for granting a rehearing.

## DISCUSSION

In their petition for rehearing, dated September 9, 2019, appellants request to change their filing status from married filing jointly (as originally filed), to married filing separately. In support, appellants contend that they have "newly discovered, relevant evidence," which appellants attached to their petition: an amended California resident income tax return for appellant-wife, also dated September 9, 2019, and claiming "Head of Household" filing status. Appellants further contend that, based on appellant-wife's amended filing status, appellant-husband no longer has a filing requirement in California. The amended return claims a $520 refund, and based thereon, appellants reargue their position on appeal: appellant-husband's income is not subject to tax in California and cannot be considered when applying the California

method because he earned the income while a nonresident of California. (See Rev. & Tax. Code, § 17041.) Here, we understand appellants are separately contending that the Office of Tax Appeal (OTA)'s decision is contrary to law or unsupported by the evidence on the basis that appellants are entitled to adjustments for filing separately.

FTB contends that, as a matter of law, appellants are required to file jointly in California because they filed jointly for federal purposes and no exception applies under the facts of this case. (See Rev. & Tax. Code, § 18521.) FTB contends that appellants cannot change their filing status because the nonresident spouse, appellant-husband, had California source income. FTB further contends that, irrespective of filing status, "one-half of [appellant-husband's] Texas income was subject to California income tax," as the community property of appellant-wife (a California domiciliary), because he is domiciled in Texas, which is a community property state.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law that occurred during the proceedings. (Cal. Code Regs, tit. 18, § 30604; *Appeal of Do* (2018-OTA-002P).)

As provided in the State Board of Equalization (board)'s precedential decision in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, and as reflected in the board's Rules for Tax Appeals, the board has historically looked to Code of Civil Procedure section 657, for guidance in determining whether grounds for a rehearing exist. (See Cal. Code. Regs., tit. 18, §§ 5461(c)(5), 5561(a).) OTA's precedential opinion in *Appeal of Do*, *supra*, and OTA's regulations, reflect that OTA adopted the board's established precedent of looking to Code of Civil Procedure section 657, and the applicable caselaw, for guidance in determining whether to grant a new hearing. (See Cal. Code. Regs., tit. 18, § 30604.)

To prevail on the basis of newly discovered evidence, appellants must demonstrate that: (1) the evidence is newly discovered; (2) the evidence is relevant to appellants' appeal; and (3) appellant could not, with reasonable diligence, have discovered and produced the evidence prior to the written decision. (Cal. Code of Regs., tit. 18, § 30604(c); see *Hall v. Goodwill Industries*

*of Southern California* (2011) 193 Cal.App.4th 718, 731.) The construction of what appears to be new evidence from information which existed prior to the hearing does not constitute newly discovered evidence for purposes of granting a rehearing. (*Appeal of Wilson Development, Inc*., *supra*.) Newly discovered evidence is "material" if it is likely to produce a different result. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.)

The second ground for a rehearing alleged by appellants may involve a factual finding that is unsupported by the evidence; or a written opinion that misapplies undisputed facts to the law (i.e., the decision is contrary to law or against the law). (See Cal. Code. Regs., tit. 18, § 30604(d).) With respect to factual disputes concerning the sufficiency of the evidence to support OTA's opinion, the standard of review is that a rehearing should not be granted unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that a different decision should have been reached. (See Code Civ. Proc., § 657.) Resolution of such a dispute does not involve a weighing of the evidence, but instead requires a finding that OTA's opinion is contrary to law because it is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of Am*. (1985) 38 Cal.3d 892, 906.) The relevant question is not over the quality or nature of the reasoning behind OTA's opinion, but whether, after reviewing the evidence in the record, the opinion can or cannot be valid according to the law because it is not supported by any substantial evidence. (See *Appeal of NASSCO Holdings, Inc*. (2010-SBE-001) 2010 WL 5626976.)

On the other hand, with respect to purely legal challenges (and undisputed facts), a rehearing may be granted on the basis that the opinion is contrary to law when there is "doubt that [the Panel] properly decided the legal issue." (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 187-188.)[1] A rehearing may also be granted on the basis that it is against the law when, on review, the Panel disagrees with the original opinion. (See *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 922 [trial courts have "power … to grant new trials if they disagree with the verdict"].) The Panel has discretion to grant a rehearing on the basis that the opinion is against the law. (See *In Re Wickersham's Estate* (1902) 138 Cal. 355, 361 [it is "within the discretion of the trial court to grant a new trial" to reverse its earlier finding "as conclusion of law, that the contestants 'are estopped [from contesting any matters in the estate].)

[1] Abrogation recognized by *Barber v. Long Beach Civil Service Com*. (1996) 45 Cal.App.4th 652, 658) on an unrelated issue pertaining to whether a trial court, when reviewing an administrative decision, may exercise independent judgment by examining the credibility of witnesses who testified in the administrative hearing.

We believe that the above-described standards should apply when reviewing a petition for rehearing of a written opinion issued by OTA.

First, although appellant-wife's amended income tax return is *new*, in that it is dated after OTA's written opinion, it is not newly discovered evidence within the meaning of Regulation 30604 because it was constructed from information which existed prior to the written opinion.[2] Therefore, the first ground for a rehearing alleged by appellant (i.e., new evidence) is not met.

Second, appellants also contend that adjustments are warranted on the basis that appellants are not required to file jointly. Here, the evidence clearly shows, and the parties have not disputed, that appellants filed jointly for federal income tax purposes for 2013. Under these facts, the law provides that, subject to limited exceptions, taxpayers must use the same filing status for state income tax purposes as they used for federal income tax purposes. (Rev. & Tax. Code, § 18521(a)(1).) As relevant, one exception is that a nonresident for the entire taxable year who had no income from a California source may file a separate California return. (Rev. & Tax. Code, § 18521(c).) Marital property interests in personal property are determined under the laws of the acquiring spouse's domicile. (*Schecter v. Superior Court* (1957) 49 Cal.2d 3, 10.) Appellant-husband is considered to have California source income because he has a community property interest in one-half of appellant-wife's California source income because she is domiciled in California, a community property state. Therefore, this exception to permit filing separately does not apply to appellants. As such, the second ground for a rehearing alleged by appellants is not met because our opinion was consistent with the law, and there is no basis to conclude that our opinion is unsupported by the evidence in the record.

Finally, there is an additional requirement that any alleged ground for rehearing must materially affect the substantial rights of the party seeking a rehearing. (Cal. Code. Regs., tit. 18, § 30604.) Here, FTB inadvertently failed to include appellant-wife's 50 percent share of appellant-husband's wages of $106,967.61 in FTB's proposed assessment, because FTB accepted appellants' reported adjusted gross income of $48,209 for 2013 (consisting only of appellant-wife's wages). The result is that appellants' 2013 tax liability, as proposed by FTB, is substantially understated. As such, any potential benefit from filing amended returns with a

[2] As relevant, appellant-wife previously attached an amended California resident income tax return, dated February 25, 2019, to a "request to settle the" matter, which appellants submitted to this office and FTB in response to FTB's brief. The previously submitted return reported different figures from the September 9, 2019 return.

different filing status, even if permissible, would be offset by the requirement to include this additional income. Therefore, we further find appellants' alleged grounds for a rehearing are not material within the meaning of Regulation 30604, because either ground is unlikely to change our decision that appellants failed to establish a basis to reduce FTB's proposed assessment.

In conclusion, appellants' petition is denied because appellants failed to establish that either ground alleged as a basis for granting a rehearing is met and materially affects their substantial rights on appeal.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Neil Robinson
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Neil Robinson
Administrative Law Judge

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