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2019 – OTA – 406
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011187
BRAYTON KIKUMOTO PROPERTIES, LLC	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	John Brayton, Principal
For Respondent:	Joel M. Smith, Tax Counsel III Marguerite Mosnier, Tax Counsel IV
For the Office of Tax Appeals:	Neha Garner, Tax Counsel III

K. GAST, Administrative Law Judge: On July 26, 2019, the Office of Tax Appeals issued a decision in which we sustained respondent Franchise Tax Board's (FTB) denial of appellant's claims for refund. We held that, for the 2012 and 2013 tax years, (1) appellant did not establish reasonable cause to abate the late-filing penalty imposed under California Revenue and Taxation Code (R&TC) section 19172, and (2) the late payment penalty was properly imposed under R&TC section 19132 and appellant did not establish reasonable cause to abate it. Appellant timely filed a petition for rehearing (petition) under R&TC section 19048. Upon consideration of appellant's petition, we conclude the grounds set forth therein do not meet the requirements for a rehearing under California Code of Regulations, title 18, section (Regulation) 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party (here, appellant) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the party could not

have reasonably discovered and provided prior to the issuance of the written opinion;
(d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Regulation § 30604(a)-(e).)

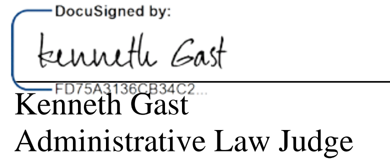
In its petition, appellant contends there was an irregularity in the appeal proceedings which occurred prior to issuance of our decision and prevented fair consideration of the appeal. (See Regulation 30604(a).) Appellant asserts that its principal and representative in this matter, Mr. John Brayton, "was dealing with health issues at the time of the hearing which prevented a more clear and organized case to be presented." However, appellant could have, but did not, request further postponement of the hearing, which we had already granted once for this appeal. Rather, appellant choose to proceed with the hearing. Appellant further contends that FTB's hearing representative was not the same person who wrote the briefs, and therefore appellant had to explain details in those briefs that it would not have had to do if FTB's original representative had been at the hearing. This contention, however, is also unconvincing. Appellant, not FTB, had the burden of proving entitlement to a refund. Therefore, it does not matter whether FTB's hearing representative did or did not prepare the appeal briefs or directly acknowledge the issues and address specific points in those briefs. Accordingly, these contentions do not show an irregularity occurred prior to the issuance of our decision.

Appellant also submits a new exhibit, which is an FTB form entitled "Physician Affidavit of Physical or Mental Impairment." The form is dated September 4, 2019, which is after the date of the hearing for this case, and is completed and signed by Mr. Brayton's physician. The physician declares under penalty of perjury that Mr. Brayton was experiencing mental and physical illnesses that prevented him from managing his financial affairs. However, such evidence only constitutes grounds for a rehearing when appellant "could not have reasonably discovered and provided prior to issuance of [our] written decision." (See Regulation 30604(c).) Appellant has not shown this to be the case here. In addition, the physician indicates that Mr. Brayton was prevented from managing his financial affairs from 2015 to the current year, which is after the time-periods appellant's 2012 and 2013 tax returns and payments became due. Accordingly, appellant is not entitled to a rehearing on this basis.

Lastly, appellant appears to contend there is insufficient evidence to justify our decision or that our decision is contrary to law. (See Regulation 30604(d).) However, as discussed in our detailed opinion, there is sufficient evidence to support our conclusion that Mr. Brayton's illness

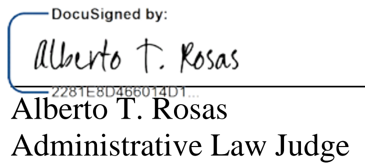
did not incapacitate him to such an extent that he was unable to timely file and pay appellant's taxes by the due dates. Accordingly, appellant is not entitled to a rehearing on this basis as well.

For the foregoing reasons, appellant's petition for rehearing is denied.

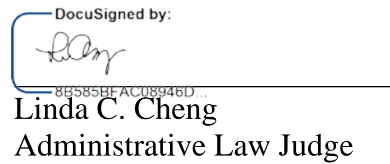


Kenneth Gast
Administrative Law Judge

We concur:



Alberto T. Rosas
Administrative Law Judge



Linda C. Cheng
Administrative Law Judge

Date Issued: 12/20/2019