OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18114010
DANNY L. REED AND PAULA A. REED	) Date Issued: December 4, 2019

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Danny Reed, Taxpayer
Paula Reed, Taxpayer

For Respondent: Mira V. Patel, Tax Counsel

A. KWEE, Administrative Law Judge: On July 31, 2019, we issued a written opinion sustaining the Franchise Tax Board (FTB)'s proposed assessment of $956 in additional tax, plus applicable interest, for the 2012 tax year. Our opinion held that Danny L. and Paula A. Reed (appellants) failed to establish that any adjustments to FTB's proposed assessment were warranted. Appellants timely petitioned for a rehearing pursuant to Revenue and Taxation Code section 19048, claiming there was new evidence which shows that FTB misapplied their 2012 payment to the 2013 tax year.[1] We conclude that appellants failed to establish a basis for granting a rehearing.

DISCUSSION

In their petition for rehearing, appellants contend that FTB has evidence to support that appellants already paid their 2012 tax liability. Appellants contend that the parties discussed this matter via telephone and during the conversation FTB orally admitted that FTB applied appellants' payment (which appellants allegedly intended to cover their 2012 liabilities) to appellants' 2013 tax year. As such, appellants contend that FTB's phone records support

[1] Although appellants do not specifically identify a ground on which we may grant a rehearing, their petition cites to evidence which was not previously referenced during the appeal as the basis for granting the rehearing; therefore, we understand appellants are petitioning for a rehearing on the grounds of new evidence.

appellants' contention that they already paid their 2012 tax liability. Appellants ask the Office of Tax Appeals (OTA) to obtain this evidence from FTB.

FTB contends that it did not bill, and could not have billed, appellants for the 2012 tax year because appellants' 2012 liability was not yet final. FTB further contends that, although appellants allege FTB's Final Notice Before Lien and Levy was for the 2012 tax year, that document clearly states the levy is for appellants' *2013* tax liabilities, and, as such, the payment was applied to the 2013 tax year.

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).)

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) appellants could not, with reasonable diligence, have discovered and produced the evidence prior to the written decision. (Cal. Code 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.* (94-SBE-007) 1994 WL 580654.) 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 instant appeal before OTA involves FTB's action on the 2012 tax year. As such, OTA's jurisdiction over this appeal is limited by statute to the 2012 tax year. (Rev. & Tax. Code, §§ 19324, 19045.) Therefore, appellants' payment of their 2013 liability as disclosed on FTB's Final Notice Before Lien and Levy is not relevant. Even if appellants intended to apply this payment to the 2012 tax year, it is immaterial to our decision that FTB's determination (which was based on federal adjustments) was correct. As such, the alleged phone records pertaining to the 2013 payment, even if such phone records exist, would not change our decision to sustain FTB's action on the 2012 tax year, and does not constitute a basis for granting a rehearing.[2] As such, the petition is denied.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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

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Tommy Leung
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Tommy Leung
Administrative Law Judge

[2] Based on our finding that the alleged phone records are immaterial, we do not address whether the phone records could constitute newly discovered evidence.