OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011072
GLG ENTERPRISES, INC.	)
	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Anthony G. Largomarsino, Attorney

For Respondent: Maria Brosterhous, Tax Counsel IV

M. GEARY, Administrative Law Judge: On May 28, 2019, we issued an opinion sustaining respondent Franchise Tax Board's (FTB's) proposed assessment of $2,757.90 in tax, a 25-percent late-filing penalty of $689.47, a 25-percent demand penalty of $689.47, a $92 filing enforcement fee, and interest.

Pursuant to the California Code of Regulations, title 18, section (Regulation) 30602, appellant filed a timely petition for rehearing (PFR). Upon consideration of the matters stated therein, we find that appellant has not established good cause for a new hearing. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P.)

Regulation 30604(a)-(e), provides that a rehearing may be granted 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 that occurred during the proceedings and prior to the issuance of the written opinion, which ordinary prudence could not have guarded against; (3) newly discovered, relevant evidence, which the party could not, with reasonable diligence, have discovered and produced prior to the 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. (See also *Appeal of Do*, *supra*.)

Appellant contends that its PFR should be granted on the first, second, and fourth grounds identified above.[1] It specifically alleges that, as shown by the attached declaration of Linda M. Kronseder, appellant received no notification or information from the Internal Revenue Service (IRS) to indicate that appellant had income during the taxable year ending July 31, 2014 (TYE 7/14) and that FTB never provided a copy of such information to appellant, which prevented appellant from investigating FTB's assertions. Appellant argues that FTB's failure to provide evidence of the alleged 2014 federal income adjustment was an irregularity in the proceedings by which appellant was prevented from having a fair consideration of its case. It further argues that there is insufficient evidence to justify our finding that there was such an income adjustment, and that our reliance on FTB's unsupported assertion that there was such an income adjustment constituted an accident or surprise, which ordinary prudence could not have guarded against, and an error in law.

FTB opposes the PFR. FTB argues that it routinely relies on information obtained from the IRS regarding federal adjustments, and that proposed assessments based on such information do not lack evidentiary support or constitute irregularities in appeal proceedings. FTB further alleges that it informed appellant that it based the proposed assessment on information obtained from the IRS, and that appellant had every opportunity to request copies of the reports or other documents upon which FTB relied, but it never did so; thus, there was no accident or surprise.

An irregularity in appeal proceedings warranting a rehearing would generally include any departure from the due and orderly method of conducting the appeals proceedings by which the substantial rights of a party have been materially affected. (See *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) For our purposes, the terms "accident" and "surprise" are synonymous. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 228.) Both refer to a situation in which a party, through no fault of its own, has been unexpectedly placed to its detriment. (*Wade v. De Bernardi* (1970) 4 Cal.App.3d 967, 971.) A PFR on the grounds of insufficient evidence should be granted only when, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that we clearly should have reached a different decision. (Code Civ. Proc., § 657.) Likewise, a PFR on the ground that our decision was

[1] Although appellant asserts that there was an "error in law," it appears from its arguments that it contends that there was insufficient evidence to support our Opinion, which was, therefore, contrary to law. (Cal. Code Regs., tit. 18, § 30604(d).) It does not argue that there was a procedural "error in law." (Cal. Code Regs., tit. 18, § 30604(e).)

contrary to law cannot be granted unless we conclude that our disposition was erroneous as a matter of law. (*Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 323.)

FTB's reliance on an estimate of income based on information provided by the IRS and our reliance on FTB's representations regarding the bases for its estimate of appellant's income were not irregularities warranting a rehearing. Appellant's contentions that such reliance constituted accident or surprise, which ordinary prudence could not have guarded against, and that our reliance on FTB's estimate was an error in law are equally unpersuasive. This brings us to the issue deserving more detailed analysis; whether FTB's estimate of appellant's income is supported by sufficient evidence.

Appellant misunderstands the respective burdens of the parties in this tax appeal. Revenue and Taxation Code section 19087(a), provides that if any taxpayer fails to file a return, FTB at any time "may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due." Appellant knew when it received FTB's June 24, 2016 "Notice of Proposed Assessment" (NPA) that FTB alleged that the IRS had reported to FTB that appellant had income during TYE 7/14. In its appeal filed with the Office of Tax Appeals, appellant alleged that the proposed assessment was incorrect, but at no time, to our knowledge, did appellant ask FTB to provide information regarding the bases for its calculation of estimated income or a copy of the information the IRS provided to FTB. Also, appellant did not provide to us any evidence, such as an account transcript, to refute FTB's representation regarding the bases for the proposed assessment. We also note that in an October 5, 2016 "Filing Requirement – Protest," FTB again informed appellant that it was required to file an income tax return for TYE 7/14, and that if the return was filed by November 4, 2016, FTB would withdraw the NPA and "recalculate any penalties and interest . . . based on the figures reported . . . ." Still, appellant did not file a return.[2]

The evidence, including the statements made by FTB, established that the IRS provided to FTB information indicating that appellant had income during the TYE7/14, and that FTB estimated that income at $31,198. FTB had a minimal burden to show that its proposed assessment is reasonable and rational. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

[2] As stated in the opinion, "even if [appellant] earned no income from business operations after that [July 31, 2013], the obligation to pay at least the minimum tax continued into the next taxable year, 2014, because appellant did not file its certificate of dissolution with the Secretary of State until over eight months into TYE 7/14. (R&TC, §§ 23153, 23331 [citation omitted].)"

Appellant's conclusory allegation on appeal that the proposed assessment was incorrect is simply insufficient to call FTB's estimate into question. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, at pp. 935-936.) Consequently, we find that there is adequate evidentiary support for the Opinion, which is not contrary to law. Consequently, we deny the PFR.

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Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Linda C. Cheng
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Linda C. Cheng
Administrative Law Judge

Date Issued: 1/22/2020