

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010937
NON-STOP CARRIERS, LLC)
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OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Oscar Cisneros, Chief Executive Officer

For Respondent: Jean M. Cramer, Tax Counsel IV

M. GEARY, Administrative Law Judge: On August 16, 2019, we issued an Opinion finding that appellant had timely filed its return for the 2013 taxable year and granting appellant a refund of a late-filing penalty, plus interest, assessed by respondent Franchise Tax Board (FTB).

Pursuant to California Code of Regulations, title 18, section (Regulation) 30602, FTB filed a timely petition for rehearing (PFR). Upon consideration of the matters stated therein, we find that FTB has not established that it is entitled to a new hearing. (*Appeal of Do*, 2018-OTA-002P.)

Regulation 30604, subdivisions (a)-(e), provide that a rehearing may be granted where one of the following grounds exists and the rights of the complaining party (here, FTB) are materially affected: (1) an irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; (2) an 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. (*Appeal of Do, supra.*)

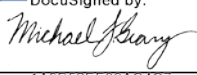
FTB argues that it is entitled to a rehearing on grounds that there is insufficient evidence to justify the written opinion and the opinion is contrary to law.¹ Appellant opposes the PFR.

FTB argues that the Opinion incorrectly relies on Internal Revenue Code (IRC) section 7502, Treasury Regulation section 301.7502-1, and the common law “mailbox rule” discussed in *Baldwin v. United States* (9th Cir. 2019) 921 F.3d 836 and other cases. FTB contends that California does not conform to IRC section 7502 in its entirety and that, pursuant to R&TC section 21027, subdivision (b), California law applies only those Treasury Regulations promulgated under the authority of IRC section 7502(c)(2), pertaining to certified mail and electronic filing, which appellant did not use for filing of its 2013 return. FTB asserts that the controlling authority is Government Code section 11003, which states, in pertinent part, that a return “shall be deemed filed on the date shown by the cancellation mark stamped on the envelope containing it, or on the date it was mailed if proof satisfactory to the state agency establishes that the mailing occurred on an earlier date.” FTB argues that, since there is insufficient evidence that the return was timely filed – appellant’s allegation to that effect being unsupported by other reliable evidence – we should have sustained FTB’s action.

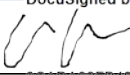
FTB is correct that the Opinion should have focused on Government Code section 11003. However, the analysis under that section is the same. Thus, the result is the same and FTB’s rights were not materially affected. Furthermore, the Opinion does not rely on a presumption of delivery based on proof of mailing. It concludes that the evidence is sufficient to support a finding that there was timely delivery of the return to FTB. We cannot grant a new hearing on the grounds of insufficient evidence unless, 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.) FTB has failed to show that we should have reached a different decision.


¹ The PFR states that “the opinion contained errors in law....” Consistent with California Code of Civil Procedure section 657, we interpret the fifth ground stated above to refer to an error in law occurring during the appeal proceedings, as opposed to an error in the Opinion. (*Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654; California Regulatory Notice Register 2018, Volume No. 28-Z, p. 1100.) FTB does not argue that there was an error in law during the proceedings. Thus, we interpret FTB’s arguments to be based solely on the fourth ground stated above.

We conclude that FTB has not established any valid grounds for a new hearing. Consequently, we deny FTB’s petition.

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Michael F. Geary
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

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Kenneth Gast
Administrative Law Judge

Date Issued: 2/4/2020