

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18042816
J. WHITE)
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OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: J. White
For Respondent: Gi Nam, Tax Counsel

T. STANLEY, Administrative Law Judge: On December 11, 2019, the Office of Tax Appeals (OTA) issued an Opinion, based on the written record, in which we found appellant was not liable for the notice and demand penalty, plus interest, under California Revenue and Taxation Code (R&TC) section 19133. Respondent Franchise Tax Board (FTB) timely filed a petition for rehearing (PFR) under R&TC section 19048. Upon consideration of FTB’s PFR, we conclude that the ground set forth therein meets the requirements under California Code of Regulations, title 18, (Regulation) section 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party (here, FTB) 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. (Cal. Code Regs., tit. 18, § 30604(a)-(e).)

In our Opinion, we concluded that upon the record before us the demand penalty was incorrectly applied and must be abated. FTB’s asserts in its PFR that there was an irregularity in

the proceedings which occurred prior to the issuance of the Opinion, and that the irregularity materially affected FTB's rights.¹ The basis for this assertion relies on the following timeline: 1) FTB submitted additional evidence on December 4, 2019; 2) OTA issued an Opinion on December 9, 2019; and 3) OTA rejected FTB's "additional briefing" in a letter dated December 11, 2019. FTB asserts that it did not submit "additional briefing," but rather submitted additional evidence with a cover letter (not a brief). FTB further asserts that had this been an oral hearing matter, OTA would have accepted its additional evidence. We agree.


When OTA holds an oral hearing, the panel of administrative law judges expressly has the authority to accept into evidence any documents that are submitted prior to the closure of the record (which is most typically done at the close of the hearing). (See Cal. Code Regs., tit. 18, § 30214(e)(1) & (3).) The OTA Rules for Tax Appeals, however, do not contain a provision that alerts the parties and public as to when the record closes for appeals where the Opinion is based only on the written record. The "written record" is defined to include "any other relevant evidence that a Panel determines to be the sort of evidence responsible persons are accustomed to rely on in the conduct of serious affairs." (Cal. Code Regs., tit. 18, § 30102(w)(8).) Furthermore, FTB's interpretation is supported by Regulation section 30604(c), which refers to newly discovered evidence as that "which the party could not have reasonably discovered and provided *prior to issuance of the written opinion.*" (Emphasis added.) It was reasonable for FTB to assume that new evidence could be submitted into the written record up until the time an Opinion was issued.

Furthermore, we find that an error in law, or an irregularity in the proceedings support granting FTB's PFR. Pursuant to Regulation section 30102(u), a matter is submitted on that date "a [p]anel stops receiving any further evidence, arguments or testimony in a matter, and the appeal proceeding is submitted for a written decision." In its June 17, 2019 letter, OTA notified the parties that briefing was complete and that this appeal was submitted for a decision based on the written record. However, "the record in an appeal proceeding can be re-opened at the [p]anel's discretion. (*Ibid.*) While the panel had the authority to reject FTB's additional evidence or to reopen the record, we were not given the opportunity to consider the request because the Opinion was issued before we were notified of FTB's submission.

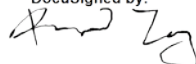
¹ FTB's PFR contained other bases, which we do not address because we grant a rehearing on the basis discussed herein.

We find that an irregularity in the proceedings occurred which materially affected FTB’s rights. We find that the record could have been reopened prior to December 9, 2019, when the Opinion was issued. FTB’s additional evidence is relevant, if not dispositive of the issue on appeal.

For the foregoing reasons, we grant a rehearing.

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Teresa A. Stanley
Administrative Law Judge

I concur:

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Richard I. Tay
Administrative Law Judge

T. LEUNG, Dissenting:

I disagree.

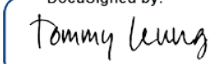
Franchise Tax Board (FTB) is correct when it argues that for oral hearings, exhibits may be submitted up until the record is closed and the case is submitted. However, as both parties know, appellant waived the right to an oral hearing; thus, the appeal is “submitted for decision based upon the written record.” (See Cal. Code Regs., tit. 18, § 30209(a).) Instead, the Office of Tax Appeals’ (OTA) Rules for Tax Appeals direct us to look to the submission date to establish the time when the written record is set. (Cal. Code Regs., tit. 18, § 30000, et seq.)

“‘Written record’ refers to the record that a Panel may consider in reaching a determination when the appellant has declined an oral hearing, or waived the right to an oral hearing pursuant to regulation 30404” (Cal. Code Regs., tit. 18, § 30102(w).) The “‘submission date’ is the date upon which a Panel stops receiving any further evidence, arguments or testimony in a matter, and the appeal proceeding is submitted for a written decision. The determination of the submission date *is at the discretion of the Panel*, and the record in an appeal proceeding *can be re-opened at the Panel’s discretion.*” (Cal. Code Regs., tit. 18, § 30102(u) (emphasis added).)

In this appeal, after briefing was complete, OTA sent the parties a letter dated June 17, 2019, advising same and stating: “Please note, the above-referenced appeal will be submitted for decision on the basis of the written record and without an oral hearing.” Therefore, this appeal was submitted for decision, based on the written record, on June 17, 2019.

FTB directs our attention to OTA Rule 30210(g), but that provision only applies when a conference is requested. (Cal. Code Regs., tit. 18, § 30102(g).) Neither party requested a conference and, as FTB admits, its December 4, 2019, correspondence was nothing more than a cover letter with additional exhibits and could not be considered as a request for a conference or to re-open the record.

Based on the foregoing, I would deny the petition.

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Tommy Leung
Administrative Law Judge

Date Issued: 10/14/2020