OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011305
F. HENDERSON (REQUESTING SPOUSE)	)
AND	)
R. HENDERSON (NONREQUESTING SPOUSE)	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Requesting Spouse: F. Henderson

For Nonrequesting Spouse: R. Henderson

For Respondent: Brad Coutinho, Tax Counsel III

A. LONG, Administrative Law Judge: On February 13, 2020, the Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's (FTB) action in this matter. OTA determined that F. Henderson (requesting spouse) was not entitled to innocent spouse relief under Revenue & Taxation Code (R&TC) section 18533(f) and not entitled to relief from nonpayment under R&TC section 19006(c) for the 2005, 2006, and 2007 tax years. F. Henderson timely filed a petition for rehearing (PFR) under R&TC section 19048. FTB and R. Henderson (nonrequesting spouse) each filed a brief in response to the PFR.

OTA may grant a rehearing when 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.) A ground for a rehearing is

material if it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708.)

Requesting spouse argues that OTA incorrectly determined that requesting spouse failed to prove spousal abuse. Requesting spouse asserts that she has since been granted another restraining order against nonrequesting spouse and provided a copy of a Notice of Hearing dated March 19, 2020, for a hearing on a domestic violence restraining order against nonrequesting spouse. Requesting spouse also asserts that OTA erred in its finding that the spouses were not legally separated or divorced for 12 months prior to January 26, 2016. Finally, requesting spouse alleges that she does not recall waiving the right to an oral hearing. These arguments appear to be made on the grounds that there is insufficient evidence to justify the written Opinion or the Opinion is contrary to law; that there is newly discovered, relevant evidence that was not considered in the underlying opinion; and that there was an irregularity in the appeals proceedings. We will discuss each ground in turn.

Insufficient Evidence to Justify the Opinion or the Opinion is Contrary to Law

Although California Code of Regulations, title 18, section 30604(d), combines insufficiency of the evidence and contrary to law in one subsection, these are two separate, distinct grounds for a new hearing. To find that there is an insufficiency of evidence to justify the opinion, we must find that we clearly should have reached a different determination after weighing the evidence in the record and reasonable inferences based on that evidence. (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.)

To find that the opinion is against or contrary to law, we need not reweigh the evidence, but must find that the opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This requires a review of the opinion to indulge "in all legitimate and reasonable inferences" to uphold the opinion. (*Sanchez-Corea v. Bank of America*, *supra*, at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the opinion, but whether the opinion can be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

The Opinion determined that requesting spouse failed to meet the threshold conditions of Revenue Procedure 2013-34 section 4.02 for a streamlined determination to grant equitable relief. Specifically, requesting spouse did not establish the following: (1) that the spouses were

divorced, legally separated, or lived apart from each other for 12 months prior to the date of FTB's determination; (2) that requesting spouse would suffer economic hardship if relief were not granted; and (3) that nonrequesting spouse had abused requesting spouse to negate her knowledge (or reason to know) that nonrequesting spouse would not or could not pay the California tax liabilities reported on the 2005, 2006, and 2007 returns. These threshold conditions were considered under Revenue Procedure 2013-34 section 4.03 to determine whether it would be inequitable to hold requesting spouse liable for all or part of the tax liability. Under section 4.03, these three factors were among several factors considered and weighed, and no one factor or a majority of factors necessarily determines the outcome of a case.

Regarding the marriage factor, whether the spouses were divorced, legally separated, or lived apart is determined at the time FTB made its determination, which was on January 26, 2016. In the PFR, requesting spouse purports to have separated from nonrequesting spouse on March 10, 2016. If true, this would mean that the spouses had not separated by January 26, 2016, the date of FTB's determination. Therefore, the Opinion did not err in its determination in this regard.

Regarding the economic hardship factor, requesting spouse points to a document she calls "child support/spousal support order," which lists her income and expenses. The document, an Income and Expense Declaration, does in fact require the declarant to fill out his or her income and expenses. However, without other evidence, such as paystubs or a list of assets, it is insufficient to establish that requesting spouse would suffer economic hardship. The Opinion did not err in the determination that requesting spouse would not suffer economic hardship based on the record.

Regarding the allegations of spousal abuse, requesting spouse contends that OTA erred in finding that she did not meet her burden of proving spousal abuse. The knowledge requirement may be negated if the nonrequesting spouse abused the requesting spouse or maintained control of the household finances by restricting the requesting spouse's access to financial information such that the nonrequesting spouse's actions prevented the requesting spouse from questioning or challenging payment of the liability. (Rev. Proc. 2013-34, § 4.03(2)(c)(ii).) Claims of abuse require substantiation, or at minimum, specificity in allegations of abuse. (See *Nihiser v. Commissioner*, T.C. Memo. 2008-135, p. *24; *Thomassen v. Commissioner*, T.C. Memo. 2011-88.) "A generalized claim of abuse is insufficient." (*Contreras v. Commissioner*, T.C.

Memo. 2019-12, p. *21, citations omitted.) Requesting spouse has provided numerous documents to support her allegations of abuse, dating from May 19, 2010, to January 31, 2019; however, as the Opinion states, requesting spouse's documents fail to support her allegations of abuse. Requesting spouse has made several claims of abuse, but the claims are unsupported with credible evidence. Moreover, some of her claims have been contradicted in other documents, such as IRS Form 8857 where she stated that she was not afraid of nonrequesting spouse and he did not pose a danger to her, her children, or her other family members. Requesting spouse has therefore failed to establish that there is insufficient evidence to justify the Opinion or that the Opinion is contrary to law.

Newly Discovered, Relevant Evidence

Evidence is "newly discovered" if it was material to the party seeking a rehearing and it was not known or accessible to the party seeking rehearing prior to the issuance of the written opinion. (See *Hayutin v. Weintraub* (1992) 207 Cal.App.2d 497, 512.) Evidence that, under the circumstances, must have been known to the party seeking a rehearing prior to issuance of the written opinion may not be regarded as "newly discovered." (See *ibid*.)

With the PFR, requesting spouse has provided two additional exhibits: a form entitled "Mandatory Settlement Conference Calendar Term Sheet – Dissolution of Marriage," dated April 10, 2019, as evidence of their separation date of March 10, 2016; and a Notice of Hearing filed with the Superior Court of California, County of San Diego, on March 19, 2020, for a domestic violence restraining order as evidence of nonrequesting spouse's abuse.[1]

These documents do not meet the standard of newly discovered, relevant evidence. As previously stated, the Mandatory Settlement Conference is neither material nor newly discovered because the date of separation is not in requesting spouse's favor and the document was available during the pendency of the appeal. Similarly, the Notice of Hearing is not material because the Treasury Regulations require us to focus on actions that occurred *prior* to the time requesting spouse signed the joint return and that the *prior* abuse resulted in requesting spouse not challenging the return.[2] (Treas. Reg. §§ 1.6015-2(c), 1.6015-3(c)(2)(v).) As such, these

[1] We note that the Notice of Hearing granted a temporary restraining order until the hearing date.

[2] To the extent requesting spouse provides the Notice of Hearing from 2020 as further evidence of ongoing abuse that existed during the relevant time at issue, we find that the Notice of Hearing is not likely to change the determination with regard to that issue, and is therefore not material new evidence under the applicable standard.

documents fail to support a ground for a new hearing based on newly discovered, relevant evidence.

Irregularity in the Proceedings

Courts have defined an irregularity in the proceedings as "an overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct" (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182), and as "[a]ny departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected." (*Appeal of Graham and Smith*, *supra*, quoting *Gay v. Torrance* (1904) 145 Cal. 144, 149.) Courts have also required, in addition to identifying such an irregularity, that the moving party show he or she was ignorant of the facts constituting the irregularity prior to the court's decision, "since it is settled that a party may not remain quiet, taking his chances upon a favorable verdict, and, after a verdict against him [or her], raise a point of which he [or she] knew and could have raised during the progress of the [proceedings]." (*Gray v. Robinson*, *supra*, at p. 183.)

Requesting spouse states that she is unaware of when she would have waived the right to an oral hearing. Our records indicate that requesting spouse was notified by the Board of Equalization of an option for an oral hearing. In a letter dated April 23, 2019, our office also informed requesting spouse that the Opinion would be based on the written record and without an oral hearing. We see no irregularity having occurred during the proceedings. Moreover, requesting spouse had opportunities during the pendency of the appeal to request an oral hearing, but did not do so.

In summation, these arguments fail to support granting a rehearing based on the grounds that there is insufficient evidence to justify the written Opinion or the Opinion is contrary to law; that there is newly discovered, relevant evidence that was not considered in the underlying

Opinion; or that there was an irregularity in the appeals proceedings. Requesting spouse's PFR therefore is denied.

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Andrea LH Long
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Andrea L.H. Long
Administrative Law Judge

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

Date Issued: 2/2/2021