

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

S. REED) OTA Case No. 18042786
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)**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant:

S. Reed

For Respondent:

Ellen L. Swain, Tax Counsel IV

J. LAMBERT, Administrative Law Judge: On January 28, 2020, the Office of Tax Appeals (OTA) issued a written Opinion sustaining Franchise Tax Board's (FTB's) action proposing an assessment of tax and imposing penalties, plus interest, for the 2014 and 2015 tax years. In addition, OTA imposed a \$500 frivolous appeal penalty. On February 27, 2020, S. Reed (appellant) timely filed a petition for rehearing (PFR) arguing that a rehearing should be granted. Upon consideration of appellant's PFR, we conclude that the grounds set forth therein do not meet the requirements for a rehearing under California Code of Regulations, title 18, section (Regulation) 30604.

A rehearing may be granted where one of the following grounds exist and the rights of the filing party (here, appellant) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to issuance of the written opinion and prevented fair consideration of the appeal; (b) 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 filing party could not have reasonably discovered and provided prior to 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).)

Appellant contends that a rehearing is warranted based on all of the grounds described above and provides numerous arguments, such as that FTB incorrectly asserted that the estimate of income was reasonable and rational, that appellant's issues were not given consideration, and that FTB's notices should be withdrawn. However, for each ground, appellant provides many arguments which are the same or similar to the arguments that he provided during the original appeal. These repeated arguments which were considered and rejected in the original Opinion do not constitute grounds for rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Additionally, appellant asserts that OTA did not consider the complete record; however, OTA considered all of appellant's documents and arguments in making its determination. Furthermore, appellant asserts that a rehearing should be granted based on newly discovered, relevant evidence. Appellant provides an FTB document he received December 24, 2019, indicating that appellant was identified as a "frivolous activity non-filer" by FTB. Appellant asserts that he was never notified by FTB that he was identified as a frivolous activity non-filer. Appellant also provides a letter from the California Department of Tax and Fee Administration dated March 6, 2020, stating that it is unable to locate an account for any permits, license, business licenses, or accounts related to appellant. However, "newly discovered evidence must be material in the sense that it is likely to produce a different result." (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.) We note the document was received on December 24, 2019, before the issuance of the written Opinion on January 28, 2020. However, appellant has not established the relevance of the documents or that they are likely to produce a different result.

Appellant also contends that the frivolous appeal penalty should not be imposed and argues that he is constitutionally protected from deprivation of life, liberty, or property without due process of law. However, OTA is precluded from deciding constitutional arguments by both longstanding policy and constitutional mandate. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corp.* (83-SBE-221) 1983 WL 15592.) We have considered all of the arguments and evidence in

the PFR and find that they do not establish that a rehearing should be granted based on the requirements under Regulation 30604. Accordingly, appellant’s PFR is hereby denied.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

Date Issued: 2/24/2021