OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19115504
L. COLLIER	)
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	)
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	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Philip D. London, CPA

For Respondent: Eric R. Brown, Tax Counsel III

H. LE, Administrative Law Judge: On September 16, 2020, the Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's (FTB) tax deficiency determination that is based upon federal adjustments but reversed FTB's accuracy-related penalty imposition for the 2015 tax year.[1] L. Collier (appellant) then timely filed a petition for rehearing (PFR) with OTA on the bases of an error in law and newly discovered, relevant evidence. Upon consideration of appellant's PFR, we conclude that the grounds set forth therein do not constitute a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (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 filing 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.

[1] Neither party seeks a rehearing on our disposition of the accuracy-related penalty; thus, we need not address it further.

(Cal. Code Regs., tit. 18, § 30604(a)-(e); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

Appellant bases her petition on two grounds for a rehearing. First, appellant asserts an error in law but fails to elaborate beyond this bare assertion. Every PFR must contain facts and argument explaining why the filing party believes there are grounds for rehearing. (Cal. Code Regs., tit. 18, § 30603(e).) Here, appellant's PFR lacks any facts or argument specific to its assertion of an error in law. In the absence of specific facts or argument, we will not address appellant's bare assertion regarding this ground for rehearing.

Second, appellant contends that a rehearing should be granted based on newly discovered, relevant evidence. A party seeking a rehearing under this ground must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence materially affects the substantial rights of the party. (*Doe v. United Air Lines, Inc*. (2008) 160 Cal.App.4th 1500, 1506.)[2] Failure to show any of these three requirements is sufficient to deny appellant's petition for rehearing based on newly discovered, relevant evidence. (See *ibid*.)

On the first requirement, implicit in the term "newly discovered" is the concept that the evidence existed, but remained undiscovered, prior to issuance of the Opinion. (*Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1079; see also Cal. Code Regs., tit. 18, § 30604.) On the second requirement, a PFR will be denied when (a) the newly discovered evidence could have been produced by the exercise of reasonable diligence, (b) the party seeking rehearing has not shown due diligence in discovering and producing the newly discovered evidence, or (c) no reason is shown for why the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the Opinion. (*Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208.) Lastly, on the third requirement, newly discovered evidence is "material" to appellant's case if it is likely to produce a different result. (*In re Marriage of Smyklo* (1986) 180 Cal.App.3d 1095, 1101.)

Here, appellant submitted two letters dated October 2020 that she claims are newly discovered, relevant evidence. The letters, respectively, indicate that the Internal Revenue

[2] OTA's grounds for granting a rehearing are established by regulation, based largely on regulations established by our predecessor, the State Board of Equalization. As seen in *Appeal of Wilson Development*, *Inc*., *supra*, the grounds were originally based on relevant causes provided for in the California Code of Civil Procedure (CCP) section 657. As such, case law analyzing the relevant causes in CCP section 657, such as *Doe*, *supra*, provide guidance for our analysis here.

Service (IRS) Taxpayer Advocate is working to resolve appellant's IRS audit reconsideration request, and request a "hold" on FTB's action until the IRS can review appellant's audit reconsideration request. However, both letters were created after the issuance of the Opinion in this appeal, and neither letter shows a material error in the IRS's adjustments or FTB's determination based upon those adjustments. Furthermore, appellant has not shown she exercised reasonable diligence in discovering and producing information on these matters prior to the issuance of our Opinion. Therefore, we find that appellant's two letters do not constitute newly discovered, relevant evidence sufficient to grant a rehearing.

Appellant also submitted her IRS audit reconsideration request.[3] However, although the request contains a list of expenses, appellant has provided no documents to support the expenses. Without the appropriate support, the request is not material because it would not change the outcome of our Opinion.[4] Accordingly, appellant has failed to show that the IRS audit reconsideration request is newly discovered, relevant evidence that warrants a rehearing.

[3] This appears to be the actual copy and not an undated, partial copy previously submitted before briefing closed for our Opinion.

[4] Appellant invites us to essentially perform an audit of appellant's list of expenses. However, we decline to do so.

In summary, we find that appellant has not established the existence of any grounds for a rehearing; thus, we deny appellant's PFR.[5]

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Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

We concur:

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

Date Issued: 2/19/2021

[5] Appellant's PFR also requests an extension to allow the IRS time to review her IRS audit reconsideration request. However, we note that appellant made no such extension request before the issuance of our Opinion. (See Cal. Code Regs., tit. 18, § 30302(c).) Furthermore, FTB previously invited appellant to submit documentation that the IRS has accepted appellant's audit reconsideration request, but appellant did not do so. Regardless, FTB provided an updated IRS Account Transcript—dated after appellant's PFR—that shows the federal examination closed and has not been reopened for IRS audit reconsideration. Therefore, the record reflects that the IRS determination is final, and FTB's proposed assessment was issued following that final federal determination. Accordingly, we deny appellant's extension request.