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2022 – OTA – 062
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19064908
V. HARRISON,	CDTFA Case ID 197-049
dba VONZIE AUTO SALES	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Melisa Coates, Enrolled Agent

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. GEARY, Administrative Law Judge: On September 17, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining a Decision issued by the California Department of Tax and Fee Administration (respondent) to V. Harrison, dba Vonzie Auto Sales (appellant). Respondent's Decision deleted a negligence penalty, conditionally relieved a penalty imposed pursuant to Revenue and Taxation Code section 6565 (finality penalty), and reduced the taxable measure to $236,567, but otherwise denied appellant's late protest.[1] On October 18, 2021, pursuant to the California Code of Regulations, title 18, (Regulation) section 30602, appellant filed a timely petition for a rehearing (PFR).[2] Upon consideration of the matters stated therein, we find that appellant has not established grounds for a new hearing.

Regulation section 30604 provides that OTA may grant a rehearing where any one or more of the six stated grounds exist, and the rights of the complaining party are materially affected. Those grounds are: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution

[1] Appellant filed a late protest of a July 3, 2015 Notice of Determination (NOD) for tax of $36,377.77, plus accrued interest, and a negligence penalty of $3,637.78 for the period July 1, 2011, through June 30, 2014 (liability period). The NOD was based on an audit, which established a deficiency measure of $457,104 for unreported taxable sales.

[2] Appellant refers to its filing as a petition for original hearing or, in the event that petition is denied, a petition for rehearing. The Rules for Tax Appeals (Cal. Code Regs., tit. 18, § 30000, et seq.) describe procedures for requesting, and acts or omissions that result in the waiver of, an oral hearing. Those Rules do not provide for a petition for original hearing. Therefore, we treat appellant's filing as a PFR.

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; (5) the opinion is contrary to law; or (6) an error in law that occurred during the hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).) Grounds for a rehearing, if established, will be found to have materially affected the substantial rights of the petitioning party when a different result would have been likely but for the alleged event or error. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.)[3]

The following is a chronology of the relevant circumstances and events:

- June 17, 2019 – Appellant appealed to the Office of Tax Appeals (OTA).
- September 25, 2019[4] – OTA mailed its first request to find out if appellant wanted an oral hearing and instructed appellant to reply by October 25, 2019, stating, "*If you fail to respond or if we do not receive the copy of this letter timely, we will submit the appeal for decision on the basis of the written record and without oral hearing*." (Italics in original.)
- November 1, 2019 – Appellant sent his late reply requesting an oral hearing. OTA accepted the late request.
- May 20, 2020 – OTA mailed a notice of a July 2, 2020 prehearing conference and a July 28, 2020 oral hearing. The notice of hearing stated, "If your response is not received by June 4, 2020, your case will be submitted for decision without an oral hearing and decided on the basis of the written record."
- May 29, 2020 – Appellant's representative returned the Response to Notice of Oral Hearing, opting for an online video hearing.[5]

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[3] Regulation 30604 is based upon the provisions of California Civil Code of Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.*, 1994 WL 580654 [State Board of Equalization (SBE) utilizes CCP 657 in determining grounds for rehearing]; *Appeal of Do*, 218-OTA-002P [OTA adopts SBE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute can be helpful when interpreting the provisions contained in this regulation.

[4] On June 26, 2019, respondent requested a 90-day deferral to complete a reaudit.

[5] In-person hearings had been suspended in an effort to limit the spread of COVID-19.

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- July 2, 2020 – OTA convened the properly noticed telephonic prehearing conference. Appellant did not call into the conference as instructed by the notice. When contacted later by OTA, appellant's representative stated that she was unaware that a conference had been scheduled. Appellant also requested an in-person hearing.
- July 13, 2020 – OTA granted appellant's request to postpone the hearing to await an in-person hearing.
- June 11, 2021 – OTA mailed notices of an August 3, 2021 prehearing conference and an August 24, 2021 in-person oral hearing and instructed appellant to reply no later than June 28, 2021. The notice again stated, "If your response is not received by June 28, 2021, your case will be submitted for decision without an oral hearing and decided on the basis of the written record."
- July 1, 2021 – After appellant did not timely reply to the notice of hearing, OTA sent a copy of the Response to Notice of Oral Hearing to appellant's representative via mail and email, requesting a reply.
- July 6, 2021 – Because it did not receive a reply from appellant, OTA called appellant's representative to again follow up regarding the oral hearing, leaving a message requesting a return phone call.
- July 7, 2021 – Appellant's representative had a telephone conversation with OTA and stated that she had not received the hearing notice and had not checked her emails. Appellant's representative stated that she wanted to postpone the hearing. OTA staff instructed the representative to put the request for a postponement in writing.
- July 9, 2021 – OTA sent an email to appellant's representative confirming the telephone conversation and again instructing the representative to put the postponement request in writing.
- July 15, 2021- Having received nothing from appellant about the postponement, OTA called appellant's representative to again follow up, leaving a message requesting a return phone call.

- July 20, 2021 – Having heard nothing further from appellant regarding the August 24, 2021 in-person hearing, OTA sent a letter notifying appellant that the matter had been removed from the hearing calendar and would be decided on the basis of the written record because appellant failed to complete and return the Response to Notice of Oral Hearing. OTA also sent a copy of the letter to appellant's representative via email.
- July 26, 2021 – Appellant's representative faxed a Response to Notice of Oral Hearing, stating that she was requesting a postponement because she was "unable to attend" on the scheduled date.
- August 3, 2021 – OTA sent an email to the parties, stating, in part, that to the extent the faxed Response to Notice of Oral Hearing was intended as a request to place this matter back on the hearing calendar, the request was denied without prejudice on the grounds that appellant did not timely respond to the Notice of Oral Hearing and had not shown reasonable cause for his failure to do so. Appellant did not reply to the email.
- September 17, 2021 – OTA issued the Opinion.
- October 18, 2021 – Appellant filed the PFR.

The PFR makes no reference to Regulation section 30604 or to the grounds stated therein. In support of the PFR, appellant states only that the representative faxed a Response to Notice of Oral Hearing requesting a postponement and that the representative did not receive a response and therefore assumed the hearing was being postponed. We interpret this argument to be a request for rehearing on the ground that removing the matter from the hearing calendar and issuing an opinion on the basis of the written record constituted errors in law that warrant a new hearing under Regulation section 30604(a)(6).

Appellant also appears to argue that a new hearing is warranted to allow appellant an opportunity to present evidence that was not contained in the written record. Appellant refers specifically to "information showing various factors outlined" on documents that appellant attached to the PFR. Those documents consist of: (1) a fax report showing that appellant's representative faxed something to OTA on June 26, 2021; (2) a copy of the Response to Notice of Oral Hearing that OTA interpreted as a request to place the matter back on the hearing calendar; (3) a document entitled Response to Appeal Conference for Vonzie Auto Sales, which

appears to summarize the bases upon which appellant disputes the information contained in several of respondent's audit schedules; and (4) copies of pages one (of two) of respondent's audit schedules R1-12C and R1-12D-2, purporting to show that respondent erred by including duplicates and counting as sales vehicles that were for personal use or still in resale inventory.[6]

While a request for a new hearing can be based on a party's desire to offer additional evidence, such evidence must be "newly discovered," meaning that the filing party could not have reasonably discovered and provided the evidence prior to issuance of the written opinion. (Cal. Code Regs., tit. 18, § 30604(a)(3).) Nothing in our record even suggests that the evidence to which appellant vaguely refers qualifies as newly discovered evidence.[7] Appellant's desire to supplement the record with additional evidence that was available prior to issuance of the Opinion is not grounds for a rehearing, and we need not address this argument further. Nevertheless, if appellant demonstrates that a new hearing is required on the grounds of an error in law, appellant will have the opportunity to present additional evidence.

Error in Law

In this context, an "error in law" generally refers to an error in the proceedings, such as an evidentiary or procedural ruling, as opposed to a legal error in an opinion. (Cal. Code Regs., tit. 18, § 30604(b); see also, e.g., *Hernandez v. Wilson* (1961) 193 Cal.App.2d 615, 616 [denial of motion for new trial on grounds jury trial wrongfully denied after waiver reviewable as alleged error in law].) To grant a new hearing, we must conclude that OTA's actions were erroneous as a matter of law. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17-18.)

On June 11, 2021, OTA mailed notices of the August 3, 2021 prehearing conference and the August 24, 2021 in-person oral hearing to appellant and his representative. The notices sent to appellant's representative were not returned by the U.S. Postal Service and it is rebuttably presumed that the notices were physically delivered to the addressee within the time that such a

[6] We understand the purpose of the first two listed documents: to show that appellant eventually responded to the notice of hearing. However, as stated above, there is no dispute that appellant faxed the Response to Notice of Oral Hearing on the date and at the time indicated, and those documents have no relevance to the issue on appeal.

[7] We note that respondent's audit schedule R1-12C was superseded by audit schedule R2-12C, which deleted the duplicates about which appellant seeks to offer evidence. Both of these audit schedules are in evidence.

mailing would be expected to take.[8] (*Schikore v. BankAmerica Supplemental Retirement Plan* (9th Cir. 2001) 269 F.3d 956, 961.) Consistent with Regulation sections 30402 and 30403,[9] the hearing notice clearly instructed appellant to reply no later than June 28, 2021, and informed appellant that if his response was not received by that date, the matter would be submitted for decision without an oral hearing and decided on the basis of the written record. OTA even confirmed with appellant's representative that the physical and email addresses on file for her were correct and emailed a second copy of the hearing notice to the representative on July 1, 2021, thereafter following up several more times by telephone. When appellant's representative indicated during a July 7, 2021 telephone call that that she wanted to postpone the hearing, OTA instructed the representative to put the postponement request in writing.[10] After yet another follow-up call to appellant's representative on July 15, 2021, and no reply from appellant, OTA finally notified appellant by letter dated July 20, 2021, that the matter was removed from the hearing calendar. We find that appellant had ample notice of the consequences of his failure to timely complete and return the Response to Notice of Oral Hearing and that OTA's removal of the matter from the hearing calendar was consistent with the law. On that basis, we conclude that OTA's removal of the matter from the hearing calendar was not an error in law.

Regulation section 30404(a) provides that when OTA removes the matter from the hearing calendar after an appellant fails to return the completed Response to Notice of Oral Hearing, the matter will be submitted to a Panel for a decision on the basis of the written record without an oral hearing, unless OTA determines otherwise pursuant to subdivision (b). Regulation section 30404(b) provides that prior to issuance of the Opinion, OTA may, in its discretion, return the matter to the hearing calendar if appellant shows that there was good cause for its failure to respond to the hearing notice.

[8] Although not particularly relevant to our analysis, we note that notices sent to appellant at his address of record have been returned to OTA by the U. S. Postal Service. Respondent's representative has only recently responded to OTA's repeated requests for appellant's current mailing address by indicating that she does not have one.

[9] Regulation section 30403 states, in part, that "An appellant who wishes to have an oral hearing must provide OTA with a signed and completed response to the notice of oral hearing not later than 15 days from the date the notice of oral hearing was mailed."

[10] Although not at issue here, we also note that it was impossible to determine whether appellant's belated postponement was for good cause, as required by Regulation section 30220, because the representative made no effort to establish the reason why she was unable to attend the hearing on August 28, 2021.

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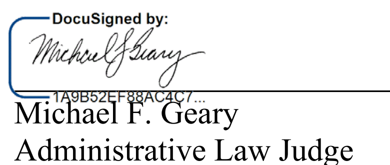
As already stated, OTA notified appellant on July 20, 2021, that the matter had been removed from the hearing calendar. Postponement had become a moot issue six days before appellant's representative finally faxed a Response to Notice of Oral Hearing to OTA requesting a postponement on the grounds that she was "unable to attend" on the scheduled date. Nevertheless, OTA agreed to treat appellant's request for a postponement as a request to return the matter to the hearing calendar. Because appellant had not shown good cause for the failure to timely complete and return the Response to Notice of Oral Hearing, OTA's August 3, 2021 email informed appellant that the request was denied because appellant did not even attempt to show that there was good cause for his failure to timely respond to the hearing notice. The denial was without prejudice, and there was nothing to prevent appellant from thereafter showing good cause to return the matter to the hearing calendar. During the more than six weeks that followed (before OTA issued the Opinion), appellant made no further attempt to show good cause, and we find no evidence of good cause in the record.

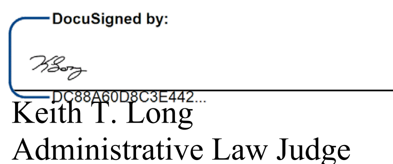
The representative's statement that she requested a postponement of the hearing and, receiving no response, assumed the hearing had been postponed, is not supported by the record. On the contrary, the record supports the chronology stated above and, with the clear guidance provided by the Rules for Tax Appeals, supports the actions taken by OTA, including denial of the request to place the matter back on the hearing calendar, and issuance of the Opinion on the basis of the written record. On these bases, we find that: (1) OTA correctly interpreted appellant's untimely request to reschedule as a request to return the matter to the hearing calendar; and (2) OTA correctly denied that request and based the Opinion on the written record.

For the reasons stated above, we conclude that appellant has not established grounds for a new hearing.

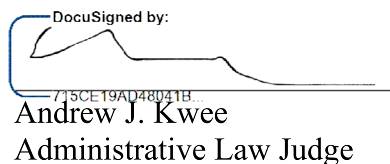


Michael F. Geary
Administrative Law Judge

We concur:



Keith T. Long
Administrative Law Judge



Andrew J. Kwee
Administrative Law Judge

Date Issued: 1/12/2022