OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20046104
G. PEREIRA	)
	)
	)
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	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: G. Pereira

For Respondent: Joel M. Smith, Tax Counsel III

T. STANLEY, Administrative Law Judge (ALJ): On October 5, 2021, the Office of Tax Appeals (OTA) issued an Opinion holding that, for taxable year 2016, 1) appellant did not show error in Franchise Tax Board's (FTB's) proposed assessment because he lived in Mexico for a temporary or transitory purpose, and 2) appellant established reasonable cause to abate the late-filing penalty. Appellant filed a timely petition for rehearing (PFR).[1]

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party are materially affected: (1) an irregularity in the appeal proceedings, that occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion, 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 Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P.)

Appellant asserts two grounds for a rehearing: 1) that there was an irregularity in the appeal proceedings or error in law in the appeals hearing or proceeding; namely, that he either

[1] Appellant does not contest abatement of the late-filing penalty. Thus, we address only the request to re-hear the issue of whether appellant was a resident of California for tax purposes during taxable year 2016.

had a hearing[2] or would have argued orally if an oral hearing had been offered; and 2) that there was insufficient evidence to justify the Opinion's conclusion that he was a resident of California in 2016.[3] Each argument is addressed in turn.

Generally, an irregularity in a proceeding broadly includes "any departure by [OTA] from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected." (*Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) We review "the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]" (See *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.) The grant or denial of a new hearing on such basis "is largely in the discretion of the" presiding officer. (*Loggie v. Interstate Transit Co.* (1930) 108 Cal.App. 165, 171.) We find no such irregularity in our review of the record. The record shows that appellant is mistaken in his belief that a hearing was held. Appellant did attend a conference on March 18, 2021 (the conference). The purpose of the conference, as reiterated in the Minutes and Orders that issued on March 23, 2021, was "[t]o request that appellant produce additional evidence in support of his position that he was not a resident of California for 2016; or in other words, was appellant outside California (and in Mexico) for more than a temporary or transitory purpose." Appellant cooperated with OTA's request and provided additional documentation by email on May 3, 2021, and on May 8, 2021. Therefore, at the conference, appellant was invited to further substantiate his assertion that he was a nonresident of California in 2016, and there was no irregularity with respect to the conference.

Appellant further asserts that had an oral hearing been offered, he would have accepted, which "may have resulted in a different determination by the OTA." This appears to be an argument that OTA failed to offer appellant the right to a hearing, and that such error in law requires a rehearing. "[A]n error in law is a claim of a procedural wrong," or error in the appeals proceeding, such as an erroneous denial of a jury trial at the court level. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P, at fn. *2; see also Cal. Code Regs., tit. 18, § 30604(b).)

[2] OTA held an electronic conference to determine whether appellant would be able to submit additional documentation to support his assertions. Appellant did respond to the Minutes & Orders issued on March 23, 2021, and submitted additional documentation.

[3] Throughout the petition, appellant refers to "respondent's" findings in the Opinion. The respondent in this appeal is FTB. OTA is an independent appeals body with its own tax experts that is separate from FTB or any other tax agency.

On July 9, 2020, OTA sent to appellant a letter which indicated that FTB had filed its opening brief. The letter included a form by which to select an oral hearing and location, or alternatively to request an opinion based on the written record. The letter instructed appellant that "[i]f you fail to respond or if we do not receive the enclosed copy of this letter, we will submit the appeal for decision on the basis of the written record and without oral hearing." Appellant did not respond to the letter, and OTA issued a letter to appellant on August 27, 2020, stating that the matter would be determined based on the written record. This was reiterated in letters dated November 19, 2020, January 12, 2021, and June 7, 2021, issued during the briefing process. Because appellant was notified that an oral hearing was available, and despite several notifications failed to request a hearing, we conclude there was no error in the proceeding that warrants a rehearing.

Appellant's second ground for a rehearing is that there was insufficient evidence to support the conclusion that appellant remained a resident of California in 2016, and that he was only in Mexico for a temporary or transitory purpose.

California Code of Regulations, title 18, section 30604(a)(4) provides that a rehearing may be granted on insufficiency of the evidence to justify the opinion. We review an opinion to determine whether it is supported by sufficient evidence, taking a fresh look at the evidence, and exercising independent judgment to weigh the evidence and draw reasonable inferences from that evidence.[4] (See *Yarrow v. State* (1960) 53 Cal.2d 427, 434 [interpreting Code of Civil Procedure section 657].)[5] To find that there is an insufficiency of evidence to justify the opinion, we must be convinced from the entire record that the prior panel clearly should have reached a different decision. (Code Civ. Proc., § 657; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.)

Appellant lists some of the findings of fact in the opinion and underlines those findings with which he agrees. Appellant believes those underlined facts establish more likely than not that he did not have an intent to return to California and was, therefore, not in Mexico for a

[4] A PFR is assigned to a panel that includes only one ALJ who signed the original Opinion, usually the lead ALJ who authored the Opinion, and two new members who did not participate in the original panel's deliberations. (Cal. Code Regs., tit. 18, § 30606(a).)

[5] As provided in *Appeal of Wilson Development, Inc*., (94-SBE-007) 1994 WL 580654, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable case law as relevant guidance in determining whether to grant a new hearing.

temporary or transitory purpose. Appellant further asserts that the remainder of the findings are either incorrect or do not support OTA's conclusion. Specifically, appellant argues that: 1) OTA can only "conjure" his intention; 2) OTA has "no intimate knowledge of conversations of [a]ppellant and his spouse"; 3) it was always appellant and his spouse's plan to unite with him but that move was interrupted by a family health crisis, a pandemic, and financial strain; 4) appellant's adult children maintain the same California address as their permanent address in order for them to have a place to return after college; and 5) use of the California address was for security and reliability purposes. Appellant then restates his position with respect to the evidence in our record, just as he argued in briefing prior to the issuance of the Opinion.

As indicated above, we must determine whether 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.) To prevail, appellant must show an insufficiency of evidence to justify the opinion. (*Appeals of Swat-Fame, et al.*, *supra*.) To make that finding, we must conclude after weighing the evidence in the record, including reasonable inferences based on that evidence, that we should have reached a different opinion. (*Ibid.*) Instead of showing that the conclusion in OTA's Opinion was unsupported by any substantial evidence, appellant restates much of the evidence that formed the basis for the holding that appellant was a resident of California in 2016. While it is true that some of the evidence supports appellant's position, much of the evidence shows that appellant did plan to return to California where his spouse continued to reside years later, as he admitted in his PFR, stating that circumstances "have limited Claire's travels for the meantime." This strongly indicates that appellant's spouse even now, five years later, still resides in California. In addition, appellant sent the PFR from the same Woodland Hills, California address he used to file tax returns both before and after 2016 and throughout the appeals process. Appellant had claimed during the appeal that he moved to Florida from Mexico; however, his mailing address was never modified from the California address, nor is there any evidence that appellant's spouse joined him in Florida. Appellant would have us disregard the strong, continued familial attachments with California that he has retained, which we cannot do.

We must weigh all the evidence, not just the evidence that supports appellant's position. The evidence showing appellant continues to have strong ties to California from 2016 forward, must be considered as well. The Opinion analyzed appellant's circumstances using the factors

set out in *Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264 and found that the factors in the third category[6] strongly supported appellant's continued California residency. The Opinion was supported by considerable evidence, and we find no basis to grant a rehearing based on insufficiency of the evidence.

With respect to documents submitted with appellant's petition, we note that appellant has not alleged that it is new evidence that could not have been discovered and provided prior to the issuance of the Opinion. (See Cal. Code Regs., tit. 18, § 30604(a)(3).) Moreover, appellant's dissatisfaction with the outcome of the appeal, and the attempt to reargue the same issues a second time, is not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Accordingly, we find no basis to grant a rehearing in this appeal.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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John O. Johnson
Administrative Law Judge

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Amanda Vassigh
Administrative Law Judge

Date Issued: 5/17/2022

[6] Category 3 includes: location and approximate sizes and values of residential real property; where the taxpayer's spouse and children reside; taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls); origination point of the taxpayer's checking account/credit card transactions; and the number/general purpose (vacation, business, etc.) of days the taxpayer spends in California versus other states. (See *Appeal of Bragg*, *supra*, at *p. 6.)