OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20127051
T. BERKEY AND	)
N. BERKEY	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Sara Kurth, EA

For Respondent: Kristin K. Yeager, Program Specialist

N. RALSTON, Administrative Law Judge: On December 14, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining the Franchise Tax Board's (respondent) proposed assessment of additional tax of $5,064.00 for the 2016 tax year. On January 13, 2022, T. Berkey and N. Berkey (appellants) filed a timely petition for rehearing (petition).

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party (here, appellants) are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the Opinion and prevented the fair consideration of the appeal; (2) an accident or surprise which 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; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) California Code of Regulations, title 18, section 30604 is based upon the provisions of the Code of Civil Procedure (CCP) section 657. As such, case law pertaining to the operation of CCP section 657, as well as the language of the statute itself, are persuasive authority in interpreting the provisions contained in this regulation. (*Appeal of Wilson Development, Inc.*, *supra*.)

In their petition for rehearing, appellants provide an amended 2016 California Individual Income Tax Return (Form 540X) and an amended 2016 federal income tax return (Form 1040X). Appellants assert that the federal amended return has been submitted to the IRS, and ask that their account be "corrected" with this new information.[1] While appellants do not specifically allege which of the six grounds for a rehearing exists, appellants' provision of the newly submitted California and federal amended tax returns will be treated as a claim that appellants have provided newly discovered, relevant evidence, which they could not have reasonably discovered and provided prior to issuance of the Opinion.

Appellants have not explained why the amended returns could not have been filed with respondent and a copy provided to OTA by appellants prior to the issuance of the Opinion. Additionally, during the course of the original appeal, OTA wrote to appellants via letter dated September 7, 2021, requesting that appellants provide any records that appellants would like OTA to consider in connection with their appeal. Appellants did not respond to this letter. As noted in *Appeal of Wilson Development, Inc., supra*, "[W]e prefer a record which contains all the evidence the parties believe is relevant. However, when the evidence could have been submitted before the decision, but was not, the goal of reaching the correct result must usually fall to the need to efficiently resolve matters before [OTA]." As such, if a party attempts to submit evidence after an opinion has been issued, they must show that the proffered evidence is material and could not have been produced prior to the issuance of the opinion in order for OTA to consider the evidence when deciding whether or not to grant the petition for rehearing. (*Ibid*.) Because appellants have not demonstrated that the amended returns they are now seeking to submit were not available and could not have reasonably been created and provided to OTA prior to the issuance of the Opinion, OTA cannot grant a rehearing on the basis of the newly offered amended returns.

Furthermore, with regard to newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (*See Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728*; Hill v. San Jose Family Housing*

[1] It is unclear, what exactly appellants' mean when they state that they would like appellants' "account to be corrected with this new information." OTA is a separate and independent agency from respondent (Franchise Tax Board) and it is respondent (not OTA) that administers the California income tax and would have the ability to potentially accept and process appellants' California amended return and thereby "correct" appellants' account. If appellants would like respondent to consider appellants' amended return, they would need to file that amended return with respondent directly.

Partners, LLC (2011) 198 Cal.App.4th 764, 779.) Here, there is no evidence that the federal amended return was actually filed with the IRS.[2] Moreover, to show that respondent should make a corresponding adjustment to its proposed assessment (based on the IRS assessment), appellants would need to show that the federal amended return was not only filed with the IRS, but also accepted by the IRS. Thus, appellants have failed to establish how the amended returns would produce a different result in the present matter.

In summary, appellants have not shown that grounds exist for a new hearing. Appellants' petition is hereby denied.

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

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Ovsep Akopchikyan
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Ovsep Akopchikyan
Administrative Law Judge

Date Issued: 7/21/2022

[2] Respondent submitted a copy of appellants' federal account transcript dated March 3, 2022, which shows that, as of that date, the federal amended return had not been submitted to the IRS.