OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20025885
	) CDTFA Case ID 442332
J. GOLDSTEIN	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: A. Lavar Taylor, Attorney

For Respondent: Joseph Boniwell, Tax Counsel III

J. ALDRICH, Administrative Law Judge: On January 3, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision, as amended by a supplemental decision and recommendation (SD&R), issued by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA's SD&R denied, in part, a petition for redetermination filed by J. Goldstein (appellant) of the Notice of Determination (NOD) dated March 14, 2008, which held him personally responsible for the unpaid liabilities of National Imaging Company dba Reseda Mobil's (NIC). The NOD was for $369,810.62 in tax, plus applicable interest, and $130,841.59 in penalties, for the period January 1, 2003, through April 24, 2007. In its SD&R issued on October 24, 2016, CDTFA recommended deleting NIC's unpaid liabilities (tax, interest, and penalties) for the period of January 1, 2003, through July 10, 2005. Therefore, the remaining liability period was July 11, 2005, through April 24, 2007 (liability period). For the liability period, the tax liability is $184,503.48, plus applicable interest, and penalties. The fraud penalty is $46,125.87, and the finality penalty is $18,450.35 ($64,576.22 in total penalties).

On February 2, 2022, appellant filed a timely petition for a rehearing (PFR). 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: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented 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.)

Appellant contends that a rehearing should be granted based on the first five grounds noted above. OTA addresses each ground in turn and concludes that appellant has not established a basis for a rehearing.

Irregularity in the Appeal Proceedings

OTA must determine whether appellant has established that there was an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(1).) An irregularity in the proceedings warranting a rehearing would generally include any departure from the due and orderly method of conducting the appeal proceedings by which the substantial rights of a party have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.)

Appellant argues that his former attorney, Mr. Nemiroff, deprived appellant of the ability to present all available evidence by misadvising him that OTA would never rule against him. Appellant claims that when he asked his former attorney if additional work should be done, such as obtaining documents or subpoenaing witnesses, his former attorney purportedly indicated that such work was unnecessary. In sum, appellant argues that his former attorney's counsel constitutes an irregularity in the appeal proceedings sufficient to warrant a rehearing.

Here, appellant does not allege an irregularity in how the OTA panel conducted the appeal proceedings, but rather the claimed irregularity stems from appellant's former representative's interactions with appellant. Since appellant's selection of his former representative is unrelated to OTA's method of conducting the appeal proceedings, then there was not an irregularity in the proceedings that prevented the fair consideration of the appeal. Appellant's dissatisfaction with the outcome of the appeal, his legal strategy, or his former representative are not valid grounds for a rehearing. (See *Appeal of Graham and Smith*, *supra*.)

As such, OTA finds there is no evidence that an irregularity occurred during the appeals proceeding. Therefore, appellant has failed to establish an irregularity warranting a rehearing.

Accident or Surprise

Next, OTA must determine whether appellant has established an accident or surprise which occurred during the appeal proceedings and prior to issuance of the Opinion, which ordinary caution could not have prevented. (Cal. Code Regs., tit. 18, § 30604(a)(2).) Interpreting section 657 of the Code of Civil Procedure, the California Supreme Court held that the terms "accident" and "surprise" have substantially the same meaning. (*Kauffman v. De Muttis* (1948) 31 Cal.2d 429, 432.) To constitute an accident or surprise, a party must be unexpectedly placed in detrimental condition or situation without any negligence of the part of the party. (*Ibid*.) A rehearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Wilson Development, Inc.*, *supra*.)

Appellant argues that there was an accident or surprise based on "the inappropriate actions of his [former] attorney." Appellant argues that he relied to his detriment on the advice of his former attorney. Appellant claims he was surprised that his former attorney turned out to be wrong when OTA sustained CDTFA's SD&R. In support of these claims, appellant submitted a declaration with his PFR.

Accordingly, OTA turns its analysis to consider appellant's declaration. Appellant's declaration includes, in pertinent part, the following:

> 49. … It was Mr. Nemiroff who told me that I should file Chapter 7 bankruptcy. He said that if I listed [CDTFA] as a creditor, the problem would go away. The problem obviously did not go away.
>
> 50. … He told me that I could do all of the work for the appeal. Mr. Nemiroff never looked at my exhibits. He never interviewed me in detail to learn about the facts (which is what Mr. Lavar Taylor did after I hired him). Whenever I asked Mr. Nemiroff whether additional work should be done, such as obtaining documents, and subpoenaing witnesses, Mr. Nemiroff repeatedly advised me that such work was unnecessary because the OTA would "never" rule against me.

Based on the declaration and evidence in the record, appellant appears to have hired Mr. Nemiroff for two separate matters: a Chapter 7 bankruptcy petition and the underlying OTA

appeal. Appellant's opening brief was acknowledged on June 29, 2020, in this appeal. The bankruptcy petition was filed on November 20, 2009, which precedes appellant's opening brief in this matter by over a decade. According to appellant, Mr. Nemiroff's bankruptcy efforts did not make "The problem … go away." Despite this, appellant chose to continue to work with Mr. Nemiroff during the OTA appeals process. Furthermore, appellant's declaration shows that appellant was aware of the legal strategy. While appellant may have been surprised by the outcome *after the issuance of the Opinion*, appellant has not proven that accident or surprise occurred during the appeals proceedings and prior to the issuance of the Opinion. Based on the foregoing, OTA finds appellant has failed to establish an accident or surprise warranting a rehearing.

Newly Discovered Evidence

To find that a rehearing is warranted based on newly discovered evidence, appellant must show that there is newly discovered, relevant evidence, which could not have been reasonably discovered and provided prior to the issuance of the Opinion and that evidence materially affects his rights. (Cal. Code Regs., tit. 18, § 30604(a)(3); *Ulwelling v. Crown Coach Corp*. (1962) 206 Cal.App.2d 96, 127-128.) Evidence is "newly discovered" if it was not known or accessible to the party seeking a rehearing prior to the issuance of the Opinion. (See *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.)

Appellant claims that he could not have reasonably presented the evidence submitted with his PFR in light of the improper advice from his former counsel. Appellant included the following evidence with the PFR: a declaration signed by appellant on March 14, 2022; a declaration of W. Haddad that is signed by W. Haddad and dated March 8, 2022; a letter executed by N. Moore on August 16, 2007; an August 15, 2007 CDTFA memorandum; and a letter dated May 15, 2007, from ExxonMobil to NIC. Appellant also states that if his PFR is granted, he would subpoena C. Kline.

Here, appellant has not explained why the proposed evidence could not have been reasonably discovered and presented prior to the issuance of the Opinion or how the proposed evidence would materially change the outcome. There are also inconsistencies in appellant's argument alleging improper advice. Appellant, in the quoted portion of his declaration above, explained that his former attorney never looked at his exhibits and that appellant could do all of the work on this appeal. If that is true, then appellant could have submitted the proposed

evidence prior to the issuance of the Opinion. For example, OTA heard testimony from appellant during the hearing and received other declarations from appellant during the appeals process.

Regarding the declaration of W. Haddad, appellant does not explain why he was unable to produce such a declaration prior to the issuance of the Opinion or how it is material. Furthermore, the following items, which appellant submits as evidence with his PFR, were already part of the record and, as such, are not newly discovered: a letter executed by N. Moore on August 15, 2007; an August 15, 2007 CDTFA memorandum; and a letter dated May 15, 2007, from ExxonMobil to NIC. Therefore, appellant has failed to establish that there is newly discovered evidence that warrants a rehearing.

Insufficient Evidence

To find that there is insufficient evidence to justify the Opinion, we must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different Opinion. (Code Civ. Prov., § 657; *Appeal of Swat-Fame Inc., et al.*, 2020-OTA-045P, citing *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.)

Appellant claims that "[t]he conclusion that [appellant] was aware of the understatement of taxes prior to the issuance of the audit report has no basis in the record." Appellant also argues that there is no evidence in the record indicating that he was aware of the understatement of taxes or the discrepancy cited to by the auditor.

CDTFA argues that appellant failed to counter the evidence discussed in the Opinion and provided the following examples: appellant's role as sole director and officer of NIC; appellant's signature on NIC's sales and use tax returns during the liability period; appellant's self-representation as NIC's president and owner; appellant's signature on business checks payable to CDTFA; and the Automated Compliance Management System entries detailing appellant's regular communication with CDTFA concerning NIC's tax liabilities. CDTFA argues that the Opinion weighed the entire record and correctly determined that there was sufficient evidence that appellant knew NIC had unpaid taxes during the liability period.

Here, OTA concludes that the Opinion properly examined the evidentiary record and made factual findings and legal conclusions consistent with that record. Furthermore, after reviewing the available evidence, OTA finds that the evidence does not establish that the

Opinion clearly should have reached a different conclusion. As such, OTA finds that appellant has failed to establish that there was insufficient evidence that warrants a rehearing.

Contrary To Law

A rehearing may be granted when the Opinion is contrary to law, such that the substantial rights of the complaining party are materially affected. (Cal. Code Regs., tit. 18, § 30604(a)(5); *Appeal of Wilson Development, Inc.*, *supra*.) Determining whether the underlying Opinion is contrary to law does not involve a weighing of the evidence, but instead requires a finding that the Opinion is unsupported by any substantial evidence; that is, the record would justify a directed verdict against the prevailing party. (*Appeal of Martinez Steel*, 2020-OTA-074P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) The question before us does not involve examining the quality or nature of the reasoning behind the underlying Opinion, but whether the Opinion is valid according to the law. (*Ibid*.)

Appellant argues that OTA erred because it did not consider *Alsheskie v. U.S.* (9th Cir. 1994) 31 F.3d 837 (*Alsheskie*). Appellant argues that it is important to consider *Alsheskie* in light of the evidence that appellant did not hold any meaningful authority within NIC. Appellant argues that in *Alsheskie*, the Ninth Circuit Court of Appeals determined that the taxpayer was not a responsible person for purpose of Internal Revenue Code (IRC) section 6672, and the court found that the taxpayer did not have discretionary authority to pay the corporation's withholding taxes during the relevant time period.

CDTFA counters that *Alsheskie* concerns the non-payment of federal employment taxes under IRC section 6672 and therefore, at best, may serve only as persuasive authority. CDTFA also argues that *Alsheskie* is factually distinguishable from this appeal, and that the Opinion correctly applied R&TC section 6829 and California Code of Regulations, tit. 18, (Regulation) section 1702.5, which governs responsible person liability under the California Sales and Use Tax Law.

In his PFR, appellant requests that OTA consider *Alsheskie* for the first time in the appeals process. However, there are several notable distinctions between the Opinion and *Alsheskie*. For instance, after examining the evidence, OTA found that appellant had the authority to pay NIC's taxes. OTA also determined that appellant had broad authority for NIC. In making this conclusion, OTA analyzed the collection of, and the failure to remit, California sales and use taxes according to the California Sales and Use Tax Law. (See R&TC, § 6829;

Cal. Code Regs., tit. 18, § 1702.5.) In contrast, the court in *Alsheskie* analyzed evidence relating to the non-payment of federal employment taxes. Thus, the Opinion and *Alsheskie* are distinguishable because they involve different jurisdictions (i.e., California versus federal) and different binding authorities (IRC section 6672 in *Alsheskie* versus R&TC section 6829 and Regulation section 1702.5 in this appeal), and the basis for taxes, central to the respective analyses, are distinct (income tax-related employment taxes versus sales and use taxes). In sum, *Alsheskie* is factually and legally distinguishable from the present appeal, and nonbinding on OTA in this appeal. Based on the foregoing, OTA finds that appellant has failed to establish that a rehearing should be granted based on the contention that the Opinion is contrary to law.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

Date Issued: 8/15/2022