OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **R. BREWER AND** **M. BREWER**	OTA Case No. 20076413

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Stewart A. Farber, CPA

For Respondent: David Muradyan, Tax Counsel III

C. AKIN, Administrative Law Judge: On December 28, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's (FTB's) denial of R. Brewer and M. Brewer's (appellants') claim for refund of the late-payment penalty in the amount of $29,236.56, plus applicable interest, for the 2018 tax year. On January 12, 2022, appellants filed a petition for rehearing (petition). Upon consideration of appellants' petition, OTA concludes that appellants have not established a basis for a new hearing.

A rehearing may be granted where one of the following six grounds exists 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 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 that occurred during 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.)

Appellants do not identify which of the above six grounds are applicable to their petition. Instead, appellants merely state, "[I]t is clear that California is not convinced of the complexity

of the subject transaction, which created the large income upon which California claims [appellants] did not pay the correct estimated tax."[1] Appellants then attach various documents totaling 659 pages, many of which were not previously provided with their original appeal.

Newly Discovered, Relevant Evidence

Because appellants provide a large number of new documents, it appears appellants are asserting newly discovered, relevant evidence as grounds for a rehearing. However, the documents appellants provide with their petition are unlabeled, unorganized, and unexplained by appellants.[2] These documents include, for example: 2018 federal and California Schedules K-1 from various pass-through entities; 2018 federal partnership returns (Forms 1065) from pass-through entities; 2018 California Limited Liability Company (LLC) returns (Forms 568) from pass-through entities; FTB notices; FTB's opening brief and attached exhibits from an unrelated appeal; 2013, 2014, 2017, and 2018 California nonresident or part-year resident returns (Forms 540NR) for unrelated taxpayers; a 2015 California resident return (Form 540) for the same unrelated taxpayers; a 2016 amended Colorado return for the same unrelated taxpayers; appellants' 2018 California resident return (Form 540); and a seller's final settlement statement dated October 2, 2018, reflecting the sale of various properties by a pass-through entity for more than $259 million.[3]

Other than attempting to highlight the complexity of the transaction, the relevance of these documents to the late-payment penalty at issue in this appeal and in this petition is not explained by appellants and is not readily apparent from the documents alone. OTA notes that it is not required to sort through voluminous and unorganized documentation in an attempt to find errors in FTB's determination. (*Appeal of Amaya*, 2021-OTA-328P.) More importantly, appellants have not shown that these documents could not have been provided to OTA before the Opinion was issued on December 28, 2021.

[1] While appellants reference "estimated tax" here, the issue in this appeal was the late-payment penalty imposed under Revenue and Taxation Code (R&TC) section 19132, not the underpayment of estimated tax penalty imposed under R&TC section 19136.

[2] Many of the documents are provided multiple times, some documents are incomplete, other documents are separated by other unrelated documents, and several documents pertain to unrelated taxpayers who are not parties to the underlying appeal or this petition.

[3] This list of documents is not intended to be an exhaustive list of everything appellants provided and is instead intended to highlight the type of information and documentation that appellants submitted with their petition.

California Code of Regulations, title 18, section 30604(a)(3) only permits a rehearing for newly discovered, relevant evidence, which the filing party (here, appellants) could not have reasonably discovered and provided prior to issuance of the Opinion. As noted in *Appeal of Wilson Development, Inc., supra*, OTA "prefer[s] a record which contains all the evidence the parties believe is relevant. However, when the evidence could have been submitted before [the opinion], 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, the party 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 grant the petition. (*Ibid*.) All of the documents appellants submit with their petition relate to the 2018 and earlier tax years. As such, appellants have not established that the more than 600 pages of documents they now seek to submit were not available to appellants and could not have reasonably been provided to OTA prior to the issuance of the Opinion on December 28, 2021. Thus, OTA cannot grant a rehearing on the basis of these documents.

Insufficient Evidence or Contrary to Law

Appellants' only contention in the petition is that "it is clear that California is not convinced of the complexity of the subject transaction, which created the large income upon which California claims [appellants] did not pay the correct estimated tax." OTA will treat this statement as a contention that there is either insufficient evidence to justify the Opinion or that the Opinion is contrary to law. (See Cal. Code Regs, tit. 18, § 30604(a)(4), (5).)

To find that there is an insufficiency of evidence to justify the Opinion, OTA 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. (*Appeals of Swat Fame Inc., et al.*, 2020-OTA-045P.) The "contrary to law" standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs, tit. 18, § 30604(b).) To find that the Opinion is contrary to law, OTA must determine whether the Opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P.) This requires a review of the Opinion to indulge "in all legitimate and reasonable inferences" to uphold the Opinion. (*Appeals of Swat-Fame Inc., et al.*, *supra*.) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to law. (*Ibid*.; *Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

Appellants assert that OTA does not understand or was not convinced of the complexity of the transaction which led to the large tax liability for appellants' 2018 tax year (and the resulting late payment of tax). However, the Opinion specifically recognized the complexity of the transaction when stating: "While [OTA] understand[s] appellants' assertions regarding the complexity of the transaction, their position as minority investors, and the difficulty in calculating or determining their tax liability prior to receipt of the Schedule K-1, appellants have failed to explain what efforts they made (if any) to obtain the information or documentation from the real estate LLC necessary to timely calculate and pay their taxes for the 2018 tax year." Despite the complexity of the transaction, OTA noted that appellants "must show the efforts [they] made to acquire that information from the source that held it, and that difficulties in obtaining the necessary information led to the delay in payment."

It is well settled that an asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Moren*, 2019-OTA-176P.) As noted in OTA's precedential Opinion in *Appeal of Moren*, *supra*, if taxpayers assert that they do not have the information necessary to make a reasonably accurate estimate of their tax liability, they must show the efforts made to acquire that information from the source that held it. Because appellants did not establish that they made any effort to acquire the needed information from the LLC prior to the due date for the payment of tax, appellants failed to establish reasonable cause for their late payment. The Opinion specifically considered and accepted appellants' arguments regarding the complexity of the transaction; however, the Opinion did not find this complexity alone to be determinative or controlling to the issue of whether they established reasonable cause existed to abate the late-payment penalty. Appellants' dissatisfaction with the outcome of their appeal, and their attempt to reargue the same issue a second time, is not grounds for a rehearing. (*Appeal of Graham and Smith*, *supra*.)

Thus, appellants have not demonstrated that OTA clearly should have reached a different determination after weighing the original evidence in the record. Similarly, appellants have not established the Opinion is "unsupported by any substantial evidence." (*Appeals of Swat-Fame, et al.*, *supra*.) In summary, appellants have not shown that grounds exist for a rehearing.[4] Appellants' petition is hereby denied.

DocuSigned by:
Cheryl L. Akin
1A8C8E38740B4D5...

Cheryl L. Akin
Administrative Law Judge

We concur:

DocuSigned by:
8A4294817A67463...

Andrew Wong
Administrative Law Judge

DocuSigned by:
Josh Lambert
CB1F7DA37831416...

Josh Lambert
Administrative Law Judge

Date Issued: 7/15/2022

[4] Appellants do not allege any additional grounds for a rehearing (i.e., an irregularity in the proceedings that prevented the fair consideration of the appeal; an accident or surprise that occurred, which ordinary caution could not have prevented; or an error in law that occurred during the appeals hearing or proceeding), and OTA does not find any of these other grounds for a rehearing to be applicable here.