OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of: **C. GOTTSTEIN**	OTA Case Nos. 18011448, 18011450, 18011452

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: C. Gottstein

For Respondent: David Muradyan, Tax Counsel III

J. LAMBERT, Administrative Law Judge: On March 24, 2022, the Office of Tax Appeals (OTA) issued an Opinion which sustained the actions of respondent Franchise Tax Board (FTB) in proposing: (1) an assessment of tax of $173.00 and a late filing penalty of $135.00, plus interest, for the 2012 tax year; (2) an assessment of tax of $399.00, a late filing penalty of $135.00, a notice and demand penalty (demand penalty) of $99.75, and a filing enforcement cost recovery fee (filing enforcement fee) of $76.00, plus interest, for the 2013 tax year; and (3) an assessment of tax of $811.00, a late filing penalty of $202.75, and a demand penalty of $202.75, and a filing enforcement fee of $79.00, plus interest, for the 2014 tax year.[1] OTA also determined that it does not have jurisdiction to consider C. Gottstein's (appellant's) request for reimbursement of charges or fees pursuant to Revenue and Taxation Code (R&TC) section 21018. Appellant filed a timely petition for rehearing (PFR).

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

[1] OTA determined that: (1) appellant C. Gottstein had not demonstrated error in the proposed assessments for the 2012, 2013, and 2014 tax years; (2) the demand penalties should not be abated for the 2013 and 2014 tax years; (3) the late filing penalties should not be abated for the 2012 through 2014 tax years; (4) the filing enforcement fees may not be abated for the 2013 and 2014 tax years; and (5) interest may not be waived.

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).)

Appellant appears to argue that the Opinion is contrary to law and there is insufficient evidence to justify the Opinion. The question of whether the Opinion is contrary to law is not one which involves 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. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.)[2] This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the Opinion if possible. (*Id*. at p. 907.) The question before OTA on a PFR does not involve examining the quality or nature of the reasoning behind OTA's Opinion, but whether that Opinion can be valid according to the law. (*Appeal of NASSCO Holdings, Inc*. (2010-SBE-001) 2010 WL 5626976.)

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.)

As to OTA's determination that appellant did not show reasonable cause for failing to timely file her returns and respond to the Demands for Tax Returns, appellant notes that the Opinion states that she attempted to have her tax returns filed with the assistance of several entities. Appellant argues that such activities cannot be used as a basis to show she had no reasonable cause. However, as stated by appellant, in addition to attempting to file her returns, she was involved in other activities, such as litigation with her former spouse and defending her professional license. These activities and others were discussed in the Opinion, which stated that

[2] California Code of Regulations, title 18, (Regulation) section 30604 is based upon the provisions of California Civil Code of Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 [State Board of Equalization (BOE) utilizes CCP section 657 in determining grounds for rehearing]; *Appeal of Do*, 2018-OTA-002P [OTA adopts BOE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute provide guidance in interpreting the provisions contained in Regulation section 30604.

a taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause, citing *Appeal of Head and Feliciano*, 2020-OTA-127P.

Appellant also mentions Charles Schwab & Co. (Schwab) as an entity she contacted as part of her attempts to receive information that would help her file her returns. Schwab provided her with basis information for her stock sales to use in filing her return; however, appellant did not file a return after receiving this information. This does not support appellant's contention that her failure to timely file a return was based on a lack of information. In addition, difficulty in obtaining information does not constitute reasonable cause for the late filing of a return. (*Appeal of Xie*, 2018-OTA-076P.) Taxpayers have an obligation to file timely returns with the best available information, and to then subsequently file an amended return, if necessary. (*Ibid*.) In addition, the Opinion stated that, while appellant sought assistance in filing her federal tax returns in 2016, appellant has not provided evidence of steps taken during 2013 to 2015, when her California tax returns were due, or during the following years, such as contacting tax preparation services or other attempts to complete and file the returns at issue. Appellant provides the same or similar arguments as she did during the original briefing and hearing which were already considered by OTA in its Opinion.

As to the issue of appellant's request for reimbursement of charges or fees pursuant to R&TC section 21018, she argues that it is an erroneous processing action and not an erroneous levy at issue. OTA notes that, in her original briefing, appellant states that "FTB erroneously levied my US Bank account down to zero" and "failed to properly process the reimbursement of US Bank non-refundable levy fees." Appellant also stated that FTB did not notify of her of the levy. As stated in the Opinion, R&TC section 21018 provides that a person may file a claim with FTB for reimbursement of charges or fees imposed on the person by an unrelated business entity as the direct result of an erroneous levy, erroneous processing action, or erroneous collection action by FTB. OTA has no jurisdiction to review FTB's determinations as to such claims, regardless of whether the claim for reimbursement of charges or fees is the result of an erroneous levy or an erroneous processing action.

As to the issue of interest abatement, the Opinion held that the evidence does not indicate that FTB committed any unreasonable error or delay in the performance of a ministerial or managerial act, and that interest should not be abated. The Opinion stated that any interest

charged to the 2013 tax year as a result of the transfer of a payment of $753.36 is the result of appellant's request to move the payment to another year. Appellant contends that an FTB employee asked her to make the transfer and that she did so based on erroneous information provided by the FTB employee. However, as noted in the Opinion, the evidence in the record only shows that appellant requested that the balance be moved to 2015. FTB's Comment Screen Printout dated May 10, 2018, states: "[Appellant] requested the 2013 payment $753.36 be moved to her 2015 balance due."[3] Appellant was also aware that there was a deficiency in her 2013 account after the transfer, as she requested the processing of the transfer. Appellant has not established why she could not have paid the amount owed after the transfer to stop interest from accruing. As noted in the Opinion, an error or delay can only be considered for interest abatement when no significant aspect of the error or delay is attributable to the taxpayer. (R&TC, § 19104(b)(1).) As with the other issues, appellant provides the same or similar arguments as she did during the original briefing and hearing which were already considered by OTA in its Opinion.

[3] In addition, the Opinion stated that $285.15 was used to make a payment for federal tax due, after an offset request by the IRS, and that FTB may enter into an agreement to collect any delinquent tax debt due to the IRS. (See R&TC, § 19291(a).)

To the extent appellant submits new evidence, such evidence does not show that she is entitled to a rehearing, and appellant has not shown that the evidence was not known or accessible to her prior to the issuance of the Opinion. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) Appellant provides arguments which are the same or similar to the arguments that she provided during the original appeal. These repeated arguments, which were considered and rejected in the original Opinion, do not constitute grounds for rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Appellant has not shown that the Opinion is contrary to law, that there is insufficient evidence to justify the Opinion, or that any other ground exists such that a rehearing should be granted. Consequently, the petition for rehearing is denied.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Richard Tay
Administrative Law Judge

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Andrew Wong
Administrative Law Judge

Date Issued: 11/17/2022