

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 20127033
S. KIM AND)	
D. KIM)	
_____)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants:	Hyeokjin Kwon, EA
For Respondent:	Joel M. Smith, Tax Counsel III

R. TAY, Administrative Law Judge: On March 7, 2022, Office of Tax Appeals (OTA) issued an opinion (Opinion) sustaining the action of Franchise Tax Board (respondent) denying appellants' claim for refund for the 2018 tax year. In the Opinion, OTA held appellants did not show error in respondent's proposed assessment of the late payment penalty and interest. Appellants timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19334. Upon consideration of appellants' petition, OTA concludes they have not established a basis for rehearing.

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 that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, 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 written opinion; (4) insufficient evidence to justify the written 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.)

Appellants seek a rehearing on the grounds that OTA erred in the Opinion. In their petition, appellants attempt to clarify that they do not seek credit for the withholding that the

California Employment Development Department (EDD) refunded; rather, they argue that they made timely tax payments as evidenced by appellant-husband's employer's tax refunds from the EDD. Appellants provide a copy of the Explanation of Tax Overpayment Refund dated October 21, 2020, from the EDD, and a canceled check from the EDD in the amount of the refund. Appellants argue that the refund issued to appellant-husband's employer shows appellants paid sufficient amounts of tax before the payment deadline, and thus, respondent's proposed assessment of the late payment penalty and interest is erroneous.

Although not clearly stated, it is apparent that appellants argue that they deserve a rehearing because the Opinion is not supported by sufficient evidence.¹ To find that there was insufficient 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. (Code Civ. Proc. § 657;² *Appeal of Swat-Fame, Inc., et al.*, 2020-OTA-046P, citing *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.) Appellants make a number of the same arguments that they made on appeal. These repeated arguments, which were considered and rejected in the Opinion, do not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Moreover, a review of the record shows ample evidence to justify the Opinion. Appellants argue that the employment tax refunds from the EDD to appellant-husband's employer demonstrate appellants overpaid their withholding. However, appellants have not shown that any portion of such overpayment should have been credited to their account. Appellant-husband's employer is a different taxpayer, and appellants have not shown that the employer made overpayments on behalf of appellants specifically.

On the contrary, respondent provided documents from the EDD showing appellants paid \$1,109 of withholding for the 2018 tax year, and appellants have not demonstrated otherwise. Thus, appellants have not shown they made timely tax payments in the form of withholding

¹ Appellants may be contending that they produced newly discovered evidence that could not have been discovered or produced before OTA issued the Opinion; however, based on the dates the evidence was issued, appellants presumably had possession of these documents prior to the date OTA issued the Opinion, and there is no evidence in the record to the contrary. Thus, OTA dismisses this argument without further discussion.

² 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 caselaw as relevant guidance in determining whether a ground has been met to grant a rehearing.

through their employer. Accordingly, OTA finds that the evidence in the record supports the Opinion, and appellants are not entitled to a rehearing.

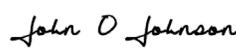
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Richard Tay
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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John O. Johnson
Administrative Law Judge

Date Issued: 2/24/2023