

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
Q. NGO ) OTA Case No. 20025882  
 ) CDTFA Case ID 845632  
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**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant: Hai Vang Dang, Representative

For Respondent: Jason Parker, Chief of Headquarters Ops.

N. RALSTON, Administrative Law Judge: On January 23, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by the California Department of Tax and Fee Administration (respondent). Respondent’s decision denied a petition for redetermination filed by Q. Ngo (appellant) of a Notice of Determination (NOD) dated August 12, 2014. The NOD is for \$12,164.17 in tax, plus applicable interest, and a negligence penalty of \$1,216.43, for the period January 1, 2011, through December 31, 2013 (liability period).

On January 31, 2023,<sup>1</sup> appellant timely petitioned for a rehearing with OTA on the basis that an accident or surprise occurred. OTA concludes that the ground set forth in appellant’s petition does not constitute a basis for a new hearing.

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 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 evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the written opinion; (5) the opinion

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<sup>1</sup> Appellant filed a Petition for Rehearing (PFR) on January 31, 2023. Appellant then filed a perfected PFR on February 9, 2023.

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.)

As provided in *Appeal of Wilson Development, Inc.*, *supra*, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable case law as relevant guidance in determining whether a ground has been met to grant a new hearing.

Appellant alleges that an accident or surprise, which ordinary caution could not have prevented, occurred on the originally scheduled oral hearing date of September 13, 2022, because appellant and appellant's family were ill and needed to reschedule the hearing. Appellant further contends appellant was unaware that the hearing had been rescheduled and appellant's representative was unable to use the Office of Tax Appeals Portal (portal) on OTA's website.<sup>2</sup> 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 Mutiis* (1948) 31 Cal.2d 429, 432.) Further, to constitute an accident or surprise, a party must be unexpectedly placed in a detrimental condition or situation without any negligence on the part of that party. (*Ibid.*) A new hearing 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, supra.*)

Here, appellant was not placed in a detrimental condition or situation and there was no accident or surprise that detrimentally affected appellant's substantial rights. Since appellant was ill and unable to attend the September hearing, OTA granted appellant's postponement request and rescheduled appellant's hearing to a later date. On November 4, 2022, OTA mailed appellant and appellant's representative a Notice of Oral Hearing (Notice) notifying appellant of the rescheduled oral hearing date of January 19, 2023. The Notice gave appellant until November 21, 2022, to respond and informed appellant that appellant's case would be submitted without an oral hearing and decided on the written record if OTA did not receive appellant's response by the aforementioned deadline. (See Cal. Code Regs., tit. 18, § 30401.) On November 29, 2022, OTA sent appellant a letter, informing appellant that OTA had not received

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<sup>2</sup> Appellant also repeats the prior argument that respondent's audit was based on estimates rather than appellant's actual sales. This matter was thoroughly briefed during the course of the appeal and OTA reviewed all of the documentation available and issued an Opinion which gave appropriate consideration to the evidence and arguments presented by appellant on appeal in reaching its conclusions. Appellant's dissatisfaction with the outcome of the appeal, and the attempt to reargue the same issues a second time, is not grounds for a rehearing.

a response to the Notice and that therefore, appellant's appeal had been removed from the January oral hearing calendar and would be decided based on the written record. The Notice was not returned to OTA as undeliverable. Furthermore, neither appellant nor appellant's representative ever advised OTA that either one changed their address. In addition, appellant's representative communicated with OTA well after the Notice was mailed and never indicated that appellant did not receive the new hearing information or that appellant or appellant's representative had changed their address.

Regarding appellant's argument that its representative was unable to use the portal, OTA emailed appellant's representative on October 7, 2022 and explained how to access the portal. The email also included an attached letter which informed appellant that the oral hearing had been postponed and would be rescheduled per appellant's request. Appellant was not required to use the portal to proceed with the appeal; rather, appellant was provided access to the portal as a matter of convenience. Appellant was still able to contact OTA via phone, email, fax, or letter. In fact, appellant's representative contacted OTA via email dated January 7, 2023 (i.e., after appellant was provided with the portal information) wherein appellant's representative advised OTA that appellant was applying to respondent's settlement program. Appellant was given the opportunity to have an oral hearing at later date but chose not to respond to OTA's Notice regarding rescheduling the hearing. Thus, appellant's material rights were not substantially affected; rather, appellant's failure to have an oral hearing was the result of appellant's own failure to respond to OTA's Notice.

Accordingly, OTA finds that appellant has not satisfied the requirements for granting a rehearing and, as such, appellant’s petition is denied.

DocuSigned by:  
*Natasha Ralston*  
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Natasha Ralston  
Administrative Law Judge

We concur:

DocuSigned by:  
*Sheriene Ridenour*  
67F043D83EF547C...  
Sheriene Anne Ridenour  
Administrative Law Judge

DocuSigned by:  
*Andrea L.H. Long*  
272945E7B372445...  
Andrea L.H. Long  
Administrative Law Judge

Date Issued: 8/4/2023