OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. SHANAHAN**	)	OTA Case No. 19085136

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: J. Shanahan

For Respondent: Topher Tuttle, Attorney

S. RIDENOUR, Administrative Law Judge: On March 2, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) proposing an assessment of tax, a late filing penalty, a demand penalty, and a filing enforcement recovery fee, plus applicable interest, for the 2016 tax year. In the Opinion, OTA held the following: appellant did not establish error in FTB's proposed assessment; appellant did not establish reasonable cause for failing to timely file his 2016 tax return; appellant is liable for the demand penalty; and FTB properly imposed the filing enforcement fee. Appellant timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellant's petition, OTA concludes appellant has not established a basis for a 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 (here, appellant): (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, 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

Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6);[1] *Appeal of Do*, 2018-OTA-002P.)

Appellant argues that a rehearing should be granted based on the above-mentioned grounds one through five.[2] In support of his arguments, appellant provided a 10-page document titled "U.S. Supreme Court challenge questions as to 'what is income,'" which appellant indicates is written by Jeffrey T. Maehr.

Irregularity in the Proceedings

An irregularity in the proceedings warranting a rehearing would generally include any departure by OTA from the due and orderly method of conducting appeal proceedings by which the substantial rights of a party (here, appellant) have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) Indeed, courts have found that an irregularity in the proceeding is "any act that (1) violates the right of a party to a fair trial and (2) which a party 'cannot fully present by exceptions taken during the progress of the trial . . . .' [citation]." (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1230.) Included in the classification of irregularities is an "overt act of the trial court . . . or adverse party, violative of the right to a fair and impartial trial . . . ." (*Russell v. Dopp* (1995) 36 Cal.App.4th 765, 780.) Examples of irregularities include the absence of a judge from the courtroom during a portion of the trial, and a judge threatening to prejudge testimony unless a witness is withdrawn. (See *O'Callaghan v. Bode* (1890) 84 Cal. 489, 495; see also *Pratt v. Pratt* (1903) 141 Cal. 247, 252.)

In an appeal before OTA, the grounds for a rehearing pursuant to California Code of Regulations, title 18, (Regulation) section 30604 can exist both where an oral hearing is held and where an appeal is submitted for an Opinion based upon the written record. The granting or denial of a rehearing on such basis "is largely in the discretion of the" presiding officer. (*Loggie v. Interstate Transit Co.* (1930) 108 Cal.App. 165, 171.)

[1] California Code of Regulations, title 18, section 30604 is essentially based upon the provisions of California Code of Civil Procedure section 657; therefore, the language of California Code of Civil Procedure section 657 and applicable caselaw are appropriate and relevant guidance in determining whether a ground has been met to grant a rehearing. (*Appeal of Martinez Steel Corp.*, 2020-OTA-074P.)

[2] For the sixth ground (i.e., an error in law in the OTA appeals hearing or proceeding), appellant indicates he has "No comments."

Appellant argues that despite him making "it clear that [he] needed the whole process to NOT start in 2022, but to be started in early 2023," OTA scheduled a prehearing conference (PHC) for the end of November 2022, resulting in an irregularity in the proceedings. Appellant contends that he requested the extension for the hearing "so that [he] would have time to study for the hearing and review all the paperwork." Appellant also contends that since he made commitments to several of his clients, he "was planning to finish [his research] in November and December[,] so that [he] could be ready in January, 2023 [*sic*] for the process to start."

OTA's Rules for Tax Appeals govern this appeal. On August 7, 2019, OTA received appellant's appeal, and the briefing period commenced pursuant to Regulation section 30301 et seq. At the conclusion of the briefing period, OTA scheduled an oral hearing for June 16, 2022, and sent appellant a Notice of Oral Hearing (Hearing Notice) dated April 29, 2022. Appellant responded to the Hearing Notice requesting a postponement, which OTA granted pursuant to Regulation section 30220. Thereafter, OTA sent appellant a second Hearing Notice notifying him that OTA rescheduled the oral hearing for October 13, 2022. Appellant responded to the second Hearing Notice requesting a second postponement, which OTA granted. In the letter granting the request, OTA notified appellant that OTA will not postpone or defer a hearing when the request will result in unreasonable delay or is otherwise not in the interests of fair and efficient tax administration, and that any future postponement requests in this matter would be subject to strict review. (Cal. Code Regs., tit. 18, §§ 30213(a)(10), 30220(c).) Subsequently, OTA sent appellant a third Hearing Notice notifying him that OTA rescheduled the oral hearing for January 18, 2023, and the PHC for November 29, 2022. Appellant responded to the third Hearing Notice requesting a third postponement.

In his third postponement request, appellant asserted that, despite his request for a "postponement of the hearing process" until January 2023, OTA: (1) requested appellant respond to the third Hearing Notice by November 21, 2022; (2) scheduled the PHC for November 29, 2022; and (3) sent the parties a Request for PHC Statement with a November 17, 2022 deadline for each party to provide OTA with the requested information, including exhibits and witnesses. Appellant argued that he could not "possibly start reviewing all of the details of [his] case" and be sufficiently ready by the various deadlines. Rather, appellant "originally planned" to start his research in "Nov/Dec 2022 so that [he could] be ready for 'the hearing process' to start in January of 2023." Appellant further argued that "[a]ny other

schedule that has official duties occurring before January, 2023 [*sic*], will probably result in damage to [appellant's] ability to provide adequate defense in [his] case against [FTB and its] professional attorney."

By letter dated November 16, 2022, OTA informed appellant that his third request for a postponement was denied based on a finding that an additional postponement would result in unreasonable delay and was otherwise not in the interests of fair and efficient tax administration. (Cal. Code of Regs., tit. 18, §§ 30213(a)(10), 30220(c).) The letter explained that a PHC is an informal conference that is held with the purpose of setting the expectations for the hearing. No decisions regarding the merits of the case are decided during a PHC, nor are substantive law or arguments addressed. Rather, the parties' responses to the Request for PHC Statement are discussed; specifically, the issue(s) of the case, the submitted evidence, intended witnesses, and the timeline of the hearing. The letter clarified that a PHC is held with the goal of having a productive hearing that proceeds as smoothly, effectively, and fairly as possible. The letter also informed appellant that pursuant to the Hearing Notice, appellant needed to submit the Response to Notice of Oral Hearing (which was attached to the Hearing Notice) by November 21, 2022, and if OTA did not receive the response by that date, appellant's case would be submitted for decision without an oral hearing and decided on the basis of the written record. Subsequently, by email dated November 17, 2022, OTA informed appellant that OTA received FTB's PHC Statement, and that OTA was granting appellant until November 21, 2022, to submit his PHC Statement.

OTA attempted to conduct the PHC on November 29, 2022; however, appellant did not make an appearance. OTA attempted to contact appellant by phone and email prior to the start of the conference and five minutes past the starting time of the conference, but appellant did not respond. After waiting 10 minutes, OTA concluded the PHC; no substantive matters were discussed. OTA issued the parties a PHC Minutes and Orders dated November 29, 2022, indicating that since appellant did not appear at the PHC and did not submit the Response to Notice of Oral Hearing form, the case would be submitted for decision without an oral hearing and decided on the basis of the written record. (Cal. Code Regs, tit. 18, §§ 30403, 30404(a) & (b).)

OTA's Rules for Tax Appeals are clear; a party that fails to respond to a Notice of Oral Hearing waives the right to an oral hearing absent a showing of good cause for failure to respond

to the hearing notice. (Cal. Code Regs., tit. 18, § 30404.) Here, OTA denied appellant's third request for a postponement based on a finding that an additional postponement would result in unreasonable delay and was otherwise not in the interests of fair and efficient tax administration. (Cal. Code Regs., tit. 18, § 30220.) Appellant has not shown good cause for failing to respond to the Hearing Notice by the November 21, 2022 deadline. Furthermore, appellant has failed to show that OTA's denial of his third request for postponement was an irregularity in the proceedings. While appellant argues that he wanted the "whole process" to not start until 2023, "so that [he] would have time to study for the hearing and review all the paperwork," OTA finds that appellant, who filed his appeal with OTA on August 7, 2019, was provided sufficient time to prepare for the November 29, 2022 PHC, as well as the January 18, 2023 oral hearing. Moreover, appellant choosing to tend to his commitments to his clients before "planning to finish [his research] in November and December," is not good cause. (See Cal. Code Regs., tit. 18, § 30220.) Rather, appellant must bear the consequences of that choice. (*Ibid*.) OTA concludes that appellant's appeal did not suffer from an irregularity in the proceeding that prevented fair consideration of his appeal. Thus, OTA cannot grant a rehearing based on this ground.

Accident or Surprise

Regulation section 30604(a)(2) permits a rehearing when an accident or surprise occurs during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented. The terms "accident" and "surprise" have substantially the same meaning, and each is used to denote some detrimental condition or situation in which a party is unexpectedly placed without any negligence on the part of that party, which ordinary caution could not have guarded against. (*Appeal of Le Beau*, 2018-OTA-061P; *Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) 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 Le Beau*, *supra*.)

Appellant asserts that the arguments he provides for a rehearing based on an irregularity in the proceedings, as discussed above, "also appl[y] here." It appears appellant is arguing that, since he indicated he wanted a "postponement of the hearing process" until January 2023, he was detrimentally surprised that OTA did not grant his third postponement request and that the PHC remained scheduled for late November 2022. However, by letter dated November 16, 2022, OTA informed appellant that his third request for a postponement was denied, and explained that

a PHC is an informal conference that is held with the purpose of setting the expectations for the hearing, and no decisions regarding the merits of the case would be decided during the PHC, nor would substantive matters of law or arguments be addressed. While appellant may have wanted OTA to grant his third postponement request and reschedule the PHC for 2023, OTA's denial of appellant's request does not amount to a detrimental condition or situation in which appellant was unexpectedly placed. Appellant chose not to participate in the PHC and chose not to respond to the Hearing Notice; appellant must bear the consequences of those choices. OTA finds that appellant has not established an accident or surprise which ordinary caution could not have prevented. Thus, OTA cannot grant a rehearing based on this ground.

New Evidence

Regulation section 30604(a)(3) only permits a rehearing for newly discovered evidence, material to the appeal, which the filing party (here, appellant) could not have reasonably discovered and provided prior to issuance of the Opinion. In the context of newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728.) As noted in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 at p. *2, the trier of fact "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." As such, if a party attempts to submit evidence after the 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. (Cal. Code Regs., tit. 18, § 30604(a)(3); *Appeal of Wilson Development, Inc.*, *supra*.) The document written by J. Maehr that appellant provides with his petition is akin to a brief. Briefs are not evidence. Therefore, the proffered document is not evidence, let alone evidence that is material which could not have been produced prior to the issuance of the Opinion. Thus, OTA cannot grant a rehearing based on this ground.

Insufficient Evidence

To find that there is 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; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Appeals of Swat-Fame Inc., et al., supra*.)

Appellant contends that since FTB did not respond to a 7-page letter dated November 11, 2019, in which appellant sent "over 25 comments and questions" for FTB, there is insufficient evidence to justify the Opinion. In the Opinion, OTA explained that based on the submitted evidence, FTB's estimation of appellant's income was both reasonable and rational. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935). Therefore, appellant had the burden of proving the proposed assessment is incorrect. (*Appeal of Bindley*, 2019-OTA-179P.) As appellant provided no credible, competent, or relevant evidence showing error in FTB's proposed assessment, FTB's determination was upheld. OTA finds that there was sufficient evidence to justify the Opinion; therefore, OTA cannot grant a rehearing based on this ground.

Contrary to Law

The contrary to law standard of review involves reviewing the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) A holding is contrary to law "only if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a [holding] against the part[y] in whose favor the [holding was] returned.'" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 (*Sanchez-Corea*), citing *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.) This requires indulging "in all legitimate and reasonable inferences" to uphold the Opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907; see also *Appeals of Swat-Fame Inc. et al., supra*.) The question does not involve "examining the quality or nature of the reasoning behind [OTA's Opinion], but whether [the Opinion] can or cannot be valid according to the law." (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976, at p. *5.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party (here, FTB), with all legitimate inferences to uphold the Opinion, the petitioning party (here, appellant) establishes that the Opinion incorrectly stated or applied the law and, therefore, is contrary to law. (*Appeal of NASSCO Holdings, Inc., supra*.)

Appellant contends the "Opinion is contrary to the U.S. Constitution, the supreme law of the land, in that direct taxes must be apportioned to the states," and that the "framers of the Constitution never intended for the ordinary person to be taxed for his/her labor to earn a living." In the Opinion, OTA addressed appellant's constitutional arguments and noted that such contentions have been consistently and emphatically rejected by federal and state courts as frivolous. (See, e.g., *Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431; *Appeal of Balch*, 2018-OTA-159P.) Appellant's constitutional arguments do not establish that the Opinion was contrary to law. Thus, OTA cannot grant a rehearing based on this ground.

Conclusion

For the aforementioned reasons, OTA finds that appellant has not established that a ground exists for a rehearing pursuant to Regulation section 30604(a). Furthermore, as to appellant's repeated arguments which were considered and rejected in the Opinion, they do not constitute grounds for rehearing. (*Appeal of Graham and Smith*, *supra*.) Likewise, appellant's dissatisfaction with the outcome of his appeal is not grounds for a rehearing. (*Ibid*.) Accordingly, appellant's petition is denied.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
Lauren Katagihara
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Lauren Katagihara
Administrative Law Judge

Date Issued: 11/21/2023