OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **M. MILLS**	OTA Case No. 220911482

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: M. Mills

For Respondent: Christopher T. Tuttle, Attorney

V. LONG, Administrative Law Judge: On August 2, 2023, the Office of Tax Appeals (OTA) issued an Opinion in which OTA sustained the action of respondent Franchise Tax Board (FTB). In the Opinion, OTA upheld FTB's proposed assessment, as modified on appeal, to reflect estimated income of $67,092, and to recalculate the late-filing penalty and interest accordingly. 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 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 which occurred prior to issuance of the Opinion and prevented the 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 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 OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Appellant's petition for rehearing states that FTB erred in its assessment because the IRS acknowledged and accepted appellant's written testimony in the form of a letter stating that he

had no taxable income in 2019. Appellant states the same letter was submitted to FTB, and that his written testimony should supersede the third-party information received by FTB, upon which it based its proposed assessment. Appellant has not provided a copy of this letter to OTA. Appellant further states that he is not required to file income tax documents and asserts that private sector wages are not taxable. Appellant does not allege specific grounds for rehearing, but OTA interprets appellant's statements to assert newly discovered evidence or that the Opinion is contrary to law.

Appellant asserts that his written testimony is newly discovered evidence; however, appellant has not provided OTA with a copy the written testimony that he references, and, even if a copy were provided, appellant's testimony does not meet the standard for granting a petition for rehearing. Appellant offers no argument or explanation for why the written testimony could not have been discovered or provided prior to the oral hearing. Such evidence cannot be considered "newly discovered" where appellant could have provided written testimony during the appeal proceedings but chose to do so only after issuance of the Opinion. (See *Appeal of Le Beau*, 2018-OTA-061P.)

Further, appellant's written testimony is not material to the appeal. In the context of newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (*See Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728*; Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764.) Here, appellant's self-serving testimony, which is contrary to contemporaneous information provided to FTB by multiple third parties, is not likely to produce a difference result on appeal. (See *Korhauser v. Commissioner*, T.C. Memo. 2013-230 [courts are not bound to accept a taxpayer's self-serving and unverified testimony].)

Appellant asserts that the Opinion is contrary to law because he contends that his private sector wages are not taxable income. However, courts have consistently held that this argument is frivolous and without merit. (See, e.g., *Briggs v. Commissioner*, T.C. Memo. 2016-86; *Sullivan v. United States* (1st Cir. 1986) 788 F.2d 813; *Waltner v. Commissioner*, T.C. Memo. 2014-35; *Appeal of Balch* 2018-OTA-159P.) Accordingly, appellant has not established that the Opinion is contrary to law.

Appellant is further cautioned that bringing frivolous arguments before OTA in the future may subject appellant to a frivolous appeal penalty pursuant to R&TC section 19714. This

section provides that a penalty of up to $5,000 shall be imposed whenever it appears to OTA that proceedings before it have been instituted or maintained by the taxpayer primarily for delay, or that a taxpayer's position in the proceedings is frivolous or groundless.

Based on the foregoing, OTA finds that appellant has not established grounds for rehearing and, as such, the petition is denied.

DocuSigned by:
Veronica L. Long
32D46B0C49C949F...

Veronica Long
Administrative Law Judge

We concur:

DocuSigned by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

DocuSigned by:
Asaf Kletter
D17AEDDCAAB045B...

Asaf Kletter
Administrative Law Judge

Date Issued: 2/26/2024