OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. BLAU**	OTA Case No. 21088383

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Harold Hecht, CPA

For Respondent: Cheyanna L. Jaffke, Attorney

E. LAM, Administrative Law Judge: On July 7, 2023, the Office of Tax Appeals (OTA) issued an Opinion modifying the action of respondent Franchise Tax Board (FTB) by partially abating interest, but otherwise sustaining the action of its proposed assessment of tax. In the Opinion, OTA held: (1) appellant did not demonstrate that FTB's apportionment of business income to appellant for the 2011 tax year was erroneous; and (2) interest is abated, as conceded by FTB on appeal, from February 25, 2018, through February 9, 2021, and from April 11, 2021, through July 13, 2021. 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 that appellant has not established a basis for rehearing.

OTA may grant a rehearing where one of the following six grounds exists 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 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).)

Newly Discovered Evidence

Appellant argues that a new hearing should be granted on the ground of new evidence not available at the time of the proceeding, which is now available. The new evidence appellant provides includes 38 tax returns, together with an Excel file, to establish the amount of gross proceeds from the underlying Internal Revenue Code (IRC) section 1231 net gain (1231 net gain) transactions. Appellant's evidence appears to modify the apportionment percentage of The Related Companies, L.P., a limited partnership (TRC LP) by including the gross receipts (not the net gain as previously proposed) from the 1231 net gain transactions in the sales factor.[1] Appellant illustrates in the Excel file how the new proposed apportionment factors, as modified, would flow through from TRC LP to Yukon Holdings, LLC, a limited liability company (Yukon).[2]

A party seeking a rehearing under the grounds of newly discovered evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence materially affects the substantial rights of the party. (*Doe v. United Air Lines, Inc*. (2008) 160 Cal.App.4th 1500, 1506.)[3] Failure to show any of these three requirements is sufficient to deny a taxpayer's petition for rehearing based on newly discovered, relevant evidence. (See *ibid*.) As noted in *Appeal of Wilson Development, Inc.*, (94-SBE-007) 1994 WL 580654, OTA "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."

[1] On the underlying appeal, appellant proposed to take the California apportionment percentage from TRC LP in which appellant held an indirect interest and modified the sales factor to include the 1231 net gain (not gross receipts) to apportion the business income of $80,331,367.

[2] It remains unclear whether appellant proposes to use TRC LP's or Yukon's apportionment percentage to apportion the business income of $80,331,367; however, OTA deems that aspect irrelevant because OTA ultimately finds that a rehearing is not warranted. Furthermore, no provision exists that permits a new hearing based on a new legal theory predicated on the submission of new facts and evidence that a taxpayer failed to raise and provide prior to the issuance of the written Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).) Therefore, OTA will not discuss this further.

[3] OTA's grounds for granting a rehearing are established by regulation, based largely on regulations established by its predecessor, the State Board of Equalization. As seen in *Appeal of Wilson Development, Inc*., (94-SBE-007) 1994 WL 580654, the grounds were originally based on relevant causes provided for in Code of Civil Procedure (CCP) section 657. As such, case law analyzing the relevant causes in CCP section 657, such as *Doe v. United Airlines*, *supra*, 160 Cal.App.4th at 1506, provide guidance for the analysis here.

A petition will be denied when: (a) the newly discovered evidence could have been previously produced by the exercise of reasonable diligence, (b) the party seeking rehearing has not shown due diligence in discovering and producing the newly discovered evidence prior to the issuance of the written Opinion, or (c) no reason is shown for why the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the written Opinion. (See *Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208 (*Mitchell*).) A party seeking a rehearing based on newly discovered evidence must show that it exercised reasonable diligence in discovering and producing it. (See *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th 1500, 1506.) The very strictest showing of diligence is required. (See *Shivers v. Palmers* (1943) 59 Cal.App.2d 572, 576.) A general averment of diligence is insufficient. (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 154.) The party seeking rehearing must specify the particular acts or circumstances that establish diligence. (See *ibid*.)

Here, the new evidence appellant provided with his petition was prepared for the 2011 tax year; however, appellant did not previously provide the evidence at audit, at FTB protest, or on appeal before OTA. In his petition, appellant asserts the gross receipts information was unavailable due to limitations in accessing the records amid COVID-19 closures and the age of the records when appellant filed his appeal on or about August 2021. However, appellant has not shown and evidence in the record does not indicate that: (a) the new evidence could not have been previously obtained through reasonable diligence, (b) due diligence was exercised in discovering and producing the newly discovered evidence prior to the issuance of the Opinion, or (c) the newly discovered evidence could not have been discovered and produced with reasonable diligence prior to issuance of the Opinion. (See *Mitchell*, *surpa*.) In fact, appellant has not established and evidence in the record does not indicate that appellant exercised any due diligence in previously discovering and producing the evidence. As such, OTA cannot grant a rehearing on the basis of newly discovered evidence.

Accident or Surprise; Contrary to Law

Appellant also asserts that a new hearing should be granted on grounds other than new evidence. Appellant asserts that it was the first time that the substantial and occasional sale rule under California Code of Regulations, title 18, section 25137(c)(1)(A) was raised, and, therefore, appellant did not previously have the opportunity to address or rebut.[4] It appears to OTA that appellant is arguing that there was an accident or surprise during the appeal proceedings. Appellant also asserts that FTB assessed appellant as if he was unitary with TRC LP.[5] It appears to OTA that appellant is arguing that the Opinion is contrary to law.

A new hearing is only appropriate if the alleged accident or surprise (or if the Opinion is allegedly contrary to law), materially affected the substantial rights of the party seeking the rehearing. (Cal. Code Regs., tit. 18, § 30604(a); Code Civ. Proc., § 657; see *Appeal of Wilson Development, supra*.) A ground for rehearing is material if it is likely to produce a different result. (*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; *Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319.)

Here, the discussions in the Opinion regarding: (a) the substantial and occasional sale rule, and (b) unity between appellant and TRC LP, were explicitly provided as examples and were not directly relevant or crucial to the resolution of the underlying appeal. Importantly, appellant in his petition does not explain how his contentions would produce a different result in reversing OTA's holding in the underlying appeal. As such, appellant's assertions, together with the evidence he submitted, failed to demonstrate how they materially affect appellant's substantial right or how they could potentially lead to a different outcome.

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[4] FTB's opening brief from the underlying appeal specifically asserted that appellant failed to acknowledge that any of the 1231 net gain is removed from the factor because of the substantial and occasional sale regulation. As such, it was not the first time where the substantial and occasional sale rule was raised in the underlying appeal, and appellant had the opportunity to submit a reply brief but did not do so. (See Cal. Code Regs., tit. 18, § 30303(c).) Nonetheless, the issue of substantial and occasional sale was not at issue. Appellant in the underlying appeal failed to discuss and provide evidence showing that the gross receipts from the 1231 net gain were wrongfully excluded from the apportionment factors by TRC LP or the other underlying pass-through entities.

[5] The Opinion in footnote 8 specifically acknowledged that "[i]t appears that both parties are treating the underlying pass-through entities where the 1231 net gain transactions originated as unitary with TRC LP." Nonetheless, the issue of unitary was not at issue in the underlying appeal. Rather, it was appellant in the underlying appeal who failed to demonstrate that he could use TRC LP's apportionment percentage instead of Yukon's apportionment percentage to apportion the 1231 net gain.

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

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Eddy Y. H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

We concur:

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Asaf Kletter
Administrative Law Judge

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

Date Issued: 5/9/2024