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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of:	OTA Case Nos. 19024329; 19024331
R. PERRILLO AND	CDTFA Case IDs: 932539; 9347978; 937826;
K. WHITEMAN	937829; 1008157

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: R. Perrillo
K. Whiteman

For Respondent: Sunny Paley, Attorney

J. ALDRICH, Administrative Law Judge: On February 22, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining decisions issued by respondent California Department of Tax and Fee Administration (CDTFA) to R. Perrillo and K. Whiteman (collectively, appellants).[1]

The first CDTFA decision denied a petition for redetermination filed by R. Perrillo of two Notice of Determination (NOD) dated June 18, 2015, and December 16, 2015. The June 18, 2015 NOD is for tax of $7,213, plus applicable interest, and a penalty of $721.30 for the period May 3, 2012, through December 31, 2012 (liability period 1). The December 16, 2015 NOD is for tax of $5,477.68, plus applicable interest, and a penalty of $478.40 for the period of January 28, 2014, through December 31, 2014 (liability period 2).

The second CDTFA decision denied a petition for redetermination filed by K. Whiteman of three NODs dated January 21, 2016, January 28, 2016, and April 17, 2017. The January 21, 2016 NOD is for tax of $2,809.18, plus applicable interest, for the period of April 5, 2013, through December 31, 2013 (liability period 3). The January 28, 2016 NOD is for

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

tax of $2,673, plus applicable interest, for the period of January 1, 2014, through December 31, 2014 (liability period 4). The April 17, 2017 NOD is for tax of $520, plus applicable interest, for the period of January 1, 2015, through December 31, 2015 (liability period 5).

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 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 OTA 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 caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing.

Appellants timely petitioned for a rehearing with OTA on the following basis: (1) an irregularity in the appeal process excluded all documents from evidence at the outset of the hearing; (2) a surprise occurred because they "were only allowed to present [their] case verbally, putting [them] at such a disadvantage that it became impossible to document [their] complaints[;]" (3) that relevant evidence exists; and (4) the Opinion was written without appellants' submission, and the state included testimony that was false and prejudicial. OTA concludes that the grounds set forth in appellants' petition do not constitute a basis for a new hearing.

Procedural History

The pertinent procedural history is discussed as follows. By letter dated September 20, 2018, appellants submitted their requests for appeal.[2] OTA, via letter, acknowledged appellants' requests for appeal. The acknowledgement letter established a

[2] At the agency level, CDTFA issued two separate decisions. However, OTA consolidated the appeals for purposes of the hearing and the Opinion consistent with appellants' request.

deadline for appellants to submit an opening brief. Also, the acknowledgement letter clearly indicated the following: OTA and CDTFA are separate agencies; appellants would need to submit supporting documentation to OTA; and "any information or other material that you have previously supplied to CDTFA . . . or any information or other material that [CDTFA] may have previously supplied to you, is not part of the record in this appeal." Appellants submitted an opening brief which did not contain supporting documents.

After the briefing period closed, OTA issued a Notice of Oral Hearing (Notice) dated February 7, 2020, and a Notice of Telephonic Prehearing Conference (Notice of PHC). Regarding exhibits, the Notice indicates that "Each party may provide exhibits and…The parties should exchange all exhibit lists and copies of their exhibits at least 15 days before the hearing." The Notice of PHC contains the following note:

> Because the OTA is separate from the state's taxing agencies, the OTA will not have materials you have provided to, or received from, those taxing agencies unless those materials were provided with an appeal letter or brief filed with the OTA. You may submit additional documents to the OTA in connection with your appeal by submitting them to the OTA and providing copies of the documents to the opposing party. This should be done well in advance of the scheduled hearing.

In response, appellants requested to waive the prehearing conference (PHC) and to change the location and date of the hearing. On March 2, 2020, OTA issued a revised Notice to effectuate changes pursuant to appellants' request. Via email, appellants reiterated their request to waive the PHC. On March 11, 2020, OTA issued a letter clarifying the purpose of the PHC. The March 11, 2020 letter explained that the PHC provides an informal forum to address items like the proposed evidence to be introduced into the record. The March 11, 2020 letter also reminded appellants, like the acknowledgement letter, that OTA and CDTFA are independent, and that "It is [appellants'] responsibility to make sure that any document [they] wish to be considered was sent directly to OTA. The submission of evidence or documents is a matter to discuss during a [PHC], including deadlines for the timely submission of such evidence."

OTA issued Pre-Hearing Orders on March 12, 2020, which established a deadline of March 25, 2020, for the submission of proposed evidence. Appellants requested a postponement and declined the PHC. OTA granted the postponement. On June 11, 2021, OTA issued a third Notice and Notice of PHC with the same or similar language, mentioned above. In response, appellants requested a postponement and to waive the PHC. OTA granted appellants' request to

postpone. On June 30, 2022, OTA issued a fourth Notice and Notice of PHC with the same or similar language. Appellants again requested a postponement, which OTA granted. On September 9, 2022, OTA issued a fifth Notice and Notice of PHC with the same or similar language. In response, appellants requested to opt out of the PHC.

On October 6, 2022, OTA issued Prehearing Orders which, in pertinent part, established October 26, 2022, as the deadline for additional submissions. On November 10, 2022, appellants requested electronic copies of certain records. On November 10, 2022, OTA sent appellants a SharePoint link with electronic copies of OTA's administrative record.

On November 16, 2022, OTA held an oral hearing. During the oral hearing appellants requested to submit approximately 7,000 pages or a 28-inch pile of paper into evidence.[3] OTA denied appellants request because the exhibits had not been timely submitted and appellants had not identified any exhibits prior to the hearing. Appellants later filed a timely petition for rehearing with OTA.

Irregularity

When an irregularity in the proceedings is asserted, OTA must determine whether the party seeking a rehearing (here, appellants) have established that there was an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and whether that irregularity prevented fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(1).) An irregularity in the proceedings warranting a rehearing generally includes any departure from the due and orderly method of conducting the appeal proceedings by which the substantial rights of a party have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Gay v. Torrance* (1904) 145 Cal. 144, 149.)

Appellants assert that an irregularity in the appeal process excluded all documents from a 29-inch (or 28-inch) pile of paper at the outset of the hearing. Appellants claim that they requested, prior to the deadline, for the submission of these documents and the request was not processed timely.

The procedural history, discussed above, clearly shows that appellants were placed on notice that OTA and CDTFA were separate and distinct agencies and that any evidence from the

[3] In their petition for rehearing, appellants refer to the height of their pile of paper as 29 inches. It is unclear what, if anything, is contained on those pages since appellants never submitted them to OTA. It is also unclear how 28 inches of records during the hearing became 29 inches of records according to the petition for rehearing. (Transcript, p. 13 line 11; and p. 15 line 7.)

prior proceeding would not be part of the record unless directly submitted to OTA. Appellants were afforded multiple opportunities to submit documentation in support of their position (e.g., during briefing, in response to each of the Notices, in response to each of the Notices of PHC, or by the deadline established in the Prehearing Orders). Appellants also had the opportunity to attend a PHC to clarify what records were in OTA's possession. Appellants elected not to avail themselves of those opportunities. Instead, appellants requested to submit "7,000 pages and 28 inches of records" on the day of the hearing. (Transcript at p. 23, line 15-16.) Because appellants' submission request was untimely, and because the records requested for submission at the hearing appeared to be in the record, OTA denied the request.[4] (Transcript at p. 13, lines 18 through 25; p. 14, lines 1 through 8; p. 15, lines 9 through 21).

Here, appellants chose to ignore the multiple opportunities OTA provided, until after the established deadlines to exercise them passed. Therefore, OTA finds appellants' assertion that a material irregularity occurred to be without merit. Accordingly, OTA finds no basis for a rehearing under California Code of Regulations, title 18, section 30604(a)(1).

Accident or Surprise

With respect to accident or surprise, 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 Wilson Development, Inc.*, *supra*.) 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.) 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*.)

Appellants assert that a surprise occurred because they were only allowed to present their appeal verbally, which put them at such a disadvantage that it became impossible to document their complaints.

As discussed above, on multiple occasions, appellants were placed on notice of opportunities to submit documents supporting their position. Indeed, from appellants' Request for Appeal dated September 20, 2018, through the October 26, 2022 deadline set by the

[4] Some of the documents that appellants wished to introduce into evidence were also submitted as exhibits by CDTFA. To the extent that the documents were incorporated in CDTFA's timely submission they were admitted into evidence.

Prehearing Orders, appellants had approximately four years to submit documentation to OTA. After the issuance of an unfavorable Opinion, appellants now argue that a surprise occurred. However, appellants failed to respond to the notices or other opportunities to submit documentation. Accordingly, OTA finds no basis for a rehearing under California Code of Regulations, title 18, section 30604(a)(2).

Relevant Evidence Exists

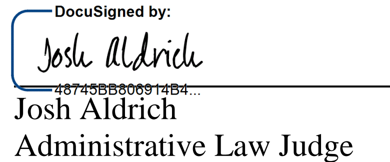
Appellants assert that "relevant evidence, including access to the file in its entirety exists." Here, OTA notes that appellants have not submitted their purported evidence. Further, the mere existence of relevant evidence does not serve as grounds for a new hearing. (See Cal. Code Regs., tit. 18, § 30604(a)(3).) Instead, the evidence must be newly discovered evidence that appellants could not have reasonably discovered and provided prior to the issuance of the Opinion, and it must be material to the appeal. Therefore, OTA finds no basis to grant a rehearing under California Code of Regulations, title 18, section 30604(a)(3).

False and Prejudicial Testimony

Appellants argue that the Opinion was decided without their documented evidence and that the state included testimony that was false and prejudicial.

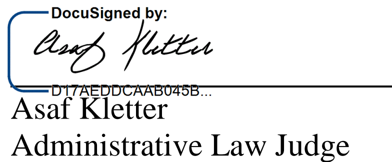
The discussion above addressed the exclusion of appellants' untimely submission from the evidentiary record. Therefore, OTA need not address it here. Appellants appear to misconstrue the hearing process. In the underlying appeal, CDTFA did not present any testimony. Instead, CDTFA's attorney provided an argument with references to exhibits admitted into evidence. Accordingly, OTA finds no basis for a rehearing under California Code of Regulations, title 18, section 30604(a)(1)-(2).

In sum, appellants are not entitled to a rehearing.

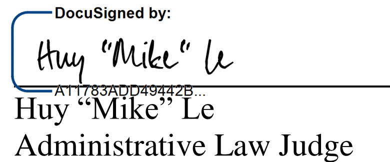


Josh Aldrich
Administrative Law Judge

We concur:



Asaf Kletter
Administrative Law Judge



Huy "Mike" Le
Administrative Law Judge

Date Issued: 4/15/2024