

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 230112305
J. AXELROD)
)
)
)
)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: J. Axelrod
For Respondent: Noel Garcia-Rosenblum, Attorney

V. LONG, Administrative Law Judge: On February 13, 2024, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$43,668.75 for the 2021 tax year.

In the Opinion, OTA held that J. Axelrod (appellant) had not established reasonable cause for the late payment of tax. Appellant timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19334. 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 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, material evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (4) insufficient evidence to justify the written opinion; (5) the opinion 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.)

Appellant contends that the Opinion is contrary to law. Specifically, appellant contends he should be granted a rehearing because he asserts that OTA misinterpreted R&TC

section 19132(a) and *Appeal of Moren*, 2019-OTA-176P (*Moren*), and that OTA's refusal to abate the late payment penalty is a misapplication of law that violates public policy.

To find that the Opinion is contrary to law, OTA must determine whether the Opinion is "unsupported by any substantial evidence;" that is, the record would justify a directed verdict against the prevailing party. (*Appeal of Swat-Fame Inc., et al.*, 2020-OTA-045P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).¹) This requires a review of the Opinion to indulge in "all legitimate and reasonable interests" to uphold the Opinion. (*Sanchez-Corea, supra*, at p. 907.) The relevant question is not over the qualify or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5629676.)

The Opinion applied R&TC section 19132(a) and relevant case law including *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*), *Appeal of Rougeau*, 2021-OTA-335P, and *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860, in reaching its determination. Appellant does not address these cases, but merely states his disagreement with the Opinion's conclusion. A review of the Opinion demonstrates that it was supported by substantial evidence.

Appellant asserts that the Opinion reflects a misinterpretation of *Moren* because appellant contends that he exercised ordinary business care and prudence in relying on his accountant, who had filed over 20 California income tax returns. The Opinion cited to *Moren* for the proposition that a determination of reasonable cause requires an analysis of an appellant's actions leading up to the late payment and the timing of those actions to determine whether they reflect ordinary business care and prudence, such as an ordinarily intelligent and prudent businessperson would have performed under similar circumstances.

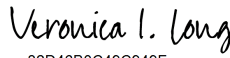
Appellant's reliance on *Moren* is unavailing because, as stated in the Opinion, it is well-settled that a taxpayer's failure to make a timely payment is not excused by the taxpayer's reliance on a tax preparer because a taxpayer has a personal, non-delegable obligation to meet statutory deadlines. (See *Boyle, supra*, at 241, 251-252; see also *Appeal of Rougeau, supra*.) While reasonable cause may nonetheless exist in certain circumstances, the taxpayer must show that they relied on a tax professional with competency in the subject tax law. (*Appeal of Summit Hosting LLC*, 2021-OTA-216P, citing *Boyle, supra*.) OTA's predecessor, the Board of

¹ As provided in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, 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.


Equalization (BOE), has held that there is no basis for concluding that an out-of-state tax preparer possesses expertise in California tax law. (*Appeal of Berolzheimer, supra.*)² Further, the evaluation on a petition for rehearing indulges in “all legitimate and reasonable interests” to uphold the opinion. (*Sanchez-Corea, supra*, at p. 907.) For these reasons, appellant has not established that the Opinion is unsupported by any substantial evidence.


Finally, appellant asserts that refusal to abate the late payment penalty violates public interest. However, even if true, violation of public interest is not grounds for rehearing.

Accordingly, OTA finds that appellant has not established grounds for rehearing.

Signed by:

32D46B0C49C949F...
Veronica I. Long
Administrative Law Judge

We concur:

DocuSigned by:

6D3FE4A0CA514E7...
Sara A. Hosey
Administrative Law Judge

Signed by:

25F8FE08FF56478...
Natasha Ralston
Administrative Law Judge

Date Issued: 8/14/2024

² Prior to January 1, 2018, the adjudicatory functions now performed by OTA were performed by BOE, OTA’s predecessor. California Code of Regulations, title 18, section 30504, provides that precedential opinions of BOE that were adopted prior to January 1, 2018, may be cited as precedential authority to OTA unless a panel removes, in whole or in part, the precedential status of the opinion.