OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **M. BOWEN**	OTA Case No. 230212684

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: M. Bowen

For Respondent: Jaclyn N. Zumaeta, Assistant Chief Counsel

M. Geary, Administrative Law Judge: On October 30, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of the Franchise Tax Board (respondent) denying, in part, M. Bowen's (appellant's) claim for refund for the 2014 tax year on the grounds that the claim was partially barred by the statute of limitations. Appellant timely filed a petition for rehearing (petition). Upon consideration of appellant's petition, OTA concludes that appellant has not established grounds for a rehearing.

OTA may grant a rehearing where any of the following grounds is established and materially affects the substantial rights of the filing party: (1) an irregularity in the appeal proceedings, which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) accident or surprise, which occurred during the appeal proceedings and prior to the issuance of the Opinion, and 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 Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law that occurred during the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

It is not clear on what grounds appellant bases the petition. Appellant argues that OTA was not provided with all the evidence. The evidence upon which the Opinion was based showed the following:

- Appellant failed to file a California income tax return for the 2014 tax year by April 15, 2015.
- On January 28, 2016, respondent instructed appellant to file a return, or explain why appellant was not required to file a return, by March 2, 2016. Appellant did not comply.
- On March 28, 2016, respondent sent appellant a Notice of Proposed Assessment (NPA) based on estimated earnings and instructed appellant to either file a return, file a protest of the NPA, or pay the estimated tax (plus penalties, interest, and a filing enforcement fee) by May 27, 2016. Again, appellant did not comply.
- On June 27, 2016, respondent sent appellant a Notice of State Income Tax Due. Two similar notices were sent on November 1, 2016, and on December 9, 2016, the last being a Final Notice Before Levy and Lien.
- On January 27, 2017, respondent sent an Earnings Withholding Order to appellant's employer to institute a wage garnishment. Appellant negotiated a reduction in the garnished amount. Over the following approximately six years, there were numerous communications between appellant and respondent regarding collection, including one, on December 7, 2017, during which respondent's representative advised appellant to file a 2014 return to avoid the possible bar of the statute of limitations.
- On February 21, 2023, appellant filed a 2014 income tax return (almost eight years after the due date) reporting no tax liability. Respondent accepted the return as filed, treated it as a claim for refund, abated the penalties and fee, released the state's tax lien, and refunded to appellant all payments made within the year preceding the return filing date.

Appellant asserts that he brought additional facts to the attention of his representative, who decided not to offer evidence of those facts into evidence. Appellant describes these additional facts in the petition, which states that in 1996 appellant was awarded a permanent disability rating by the Workers' Compensation Appeals Board (WCAB), which led to appellant having limited financial resources with which to oppose respondent's assertions that appellant owed taxes and more for the 2014 tax year. Appellant further asserts that his desperate financial situation and the emotional stress from having to deal with respondent's demands caused

appellant's failure to timely file a claim for refund of all payments made. Appellant attaches the following evidence to the petition: (1) a December 6, 1994 report of a medical examination of appellant for injuries sustained on the job in January of that year; (2) a June 22, 1995 report of a medical examination by a different physician but for the same injury; and (3) a September 16, 1996 Findings & Award issued by the WCAB, which states that appellant suffered an injury to his neck and upper back, resulting in a permanent disability rating of 9 percent, entitling appellant to 27 weeks of disability payments and continuing medical care for the injuries.

Respondent argues that the evidence provided by appellant does not establish a "financial disability" sufficient to suspend operation of the statute of limitations pursuant to Revenue and Taxation Code (R&TC) section 19316, which requires a physician to complete Form FTB 1564 essentially attesting to a disability of sufficient severity to have prevented a taxpayer from managing their own financial affairs for a specific period.

A reasonable interpretation of the petition suggests appellant seeks a new hearing on three possible grounds, all of which focus on appellant's assertion that his representative failed to offer the three documents, identified above, into evidence. If that interpretation is correct, appellant argues that his representative's conduct was (1) an irregularity in the appeal proceedings that occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; or (2) an accident or surprise, which occurred during the appeal proceedings and prior to the issuance of the Opinion. The third alternative is that appellant bases the petition on the ground that the three documents are newly discovered, material evidence. For the reasons explained below, none of these arguments are persuasive.

An irregularity in the appeal proceedings

An irregularity in the proceedings warranting a rehearing can include any departure by OTA from the due and orderly method of conducting appeal proceedings by which the substantial rights of the filing party have been materially affected. (*Appeal of Shanahan*, 2024-OTA-040P.) It has also been held to include:

- any act that violates the right of a party to a fair trial and which a party cannot fully present by exceptions taken during the progress of the trial (*Ibid*., citing *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1230); and

- an overt act of the trial court or the adverse party that violates the filing party's right to a fair and impartial trial (*Ibid*., citing *Russell v. Dopp* (1995) 36 Cal.App.4th 765, 780).

Attorney misconduct can also constitute an irregularity in the proceedings, but as with all grounds for rehearing, such misconduct can be sufficient to warrant granting the petition only where it is reasonably probable that, without the misconduct, the filing party would have achieved a better result. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1412.)

Appellant was aware that his representative planned to not bring the additional facts to the attention of OTA. There were other options available to appellant. For example, he could have insisted that the representative offer the documents into evidence, or he could have proceeded without representation and offered the documents into evidence. A dispute in advance of a hearing regarding planned offers of evidence, even a refusal by a representative to make an argument or offer evidence at a later hearing is not an irregularity in the proceedings that warrants a rehearing. Furthermore, OTA has reviewed the subject documents and finds that it is not reasonably probable that their admission at the hearing would have led to a more favorable result for appellant. This latter finding is dispositive of the remaining two possible grounds for appellant's PFR. Nevertheless, OTA will consider other requirements for those grounds below.

An accident or surprise

To be entitled to a new hearing on the grounds of accident or surprise, a party must show that they were unexpectedly placed in a detrimental condition or situation without any negligence on their part and which ordinary caution could not have guarded against. (*Appeal of Le Beau*, 2018-OTA-016P.) Appellant's representative may have recommended against submission of the documents to OTA, and appellant may have disagreed with the recommendation, but unexpected advice during a proceeding is not the kind of accident or surprise that warrants a new hearing. Disagreements between taxpayers and their representatives are not uncommon. If appellant believed the evidence was required for a fair hearing, it was incumbent on appellant to insist that the evidence submitted.

Here, there was no accident or surprise. Appellant was informed before the hearing that the documents would not be offered into evidence. He chose to follow his representative's advice.

Newly discovered, material evidence

The evidence was not newly discovered since issuance of the Opinion on October 30, 2023. Appellant had the documents long before OTA issued the Opinion. Appellant discussed them with the representative well before the hearing. The representative told appellant that she would not be submitting the documents as evidence, and appellant acquiesced.

OTA finds that appellant has not established grounds for a rehearing. Consequently, the petition is denied.

DocuSigned by:
Michael Geary
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Michael Geary
Administrative Law Judge

We concur:

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Lissett Cervantes
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For
Amanda Vassigh
Administrative Law Judge

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For
Richard Tay
Administrative Law Judge

Date Issued: 6/28/2024