OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **E. LEBRUN**	OTA Case No. 230112506

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Guy V. Coulombe, EA

For Respondent: Noel Garcia-Rosenblum, Attorney

E. LAM, Administrative Law Judge: On May 28, 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 $3,542.05 for the 2008 tax year; $3,120.70 for the 2009 tax year; $3,532.32 for the 2011 tax year; $1,534.22 for the 2012 tax year; $3,999.87 for the 2013 tax year; $782.01 for the 2016 tax year; and $1,123.25 for the 2017 tax year. In the Opinion, OTA held that appellant has not shown she timely filed her claim for refund for the 2008, 2009, 2011, 2012, 2013, 2016, and 2017 tax years (the tax years at issue).[1]

On July 26, 2024, appellant timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19334 on the basis that: (1) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (2) insufficient evidence to justify the Opinion; (3) the Opinion is contrary to law; and (4) an error in law in the OTA appeals hearing or proceeding. Upon consideration of appellant's petition, OTA concludes that the grounds set forth in this petition do not constitute a basis for granting a new hearing.

[1] Appellant asserts that OTA failed to include the 2014 tax year in the appeal. However, in appellant's Request for Appeal Before OTA, the 2014 tax year was not listed as a year in dispute. Additionally, neither the prehearing conference minutes and orders issued on February 23, 2024, nor at the oral hearing itself reflected that appellant raised the 2014 tax year as an issue. Therefore, it was appellant's failure, not OTA's, to include the 2014 tax year in the appeal. Accordingly, OTA will not address the 2014 tax year further, as it is not at issue.

OTA will grant a rehearing where one of the following grounds for a rehearing exists 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 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

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.)[2] 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 at p. *2, the trier of fact "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." As such, if a party attempts to submit evidence after the Opinion has been issued, the party must show that the proffered evidence is material and could not have been produced prior to the issuance of the Opinion in order for OTA to grant the petition. (Cal. Code Regs., tit. 18, § 30604(a)(3); *Appeal of Wilson Development, Inc.*, *supra*.)

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

[2] 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.

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.)

Here, appellant asserts that she recently discovered purported new evidence that FTB did not finalize the Notice of Proposed Assessment (NPA) for all tax years in question. Appellant argues that none of the NPAs accurately reflected the appropriate "debits and credits," and if those numbers were upheld, FTB would owe appellant a refund. However appellant has failed to show that reasonable diligence was exercised in discovering or producing the purported new evidence prior to the issuance of the written opinion.

Furthermore, appellant must show that the evidence materially affects the substantial rights of the party. In the context of newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (*Appeal of Shanahan*, 2024-OTA-040P.) Here, the record indicates that appellant's claims for refunds for the tax years in question were filed outside the applicable statute of limitations. Therefore, appellant's new evidence would not be considered material or likely to produce a different outcome, as it does not pertain to proving that appellant's claims for refunds were filed within the applicable statute of limitations.

Insufficient Evidence

To find that there is insufficient evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different opinion. (Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Appeals of Swat-Fame Inc., et al.*, *supra*.)

Here, appellant generally asserts that the statute of limitations for filing a claim for refund does not apply to overpayments collected from the Earnings Withholding Orders. Appellant contends that the Earnings Withholding Orders that were issued to appellant's employers and banks to pay for unpaid taxes exceeded the combined amounts of tax, withholding, interest, fees, and penalties.

However, as discussed in the underlying Opinion, while the parties do not dispute that appellant made overpayments, appellant nevertheless failed to file refund claims for the relevant tax years before the statute of limitations expired, as required under R&TC section 19306. Appellant's assertion that her refund claims were improperly denied on the basis that the statute of limitations under R&TC section 19306 does not apply to payments collected through the Earnings Withholding Orders is unfounded. Here, after weighing the evidence in the record,

including reasonable inferences based on that evidence, no different outcome would be reached by OTA based on appellant's unsupported assertions. Appellant has not demonstrated that there was insufficient evidence to justify the underlying Opinion.

Contrary to Law

The contrary to law standard of review involves reviewing the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) A holding is contrary to law "only if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a [holding] against the part[y] in whose favor the [holding was] returned.'" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 (*Sanchez-Corea*), citing *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.) This requires indulging "in all legitimate and reasonable inferences" to uphold the Opinion. (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907; see also *Appeals of Swat-Fame Inc. et al.*, *supra*.) The question does not involve "examining the quality or nature of the reasoning behind [OTA's Opinion], but whether [the Opinion] can or cannot be valid according to the law." (*Appeal of Shanahan*, *supra*, citing *Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976, at p. *5.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party (here, FTB), with all legitimate inferences to uphold the Opinion, the petitioning party (here, appellant) establishes that the Opinion incorrectly stated or applied the law and, therefore, is contrary to law. (*Appeal of NASSCO Holdings, Inc.*, *supra*.)

Appellant asserts that OTA has failed to cite any existing law explaining how the overpayments collected from the Earnings Withholding Orders meet the definition of an "expired tax refund" and, therefore, the underlying opinion is contrary to law.

Here, as previously discussed, appellant failed to file claims for refund for the relevant tax years before the statute of limitations expired, as required under R&TC section 19306. OTA also clarified that, according to established case law, a taxpayer's failure to file a claim for refund within the statutory period bars a refund even if the tax is alleged to have been erroneously, illegally, or wrongfully collected. (*Appeal of Benemi Partners, L.P.*, 2020-OTA-144P.) In this case, the underlying Opinion was supported by substantial evidence, and the overall evidence in the record was sufficient to justify a decision against appellant. Appellant's dissatisfaction with the outcome and attempt to reargue the same issues a second time, is not grounds for a rehearing. *(Appeal of Graham and Smith*, 2018-OTA-154P.) Accordingly, appellant's arguments do not establish that the underlying Opinion was contrary to law.

Error in Law

Courts have found that a new trial may be granted based on an error in law if its original ruling as a matter of law was erroneous. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17-18, citing *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391, 397.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong.[3] (*Appeals of Swat-Fame, Inc., et al.*, *supra*, at fn. 2; see also Cal. Code Regs., tit. 18, § 30604(b).) As stated in Code of Civil Procedure section 657, in the judicial context, an error in law "occurring at the trial and excepted to by the party making the application," is grounds for a new trial. This includes situations where, for example, the trial court made an erroneous evidentiary or procedural ruling. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138; *Ramirez v. USAA Casualty Ins. Co.*, *supra*.) It must be "reasonably probable" that the party moving for a new trial would have obtained a more favorable result absent the error. (See, e.g., *Saxena v. Goffney* (2008) 159 Cal.App.4th 316; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283.) "'Reasonable probability' does not mean 'more likely than not'; it means merely a 'reasonable chance, more than an abstract possibility.'" (*Martin–Bragg v. Moore* (2013) 219 Cal.App.4th 367, 395, citing *College Hosp. Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Appellant asserts that OTA has dismissed the facts and exhibits as presented when making the determination against her. Appellant further argues that OTA did not provide a legally sound or reasonable argument that would be upheld by any other attorney or judicial body under statutory law.

However, appellant's unsupported assertions have not identified any procedural wrong that would constitute an error in law for this petition. Here, appellant's exhibits 1 through 6, along with FTB's exhibits A through BBB, were fully received and admitted into the record. There were no objections from appellant at the hearing when these exhibits were admitted into the record as evidence. Additionally, no relevant evidence was excluded from consideration. Furthermore, OTA took appellant's witness testimony into account when making its decision in

[3] For example, courts have found an error in law occurred when there was an erroneous denial of a jury trial (*Johnson v. Superior Court* (1932) 121 Cal.App. 288); an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 Cal.App. 487); an erroneous application of the law by a jury (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722); and an erroneous instruction to a jury (*Maher v. Saad* (2000) 82 Cal.App.4th 1317).

the underlying Opinion. Here, there is no basis to suggest that the underlying Opinion had any procedural wrong that would amount to an error in law.

Accordingly, OTA finds that appellant has not satisfied the requirements for granting a rehearing and, as such, her 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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Keith T. Long
Administrative Law Judge

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Steven Kim
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Steven Kim
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