OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **R. MONZON**	OTA Case No.: 230212587 CDTFA Case ID: 3-269-074

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: R. Monzon

For Respondent: Mari Guzman, Attorney

A. WONG, Administrative Law Judge: On October 17, 2024, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied R. Monzon's (appellant's) petition for redetermination of a Notice of Dual Determination (NODD) dated October 27, 2021. The NODD is for tax of $36,668.52, plus applicable interest, and penalties of $4,301.40 for the period April 1, 2018, through June 30, 2019 (liability period), and reflects CDTFA's determination that appellant is personally liable as a responsible person for the unpaid sales tax liabilities of Prestige JSN Auto Body of Irvine, Inc. (Prestige Irvine) under Revenue and Taxation Code (R&TC) section 6829. OTA based its Opinion on the written record after appellant waived the right to an oral hearing.

As relevant here, on February 10, 2023, appellant, via his attorney, submitted an appeal letter/opening brief to OTA and requested that a "conference" be scheduled to discuss its appeal in greater detail. In a letter dated April 20, 2023, and sent to appellant's attorney, OTA provided a form offering appellant three options for proceeding with the appeal: (1) an oral hearing; (2) submission on the written record without an oral hearing; or (3) agreement with CDTFA's determination and dismissal of the appeal. OTA requested return of the completed form by May 22, 2023; otherwise, appellant's appeal would be submitted for an Opinion based

[1] The State Board of Equalization (board) formerly administered sales and use taxes. On July 1, 2017, the board's administrative functions relevant to this case transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, if this Opinion refers to events occurring before July 1, 2017, "CDTFA" refers to the board.

on the written record and without an oral hearing. OTA received no response. By letter dated May 30, 2023, and sent to appellant's attorney (with a carbon copy to appellant), OTA indicated that it had not received a response to its April 20, 2023 letter, so OTA would submit the appeal for an Opinion based on the written record without an oral hearing.

On March 7, 2024, appellant's attorney submitted an inquiry via OTA's online portal, indicating that he no longer represented appellant and asked how to "remove my representation." On March 13 and 22, 2024, OTA emailed appellant's attorney and asked for a written request to withdraw but received no response.[2] On March 22, 2024, OTA also called appellant, who indicated that he would call OTA back the following week with information regarding a new representative. However, OTA has no record of any subsequent communication from appellant until he petitioned OTA for a rehearing on November 14, 2024.

OTA will grant a rehearing where at least one of the following six 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).)

Appellant petitions for a rehearing on the following four bases: (1) irregularities in the appeal proceeding; (2) an accident or surprise; (3) newly discovered material evidence; and (4) insufficient evidence. OTA concludes that the grounds set forth in this petition do not constitute bases for granting a new hearing.

Irregularity in the Appeal Proceedings

In his petition for rehearing, appellant alleges the following three irregularities: (1) during the audit, appellant warned CDTFA that Prestige Irvine's owner was selling both the business and its building so CDTFA should place a lien on them, but CDTFA failed to do so;[3] (2) during

[2] Parties must promptly notify OTA and the opposing party in writing of any substitutions or withdrawals of representation. (Cal. Code Regs., tit. 18, § 30211(d).) Otherwise, OTA will continue including the representative of record on notices and correspondence.

[3] In his petition for rehearing, appellant misidentified OTA as the state agency responsible for this alleged irregularity. However, OTA is an independent appeals body that neither performs audits nor files liens and was not involved during the audit. Appellant must be referring to CDTFA whose functions include auditing and collecting sales and use taxes.

CDTFA's dual determination investigation, appellant asked CDTFA to interview certain Prestige Irvine employees that could vouch for him, but CDTFA failed to do so;[4] and (3) appellant never waived, and was thus deprived of, his right to an oral hearing before OTA.[5]

OTA will grant a rehearing when an irregularity in the appeal proceedings occurs prior to the Opinion's issuance and prevents fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(1).) Generally, an irregularity includes any departure by OTA from the due and orderly method of conducting appeal proceedings that materially affects the substantial rights of a party. (*Appeal of Mather*, 2024-OTA-378P.) Courts have found that an irregularity in a proceeding is any act that: (1) violates the right of a party to a fair trial and (2) which a party cannot fully present by exceptions taken during the progress of the trial. (*Ibid*.) An overt act of the trial court or adverse party, violative of the right to a fair and impartial trial, may be regarded as an irregularity. (*Ibid*.) Examples of irregularities include the absence of a judge from the courtroom during a portion of the trial, and a judge threatening to prejudge testimony unless a witness is withdrawn. (*Ibid*.)

Here, appellant's first and second alleged irregularities (i.e., CDTFA's failure to file a lien and interview Prestige Irvine employees) purportedly took place during CDTFA's audit and dual determination investigation, respectively. But the plain meaning of California Code of Regulations, title 18, (Regulation) section 30604(a)(1) requires that they occur "in the appeal proceedings" before OTA. Because these alleged irregularities preceded the OTA appeal proceedings, OTA cannot grant a rehearing based on them.

As for appellant's third alleged irregularity (i.e., OTA deprived appellant of his right to an oral hearing), OTA's Rules for Tax Appeals require a written request for an oral hearing. Specifically, Regulation section 30401(b) states, "Every appellant has the right to an oral hearing before [OTA] upon written request, except as otherwise provided by law. An appellant must request an oral hearing in writing prior to the completion of briefing. The request may be included in the appellant's appeal letter, on a form provided by OTA, or with the appellant's briefing. OTA will provide the appellant with a form to request an oral hearing…."

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[4] In his petition for rehearing, appellant originally categorized this allegation under the ground of newly discovered material evidence. However, the alleged failure by CDTFA to interview individuals does not constitute evidence. This allegation is more akin to a procedural irregularity so OTA will evaluate it as such.

[5] In his petition for rehearing, appellant also claims that he asked OTA to authorize a subpoena for bank records but believes that OTA did not do so. OTA has no record of appellant ever requesting a subpoena from OTA. Accordingly, OTA will not discuss this claim any further.

OTA may also require that an appellant confirm his request for oral hearing. Regulation section 30401(b)(1) states, "OTA may send an appellant a confirmation notice(s) to determine whether the appellant still seeks an oral hearing. If the appellant fails to respond to OTA's confirmation notice by the deadline set in the confirmation notice, the appellant waives the right to have an oral hearing, unless OTA is advised by the appellant that it still wants an oral hearing and OTA determines that there is good cause for appellant's failure to timely respond to the confirmation notice."

Here, appellant requested a "conference," not an oral hearing, in his February 10, 2023 appeal letter/opening brief. Even if OTA could construe appellant's request for a "conference" as a request for an oral hearing, appellant failed to respond to OTA's subsequent April 20, 2023 letter asking how he would like to proceed with his appeal. That letter contained a form by which appellant could request (or confirm his request for) an oral hearing; however, appellant never returned it or otherwise communicated/confirmed that he wanted an oral hearing. As a result, on May 30, 2023, OTA sent a letter informing appellant that it had not received a response from appellant and thus would submit the appeal for an Opinion based on the written record without an oral hearing.

Based on these facts, OTA finds that it adhered to the procedures by which an appellant could request or confirm a request for an oral hearing under the Rules for Tax Appeals, but appellant failed to make or confirm such a request. Thus, OTA did not deprive appellant of his right to an oral hearing; rather, appellant waived it. Accordingly, OTA concludes that appellant's third alleged irregularity is not an irregularity at all, and so none of the three irregularities alleged by appellant warrant a rehearing.

Accident or Surprise

In his petition for rehearing, appellant asserts that his attorney never notified or communicated with him about an oral hearing. Although appellant also categorized this assertion as an irregularity, OTA finds that it is more akin to an accident or a surprise based on relevant case law. (See, e.g., *People's Finance & Thrift Co. of Porterville v. Phoenix Assur. Co., Ltd., of London* (1930) 104 Cal.App. 334 [attorneys' complete abandonment of case before trial without defendants' knowledge constituted accident/surprise].)[6] Accordingly, OTA will examine whether appellant's assertion constitutes an accident or surprise necessitating a rehearing.

[6] Since California Code of Regulations, title 18, (Regulation) section 30604 is based on Code of Civil Procedure section 657, case law pertaining to that statute's operation constitutes relevant guidance in interpreting Regulation section 30604. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1595 WL 1320; see also *Appeal of Do*, 2018-OTA-002P.)

OTA will grant a rehearing when an accident or surprise occurs during the appeal proceedings and prior to the Opinion's issuance, which ordinary caution could not have prevented. (Cal. Code Regs., tit. 18, § 30604(a)(2).) The terms "accident" and "surprise" have substantially the same meaning, and each is used to denote some detrimental condition or situation in which a party is unexpectedly placed, without any negligence on the part of that party, which ordinary caution could not have guarded against. (*Appeal of Mather*, *supra*.) A rehearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (*Ibid*.)

Here, regardless of whether appellant's attorney notified or communicated with him about an oral hearing, OTA in fact did so. By letter dated April 20, 2023, and sent to appellant's attorney, OTA informed appellant about his option to select an oral hearing and provided him with a form to fill out. During this time, nothing in OTA's file suggested any issues in appellant's relationship with his attorney. By follow-up letter dated May 30, 2023, and specifically carbon-copied to appellant's address of record, OTA noted that appellant had failed to respond and exercise his option for an oral hearing, so the appeal would be submitted based on the written record, without an oral hearing. At the very least, this May 30, 2023 letter notified appellant that he had waived his right to an oral hearing and, if this was not his intent, should have prompted him to alert OTA. But he never did. Accordingly, OTA finds that, on these facts, there was no accident or surprise that ordinary caution could not have prevented; thus, a rehearing based on accident or surprise is unwarranted.

Newly Discovered Material Evidence

In his petition for rehearing, under the heading of newly discovered material evidence, appellant alludes to "affidavit[s] of support" from Prestige Irvine employees. However, appellant fails to include any such third-party affidavits with his petition. Accordingly, OTA will not discuss them any further. However, with his petition for rehearing, appellant does include his own affidavit dated November 14, 2024, in which he essentially avers that he lacked authority to pay Prestige Irvine's taxes or to cause them to be paid. Here, OTA will analyze whether appellant's affidavit qualifies as newly discovered material evidence justifying a rehearing.

A party seeking a rehearing based on newly discovered material evidence must show the following: (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. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) Here, appellant's affidavit satisfies none of these three elements.

First, evidence is "newly discovered" if it was not known or accessible to the party seeking rehearing prior to the issuance of the Opinion. (See *Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) Evidence which, under the circumstances, must have been known to the party seeking rehearing prior to issuance of the Opinion may not be regarded as "newly discovered." (*Ibid*.)

Here, appellant states in his affidavit that he had personal knowledge of the facts described therein, all of which related to his lack of authority during the liability period. Appellant's firsthand experience of these facts would mean that they were known and accessible to him from the moment they transpired and that he could not have "newly discovered" them after OTA issued its Opinion. Accordingly, appellant's affidavit does not qualify as newly discovered evidence.

Second, a party seeking a rehearing based on newly discovered evidence must also show that it exercised reasonable diligence in discovering and producing such evidence. (See *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th 1500, 1506.) A general averment of diligence is insufficient; the party seeking rehearing must specify the particular acts or circumstances that establish diligence. (See *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 154.) A rehearing is properly denied where the "newly discovered" evidence was available and could have been produced prior to the Opinion's issuance. (See *Jones v. Green* (1946) 74 Cal.App.2d 223, 232.)

Here, appellant failed to specify what acts or circumstances establish his diligence in discovering or producing his affidavit. Additionally, because appellant had personal knowledge of the facts in his affidavit, he could have produced the affidavit earlier in the appeals process (e.g., during OTA's briefing period) but apparently waited until after OTA issued its Opinion denying his appeal. Accordingly, OTA concludes that appellant has failed to make the requisite showing of diligence.

Third, a party seeking rehearing based on newly discovered evidence must show the evidence is material to the party's case. (See *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th at p. 1506.) "Material" means likely to produce a different result. (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.) Evidence that is merely cumulative or that simply tends to impeach or discredit a witness is insufficient grounds for a new trial. (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 910, disapproved of on other grounds by *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359.)

Here, appellant's affidavit contains facts regarding his lack of authority to pay Prestige Irvine's taxes or to cause them to be paid during the liability period. This echoes a

statement by a former Prestige Irvine employee (E. Inocencio). OTA's Opinion considered that third-party statement but determined that its evidentiary value was "vastly outweighed by the evidence supporting CDTFA's position." Appellant's affidavit is cumulative, from an interested party, and, given CDTFA's evidence, unlikely to produce a different result. Accordingly, OTA finds that appellant's affidavit is not material.

In conclusion, appellant has failed to show that his affidavit is newly discovered, that he exercised reasonable diligence in discovering and producing it, or that it was material. Failure to show any of these three elements is sufficient to deny appellant's petition for rehearing based on newly discovered material evidence—appellant has failed to show all three. Accordingly, OTA concludes that a rehearing based on the newly discovered relevant evidence ground is not warranted.

Insufficient Evidence

In his petition for rehearing, appellant reiterates two arguments that OTA already addressed in its Opinion: (1) appellant was not a "responsible person" for Prestige Irvine under R&TC section 6829; and (2) he did not willfully fail to pay or to cause to be paid Prestige Irvine's taxes because he lacked authority to pay its taxes. OTA construes appellant's reiterated arguments as a contention that there was insufficient evidence to justify OTA's Opinion.

To find that there is insufficient evidence to justify the Opinion, the OTA Panel considering a petition for rehearing must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Opinion clearly should have reached a different result. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) The OTA Panel has the affirmative duty to independently appraise the evidence and to grant the petition for rehearing where the preponderance of the evidence is opposed to the findings in the Opinion. (See *Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 739.) The OTA Panel may disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom that are contrary to the factual findings in the Opinion. (See *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1159-1160.)

The present OTA Panel has reappraised the evidentiary record and finds that a preponderance of the evidence supports the Opinion's findings that appellant was a "responsible person" for Prestige Irvine per R&TC section 6829 and that he willfully failed to pay (or to cause to be paid) Prestige Irvine's taxes during the liability period. Therefore, OTA concludes that appellant's arguments and contention about insufficient evidence are unpersuasive.

Other Factors

In his petition for rehearing, appellant also asserts that OTA should have considered the following two factors in determining the merits of the case: (1) his age and health; and (2) the character of another individual associated with Prestige Irvine. Appellant has not cited to, nor is OTA aware of, any authorities suggesting that, on the facts of this case, these two factors are relevant to either responsible person liability under R&TC section 6829 or the grounds for rehearing under Regulation section 30604. Thus, OTA finds appellant's assertions lacking in merit.

For the reasons stated above, OTA concludes that appellant has failed to establish any grounds for rehearing. Therefore, appellant's petition for rehearing is denied.

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Andrew Wong
Administrative Law Judge

We concur:

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Michael F. Geary
Administrative Law Judge

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Greg Turner
Administrative Law Judge

Date Issued: 10/10/2025