

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 220811064
M. MCGUIRE)
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OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Margaret Y. McGuire
For Respondent: Christopher M. Cook, Attorney

C. AKIN, Administrative Law Judge: On June 4, 2025, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) proposing additional tax of \$4,932, a late-filing penalty of \$1,233, and applicable interest for the 2018 tax year; and additional tax of \$4,746, a late-filing penalty of \$1,186.50, and applicable interest for the 2019 tax year. In the Opinion, OTA held appellant had not established error in FTB’s proposed assessments and had not established reasonable cause to abate the late-filing penalty for the 2018 and 2019 tax years.

On July 7, 2025, appellant timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19048 on the basis that: (1) she did not waive her right to an oral hearing as stated in the Opinion, and (2) the Opinion is “contrary to law and equity” because the income received by appellant in 2018 and 2019 was attributable to benefits that were due to and should have been paid to appellant starting from her husband’s death in October 2014. 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.

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); *Appeal of Shanahan*, 2024-OTA-040P.)

Irregularity in the Appeal Proceeding or Error in Law in the OTA Appeals Hearing or Proceeding

In the petition, appellant asserts that she did not waive her right to an oral hearing as stated in the Opinion. Appellant notes that she woke up early on the morning of the virtual hearing to eat and review for the hearing. She states that she had a bad cold, felt very tired, and, at approximately 7 a.m., decided to rest before the hearing. She explains that she set an alarm for 8 a.m. but somehow slept until about 3 p.m., and as a result, missed the oral hearing. OTA will treat appellant's contention that the Opinion improperly treated her hearing as waived as an assertion that either there was an irregularity in the appeals proceeding that prevented a fair consideration of the appeal, or there was an error in law in the OTA appeals hearing or process.

An irregularity in the proceedings warranting a rehearing would generally include any departure by OTA from the due and orderly method of conducting appeal proceedings by which the substantial rights of a party (here, appellant) have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P.) 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. (*Appeal of Shanahan*, *supra*.)

An "error in law" shall mean an error in the OTA appeals hearing or proceeding, other than a legal error in the Opinion. (Cal. Code Regs., tit. 18, § 30604(b).) For example, the erroneous admission of evidence subject to attorney-client privilege, over the objection of the party petitioning for a rehearing, might be a basis for a rehearing due to an error in law if the error was material. (*Ibid.*)

Here, OTA properly treated appellant's hearing as waived when she failed to appear for the duly noticed oral hearing.¹ California Code of Regulations, title 18, (Regulation) section 30404(c), entitled "Failure to appear," expressly provides that if a party fails to appear for a duly noticed hearing, OTA may submit the appeal for decision based on the written record and remove it from the hearing calendar. OTA properly submitted the appeal for decision based

¹ OTA properly notified appellant of the oral hearing in a "Notice of Oral Hearing" mailed to appellant on January 30, 2025. Appellant responded to the hearing notice on February 12, 2025, confirming her planned attendance at the oral hearing scheduled for April 17, 2025.

on the written record and removed it from the hearing calendar when appellant failed to appear for her oral hearing scheduled for the morning session on April 17, 2025.

Additionally, Regulation section 30404(d) provides that if an appeal is removed from the oral hearing calendar, and the panel has not yet issued a written Opinion, OTA may, in its discretion, return the appeal to the oral hearing calendar upon a showing of good cause. While appellant's stated reasons for missing the oral hearing, as presented in the petition, may have been sufficient to establish good cause for purposes of the exception in Regulation section 30404(d), appellant did not timely notify OTA of the reason for missing the oral hearing (or request that the hearing be placed back on the hearing calendar) before OTA issued the written Opinion on June 4, 2025. Appellant did not contact OTA upon waking from her nap at approximately 3 p.m. on April 17, 2025, the day of the hearing, or in the days or weeks following the scheduled oral hearing. In fact, the first-time appellant contacted OTA regarding the missed oral hearing was in the petition filed with OTA on July 7, 2025. This is more than a month after the Opinion was issued on June 4, 2025, and more than two and a half months after the missed oral hearing on April 17, 2025. As such, OTA properly treated appellant's hearing as waived when she failed to appear for her duly noticed oral hearing and failed to request a good cause exception to the hearing waiver before the Opinion was issued. (Cal. Code Regs., tit. 18, § 30404(c), (d).)

Appellant has not established an irregularity in the appeal proceeding or an error in law in the appeals hearing or proceeding. As such, rehearing is not warranted based on appellant's argument that OTA improperly treated her hearing as waived.

Contrary to Law

Next, appellant asserts that it is "contrary to law and equity" to tax her in 2018 and 2019 for income she contends she applied for and was due starting from the death of her husband in October 2014. OTA treats this as an assertion that the Opinion is contrary to law.

The "contrary to law" standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) To find that the Opinion is against (or contrary to) law, OTA must determine whether the opinion is "unsupported by any substantial evidence." (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) This requires a review of the Opinion to indulge "in all legitimate and reasonable inferences" to uphold the Opinion. (*Ibid.*) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Ibid.*, citing

Appeal of NASSCO Holdings, Inc. (2010-SBE-001) 2010 WL 5626976.) In this review, OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Ibid.*)

By way of background, FTB issued Notices of Proposed Assessment (NPAs) to appellant for the 2018 and 2019 tax years proposing tax, late-filing penalties, and interest after it sent, and appellant failed to respond to, Requests for Tax Returns for each of these years. The NPAs estimated appellant's income based on Forms 1099 issued to appellant for the 2018 and 2019 tax years reporting that appellant had been paid interest income and pension, annuity or retirement income totaling approximately \$89,000 and \$88,000, during these years.

In the petition, appellant contends that the income at issue should have been paid to her beginning upon the death of her husband in October 2014, instead of being paid in larger lump sums in 2018 and 2019. Appellant notes that if the sum received in 2018 and 2019 were evenly applied to the period beginning on the date of her husband's death in October 2014 (i.e., to the 2014 through 2019 tax years), she either would "not have been taxed" or would have only owed "a minimal amount." Appellant also asserts that in 2018 and 2019 she had itemized deductions of approximately \$20,000 each year for mortgage interest and property taxes instead of the standard deduction FTB allowed per the NPAs issued for these years (\$4,401 and \$4,537). Neither of these arguments establish that the Opinion is contrary to law.

Internal Revenue Code (IRC) section 451(a) provides, "The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period."² Treasury Regulation section 1.451-1(a) further provides that "[g]ains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer unless includible for a different year in accordance with the taxpayer's method of accounting."³ In the petition, appellant acknowledges that the income at issue was paid to her in 2018 and 2019, and appellant has not established that she uses a method of accounting which would require the inclusion of these income amounts in a year other than the year paid to her.⁴

² California conforms to IRC section 451 pursuant to R&TC section 17551(a).

³ California applies Treasury Regulations promulgated by the IRS to the extent they do not conflict with the R&TC. (R&TC, § 17024.5(d).

⁴ OTA notes that most individual taxpayers use the cash receipts and disbursement method of accounting. Generally, under the cash receipts and disbursements method, all items which constitute gross income (whether in the form of cash, property, or services) are to be included for the taxable year in which actually or constructively received. (See Treas. Reg., § 1.446-1(c)(1)(i).) California conforms to IRC section 446 pursuant to R&TC section 17551(a).

Because the amounts were paid to appellant in 2018 and 2019, they are taxable in 2018 and 2019. (IRC, § 451(a); Treas. Reg. § 1.446-1(c)(1)(i).) This outcome is not changed by the fact that appellant would have been subject to less tax had the amounts paid in 2018 and 2019, been ratably paid to appellant over a period beginning on the date of her husband’s death in October 2014. Thus, appellant has not established that the Opinion is contrary to law on the basis of this argument.

Next, regarding appellant’s contention that she should be entitled to itemized deductions of approximately \$20,000 in 2018 and 2019, OTA notes that, “no itemized deduction shall be allowed for the taxable year” unless “an individual makes an election under [IRC section 63(e)] for the taxable year.” (IRC, § 63(e)(1).)⁵ Such an election “shall be made on the taxpayer’s return.” (IRC, § 63(e)(2).) Thus, appellant is not entitled to itemized deductions unless and until she files returns electing to take itemized deductions in place of the standard deduction for the 2018 and 2019 tax years. As noted in the Opinion, to date appellant has not filed returns for 2018 and 2019. Therefore, she is not entitled to the claimed itemized deductions of approximately \$20,000. Again, appellant has not established that the Opinion is contrary to law on the basis of this argument.

Accordingly, OTA finds that appellant has not established that grounds exist for a rehearing pursuant to Regulation section 30604(a).

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Cheryl Akin
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Cheryl L. Akin
Hearing Officer

We concur:

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

Signed by:
Seth Elsom
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Seth Elsom
Hearing Officer

Date Issued: 11/5/2025

⁵ California conforms to IRC section 63 pursuant to R&TC section 17073(a).