

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
WILSON DEVELOPMENT, INC.) No. 86R-1678-CS

For Appellant: Daniel J. Schneider
Attorney at Law

For Respondent: Cody C. Cinnamon
Counsel

OPINION ON PETITION FOR REHEARING

On January 29, 1992, we sustained the action of respondent Franchise Tax Board in denying the claim of appellant Wilson Development, Inc., for refund of franchise tax in the amount of

\$153^{1/} for the income year ended November 31, 1981. Our summary decision addressed the issue of whether appellant was entitled to use an accounting method different from its regular method to compute the gain from the sale of property. We held that appellant was not entitled to use a different method of accounting because appellant did not satisfy the regulatory requirement that a complete and separable set of books and records be kept. (Former Cal. Admin. Code, tit. 18, reg. 24651, subd. (d)(2), repealer filed Apr. 11, 1987 (Register 87, No. 15).)

Appellant timely filed a petition for rehearing pursuant to section 26077 of the Revenue and Taxation Code.^{1/} The basis of appellant's petition is that the evidence it submitted in the original appeal was intended to prove that the cash method of accounting (as opposed to appellant's regular accrual method) was used to account for its sales of property. It then requested additional time to submit to us "as soon as practicable, its records substantiating the separate business status of the subject commercial property." (App. Pet. For Rehg., at 4.)

Upon receipt of appellant's petition for rehearing, we sent appellant's counsel a letter stating that, along with the additional evidence it sought to submit, appellant must establish that the evidence to be presented was not previously available. We have reviewed the supplemental submission and conclude that appellant has not made such a showing.

This board has not previously stated what a party must show in order to gain consideration of additional evidence submitted pursuant to a petition for rehearing. In fact, we have not even discussed generally the showing a party must make when requesting a rehearing. The statutory provisions authorizing petitions for rehearing (Rev. & Tax. Code, §§ 19046-19048, 19334), and this board's regulations concerning appeals (Cal. Code Regs., tit. 18, reg. 5021, et seq.), do not specify the grounds upon which a petition will be granted.

This board, when acting on income and franchise tax matters, acts in a manner similar to a trial court, in the sense that we resolve factual disputes and then apply the law to those facts, and somewhat like an appeals court, in the sense that the taxpayer appeals an adverse decision of respondent. Therefore, we will look to those standards governing the California trial and appellate courts for guidance in acting on petitions for rehearing.

^{1/} As we explained in our original decision, the amount in controversy is substantially more than \$153.

^{2/} Unless otherwise specified, all section references are to the Revenue and Taxation Code as in effect for the income year in issue.

In regard to petitions for rehearing following a decision by an appellate court, the California Supreme Court has stated:

[i]f we are satisfied, from the petition, that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether we have correctly decided, we grant a rehearing.

(In re Jessup, 81 Cal. 408, 471-472 [21 P. 976, 22 P. 742] (1889).)

At the trial court level, the equivalent of a petition for rehearing is a motion for a new trial. Code of Civil Procedure section 657 sets forth the grounds for the granting of a new trial. As applicable to administrative hearings such as ours, the following causes mentioned in section 657 are relevant grounds for the granting of a rehearing, when they materially affect the substantial rights of the complaining party: 1) irregularity in the proceedings before this board by which the party was prevented from having a fair consideration of its case; 2) accident or surprise, which ordinary prudence could not have guarded against; 3) newly discovered evidence, material for the party making the petition for rehearing, which the party could not, with reasonable diligence, have discovered and produced prior to our decision of the appeal; 4) insufficiency of the evidence to justify the decision, or the decision is against law; or 5) error in law.

In the present petition, appellant has presented schedules attempting to show separate financial statements for the accrual business and the cash business.^{1/} The implication from appellant's submissions is that these are newly prepared records separating the two activities. However, there has been no showing that these schedules could not have been prepared for the original appeal. The fact that these schedules were prepared from existing accounting records, or previously existed as they are, leads us to conclude that they easily could have been submitted in the original appeal. Moreover, the construction of what appears to be "new" evidence from information which existed prior to the hearing does not constitute "newly discovered" evidence which a party could not have produced prior to a decision of the appeal.

^{3/} We have not considered and, therefore, express no opinion as to whether the documents submitted by appellant satisfy the requirements of the regulation discussed in our original determination.

This board always strives to reach the correct result. To that end we prefer a record which contains all the evidence the parties believe is relevant. However, when the evidence could have been submitted before our decision, but was not, the goal of reaching the correct result must usually fall to the need to efficiently resolve matters before this board. Since appellant has failed to show that the proffered evidence could not have been produced prior to our decision, we will not consider said evidence in deciding whether or not to grant the petition for rehearing. Lacking any other grounds showing error in our decision, we must deny appellant's petition for rehearing.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19334 of the Revenue and Taxation Code, that the petition of Wilson Development, Inc., for rehearing of its appeal from the action of the Franchise Tax Board in denying its claim for refund in the amount of \$153 for the income year ended November 30, 1981, be and the same is hereby denied, and that our order of January 29, 1992, be and the same is hereby affirmed.

Done at Sacramento, California, this 5th day of October, 1994, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Fong, and Ms. Scott present.

_____, Chairman

Ernest J. Dronenburg, Jr., Member

Matthew K. Fong, Member

Winnie Scott*, Member

_____, Member

*For Gray Davis, per Government Code section 7.9.