OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010927
JOSEPH MICHAEL	)
	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Paul Rosenkranz, CPA

For Respondent: David Hunter, Tax Counsel IV

For Office of Tax Appeals: Linda Frenklak, Tax Counsel V

N. DANG, Administrative Law Judge: On April 26, 2019, we issued a decision sustaining Franchise Tax Board's (FTB) denial of appellant's protest of a proposed assessment for the 2009 tax year. Thereafter, appellant filed a timely petition for rehearing (Petition) of this matter pursuant to California Code of Regulations, title 18, section 30505(a).

In his petition, appellant contends that a rehearing should be granted because there is insufficient evidence to support our finding that appellant's casualty loss was sustained in 2007. Appellant disputes our interpretation of the evidence in reaching this finding, asserting that the cases we relied upon are not only factually distinguishable from appellant's situation (that is, they dealt with "small contained areas of damage"),[1] but that we failed to properly consider the numerous documents submitted by appellant showing that additional "investigation" was required before he was able to obtain approval from the Los Angeles Department of Building and Safety to remediate and improve the property at issue in 2009.

A rehearing may be granted where there is insufficient evidence to justify the written opinion and the rights of the complaining party are materially affected. (Cal. Code Regs., tit. 18, § 30604(d).) Insufficiency of the evidence means "that there is an absence of evidence or that

[1] Appellant refers to our reliance on *Kunsman v. Comm'r* (1967) 49 T.C. 62 and *Allen v. Comm'r* T.C. Memo. 1984-630.

the evidence received is lacking in probative force to establish the proposition of fact to which it is addressed." (*Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 382-383.)[2] "[A] new trial shall not be granted upon the ground of insufficiency of the evidence … unless after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.)

We found that a landslide occurred on appellant's property following a period of heavy rains in 2005, but that this casualty loss was sustained in 2007 when appellant's property damage claim was denied. These facts are not in dispute. We also considered and rejected appellant's claim that the casualty loss was not sustained until 2009, because there was no credible evidence indicating that appellant was either unaware that a landslide had occurred on his property until 2009, or that appellant was somehow prevented from ascertaining the full extent of his loss until that year. As previously explained in the opinion, the documents provided by appellant indicate that he was informed of the totality of the damage caused by the landslide on his property prior to 2007, and that the only uncertainty that remained to him pertained to how he might remediate and improve his property following the landslide. Appellant's Petition, which mostly repeats many of the same arguments initially raised on appeal, has not convinced us that we clearly should have reached a different conclusion. Dissatisfaction with the opinion and the attempt to reargue the same issue does not constitute proper grounds for a rehearing (*Appeal of Smith*, 2018-OTA-154P.)

Further, appellant's contention that he was unduly prejudiced by our reliance on what he alleges to be factually distinguishable cases, is misplaced. Although appellant is correct that these cases involved only "small contained areas of damage," this factual distinction does not warrant a rehearing. We cited these cases only for the uncontested rule that a casualty loss is sustained in the year in which the casualty loss is discovered by the taxpayer, and not the year in which the repair costs were ultimately determined. This rule applies to casualty losses generally, and, is *not limited* to the specific facts of these cases. Therefore, it was not necessary for

[2] Since California Code of Regulations, title 18, section 30604(d) is directly based upon Code of Civil Procedure section 657, we find case law pertaining to its operation, as well as the language of the statute itself, to be persuasive authority in interpreting this regulation. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1595 WL 1320; see also *Appeal of Do*, 2018-OTA-002P.)

appellant's casualty loss to have occurred over a small, contained area of damage for us to find, based on the evidence stated above, that he was aware of the casualty loss prior to 2007.

Based on the foregoing, we deny appellant's Petition.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:
Sara A Hosey
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Sara A. Hosey
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

Date Issued: 2/5/2020