OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	
ROANJA PLANNING, INC.	) OTA Case No. 18011858) CDTFA Account No. 018-741744) CDTFA Case ID 597654))))

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant:	Dennis L. Perez, Attorney
For Respondent:	Kevin C. Hanks, Chief, Headquarters Operations Bureau

N. DANG, Administrative Law Judge: On June 7, 2019, we issued an opinion finding that appellant's liability should be redetermined in accordance with the California Department of Tax and Fee Administration's (CDTFA's) final reaudit, but that otherwise, CDTFA's decision on appellant's petition for redetermination should be sustained. Thereafter, appellant filed a timely petition for rehearing (Petition).

In its Petition, appellant takes issue with our reliance on *Baumgardner v. Commissioner* (9th Cir. 1957) 251 F.2d 311, 322 (*Baumgardner*) in upholding CDTFA's imposition of the fraud penalty. Appellant asserts that *Baumgardner* does not support the proposition stated in the opinion, that a finding of fraud may be based solely on a pattern of consistent and substantial underreporting. Thus, appellant contends that the failure to support our finding of fraud in the opinion with additional evidence, such as that found in *Baumgardner* or *In re Renovizor's, Inc.* (9th Cir. 2002) 282 F.3d 1233, means that there is insufficient evidence to justify the opinion, that it is contrary to law, and that we have committed an error in law.

Grounds for Rehearing

Although the grounds for rehearing asserted by appellant in its Petition may appear related, they in fact entail wholly distinct considerations. It is therefore necessary to clarify and distinguish these grounds prior to addressing appellant's contentions.

Our predecessor the State Board of Equalization (SBE), specified the grounds constituting good cause for a rehearing in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654. Reasoning that SBE's adjudicatory responsibilities were similar to those of a trial court, SBE chose to utilize the applicable provisions of California Civil Code of Procedure (CCP) section 657, which pertain to grounds for a new trial, in determining whether a rehearing was warranted. (*Ibid*.) These grounds have since been adopted as part of the Office of Tax Appeals' (OTA's) Rules for Tax Appeals (Cal. Code Regs., tit. 18, section 3000 et. seq.) section (Regulation) 30604.[1] Therefore, since Regulation 30604 is essentially based upon the provisions of CCP section 657, case law pertaining to the operation of CCP section 657, as well as the language of the statute itself, are persuasive authority in interpreting the provisions contained in this regulation.

As stated in CCP section 657, 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 the trial court made an erroneous evidentiary or procedural ruling or refused to exercise its discretion where required to do so by law. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 [deciding whether a new trial was warranted based on the trial court's admission of allegedly irrelevant evidence]; *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391 [discussing whether the trial court's grant of judgment on the pleadings without leave to amend warranted a new trial]; *Hernandez v. Wilson* (1961) 193 Cal.App.2d 615 [new trial granted for failure to consider a request to withdraw a waiver of jury trial].) As applied here, we interpret this civil trial provision to mean situations where OTA has, as a matter of law, committed an error during the appeals process (e.g., where OTA has made an erroneous ruling to admit or reject evidence, or failed to consider or respond to a party's request to file an additional brief, obtain an extension of time, or to return the matter to the oral hearing calendar).

Insufficiency of the evidence and contrary to law are also fundamentally different grounds for rehearing. "The two are stated in the disjunctive. They are alternatives. They are objections of an entirely different order. When we say that the evidence is insufficient to justify the decision, we mean that there is an absence of evidence or that 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.) "[A] new trial shall not be granted upon the

[1] These grounds were also adopted by OTA in a precedential opinion. (*Appeal of Do* (2018-OTA-002P).)

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.)

In contrast, "[i]t has been judicially observed that the meaning of the code phrase 'against law' is not altogether plain. When considered in connection with preceding code provisions, however, it clearly relates to matters which may furnish a reason for the re-examination of an issue of fact." (*Mosekian v. Ginsberg* (1932) 122 Cal.App. 774, 776-777.) "[A] decision is 'against the law' where the evidence is insufficient in law and without conflict on any material point." (*In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728, citing *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.) The term contrary to law also refers to situations where the court failed to find on material issues raised by the parties, or where the findings are "so inconsistent, ambiguous, and uncertain that they are incapable of being reconciled and it is impossible to tell how a material issue is determined." (*Renfer v. Skaggs, supra* at p. 383.)

The question of whether an opinion is contrary to law therefore is not one which involves a weighing of the evidence, but rather, an examination of whether the opinion is supported by "substantial evidence," or conversely, whether a directed verdict against the prevailing party is justified. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) In other words, the ground of contrary to law implies an inquiry into the nature (and not sufficiency) of the evidence required, as a matter of law, to support a factual finding.

Appellant's Petition

Here, appellant's contentions do not implicate any of OTA's procedural or evidentiary rulings in this matter. We therefore consider appellant's PFR only on grounds of insufficiency of the evidence and contrary to law.

A finding of fraud is a factual determination and should only be reversed absent clear and convincing evidence, which is the standard we applied in upholding CDTFA's imposition of the fraud penalty. (*Bradford v. Commissioner* (9th Cir. 1986) 796, F.2d 303.) There is no requirement that the fraud penalty be supported by evidence similar to that found in *Baumgardner*, or any other case, so long as it is supported by clear and convincing evidence. Further, appellant is mistaken in its assertion that *Baumgardner* fails to support the proposition that a finding of fraud may be supported solely by a pattern of consistent and substantial underreporting. This is plainly contradicted by the following language:

> [W]e think this burden is clearly sustained by the discrepancies between real net income and reported income for so many years. Consistent, substantial understatements of income for several years, as was true here, is highly persuasive evidence of intent to defraud the government. [Citations.] . . . Other Courts of Appeals have expressed the view that discrepancy between real and reported income for a number of years alone is strong evidence of an attempt to evade taxes which satisfies the 'clear and convincing' concept and warrants the imposition of fraud penalties. [Fn. omitted.]

(*Baumgardner*, *supra* at p. 322.)

Thus, we conclude that the opinion was not contrary to law.

The record in this appeal also contains clear and convincing evidence sufficient to support the imposition of the fraud penalty. Excepting the fourth quarter of 2008, appellant failed to report between 92 to 99 percent of its taxable sales for each quarter of the liability period. Appellant also charged and collected sales tax reimbursement with respect to nearly all of its sales, amounting to roughly $8.5 million in unremitted tax reimbursement which appellant retained for its own use. Based on these facts, we not only rejected appellant's explanation that it had reported its taxable sales in good faith, but we infer that appellant, through its sole officer and owner, was aware of the underreporting. Under these circumstances, we remain firmly convinced that appellant's underreporting was due to fraud.

Accordingly, appellant's Petition is hereby denied.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:
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Andrew J. Kwee
Administrative Law Judge

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Sara A Hosey
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Date Issued: 1/24/2020