OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010689
L. PAUL	)
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	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: William D. Hartsock, Attorney

For Respondent: John E. Yusin, Tax Counsel IV

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

D. BRAMHALL, Administrative Law Judge: On May 1, 2019, this panel issued an opinion (the Opinion) that modified the proposed assessments from the Franchise Tax Board (FTB) by allowing amortization deductions for leasehold improvements in the amount of $61,406, with amortization of that amount over 15 years commencing in 2003. With the exception of that deduction, the Opinion sustained FTB's proposed assessment and found that appellant L. Paul is not entitled to abatement of the late-filing penalty for 2003, 2004, or 2005, nor is he entitled to abatement of the accuracy-related penalty for 2004 or 2005. On May 30, 2019, appellant filed a timely petition for rehearing, in accordance with California Code of Regulations, title 18, section (Regulation) 30505. Upon consideration of this petition, we conclude that it does not establish grounds for a new hearing, in accordance with Regulation 30604, *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 and *Appeal of Do*, 2018-OTA-002P.

A rehearing may be granted where one of the following grounds exists, and the substantial rights of the complaining party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal

proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law. (Cal. Code of Regs., tit. 18, § 30604(a)-(e). See also *Appeal of Do, supra*, and *Appeal of Wilson Development, Inc., supra*.)

In his petition for rehearing, appellant sets forth various grounds for a new hearing. Appellant contends that his petition should be granted because there was an irregularity in the proceedings, there is insufficient evidence to justify the Opinion, and the Opinion is contrary to law. We consider each argument in turn.

Issue 1 - Whether there was an irregularity in the proceedings

First, appellant contends that there was an irregularity in the proceedings that prevented a fair consideration of his appeal. The procedural issues that appellant raises are the same issues that appellant raised during the initial appeal. Appellant contends that the California Department of Tax and Fee Administration (CDTFA) "controlled the Appeal," during the transition period in 2017, when the Board of Equalization (BOE) continued to hear tax appeals and the Office of Tax Appeals (OTA) was not yet authorized to hear appeals.

Assembly Bill 102 (the Taxpayer Transparency and Fairness Act of 2017) created CDTFA, effective July 1, 2017. We acknowledge that various former employees of the BOE were transferred to CDTFA, but they continued to provide administrative services to the BOE during a transition period in the latter half of 2017. Pursuant to the Taxpayer Transparency and Fairness Act of 2017, OTA assumed responsibility for appeals from the BOE on January 1, 2018. Activities and coordination between the agencies, including personnel transfers and cooperation between the agencies, were reasonably related to the changes in law and do not constitute irregularities in the proceedings that prevented a fair consideration of appellant's appeal. The Opinion was drafted and reviewed by Administrative Law Judges at OTA based on the briefings and evidence provided by appellant and FTB.

Further, the Opinion properly declined to consider these contentions. In the Opinion, we explained that the power of the OTA is limited to determining the correct amount of appellant's California income tax liability for the years on appeal. (*Appeals of Fred R. Dauberger, et. al.*, (82-SBE-082) 1982 WL 11759.) While appellant asserts that our reliance on that opinion is an

error of law because the authority related to the BOE and not OTA, OTA is the successor-in-interest to the BOE with regard to income tax appeals. Therefore, precedential BOE opinions that were adopted prior to January 1, 2018 may be cited as precedential authority for OTA, unless a panel removes, in whole or in part, the precedential status of the opinion. (Cal. Code Regs., tit. 18, § 30504.)

Thus, we find that the Opinion was rendered independently and that there was not an irregularity in the proceedings that prevented a fair consideration of the appeal and that the authority relied upon in support of that conclusion was appropriate.

Issue 2 - Whether the Opinion is based on insufficient evidence or is contrary to law

Regulation 30604(d) provides two separate and distinct grounds for a new hearing: that there is insufficient evidence to support the opinion or, alternatively, that the opinion is against the law. To find that there is an insufficiency of evidence to justify the opinion, we must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, we clearly should have reached a different determination. (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.) To find that the opinion is against or contrary to law, we must determine that the opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) The question for this review is whether the decision can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) This requires a review of the decision to indulge "in all legitimate and reasonable inferences" to uphold the decision. (*Sanchez-Corea*, *supra,* 38 Cal.3d at p. 907.) In our review, we consider the evidence in the light most favorable to FTB as the prevailing party. (*Ibid*.)

Appellant asserts that the depreciation allowed should be $92,463 rather than the $61,406 that was allowed in the Opinion and that the Opinion was in error because there was no discussion or increased allowance for the insurance and utility expense items that appellant had briefed in the initial appeal. Appellant also argues that the Opinion reached false legal conclusions based on the incorrect belief that appellant "conceded that the FTB's method for determining income was reasonable for the 2003 tax year." These issues are questions of fact that involve discretion in considering the relative weight of the evidence presented by the parties. As to objection over depreciation allowances, OTA's decision gave appropriate consideration to the evidence in the record. As to the lack of discussion regarding insurance and utility costs, we

note that the parties' briefs and exhibits establish the fact that FTB allowed deductions in excess of those actually claimed on appellant's late-filed returns. Further, the record contains a copy of a letter dated May 16, 2016, from appellant to Megha Gupta, FTB's protest hearing officer, which states in pertinent part: "we agree with your analysis for 2003 only." Appellant's opening brief states, "By letter dated May 16, 2016, we agreed with Ms. Gupta's calculation of 2003 taxable income, which we found reasonable, but disagreed with the calculation of 2004 and 2005 income." Thus, we believe that our factual conclusion was based on sufficient evidence in the record. However, even if the conclusion regarding appellant's position was in error, this disagreement would not constitute grounds to grant a rehearing because the statement was not relevant to the outcome of the appeal. Rather, the decision undertook a thorough review of FTB's income estimation methodology and found it reasonable for all years at issue.

Appellant disagrees with a statement in the Opinion that "some evidence should be available" if legal fees had been paid by appellant during the tax years at issue. Appellant believes that this is an "unfair statement" because "the events at issue herein occurred more than a dozen years ago and few payees (or banks) retain records for that long." The issue of the legal fees was briefed by the parties, all available evidence was reviewed, and the issue was resolved by the Opinion. Appellant feels that our statement was unfair but repeating the same arguments that were previously considered and rejected in the Opinion does not constitute sufficient grounds for rehearing this appeal.

Appellant had the burden of proving error in FTB's proposed assessment of tax; the Opinion determined that he failed to meet that burden. Appellant is arguing that the Opinion incorrectly weighed the evidence. However, the relevant inquiry for purposes of a petition for rehearing is not one which involves a weighing of the evidence, but rather is a question of whether there is evidence which, if given its fullest effect, is legally sufficient to support the decision. (See *Mosekian v. Ginsberg* (1932) 122 Cal.App. 774, 777; *Sanchez-Corea, supra*, 38 Cal.3d at p. 906.) We find that the evidence supports the Opinion and that a rehearing is not warranted on this basis.

Appellant also asks us to "reconsider" several legal interpretations and, by implication, appellant appears to argue that the Opinion is contrary to or against law.[1] Appellant argues that the Opinion improperly cited the *Appeal of Don S. Cookston* (83-SBE-048) 1983 WL 15434 (*Cookston*), which appellant states "has little to no applicability." Appellant distinguishes his appeal from *Cookston* on the basis that the "delay between the years at issue [*in Cookston*] and the BOE's determination was only four years. Therefore, the taxpayer could reasonably be expected to procure records from third parties." Appellant, by contrast, contends that the present appeal concerns the tax years from 2003 to 2005, and thus involves records that may be over 16 years old. We find the noted factual distinction to be legally irrelevant and find the presumption in *Cookston* applicable to this appeal. Thus, we are not persuaded that the Opinion contained an error in law because we cited *Cookston.* Furthermore, the *Cookston* presumption is not critical to the result in the Opinion. The critical rule is that taxpayers have the burden of proving that they are entitled to the deductions that they claim. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440; *Appeal of James C. and Monablanche A. Walshe* (75-SBE-073) 1975 WL 3557; *Appeal of Gilbert W. Janke* (80-SBE-059) 1980 WL 4988). Appellant has not identified a legal issue that raises doubt regarding the Opinion. Accordingly, appellant's contentions do not warrant a rehearing on these grounds.

[1] Although respondent has identified the argument as one that is an error in law, it appears that appellant is arguing that the decision is contrary to law. Courts have found that a new trial may be granted based on an error in law if its original ruling was erroneous as a matter of law. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17, citing *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong. For example, courts have found an error in law occurred when there was an erroneous denial of a jury trial (*Johnson v. Superior Court* (1932) 121 C.A. 288), an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 Cal.App. 487), an erroneous application of the law by a jury (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722), and an erroneous instruction to a jury (*Maher v. Saad* (2000) 82 Cal.App.4th 1317).

For the reasons set forth above, appellant has not shown good cause for a rehearing based on any of the grounds required by *Appeal of Wilson Development, Inc.*, *supra*, *Appeal of Sjofinar Do*, *supra*, and Regulation 30604. Appellant's petition for rehearing is hereby denied.

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Douglas Bramhall
Administrative Law Judge

We concur:

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Michael F. Geary
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge

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