

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

D. LIST) OTA Case No. 18010892
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)**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant:

Robert B. Rosenstein, Attorney

For Respondent:

Bradley W. Kragel, Tax Counsel IV

For Office of Tax Appeals:

Mai Tran, Tax Counsel IV

D. CHO, Administrative Law Judge: On July 16, 2019, the Office of Tax Appeals (OTA) issued an opinion determining that appellant was not entitled to additional cost basis on the sale of certain stock for the 2009 taxable year. OTA found that the “sale” of appellant’s former spouse’s interest in stock to appellant was a nontaxable transfer of property pursuant to Internal Revenue Code (IRC) section 1041, and therefore appellant’s basis is limited to the adjusted basis of the interest held by his former spouse immediately before the transfer. Appellant then filed a petition for rehearing pursuant to Revenue and Taxation Code (R&TC) section 19048.

A rehearing may be granted where one of the following grounds exists and the substantial rights of the filing party are materially affected: (a) an irregularity in the appeal proceedings that occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to the issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Cal. Code of Regs., tit.

18, § 30604(a)-(e).) Upon consideration of appellant's petition for rehearing, we conclude that the grounds set forth therein do not meet the requirements for a rehearing.

Appellant contends that a rehearing should be granted on the basis that there is insufficient evidence to justify the opinion or that the opinion is contrary to law. Appellant states that OTA erred in applying IRC section 1041 because appellant and his former spouse separated in 2003 prior to the former spouse's sale of her interest in the stock to appellant in 2005. Appellant argues that OTA erred in relying on the date of the divorce decree as the date of the cessation of marriage for purposes of IRC section 1041. Appellant maintains that the date of the cessation of marriage occurred on November 10, 2003, when the parties separated; therefore, they were no longer spouses at the time of the transfer of stock in 2005. Appellant further contends that OTA failed to properly consider the weight of appellant's former spouse's declaration. Appellant maintains that his former spouse is not the taxpayer, and there is no evidence of any self-serving basis for her declaration.

California Code of Regulations, title 18, section (Regulation) 30604(d) provides that a rehearing may be granted on two distinct grounds: (1) insufficient evidence to justify the written opinion; or (2) the opinion is contrary to law. (See also *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.) To find that there is insufficient evidence to justify the written opinion, we must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, that the Panel clearly should have reached a different determination. (Code Civ. Proc., § 657.)¹

With respect to appellant's argument that there is insufficient evidence to support the opinion, the Panel relied on the Separation Agreement and the Decree for Dissolution of Marriage in determining that the transfer of appellant's former spouse's interest in the stock was a nontaxable event pursuant to IRC section 1041. Based on these documents, the Panel found that appellant and his former spouse's marriage ended on June 17, 2005, and the transfer of stock

¹ 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 its adjudicatory responsibilities were similar to those of a trial court, the SBE chose to utilize the applicable provisions of California Code of Civil 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 OTA's Rules for Tax Appeals (Cal. Code Regs., tit. 18, § 3000 et seq.) under Regulation 30604, discussed above. (See also *Appeal of Do*, 2018-OTA-002P [wherein OTA adopted these grounds in a precedential opinion].) Accordingly, since Regulation 30604 is essentially based upon the provisions of CCP section 657, the language of the statute itself, as well as case law pertaining to the operation of CCP section 657, are persuasive authority in interpreting the provisions contained in Regulation 30604.

occurred on or after that date. The Panel concluded that the Separation Agreement specifically provided for the transfer of appellant's former spouse's interest in the stock to appellant in dividing the couple's community and separate property. Appellant argues that the Panel failed to give sufficient weight to his former spouse's declaration. As stated in the opinion, the Panel found that appellant's former spouse's declaration was unpersuasive, as it was prepared for audit and dated in 2013, eight years after the transfer of the stock. After weighing the evidence in the record, including reasonable inferences based on that evidence, we cannot conclude that the Panel clearly should have reached a different determination.

To find that the opinion is against (or contrary) to law, we must determine whether 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*)). This requires a review of the opinion to indulge "in all legitimate and reasonable inferences" to uphold the opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) 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. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) In our review, we consider the evidence in the light most favorable to the prevailing party (here, respondent). (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.)

Appellant argues that the Panel erred in interpreting the date of "cessation of marriage" for purposes of IRC section 1041. Appellant maintains that the "cessation of marriage" should be interpreted to include the date of separation, which is defined by California Family Code section 70 as "a complete and final break in the marital relationship" However, appellant has not provided any legal support to establish that the date of separation should be considered when interpreting the "cessation of marriage" under IRC section 1041. There is no authority requiring us to use the definition contained in California Family Code section 70 when interpreting IRC section 1041, including the definition of the term "cessation of marriage." Further, although appellant cited to *In re Marriage of Manfer* (2006) 144 Cal.App.4th 925 to support his contention, the California Fourth District Court of Appeal never analyzed or referenced the term "cessation of marriage" or the IRC when discussing the definition of the date of separation. Accordingly, we do not find it persuasive in this appeal.

As stated in the opinion, the IRC does not offer a definition of the term “cessation of marriage.” As a result, the Panel looked to the Temporary Treasury Regulation section 1.1041-1T(b) and concluded that a transfer of property was related to the “cessation of marriage” if the property was transferred pursuant to a divorce or separation instrument. Based on the foregoing, we find that appellant has not demonstrated that the opinion is contrary to law.

Lastly, as for appellant’s arguments regarding the separation agreement not being a valid instrument for the sale of the stock, as noted in the opinion, the transfer of property is presumed to be related to the cessation of marriage if the transfer is pursuant to a divorce or separation agreement and the transfer occurs within six years after the date on which the marriage ceases.² (Temp. Treas. Reg. § 1.1041-1T(b), Q&A-7.) There is no requirement in IRC section 1041 or in the Temporary Treasury Regulation that the separation agreement must state that it is a sale of the stock between appellant and his former spouse. Rather, the separation agreement was a division of the couple’s community and separate property. Appellant takes issue with our reliance on Temporary Treasury Regulation section 1.1041-1T(b), Q&A-7. Since California conforms to IRC section 1041 through R&TC section 18031, Temporary Treasury Regulations are applicable as regulations under the Personal Income Tax Law (PITL) to the extent that they do not conflict with the PITL or with regulations issued by the Franchise Tax Board. (R&TC, § 17024.5(d).)

² Even if the marriage ceased in 2003, as asserted by appellant, since the transfer of stock occurred in 2005, which is within six years of the cessation of his marriage, the transfer of the stock would still be presumed to be related to the cessation of appellant’s marriage and is a nontaxable event, which would not increase appellant’s basis in the stock.

Based on the above, appellant has not shown that there is insufficient evidence in the record to support the opinion or that the opinion is contrary to law. Accordingly, a rehearing is not warranted.

DocuSigned by:

Daniel Cho

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Daniel K. Cho

Administrative Law Judge

We concur:

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Kenneth Gast

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Kenneth Gast

Administrative Law Judge

DocuSigned by:

Andrea L.H. Long

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Andrea L.H. Long

Administrative Law Judge

Date Issued: 4/1/2020