

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18043054
A. **BERMAN AND**)
A. **SCOTTA**)
_____)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Dehra Di’Fiore-Moles
Tax Appeals Assistance Program (TAAP)

For Respondent: Marguerite Mosnier, Attorney V

J. LAMBERT, Administrative Law Judge: On December 23, 2019, the Office of Tax Appeals (OTA) issued an opinion in which it reversed respondent Franchise Tax Board’s (FTB) action in denying a claim for refund of a notice and demand penalty of \$10,364.25. FTB filed a timely petition for rehearing (PFR). We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

As relevant here, a rehearing may be granted where the opinion is contrary to law, such that the substantial rights of the complaining party (here, FTB) are materially affected.¹ (Cal. Code Regs., tit. 18, § 30604(d); *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) The question of whether the opinion is contrary to law is not one which involves a weighing of the evidence, but instead requires a finding that the opinion is “unsupported by any substantial evidence”; that is, the record would justify a directed verdict against the prevailing

¹ Although FTB argues that there was an “error in law” pursuant to California Code of Regulations, title 18, section 30604(e), that subdivision generally refers to errors that occurred during the course of the proceedings, such as an erroneous evidentiary or procedural ruling. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138; *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391.) FTB provides no argument or evidence of such an error in law.

party.² (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This requires a review of the opinion in a manner most favorable to the prevailing party (here, appellants), and an indulging of all legitimate and reasonable inferences to uphold the opinion if possible. (*Id.* at p. 907.) The question before us on a PFR does not involve examining the quality or nature of the reasoning behind OTA’s opinion, but whether that opinion is valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

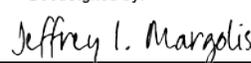
FTB contends that OTA’s interpretation of California Code of Regulations, title 18, section 19133, is contrary to law in that OTA was required to defer to FTB’s interpretation of its own regulation. This contention is incorrect. In the course of deciding an appeal, OTA may be required to interpret FTB’s regulations. (*Appeal of Talavera*, 2020-OTA-022P.) In doing so, while OTA may consider FTB’s interpretations of its own regulations to be persuasive, such interpretations are not binding on OTA in this appeal. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 (*Yamaha*) [the amount of deference is “fundamentally *situational*”].) Therefore, FTB has not shown that OTA’s failure to defer to its interpretation was contrary to law.

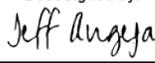
Based on the foregoing, we find that FTB has not shown a rehearing is warranted, and therefore its PFR is hereby denied.

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Josh Lambert
Administrative Law Judge

We concur:

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Jeffrey I. Margolis
Administrative Law Judge

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Jeffrey G. Angeja
Administrative Law Judge

Date Issued: 6/3/2020

² California Code of Regulations, title 18, section 30604, is essentially based upon the provisions of California Code of Civil Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.*, *supra*; *Appeal of Do*, 2018-OTA-002P [OTA adopts State Board of Equalization’s grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute are persuasive authority in interpreting the provisions contained in this regulation.