

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Consolidated Appeals of:	)	OTA Case Nos. 18042682, 18042961, 18053206
<b>PARADIGM PUBLISHING, INC.;</b>	)	
<b>CSBT CORP.; CSBT ENTERPRISES, INC.</b>	)	
	)	

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**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellants: Sean R. Kenney, Esq.

For Respondent: Mira V. Patel, Tax Counsel

R. TAY, Administrative Law Judge: On December 23, 2019, we<sup>1</sup> issued an opinion that found that respondent Franchise Tax Board (FTB) erred in its proposed assessment of the late payment penalties because appellants had shown reasonable cause existed to abate the penalties for the 2014 tax year. Accordingly, we reversed FTB's denial of appellants' claims for refund of the late payment penalty.

FTB filed a timely petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048.<sup>2</sup> A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party (here, FTB) 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 party could not have reasonably discovered and provided prior to the issuance of the written opinion;

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<sup>1</sup> Judge John O. Johnson replaced Judge Douglas Bramhall, who originally heard this matter but is no longer with the Office of Tax Appeals (OTA).

<sup>2</sup> FTB's petition only lists Paradigm Publishing, Inc. (case number 18042682) in the subject line. However, because FTB's petition does not specifically limit its contentions to our conclusion with respect to Paradigm Publishing, Inc. but rather takes issue with our opinion as a whole, we treat its petition as a request for a rehearing for all three appeals in this consolidated matter.

(d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Cal. Code Regs., tit.18, § 30604(a)-(e).)<sup>3</sup> Upon consideration of FTB’s petition, we conclude that the grounds set forth therein do not meet the requirements to grant a rehearing.<sup>4</sup>

### Insufficient Evidence

FTB’s petition asserts that OTA should grant a rehearing because there was insufficient evidence to justify the written opinion. To find that there was insufficient 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 opinion. (Code Civ. Proc., § 657; *Bray et al. v. Rosen* (1959) 167 Cal.App.2d 680, 684.) In reviewing the evidence, we must do so “in the light most favorable to the verdict and presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from that evidence.” (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584-585.)

Here, FTB contends that appellants provided no evidence of their efforts to obtain a final purchase price allocation when their assets were sold to an unrelated purchaser, and they failed to use estimated allocations to make timely tax payments. On this basis, FTB asserts that appellants “clearly do not establish reasonable cause,” and OTA should grant a rehearing.

We are unconvinced by FTB’s arguments. During the hearing and in their briefs, appellants set forth evidence of their efforts to properly pay their tax resulting from the net gain on the asset sale. At the hearing, Ms. Denny also credibly testified to having ongoing conversations about the purchase price allocation with the purchaser’s representative. Thus, appellants did provide evidence of their efforts to assess their tax liability, which we found was sufficient to meet their burden of showing reasonable cause to abate the late payment penalties.

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<sup>3</sup> 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.* (94-SBE-007) 1994 WL 580654 [the State Board of Equalization (SBE) looks to CCP section 657 in determining the SBE’s grounds for rehearing]; *Appeal of Do*, 2018-OTA-002P [OTA adopts the SBE’s grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the statute are persuasive authority in interpreting this regulation.

<sup>4</sup> Portions of FTB’s petition rehashes arguments that we already addressed and rejected in our opinion. We find no error in the opinion’s analysis and conclusions as to those arguments, and therefore find a rehearing is not warranted under FTB’s reiteration of those arguments on petition. (See *Appeal of Smith*, 2018-OTA-154P [dissatisfaction with the opinion and attempt to reargue the same issue are not proper grounds for reconsideration].) Therefore, we focus our discussion herein on the remaining contentions in FTB’s petition.

FTB also contends that appellants’ alleged failure to use Schedule 1.2(a) Closing Date Payment Allocation to make estimated tax payments shows that there was insufficient evidence to support a reasonable cause finding. To find in favor of FTB, we would have to conclude that FTB’s argument demonstrates that we clearly should have reached a different opinion. (Code Civ. Proc., § 657; *Bray et al. v. Rosen, supra*, 167 Cal.App.2d at 684.) However, we find FTB’s argument unpersuasive. FTB refers to the payment allocation as an “estimated allocation,” but does not explain how an estimate of the purchase price allocated to each entity could be used to make a reasonable estimate of the tax due. In fact, to properly compute their tax due from the asset sale, appellants needed the purchase price allocated to *each asset sold*—not just to each entity—so that they could properly compute their net gain. The “estimated allocation” did not contain such information. Consequently, FTB has not shown that appellants’ alleged failure to use the Closing Date Payment Allocation schedule indicates that there was insufficient evidence to support our opinion.

#### Contrary to Law<sup>5</sup>

Finally, FTB argues that our opinion is contrary to law because it applied an incorrect legal standard. Citing to footnote 6 of our opinion, FTB asserts that we made “a misstatement of the law because the duty to pay taxes is a nondelegable duty” and that reliance on a tax preparer to “make proper timely payments” is not reasonable cause as established in *United States v. Boyle* (1985) 469 U.S. 241. However, FTB misconstrues footnote 6 in our opinion and reiterates an argument against a reasonable cause finding that we already addressed in our opinion. We find no error in that analysis contained in our opinion, and therefore need not repeat our conclusions here.


#### Reimbursement Claim for Fees

In their reply brief to FTB’s petition, appellants requested a reimbursement of “litigation costs,” which may be requested under R&TC section 21013. However, pursuant to OTA’s Rules for Tax Appeals, a reimbursement claim “must be submitted after the [opinion] . . . becomes final.” (Cal. Code Regs., tit.18, § 30705.) Thus, appellant’s reimbursement claim is not ripe and


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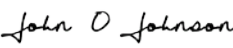
<sup>5</sup> FTB’s petition argues that “OTA erred in its application of the law . . . .” Consistent with CCP section 657, we interpret the fifth ground stated above to refer to an error in law occurring during the appeal proceedings, as opposed to an error in the opinion. Because FTB does not argue that there was an error in law during the proceedings, we interpret FTB’s arguments to be based solely on the fourth ground stated above.

must be submitted after our initial opinion dated December 23, 2019, becomes final, which is 30 days from the date on which we mail this opinion on the petition for rehearing. (Cal. Code Regs., tit.18, §§ 30505, 30606.)

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Richard Tay  
Administrative Law Judge

We concur:

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Kenneth Gast  
Administrative Law Judge

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John O. Johnson  
Administrative Law Judge

Date Issued: 7/28/2020