

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18063296
RICARDO'S ON THE BEACH, INC.) CDTFA Account No. 097-309611
) CDTFA Case ID 762694
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)
)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Gary M. Slavett, Attorney

For Respondent: Sunny Paley, Tax Counsel

For Office of Tax Appeals: Corin Saxton, Tax Counsel IV

S. BROWN, Administrative Law Judge: On March 6, 2020, the Office of Tax Appeals (OTA) issued an opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by Ricardo’s on the Beach, Inc. (appellant). CDTFA’s decision denied appellant’s petition for redetermination of CDTFA’s Notice of Determination for \$1,465,030.30 in tax, a 25 percent penalty of \$366,257.79 for fraud or intent to evade the payment of tax, plus accrued interest, for the period January 1, 2005, through December 31, 2011. Appellant filed a timely petition for rehearing (PFR). We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

California Code of Regulations, title 18, section (Regulation) 30604(a)-(e) provides that a rehearing may be granted where one of the following grounds exists and the substantial rights of the complaining party are materially affected: (a) irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; (b) accident or surprise that occurred during the proceedings and prior to the issuance of the written opinion, which ordinary prudence could not have guarded against; (c) newly discovered, relevant evidence, which the party could not, with reasonable diligence, have discovered and produced 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. (See also *Appeal of Do*, 2018-OTA-002P.) A ground for a rehearing is material if it is likely to produce a different result.¹ (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708.)

Here, appellant argues that a rehearing should be granted because the opinion was contrary to law.² Appellant asserts that OTA's opinion applied an incorrect standard by following guidance from case law (*Ruidoso Racing Ass'n, Inc. v. Commissioner* (10th Cir. 1973) 476 F.2d 502, 506; *Alexander Shokai, Inc. v. Commissioner* (9th Cir. 1994) 34 F.3d 1480, 1488) that appellant contends is factually distinguishable from the present case and legally incorrect. Appellant argues that instead OTA should follow different federal case law to reach a finding that the fraud penalty set forth in Revenue and Taxation Code (R&TC) section 6485 does not apply when the fraud was committed by a taxpayer's agent.

As relevant here, good cause for a new hearing may be shown where there was insufficient evidence to justify the opinion or the opinion was contrary to law, such that the substantial rights of the complaining party are materially affected. (Cal. Code Regs., tit. 18, § 30604(d); *Appeal of Wilson Development, Inc., supra.*) 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 party. (*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, 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 562 6976.)

¹ Regulation 30604 is essentially based upon the provisions of Civil Code of Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 [State Board of Equalization (SBE) utilizes CCP section 657 in determining grounds for rehearing].) Therefore, OTA may look to the language of CCP section 657 and case law pertaining to the operation of the statute for guidance in determining whether a ground for a rehearing exists.

² Although appellant also argues that there was an "error in law" pursuant to Regulation 30604(e), that subdivision generally refers to errors that occurred during the course of the proceedings. 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, for example, the trial court made 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.) Appellant, however, has provided no arguments or evidence indicating that such an error in law occurred during the course of the proceedings.

We find appellant's argument unavailing. The federal case law appellant cites is not controlling. OTA's written opinion considered federal law only by analogy as persuasive authority in the Panel's application of R&TC section 6485. Appellant's PFR primarily repeats citations to the same federal case law that it raised during the hearing, which we continue to find unpersuasive as to application of R&TC section 6485 under the facts of the present case.³

In addition, we note that appellant's PFR relies in part on federal case law that is not helpful to appellant's position. For example, the PFR repeatedly points to *Allen v. Commissioner* (2007) 128 T.C. 37 (*Allen*), in which there was no fraud penalty at issue. In that case, the U.S. Tax Court found that the Internal Revenue Code's statute of limitations could be extended solely due to fraud by a tax preparer, despite the taxpayer's lack of knowledge of the preparer's fraud. (*Allen, supra*, 128 T.C. at p. 41.) In reaching this conclusion, the tax court explained that: taxpayers are charged with the knowledge, awareness, and responsibility for their tax returns; the taxpayer, not the preparer, has the ultimate responsibility to file his or her return and pay the tax due; and "this duty cannot generally be avoided by relying on an agent." (*Ibid.*) Thus, to the limited extent that *Allen* may be relevant here, it runs counter to appellant's position that a tax preparer's fraud cannot be imputed to a taxpayer absent the taxpayer's knowledge of the fraud. In another example, appellant's PFR relies on the majority opinion in *BASR Partnership v. U.S.* (Fed.Cir.2015) 795 F.3d 1338 (*BASR*), which, like *Allen*, concerns only extension of the Internal Revenue Code's statute of limitations due to fraud. The facts of *BASR* are clearly distinguishable from the present case because there was no evidence that *BASR*, or even its accountant, knew or should have known that the tax return was false or incorrect. (*BASR, supra*, 795 F.3d at pp. 1341, 1347.)

³ We note that appellant's characterizations of the facts of this case do not necessarily reflect our written opinion's factual findings and analysis. For example, it is not clear to what extent appellant's accountant was an "outside accountant," given that until 2010 or 2011, he was an employee of TLD Acquisition Co., LLC, which is owned in part by Mr. Ernst, one of appellant's corporate principals. Moreover, our written opinion left open the question of whether appellant's corporate principals must have known of the fraud.

In light of all of the above, appellant has failed to demonstrate that the opinion is “unsupported by any substantial evidence,” in a light most favorable to the prevailing party with reasonable inferences to uphold the opinion. Consequently, we find that OTA’s opinion was not contrary to law. Based on the foregoing, we find that appellant has not shown good cause for a new hearing as required by the authorities referenced above, and appellant’s petition is hereby denied.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Nguyen Dang
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Nguyen Dang
Administrative Law Judge

DocuSigned by:
Michael F. Geary
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Michael F. Geary
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Date Issued: 9/10/2020