OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011717
D. NEWTON	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Tristen Thalhuber,
Tax Appeals Assistance Program (TAAP)[1]

For Respondent: Brian Werking, Tax Counsel III

K. GAST, Administrative Law Judge: On March 19, 2020, the Office of Tax Appeals issued an opinion in which we sustained respondent Franchise Tax Board's (FTB) proposed assessment for the 2010 tax year.[2] Appellant timely filed a petition for rehearing (petition).[3]

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the filing party (here, appellant) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) 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; (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

[1] Christopher Engelmann of TAAP represented appellant during the underlying appeal and oral hearing. Mr. Engelmann was then replaced by Nick Frey, also of TAAP, who filed appellant's opening brief for the petition for rehearing, and Mr. Frey has since been replaced by the above-named TAAP representative.

[2] Administrative Law Judge (ALJ) Josh Lambert replaced ALJ Sara A. Hosey, who wrote the original opinion in this matter. For ease of reading, references herein to "we," "our," or "us" refer to the three-ALJ panel that decided the original opinion.

[3] In our opinion, we also reversed FTB's imposition of the accuracy-related penalty, which it conceded on appeal. Neither party seeks a rehearing on our disposition of that issue and we do not address it further.

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).)

Appellant bases its petition on the fourth ground; that is, our written opinion is contrary to law. Upon consideration of appellant's petition, we conclude the ground set forth therein does not meet the requirements for a rehearing.

To find that our opinion is contrary to law, we must determine that the opinion is unsupported by any substantial evidence. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P at p. 3.) This requires a review of the opinion to indulge in all legitimate and reasonable inferences to uphold it. (*Ibid.*) 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. (*Ibid.*) In our review, we consider the evidence in the light most favorable to the prevailing party (here, FTB). (*Ibid.*)

Our opinion upheld an FTB determination that was, in turn, predicated upon a final federal determination disallowing appellant's cost of goods sold deduction for 2010 for his sole proprietor automobile wholesaling business. Appellant nevertheless takes issue with our conclusion that he was not entitled to any cost of goods sold deduction. Appellant asserts that he "could not have sold a single vehicle, or earned $92,687 in gross receipts without having first bought inventory." In appellant's view, we should have permitted a reasonable estimate of $23,940 for his cost of goods sold deduction, as allowed under *Cohan v. Commissioner* (2d Cir. 1930) 39 F.2d 540 (*Cohan*), and therefore he disagrees with our opinion's statement that such estimation "would amount to unguided generosity."

However, as noted in our opinion, for us to estimate the amount of expenses under the *Cohan* rule, we must have some evidentiary basis upon which an estimate can be made. In the underlying appeal, appellant provided invoices that indicated he purchased 14 vehicles in 2010 for a total of $23,940. But, critically, we found he failed to establish that any of those vehicles were sold during the same year. While we acknowledged appellant's assertion that he must have incurred costs to purchase the vehicles he sold, we did not believe the record provided any basis upon which we could estimate the cost of goods sold in 2010 under the *Cohan* rule.

Appellant next asserts that his testimony at the hearing established a 10 to 20 percent markup on his inventory, which is "unrefuted[] and a reasonable estimation of profit margins in the industry." He contends that under the *Cohan* rule his cost of goods sold deduction should be

estimated to be $77,239, which, after applying a 20 percent markup, equals the reported gross receipts of $92,687. However, again, as noted in our opinion, appellant provided no corroborating evidence that his markup was in fact 10 to 20 percent. Therefore, without such foundational evidence, we declined to make an estimate under the *Cohan* rule.

Finally, we note that appellant's dissatisfaction with our opinion and attempt to reargue the same issue do not constitute grounds for a rehearing. (*Appeal of Smith*, 2018-OTA-154P.) Accordingly, viewing the evidence most favorable to FTB, we believe our opinion was not contrary to law.

For the foregoing reasons, appellant's petition is denied.

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

Date Issued: 10/6/2020