OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **S. KITE (APPEALING SPOUSE) AND** **N. KITE (NON-APPEALING SPOUSE)**	) OTA Case No. 18011701)))))

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Christopher S. Egan

For Respondent: Maria Brosterhous, Tax Counsel IV

A. LONG, Administrative Law Judge: On March 3, 2020, this panel issued an Opinion sustaining respondent Franchise Tax Board's (FTB) action in this matter. We determined that appealing spouse S. Kite was not entitled to innocent spouse relief under Revenue & Taxation Code (R&TC) section 18533(b), (c), or (f). S. Kite timely filed a petition for rehearing (PFR) under R&TC section 19048 based upon two grounds: insufficiency of the evidence and the opinion is contrary to law. FTB and non-appealing spouse N. Kite chose not to file a response to the PFR.

OTA may grant a rehearing when one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law that occurred during the proceedings. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P.) A ground for a rehearing is material if it is likely to produce a different result. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708.)

Although California Code of Regulations, title 18, section 30604(d) combines insufficiency of the evidence and contrary to law in one subsection, these are two separate, distinct grounds for a new hearing. To find that there is an insufficiency of 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 determination. (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.)

To find that the opinion is against or contrary to law, we need not reweigh the evidence, but must find that 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.) This requires a review of the opinion to indulge "in all legitimate and reasonable inferences" to uphold the opinion. (*Sanchez-Corea v. Bank of America*, *supra*, at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the opinion, but whether the opinion can be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.)

Insufficiency of the Evidence

Appellant-wife argues that she was not afforded the opportunity to cross-examine appellant-husband's statements and thus appellant-husband's statements should be only given the weight of administrative hearsay. Of note, appellant-wife objects to the panel accepting appellant-husband's assertion that he and appellant-wife shared a joint bank account in which appellant-husband deposited the income from exercising his stock options.

The OTA Regulations (found under Cal. Code Regs, tit. 18, § 30000 et seq.) define evidence as "any information contained in the written record or oral hearing record that the panel may consider when deciding an appeal." (Cal. Code Regs., tit. 18, § 30102(h).) Rules relating to evidence and witnesses contained in the California Evidence Code and the California Code of Civil Procedure do not apply to any proceedings before OTA, but the panel may rely on the Evidence Code when evaluating the weight to give the evidence. (Cal. Code Regs., tit. 18, § 30214(e).) When appellants waive their right to an oral hearing, as is the case here, the appeal is limited to the written record, which includes "statements and arguments in the briefs and other documents filed with OTA…." (Cal. Code Regs., tit. 18, § 30102(w)(1); see also Cal. Code Regs., tit. 18 § 30209(b).) Any information contained in appellant-husband's brief, including his

unsworn statements, may be considered evidence when OTA decides an appeal. (Cal. Code Regs., tit. 18, § 30102(g).)

Moreover, the administrative hearsay provision under the Administrative Procedures Act section 11513, which limits the admittance of hearsay to supplement direct evidence, is inapplicable to proceedings before the OTA.[1] (Cal. Code Regs., tit. 18, § 30216(d).) Without this limitation, evidence that is admitted without objection is sufficient to sustain a finding. (*Powers v. Board of Public Works* (1932) 216 Cal. 546, 552; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1268.)

While an oral hearing would allow each appellant to cross-examine one another's statements, when the appellants waive the right to an oral hearing, as they did here, the appellants' opportunity to refute any statements in the opposing parties' briefs is done by filing a supplemental brief. In this case, appellant-wife filed a supplemental brief after appellant-husband's now contested assertions were made, but she did not address the joint bank account issue at any time during the briefing process. When a party does not refute or contest the facts alleged by an opposing party, it is logical for us to assume the facts as true. (See e.g., *Eaddy v. Commissioner*, T.C. Memo. 1989-450.)

The bulk of the evidence the parties submitted for us to review are appellant-wife's sworn statements and appellant-husband's unsworn statements from his briefs. While statements and testimony are generally given minimal weight, when it is the only evidence submitted to us, that is all we have to consider. After making reasonable inferences (such as appellant-wife's silence regarding the joint account), we find on balance that the evidence does support a finding that appellant-wife knew about the omitted income in 1996. We are not obliged to accept appellant-wife's statements at face value simply because they are notarized. Although notarizing validates that appellant-wife was the person who made the statements, it does not certify the veracity of those statements.

[1] "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." (Gov. Code, § 11513(d).) We note that appellant-wife did not timely controvert, contest, or otherwise object to appellant-husband's contention regarding the joint bank account before the submission of the case (i.e., the close of the briefing period). (See Cal. Code Regs., tit. 18, § 30102(u).)) As such, even if the Administrative Procedures Act provision was applicable, appellant-wife's objection to the admission of appellant-husband's assertion during the PFR is untimely.

Contrary to Law

Appellant-wife argues that the panel misapplied the standard for actual knowledge set forth in R&TC section 18533(c). Appellant-wife focuses on the fact that appellant-husband's statements are not evidence of actual knowledge. Appellant-wife also argues that appellant-husband, as the intervening spouse, has the burden of proof.

In cases where the agency is no longer adverse to the appealing spouse, the Tax Court has stated that "there's a good chance that we would place the burden of proof on [the intervenor] to convince us that the requesting spouse is not entitled to relief." (*Stergios v. Commissioner*, T.C. Memo. 2009-15.) However, when both parties introduce evidence, "we can just decide the issues on who persuaded us by a preponderance of the evidence." (*Ibid.*; see also *McClelland v. Commissioner*, T.C. Memo. 2005-121.)

Actual knowledge is "actual and clear awareness (as opposed to reason to know) of the existence of an item giving rise to a deficiency (or a portion thereof)." (*Smaaland v. Commissioner*, T.C. Memo. 2017-31 citing *Cheshire v. Commissioner* (2000) 115 T.C. 183, 195.) A taxpayer's "actual subjective knowledge may be established by *circumstantial evidence in an appropriate case*." (*Ibid.*, italics added.)

As we previously stated, OTA may consider anything in the record, including statements made in the briefs, as evidence. (Cal. Code Regs., tit. 18, § 30102(g).) As we recounted in the underlying Opinion, appellant-wife and appellant-husband shared a joint bank account and the proceeds were put into that joint account. This provided appellant-wife with the amount, source, and date of receipt of the exercised stock options. When appellant-wife reviewed and signed the joint tax return which only reported a taxable income of $47,208, it would have been apparent the return significantly underreported appellant-husband's capital gains from the exercise of his stock options of $125,160. After indulging all legitimate and reasonable inferences, appellant-husband has proved by the preponderance of the evidence that appellant-wife had actual knowledge when she signed the return.

In light of the above, we find that appellant-wife has not shown that there is insufficient evidence to support the Opinion or that the Opinion is contrary to law. Because there was no objection or refutation of appellant-husband's statements, we were free to consider and weigh all the evidence in the written record and we are not convinced that we should have reached a different result. Additionally, after taking all reasonable inferences, we find that the Opinion is

valid according to law. Appellant-wife has not satisfied the requirements for granting a rehearing and, as such, the petition is denied.

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Andrea L.H. Long
Administrative Law Judge

We concur:

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Amanda Vassigh
Administrative Law Judge

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Josh Lambert
Administrative Law Judge

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