OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18012098
D. LINDSEY AND	)
L. LINDSEY	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Hector C. Perez, Attorney

For Respondent: Sonia D. Woodruff, Tax Counsel IV

K. GAST, Administrative Law Judge: On February 5, 2020, the Office of Tax Appeals issued an Opinion in which we largely sustained respondent Franchise Tax Board's (FTB) proposed assessment for the 2003 tax year, except we modified it by lowering appellants' taxable gain from the sale of their principal residence in California (the property) to $1,459,225.[1] Appellants filed a timely petition for rehearing (petition).

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party (here, appellants) are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the opinion, 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 opinion; (4) insufficient evidence to justify the opinion; (5) the opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Appellants' petition does not specifically allege which of the six grounds exists. However, their two main contentions—essentially, that we improperly determined the adjusted

[1] Our Opinion also noted issues for other tax years that had been conceded by FTB prior to the oral hearing for this appeal, but those issues are not relevant here and will not be discussed further.

basis and amount realized used in computing the gain from the sale of the property—suggest that they believe there is insufficient evidence to justify our Opinion. To find that there is insufficient evidence to justify our 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. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P at p. 3.)

Appellants are Entitled to a Rehearing on the Issue of Whether the Property's Adjusted Basis Should be Increased by an Additional $61,371 of Capital Improvements Made in 2003

In our Opinion, we concluded that appellants' basis in the property at the time of the sale in 2003 was $1,424,526, which is the original purchase price of $1.2 million, plus the allowed improvements of $1,649,052, divided by two.[2] In their petition, however, appellants argue that the basis should be increased by $61,371 to take into account pre-sale capital improvement expenses incurred in 2003. In its reply to appellants' petition, FTB agrees with this upward basis adjustment.

Based on a review of the record, we agree with the parties that there is insufficient evidence to justify the Opinion's denial of an additional basis of $61,371. Because we cannot revise our Opinion for substantive matters that change, in whole or in part, the holding of the Opinion (see Cal. Code Regs., tit. 18, § 30505 & 30606), we are compelled to grant appellants a rehearing on the issue of whether they are entitled to an additional basis of $61,371.

Appellants are Not Entitled to a Rehearing on the Issue of Whether They were Required to Recognize the Property's Entire Sale Proceeds of $3.6 Million

In our Opinion, we also concluded that appellants were required to recognize the entire sale proceeds of $3.6 million from the sale of the property, instead of just one-half. We found that Marbel, the other one-half owner of the property, was not involved in the sale nor did it receive any of the funds, and therefore should not be attributed any of the proceeds. Based on this finding, we computed an amount realized of $3,383,751 (after subtracting selling expenses of $216,249), and a taxable gain of $1,459,225 (after subtracting the determined adjusted basis of

[2] We divided by two to take into account that, pursuant to the 1996 purchase agreement, appellants sold one-half of their interest in the property to Marbel Holdings, Inc. (Marbel), a Nevada corporation owned by an offshore entity.

$1,424,526 and the home sale gain exclusion of $500,000 under Internal Revenue Code section 121).

Appellants disagree with our determination of gain. Specifically, they contend that since we determined the adjusted basis should be divided by two, to take into account the fact that the property was equally owned by appellants and Marbel, we should have likewise reduced the amount realized by half. According to appellants, it is incorrect (and inconsistent) for us to view the various transactions associated with sale of the property to Marbel as legitimate when determining adjusted basis, but then view them as shams when determining amount realized. Appellants assert that if we believe the sale of the property to Marbel was a sham, then we should have allowed them the entirety of the adjusted basis, not half that amount.

However, we disagree that our Opinion takes inconsistent positions on the computation of the property's amount realized and adjusted basis. There is no dispute that, pursuant to the 1996 purchase agreement, Marbel became one-half owner of the property in that year. Therefore, we respected appellants' sale of their one-half interest in the property to Marbel as a legitimate transaction. But that finding does not necessarily lead to the conclusion that Marbel was also entitled to one-half of the sale proceeds on the property's sale. We pointed to several facts in the record as support. We found the Seller Final Closing Statement dated May 16, 2003, only mentioned appellants, not Marbel, as recipients of the sale proceeds of $3.6 million. We further found that not only did the 1996 purchase agreement specify a profit allocation inconsistent with a true fifty-fifty split, but there was also no evidence that the agreed-upon allocation was respected. Thus, we believed it was necessary to look at the facts of what actually happened to determine how to allocate the gain from the sale.[3] Simply stated, appellants produced no evidence that Marbel ever received any of the sale proceeds from the property's sale. Therefore, appellants are denied a rehearing on this issue.

[3] Appellants further argue that requiring them to recognize the full sale proceeds, but only allowing them half the adjusted basis, causes them to double count the amount realized from one-half of the property's sale to Marbel in 1996. This is so, appellants allege, because the promissory note from Marbel and its 2003 repayment out of its share of the proceeds from the sale of the property in 2003 were treated as amounts realized to appellants, "first in the sale of a one-half interest to Marbel in 1996, then again in the sale of appellants' retained one-half interest in 2003." But the sale of the property in 2003 was to third-party individual purchasers, which produced consideration entirely independent from the 1996 sale, so we fail to see how appellants are being required to double count income.

Accordingly, we grant appellants' petition solely on the limited issue of whether they are entitled to an additional basis of $61,371 for capital improvement expenses made to the property in 2003. (See Cal. Code Regs., tit. 18, § 30606 [noting that a panel may limit the scope of the rehearing].)

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
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Richard Tay
Administrative Law Judge

Date Issued: 4/9/2021