OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20127088
K. PANDA AND	)
M. PANDA	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: K. Panda

For Respondent: Phillip C. Kleam, Tax Counsel III

E. S. EWING, Administrative Law Judge: On November 23, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining Franchise Tax Board's (respondent's) proposed assessment of additional tax of $4,478, a late filing penalty of $509.50, and applicable interest, for the 2015 tax year. K. Panda and M. Panda (appellants) thereafter timely filed a petition for rehearing (Petition) in this matter. Upon consideration of appellants' Petition, we conclude no basis for a rehearing exists.

OTA may grant a rehearing where one of the following grounds exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings which occurred prior to issuance of the Opinion and prevented the 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); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) As provided in *Appeal of Wilson Development, Inc.*, *supra*, it is appropriate for OTA to look to Code of Civil Procedure

section 657 and applicable case law as relevant guidance in determining whether a ground exists to grant a new hearing.

Appellants' Petition requests a new hearing based on the following grounds: "the Opinion is contrary to law"; and "insufficient evidence to justify the Opinion." 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; *Appeal of Le Beau*, 2018-OTA-061P.) This requires a review of the Opinion in a manner most favorable to the prevailing party (here, respondent), and an indulging of all legitimate and reasonable inferences to uphold the Opinion if possible. (*Sanchez-Corea v. Bank of America*, *supra*., at p. 907; *Appeal of Martinez Steel Corp.*, 2020-OTA-074P.) The question before us on this Petition does not involve examining the quality or nature of the reasoning behind the Opinion, but whether that Opinion is valid according to the law. (*Appeal of Martinez Steel Corporation*, *supra*.) When analyzing whether the Petition should be granted based on an insufficiency of evidence to justify the Opinion, OTA "must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, [OTA] clearly should have reached a different opinion." (*Appeals of Swat-Fame*, *Inc.*, *et al*., 2020-OTA-045P, citing Code Civ. Proc. § 657.)

Appellants assert that the Opinion is based on insufficient evidence and is contrary to law when it states, "Where the income in question is community property, one-half of the income is attributable to each spouse and each spouse must report and pay tax on his or her respective one-half community property interest in the income. Thus, one-half of the community income is attributable to appellant-wife for tax reporting purposes." However, OTA disagrees with appellants because this statement of the law is correct and was taken directly from OTA's precedential Opinion in *Appeals of Cremel and Koppel*, 2021-OTA-222P, at page 6. This specific conclusion in *Appeals of Cremel and Koeppel*, *supra*, (i.e., that one-half of community income is attributed to each spouse) is based on several U. S. Supreme Court cases, including *U.S. v. Mitchell* (1971) 403 U.S. 190, *U.S. v. Malcom* (1931) 282 U.S. 792, and *Poe v. Seaborn* (1930) 282 U.S. 101.

Further, appellants contend that the language in the Opinion is not controlling when spouses file using the married filing jointly status. Appellants refer to the fact that respondent's

Publication 1031, *Guidelines for Determining Resident Status*, does not say to include non-California income for married filing jointly filers. Thus, appellants conclude that the Opinion is contrary to the law or unsupported by sufficient evidence because the instructions for Publication 1031 do not, in appellants' view, allow for the result reached in the Opinion. However, while OTA disagrees with appellants' reading of respondent's Publication 1031, it is nevertheless not controlling here.

Assuming, arguendo, that respondent's Publication 1031 can reasonably be read by appellants to be contrary to the holding in the Opinion, taxpayers ultimately must follow the law itself, and the law is clear in this matter. The authoritative sources of law are the statutes, regulations and judicial decisions, not informational publications published by the tax authority. (*Appeal of Dandridge*, 2019-OTA-458P.) "[T]he fact that [a tax agency] publication is unclear or inaccurate does not help the taxpayer. Well-established precedent confirms that taxpayers rely on such publications at their peril. Administrative guidance contained in [tax agency] publications is not binding on the Government, nor can it change the plain meaning of tax statutes." (*Miller v. Commissioner* (2000) 114 T.C. 184, 194-195; see also *Green v. Commissioner* (1972) 59 T.C. 456, 458 [rejecting taxpayer's attempt to deduct nondeductible commuting expenses based on his interpretation of an IRS publication and concluding that "the sources of authoritative law in the tax field are the statute and regulations, and not informal publications"].)

The Opinion properly points out that California is a community property state and explains that "[w]here the income in question is community property, one-half of the income is attributable to each spouse and each spouse must report and pay tax on his or her respective one-half community property interest in the income." (See *Appeals of Cremel and Koeppel*, *supra*). Thus, the Opinion concludes that "one-half of the community income is attributable to appellant-wife for tax reporting purposes." The facts in this appeal and the conclusion reached in the Opinion are consistent with OTA's prior precedential cases cited above (e.g., *Appeals of Cremel and Koeppel*, *supra*, and *Appeal of Li*, 2020-OTA-095P) and the authorities cited in these two precedential Opinions, including the U.S. Supreme Court decisions noted above. These cases support OTA's application of the law to the facts of this appeal, and the Opinion is therefore not contrary to law.

Additionally, the determination of whether an item of income is taxable in California is not affected by whether the taxpayers file a married filing jointly return or separate returns. In fact, in *Appeals of Cremel and Koeppel*, *supra*, the taxpayers filed a joint tax return for the 2011 tax year and separate tax returns for the 2012 tax years, yet the same two-step analysis was equally applicable to both tax years.[1] Appellants' Petition appears to make the incorrect assumption that there is a different treatment of the income of each spouse depending on whether they file jointly or separately. Appellants have not pointed to any authority for that proposition and OTA is aware of none. Indeed, the authorities cited in the Opinion control here, and there is no support to be found in them for appellants' position.

Next, appellants claim that the Opinion, as it relates to appellant-wife's domicile, is not supported by the evidence. Specifically, appellants state, "There are various references made to tax code sections to justify the [O]pinion, but we have different opinion [*sic*] on our domicile determination." Appellants go on to assert that they presented sufficient facts to show that appellant-wife was domiciled in Nevada. However, as noted above, OTA need not weigh the evidence in a manner satisfactory to appellants. Instead, OTA must consider whether the Opinion is unsupported by any substantial evidence. (See *Appeal of Le Beau*, *supra*.) Here, the panel carefully considered all the documentary and testimonial evidence and determined that appellant-wife was domiciled in California during the tax year at issue. For example, some of the evidentiary items relied upon in concluding that appellant-wife was domiciled in California included substantial evidence showing that: (1) one of appellants' minor children lived in and attended school in California for a significant portion of the tax year at issue; and (2) during the tax year at issue, appellant-wife remained employed by a California employer and continued to work in California for the majority of the year. While appellants may disagree with this conclusion, appellants have not shown that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different conclusion. (See *Appeals of Swat-Fame*, *Inc.*, *et al.*, *supra*.) Thus, appellants have failed to show that the Opinion is unsupported by the evidence.

[1] See, e.g., factual findings 10 and 11 with respect to the joint filing for the 2011 tax year and factual findings 15, 16, and 18 with respect to the separate filings for the 2012 tax year. (*Appeals of Cremel and Koeppel*, *supra*, at pp. *3-*4).

For the foregoing reasons, the Opinion is neither contrary to law, nor is the evidence presented in this case insufficient to justify the Opinion. Therefore, OTA finds that appellants have not established grounds for a rehearing, and the Petition is denied.

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Elliott Scott Ewing
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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Cheryl L. Akin
Administrative Law Judge

Date Issued: 6/15/2022