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2022 – OTA – 284
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 19075028
D. HAGER AND	)	
C. HAGER	)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Christopher Hamilton, Attorney

For Respondent: Sonia Woodruff, Tax Counsel IV

On August 23, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's action in this matter and holding that D. Hager's (appellant-husband's) damage award was not excluded from gross income pursuant to Internal Revenue Code (IRC) section 104(a)(2). Appellants filed a petition for rehearing under California Code of Regulations, title 18 (Regulation) section 30604 claiming two grounds: contrary to law and error in law.

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 occurred prior to the issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise that occurred during the appeals proceeding, 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; (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.) Because Regulation section 30604 is based upon the provisions of Code of Civil Procedure (CCP) section 657, case law pertaining to the operation of CCP section 657 as well as the language of the statute itself, are persuasive

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authority in interpreting the provisions contained in this regulation. (See *Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

Contrary to Law

To find that the Opinion is contrary to law, OTA 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.) Accordingly, OTA must examine the record to determine whether holding that appellants' income is taxable was, as a matter of law, unsupported by any substantial evidence.

Appellants describe in great length the legislative changes that occurred between 1996 and 2012. In addition, appellants take issue with the Opinion's citation to *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F.3d 1253 (*Rivera*) and *Vincent v. Commissioner*, T.C. Memo. 2005-95 (*Vincent*). The Opinion cited to these cases in the following manner:

> In order to demonstrate that the damages were awarded "on account of" appellant-husband's physical injury, appellants must show a "direct causal link" between the damages and the physical injury. (See, e.g., *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F.3d 1253 (*Rivera*), 1257; *Domeny v. Commissioner*, T.C. Memo. 2010-9 (*Domeny*).) Where damages are received pursuant to a settlement agreement, the language of the settlement agreement may show whether the damages were paid on account of physical injury. (See, e.g., *Rivera*, *supra*; *Domeny*, *supra*.) However, where there is no settlement agreement, or the settlement agreement does not resolve the issue, courts may rely on the jury's verdict, or other facts and circumstances of the litigation, to determine why the payor paid the damages. (See, e.g., *Vincent v. Commissioner*, T.C. Memo. 2005-95 (*Vincent*); *Domeny*, *supra*.)

Appellants argue that the Opinion failed to "meaningfully address how those cases apply to Appellants and ignores the material distinctions between those cases and the present case…." Appellants contend that instead, *Domeny v. Commissioner*, T.C. Memo. 2010-9 (*Domeny*) is the case most relevant to the appeal.

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Appellants' attempt to distinguish the facts of their case from *Rivera* and *Vincent* is misguided. For one, these cases were cited for the statements of law found in *Rivera* and *Vincent*, not because they are factually similar to the appellants' case. For another, OTA fails to see the difference between *Domeny*, appellants' favored case, and *Rivera* and *Vincent.* The Opinion's citation to *Rivera* and *Vincent* is coupled with a citation to *Domeny,* which undercuts appellants' claim that the statements of law from *Rivera* and *Vincent* are inapplicable to the issue in the appeal. Similarly, appellants' contention that *Domeny* reflects the intent of Congress "in implementing the 1996 and 2012 changes to IRC § 104(a)(2)" as opposed to *Rivera* and *Vincent* is undermined by the fact that all three cases (*Rivera* involving the 2003 tax year, *Vincent* involving the 1998 tax year, and *Domeny* involving the 2005 tax year) refer to the same applicable law.

The issue in this appeal requires a facts and circumstances analysis in order to ascertain the purpose of the jury award. As a result, cases involving this issue (including *Rivera* and *Vincent*) are factually intensive and will always be factually distinguishable. There will never be a factually identical case to the appeal at hand, making appellants' attempts to factually distinguish these cases further misguided. *Domeny*, which appellants want us to apply in place of *Rivera*, is equally, if not more, factually distinguishable because a settlement was reached before a lawsuit was ever filed in that case. As such, the court only had the settlement agreement from which to ascertain the payor's intent for the settlement payment. Here, there was much more to consider beyond just the jury award and the fact that taxes were not withheld from the award, a fact that appellants rely heavily upon in the petition for rehearing.

The statements in the Opinion are correct and accurate statements of relevant law from applicable federal cases. Additionally, the Opinion is consistent with OTA precedential opinion, *Appeal of Head and Feliciano*, 2020-OTA-127P. As such, appellants have not shown that the Opinion (including its reliance on *Rivera* and *Vincent*) is contrary to law.

Error in Law

As stated in CCP section 657, in the judicial context, 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 the trial court made an erroneous evidentiary or procedural ruling or refused to exercise its discretion where required to do so by law. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 [deciding whether a new trial was warranted based on the

trial court's admission of allegedly irrelevant evidence]; *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391 [discussing whether the trial court's grant of judgment on the pleadings without leave to amend warranted a new trial]; *Hernandez v. Wilson* (1961) 193 Cal.App.2d 615 [new trial granted for failure to consider a request to withdraw a waiver of jury trial].) As applied here, OTA interprets this civil trial provision to mean situations where the panel of administrative law judges (Panel) has, as a matter of law, committed a procedural error during the appeals process (e.g., where the Panel has made an erroneous ruling to admit or reject evidence, or failed to consider or respond to a party's request to file an additional brief, obtain an extension of time, or to return the matter to the oral hearing calendar).

Here, appellants argue that the Panel's reliance on an appellate court decision and rejection of post-trial declarations is prejudicial legal error. Appellants, however, have not pointed to any procedural error occurring during the course of the underlying appeal. OTA's review of the OTA appeal indicates that appellants' request to seal certain exhibits was granted, all of appellants' requested exhibits (including the declarations and appellate court decision) were admitted into the record, and appellants' requested timeframes during the hearing were accommodated. Because the appellate court decision was properly admitted into the evidentiary record, there is no error in law in the Panel's consideration of this evidence in the Opinion. With respect to the post hearing declarations, they were admitted into the evidentiary record and were in fact considered by the Panel as indicated in footnote 8 of the Opinion. As such, there is no basis for rehearing this appeal under this ground.

<u>Insufficiency of the Evidence</u>

To the extent that appellants' arguments are based on the ground for insufficiency of the evidence, OTA will review appellants' petition for rehearing under that ground. To make a finding 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, the Panel clearly should have reached a different determination. (*Appeals of Swat-Fame, Inc., et al., supra*.) OTA may review conflicting evidence, weigh its sufficiency, consider credibility of witnesses, and draw reasonable inferences from the evidence presented in the underlying appeal. (See *Valdez v. J. D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 512.)

Appellants argue that the Opinion ignored or gave little weight to material evidence that links appellant-husband's physical injury to the retaliation. Specifically, appellants assert that

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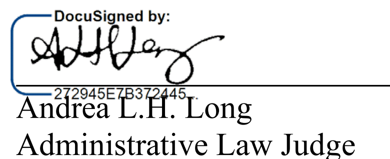
the motion to exclude evidence, the opening statements, the evidence produced at trial, jury instructions, and jury verdict all support a finding that appellant-husband was compensated for his injuries. Conversely, appellants assert that the Panel's review of the appellate court decision and rejection of post-trial declarations were prejudicial error.

Appellants assert that "the facts and circumstances support the reasonable inference that [D.] Hager was seeking and was awarded damages on account of physical injury." Appellants further assert that the "logical inference" from the facts from the case is that appellant-husband suffered a work-related injury on account of the Los Angeles Sheriff's Department retaliation.

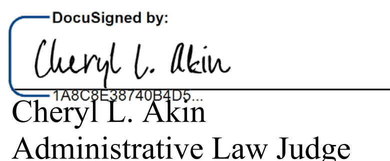
The Panel was not bound to accept appellants' claim that the jury would have inferred that appellant-husband's injuries were a direct result of retaliation and that the damages awarded to appellant-husband by the jury were therefore intended as compensation for his physical injuries. The Panel was free to reach a different conclusion in light of the evidence presented at the OTA hearing and with the parties' briefs. (See *Jones v. Citrus Motors Ontario, Inc*. (1973) 8 Cal.3d 706, 711.)

Appellants' dissatisfaction with the Opinion and attempt to reargue the same issue does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, *supra*.) Based on the foregoing, appellants have not shown grounds for a rehearing exist, and appellants' petition for rehearing is hereby denied.

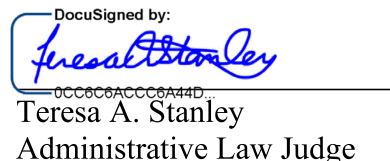


Andrea L.H. Long
Administrative Law Judge

We concur:



Cheryl L. Akin
Administrative Law Judge



Teresa A. Stanley
Administrative Law Judge

Date Issued: 7/26/2022