OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of: **RORB, INC. AND** **R. ORBAN**	OTA Case Nos. 20025808, 20025815

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Donald L. Williamson, CPA

For Respondent: Nathan H. Hall, Tax Counsel III

C. AKIN, Administrative Law Judge: On November 24, 2021, Office of Tax Appeals (OTA) issued an Opinion concluding, on the main issue, that Rorb, Inc. (Rorb) was not entitled to a bad debt expense deduction for the 2012 tax year.[1] OTA thus sustained respondent Franchise Tax Board's (FTB) actions: (1) reducing Rorb's reported net operating loss by $1,528,229.00 for the 2012 tax year; and (2) proposing additional tax of $176,677.00 and an accuracy-related penalty of $35,335.40, plus applicable interest, for R. Orban's 2012 tax year. On December 24, 2021, Rorb and R. Orban (collectively, 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 the 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

[1] Administrative Law Judge (ALJ) Cheryl L. Akin replaced ALJ Nguyen Dang as the lead and writing ALJ for the Opinion on Petition for Rehearing. ALJ Nguyen Dang wrote the original Opinion in this matter.

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.) California Code of Regulations, title 18, section 30604 is based upon the provisions of the Code of Civil Procedure (CCP) section 657. As such, case law pertaining to the operation of CCP section 657, as well as the language of the statute itself, are persuasive authority in interpreting the provisions contained in this regulation.

Appellants assert two reasons for filing their petition: (1) to "present newly discovered, relevant evidence, not requested by OTA in the course of the appeal," which is "from third parties" and was "not available to appellant[s] prior to issuance of the [O]pinion"; and (2) "evidence [appellants] presented has been overlooked or not given appropriate consideration." While appellants do not specifically allege which of the six grounds for a rehearing exists with respect to the second contention, appellants' contention that the Opinion failed to consider or "overlooked" certain evidence will be treated as a claim that there was an irregularity in the proceeding. Appellants' contention that evidence was "not given appropriate consideration" or weight will be treated as a claim that there is insufficient evidence to justify the Opinion.

Newly Discovered, Relevant Evidence

With their petition, appellants provide eight documents which they contend either were not previously submitted to OTA during the appeal or were not properly considered in the Opinion: (1) an Assignment, Endorsement and Allonge Agreement dated January 13, 2010, by and between Harman Professional, Inc., Circuit Research Labs, Inc. (CRL), and Jayson Brentlinger (Brentlinger); (2) a summary of emails Brentlinger sent to the Board of Directors of an unidentified entity on February 24, 2010; (3) the Resolution of Nabro Able LLC (Nabro) and Waiver of Notice of Meeting dated July 12, 2010; (4) the CRL Statement of Assets, Liabilities, Equity Income Tax Basis as of December 31, 2012; (5) a draft Nabro Statement of Assets, Liabilities, and Equity Income Tax Basis as of December 31, 2014; (6) an invoice from Mark Leavitt, CPA dated December 18, 2012; (7) an invoice from Silicon Counsel LLP dated January 6, 2013; and (8) email correspondence between appellant R. Orban, Mark Leavitt, CPA, and Silicon Counsel LLP from December 2012. Of these documents, only the Assignment, Endorsement and Allonge Agreement dated January 13, 2010, the invoices from Mark Leavitt, CPA and Silicon Counsel LLP, and the email correspondence between appellant R. Orban,

Mark Leavitt, CPA, and Silicon Counsel LLP (i.e., items 1, 6, 7, and 8) are newly submitted documents.[2]

While appellants contend that the newly submitted documents are "newly discovered, relevant evidence," which is "from third parties [and] not available to appellant[s] prior to the issuance of the opinion," each of these documents are dated between 2010 and 2013. Appellants have not explained why these documents dated from 2010, 2012, and 2013, could not have been obtained by appellants and provided to OTA prior to the issuance of the Opinion on November 24, 2021. Additionally, appellant Rorb and/or appellant R. Orban were the recipients of the two invoices (items 6 and 7) and appellant R. Orban was the sender and/or recipient of each of the emails (item 8). As such, appellants have not explained why these documents were not in appellants' possession and needed to be obtained from third parties. To the extent that appellants contend that OTA did not request this evidence in the course of the appeal, OTA notes that it is appellants burden to present their case which includes submitting all relevant evidence supporting their position.[3]

As noted in *Appeal of Wilson Development, Inc., supra*, "[W]e prefer a record which contains all the evidence the parties believe is relevant. However, when the evidence could have been submitted before the decision, but was not, the goal of reaching the correct result must usually fall to the need to efficiently resolve matters before [OTA]." As such, if a party attempts to submit evidence after an opinion has been issued, they must show that the proffered evidence is material and could not have been produced prior to the issuance of the opinion in order for OTA to consider the evidence when deciding whether or not to grant the petition. (*Ibid*.) Because appellants have not demonstrated that the evidence they are now seeking to submit was

[2] Item 2, the summary of emails from Brentlinger, and item 3, the Resolution of Nabro and Waiver of Notice of Meeting, were provided by FTB in the original appeal as Exhibit E (pages 3 through 6) of FTB's Opening Brief dated April 27, 2020. Item 4, the CRL 2012 Statement of Assets, Liabilities, and Equity Income Tax Basis, was provided by both FTB as Exhibit T of FTB's Opening Brief dated April 27, 2020, and by appellants as an unlabeled exhibit with their Reply Brief dated June 25, 2020. Item 5, the draft Nabro 2014 Statement of Assets, Liabilities, and Equity Income Tax Basis, was provided by appellants as an unlabeled exhibit with their Reply Brief dated June 25, 2020. Appellants' contentions that the panel overlooked these items or did not give this evidence appropriate consideration will be addressed in the discussion under the Irregularity in the Appeal Proceedings and Insufficient Evidence sections below.

[3] Except as otherwise specifically provided by law, the burden of proof is upon appellant as to all issues of fact. (Cal. Code of Regs., tit. 18, § 30219(a).) FTB's determinations are generally presumed correct, and the taxpayer bears the burden of proving otherwise. (*Appeal of Vardell*, 2020-OTA-190P.) The applicable burden of proof is by the preponderance of the evidence (Cal. Code of Regs., tit. 18, § 30219(c)) and unsupported assertions cannot satisfy a taxpayer's burden of proof. (*Appeal of Vardell*, *supra*.)

not available and could not have reasonably been obtained from the applicable third parties and provided to OTA prior to the issuance of the Opinion, OTA cannot grant a rehearing on the basis of this newly offered evidence. This conclusion dispenses with appellants' arguments regarding the accuracy-related penalty, as appellants' remaining contentions regarding reasonable cause and reliance on tax professionals were expressly considered and rejected in the Opinion.[4] Appellants' dissatisfaction with the outcome of their appeal, and their attempt to reargue the same issues a second time, is not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Irregularity in the Appeal Proceeding

Appellants also contend that the panel erred in overlooking certain items of evidence.[5] This assertion is being treated as claim that there was an irregularity in the proceeding that prevented the fair consideration of the appeal. Courts have defined an irregularity in the proceedings as "[a]ny departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected." (*Appeal of Graham and Smith*, *supra*.)

However, no such irregularity occurred here. To the contrary, the parties in this appeal were offered ample opportunity to submit briefs and exhibits, including a request for additional briefing by OTA. While appellants contend that certain unspecified exhibits were "overlooked," OTA concludes that the panel properly considered all of appellants' evidence and arguments when issuing the Opinion. In fact, some of the items of evidence that appellants contend were "overlooked" were the evidentiary basis for several of the enumerated factual findings in the Opinion. For example, the CRL 2012 and the draft Nabro 2014 Statement of Assets, Liabilities and Equity Income Tax Basis provided the evidentiary basis for factual findings numbers 10 and 12, which noted Nabro's various assets and liabilities as of December 31, 2012, and 2014.

[4] In their petition, appellants also state that they intend to produce "evidence of Brentlinger's security for his $2,220,170 loan to Nabro." However, to date appellants have not produced this evidence. More importantly, appellants have not established that this evidence could not have been obtained from the applicable third party and provided to OTA prior to the issuance of the Opinion. This conclusion similarly dispenses with appellants' arguments regarding Brentlinger's claimed perfected security interest in Nabro's assets, as no additional evidence or argument was provided by appellants in their petition.

[5] Appellants do not specifically identify which items of evidence they contend were "overlooked" versus which items of evidence they contend were not given "appropriate consideration."

Each of the exhibits appellants point to in their petition was admitted into the evidentiary record. (See Cal. Code Regs., tit. 18, § 30214(f).) The complete evidentiary record, as well as the parties' extensive briefing on the issues, were reviewed and considered by the panel before the issuance of the Opinion. To the extent that certain items of evidence were not explicitly discussed in Opinion, there is no requirement that a written opinion must expressly set forth each item of documentary evidence or each exhibit submitted by the parties in an appeal before OTA. The evidentiary record in this case was almost 400 pages long and contained more than 40 separate exhibits. Explicitly referencing and discussing every exhibit submitted by the parties would have been burdensome and would have made the Opinion unnecessarily lengthy and complicated. Where particular exhibits were not explicitly referenced in the Opinion, those exhibits were not found to be determinative or controlling of the outcome in this appeal.[6] In summary, appellants have not shown that the Opinion "overlooked" certain evidence and have failed to establish that there was an irregularity in the proceeding requiring a rehearing.

Insufficient Evidence

To find that there is 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 Opinion clearly should have reached a different determination. (Code Civ. Proc., § 657; *Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)

Summary of Emails from Brentlinger and Resolution of Nabro and Waiver of Notice of Meeting

With respect to these documents, appellants contend that the documents show that, "[n]one of the assets of CRL have ever been beneficially transferred to [Nabro], or any other entity, and are still the property of CRL." Appellants expressly disagree with the Opinion's conclusion that Nabro's assets had potential future value because they were eventually sold in 2016. In their petition, appellants contend that: (1) none of the assets of CRL were beneficially

[6] Appellants' specific assertions regarding each item of evidence will be addressed in the discussion under the Insufficient Evidence section below.

transferred to Nabro and were instead retained by CRL; and (2) the "[u]ltimate sale of the Orban asset in 2016 was by CRL" and "[t]he Orban asset was never an asset of Nabro."[7]

However, the holding in the Opinion is not based on a conclusion that assets of CRL had been transferred to or were beneficially owned by Nabro. The Opinion never concluded that assets of CRL had been transferred to Nabro or that the Orban asset, specifically, had been transferred to, was owned by, or was sold by Nabro rather than CRL.[8] While the Opinion concluded that the 2016 sale included Nabro's remaining assets (indicating that those remaining assets may have had some residual value at that time), this conclusion was based on appellants' statement made in response to OTA's request for additional briefing. In their response dated January 13, 2021, appellants indicated that the terms of this sale are confidential and protected by nondisclosure agreements but stated that their understanding is that "the sale was of virtually all physical and intangible assets" of CRL, Nabro, and the related entities.[9]

In any event, this conclusion regarding the 2016 sale was an alternative finding made in addition to the primary finding that Nabro had substantial assets at the end of the 2012 tax year. Even if appellants are correct that the subsequent sale in 2016 did not include any Nabro assets and that Nabro's assets had no value at the time of the sale in 2016, this does not invalidate or negate the Opinion's primary finding that Nabro had substantial assets at the end of the 2012 tax year. This later conclusion alone was dispositive of the issue of whether appellants had established worthlessness of the debt Nabro owed to Rorb on December 31, 2012.

CRL 2012 Statement of Assets, Liabilities, and Equity Income Tax Basis

With respect to this document, appellants argue that Nabro had liquid assets (cash and accounts receivable) of just $137,074 from which to pay its debt to appellants. Additionally, appellants point to this document to argue that CRL and CRL International similarly did not have

[7] In their briefing in the original appeal, appellants describe the Orban Asset as "the right to develop products using the Orban Optimod technology, patents, trade secrets, brand, and other intellectual property such as product documentation. It also includes tooling, fixtures, and other physical-plant items."

[8] In their petition, appellants state that the "[u]ltimate sale of the Orban asset in 2016 was by CRL." However, in their response to OTA's request for additional briefing dating January 13, 2021, appellants state that "Orban USA, Inc. took over operation of the Orban Asset on 01/01/2015." OTA makes no conclusion or finding here regarding which specific entity (CRL, Orban USA, Inc., or some other related entity) owned the Orban Asset at the time of the sale in 2016.

[9] At the time Nabro ceased operations on December 31, 2014, Nabro's balance sheet indicted that it had total assets with a book value of more than $1.3 million. Appellants never explained what happened to these Nabro assets after Nabro ceased operating in 2014.

sufficient liquid or current assets to pay their intercompany payables (totaling $2,224,177 on December 31, 2012) owed to Nabro. However, CRL and CRL International were ongoing businesses with continuing business operations beyond the 2012 tax year in question. The mere fact that these entities did not have sufficient liquid or current assets to fully pay their intercompany payables to Nabro on December 31, 2012, does not establish that these intercompany payables could not potentially be repaid to Nabro (at least in part) sometime in the future. (See, e.g., *Simon v. Commissioner* (1978) 37 T.C. Memo. 1978-485 [when a financially troubled company remains actively engaged in business, the potential ability to pay some of its debt exists].)[10]

Additionally, the Opinion specifically considered and rejected appellants' arguments that "Nabro had 'no reasonable expectation' of collecting the $2,224,177 in intercompany receivables or recouping the full value of the $1,158,535 in raw materials." The Opinion specifically concluded that "[a]ppellants did not provide any evidence to support their contention that, in 2012, Nabro's intercompany receivables were uncollectible or that the fair market value of its raw materials was substantially less than book value." Although appellants clearly disagree with how the panel weighed this evidence, it is not for the party to decide whether a requisite degree of belief was established in the mind of the trier of fact. Rather, it is up to the trier of fact "to believe the existence of a fact is more probable than its nonexistence . . . ." (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) Appellants have not demonstrated that the Opinion should have reached a different determination after weighing all the evidence in the record. After weighing the evidence, the Opinion concluded that appellants had not established that Nabro had no reasonable expectation of collecting its intercompany receivables. Appellants' dissatisfaction with this conclusion and the outcome of their appeal is not grounds for a rehearing. (*Appeal of Graham and Smith*, *supra*.)

[10]Appellants' argument here also fails to consider CRL's and CRL International's significant other (non-current and non-liquid) assets, such as raw materials and finished goods inventory, prepaid deposits, property and equipment, licenses, and goodwill. The 2012 balance sheet indicated that the combined goodwill alone (after subtracting accumulated amortization) had a book value of more than $5.2 million as of December 31, 2012. The existence of these assets with substantial book value, the continued business operations beyond the 2012 tax year, and the subsequent sale of substantially all of these and other related entities' physical and intangible assets in 2016 for an undisclosed sales price all indicate that a potential for repayment of the intercompany payables owed to Nabro may have existed as of December 31, 2012.

Draft Nabro 2014 Statement of Assets, Liabilities, and Equity Income Tax Basis

Lastly, with respect to this document, appellants note that Nabro's total assets as of December 31, 2014, including fixed assets, were $1,337,515 and currently liabilities were $1,806,384 and argue that, "[a]s of December 31, 2014 when Nabro ceased operations, there were clearly no funds available to pay any portion of the debt . . . ." Again, the Opinion specifically considered this evidence, including the value of Nabro's total assets and liabilities at December 31, 2014.[11] However, after considering this evidence and the declining book value of Nabro's assets between 2012 and 2014, the Opinion found it to be of little probative value: "While Nabro's year-end balance sheet for 2013 and 2014 do show a large year over year decrease in the book value of these assets, there is no indication of the specific cause of this decline or its relevance of establishing the fair market value of Nabro's assets in 2012. We therefore find this evidence to be of little probative value."

The trier of fact is the exclusive judge of the creditability of the evidence and can reject evidence as unworthy of credence. (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742.) The 2014 balance sheets reflecting Nabro's assets and liabilities on December 31, 2014, and Nabro's inability to pay the debt at the end of 2014, does not conclusively establish that the debt owed to Rorb was worthless in the earlier 2012 tax year. The Opinion weighed this evidence and found it to be of little probative value for the reasons just noted. Thus, appellants have not demonstrated that OTA clearly should have reached a different determination after weighing the original evidence in the record.

[11] See, e.g., Factual Findings numbers 10 through 12, which expressly discuss Nabro's total assets, liabilities, and shareholder equity balances, as reported on Nabro's balances sheets as of December 31, 2012, 2013, and 2014.

In summary, appellants have not shown that grounds exist for a renew hearing. Appellants' petition is hereby denied.

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Cheryl L. Akin
Administrative Law Judge

We concur:

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