OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. KUAN AND** **S. KUAN**	OTA Case No. 19095215

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: C. Kuan

For Respondent: Phillip C. Kleam, Tax Counsel III

C. AKIN, Administrative Law Judge: On April 15, 2022, Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's (FTB's) proposed assessment of tax of $737, plus applicable interest, for the 2014 tax year, as revised by FTB on appeal. Appellants timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048.

OTA may grant a rehearing where one of the following six grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to the 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, rele vant 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 that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P.)

Appellants' petition fails to identify which of the above grounds supports their petition. Instead, appellants present 23 separately numbered arguments, which they contend require a rehearing or that their case be "dismissed." For purposes of this Opinion, OTA will group similar arguments together and address appellants' arguments under the most relevant or

applicable ground. Upon consideration of appellants' petition, OTA concludes appellants have not established a basis for rehearing.

Contrary to Law: Appellants' Arguments Numbers 3, 4, 5, 6, 9, 12, 13, 14, 17, 21, & 22

Although appellants' contention under each of these numbered arguments is slightly different, appellants generally assert that: (1) community property law does not apply to them; (2) half of C. Kuan's Nevada wage and gambling income should not have been attributed to S. Kuan and taxed in California; and (3) FTB otherwise erred in its computation of appellants' California taxable income and/or the resulting tax (i.e., $737) as revised on appeal. For example, appellants assert:

- "FTB failed to subtract $25,906[,] C. Kuan's 50% of Nevada wage[s] which is [the] difference between [California] and federal law .....The correct [adjusted gross income] amount should be $128,786 - $25,906 - $5,356 = $97,524" and as a result "the tax is $162 . . . not $737 . . . ." (Argument No. 3.)
- "Nevada wages are not subject to California tax." (Argument No. 4.)
- "Nevada wage [*sic*] is not **SOURCES WITHIN California** [sic] nor **EARNED** while a California resident." (Argument No. 5; all caps and bold in original.)
- "To add 50% of Nevada wages attributable to S. Kuan is contrary to California law. Nevada wages attributable to S. Kuan is [*sic*] definitely not earned nor received." (Argument No. 6.)
- "It is erroneous for FTB to report attribute[d] income from Nevada as income earned or received as a [California] resident and income earned or received from [California] sources as [a] nonresident." (Argument No. 9.)
- "It is erroneous for FTB to tax Nevada wage[s] as California law does not tax income from sources other than California sources." (Argument No. 12.)
- "It is erroneous for FTB to tax attribute[d] Nevada wage[s] as California law provides that for each taxable year there shall be imposed upon the taxable income of every nonresident or part-year resident a tax on the income received from sources in California." (Argument No. 13.)
- "It is erroneous for FTB to tax Nevada wage[s] as California's method of computing the tax liability of a nonresident or part-year resident does not impose a tax on the

nonresident or part-year resident taxpayer's income from sources outside of California (non-California source income)." (Argument No. 14.)

- "FTB incorrectly applied Community Property Law to our case. Community Property Law is applicable when there is [a] marital dispute or separation..... It is erroneous for FTB to apply community property law since we are happily married and have no marital problem[s] . . . ." (Argument No. 17.)
- Appellants' tax should be either $162 or $41. (Arguments Nos. 21 & 22.)

These arguments will be evaluated as a contention that the Opinion is contrary to law. "[T]he 'contrary to law' standard of review shall involve a review of the Opinion for consistency with the law." (Cal. Code Regs., tit. 18, § 30604(b).) To find that the Opinion is contrary to law, OTA must determine whether the Opinion is unsupported by any substantial evidence, which requires a review of the Opinion to indulge in all legitimate and reasonable inferences to uphold it. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Ibid*.) In its review, OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Ibid*.)

In the above arguments, appellants essentially renew or restate contentions made in the underlying appeal. Appellants contend OTA[1] did not properly apply community property law, improperly attributed income to S. Kuan, and did not properly compute appellants' 2014 California taxable income or resulting California tax liability. However, the Opinion properly considered and rejected these arguments. The Opinion applied the relevant two-step analysis as set forth in OTA's precedential opinion in *Appeals of Cremel and Koeppel*, 2021-OTA-222P. Under step one of that analysis, the Opinion correctly concluded that all four items of income earned by appellants during the 2014 tax year were community property because both C. Kuan and S. Kuan, who were both earners of their respective items of income at issue, were domiciled in community property states during this year.[2] This determination was proper since an individual's marital property interest in personal property is determined by the laws of the

[1] Appellants generally refer to FTB, rather than OTA, in their numbered arguments here; however, OTA will treat these statements as assertions that OTA did not properly consider appellants' contentions in the Opinion.

[2] S. Kuan was domiciled in California and C. Kuan was domiciled in either California or Nevada during the 2014 tax year. Both California and Nevada are community property states. (See Fam. Code, § 760; N.R.S., § 123.220.)

earning or acquiring spouse's domicile. (*Appeals of Cremel and Koeppel*, *supra*; *Appeal of Li*, 2020-OTA-095P.)

The Opinion also addressed and rejected appellants' argument that community property laws are not applicable here because appellants "are happily married." The Opinion cited to the applicable community property statutes in California and Nevada, both of which generally provide that property acquired by a married person during the marriage is community property. (Fam. Code, § 760; N.R.S., § 123.220.) There is nothing in these statutes which limit the application of California or Nevada community property law to situations where there is a marital dispute, separation, divorce, or marital problems, as appellants assert.

The Opinion similarly considered and rejected appellants' contentions regarding the attribution of 50 percent of C. Kuan's Nevada wage and gambling income to S. Kuan as S. Kuan's community property share of such income, the inclusion of this income in appellants' California taxable income, and the resulting computation of appellants' California tax. Because the Nevada wage and gambling income were found to be community property under step one of the applicable two-step analysis, 50 percent of this income is properly attributed to S. Kuan for income tax reporting purposes as S. Kuan's community property share of this income. (See *Appeals of Cremel and Koeppel, supra*, citing *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.)

Under step two of the applicable two-step analysis, the Opinion properly concluded that such income was taxable in California because S. Kuan was a California resident who is taxed on all of her income regardless of its source. (R&TC, § 17041(a)(1); see also *Appeals of Cremel and Koeppel*, *supra*.) Thus, the Opinion properly applied R&TC section 17041(a)(1) and OTA's precedential Opinion in *Appeals of Cremel and Koppel*, *supra*, to conclude that S. Kuan's 50 percent community property share of C. Kuan's Nevada gambling and wage income were taxable in California. As such, the Opinion correctly concluded that FTB's computation of appellants' California taxable income and resulting California tax of $737 (as revised on appeal) were correct, and the Opinion is not contrary to law. Appellants' dissatisfaction with the Opinion and attempt to reargue the same issues a second time does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.)

Irregularity in the Proceeding: Appellants' Arguments Numbers 15 & 16

In their arguments numbers 15 and 16, appellants appear to contend OTA made various procedural-type errors relating to the time granted to each party for the filing of their briefs. An irregularity in the proceedings has been defined as any departure by OTA from the due and orderly method of disposition of an action by which the substantial rights of a party (here, appellants) have been materially affected. (*Appeal of Graham and Smith*, *supra*.)

In argument number 15, appellants contend that OTA granted FTB 60 days to file their opening brief, while appellants were only permitted 14 days to reply after being notified by OTA that the Tax Appeals Assistance Program (TAAP) was no longer representing appellants. Appellants contend that this is "unjust, unfair, unreasonable, and unacceptable." California Code of Regulations, title 18, (Regulation) section 30303(b) provides that respondent (here, FTB) must submit an opening brief not later than 60 days from the date OTA acknowledges receipt of appellants' opening brief. Regulation section 30303(c) then provides that appellants may submit a reply brief and that any such reply brief must be submitted not later than 30 days from the date OTA acknowledges receipt of respondent's opening brief.

Here, appellants' appeal letter (treated as appellants' opening brief pursuant to Regulation section 30303(a)) was acknowledged by OTA in a letter dated September 11, 2019. Pursuant to Regulation section 30303(b), OTA properly granted FTB 60 days from the date of this letter to file its opening brief in the underlying appeal. Thus, there was no procedural error in OTA's granting FTB 60 days to file its opening brief in this appeal. Additionally, while appellants contend that they were only provided 14 days to file their reply brief, OTA's letter dated November 14, 2019, acknowledged receipt of FTB's opening brief and notified appellants' that they had until December 14, 2019, to file their reply. Thus, consistent with Regulation section 30303(c), appellants were granted 30 (not 14) days to reply to FTB's opening brief.

Additionally, OTA notes that appellants twice requested extensions to file their reply brief.[3] Pursuant to these requests and due to the Covid-19 state of emergency in 2020, OTA extended the deadline for the filing of appellants' reply brief to March 24, 2020, May 23, 2020, and finally to August 4, 2020. Thus, appellants were given a total of almost nine months to file

[3] Regulation section 30302(c) permits a party to request an extension of time for filing a brief and notes that OTA may extend, defer or postpone briefing deadlines for good cause.

their reply brief. To the extent appellants assert that additional time was needed to file their reply brief due to the resignation of their TAAP representative on or about July 9, 2020, appellants could have requested an additional extension for good cause pursuant to Regulation section 30302(c).[4] Finally, OTA notes that appellants requested and were permitted to file an additional supplemental brief on November 15, 2020, which afforded appellants an opportunity to address anything that may have been omitted from their prior reply brief.

In argument number 16, appellants further contend OTA erred in accepting FTB's opening brief, filed on November 12, 2019, which appellants contend is two days past the November 10, 2019 due date OTA provided in the acknowledgement letter dated September 11, 2019. OTA notes that November 10, 2019, was a Sunday, and Monday, November 11, 2019, was a state holiday (Veterans Day). Where a due date falls on a Saturday, Sunday, or a state holiday, Regulation section 30205 permits the deadline to be extended to the next business day. The next business day was November 12, 2019, and FTB properly filed its brief on this date. Thus, OTA did not err in accepting FTB's opening brief filed on November 12, 2019, and appellants have not established that a rehearing should be granted due to an irregularity in the appeal proceedings.

Appellants' Remaining Arguments Numbers 1, 2, 7, 8, 10, 11, 18, 19, 20, & 23

Appellants' remaining arguments amount to various complaints against FTB during the audit, protest, and appeals processes.[5] In argument number 1, appellants state that FTB used the wrong legal standard (i.e., residency rather than domicile) to attribute C. Kuan's Nevada income to California. In argument number 20, appellants similarly argue that FTB's proposed assessment was not reasonable and rational, FTB had the burden of proof, and FTB used the wrong legal standard by using C. Kuan's residency rather than domicile.

However, regardless of which party (appellants or FTB) had the burden of proof, the preponderance of the evidence established that C. Kuan was domiciled in a community property state. Even if FTB applied the incorrect standard (i.e., by using residency) to attribute C. Kuan's

[4] To the extent appellants also assert that OTA improperly delayed in informing appellants that TAAP had withdrawn its representation of appellants, appellants should have been informed of this withdrawal of representation directly by TAAP.

[5] These arguments do not clearly fall within any of the six grounds for rehearing. As such, they will be discussed more generally.

Nevada wage and gambling income to S. Kuan, the application of the correct legal standard (i.e., the domicile of the earning spouse, C. Kuan) has the same result. The Opinion correctly based the community property determination on C. Kuan's domicile, rather than on residency. Because C. Kuan was domiciled in a community property state during the 2014 tax year, his income during this year was community property and 50 percent was properly attributed to S. Kuan for income tax reporting purposes. (*Appeals of Cremel and Koeppel*, *supra*; *Appeal of Li*, *supra*.)[6]

Finally, in arguments numbers 2, 7, 8, 10, 11, 18, and 19, appellants contend that FTB made numerous errors during the audit, protest, and appeals processes and alleges various wrongdoings by FTB such as: "making false statements" about a telephone conversation and letter; "covering up" such false statements and wrongdoing; failing to provide appellants' with requested explanations regarding the applicability of Nevada income tax law to appellants' 2014 tax year and a claimed discrepancy with an exhibit FTB provided with its opening brief; and failing to exercise due professional care. However, OTA does not have jurisdiction over whether appellants are entitled to a remedy for FTB's actual or alleged violation of any substantive or procedural right of the taxpayer, unless the violation affects the adequacy of a notice, the validity of an action, or the amount at issue in the appeal. (Cal. Code of Regs., tit. 18, § 30104(d).)

Here, appellants' various assertions regarding the claimed errors, wrongdoing, and lack of due professional care by FTB do not affect the adequacy or validly of the FTB's notices (i.e., the Notice of Proposed Assessment or Notice of Action issued to appellants on October 15, 2018, and August 8, 2019, respectively). Additionally, for the reasons set forth in the Opinion, and discussed in the contrary to law ground section above, FTB's proposed assessment of additional tax of $737 (as revised by FTB on appeal) is correct. Thus, appellants'

[6] In argument number 23, appellants cite to the O.J. Simpson trial in 1995 and state, "If it Doesn't Fit, You Must Acquit." (Capitalization in original.) Appellants appear to be asserting that FTB must prove its case beyond a reasonable doubt. However, OTA's regulations generally provide that the burden of proof is on the appellant as to all issues of fact and that such burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a) & (c).) As previously noted, regardless of which party had the burden of proof, OTA finds that the preponderance of the evidence (the standard applicable in this appeal) establishes that the proposed assessment of tax (as revised on appeal) was correct.

assertions regarding errors, wrongdoing, and lack of professional care by FTB do not affect the revised amount at issue in the appeal and are not grounds for a rehearing.[7]

Accordingly, appellants' petition is hereby denied.

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

We concur:

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Amanda Vassigh
Administrative Law Judge

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John O Johnson
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John O. Johnson
Administrative Law Judge

Date Issued: 11/16/2022

[7]Appellants also submitted numerous exhibits with their petition. Most were previously provided during the underlying appeal. To the extent appellants have submitted new exhibits with their petition, appellants have not shown that such exhibits could not have been reasonably discovered and provided to OTA prior to the issuance of the Opinion. (Cal. Code Regs., tit. 18, § 30604(a)(1).) Thus, appellants are not entitled to a rehearing based on any newly submitted exhibits.