OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeals of:	OTA Case Nos. 19034546, 19034547
STARBUZZ TOBACCO, INC. AND STARBUZZ INTERNATIONAL, INC.	CDTFA Case IDs 925929, 925931

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Mardiros H. Dakessian, Attorney
Steven Rauser, Attorney

For Respondent: Courtney Daniels, Tax Counsel III

A. KWEE, Administrative Law Judge: On April 28, 2021, the Office of Tax Appeals (OTA) issued an Opinion reversing decisions of respondent California Department of Tax and Fee Administration (CDTFA) on separate claims for refund filed by Starbuzz Tobacco, Inc. and Starbuzz International, Inc. (collectively, appellants).[1] CDTFA's first decision, dated February 20, 2019, denied a March 19, 2019 claim for refund of $1,814,429.11 in tax filed by appellant Starbuzz Tobacco, Inc. for the period August 1, 2013, through September 30, 2015. In a related matter, CDTFA issued a separate decision on February 20, 2019, denying a claim for refund dated November 3, 2015, for $1,004,309.89 in tax, and filed by appellant Starbuzz International, Inc. for the period October 1, 2012, through September 30, 2013. These matters were consolidated on appeal to OTA. CDTFA's decisions concluded that appellants' shisha

[1] Sales taxes were formerly administered by the State Board of Equalization (SBE). In 2017, functions of SBE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to SBE; and when this Opinion refers to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

products[2] qualified as tobacco products, the distribution in this state of which is subject to tax, pursuant to the Cigarette and Tobacco Products Tax Law.[3]

On May 26, 2021, CDTFA timely petitioned for a rehearing on the basis that OTA Opinion's "novel interpretation is in opposite to the plain language of the Statute . . . and creates an absurd result." As such, CDTFA petitions for a rehearing entirely on the basis that "OTA's [d]ecision is contrary to law." We conclude that CDTFA established a basis to grant a new hearing.

Grounds for granting a rehearing

OTA may grant a rehearing where 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 prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, 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;[4] or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

As provided in the State Board of Equalization (SBE)'s precedential decision in *Appeal of Wilson Development, Inc.*, *supra*, and as reflected in SBE's Rules for Tax Appeals, SBE considered it appropriate, in cases of uncertainty, to look at Code of Civil Procedure section 657 for guidance in determining whether a ground for a rehearing exists. (See, e.g., Cal. Code Regs., tit. 18, §§ 5461(c)(5) [repealed 7/30/20], 5561(a).) OTA continues to apply the same standards as SBE for granting a rehearing; thus, it is appropriate to continue looking to Code of Civil Procedure section 657, applicable caselaw, and precedential decisions for guidance in

[2] OTA's Opinion uses the term shisha. CDTFA's decision uses the term "hookah tobacco products." It is undisputed that the product at issue is a tobacco mixture containing 16.2 percent tobacco, which is smoked in a hookah, and commonly referred to by terms such as hookah tobacco, shisha, or maassel. For consistency, we refer to the product as "shisha"; however, the terminology is immaterial.

[3] Part 13 of Division 2 of the Revenue and Taxation Code.

[4] See also California Code of Regulations, title 18, section 30604(d) [effective January 2, 2019, through February 28, 2021].

determining whether to grant a new hearing in cases where application of OTA's Rules for Tax Appeals is not clear.

The March 1, 2021, revision to the Rules for Tax Appeals adds a new explanation that "the '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).) Otherwise, for petitions for rehearing filed on or after March 1, 2021, OTA currently has no precedential Opinion applying the two recently severed grounds for a rehearing.

As background, for petitions filed prior to March 1, 2021 (i.e., prior to the regulatory amendment), the analysis for contrary to law and insufficient evidence is interconnected as a single ground for rehearing. For example, a ground for a rehearing under California Code of Regulations, title 18, section 30604(d) requires a finding that the Opinion is "unsupported by any substantial evidence." (*Appeal of Swat-Fame, Inc., et al*., 2020-OTA-045P; *Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) This requires indulging "in all legitimate and reasonable inferences" to uphold the Opinion. (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907.) The question does not involve examining the quality or nature of the reasoning behind OTA's Opinion, but whether the Opinion is valid according to the law. (*Appeal of NASSCO Holdings, Inc*. (2010-SBE-001) 2010 WL 5626976.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party, with all legitimate inferences to uphold the Opinion, the Panel finds that the Opinion incorrectly stated or applied the law and, as such, it is contrary to law. (*Ibid*.; see also *Russell v. Nelson* (1969) 1 Cal.App.3d 919, 922.)

In some cases, after addressing the sufficiency of the evidence, and consistent with the standards described above, the outcome might result in resolving a purely legal question. The recent revision to OTA's Rules for Tax Appeals severed the former ground for a rehearing (i.e., insufficient evidence or contrary to law) into two separate grounds effective with petitions filed on and after March 1, 2021. (Cal. Code Regs., tit. 18, § 30604(a)(4)-(5).) This does not create two new and different grounds for rehearing. The revision merely clarifies that it is appropriate to streamline the analysis, while still looking to existing precedent. The essential elements for a rehearing are the same under the former and current Rules for Tax Appeals. The revision serves to make clear that the analysis may now focus solely on sufficiency of the evidence or application of law, or both, as relevant. (Cal. Code Regs., tit. 18, § 30604(a)(4)-(5).)

In the instant appeal, CDTFA does not contend that the Opinion is unsupported by any substantial evidence and does not dispute the evidentiary findings of the Opinion. Furthermore, the pertinent facts are undisputed, and, for that matter, there are no factual disputes on appeal. As such, this appeal turns entirely on a question of law.

Thus, we turn to whether the Opinion is contrary to law. (See Cal. Code Regs., tit. 18, § 30604(a)(5).) We believe granting a rehearing on this basis requires a finding that: (1) at least some portion of the written Opinion is contrary to law; and (2) applying a correct interpretation of the law would likely result, in whole or part, in a different holding. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779; *Appeal of NASSCO Holdings, Inc.*, *supra*.)

I. Whether OTA's Opinion is contrary to law

The pertinent evidentiary findings and facts are not in dispute. The relevant facts and findings are as follows:

1. Appellants reported and paid tax on the distribution of shisha products in this state during the period October 1, 2012, through September 30, 2015 (claim period).
2. Appellants timely filed a claim for refund of all taxes paid pursuant to Revenue and Taxation Code (R&TC) section 30123 during the claim period. [5]
3. Appellants' shisha products contained 16.2 percent dry tobacco during the claim period.[6]
4. Shisha is a type of combustible[7] tobacco that is smoked with a hookah.[8]
5. Appellants are entitled to the refunds claimed if their shisha products do not meet the definition of "tobacco products" within the meaning of R&TC section 30121.

[5] All citations to the R&TC are to the language in effect during the claim period.

[6] CDTFA did not dispute the tobacco percentage (16.2 percent) or the use of dry tobacco weight.

[7] One of appellants' arguments on appeal is that shisha products are not directly lighted or combusted due to the moisture. The focus of the legal inquiry is whether appellant's shisha products constitute "smoking tobacco." It is undisputed that smoke is generated from the heating process. Thus, we need not address whether the heating method applied to cause the tobacco to burn and generate smoke will fully or partially, directly or indirectly, combust the tobacco. It is sufficient simply to note that neither party has disputed that the shisha products are heated, and that there is enough heat applied to cause the shisha products to emit smoke.

[8] This definition is contained in appellants' Exhibit 4: "Hookah tobacco (also known as waterpipe tobacco, maassel, shisha, narghile, or argileh) is a type of combustible tobacco that is smoked with a hookah (waterpipe)."

The R&TC imposes a tax on the distribution of "cigarettes" and "tobacco products" in this state. (R&TC, § 30123(a), (b).) The sole issue in this petition involves the Opinion's interpretation of R&TC section 30121(b), to the extent it defines the term "tobacco products" for purposes of the tax imposed on in-state distributions of tobacco products pursuant to R&TC section 30123.[9] During the claim period, "tobacco products" was defined as follows:

> "Tobacco products" includes, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, *and any other articles or products made of, or containing at least 50 percent, tobacco,* but does not include cigarettes.

(R&TC, § 30121(b), italics and emphasis added.) Applying this section, the Opinion concluded that in-state distributions of appellants' shisha products were nontaxable because they contain less than 50 percent tobacco and, as such, do not meet the definition of "tobacco products."[10] We find this interpretation to be contrary to a plain reading of the statute, contrary to the statement of intent for the statute, and inconsistent with existing authority.

The plain language of the statute

It is undisputed that appellants' shisha products are smoked in hookah pipes and contain tobacco. Thus, appellants' shisha products are a form of smoking tobacco. Tobacco products include "all forms of . . . smoking tobacco." (R&TC, § 30121(b).) Furthermore, the 50 percent requirement does not apply to certain *specified* tobacco products including "smoking tobacco."[11] (*Ibid*.) By its plain terms, the 50 percent requirement only applies to other *unspecified* articles or products "made of, *or containing at least 50 percent*, tobacco." (*Ibid*., italics added.) Smoking tobacco is a *specified* tobacco product, and the 50 percent requirement does not apply to *specified* tobacco products. Thus, in the April 28, 2021 Opinion, the Panel's application of the 50 percent requirement to a *specified* tobacco product is contrary to law. As a consequence, the Opinion incorrectly found that tax does not apply, and granted appellants' refund claim. This

[9] The terms "cigarettes" and "tobacco products" are separately defined in subdivisions (a) and (b), respectively, of R&TC section 30121.

[10] R&TC section 30121 was subsequently amended to eliminate the 50 percent language. It is undisputed that appellants' shisha products constitute tobacco products under current law. This Opinion only addresses the application of tax during the claim period (October 1, 2012, through September 30, 2015).

[11] The tobacco products explicitly specified in the statute as taxable irrespective of the 50 percent threshold are: cigars, smoking tobacco, chewing tobacco, and snuff (specified tobacco products). (R&TC, § 30121(b).)

finding is material because a correct application of R&TC 30121(b) would have resulted in denying the refund claims.

Statement of electoral intent

California voters approved R&TC sections 30121, and 30123, with the passage of Proposition 99. (See Initiative Measure (Prop. 99, § 4, approved Nov. 8, 1988, effective Jan. 1, 1989). This measure included a statement of electoral intent:

> Sec. 2. The people find and declare as follows:
>
> (a) Tobacco use is the single most preventable cause of death and disease in America.
>
> (b) Tobacco-related diseases create immense suffering and personal loss, and a staggering economic cost which all Californians have to pay.....¶
>
> (e) To reduce the incidence of cancer, heart, and lung disease and to reduce the economic costs of tobacco use in California, it is the intent of the people of California to increase the state tax on cigarettes and tobacco products and do all of the following:
>
> (1) Reduce smoking and other tobacco use among children.
> (2) Support medical research into tobacco-related cancer, heart, and lung diseases.
> (3) Treat people suffering from tobacco-related diseases.
> (4) In recognition of the uncompensated costs of tobacco-related illness, support treatment of patients who cannot afford to pay for services.

(*Id*. at § 2.) This measure also added a provision to the California Constitution guaranteeing that the funds generated from the tax supports these goals. (Cal. Const. Art. XIII B, § 12.) In summary, the legislative intent of Proposition 99 is to reduce tobacco related diseases by increasing the cost of cigarette and tobacco products, and to use the revenue generated from the tax for specified purposes.

Appellants submitted evidence that shisha products are smoking tobacco and that the shisha products are just as, if not more, dangerous than smoking cigarettes. Appellants' Exhibit 4 includes statistics from the United States Food and Drug Administration (FDA). The FDA found that "A typical one-hour hookah session involves inhaling 100–200 times the volume of smoke from a single cigarette." Appellants' Exhibit 5 is a California Department of Public Health (CDPH) document explaining that "Smoking hookah for 45-60 minutes can be equivalent to smoking 100 or more cigarettes." Appellants' Exhibit 6 is another CDPH document, produced

for owners of multi-unit buildings, which states: "Smoking tobacco using a hookah poses serious health risks to smokers and to those exposed to the smoke." It also explains that "Restricting smoking, including use of a hookah, will protect your most vulnerable tenants including children ....."

The electoral intent was to tax distributions of cigarettes and tobacco products to reduce tobacco-related diseases. Thus, Proposition 99 taxes in-state distributions of cigarettes and tobacco products. (See R&TC, § 30123.) It would not fit with electoral intent to exempt shisha products from the taxes imposed by R&TC section 30123, and tax a potentially less dangerous product (cigarettes). Smoking tobacco is a tobacco product, it is known to cause disease, and for this reason the people of California enacted R&TC section 30123, which clearly and unambiguously taxes distributions of "all forms of . . . smoking tobacco" in this state. "[T]he basic principle of statutory and constitutional construction [ ] mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language." (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) The stated intent in taxing smoking tobacco is to reduce to incidence of tobacco-related diseases. In other words, the plain language (to tax smoking tobacco) is consistent with the statement of intent (to reduce tobacco related diseases). By its terms, there is no stated exemption for smoking tobacco. Thus, we further find that exempting distributions of appellants' smoking tobacco from tax would be contrary to the stated intent of the people of California.

Existing authorities

Although the plain language of the statute is controlling, and the foregoing is thus dispositive, it bears mentioning that this interpretation is consistent with CDTFA's longstanding application of the law. Specifically, on September 27, 1996, CDTFA published in its Business Taxes Law Guide (BTLG) a Cigarette and Tobacco Products Tax Annotation interpreting the definition of "tobacco products" in R&TC section 30121. CDTFA annotations are not law, and their legal interpretations are not binding on OTA. Nevertheless, in deciding an appeal, OTA may afford some consideration and give greater weight to annotations which reflect longstanding agency interpretations, especially where CDTFA is interpreting a statute that it is charged with interpreting. (*Appeal of Praxair, Inc.*, 2019-OTA-301P; *Appeal of Martinez Steel Corporation*

(PFR) 2020-OTA-074P.) CDTFA's Annotation, reproduced in its entirety below,[12] provides as follows:

> **Tobacco Products—Tobacco Content**. The Cigarette and Tobacco Products Tax applies to all forms of cigars, smoking tobacco, chewing tobacco, and snuff, regardless of the amount of tobacco they contain. In addition, the tax applies to any other articles or products which are made entirely of tobacco or contain at least 50 percent tobacco, excluding cigarettes.

(CDTFA Cigarette and Tobacco Products Tax Annotation (9/27/96).)[13] This represents CDTFA's longstanding interpretation of a statute that it is charged with interpreting. There is no argument or evidence that CDTFA has ever taken a contrary position; namely, that cigars, smoking tobacco, chewing tobacco, or snuff (i.e., specified products) must contain at least 50 percent tobacco to constitute a tobacco product.

CDTFA's interpretation is also consistent with the statement of electoral intent. The legislature delegated to CDTFA the authority to prescribe, adopt, and enforce *retroactive* rules and regulations pertaining to the administration and enforcement of the cigarette and tobacco taxes imposed by Proposition 99. CDTFA did not promulgate any regulations clarifying the definition of "tobacco products." Nevertheless, we would not expect to find a regulatory definition here because the purpose of a regulation is to implement, interpret, or make specific the law enforced and, as such, it is not necessary for an agency to clarify statutory language which, as here, is clear and unambiguous. (Gov. Code, §§ 11342.600, 11349.1(a)(1).)

Based on these factors, and especially the plain language of the statute, all of which tend to give weight to CDTFA's interpretation, we believe CDTFA's interpretation is also deserving of some consideration and deference by a Panel. (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7.) After considering all the factors described above, a Panel

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[12] Annotations provide notice of the existence of any conclusions reached in selected legal rulings of counsel regarding the application of law. (Cal. Code. Regs., tit. 18, §§ 5700(c)(1) [prior to July 1, 2017] & 35101(c)(1) [on and after July 1, 2017].) Only the annotated text published in the Business Taxes Law Guide meets the legal definition of an "Annotation." (*Ibid*.) Backup letters are not a part of, and cannot be cited as, Annotations.

[13] CDTFA's Excise Division requested confirmation from CDTFA's Legal Division of its position that tax applies to distributions of specified products (i.e., cigars, smoking tobacco, chewing tobacco, and snuff) regardless of tobacco percentage. CDTFA's Legal Department, via memorandum dated September 27, 1996, concurred with this position, and noted that CDTFA's position was consistent with treatment of tobacco products under Federal Law. Federal law taxes distributions of specified tobacco products (i.e., products listed in the federal definition of tobacco products, which included pipe tobacco) regardless of the tobacco percentage. (See 28 U.S.C. 5702.) CDTFA noted its position is consistent with the taxation of tobacco products under federal law. CDTFA annotated a blurb summarizing this position in its BTLG (reproduced in full, above).

should not take lightly overturning CDTFA's longstanding interpretation of R&TC section 30121. Overturning a longstanding, generally accepted, interpretation that specified tobacco products are taxable under R&TC section 30123 regardless of tobacco percentage cannot be examined in a vacuum. This has far-reaching consequences. Such a finding may impact not just appellants' shisha products during the claim period, but also the application of tax to distributions of all other forms of cigars, smoking tobacco, chewing tobacco, and snuff, and would undermine a constitutional amendment ratified by the electorate. The April 28, 2021 Opinion did not consider the tobacco percentage of other types of specified products in the context of whether excluding appellants' shisha products is consistent with the entire statutory framework of Proposition 99. Additionally, permitting a tobacco distributor to escape taxation under R&TC section 30123 simply by adding sweeteners to a tobacco product creates a loophole that encourages the use of this type of tobacco product over other equally harmful tobacco products, which was not the intent of Proposition 99. Furthermore, for the reasons mentioned above, we found the language of the statute to be plain and unambiguous even absent this annotation.

We grant CDTFA's petition for a rehearing on the basis that the findings expressed in the Opinion are contrary to law, and these errors resulted in an incorrect disposition of the appeal.

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Andrew J. Kwee
Administrative Law Judge

I concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

N. DANG, dissenting:

I would deny the California Department of Tax and Fee Administration's (respondent's) petition for rehearing (PFR) based on the oft-cited rule that dissatisfaction with the Opinion and the attempt to reargue the same issue previously considered and addressed in the Opinion is insufficient to demonstrate that a rehearing is warranted. (*Appeal of Graham and Smith*, 2018-OTA-154P.) A review of the Opinion for consistency with the law should not entail the substitution of one panel's reasoning for another's, particularly where the issue is one of first impression and the Opinion properly considered all the relevant evidence and authorities in reaching its holding. Rather, the standard for granting a rehearing based on the "contrary to law" standard is a high one which requires more than just convincing a new panel that the findings of an Opinion should be reversed based on the same arguments and evidence presented prior to the issuance of the Opinion.

In determining whether an Opinion is contrary to law, the evidence must be considered in a light most favorable to the prevailing party and *all legitimate and reasonable inferences made to uphold the findings of the Opinion*. (See *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) Correctly applying this standard of review means that, generally, an Opinion is contrary to law only in those limited circumstances where: (1) there is a failure to find on a material issue raised by the parties; (2) the findings are irreconcilable; or (3) where the evidence is without conflict in any material point and insufficient as a matter of law. (See *Brooks v. Harootunian* (1968) 261 Cal.App.2d 680, 685-686.)

Respondent takes the position that a rehearing is warranted because the Opinion is contrary to law but fails to address any of these conditions. Rather, respondent's PFR merely reiterates the same arguments previously considered and addressed in the Opinion, and then concludes for those same reasons, that the Opinion is contrary to law because it failed to find in respondent's favor.

For instance, respondent once again argues that under an ordinary reading of former Revenue and Taxation Code (R&TC) section 30121(b), the qualifying phrase "made of, or containing at least 50 percent, tobacco" must be construed as applying only to the last antecedent (that is, "other articles or products"), and thus, that the distribution of smoking tobacco in this state is taxable regardless of tobacco content.

It is interesting to note that for well over 20 years respondent took a contrary position, namely, that from a grammatical standpoint this statute could be interpreted in two ways – one of which is the interpretation advocated by appellants and affirmed in the Opinion. (See the backup letter to respondent's Cigarette and Tobacco Products Tax Annotation (9/27/96) stating that the "definition in Section 30121 can be interpreted in two ways, depending on whether the clause 'made of, or containing at least 50 percent tobacco' is read to qualify all the items listed before it in the definition or only 'any other articles or products.'") It seems highly improbable that the author of this backup letter[1] and a unanimous panel of three administrative law judges would find the ordinary language of the statute to be ambiguous were it not so – by its very nature, the meaning of a statute which is clear and unambiguous should be self-evident and not subject to vigorous and lengthy discussion, as demonstrated in the Opinion and this backup letter.

Respondent also fails to consider the multitude of authority interpreting syntactically similar language in a manner contrary to the one advocated by respondent. (See, e.g., *Dong v. Smithsonian* (D.C. Cir. 1997) 125 F.3d 877 [applying the qualifying clause serially]; *People v. Strickler* (1914) 25 Cal.App. 60 [applying the qualifying clause serially].) In fact, courts have long struggled with the difficult and challenging question of whether a qualifying clause should be applied serially or to the last antecedent, indicating that there is no universally agreed upon outcome for how these clauses should be applied. (See *Lockhart v. U.S.* (2016) 577 U.S. 347; Wexler, *Fun with Reverse Ejusdem Generis* (2020) 105 Minn. L. Rev. 1.)

Further, it is worth noting that had the electorate unequivocally intended the qualifying phrase to apply only to the last antecedent, it could have simply omitted the word "other" from the statute. For example, by stating that the term tobacco products includes, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and *any articles or products* made of, or containing at least 50 percent, tobacco, it becomes clear that the qualifying phrase should only apply to the last antecedent. That the electorate failed to do so leaves open the very legitimate question of how the word "other" should be interpreted.

Moreover, because the issue raised by appellants is one of first impression, there is no authority expressly controlling how the qualifying clause should be applied in this specific instance. For all the foregoing reasons, the Opinion's failure to conclude, based on an ordinary

[1] Respondent's then-acting assistant chief counsel authored this backup letter.

reading of the statute, that the statutory language must be interpreted in the manner advocated by respondent is not contrary to law.

Respondent also argues that the Opinion misconstrues the language of the statute by failing to apply various statutory canons of construction (e.g., the last antecedent rule) and to properly consider the intent of the electorate in enacting former R&TC section 30121(b). The Opinion acknowledged the applicability of these canons but also found countervailing canons of construction supporting appellants' position (e.g., reverse ejusdem generis). On this basis, the Opinion correctly concluded that the proper interpretation of former R&TC section 30121(b) could not be made solely on grammatical considerations. More importantly, as discussed in great length in the Opinion, the canons of construction are not binding rules which must be applied rigidly, but are merely interpretive tools to assist in discerning legislative intent. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1411-1412.) Therefore, the Opinion's failure to uphold respondent's interpretation based on the last antecedent rule or any other canon of construction is not contrary to law.

Regarding electoral intent, respondent agrees with the finding of the Opinion that initiative measure Proposition 99 (Prop. 99) was enacted to reduce tobacco use and its associated costs to the public through a substantial increase in the cigarette excise tax and a broadening of the tax base to include other tobacco products which were previously not subject to any excise tax. However, respondent takes issue with the finding of the Opinion that this does not conclusively support respondent's interpretation of former R&TC section 30121(b); that is, that the statute should be read broadly to apply the new excise tax to smoking tobacco regardless of tobacco content. Respondent's only explanation is that because smoking tobacco causes demonstrable harm to human health and the environment, the very harms the statute was enacted to mitigate, this finding is contrary to the express intent of the electorate, and therefore, must be contrary to law.

This reasoning is misplaced. As discussed in the Opinion, the critical question is not whether the electorate enacted Prop. 99 to mitigate the harms caused by tobacco use. That it did so is obvious and undisputed. The critical question is to what *extent* did the electorate intend the new excise tax to apply. This question remains unanswered. There is no evidence that in 1988, when the voters approved Prop. 99 over 30 years ago, they considered tobacco products containing less than 50 percent tobacco to be sufficiently harmful to human health such that they

should be subject to the new excise tax. Rather, the statute's broad carveout provision exempting *any other* articles or products containing less than 50 percent tobacco from the new excise tax, tends to suggest that the electorate did not consider items containing less than 50 percent tobacco to be sufficiently harmful to human health. At the very least, this indicates that the electorate's motive for imposing the new excise tax is more complicated than merely taxing any product containing tobacco.

Respondent also offers no answer for why, under its interpretation, the electorate would choose to arbitrarily tax some items regardless of tobacco content, and all others only if they should contain at least 50 percent tobacco. Given that there does not appear to be any significant or material difference amongst the various forms of tobacco products and the resulting harm caused by their use, it is at least plausible that the electorate intended there to be only one standard for taxing these products. This makes sense considering that many of the specifically enumerated tobacco products already meet or exceed the 50 percent tobacco content requirement (e.g., cigars).

Regardless, a review of the Opinion for consistency with the law is not one which entails examining the nature or quality of the reasoning behind the Opinion. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) Therefore, respondent's argument, which seeks only to contest the merits of the Opinion's reasoning and not the application of the law or the legal standard employed, is insufficient to establish that the Opinion is contrary to law.

Finally, it is necessary to clarify that while the Opinion rejected several of the arguments made by respondent, it ultimately found the statutory interpretations advocated by both parties to be reasonable. Where there are two reasonable interpretations of a taxing statute, the law is clear that the statutory interpretation favoring the taxpayer should prevail. (*Edison Cal. Stores v. McColgan* (1947) 30 Cal.2d 472, 476; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 326; *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 759.)

Notably, respondent does not argue that a different result would be warranted, where, as here, it is impossible to determine the application of a taxing statute with any reasonable certainty. The position ordinarily taken by the government in this situation is to argue that its annotation should be afforded deference. In any event, the Office of Tax Appeals is not bound to follow respondent's annotations, which are merely persuasive authority. (*Yamaha Corp. of America v. State Bd. Equalization* (1998) 19 Cal.4th 1.) As stated in the Opinion, the weight to

be accorded respondent's annotation "turns on a legally informed, commonsense assessment of their contextual merit." (*Id*. at p. 14.) The Opinion considered the reasoning expressed in the backup letter to respondent's annotation and found it to be unpersuasive. Indeed, respondent itself chose not to rely upon this reasoning in advocating for its position. Accordingly, the Opinion's finding that this annotation is not entitled to any significant weight is not contrary to law.

In conclusion, for the many reasons expressed above, respondent's PFR should be denied because it clearly fails to establish that any material finding of the Opinion was contrary to law.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

Date Issued: 9/9/2021