OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. O'NEILL**	OTA Case No. 19115444

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: J. O'Neill

For Respondent: Camille Dixon, Tax Counsel

A. VASSIGH, Administrative Law Judge: On February 22, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) proposing additional tax of $3,437 and applicable interest for the 2014 tax year. In the Opinion, OTA held that J. O'Neill (appellant) had not met his burden to establish error in FTB's proposed assessment of additional tax for 2014, or the federal adjustments upon which it was based, and imposed a $750 penalty for instituting and maintaining a proceeding based upon a frivolous or groundless position, pursuant to Revenue and Taxation Code (R&TC) section 19714. Appellant timely filed a petition for rehearing (petition) under R&TC section 19048. Upon consideration of appellant's petition, OTA concludes appellant has not established a basis for 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; 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.)

In his petition, appellant argues that a rehearing should be granted because of at least one of the following three grounds: (1) newly discovered, relevant evidence; (2) insufficient evidence to justify the Opinion; or (3) the Opinion was contrary to law.

First, appellant contends that a rehearing should be granted because of newly discovered, relevant evidence. OTA notes that appellant provided with his PFR, Exhibit A, a screenshot from appellant's FTB 2014 account transcript dated October 26, 2021, and Exhibit B, a screenshot from the Internal Revenue Manual. Appellant has not explained why these items could not have been reasonably obtained and provided prior to the issuance of the Opinion on February 22, 2022. Both were presumably available to appellant prior to this date and appellant has not offered any new evidence that could not have been reasonably discovered and provided prior to issuance of the Opinion. Instead, appellant asserts the same argument he made prior to the issued Opinion. Specifically, appellant misinterprets and misapplies various statutes in his petition, and argues that the payments he received during the tax year in question were not taxable, and that the IRS determination, upon which FTB based its assessment, was erroneous. The Opinion addressed these claims, and explained why the law supports FTB's adjustments to appellant's 2014 tax account.

Second, appellant contends that a rehearing should be granted because there is insufficient evidence to justify the Opinion. 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 conclusion. (Code Civ. Proc., § 657; *Appeals of Swat-Fame, Inc. et al.*, 2020-OTA-045P; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.)[1] Here, instead of showing that the conclusion in OTA's Opinion was unsupported by sufficient evidence, appellant offers the same evidence that formed the findings underlying OTA's Opinion. Appellant also selectively points to certain evidence to support his position, while ignoring relevant evidence that contradicts his position. For instance, appellant points to an FTB account print-out that shows that FTB initially accepted the California tax return he filed on January 15, 2015, showing zero tax. However, the evidence shows that FTB later adjusted appellant's California taxable income based on information it had received from the IRS, to reflect the payments Datasat Digital Entertainment (Datasat) reported it

[1] As provided in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing.

had paid to appellant during the 2014 tax year. OTA's Opinion was based on *all* of the relevant evidence provided by the parties. In his petition, appellant has not shown that there was insufficient evidence to justify the Opinion.

Third, appellant argues that the Opinion is contrary to law. The contrary to law standard of review involves a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) 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. (*Appeal of Martinez Steel*, 2020-OTA-074P; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the Opinion if possible. (*Appeals of Swat-Fame, Inc. et al*., *supra*.) The Opinion correctly held, based on the evidence, that appellant received payment from Datasat, and that such payment was taxable income. The Opinion explained the case law regarding California's applicable tax laws as well as the frivolous arguments appellant brought forth in his appeal. Appellant's dissatisfaction with the Opinion, and his attempt to reargue the same issues, does not constitute a ground for rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Appellant has not shown that the Opinion is contrary to law.

Appellant has not shown that a rehearing based on the grounds of: (1) newly discovered, relevant evidence, (2) insufficient evidence to justify the Opinion, or (3) that the Opinion was contrary to law. For the foregoing reasons, appellant's petition is hereby denied.

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

We concur:

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

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Andrew Wong
Administrative Law Judge

Date Issued: 4/14/2023