OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **G. HARDT**	) OTA Case No. 21047580)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jeffrey J. Rondini, MBA, EA

For Respondent: Brian Werking, Tax Counsel III

E. LAM, Administrative Law Judge: On October 12, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board's (FTB's) proposed assessment of tax. In the Opinion, OTA held (1) appellant had not shown error in FTB's proposed assessment of additional tax, which was based on IRS adjustments, and (2) the accuracy-related penalty should not be abated. Appellant timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellant's petition, OTA concludes he 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 filing party (here, appellant) seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise that 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 that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P.)

Appellant asserts there are three grounds to support his petition. First, appellant contends that a rehearing should be granted because of newly discovered, relevant evidence. A party seeking a rehearing under the ground of newly discovered, relevant evidence must show that: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence is material to the party's case. (*Doe v. United Air Lines, Inc*. (2008) 160 Cal.App.4th 1500, 1506.) Newly discovered evidence must be material in the sense that it is likely to produce a different result. (*Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 779.) However, 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 issuance of the Opinion. Specifically, appellant continues to argue in his petition that there were "erroneous calculations made by the IRS on its own F[or]m 866 and faulty [a]udit proceedings," resulting in a rental property basis of zero dollars when computing the taxable gain on the sale of the rental property. However, FTB's proposed assessment was based on the U.S. Tax Court stipulation entered on August 9, 2016 (U.S. Tax Court stipulation), which, as documented in the Appeals Case Memo and as noted in footnote 1 of the Opinion, provided a property basis of $191,000. Appellant has not submitted any new documentary evidence that shows an error in the stipulated rental property's basis, or in FTB's use of the U.S. Tax Court stipulation to make its proposed assessment. Appellant thus fails to provide any newly discovered evidence.

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, this panel must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Opinion should have reached a different conclusion. (Code Civ. Proc., § 657; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) 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 for OTA's Opinion. To reiterate, the Opinion relied on both the final federal adjustments found in the U.S. Tax Court stipulation, to which appellant was a party, and the fact that there were no further adjustments by the IRS. Appellant thus has not shown that there was insufficient evidence to justify the Opinion.

Lastly, appellant contends that a rehearing should be granted because of an error in law that occurred during the appeals hearing or proceeding. "[A]n error in law is a claim of a procedural wrong," or error in the appeals proceeding, such as an erroneous ruling on the admission or rejection of evidence. (*Appeals of Swat-Fame, Inc.*, *et al.*, *supra*, at fn. 2; see also Cal. Code Regs., tit. 18, § 30604(b).) Here, appellant argues that his letter to the IRS dated September 12, 2018, was not considered. However, this same letter was admitted into the evidentiary record three times as part of appellant's opening brief and as FTB's exhibits H and L, and was therefore duly considered when the Opinion was issued. More importantly, appellant's contention does not constitute an error in law that occurred during the appeals hearing or proceeding. Appellant thus has not demonstrated that an error in the law occurred.

Accordingly, OTA finds that a rehearing based on the grounds of (1) newly discovered, relevant evidence, (2) insufficient evidence to justify the written Opinion, or (3) an error in law that occurred during the appeals hearing or proceeding, is not warranted. Appellant has not satisfied the requirements for granting a rehearing and, as such, the petition is denied.

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Eddy Y.H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

We concur:

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Amanda Vassigh
Administrative Law Judge

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Lauren Katagihara
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Lauren Katagihara
Administrative Law Judge

Date Issued: 3/10/2023