OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. HANEY**	) OTA Case No. 220310003)))))

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: J. Haney

For Respondent: Joel M. Smith, Attorney

E. LAM, Administrative Law Judge: On April 18, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining the actions of respondent Franchise Tax Board (FTB) proposing additional tax and a late filing penalty for the 2016 tax year, and additional tax, a late filing penalty, and a notice and demand (demand) penalty for the 2018 tax year. In the Opinion, OTA held: (1) appellant had not shown any error in the proposed assessments for the 2018 and 2016 tax years, (2) appellant had not demonstrated reasonable cause to abate the late filing penalties for the 2018 and 2016 tax years, and (3) frivolous appeal penalties should not be imposed for the 2018 and 2016 tax years.[1] 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 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 (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, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably

[1] In the original appeal, FTB conceded that the demand penalty of $183 for the 2018 tax year was improperly imposed. Therefore, OTA held that FTB's action in imposing the demand penalty for the 2018 tax year is reversed, as conceded by FTB.

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 OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P.)

Appellant asserts that a rehearing is warranted because there was insufficient evidence to justify the Opinion and the Opinion was contrary to law. Appellant sets forth various frivolous arguments,[2] including: (1) the W-2s from Toy Locker Inc. are inadmissible being hearsay and not qualified for any "business record" exception to Federal Rule of Evidence; and (2) FTB "has not carried their burden of proof" because the IRS "did not create [Internal Revenue Code (IRC) section] 6020(b) returns," which is "credible evidence in support of the fact that [a]ppel[l]ant did nothing taxable."

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. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P (*Swat-Fame*), citing Code Civ. Proc., § 657; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.) Here, instead of showing that there is insufficient evidence to justify the Opinion, appellant asserts various frivolous arguments in the petition, such as that appellant "did nothing taxable," which has already been considered and rejected on appeal. For purposes of tax appeals before OTA, all relevant evidence shall be admissible.[3] (Cal. Code Regs., tit. 18, § 30214(f)(1).) When FTB proposes a tax assessment based on an estimate of income, FTB's initial burden is to show that the proposed assessment was reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) As explained in the Opinion, FTB met its initial burden by presenting evidence that appellant had W-2 earned income from Toy Locker Inc. for both the 2018 and 2016 tax years. However, appellant has not presented any evidence to overturn FTB's proposed assessment on appeal. Appellant's various arguments in this petition, after weighing evidence in the record, including reasonable inferences based on that evidence, does not reveal the Opinion should have reached a different conclusion. (See *Swat-Fame*, *supra*.)

[2] OTA will not address frivolous arguments "with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." (*Wnuck v. Commissioner*, (2011) 136 T.C. 498, 499, citing *Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417, 1417.)

[3] Rules relating to evidence and witnesses contained in the California Evidence Code and California Code of Civil Procedure shall not apply to any proceedings. (Cal. Code Regs., tit. 18, § 30214(f).)

To find that the Opinion is against (or contrary to) law, OTA must determine whether the Opinion is "unsupported by any substantial evidence." (*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 a review of the Opinion to indulge "in all legitimate and reasonable inferences" to uphold the Opinion. (*Swat-Fame*, *supra* citing *Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907.) 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. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907; *Swat-Fame*, *supra*.) 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).)

Here, appellant has not demonstrated that the Opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, *supra*.) In fact, appellant has not presented any evidence to overturn FTB's proposed assessment as discussed in the Opinion. As appellant provided no credible, competent, or relevant evidence showing error in FTB's proposed assessment, FTB's determination was upheld. (See *Appeal of Bindley*, *supra*.) Appellant's dissatisfaction with the Opinion and attempt to reargue the same issue does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, *supra*.) Therefore, a rehearing on the grounds that the Opinion is contrary to law is not warranted.

Appellant contends that the frivolous *return* penalty under R&TC section 19179 should not be imposed by FTB, because the Opinion decided against imposing the frivolous *appeal* penalty pursuant to R&TC section 19714 for the 2016 and 2018 tax years. However, the frivolous *appeal* penalty under R&TC section 19714 is imposed when an appellant institutes or maintains an appeal before OTA primarily for delay or based on frivolous or groundless claims. (*Appeal of Reed*, 2021-OTA-326P, fn. 6.) By contrast, the frivolous *return* penalty under R&TC section 19179, is imposed based on circumstances surrounding the filing of returns. (*Ibid*.) Therefore, the frivolous *return* penalty under R&TC section 19179 and the frivolous *appeal* penalty under R&TC section 19714 are separate and distinct from each other. (*Ibid*.) OTA's decision not to impose a frivolous *appeal* penalty under R&TC section 19714 is not grounds to abate FTB's imposition of the frivolous *return* penalty under R&TC section 19179. Furthermore, OTA has no authority to review frivolous *return* penalties imposed by FTB under

R&TC section 19179 and declines to discuss this penalty further. (*Appeal of Balch*, 2018-OTA-159P, fn. 2.)

Appellant has not satisfied the requirements for granting a rehearing and, as such, this petition is denied.

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Eddy Y.H. Lam
Administrative Law Judge

We concur:

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Asaf Kletter
Administrative Law Judge

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Cheryl L. Akin
Administrative Law Judge

Date Issued: 9/27/2023