OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **N. SAIFAN, JR. AND** **N. SAIFAN**	OTA Case No. 19115451

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: N. Saifan, Jr. and N. Saifan

For Respondent: David Hunter, Attorney

A. LONG, Administrative Law Judge: On March 23, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) proposed assessment of tax. In the Opinion, OTA held that the receipt of $400,845 from N. Saifan, Jr.'s S Corporation were constructive dividends and therefore must be included in N. Saifan, Jr. and N. Saifan's (appellants') taxable income. Appellants timely filed a petition for rehearing under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellants' petition, OTA concludes that they have 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 which occurred prior to issuance of the Opinion and prevented the 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 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 OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P.)

Appellants request a rehearing on the grounds that there was an irregularity in the appeal proceedings, an accident or surprise occurred during the appeal proceedings, and the Opinion is contrary to law. Each ground is addressed separately.

Irregularity in the Proceedings

An irregularity in the proceedings warrants a rehearing when there is any departure from the due and orderly method of conducting the appeal proceedings by which the substantial rights of a party have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Gay v. Torrance* (1904) 145 Cal. 144, 149.[1]) Courts have defined an irregularity in the proceedings as "an overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct." (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182.)

For this ground, appellants state only the following: "We refiled our taxes as directed by the Federal Judge, because the guilty plea was that the taxes were incorrectly filed, but there was no plea of guilt on any amount of money."[2] It is unclear what appellants are arguing for this ground. To the extent that appellants allege that an irregularity happened during his federal case, this is not an irregularity that occurred during their OTA appeals proceedings and is therefore not a basis grant a rehearing.[3]

Accident or Surprise

To constitute an accident or surprise, a party must be unexpectedly placed in a detrimental condition or situation without any negligence on the part of that party. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) Interpreting Code of Civil Procedure section 657, the

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

[2] Appellants requested to submit "detailed materials to support [their] request for rehearing." OTA granted the request by allowing appellants additional time to file an additional brief; however, OTA did not receive any additional briefs or materials from appellants.

[3] To the extent appellants are instead arguing that there is insufficient evidence to justify the written opinion because there was no plea of guilt in their federal case, 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 determination. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) As explained in the Opinion, FTB is not bound to follow the IRS's determination (*Appeal of Black*, 2023-OTA-023P) and appellants were given the opportunity to provide additional evidence to support their position that the receipt of $400,845 was not constructive dividends. A review of appellants' documentation in the record does not support such a finding. As such, there is no basis for a rehearing on this ground either.

California Supreme Court held that the terms "accident" and "surprise" have substantially the same meaning. (*Ibid.*)

Appellants assert that they were surprised by FTB's comment that it had no knowledge of appellants' 2006 amended return and that the Opinion did not acknowledge that appellants in fact filed an amended return. In FTB's reply brief, it admits that it received appellants' amended return on October 24, 2017. However, FTB's failure to acknowledge that an amended return was indeed filed with FTB did not place appellants in a detrimental situation or affect the outcome of the Opinion. A review of the amended return indicates that appellants had still omitted their receipt of $400,845. This does not change OTA's finding that appellants filed a fraudulent California return with the intent to evade tax or that the constructive receipts should have been included on their tax return filings.

Regarding the Opinion, appellants should not have been surprised that the Panel did not reference appellants' amended return. When a panel conducts an oral hearing, the appeal is submitted for an opinion based upon the oral hearing record after the record is closed. (Cal. Code Regs., tit. 18, § 30209(b).) "Oral hearing record" means the record the panel must consider in reaching a determination, which includes admitted evidence. (Cal. Code Regs., tit. 18, § 30102(w).)

The Minutes & Orders dated September 26, 2022, catalogues the 10 exhibits (listed as Exhibits 1 through 10) appellants intended to submit into evidence and the seven exhibits (listed as Exhibits A through G) FTB intended to submit into evidence at the oral hearing. Before the oral hearing date, on October 11, 2023, OTA also provided the parties with an electronic Exhibit Binder, which is an electronic document of Exhibits 1 through 10 and Exhibits A through G that the parties intended to submit into evidence. On the day of the oral hearing, all of the above stated exhibits were admitted into the record. These exhibits did not include appellants' 2006 amended return. Appellants knew or should have been aware what was in the oral hearing record that the Panel would be reviewing to reach a determination. Therefore, the absence of a reference to appellants' amended return in the Opinion is not an accident or surprise. Accordingly, there is no basis to grant a rehearing on this ground.

Contrary to Law

To find that an opinion is against or contrary to law, OTA need not reweigh the evidence but must find that the opinion is "unsupported by any substantial evidence." (*Appeal of Graham*

and Smith, *supra*, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) The question does not involve examining the quality or nature of the reasoning behind OTA's opinion, but whether the opinion can be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) This requires a review of the opinion in a manner most favorable to the prevailing party (here, FTB) and indulging in all legitimate and reasonable inferences to uphold the opinion. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

Appellants argue that the Opinion compares their appeal to cases that are dissimilar to the facts of their appeal because none of the cited cases dealt with persons overseas on active duty or in a war zone. IRC section 112 excludes from gross income compensation received for active service for any month wherein enlisted personnel and commissioned officers served in a combat zone.[4] However, appellants had the burden to prove that FTB's inclusion of $400,845 to taxable income as constructive dividends was incorrect. (*Appeal of Bindley*, 2019-OTA-179P.) Appellants did not meet their burden of proving, among other things, this amount that N. Saifan, Jr. received from his S Corporation was combat pay.[5] Therefore, there was no need for the Opinion to consider whether appellants' additional income of $400,845 was tax-exempt combat pay. Accordingly, the Opinion is not contrary to law.

Based on the foregoing, appellants have not shown grounds for a rehearing exist, and appellants' petition for rehearing is hereby denied.

DocuSigned by:
272945E7B372445...
Andrea L.H. Long
Administrative Law Judge

We concur:

DocuSigned by:
A11783ADD49442B...
Huy "Mike" Le
Administrative Law Judge

DocuSigned by:
1A9B52EF88AC4C7...
Michael Geary
Administrative Law Judge

Date Issued: 3/7/2024

[4] R&TC section 17131 incorporates IRC section 112.

[5] It is noted that the Notice of Action excludes combat wages of $43,555 from appellants' taxable income.