OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **C. CHIEN**	OTA Case No. 230212616

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Samuel Landis, Attorney

For Respondent: Carolyn S. Kuduk, Attorney

A. KLETTER, Administrative Law Judge: On May 30, 2024, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) proposing additional tax of $361,726, an accuracy-related penalty (ARP) of $72,345.20, and applicable interest for the 2019 tax year. In the Opinion, OTA held that appellant had not shown error in FTB's proposed assessment of additional tax for the 2019 tax year, and that the ARP was properly imposed and cannot be abated.

On July 1, 2024, Appellant timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19048 on the basis that the Opinion is contrary to law. Upon consideration of appellant's petition, OTA concludes that the ground set forth in the petition does not constitute a basis for granting a new hearing.

OTA will grant a rehearing where one of the following grounds for a rehearing is met and materially affects the substantial rights of the party 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 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 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*

Shanahan, 2024-OTA-040P.) 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).)

In the petition, appellant asserts that she did not fail to meet her burden to prove her adjusted basis in a commercial property located on Moffett Boulevard in Mountain View, California (the Moffett Property), and that FTB's disallowance of $147,315.59 of claimed selling costs was improper. Appellant asserts that "lack of documentation in itself does not equate to failure to meet the burden of the expense or FTB error." Appellant further asserts that "California has recognized that verbal testimony is sufficient evidence to substantiate capital expenses,"[1] and that the Opinion "errored in determining that [a]ppellant did not meet her burden." A legal dictionary defines testimony as "evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." (Black's Law Dict. (12th ed. 2024).) Here, the Opinion was decided based on the written record. Although OTA's regulations allow for submission of declarations or affidavits of persons regardless of whether an oral hearing is requested, appellant failed to provide any such documentation. (See Cal. Code Regs., tit. 18, § 30214(b).) In the petition, appellant thus fails to establish that the Opinion was contrary to law concerning its alleged failure to consider verbal testimony. Therefore, below, OTA reviews the law stated in the Opinion and its application of the burden of proof.

As described in the Opinion, a taxpayer has the burden to provide credible, competent, and relevant evidence showing error in FTB's determination. (*Appeal of Smith*, 2023-OTA-069P; Cal. Code Regs., tit. 18, § 30219(c) [burden of proof is by preponderance of the evidence]. Moreover, unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Silver*, 2022-OTA-408P.) The Opinion considered (1) appellant's claimed selling expenses, (2) appellant's other documentation supporting the adjusted basis reported on the 2019 California income tax return, (3) FTB's depreciation adjustment estimated under the rule established in *Cohan v. Commissioner* (2d Cir. 1930) 39 F.2d 540, 543-544 (*Cohan* rule), and (4) appellant's principal residence exclusion. After reviewing evidence in the record, OTA found FTB's determinations to be proper. Each determination is addressed in turn below.

As described in the Opinion, taxes are generally not capital expenditures and ordinary and necessary incidental repairs are not capital assets. (Internal Revenue Code (IRC),

[1] Appellant cites *Bailey v. Commissioner*, 472 F.2d 322 (5th Cir. 1973) but that citation appears to be incorrect, and California is not generally bound by the fifth circuit's rulings. Appellant also cites *Appeal of Johnson*, 76-SBE-016, but that citation refers to the *Appeal of A. Bailey* (76-SBE-016) 1967 WL 4032, which concerns California residency. That case did not hold, as appellant asserts, that "credible oral testimony can be sufficient to substantiate deductions and that the taxpayer's failure to keep precise records should not result in the automatic disallowance of all claimed expenses."

§ 1016(a)(1)(A)(i); see *Schroeder v. Commissioner*, T.C. Memo. 1996-336.) The Opinion considered appellant's claimed selling expenses and found that the disallowed amount consisted of state income tax withholding, prorated property taxes, and a deferred maintenance credit. Because the claimed selling costs of $147,315.59 related to non-capital expenses, FTB properly removed these expenses from appellant's reported adjusted basis. Moreover, the Opinion reviewed the adjusted basis schedule which appellant provided on appeal and that noted the schedule included amounts that appeared to be incurred for repairs or maintenance. Appellant did not provide any explanation or evidence to support that selling expenses should be included in her adjusted basis. Therefore, the Opinion held that appellant failed to meet its burden of proof with respect to the selling costs. (*Appeal of Smith*, *supra*.) In the petition, appellant fails to address the foregoing legal authorities or the Opinion's legal analysis, and points to no evidence in the record that shows that appellant properly claimed selling expenses. Therefore, appellant fails to establish in the petition that the Opinion was contrary to law concerning the disallowance of appellant's claimed selling expenses.

The Opinion reviewed appellant's other documentation of the reported adjusted basis provided on appeal, including her assertion that the movers lost her original receipts, the aforementioned adjusted basis schedule, a gain schedule, and two photographs of the Moffett Property. Concerning appellant's assertion that the movers lost her receipts, the Opinion found that unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Silver*, *supra*.) Concerning the other documentation, the Opinion noted that the schedules contained errors and inconsistencies, that appellant provided no explanation of the relevance of the photographs, and therefore, appellant failed to provide credible, competent, and relevant evidence showing error in FTB's determination. (*Appeal of Smith*, *supra*.) In the petition, appellant points to no evidence in the record that shows that these findings were incorrect or contrary to law. Therefore, appellant fails to establish in the petition that the Opinion was contrary to law concerning application of the burden of proof regarding the adjusted basis.

The Opinion describes the *Cohan* rule, which provides that if a taxpayer proves that the taxpayer is entitled to a tax benefit but does not substantiate the amount of the tax benefit, the court should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude of is the taxpayer's own making. (*Cohan v. Commissioner* (2d Cir. 1930) 39 F.2d 540, 543-544.) However, as the Opinion explains, the *Cohan* rule is inapplicable where the taxpayer presents no evidence at all that would permit an informed estimate of basis. (*Wheeler v. Commissioner*, T.C. Memo. 2014-204; *Vanicek v. Commissioner* (1985) 85 T.C. 731, 742-743; *Appeal of Hakim* (90-SBE-005) 1990 WL 176081.) The Opinion

also cites precedential authorities from OTA's predecessor which express reluctance to alter determinations made by FTB under the *Cohan* rule without independent facts under which a different approximation can be made. (*Appeal of Swimmer*, *et al.* (63-SBE-138) 1963 WL 1744; *Appeal of California Steel Industries, Inc.* (2003-SBE-001) 2003 WL 176962.)

In the underlying appeal, FTB used the *Cohan* rule to estimate (to appellant's benefit) appellant's depreciation expense under IRC section 1250 based on the assessed improvement value increases under Proposition 13. The Opinion found that FTB properly used the *Cohan* rule and noted that appellant appeared to concede the issue on appeal based on the gain schedule, which incorporated the adjustment. The Opinion reviewed appellant's adjusted basis schedule, which contained errors and did not include any original receipts or documentation and noted that appellant did not produce a depreciation schedule for the Moffett Property. Therefore, the Opinion found that appellant failed to establish error in FTB's determination. In the petition, appellant also fails to show that the *Cohan* rule was applied incorrectly and fails to provide any other independent basis to estimate her adjusted basis in the Moffett Property. Therefore, appellant fails to establish that the Opinion's finding which upheld FTB's estimation of appellant's depreciation expense under the *Cohan* rule was contrary to law.

The Opinion considered whether appellant properly claimed the principal residence exclusion under IRC section 121(a) and R&TC section 17131. The Opinion reviewed the undisputed facts to determine whether the Moffett Property was used as the taxpayer's residence. (See Treas. Reg. § 121-1(b).) On appeal, appellant does not address these authorities and does not point to any evidence to show that appellant was entitled to the principal residence exclusion. (*Appeal of Silver*, *supra*.) Therefore, appellant fails to establish that the Opinion's finding that she was not entitled to the principal residence exclusion was contrary to law.

Finally, appellant asserts that she had reasonable cause under the law, which warrants the abatement of the ARP. As described in the Opinion, the ARP will not be imposed to the extent that the taxpayer has shown that a portion of the underpayment was due to reasonable cause. (IRC, § 6664(c)(1); Treas. Reg. §§ 1.6664-1(b)(2), 1.6664-4(a).) The taxpayer bears the burden of proving any defenses to the imposition of the ARP. (*Recovery Group, Inc. v. Commissioner*, T.C. Memo 2010-76.) The Opinion reviewed the record and found that no potential grounds for establishing any applicable exceptions or abating the ARP were present. On appeal, appellant reasserts that due to circumstances beyond her control, the movers lost her original receipts, causing appellant to rely upon the only data available to her, which suffices to meet the reasonable cause standard. As described above, unsupported assertions are

insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Silver*, *supra*.) Aside from these statements, appellant provides no evidence with the petition, and points to no evidence in the record, to meet her burden to establish reasonable cause. Therefore, appellant fails to establish that the Opinion's finding that the ARP cannot be abated is contrary to law.

As described above, appellant does not establish or provide evidence to show error in OTA's determinations. Appellant's dissatisfaction with the outcome of the appeal, and the attempt to reargue the same issues a second time, is not grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Accordingly, OTA finds that appellant has not shown that grounds exist for a new hearing, and appellant's petition is hereby denied.

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Asaf Kletter
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Asaf Kletter
Administrative Law Judge

We concur:

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Erica Parker
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Erica Parker
Hearing Officer

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

Date Issued: 11/5/2024