OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of: **THE KAYYEM TRUST;** **R. KAYYEM AND** **M. KAYYEM**	)	OTA Case Nos. 20076394, 20086416

OPINION

Representing the Parties:

For Appellants:	Michael C. Cohen, Attorney R. Kayyem M. Kayyem
For Respondent:	Carolyn S. Kuduk, Attorney Nathan Hall, Attorney Supervisor

A. KLETTER, Administrative Law Judge: These consolidated appeals are made pursuant to Revenue and Taxation Code (R&TC) section 19045 from the actions of respondent Franchise Tax Board (FTB) proposing additional tax and applicable interest for the 2014 tax year against The Kayyem Trust, R. Kayyem and M. Kayyem (collectively, appellants). For appellant The Kayyem Trust, FTB proposed additional tax of $477,025 plus applicable interest for the 2014 tax year. For appellants R. Kayyem and M. Kayyem,[1] FTB proposed additional tax of $1,473,619 plus applicable interest for the 2014 tax year.

Office of Tax Appeals (OTA) Panel Members Asaf Kletter, Kim Wilson, and Sheriene Anne Ridenour held an oral hearing for this matter in Cerritos, California on September 11, 2024. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion pursuant to California Code of Regulations, title 18, section 30209(b).

[1] R. Kayyem and M. Kayyem were married and filed a joint tax return for the 2014 tax year.

ISSUE

Whether appellants have demonstrated error in FTB's determination that FOK Partnership (FOK) failed to complete any valid like-kind exchanges under Internal Revenue Code (IRC) section 1031.[2]

FACTUAL FINDINGS

Background

1. During the 2014 tax year, FOK was a limited partnership. FOK's business was the ownership and operation of rental real estate. FOK was the sole member of Kayyem Properties, LLC (Kayyem Properties), a Delaware single-member LLC (SMLLC) that was disregarded for federal income tax purposes. Kayyem Properties owned certain commercial real property (the Relinquished Property) in Studio City, California.[3]
2. FOK was owned by appellants in the 2014 tax year. Appellants R. Kayyem and M. Kayyem, through their grantor trust disregarded for income tax purposes, owned a 1 percent general partnership interest and a 74 percent limited partnership interest in FOK. Appellant The Kayyem Trust owned a 25 percent limited partnership interest.
3. During the 2014 tax year, Kayyem Properties formed, and was the initial sole member of, Continuum Properties, LLC (Continuum), a Delaware SMLLC that was disregarded for federal income tax purposes. Continuum's LLC Agreement provided that its purpose was to acquire, operate, and maintain three certain commercial real properties located in Pennsylvania (collectively, the Replacement Properties).[4]

[2] FOK's disregarded entities, described below, disposed of and acquired the like-kind properties.

[3] The City of Los Angeles includes Studio City, but the neighborhood is used for ease of reference.

[4] Continuum's LLC agreement allowed it to exercise all powers under Delaware law necessary or convenient to the conduct, promotion, or attainment of the business or purposes set forth in the LLC agreement. In connection with the acquisition, Continuum entered into a loan agreement with a lender. Continuum was to own, hold, sell, assign, transfer, operate, lease, mortgage, pledge and otherwise deal with the Replacement Properties as permitted under the loan documents and to receive the loan from the lender, enter into loan documents with the lender, and refinance the Replacement Properties in connection with a permitted loan payment. For so long as the loan remained outstanding, Continuum could not engage in any business or activity other than the ownership, operation, and maintenance of the Replacement Properties, and activities incidental thereto.

The agreement to sell the Relinquished Property, the Exchange Agreement with Boulevard Financial Corporation (BFC) and the sale of the Relinquished Property

4. Pursuant to a Purchase and Sale Agreement and Joint Escrow Instructions (Sale Agreement) dated May 12, 2014, by and between Kayyem Properties, as seller, and a third-party buyer, the buyer agreed to purchase the Relinquished Property for $17,200,000 by a date to be specified by Kayyem Properties that was in no event to be after September 11, 2024.[5] Fidelity National Title Company (Fidelity) was the escrow agent for the sale. Fidelity gave the anticipated sale an escrow number ending in 011.

5. On September 4, 2014, Boulevard Financial Company (BFC), a California corporation, issued a letter to Kayyem Properties. The letter stated that "[t]he Escrow Cheque [Corp.] [(Escrow Cheque)] will be used as escrow holder for all exchange transactions."[6] It also stated as follows:

> "Thank you for your interest in using [BFC] as your accommodator.
>
> Be aware that there are certain requirements in effecting and consummating an exchange in accordance with Internal Revenue [Code] (IRC) [s]ection 1031, as amended. Internal Revenue Service stipulates that the Exchangor, you, cannot be in actual or constructive receipt of funds at any time durin[g] the exchange. The exchange period begins on the date of the transfer of the first property. The exchanger [sic], you, will have forty-five (45) days to identify a "like-kind" replacement property and a total of one hundred eigh[ty] (180) days to close on the "like kind" replacement property."

FOK's general partner, R. Kayyem, signed the letter as sole member of Kayyem Properties. BFC did not sign the letter.

6. Kayyem Properties and BFC entered into an Exchange Agreement dated September 9, 2014, to effect a like-kind exchange of real properties in compliance with IRC section 1031 (a 1031 Exchange). The Exchange Agreement recited that Kayyem Properties owned the Relinquished Property and had agreed to sell it pursuant to the Sale Agreement and certain Escrow Instructions dated September 3, 2014 (Escrow Instructions); however, Kayyem Properties desired and intended to effect a 1031 Exchange. Pursuant to the Exchange Agreement, Kayyem Properties agreed to convey the Relinquished Property to BFC, and BFC agreed to convey the "Exchange

[5] The buyer had right to terminate the Sale Agreement during a due diligence period with respect to the Relinquished Property. The buyer did not terminate the Sale Agreement during that period.

[6] A copy of the escrow agreement, if there is one, is not in the record.

Property," i.e., the real property and improvements thereon to be thereafter identified by Kayyem Properties, to Kayyem Properties, subject to certain terms and conditions.[7]

7. The Exchange Agreement constituted the entire agreement between BFC and Kayyem Properties and superseded any contemporaneous or previous written or oral agreements, representations or undertakings concerning the matters and arrangements provided in the Exchange Agreement. No supplement, modification or amendment to the Exchange Agreement was binding unless executed in writing by all parties. The Exchange Agreement did not limit Kayyem Properties' rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property held by BFC during the anticipated 1031 Exchange. R. Kayyem signed the letter on behalf of FOK as sole member of Kayyem Properties. BFC also signed the letter.

8. Escrow Cheque opened escrow number ending in 458 for the intended 1031 Exchange. Escrow Cheque recorded the Exchange Agreement in a document titled "accommodation instructions."

9. On September 9, 2014, BFC, Kayyem Properties, and the buyer of the Relinquished Property agreed to amend the Exchange Agreement[8] to substitute BFC as the seller of the Relinquished Property. R. Kayyem signed the letter on behalf of FOK as sole member of Kayyem Properties. BFC and the buyer also signed the letter.

10. Pursuant to the Final Seller's Closing Statement, on September 12, 2014, Kayyem Properties sold the Relinquished Property to the buyer for a total consideration of $17,200,000. An accommodator fee of $1,500 was paid to Escrow Cheque. The proceeds from the transaction due to seller were $7,797,690.09.[9]

11. On October 20, 2014, Continuum purchased the Replacement Properties from a third-party seller for a total consideration of $16,398,195. Fidelity was the escrow agent for the sale and assigned the sale an escrow number "CONTIN-011." Pursuant to the Final Buyer/Borrow's Closing Statement, Escrow Cheque transferred the proceeds from

[7] BFC's conveyances were subject to the third-party buyer's performance and the Exchange Agreement's other terms and conditions.

[8] The amendment refers to "[o]ur existing instructions in the above numbered escrow" ending in 458, which appears to refer to the Exchange Agreement.

[9] The September 12, 2014 Final Seller's Closing Statement does not reference a subsequent exchange. It is undisputed that Escrow Cheque directly received the proceeds at the close of the sale.

BFC's sale of the Relinquished Properties, minus charges of $250, to Fidelity.[10] Continuum obtained a loan of approximately $9.26 million to close on the sale.

FOK's 1031 Exchange Reporting and Procedural History

12. FOK filed Treasury Form 8824, Like-Kind Exchanges (Form 8824), with its 2014 federal income tax return. Because the Replacement Properties were located outside of California, FOK also filed FTB Form 3840, Like-Kind Exchanges (Form 3840). On both Form 8824 and Form 3840, FOK reported that it transferred the Relinquished Property to another party on September 15, 2014, for which Replacement Properties were identified on September 16, 2014, and received on October 20, 2014. FOK reported a deferred gain of $14,235,579 on both Form 8824 and Form 3840, which was the fair market value of the Replacement Properties minus FOK's basis in the Relinquished Property.
13. FTB audited FOK and disallowed the claimed 1031 Exchange. Accordingly, FTB determined FOK had a taxable gain[11] and appellants must recognize their pro-rata share of FOK's distributive income under IRC section 702.[12] FTB issued appellants Notices of Proposed Assessment (NPAs) for the additional tax and interest.
14. Appellants protested the NPAs.
15. On June 5, 2020, FTB issued Notices of Action to appellants affirming the NPAs.
16. Appellants timely filed this appeal.

DISCUSSION

Legal Background

FTB's determinations are presumed correct, and taxpayers have the burden of proving error. (*Appeal of Davis*, 2020-OTA-182P.) Unsupported assertions are insufficient to satisfy taxpayers' burden of proof. (*Ibid*.) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing that its determination is incorrect. (*Ibid*.)

[10] On October 23, 2014, Escrow Cheque sent Kayyem Properties a letter indicating that the escrow number ending in 458 was closed and attached a Final (Closing) Statement.

[11] FTB determined the gain amount under IRC section 1231, to which California generally conforms under R&TC section 24990. Appellants do not dispute the calculation of the gain amount.

[12] California generally conforms to IRC section 702 under R&TC section 17851. FTB also determined that appellants R. Kayyem and M. Kayyem were not entitled to flow-through rental real estate losses, and that the increase to their federal adjusted gross income reduced the available itemized deductions and exemption credits. Appellants also do not dispute these adjustments, and OTA does not discuss them further.

Except as otherwise specifically provided by law, the burden of proof is generally on appellants as to all issues of fact. (Cal. Code Regs., tit. 18, § 30219(a).) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.)

Generally, taxpayers must recognize the entire amount of gain realized from the sale or exchange of property. (IRC, § 1001(c); R&TC, § 18031.)[13] To qualify for nonrecognition treatment under IRC section 1031, three general requirements must be satisfied: (1) the transaction must be an exchange (exchange requirement), (2) the exchange must involve like-kind properties (like-kind requirement), and (3) both the property transferred (the relinquished property) and the property received (the replacement property) must be held for a qualified purpose (holding requirement). (IRC, § 1031(a)(1)-(3); *Appeals of Lovinck Investments N.V., et al.*, 2021-OTA-294P (*Lovinck*).) If IRC section 1031 is inapplicable, the general recognition rule under IRC section 1001(c) is triggered. (*Lovinck*, *supra*.)

The IRC permits deferred (or "forward") exchanges. (IRC, § 1031(a)(3); Treas. Reg. § 1031(k)-1.)[14] A deferred exchange is a 1031 Exchange in which, pursuant to an agreement, taxpayers transfer the relinquished property, subsequently receive the replacement property, and meet the holding requirement for the properties. (Treas. Reg. § 1.1031(k)-1(a).)[15] A 1031 Exchange may be accomplished through intermediaries and agents, such as a "Qualified Intermediary" (QI), also known as an exchange accommodator, and ancillary parties, such as an escrow agent.[16] Agency is defined as the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on

[13] For the 2014 tax year, R&TC section 17024.5(a)(1)(O) provides that for Personal Income Tax Law purposes, California conforms to the January 1, 2009 version of the IRC. References in this Opinion to the IRC are therefore to the January 1, 2009 version.

[14] When applying the IRC, California also incorporates Treasury Regulations to the extent that they do not conflict with regulations promulgated by FTB. (R&TC, § 17024.5(d).)

[15] IRC section 1031(a)(3) imposes two additional requirements for deferred exchanges which are not at issue in this appeal: (1) the replacement property must be identified on or before the day which is 45 days after the date on which taxpayers transfer the relinquished property; and (2) the replacement property cannot be received after the earlier of the day which is 180 days after the date on which taxpayers transfer the relinquished property, or the due date for the transferor's return for the tax year in which the transfer occurs.

[16] See, e.g., Foster, Tax-Free Exchanges under Section 1031 (2024-2025 edition), ch. 1, §§ 1.2 through 1.8.

the principal's behalf and subject to the principal's control, and the agency manifests assent or otherwise consents so to act." (Rest.3d Agency, § 1.01.)[17]

The transfer of relinquished property in a deferred exchange is not a valid 1031 Exchange, if, as part of the consideration, taxpayers receive money or property which does not meet the requirements of section 1031(a) (referred to as other property under the Treasury Regulations). (Treas. Reg. § 1.1031(k)-1(a).)[18] If taxpayers "actually or constructively receive" other property in the full amount of the consideration for the relinquished property, the transaction will constitute a sale, and not a deferred exchange, even though taxpayers may ultimately receive like-kind replacement property. (*Ibid*.) Except as provided under the Treasury Regulation's safe harbors, some of which are discussed below, the determination of whether (or the extent to which) taxpayers are in "actual or constructive receipt" of money or other property before taxpayers actually receive like-kind replacement property is made under the general rules concerning actual and constructive receipt and without regard to taxpayers' method of accounting. (Treas. Reg. § 1.1031(k)-1(f)(2).)

Taxpayers are in "actual receipt" of money or property at the time taxpayers actually receive the money or property or receives the economic benefit of the money or property. (Treas. Reg. § 1.1031(k)-1(f)(2).) Taxpayers are in "constructive receipt" of money or property at the time the money or property is credited to the taxpayers' account, set apart for the taxpayers, or otherwise made available so that the taxpayers may draw upon it at any time or so that the taxpayers can draw upon it if notice of intention to withdraw is given. (*Ibid.*; see also 2 Mertens Law of Federal Income Taxation ch. 10, § 10:1 [describing "constructive receipt" doctrine].) Taxpayers are not in constructive receipt of money or property if their control of its receipt is subject to substantial limitations or restrictions. (*Ibid*.) Actual or constructive receipt of money or property by the taxpayers' agent (determined without regard to the Treasury Regulation's disqualified person provisions) is actual or constructive receipt by the taxpayers. (Treas. Reg. § 1.1031(k)-1(f)(2).)[19]

The IRC provides four safe harbor rules for actual or constructive receipt of money or property. (Treas. Reg. § 1.1031(k)-1(g).) In the case of taxpayers' transfer of relinquished

---

[17] The Restatements of Agency are cited as authorities in *National Carbide Corp. v. Commissioner* (1949) 336 U.S. 422, 436 n. 17 and *Commissioner v. Bollinger* (1988) 485 U.S. 340, 349.

[18] Treasury Regulation section 1.1031(k)-1(a) explains that the transaction may otherwise qualify under IRC section 1031(b) or (c), concerning exchanges not solely in kind. The parties have not argued that those provisions are applicable this appeal.

[19] Appellants solely argue that the "QI" safe harbor applies, and therefore, this Opinion only addresses that safe harbor.

property involving a QI, the QI is not considered the taxpayers' agent for purposes of IRC section 1031(a), but only if the agreement between the taxpayers and the QI expressly limits the taxpayers' rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property held by the QI. (Treas. Reg. § 1.1031(k)-1(g)(4)(i)-(ii) & (g)(8)(iii), Example 3 [concerning QI and qualified escrow account].) A "QI" is a person who is not the taxpayers or a "disqualified person"[20] and enters into a written agreement with the taxpayers (the exchange agreement) and, as required by the agreement, acquires the relinquished property from the taxpayers, transfers the relinquished property, acquires the replacement property, and transfers the replacement property to the taxpayers. (Treas. Reg. § 1.1031(k)-1(g)(4)(iii).)

Analysis

At issue is whether appellants had actual or constructive receipt of the proceeds from the sale of the Relinquished Property because BFC and Escrow Cheque were appellants' agents in the attempted 1031 Exchange.[21] Kayyem Properties and BFC entered into the Exchange Agreement to effect the 1031 Exchange, and the Exchange Agreement was amended to substitute BFC as the seller of the Relinquished Property. It is undisputed that BFC sold the Relinquished Property. It is also undisputed that Escrow Cheque directly received the proceeds from the Relinquished Property at the close of the sale, and that Escrow Cheque held the proceeds and directed them to the purchase of the Replacement Properties at the close of the sale. Appellants concede that BFC and/or Escrow Cheque retained control of the proceeds from the sale of the Relinquished Property.

Appellants also concede that the Exchange Agreement with BFC did not include the required safe harbor language that expressly limited appellants' rights to obtain the benefits of

[20] Treasury Regulation section 1.1031(k)-1(k) defines "disqualified person." The parties have not asserted that this provision is applicable in this appeal, and it does not apply to an agency determination under the Treasury Regulations. (Treas. Reg. § 1.1031(k)-1(f)(2).)

[21] Appellants primarily assert that they did not have constructive receipt but make arguments concerning their lack of actual receipt which are also addressed below.

the money or property held by the BFC, and therefore, the QI safe harbor did not apply.[22] Instead, appellants claim that the safe harbor provided in the Treasury Regulation is not the exclusive means for taxpayers to establish that they are not in "constructive receipt" of money and property. Appellants assert that, applying the general rules concerning actual and constructive receipt, appellants did not have constructive receipt. FTB asserts that BFC and Escrow Cheque were appellants' agents, and therefore, appellants were in actual or constructive receipt under Treasury Regulation section 1.1031(k)-1(f)(2).

Appellants do not dispute that BFC and Escrow Cheque were acting as appellants' agents. Kayyem Properties and BFC entered into the Exchange Agreement, a written agreement signed by both parties, in which BFC would act as appellants' agent to effect a 1031 Exchange. This was sufficient under generally agency principles to establish a genuine agency relationship. (See *Commissioner v. Bollinger* (1988) 485 U.S. 340, 349-350.) The September 4, 2014 letter stated that Escrow Cheque will be used as escrow holder for all exchange transactions, and R. Kayyem signed the agreement on behalf of FOK. Therefore, BFC and Escrow Cheque's actual receipt of the funds constitutes actual receipt by appellants. (Treas. Reg. § 1.1031(k)-1(f)(2).)

Concerning constructive receipt, appellants assert that FOK had no rights to the sales proceeds of the Relinquished Property, and that the creation of any such rights would have required an amendment to the Exchange Agreement and signatures of both FOK and BFC, which neither would have accepted. Appellants provide no support for this assertion, and it does not satisfy their burden of proof. (See *Appeal of Davis*, *supra*.)

Appellants also assert that there was no constructive receipt because BFC and Escrow Cheque retained control of the proceeds from the Relinquished Property sale, did not set the proceeds apart for FOK, did not make the proceeds available for FOK to draw upon, and FOK did not otherwise have access to the proceeds. Appellant R. Kayyem testified that he was an experienced real estate investor; he was aware he would not be able to access escrow

[22] While the September 4, 2014 letter contained language that to qualify under section 1031, the exchangor cannot be in actual or constructive receipt of funds at any time during the exchange, the Exchange Agreement provided that it was the entire agreement between BFC and Kayyem properties and does not contain that language. Moreover, the Exchange Agreement superseded any contemporaneous or previous written or oral agreements, representations or undertakings concerning the matters and arrangement provided in the Exchange Agreement. Further, BFC did not sign the September 4, 2014 letter. Therefore, the September 4, 2014 letter is insufficient to qualify the Exchange Agreement under the QI safe harbor provision. Appellants have also failed to explain how BFC and Escrow Cheque were QIs under the applicable Treasury Regulations, which require a QI to acquire the replacement property(ies) and transfer the property(ies) to appellants. (See Treas. Reg. § 1.1031(K)-1(g)(4)(iv)(B).)

funds; he did not attempt to access the escrow funds; and he did not directly or indirect request that the safe harbor language be omitted from the Exchange Agreement. Appellant R. Kayyem's real estate attorney testified that he was an experienced real estate attorney; he did not directly or indirectly request that the safe harbor language be omitted from the Exchange Agreement; and he did not request access to the escrow funds.[23] Appellants claim that they were unaware that the safe harbor language was not in the accommodation agreement but acted in all respects as though it was.

Case law supports the Treasury Regulations' statement that taxpayers are in constructive receipt of money or property if their control is not subject to substantial limitations or restrictions. (See, *e.g.*, *Klein v. Commissioner*, T.C. Memo. 1993-491 [finding taxpayer had control of funds at escrow]; *Fredericks v. Commissioner*, T.C. Memo. 1994-27 [finding no constructive receipt where there were substantial restrictions on certain escrow funds]; IRS Technical Advice Memorandum 20013001 [disallowing intended 1031 Exchange where the safe harbor restrictions were not present, and substantial character of the transaction was a series of interrelated sales or purchases].) Thus, despite appellants' apparent lack of knowledge of the missing safe harbor language, and the testimony that appellants did not attempt to access the funds, BFC's and Escrow Cheque's receipt of the funds constituted constructive receipt because the Exchange Agreement contained no limitation to access the sales proceeds of the Relinquished Property. Moreover, there is no copy of the escrow agreement in the record. Appellants have provided no evidence to show that they were substantially limited in accessing the funds.[24] As described above, constructive receipt by the taxpayers' agent (here, BFC and Escrow Cheque) is constructive receipt by the taxpayers (here, appellants). (Treas. Reg. § 1.1031(k)-1(f)(2.)

Appellants also argue that the transaction was a valid deferred 1031 Exchange because appellants clearly intended to effectuate a 1031 Exchange, and the transaction was not a sham. However, the mere intent to perform a 1031 Exchange is not dispositive of whether it qualifies for favorable tax treatment. (See, e.g., *Biggs v. Commissioner* (5th Cir. 1980) 632 F.2d 1171, 1176; *Carlton v. U.S.* (5th Cir. 1967) 385 F.2d 238, 243; *Bezdjian v. Commissioner*, T.C. Memo.

[23] Appellant R. Kayyem's tax counsel was not present at the hearing due to severe health issues. Appellant R. Kayyem and his real estate attorney testified that they relied on other counsel to review the provisions at issue in this appeal.

[24] Appellants assert that FOK had no rights to the sales proceeds of the Relinquished Property, and the creation of any such rights would have required an amendment to the Exchange Agreement and signatures of both FOK and BFC which neither would have accepted. Appellants provide no support for this assertion, and it does not satisfy their burden of proof. (See *Appeal of Davis*, *supra*.)

1987-140.) To qualify for nonrecognition, a taxpayer must satisfy each of the specific requirements as well as the underlying purpose of IRC section 1031. (*Bolker v. Commissioner* (9th Cir. 1985) 760 F.2d 1039, 1044.) Appellants assert that this case merely involves a scrivener's error or clerical error. However, OTA finds that the failure to include the required language and to comply with the QI provisions is not a mere clerical error. (See Black's Law Dictionary (12th ed. 2024), "Error (2)," "Clerical error" (also termed scrivener's error).) At the hearing, appellants analogized this matter to *Morton v. U*.S (2011) 98 Fed. Cl. 596, which concerned a like-kind exchange that was valid except for an accidental transfer by the bank into the wrong account. However, that case is distinguishable because there it was undisputed that the requirements of the QI safe harbor were otherwise met. (See *id*. at p. 603.)[25]

HOLDING

Appellants have not demonstrated error in FTB's determination that FOK failed to complete any valid like-kind exchanges under IRC section 1031.

DISPOSITION

FTB's actions are sustained.

DocuSigned by:
Asaf Kletter
D17AEDDCAAB045B...
Asaf Kletter
Administrative Law Judge

We concur:

Signed by:
Kim Wilson
4E8E749EDB984CD...
Kim Wilson
Hearing Officer

DocuSigned by:
Lissett Cervantes
220FF53020BF441...
For Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 12/10/2024

[25] To the extent the parties raise other arguments OTA has not addressed, OTA has considered them and found them not dispositive of the issue decided in this Opinion.