

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
**Y. MANDELBAUM** ) OTA Case No. 230613508  
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**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellant: Y. Mandelbaum  
For Respondent: Paige Chang, Attorney

V. LONG, Administrative Law Judge: On October 3, 2024, the Office of Tax Appeals (OTA) issued an Opinion sustaining an action of respondent Franchise Tax Board (FTB) denying Y. Mandelbaum’s (appellant’s) claim for refund. In the Opinion, OTA held that appellant had not established a basis to abate the late payment penalty or the underpayment of estimated tax penalty (estimated tax penalty).

On October 22, 2024, appellant timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19334 on the basis that OTA’s Opinion was contrary to law, that appellant was not allowed to present an additional brief which prevented appellant from presenting a crucial argument, that OTA’s Opinion treated facts as hearsay and OTA used appellant’s decision not to testify against him, that OTA did not give due weight to appellant’s argument regarding the estimated tax penalty, and that there was an unexpected surprise during the appeal proceedings. Appellant additionally requests that, if OTA denies the petition, that it not publish the Opinion on OTA’s website due to confidentiality concerns. Upon consideration of appellant’s petition, OTA concludes that the grounds set forth in this petition do not constitute a basis for granting a new hearing. OTA further concludes that the Opinion will be published on OTA’s website to the same extent as all other OTA opinions.

OTA will grant a rehearing where one of the following grounds for a rehearing exists 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 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 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.)

Although appellant's contentions do not clearly state their grounds using statutory language, it appears that appellant is requesting a rehearing on the following bases: an irregularity in the appeal proceedings; a surprise occurring during the appeal proceedings; insufficient evidence to justify the Opinion; and the Opinion is contrary to law.

#### Irregularity in the Proceedings

An irregularity in the proceedings warranting a rehearing would generally include any departure by OTA from the due and orderly method of conducting appeal proceedings by which the substantial rights of a party (here, appellant) have been materially affected. (*Appeal of Shanahan*, *supra*.) Courts have found that an irregularity in the proceeding is "any act that: (1) violates the right of a party to a fair trial and (2) which a party 'cannot fully present by exceptions taken during the progress of the trial . . . .' [citation]." (*Ibid.*, citing *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1230.) Irregularities include an "overt act of the trial court . . . or adverse party, violative of the right to a fair and impartial trial . . ." (*Appeal of Shanahan*, *supra*, citing *Russell v. Dopp* (1995) 36 Cal.App.4th 765, 780.) Examples of irregularities include the absence of a judge from the courtroom during a portion of the trial, and a judge threatening to prejudge testimony unless a witness is withdrawn. (*Appeal of Shanahan*, *supra*.)

In an appeal before OTA, the grounds for a rehearing pursuant to California Code of Regulations, title 18, (Regulation) section 30604 can exist both when an oral hearing is held and when an appeal is submitted for an Opinion based upon the written record.

Appellant argues that the Lead Panel Member indicated that appellant would be permitted to submit an additional brief, but later reversed the decision, and that his inability to submit an additional brief prevented appellant from presenting a crucial argument and unfairly prejudged appellant's case.

On April 25, 2024, OTA issued a letter to both parties informing them that briefing was complete for the appeal. On August 14, 2024, OTA held an oral hearing. On August 16, 2024, appellant contacted OTA by email requesting that a video recording of the oral hearing be

removed from OTA's YouTube channel and made legal arguments concerning the appeal. On August 27, 2024, OTA issued an order (August Order): (1) stating that, to the extent appellant made additional legal arguments, the submission was rejected because briefing in the appeal was closed, and that if appellant wanted to request the opportunity to submit an additional brief, Regulation section 30304(c) sets forth the procedure to request such briefing; and (2) denying appellant's request to close the oral hearing from public observation, stating that Regulation section 30431(a) required appellant to make a timely request to close the oral hearing by the due date of appellant's response to the notice of oral hearing.

On September 10, 2024, appellant requested that OTA reconsider appellant's request to submit an additional brief, which would permit appellant to respond to arguments made by FTB during the oral hearing and incorporate newly developed arguments. On September 12, 2024, OTA issued an order (September Order) denying appellant's request for additional briefing, stating that appellant's request did not explain why appellant could not have made the arguments during briefing or at the oral hearing when appellant had the opportunity to rebut FTB's presentation. Based on this, the September Order stated that appellant had not demonstrated good cause to reopen the record for additional briefing.

OTA's review of the record on appeal makes clear that no irregularity occurred in the appeal proceedings, but rather, that the August and September Orders were routine orders issued in response to post-hearing requests made by appellant. Issuing orders in response to requests of parties to an appeal is part of a due and orderly method of conducting appeal proceedings and within the authority of OTA and the Lead Panel Member pursuant to Regulation sections 30213 and 30213.5. Even if issuing routine orders was an irregularity, OTA provided appellant the opportunity to present his position during briefing and on appeal, and therefore no substantial rights of any party were materially affected. Appellant has not established that an irregularity in the proceedings occurred which would materially affect the substantial rights of any party.

#### Surprise Occurring During the Appeal Proceedings

Regulation section 30604(a)(2) permits a rehearing when an accident or surprise occurs during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented. The terms "accident" and "surprise" have substantially the same meaning, and each is used to denote some detrimental condition or situation in which a party is unexpectedly placed without any negligence on the part of that party, which ordinary caution could not have guarded against. (*Appeal of Le Beau*, 2018-OTA-061P; *Kauffman v. De Mutiis*

(1948) 31 Cal.2d 429, 432.) A rehearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (*Appeal of Le Beau, supra.*) Appellant contends that he was caught off guard by certain events during the appeal proceedings, which amounted to an unexpected surprise. However, appellant does not explain what events caused appellant's surprise. Accordingly, appellant has not established that a detrimental condition or situation occurred, which ordinary caution could not have guarded against, and therefore appellant has not established a basis for rehearing on the grounds of accident or surprise.

#### Sufficiency of Evidence to Justify the Opinion

Regulation section 30604(d)(4) provides that a rehearing may be granted where the evidence is insufficient to justify the opinion. To find that there is insufficient evidence to justify the opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the panel clearly should have reached a different opinion. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Appeals of Swat-Fame Inc., et al., supra.*)

Appellant contends that the Opinion improperly "treated certain facts as hearsay, despite exceptions within the rules of evidence and relevant statutes which could have provided resolution" and that OTA used his decision to not provide witness testimony against him.

Regulation section 30214 states that, unless otherwise provided, the California Evidence Code shall not apply to proceedings before OTA. The Regulation further provides that "[a] factual finding on any material disputed fact shall not be based solely on unsworn statements made by a party during the appeal proceeding [...] such as arguments made by an unsworn representative during an OTA oral hearing." (Cal. Code Regs., tit. 18, § 30214(f)(5).) Based on this, OTA is not able to base factual findings on appellant's unsworn statements during oral hearing. In addition, appellant failed to provide documentary evidence in support of his argument. Accordingly, appellant did not meet his burden of proof in the appeal proceedings and the Opinion sustained FTB's denial of appellant's claim for refund. Based on OTA's review of the Opinion, appellant has not established that the panel should have reached a different opinion.

#### Opinion is Contrary to Law

Regulation section 30604(d)(5) provides that a rehearing may be granted where the Opinion is contrary to law. A holding is contrary to law "only if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a directed verdict

against the part[y] in whose favor the verdict [was] returned.” (*Sanchez- Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 (*Sanchez-Corea*), citing *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.) This requires indulging “in all legitimate and reasonable inferences” to uphold the Opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907; see also *Appeals of Swat-Fame Inc. et al., supra*.) The question does not involve “examining the quality or nature of the reasoning behind [OTA’s 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, at p. \*5.)

Appellant contends that he presented good cause to challenge the penalty imposed under R&TC section 19136 and that the failure of the Opinion to address his argument is clear evidence that it was not given due weight. R&TC section 19136 incorporates Internal Revenue Code (IRC) section 6654, which imposes an addition to tax often referred to as the estimated tax penalty. A review of the record indicates that appellant made reasonable-cause type arguments that the estimated tax penalty should be abated. The Opinion states that there is no provision in the IRC or R&TC that allows the estimated tax penalty to be abated based solely on a finding of reasonable cause and, as a result, there is no general reasonable cause exception to the imposition of the estimated tax penalty. (*Appeal of Saltzman*, 2019-OTA-070P.) Accordingly, appellant has not established that the Opinion was contrary to law.

#### Publication of Opinion on OTA Website

Regulation section 30501 provides that OTA “shall publish an Opinion for each appeal,” however, a party “may request that OTA seal the record in an appeal or redact information in an Opinion pursuant to regulations 30431 and 30432.” Requests to seal the record must be made no later than 15 days after the mailing of an Opinion. (Cal. Code Regs., tit. 18, § 30431.) The request must state the grounds upon which it is based and, consistent with Regulation section 30432, OTA may, at its discretion, order that items in the administrative record be sealed or redacted. (*Ibid.*) OTA shall determine whether to grant such a request based on the following objective criteria: whether the appeal involves trade secrets or other confidential research, development, or other information the disclosure of which would cause unwarranted annoyance, embarrassment, or oppression to any person. (Cal. Code Regs., tit. 18, § 30432.)

In this appeal, there is no allegation or evidence suggesting that this objective standard would be met in this appeal. Appellant requests that the Opinion not be published on the OTA website because of an understandable interest in confidentiality. However, as set out in Regulation section 30430, the submission of an appeal constitutes waiver of the right to confidentiality regarding briefing, exhibits, communications, and other information provided to

OTA by either party in an appeal. Accordingly, OTA finds that appellant has not established grounds to seal the Opinion from publication on OTA's website.

Signed by:




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Veronica I. Long  
Administrative Law Judge

We concur:

Signed by:



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Seth Elsom  
Hearing Officer

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Andrew Wong  
Administrative Law Judge

Date Issued: 3/12/2025