

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 21078277
A. GOLDCAMP AND	)	
M. POWLEN	)	
	)	
	)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant-Powlen:	William E. Taggart, Jr., Attorney
For Appellant-Goldcamp:	Mark S. Roelke, Attorney
For Respondent:	Roman Johnston, Assistant Chief Counsel

C. AKIN, Administrative Law Judge: On August 9, 2024, the Office of Tax Appeals (OTA) issued an Opinion sustaining the actions of respondent Franchise Tax Board (FTB) proposing additional tax of \$282,576 and \$26,033 for the 2000 and 2001 tax years, respectively. In the Opinion, OTA held that: (1) FTB's proposed assessments for the 2000 and 2001 tax years were valid; and (2) appellants had not shown error in FTB's proposed assessment disallowing appellants' claimed Internal Revenue Code (IRC) section 988 losses in the amounts of \$3,002,413 and \$251,132 for the 2000 and 2001 tax years, respectively.

On September 9, 2024, Appellants timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19048 on the basis that there is insufficient evidence to justify the Opinion, the Opinion is contrary to law, and an error in law in the OTA appeals hearing or proceeding. Upon consideration of appellants' petition, OTA concludes that the grounds set forth in this petition do not constitute a basis for granting a new hearing.

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.)

Insufficient Evidence

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, OTA clearly should have reached a different result. (*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). (*Appeal of Shanahan, supra.*) Appellants do not expressly identify which holdings in the Opinion for which they believe there is an insufficiency of evidence to justify such holding. Instead, appellants focus primarily on the wording of the issues in the Opinion and assert that various portions of the Opinion are irrelevant, unnecessary, rhetorical, and should be omitted from the Opinion.¹ However, these arguments do not establish that a rehearing should be granted on the basis of insufficient evidence to justify the Opinion. Rather, as noted below, a review of the Opinion establishes that each holding in the Opinion is supported by evidence in the appeal record and that such evidence is sufficient to justify the Opinion.

Holding 1: FTB's Proposed Assessments are Valid

In response to appellants' numerous and repeated arguments that FTB's actions at audit and protest were arbitrary, capricious, and/or lacking foundation, and therefore invalid, the Opinion noted that FTB sent appellants five separate Information Document Requests (IDRs) and a Demand requesting information related to appellants' claimed IRC section 988 losses for the 2000 and 2001 tax years. Based on this evidence (the IDRs and Demand), and the Notices of Proposed Assessment for 2000 and 2001,² which expressly referenced the IDRs and Demand and appellants' failure to respond, the Opinion rejected appellants' assertion that FTB's proposed assessments were arbitrary and capricious on the basis that FTB failed to audit, review, or examine appellants' returns for the 2000 and/or 2001 tax years. As such, there is no merit to appellants' assertion that there is insufficient evidence to support this holding.

¹ This argument is addressed in more detail in the Error in Law section below.

² The IDRs, Demand and NPAs are discussed in factual findings 10 through 12 of the Opinion.

Holding 2: Appellants' Failure to Establish Error in FTB's Disallowance of Losses

Next, the Opinion concluded that appellants were not entitled to the IRC section 988 losses claimed during the 2000 and 2001 tax years both because: (1) appellants failed to substantiate that the losses were incurred in the amounts and tax years claimed; and (2) appellants failed to substantiate that the transactions giving rise to the claimed losses had economic substance. With respect to the failure to substantiate the losses, the Opinion noted that appellants had failed to provide any evidence or source documents relating to the transactions purportedly giving rise to the claimed IRC section 988 losses in the amounts of \$3,002,413 and \$251,132, for the 2000 and 2001 tax years, respectively. For example, the Opinion noted that appellants failed to provide any evidence or source documents relating to the claimed currency sales or exchanges purportedly occurring on December 28, 2000, and December 20, 2001, and generating "proceeds" of \$26,927 and \$2,183, respectively. The Opinion further noted that appellants also failed to provide any evidence or source documents relating to or substantiating the claimed basis amounts (\$3,029,340 and \$253,316) in the currency purportedly sold or exchanged on these dates. This conclusion is supported by evidence, namely, appellants' failure on appeal to substantiate the sales and basis amounts claimed, and there is no merit to appellants' assertion that there is insufficient evidence to support this holding.³

With respect to economic substance, the Opinion noted that the only evidence OTA had in the appeal record with respect to the claimed IRC section 988 losses was appellant-Powlen's description of the transactions purportedly giving rise to the losses in the protest letter filed with FTB.⁴ Again, no underlying evidence or source documentation relating to these transactions were provided by appellants. As such, OTA evaluated the transactions as described by appellant-Powlen in the protest letter and concluded that the described transactions resembled or appeared to be Son of Boss transactions which the courts have repeatedly found lack economic substance and a valid business purpose. Thus, the Opinion concluded that appellants failed to establish error in FTB's conclusion that appellants' claimed IRC section 988 losses lacked economic substance and a valid business purpose beyond the creation of tax benefits. Again, this conclusion is supported by evidence, namely appellant-Powlen's own

³ As discussed in more detail in the Contrary to Law section below, appellants had the burden of establishing the claim losses, including the basis amounts giving rise to such losses.

⁴ Appellant-Powlen's protest letter dated September 25, 2005, is discussed in factual finding 16 of the Opinion and was provided as by FTB as exhibit B with their Opening Brief dated December 6, 2021.

description of the transactions giving rise to the claimed losses in the protest letter.⁵ Additional evidence could not be evaluated because appellants failed to provide any evidence or source documents relating to these transactions. Thus, again, there is no merit to appellants' assertion that there is insufficient evidence to support this holding, and appellants are not entitled to a rehearing based on insufficiency of evidence.

Contrary to Law

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).) The question before OTA on a petition does not involve examining the quality or nature of the reasoning behind OTA's Opinion, but whether that Opinion can be valid according to the law. (*Appeal of Riedel*, 2024-OTA-004P citing *Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party, with all legitimate inferences to uphold the Opinion, the petitioning party, establishes that the Opinion incorrectly stated or applied the law and, therefore, is contrary to law. (*Appeal of Shanahan*, *supra*.)

Appellants' Failure to Substantiate the Losses

Appellants contend that the Opinion "continues with some discussion of nuances relating to the burden of proof on which it is unlikely [a]ppellants will ever agree with OTA." However, appellants fail to point to which specific statements or application of law appellants disagree with and contend are contrary to law. With respect to appellants' burden of proof on appeal, the Opinion noted that FTB's determinations are generally presumed correct, and the taxpayer bears the burden of proving otherwise. (*Appeal of Vardell*, 2020-OTA-190P.) The Opinion further noted that the taxpayer generally bears the burden of proving a claimed loss and that a loss cannot be properly computed where the taxpayer does not prove basis. (*Appeal of Rios*, 2021-OTA-341P; *Hoover v. Commissioner*, T.C. Memo. 2002-82.) The Opinion then noted that establishing a taxpayer's cost basis is a factual matter which the taxpayer has the burden of proving. (*Vaira v. Commissioner*, (3rd Cir. 1971) 444 F.2d 770,774; *O'Neill v. Commissioner* (9th Cir. 1959) 271 F.2d 44,50; *Moore v. Commissioner*, (9th Cir. 1970) 425 F.2d 713, 715.) Finally, the Opinion noted that in proceedings before OTA, the burden of proof is on appellants

⁵ As discussed in more detail in the Contrary to Law section below, appellants had the burden of proving that the transactions at issue giving rise to the claimed loss had economic substance.

as to all issues of fact, except as otherwise specifically provided by law, and the burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a), (b).)

Again, appellants have not specifically identified which of these above statements of law it disagrees with or how the OTA incorrectly applied the law to the facts of this appeal. As noted above, appellants failed to provide any evidence or source documents relating to the claimed IRC section 988 losses disallowed by FTB and at issue in this appeal. Without evidence or source documents substantiating the claimed currency sales or exchanges in 2000 and 2001, or the claimed basis amounts (\$3,029,340 and \$253,183) for these currency sales or exchanges, the Opinion properly concluded that appellants had failed to establish that they were entitled to the claimed losses and failed to show error in FTB's proposed assessments disallowing these losses.

Appellants contend the crux of the appeal is FTB's contention that appellants failed to substantiate the reported losses and that the "fundamental flaw in the position of [] FTB is that [] FTB is denying these losses on account of [a]ppellants' failure to provide [] FTB with information and documentation that it already had." Appellants further contend that they "did as much as they could do to secure the information and documentation demanded by FTB relating to the 2000 and 2001 IRC [section] 988 losses reported by [a]ppellants. Appellants further assert, "It also appears that [] FTB secured the information and documentation from the IRS and New York and that [] FTB already [had] this information and documentation when the April 7, 2005 demand was made."

The Opinion addressed these assertions by appellants in detail in Issue Section 1.F. and Issue Section 2.C.ii. In response to the assertion that FTB had already obtained the information it requested from appellants, the Opinion expressly concluded, "OTA finds no evidence to support appellants' assertion that FTB received 'most' or 'substantially all' of the information it requested from appellants in its IDRs and Demand from the IRS and/or New York or that the information FTB received was sufficient to substantiate the claimed losses or establish the economic substance of the loss transactions." The Opinion expressly noted that to the extent appellants believe the documents FTB received from the IRS and/or New York supported their claimed IRC section 988 losses, appellants were free to provide that documentation (which they had obtained from FTB) as evidence in this appeal. Appellants failed to do so.

In response to appellants' assertion that they did not have and could not obtain the information FTB requested from them, the Opinion noted that much of the documentation requested by FTB related to transactions performed directly by Woodleaf Trust. The Opinion noted that appellants failed to provide any explanation for why they were unable to obtain and

provide evidence or source documentation relating to transactions performed directly by Woodleaf Trust, given that appellant-Powlen was the sole grantor and trustee of Woodleaf Trust which was a disregarded entity.⁶ Additionally, in response to appellants' assertion on appeal that some of the documents FTB requested were held by "the money managers, accountants and lawyers who organized and operated the entities that engaged in the Son of Boss financial transactions," the Opinion noted that appellants did not describe and failed to provide any evidence of the efforts they made to obtain the relevant information and evidence from these third parties. Appellants repeated arguments in this petition which were considered and rejected in the Opinion are not grounds for a rehearing. (*Appeal of Shanahan, supra.*)

Appellants' Failure to Establish Economic Substance

With respect to economic substance, the Opinion again noted FTB's determinations are generally presumed to be correct, and the taxpayer bears the burden of proving otherwise. (*Appeal of Vardell, supra.*) The Opinion then noted that the taxpayer generally has the burden of proving that a transaction has economic substance. (*Jade Trading, LLC v. U.S. (Fed.Cl. 2007) 80 Fed.Cl. 11. (Jade Trading).*) The Opinion then analyzed the transactions as described by appellant-Powlen in his protest letter to FTB (again, the only evidence OTA had on appeal regarding the transactions at issue), and concluded that the steps taken by Woodleaf Trust in 1999, as described by appellant-Powlen in the protest letter, were analogous to those typically taken in a Son of BOSS tax shelter as described in IRS Notice 2000-44, 200-36 I.R.B. 255 (Notice 2000-44). As such, the Opinion correctly concluded that appellants had failed to establish that the transactions giving rise to the claimed IRC section 988 losses had economic substance and a valid business purpose and failed to establish error in FTB's proposed assessments disallowing these losses citing to *Jade Trading, supra*, and *Appeal of Vardell, supra*.

In their petition, appellants assert that the Opinion erroneously describes the reason the use of spread positions in call options denominated in foreign currencies in Son of BOSS transactions are deemed to lack economic substance and business purpose. Appellants contend, "It is solely an instance in which the gain portion of the spread is separated from the loss portion without taxable recognition of the gain portion that the transaction lacks economic substance and business purpose" and that "[s]uch was not the case with the transaction in 1999

⁶ Woodleaf Trust was a grantor trust established by appellant-Powlen in 1999. Appellant-Powlen was the sole grantor and trustee of Woodleaf Trust throughout the 1999, 2000, and 2001 tax years. On appeal the parties expressly agreed that Woodleaf Trust was a revocable grantor trust which was treated as a disregarded entity for federal and California income tax purpose during these tax years.

involving Woodleaf Trust and Asuma.”⁷ Appellants contend that Woodleaf Trust “acquired and recognized the loss portion” and “Asuma realized and reported the gain portion.”

However, appellants have not provided any evidence to support this assertion. Again, the Opinion evaluated the only evidence it had regarding the transactions giving rise to the claimed losses, appellant-Powlen’s description of the transactions in the protest letter and found the description of the transactions to be similar to the Son of BOSS transaction found to lack economic substance in Notice 2000-44. The Opinion correctly noted that appellants have the burden of proving that a transaction has economic substance (*Jade Trading, supra*) and correctly concluded that appellants have failed to carry that burden where they have failed to provide any evidence or source documentation: “[A]ppellants have failed to provide any source documentation as evidence in this appeal. Consequently, OTA cannot ascertain what if any, portion of appellants’ claimed IRC section 988 losses stemmed from legitimate investment activities, as opposed to Son of BOSS tax shelter transactions.” The Opinion is not contrary to law on this basis.

Error in Law

A procedural “error in law” means an error in the OTA appeals hearing or proceeding, other than a legal error in the Opinion. (Cal. Code Regs., tit. 18, § 30604(b).) For example, the erroneous admission of evidence subject to attorney-client privilege, over the objection of the party petitioning for a rehearing, might be a basis for rehearing due to an error in law if the error was material. (*Ibid.*)

Appellants do not expressly identify the purported error(s) in law they contend occurred during the appeals proceeding which materially affected appellants’ substantial rights. It appears that appellants may be asserting an error in law for two distinct reasons: (1) the Opinion’s inclusion of Issue 1, which appellants contend was irrelevant, unnecessary, rhetorical, and should be omitted from the Opinion; and (2) appellants’ contention that the Opinions citation to and reliance on quoted material from *K2 Trading Ventures, LLC v. U.S.* (Fed. Cl. 2011) 101 Fed. Cl. 365 (*K2 Trading*) “was not introduced by either party” and is inconsistent with California Code of Regulations, title 18, (Regulation) section 30102(ff).

The Opinion’s Inclusion of Issue 1

Appellants contend that Issue 1 in the Opinion: “muddies the waters that [a]ppellants attempted to clarify in the briefing” in this appeal; that a particular statement contained in the

⁷ Asuma is short for Asuma Trading Ventures, LLC.

discussion of Issue 1 is a “red herring”; Issue 1 is “rhetorical”; and the “bulk of this discussion [in Issue 1] is irrelevant to the issues before OTA in this appeal.” However, Issue 1 of the Opinion was included to address appellants’ numerous and repeated arguments and assertions in their briefs that FTB’s various actions (at audit and/or protest) were arbitrary, capricious, lacked foundation or were otherwise invalid.

For example, Issue Section 1.B. addressed appellants’ arguments that FTB failed to properly audit appellants’ 2000 and 2001 California income tax returns pursuant to *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961. Issue Section 1.D. addressed appellants’ argument that based on *Scar v. Commissioner* (9th Cir. 1987) 814 F.2d 1363, FTB’s actions were not reasonably supported by fact and law and therefore lacked foundation and were arbitrary and capricious. Issue Section 1.F. (discussed in more detail in the contrary to law section above) addressed appellants’ argument that FTB’s actions were arbitrary and or capricious because FTB received “most” or “substantially all” of the information it requested from appellants from the IRS and New York and “never carefully examined” or “did not understand, the information and documentation” received. Issue Section 1.G. addressed appellants’ assertion that FTB acted arbitrarily or capriciously in failing to follow the IRS’s purported change in position in 2006.⁸

Again, Issue 1 in the Opinion addresses the numerous, varying, and repeated arguments made by appellants in their briefing that FTB’s actions at audit and/or protest were, arbitrary, capricious, lacking foundation, and invalid. The discussion in Issue 1 is relevant, appropriate, and necessary to address appellants’ arguments and contentions on appeal. The Opinion’s inclusion of Issue 1, for the purpose of addressing appellants’ numerous different arguments regarding the validity of FTB’s actions, is not a procedural error warranting a rehearing or modification of the Opinion.

The Opinion’s Reliance on Quoted Material from K2 Trading

Appellants contend that *K2 Trading* “was not introduced by either party,” and the Opinion’s inclusion of the quoted material from *K2 Trading* is inconsistent with Regulation section 30102(ff). Regulation section 30102(ff) provides that the “written record” means the record that a Panel shall consider in reaching a determination when the appellant has declined

⁸ Each subsection in Issue 1 addressed a different specific argument made by appellants in their briefing regarding why FTB’s actions at audit and/or protest were purportedly arbitrary, capricious, lacking foundation, or invalid. The above are provided as examples only. For brevity this Opinion on appellants’ petition declines list each of the numerous arguments appellants made their briefs and each corresponding subsection in Issue 1 of the Opinion addressing appellants’ arguments.

an oral hearing, or waived the right to an oral hearing. Regulation section 30102(ff) further provides that the written record may include, but is not limited to the following: (1) the statements and arguments in the briefs and other documents filed with OTA; (2) any concessions or admissions made by a party and submitted to OTA; (3) any factual stipulations or agreements between the parties, including those which may be summarized in minutes prepared by OTA, or an order; (4) the procedural record as shown by the notices and orders issued by OTA; (5) all exhibits and other evidence that was not opposed by the other party, and any evidence the panel may include over the objection of a party; (6) declarations made under penalty of perjury; and (7) facts taken by official notice.

First, appellants' contention that *K2 Trading* "was not introduced by either party" is incorrect. *K2 Trading* was expressly and extensively cited and relied on by FTB in its March 2, 2021 preliminary protest determination letter as support for its determination that the transactions generating the claimed IRC section 988 losses at issue in tax year 2000 and 2001 lacked economic substance and a valid business purpose. This preliminary protest determination letter was provided by both parties as an exhibit,⁹ and is part of the written record pursuant to Regulation section 30102(ff)(5). It was also repeatedly cited and relied upon in FTB's briefing,¹⁰ which is part of the written record pursuant to Regulation section 30102(ff)(1).

Additionally, while appellants are correct that the *K2 Trading* decision itself was not submitted by the parties as an exhibit and was not admitted into the evidentiary record as an exhibit, legal authorities cited by the parties in an appeal such as statutes, regulations, and relevant case authorities are not required to be submitted as exhibits for admission into the evidentiary record. (See e.g., Cal. Code Reg., tit. 18, § 30102(bb) [defining "relevant evidence" as including any *evidence tending to prove or disprove any disputed fact, document, or other evidentiary item* that is of significance to the appeal]. (Italics added.))¹¹

There is also no merit to appellants' suggestion that the Opinion incorrectly or improperly cited or relied upon the court's findings in *K-2 Trading* as specific factual findings in this appeal. After discussing the courts findings in *K-2 Trading*, the Opinion then compared the transactions

⁹ It was provided as Tab 3, Exhibit D by appellants with their Opening Brief dated July 20, 2021, and by FTB as Exhibit A with their Opening Brief dated December 6, 2021.

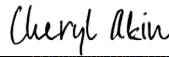
¹⁰ See e.g., FTB opening brief, page 1, line 11; page 4, footnote 11; page 6, lines 21-22; page 7 (in its entirety); page 10, lines 3-5; page 10, lines 23-24 through page 11, lines 1-5; etc.

¹¹ See also Regulation section 30102(i) defining brief and noting that a brief "may, but is not required to, include citations to specific laws, regulation, or other authorities." There is nothing in OTA's regulations requiring parties to submit legal authorities relied upon in their briefs as evidentiary exhibits.

described by the court in *K-2 Trading* to appellant-Powlen's description of the transaction in the protest-letter and concluded that "given the similarities" the transactions described by appellant-Powlen in the protest letter appeared to be the same or substantially similar to those described by the court in *K-2 Trading*. The Opinion then compared the transactions as described by appellant-Powlen in the protest letter to Son of Boss transactions specifically found by the IRS to lack economic substance in Notice 2000-44. Thus, the Opinion is expressly relying on evidence in the record, specifically appellant-Powlen's own description of the transactions in the protest letter, for its conclusion that appellants had failed to establish economic substance and a valid business purpose. Appellants' assertion that inclusion of the quoted material from *K2 Trading* is inconsistent with Regulation section 30102(ff) is without merit and appellants have failed to establish an error in law on the basis of this argument.

Conclusion

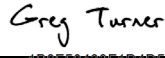
Accordingly, OTA finds that appellants have not established that a ground exists for a rehearing pursuant to Regulation section 30604(a).¹² Appellants' dissatisfaction with the outcome of this appeal is not grounds for a rehearing. (*Appeal of Shanahan, supra.*) Appellants' petition is denied.

DocuSigned by:

Cheryl L. Akin
Administrative Law Judge

We concur:

Signed by:

Veronica I. Long
Administrative Law Judge

Signed by:

Greg Turner
Administrative Law Judge

Date Issued: 6/10/2025

¹² To the extent appellants' raise additional arguments in their petition, OTA has considered such arguments and found them insufficient to establish that a ground for rehearing exists pursuant to Regulation section 30604(a). OTA also rejects appellants' arguments that certain portions of the Opinion should be removed, redacted, or omitted.