

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**KIMCO REALTY CORPORATION AND
SUBSIDIARIES**) OTA Case No. 230713916
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)
)**OPINION ON PETITION FOR REHEARING**

Representing the Parties:

For Appellants:

Jae Ko, Representative

For Respondent:

Ken Havens, Attorney

T. LEUNG, Administrative Law Judge: On January 27, 2026, the Office of Tax Appeals (OTA) issued an Opinion sustaining the actions of the Franchise Tax Board (respondent) proposing additional tax of \$203,748 (plus interest) and \$81,921 (plus interest) for the 2014 and 2015 taxable years, respectively. In the Opinion, the majority held that while Kimco Realty Corporation and Subsidiaries (appellants) were entitled to claim a Revenue and Taxation Code (R&TC) section 25106 dividend elimination for their qualified dividends, they could not simultaneously claim the dividends-paid deduction (DPD) under Internal Revenue Code (IRC) section 857(b)(2)(B) for those same dividends, and that there was no need to adjust appellants' net operating loss (NOL) carryovers.

On February 23, 2026, appellants timely filed a petition for rehearing (petition) with OTA under R&TC section 19048 on the basis that the Opinion was contrary to law. While arguing that the Opinion should be sustained, respondent requested a modification of the rationale of the Opinion to make its holding regarding real estate investment trusts (REITs) consistent with respondent's treatment of regulated investment companies (RICs). Upon consideration of appellants' petition, this panel concludes that the grounds set forth in their petition do not constitute a basis for granting a new hearing.

In their petition, appellants contend that the Opinion is contrary to law.¹ (Cal. Code Regs., tit. 18, § 30604(a)(5).) As provided in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, it is appropriate to look to Code of Civil Procedure section 657 and applicable case law as relevant guidance in determining whether a ground has been met to grant a new hearing.

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).) To find that the Opinion is contrary to law, this panel must determine whether the Opinion is “unsupported by any substantial evidence.” (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*); *Appeal of Graham and Smith*, 2018-OTA-154P.) This requires a review of the Opinion to indulge “in all legitimate and reasonable inferences” to uphold the opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the 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.) The Opinion is reviewed in the light most favorable to the prevailing party. (See *Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) The fact that appellants are dissatisfied with the outcome of their appeal is not grounds for a rehearing. (See *Appeal of Le Beau*, 2018-OTA-61P; *Appeal of Graham and Smith, supra*.)

In this appeal, the parties rely on one part of a single sentence in two separate R&TC sections to support their respective positions. Appellants cite R&TC section 25106(a)(1) to justify their dividend elimination claim, and respondent cites R&TC section 24870 to limit appellants to just a DPD. In so doing, appellants omitted “shall not be taken into account under [R&TC] Section 24344 [relating to interest deductions] or in any other manner in determining the tax of any member of the unitary group,” and respondent omitted “except as otherwise provided in this part” from R&TC sections 25106(a)(1) and 24870, respectively.

The California appellate courts have interpreted identical or virtually identical language in published decisions. In 2004, the Court of Appeal held that the phrase “shall not be taken into account under [R&TC] Section 24344 [relating to interest deductions] or in any other manner in determining the tax of any member of the unitary group” means exactly what it says – i.e., the eliminated dividends have no further tax consequence and, therefore, cannot be used to determine the tax of any member of the unitary group. (See *Fujitsu IT Holdings, Inc. v.*

¹ Appellants make other arguments that were addressed in the Opinion, and will not be discussed further herein. (See *Appeal of Graham and Smith*, 2018-OTA-154P.) Appellants also make constitutional arguments which are beyond the scope of OTA’s authority, and likewise will not be addressed herein. (See *Appeal of Acosta*, 2022-OTA-235P; see also 18 Cal. Code Regs., tit. 18, § 30104(a).)

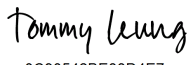
Franchise Tax Bd. (2004) 120 Cal.App.4th 459, 477 (*Fujitsu*).) In 2022, the court of appeal held that the phrase “except as otherwise provided” introduces an exception which allows the California Personal Income Tax Law and California Corporation Tax Law to override inconsistent provisions of the Internal Revenue Code even when there is conformity. (See 2009 *Metropoulos Family Trust v. Franchise Tax Bd.* (2022), *sub nom J.P. Morgan Trust Co. v. Franchise Tax Bd.*, 79 Cal.App.5th 245, 268-269 (*Metropoulos*).) Taken in their totality, R&TC sections 25106 and 24870, *Fujitsu*, and *Metropoulos* mean that California’s conformity to the federal REIT tax provisions is limited by California tax law, and once the dividend elimination rules of R&TC section 25106 are applied, those eliminated dividends cannot be used to determine the tax of any member of appellants’ combined reporting group.

Appellants further contend that the Opinion impermissibly strays beyond the confines of the R&TC by creating a California modification requiring appellants to subtract the DPD taken to arrive at federal adjusted gross income. As pointed out above, this California modification was dictated by reading the two main statutes relied on by the parties, R&TC sections 24870 and 25106, together with the *Fujitsu* and *Metropoulos* decisions. The “otherwise” language in R&TC section 24870 creates an exception to complete conformity with the federal REIT tax laws (*Metropoulos*), and the “shall not be taken into account” language in R&TC section 25106 removes the eliminated dividends from any further consideration when determining the tax of appellants (*Fujitsu*). The *Fujitsu* ruling was clear: Once dividends are eliminated by R&TC section 25106, those same dividends cannot be resurrected and re-used for other tax purposes -- e.g., for a DPD. Therefore, once appellants eliminated dividends pursuant to R&TC section 25106, appellants had to make a corresponding reduction to their federal DPD for California tax purposes. While appellants suggest that the Opinion’s interpretation of R&TC section 25106 arms respondent with a myriad of powers, it is noted that the *Fujitsu* court rejected respondent’s attempt to use dividends eliminated under R&TC section 25106 to apportion foreign income; hence, the “shall not be taken into account” language in R&TC section 25106 did not favor respondent and is facially agnostic. Thus, under *Sanchez-Corea*, appellants have not shown that the Opinion is contrary to law.

In its response, respondent asks that the Opinion be modified so the treatment of REITs and RICs can be consistent. In so doing, respondent refers to amendments made by SB 103 (Stats. 2003, ch. 655) to R&TC section 24871, clarifying that dividends received by a California corporate shareholder from a RIC are generally not excludable from income. SB 103 clearly and specifically refers to RICs under R&TC section 24871, and makes no reference to REITs. While this panel can interpret the law, it lacks the authority to rewrite or modify it. (See *Fujitsu*,

supra, at p. 478, citing *Farnow v. Superior Court* (1990) 226 Cal.App.3d 481, 486 [“a court may not rewrite a law, supply an omission or give words an effect different from the plain and direct import of the terms used”].) Only the Legislature can address respondent’s desire for consistency. (See Cal. Const., art. III, § 3.)

Accordingly, appellant’s petition is denied.

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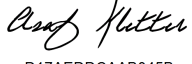
Tommy Leung
Administrative Law Judge

We concur:

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Sara A. Hosey
Administrative Law Judge

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Asaf Kletter
Administrative Law Judge

Date Issued: 7/22/2026