OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18073411
	) CDTFA Account No. 101-623689
MARTINEZ STEEL CORPORATION	) CDTFA Case ID 954455
	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Joseph A. Vinatieri, Esq.

For Respondent: Jarrett Noble, Tax Counsel III

J. LAMBERT, Administrative Law Judge: On November 1, 2019, the Office of Tax Appeals (OTA) issued an opinion in which it sustained a decision issued by respondent California Department of Tax and Fee Administration (CDTFA), on a petition for redetermination filed by Martinez Steel Corporation (appellant). CDTFA's decision denied appellant's petition for redetermination of CDTFA's Notice of Determination for $266,269 in tax, plus accrued interest, for the period July 1, 2012, through June 30, 2015 (liability period). Appellant filed a timely petition for rehearing (PFR). We conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

As relevant here, good cause for a new hearing may be shown where there was insufficient evidence to justify the opinion or the opinion was contrary to law, such that the substantial rights of the complaining party are materially affected. (Cal. Code Regs., tit. 18, § 30604(d); *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.) The question of whether the opinion is contrary to law is not one which involves a weighing of the evidence, but instead, requires a finding that the opinion is "unsupported by any substantial evidence"; that

is, the record would justify a directed verdict against the prevailing party.[1] (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) This requires a review of the opinion in a manner most favorable to the prevailing party, and an indulging of all legitimate and reasonable inferences to uphold the opinion if possible. (*Id.* at p. 907.) The question before us on a petition for rehearing does not involve examining the quality or nature of the reasoning behind OTA's opinion, but whether that opinion is valid according to the law. (*Appeal of NASSCO Holdings, Inc*. (2010-SBE-001) 2010 WL 5626976.)

Appellant argues that a rehearing should be granted because there was insufficient evidence to justify the opinion and the opinion was contrary to law.[2] Appellant notes that, pursuant to California Code of Regulations, title 18, section (Regulation) 1521(b)(6)(A), contractors holding a valid seller's permit may purchase materials for resale if they are in the business of selling materials. Appellant asserts that it purchased materials for resale and resold materials during the liability period, which establishes that it is "in the business of selling materials." Appellant notes that OTA's opinion states that "there is no way to determine whether the gross sales were comparatively significant." Appellant asserts that no legal authority, including Regulation 1521(b)(6)(A), provides any threshold that must be met by a contractor holding a valid seller's permit in order to purchase materials for resale or states that gross resales of materials must be "significant."

Appellant asserts that CDTFA only cites to its Audit Manual and Sales and Use Tax Annotations (annotations), such as annotations 190.0208 (7/5/95) and 190.0161 (8/15/94), which state that a construction contractor "may issue a resale certificate only when purchasing the materials as a fungible, commingled lot, a *significant portion* of which you intend to resell and a portion of which you will consume, but at the time of your purchase you do not know which

[1] Regulation 30604 is essentially based upon the provisions of California Civil Code of Procedure (CCP) section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 [State Board of Equalization (SBE) utilizes CCP 657 in determining grounds for rehearing]; *Appeal of Do*, 2018-OTA-002P [OTA adopts SBE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute are persuasive authority in interpreting the provisions contained in this regulation.

[2] Although appellant also argues that there was an "error in law" pursuant to Regulation 30604(e), that subdivision generally refers to errors that occurred during the course of the proceedings. As stated in CCP section 657 in the judicial context, an error in law "occurring at the trial and excepted to by the party making the application," is grounds for a new trial. This includes situations where, for example, the trial court made an erroneous evidentiary or procedural ruling. (See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138; *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391.) Appellant, however, has provided no arguments or evidence indicating that such an error in law occurred during the course of the proceedings.

items you will consume and which you will resell." [emphasis added.] Appellant argues that this allegedly erroneous and invalid rule was applied by CDTFA and then adopted by OTA. Appellant argues that the application of such an allegedly erroneous standard constitutes the application of a prohibited "underground regulation," pursuant to Government Code section 11340 et seq.

However, CDTFA's annotations are not regulations, and they are not binding upon taxpayers, CDTFA, or OTA. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15 (*Yamaha*).) The annotations are "digests of opinions written by the legal staff of [CDTFA] which are evidentiary of administrative interpretations made by [CDTFA] in the normal course of its administration of the Sales and Use Tax Law." (*Ibid*.) Pursuant to *Yamaha*, the "annotations have substantial precedential effect within [CDTFA]" and the "interpretation represented in [the] annotations is certainly entitled to some consideration by [OTA]." (*Ibid*.) In deciding cases, we must "independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation." (*Id.* at p. 7.) The annotations are "entitled to 'great weight' . . . when, as here, [CDTFA] is construing a statute it is charged with administering and that statutory interpretation is longstanding." (*Appeal of Praxair, Inc.*, 2019-OTA-301P, citing *Yamaha* at p. 25.)

In the course of deciding an appeal, OTA may be required to interpret the Sales and Use Tax Law, including CDTFA's regulations. (*Appeal of Talavera*, 2020-OTA-022P.) Here, the interpretation represented in the annotations is entitled to consideration by OTA in interpreting Regulation 1521(b)(6)(A). We find that annotations 190.0208 and 190.0161 are persuasive and entitled to great weight, because a construction contractor typically uses or consumes the materials that it purchases (Cal. Code Regs., tit. 18, § 1521(b)(2)(A)), and we would not conclude that the contractor was engaged in the business of reselling materials prior to use unless that contractor sold a significant portion of its materials. (See *Market St. Ry. Co. v. California State Bd. of Equalization* (1955) 137 Cal.App.2d 87, 95 ["Undoubtedly the term 'business' requires that the seller engage in more than one isolated sale. The number, scope, and character of the transfers must be considered."].) Accordingly, OTA was well within its authority in interpreting Regulation 1521(b)(6)(A) and the opinion did not apply an allegedly

erroneous rule or an "underground regulation." Accordingly, we conclude that OTA applied the correct law in this appeal.

Furthermore, OTA's determination was supported by substantial evidence. Appellant consumed 99.9 percent of the materials it purchased and resold only 0.1 percent of the materials, which clearly establishes that appellant was not in the business of selling, and appellant provided no evidence indicating otherwise. In other words, 0.1 percent of the materials is *not* a significant portion of the total materials appellant purchased. Therefore, appellant has not shown there was insufficient evidence to justify the opinion or the opinion was contrary to law. Based on the foregoing, we find that appellant has not shown good cause for a new hearing as required by the authorities referenced above, and appellant's petition is hereby denied.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

DocuSigned by:
John O Johnson
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Date Issued: 5/6/2020