OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18083552
	) CDTFA Case ID 486338
PROMOTIONAL DESIGN CONCEPTS, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Juan Partida, Representative

For Respondent: Kevin B. Smith, Tax Counsel III

J. LAMBERT, Administrative Law Judge: On June 2, 2021, the Office of Tax Appeals (OTA) issued an Opinion recomputing the measure of tax by revising labor installation ratios to 71 percent for 20' by 40' tents, 80 percent for 20' by 20' tents, 77 percent for other tent sizes, and 65 percent for inflatables, as explained below, and otherwise sustaining California Department of Fee and Administration's (CDTFA) action.[1] Prior to this appeal, CDTFA issued a Notice of Determination (NOD) to appellant on March 6, 2009, for tax of $148,644.86, plus accrued interest, based on three audit items. Appellant filed a timely petition for redetermination with CDTFA disputing the disallowed claimed nontaxable labor under audit item 3. CDTFA issued a Decision recommending a reaudit, which resulted in the reduction of the deficiency measure for audit item 3 by $11,125, from $1,450,397 to $1,439,272. CDTFA performed a second reaudit that reduced the deficiency measure for audit item 3 by an additional $898, to $1,438,374. Following appellant's filing of this appeal with OTA, CDTFA completed a third reaudit that further reduced the taxable measure for audit item 3 by $39,351, from $1,438,374 to $1,399,023.

[1] The installation labor ratios are, for purposes of this appeal, the ratios used by CDTFA of nontaxable installation labor to taxable fabrication labor, in the total installation labor time indicated on schedules provided by appellant.

On July 1, 2021, appellant timely filed a petition for rehearing (PFR) with OTA, stating that a rehearing should be granted on the ground that there is new evidence to show that further adjustments should be made to disallowed claimed nontaxable labor. We conclude that the ground set forth in this PFR does not constitute a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds is met and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the proceedings that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written Opinion; (4) insufficient evidence to justify the written Opinion; (5) the Opinion is contrary to law; or (6) an error in law that occurred during the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)[2]

During proceedings related to the underlying appeal, appellant contended that CDTFA improperly applied the installation ratio for other tent sizes to inflatables. In the underlying Opinion issued by OTA on June 2, 2021, the panel agreed that a separate ratio should be applied for inflatables in this case and relied on video evidence provided by appellant of the installation of a bounce house, which demonstrated that the process differed from that of a tent installation. With its PFR, appellant provides a new exhibit, which is a video of appellant's installation of an inflatable bounce house. Appellant asserts the video originally submitted and relied upon in the Opinion was not an installation of an inflatable that appellant performed itself, but rather a video from the internet. Appellant asserts that the new video demonstrates that the installation labor ratio for inflatables exceeds 90 percent.

A new hearing may be granted based on newly discovered evidence if the filing party shows: (1) the evidence is newly discovered; (2) reasonable diligence was exercised in its discovery and production; and (3) the evidence is material to the filing party's case. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 727-728; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 778-779.) The newly

[2] As provided in *Appeal of Wilson Development, Inc.*, *supra*, it is appropriate for OTA to look to the Code of Civil Procedure section 657 and applicable caselaw as relevant guidance in determining whether to grant a new hearing.

discovered evidence must be material in the sense that it is likely to produce a different result. (*Ibid*.)

Appellant has not provided any evidence or argument to show the new video evidence could not, with reasonable diligence, have been discovered and produced prior to the issuance of the written Opinion. Appellant has provided no evidence to show when the new video was produced or, if it was produced prior to the issuance of the written opinion, whether appellant was aware of its existence and its reasons for not providing the video. A new hearing will not be granted for the purpose of introducing evidence known to appellant and obtainable prior to the issuance of the original opinion, or which would have been known to appellant had it simply exercised reasonable effort to discover and present it. (*Langdon v. Langdon* (1941) 47 Cal.App.2d 28, 33.)

In addition, the original video relied upon in the Opinion was provided by appellant. Appellant previously argued on appeal that OTA should rely upon the original video and that the original video showed that a separate ratio should be applied for inflatables. OTA relied upon the original video and did, in fact, apply a separate installation labor ratio for inflatables based on that video. Appellant now submits additional evidence for the purpose of receiving further modifications. Appellant requests that OTA evaluate the new video, in the same manner that OTA evaluated the original video in the underlying Opinion. To the extent that appellant's reading of the underlying Opinion may have alerted appellant to the potential relevance of a different video, those circumstances do not establish that appellant has newly discovered evidence that could not, with reasonable diligence, have been discovered and produced prior to the issuance of the Opinion. A party who fails to offer certain evidence because it is unaware of its relevance cannot later, upon realizing its significance, claim it is "newly discovered." (*Slemons v. Paterson* (1939) 14 Ca.2d 612, 615; see *Hoffman-Haag v. Transamerica Ins. Co*.

(1991) 1 Cal.App.4th 10, 14.) Therefore, we find that appellant has not established any grounds for a rehearing, and we deny the PFR.

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Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Daniel Cho
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Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 10/5/2021