OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20106750
	) CDTFA Case ID 288-005
PEACOCK POWDER COATING, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Minaxi Kamath, President

For Respondent: Jason Parker, Chief of Headquarters Ops.

M. Geary, Administrative Law Judge: On August 20, 2021, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (respondent). Respondent's decision denied Peacock Powder Coating, Inc.'s (appellant's) petition for redetermination of a Notice of Determination (NOD) dated October 20, 2016. The NOD is for $153,469.09 in tax, plus accrued interest, and a failure-to-file penalty of $15,346.94 for the period July 1, 2006, through December 31, 2013 (liability period). On September 17, 2021, pursuant to the California Code of Regulations, title 18, (Regulation) section 30602, appellant filed a timely petition for a rehearing (PFR). Upon consideration of the matters stated therein, we find that appellant has not established grounds for a new hearing.

Regulation section 30604 provides that OTA may grant a rehearing where any of the six stated grounds exist, and the rights of the complaining party are materially affected. (See also *Appeal of Do*, 2018-OTA-002P.) Those grounds are: (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).) Grounds for a rehearing, if established, will be found to have materially affected the substantial rights of the petitioning party when a different result would have been likely but for the alleged error or event. (See *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 728; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764.)[1]

Although appellant specifically argues for a new hearing on the ground that the Opinion is contrary to law, it appears that appellant may be basing the PFR on the third, fourth, and fifth grounds stated above. We will discuss each ground below.[2]

Newly Discovered Evidence

We are authorized to grant a new hearing upon a showing that there is newly discovered evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the written opinion and which would likely lead to a different result. (Cal. Code Regs., tit. 18, § 30604(a)(3); *Santillan v. Roman Catholic Bishop of Fresno*, *supra*.)

Appellant states in its PFR that respondent – and at least by implication, the panel of judges – did not fully understand the nature of the respective businesses of the two related corporations: appellant and Iron Knob Corporation (IKC).[3] Appellant asserts that it applied no finish to, and at least implies that it performed no fabrication on, the structural iron used or sold by IKC. It also states that most of the ornamental iron products manufactured by IKC required only a primer, which IKC employees applied. Finally, appellant states that the $1,743,672 in income reported on its profit and loss (P&L) statements "included structural and ornamental iron work," and it argues that respondent "failed to differentiate the services provided by the two different corporations." Appellant identifies the facts and evidence supporting its PFR by stating, "With a review of the audit file [appellant] can point out these inconsistencies."

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[1] Regulation section 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*, *supra* [OTA adopts SBE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute can be helpful when interpreting the provisions contained in this regulation.

[2] The following subheadings follow the language of Regulation section 30604, which does not include as a ground for a rehearing a party's desire to provide *additional* evidence, but which includes as a ground for a rehearing a party's desire to provide "newly discovered" evidence that is likely to lead to a different result.

[3] Appellant and IKC were separate corporations, but they were under common ownership and worked out of the same facility. IKC manufactured and sold structural and ornamental iron. Appellant applied coatings to at least some of that iron and possibly also to materials supplied by others.

As noted in the Opinion, appellant's argument was that the two corporations should be treated as one. Appellant provided no substantial evidence and waived an oral hearing. The factual statements appellant makes now in support of its PFR find no support in the record. If appellant disputed the basic facts upon which respondent based the determination, it should have made those arguments and provided contradicting evidence during briefing. If appellant had any concerns about whether respondent had, or the panel of judges would have, a clear understanding about the relationship between appellant and IKC, what each of those companies did, or appellant's gross receipts during the liability period, it should have provided evidence to make its position clear. The burden of proof regarding these matters was on appellant. (Cal. Code Regs., tit. 18, § 30219(a), (c); *Appeal of Talavera*, 2020-OTA-022P.) The time to use available evidence to "point out … inconsistencies" or otherwise carry that burden was before OTA issued the Opinion. Nothing in the PFR suggests that there is *newly discovered* evidence. If, as seems likely, appellant is referring to possible sworn statements or testimony that one or more of appellant's owners might be able to give to correct or clarify the factual record, that same evidence could have been given before OTA issued the Opinion. Appellant simply chose not to do that. We conclude that the PFR does not establish a basis for a new hearing on the grounds of newly discovered evidence.

Insufficient Evidence

When OTA reviews an opinion to determine whether it is supported by sufficient evidence, the reconstituted panel of judges takes a fresh look at the evidence, exercising its independent judgment to weigh the evidence and draw its own reasonable inferences from the evidence.[4] (*Yarrow v. State* (1960) 53 Cal.2d 427, 434-435.) To find that there is an insufficiency of evidence to justify the opinion, we must be convinced from the entire record that the prior panel clearly should have made a different decision. (Code Civ. Proc., § 657; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683-684.)

The PFR makes no clear challenge to the factual findings upon which the Opinion relies. We infer from the PFR that appellant argues that the evidence does not support the prior panel's findings that appellant's total income for the liability period was $1,743,672 and that this entire

[4] A petition for rehearing is assigned to a panel that includes only one administrative law judge (ALJ) who signed the original Opinion, usually the lead ALJ who authored the Opinion, and two new members who did not participate in the original panel's deliberations. (Cal. Code Regs., tit. 18, § 30606(a).)

amount consisted of appellant's charges for taxable fabrication. The income amount came from appellant's P&L statements, and while appellant appears to dispute the scope of the fabrication labor performed by appellant on tangible personal property (TPP) manufactured by IKC, the description of the work performed by appellant retains the essential facts: appellant applied finishes to TPP supplied by IKC and possibly others. There is no suggestion that appellant earned its income by performing any other service, and whether appellant applied finishes to IKC's structural or ornamental iron, to TPP supplied by others, or to a combination of those is immaterial. We therefore find that the Opinion's findings regarding the services performed by appellant and the charges it made for those services are adequately supported by the evidence. On that basis, we conclude that the PFR does not establish that there is insufficient evidence to support the Opinion.

Contrary to Law

Code of Civil Procedure (CCP) section 657 and OTA's former Regulation section 30604(d) combine the "insufficient evidence" ground with the "contrary to (or against the) law" ground, and most precedential court decisions and OTA opinions that we have examined to date, including *Martinez Steel Corporation*, 2020-OTA-074P, address the combined grounds. At least two courts have observed that the phrase "against law" used in section 657 is not entirely clear (*Annin v. Belridge Oil Employees Federal Credit Union* (1953) 119 Cal.App.2d Supp. 900, 911 [citing *Mosekian v. Ginsberg* (1932) 122 Cal.App. 774, 776]) but both of those courts (and other authorities cited by those courts) state that "the phrase 'against the law' refers to a situation furnishing a reason for a reexamination of an issue of fact," which is the purpose of a rehearing. (See CCP, § 656.) However, when OTA amended its regulations (Cal. Code Regs., tit. 18, § 30000, et seq.) in 2021, it separated the "insufficient evidence" ground from the "contrary to (or against the) law" ground and explained that a PFR on the ground that the Opinion is contrary to law requires this panel to determine whether the Opinion is consistent with the law. We interpret this to mean that, unlike the "insufficient evidence" ground just discussed, granting a PFR on the "contrary to law" ground does not require this panel to reweigh all the evidence. Rather, it requires this panel to view the evidence in a light most favorable to the prevailing party, to indulge in all legitimate and reasonable inferences to uphold the opinion, if possible, and to find that the Opinion is unsupported by any substantial evidence and cannot be

sustained as a matter of law. (See *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906-907.)

Retail sales of TPP in this state are subject to sales tax measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, § 6051.) In this regard, a "sale" includes producing, fabricating, or processing TPP for a consideration for consumers who furnish the materials used. (R&TC, § 6006(b); Cal. Code Regs., tit. 18, § 1526(a).) Therefore, charges for fabricating TPP for a consumer are subject to sales tax unless specifically exempt or excluded from taxation by statute. (R&TC, § 6051.)

We have examined the record and found, above, that there is sufficient evidence to support the factual findings upon which the Opinion is based. The evidence established that appellant performed fabrication labor by applying finishes to TPP provided by its customer or customers and that the gross receipts appellant received for performing such services during the liability period totaled $1,743,672. Fabrication labor of the type just described is subject to sales tax unless specifically excluded. There is no evidence that appellant's fabrication labor was excluded from tax. Consequently, appellant's fabrication labor was subject to tax. On the basis of the foregoing, we find that the PFR does not establish that the Opinion is contrary to law.

We conclude that the PFR does not establish grounds for a new hearing. Therefore, the PFR is denied.

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Michael Geary
Administrative Law Judge

We concur:

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Amanda Vassigh
Administrative Law Judge

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Andrew J. Kwee
Administrative Law Judge

Date Issued: 1/3/2022