OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 21037328
	) CDTFA Case ID 175-012
HANWHA Q CELLS EPC USA LLC	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Michael C. Hamersley, Attorney
Jongho John Kim, Representative

For Respondent: Kevin B. Smith, Tax Counsel III

S. BROWN, Administrative Law Judge: On May 10, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining a decision issued by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA's decision denied a claim for refund filed by Hanwha Q Cells EPC USA LLC (appellant) for $1,581,848 in use tax appellant paid for the period January 1, 2017, through December 31, 2017.

On June 9, 2022, appellant timely filed a petition for rehearing (PFR) with OTA. OTA concludes that the grounds set forth in the PFR do not constitute a basis for granting 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.)

As relevant here, to find that the Opinion is contrary to law, OTA must determine whether the Opinion is "unsupported by any substantial evidence." (*Appeals of Swat-Fame, Inc., et al*., 2020-OTA-045P; *Appeal of Graham and Smith*, 2018-OTA-154P, citing *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 (here, CDTFA) and that indulges "in all legitimate and reasonable inferences" to uphold the Opinion. (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 907.) The relevant question does not involve examining the quality or nature of the reasoning behind the Opinion, but whether the Opinion is valid according to the law. (*Appeals of Swat-Fame, Inc., et al*., *supra* (citing *Appeal of NASSCO Holdings, Inc*. (2010-SBE-001) 2010 WL 5626976).) To find that there is an insufficiency of evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Opinion clearly should have reached a different conclusion. (*Appeals of Swat-Fame, Inc., et al.*, *supra*.)

In the context of newly discovered evidence, courts have concluded that new evidence is material when it is likely to produce a different result. (*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.) OTA finds this definition of materiality is appropriate to apply here.

First, appellant argues that the Opinion materially misstates the law with respect to the applicability of California Code of Regulations, title 18 (Regulation) section 1525.4(b)(10)(A) because the one-year lookback provision in that subdivision is inapplicable to the "construction contractor" provision in R&TC section 6377.1(a)(4). On this basis, appellant argues that the Opinion is contrary to law and the evidence is insufficient to justify the Opinion.

Appellant's argument appears to mischaracterize the Opinion's reference to Regulation section 1525.4(b)(10)(A). It is undisputed that on or about March 13, 2017, appellant entered into two construction contracts, one each with Sune Beacon Site 2 and Sune Beacon Site 5 (collectively, the Project Owners) to design, engineer, construct, and install solar energy power facilities at a site located in or near Cantil, California (Projects). The central finding of the Opinion is that appellant's purchase and use of tangible personal property (TPP) in 2017 does not meet the requirements for the partial use tax exemption pursuant to R&TC section 6377.1 because at the time of the purchase of the TPP, the Project Owners were not qualified persons for

purposes of the exemption. After the Opinion concluded that appellant was not entitled to the exemption, the Opinion's final paragraph addressed a remaining contention that appellant had raised: that requiring R&TC section 6377.1's "qualified person" requirement to be met at the time of purchase of the TPP would prohibit first-time power producers from qualifying for the exemption and thus would be contrary to the legislative intent behind amendments to that statute. In explaining why appellant's contention regarding legislative intent was unconvincing, the Opinion correctly noted that Regulation section 1525.4(b)(10)(A) provides an alternative test period that is applicable when the purchaser was not primarily engaged in a qualifying line of business for the financial year preceding the purchase of the property. The Opinion did not find Regulation section 1525.4(b)(10)(A) applicable to the purchaser in the instant appeal, nor did the Opinion misstate the applicability of Regulation section 1525.4(b)(10)(A). Consequently, the Opinion is neither contrary to law nor lacking sufficient evidence to justify the Opinion, and a rehearing on these grounds is not warranted.

Further, appellant contends that the Opinion is contrary to law because of its sentence on page 6 stating that "[w]ith respect to appellant's arguments concerning the intent of AB [Assembly Bill] 398, we note that while AB 398 was enacted on an urgency basis, it explicitly provided a January 1, 2018 operative date for the exemption at issue." Appellant states that the only relevant January 1, 2018 operative date in AB 398 relates to the expansion of the "qualified person" definition now codified in R&TC section 6377.1(b)(8)(A)(ii).

Appellant's position is unpersuasive. The Opinion relies on R&TC section 6377.1(b)(8)(A)(ii)'s January 1, 2018 operative date for the conclusion that the Project Owners were not qualified persons under R&TC section 6377.1(a). The sentence that appellant quotes from page 6 is referencing the January 1, 2018 operative date for the relevant portion of the exemption, i.e., R&TC section 6377.1(b)(8)(A)(ii). Thus, the Opinion is not contrary to law and there is no basis for a rehearing on this ground.

Additionally, appellant contends that the Opinion is contrary to law due to its reliance on R&TC section 6377.1(b)(9)(A)(iv)(II) to conclude that appellant is not entitled to the exemption on the grounds that the Projects did not meet statutory definition of qualified TPP. Appellant argues it is undisputed that the TPP at issue are solar modules and are not "special purpose buildings and foundations," and therefore the "special purpose buildings and foundations" provision in R&TC section 6377.1(b)(9)(A)(iv) is inapplicable to the present case.

The Opinion noted that operative January 1, 2018, the definition of "qualified tangible personal property" was expanded to include special purpose buildings and foundations used for the generation or production or storage and distribution of electric power. (R&TC, § 6377.1(b)(9)(A)(iv)(II).) Based on this provision, the Opinion concluded that "the Projects did not meet the statutory definition of qualified TPP until 2018." However, previously CDTFA had accepted appellant's position that the TPP met the statutory definition of qualified TPP and, thus, in the discussion of undisputed facts, the Opinion stated that "appellant purchased the solar modules, which were qualified TPP pursuant to [R&TC] section 6377.1(a)(4)."[1] Hence, the Opinion is inconsistent regarding its findings about whether the solar modules met the statutory definition of qualified TPP for purposes of the exemption. While arguably the solar modules may not have met the statutory definition of qualified TPP until 2018, for purposes of this analysis OTA will treat the solar modules as qualified TPP under R&TC section 6377.1(a)(4).

However, the primary finding of the Opinion is that appellant's purchase and use of TPP in 2017 does not meet the exemption's requirements under R&TC section 6377.1 because the Project Owners did not become qualified persons under R&TC section 6377.1(b)(8)(A)(ii)) until 2018. This conclusion is dispositive. Therefore, the qualified TPP analysis is not material because it does not affect the outcome of the appeal.

[1] In its response to appellant's PFR, CDTFA cites Regulation section 1521(c)(13) and R&TC section 6377.1(b)(9)(A)(iv) in support of its position that the Opinion "correctly concluded that the property at issue constituted special purpose buildings used in the generation or production of electric power, which were not included in the definition of qualified tangible personal property at the time the property was purchased and used by Appellant in 2017."

For the foregoing reasons, appellant has not established grounds for a rehearing. Consequently, appellant's PFR is denied.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

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Andrew Wong
Administrative Law Judge

Date Issued: 11/17/2022