OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20015720) CDTFA Case ID 850585
K1 SPEED, INC.	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Josh Boxer, CFO
Stuart A. Simon, Attorney
Joseph K. Fletcher III, Attorney
Paul J. Fraidenburgh, Attorney

For Respondent: Scott Claremon, Tax Counsel IV

A. WONG, Administrative Law Judge: On December 19, 2022, the Office of Tax Appeals (OTA) issued an Opinion sustaining a Decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's Decision denied, in part, a petition for redetermination filed by K1 Speed, Inc. (appellant) of a Notice of Determination (NOD) dated October 6, 2014. The NOD is for $2,521,276.46 in tax, plus applicable interest, for the period April 1, 2009, through March 31, 2012 (liability period). In its Decision, CDTFA reduced the tax liability to $2,496,245.00, but otherwise denied appellant's petition.

On January 18, 2023, appellant timely petitioned OTA for a rehearing on two bases: (1) there is insufficient evidence to support the Opinion; and (2) the Opinion is contrary to law.

Regarding the first basis for rehearing, appellant contends that the Opinion is conclusory and did not analyze or cite any evidence that would support treating a go-kart ride on an indoor rubber track as a taxable lease. Specifically, appellant argues that its customers only received the right to a go-kart ride at an "amusement park," not possessory interest in the go-kart or any

[1] The State Board of Equalization (Board) formerly administered the sales and use taxes. On July 1, 2017, the Board's administrative functions relevant to this case transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, all references to "CDTFA" refer to the Board.

associated (unspecified) equipment. In support, appellant provides documents regarding the rules of the track and safety information, which are given to each driver and posted on the walls of its facilities (i.e., the alleged amusement parks), and notes that none of these documents mentions any possessory interest in the go-kart or equipment provided to its customers.

Regarding the second basis for a rehearing, appellant argues that the Opinion is contrary to law because OTA improperly analogized a go-kart ride to taxable rentals of skis, surfboards, and similar items in concluding that a go-kart ride is also a taxable lease. Specifically, appellant asserts that it only offers go-kart rides (not go-kart rentals), which are distinguishable from rentals of skis, surfboards, and the like because the go-kart ride only takes place at appellant's indoor tracks during business hours, and the go-karts never leave "the amusement park," whereas the lessee of skis and surfboards can use them wherever or whenever he or she wants. Appellant also asserts that a better analog for the karting experience is amusement park rides such as Radiator Springs Racers and Autopia at Disney California Adventure Park and Disneyland, respectively, where riders of those allegedly nontaxable rides drive and control a car's direction and speed.

OTA concludes that neither alleged ground constitutes a basis for a new hearing.

OTA may grant a rehearing where one of the following grounds exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings, which occurred prior to issuance of the Opinion and prevented the fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceedings and prior to the issuance of the Opinion, 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 Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Insufficient Evidence

In considering a petition for rehearing based on the insufficiency of evidence ground, OTA has the affirmative duty to make an independent appraisal of the evidence and to grant the petition where the preponderance of the evidence is opposed to the findings in the Opinion. (See

Byrne v. City and County of San Francisco (1980) 113 Cal.App.3d 731, 739.)[2] Further, OTA may disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom that are contrary to the factual findings in the Opinion. (See *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1159-1160.) 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 result. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

Here, OTA's Opinion did not consider whether appellant's customers received possessory interests in appellant's go-karts or any associated equipment because that was not an issue of fact on appeal; it was undisputed that appellant's customers received a possessory interest in the go-karts and associated equipment. On page 4 of appellant's opening brief dated March 30, 2020, appellant conceded that "the karts are temporarily used by guests while racing (i.e., they have gained possession of a kart during the race)" before proceeding to argue that its customers' temporary use of the go-karts was excluded from the definition of "lease" per California Code of Regulations, title 18, (Regulation) section 1660(a)(1) and (e)(1). Similarly, appellant, in its opening brief, references the fact that it gives its customers a helmet and head sock for use while racing (OTA assumes these are the associated equipment appellant references in its petition for redetermination).

Further, OTA has reviewed the evidence in the record and finds it more than sufficient to conclude that appellant rented/leased go-karts to its customers. For example, Exhibit 1 to CDTFA's Decision is a screenshot of appellant's website as of May 11, 2009, which is during the liability period. On its website, appellant stated, "If you are interested in a go kart rental (cart rental), we think that you'll find K1 Speed has what you're seeking!" Exhibits E and F of CDTFA's hearing exhibits are also screenshots of appellant's website taken on May 10, 2011, and June 2, 2015, respectively (i.e., during and well after the liability period), and they too contain the same language indicating that appellant offered go-kart rentals/leases to its customers.

In contrast, the documents appellant provided with its petition for rehearing are undated and, based on OTA's review of the record, were not previously provided in this appeal. A party

[2] OTA may look to Code of Civil Procedure section 657 and applicable caselaw for relevant guidance in determining whether a ground for rehearing has been met. (*Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

petitioning for a rehearing based on evidence that was not previously provided must show that the evidence is newly discovered, the party exercised reasonable diligence in discovering and producing it, and the evidence is material in that it would likely change the result. (*Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) Appellant has neither claimed nor shown that these documents were newly discovered or that it exercised reasonable diligence in discovering and producing them. Further, appellant has not shown that these documents are material because, even though these documents may not evidence the transfer of a possessory interest of a go-kart or any other equipment from appellant to its customers, other evidence in the record, which OTA described above, already does so. Thus, OTA declines to accord the documents appellant provided with its petition any evidentiary value. Further, for the reasons recounted above, OTA also concludes that there is sufficient evidence to support the Opinion.

Contrary to Law

For purposes of this section, 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, OTA must determine whether the opinion is unsupported by any substantial evidence. (*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. (*Appeals of Swat-Fame Inc., et al., supra*.) 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. (*Ibid*.) In this review, OTA must examine the evidence in the light most favorable to the prevailing party. (*Ibid*.)

Regulation section 1660(e)(3)(C) provides an example of a situation that does *not* qualify for the exclusion from the term "lease": "Rental of tools to be used *on the premises of the owner of the tools* for a period of eight hours. . . ." (Italics added.) In this example, the fact that the tools were to be used on the premises of the tools' owner/lessor was not a bar to finding a lease. Similarly, the fact that the leased go-karts never leave appellant's facilities also does not disqualify them from lease treatment, contrary to appellant's assertion on appeal.

Further, appellant's attempt to analogize its go-kart leases to rides at Disney theme parks fails for two reasons. First, appellant failed to provide any evidence to support its factual assertions regarding the nature or characteristics of the rides at the Disney parks or how they compare with its own go-karts. Second, to the extent appellant is re-asserting its argument that

go-karts are a nontaxable amusement service, the Opinion already considered this argument and found it unpersuasive. Appellant's dissatisfaction with the outcome of its appeal and attempt to reargue the same issue a second time are not grounds for a rehearing. (*Appeal of Graham and Smith*, *supra*.) For the reasons provided above, OTA also concludes that the Opinion is not contrary to law.

Accordingly, OTA concludes that appellant has not established any grounds for a rehearing, so appellant's petition for rehearing is denied.

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Andrew Wong
Administrative Law Judge

We concur:

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Josh Lambert
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Josh Lambert
Administrative Law Judge

DocuSigned by:
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Keith T. Long
Administrative Law Judge

Date Issued: 5/25/2023