OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20096679
	) CDTFA Case ID 198-032
RICK'S PATIO, INC.,	)
dba Rick's Pool and Spa	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Robert B. Rosenstein, Representative

For Respondent: Jarrett Noble, Attorney

T. STANLEY, Administrative Law Judge: On March 17, 2023, the Office of Tax Appeals (OTA) issued an Opinion modifying a decision issued by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied a petition for redetermination filed by Rick's Patio, Inc. (appellant) of a Notice of Determination (NOD) dated September 26, 2016. The NOD is for tax of $79,865.67, and applicable interest, for the period January 1, 2013, through December 31, 2015. OTA's Opinion reduced the measure of taxable delivery charges to $101,507, reduced the measure of unreported taxable sales to $490,354, deleted the measure of unreported taxable service charges, and otherwise sustained CDTFA's determination.

On April 17, 2023, appellant timely petitioned OTA for a rehearing pursuant to California Code of Regulations, title 18, (Regulation) section 30604(a)(1)–(3), arguing that OTA did not consider all of the evidence appellant submitted. Specifically, appellant first argues that there was an irregularity in the OTA appeals proceedings because OTA did not provide appellant with ample opportunity or time to supply additional, material evidence. Appellant also argues that OTA's failure to accept its additional evidence was an accident/surprise that substantially, detrimentally, and materially affected its rights. Finally, appellant asserts that the additional

[1] Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to the board.

evidence it submitted was newly discovered, relevant evidence that warrants a rehearing. OTA concludes that the grounds set forth in this petition do 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 appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the 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 OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)–(6)[2]; *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654.)

Irregularity in the Proceedings

An irregularity in the proceedings is "[a]ny departure by [OTA] from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected." (*Appeal of Graham and Smith*, 2018-OTA-154P, quoting *Gay v. Torrance* (1904) 145 Cal. 144, 149.) Appellant has not established that there was an irregularity in OTA's proceedings. Rather, OTA gave appellant no fewer than 10 opportunities over the 17-month pendency of the appeal to timely submit all relevant evidence. OTA also extended some of the deadlines at appellant's request. Appellant stated at the hearing on October 12, 2022, that the documents that it wanted to submit as evidence were in boxes. CDTFA did not object to appellant submitting new evidence; however, CDTFA stated that the records would need to be in PDF format, and it could then test some line items to see if any adjustments should be made. OTA gave appellant 30 days, or until November 11, 2022, to have the appropriate records scanned into PDF format. OTA did not send out a confirming letter until November 30, 2022, so the deadline for appellant to submit its additional evidence was extended to December 29, 2022. On January 9, 2023, OTA closed the record because it had not received appellant's additional evidence. On January 18, 2023, appellant submitted documents to OTA, which OTA treated as a request to reopen the record. On February 10, 2023, OTA denied appellant's request, citing the

[2] Regulation section 30604 was modified effective June 30, 2023. The changes are not relevant to this appeal.

myriad opportunities given to appellant to timely submit its documents. OTA issued the order as part of the usual processes and procedures based on OTA's Rules for Tax Appeals, and the reasoning for the denial was also consistent with those rules. Therefore, there was no error or irregularity in OTA's proceedings which prevented fair consideration of the appeal.

Accident or Surprise

As provided in *Appeal of Wilson Development, Inc.*, *supra*, it is appropriate for OTA to look to Code of Civil Procedure section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a new hearing. Interpreting section 657 of the Code of Civil Procedure, the California Supreme Court held that the terms "accident" and "surprise" have substantially the same meaning. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) Further, to constitute an accident or surprise, a party must be unexpectedly placed in a detrimental condition or situation without any negligence on the part of that party. (*Ibid*.) A new hearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Wilson Development, Inc.*, *supra*.)

Here, appellant could not have been surprised by the passage of several deadlines to submit its documents to OTA. OTA notified the parties of each opportunity to provide additional evidence throughout the appeal proceedings. To the extent appellant alleges accident or surprise because its attorney had an internal technical issue, appellant has not explained how this constituted an accident or surprise such that it unexpectedly placed appellant in a detrimental condition without any negligence on the part of appellant. Appellant claims that 30 days was not long enough to provide the additional evidence because the records had to be manually located, reviewed, pulled, and scanned. However, OTA notes that appellant could have completed that process during the audit or two reaudits, during CDTFA's conferences, during OTA's appeals process, or by the post-hearing deadline set by OTA. Appellant actually had 89 days, not 30 days, from the date of the hearing until OTA closed the record, and appellant did not request an extension of time. Therefore, appellant was negligent in not providing the records sooner to avoid a last-minute technical issue. To the extent that appellant was surprised, it was due to its own negligence and thus does not constitute a ground for a rehearing.

Newly Discovered, Relevant Evidence

Appellant has not explained how the evidence it submitted on January 18, 2023, is newly discovered. In fact, appellant clearly had the documents prior to the hearing because it brought hardcopy versions of those documents to the October 12, 2022 hearing. Furthermore, the bankruptcy documents are dated in 2019, and the additional evidence in appellant's late submission to OTA are dated in the years 2013, 2014, and 2015. Appellant had these records available during the audit and subsequent two reaudits but chose not to provide them to CDTFA. Appellant cannot now claim that the evidence it held back during the audit and appeals processes was newly discovered.

Appellant has not established that grounds exist for a rehearing. Accordingly, appellant's petition is denied.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Sara A. Hosey
Administrative Law Judge

Date Issued: 8/25/2023