OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **CSI ALISO, INC.**	) OTA Case No. 18032469) CDTFA Case ID 577109))))

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Joseph Vinatieri, Attorney
Patricia Verdugo, Attorney

For Respondent: Jarrett Noble, Attorney

K. LONG, Administrative Law Judge: On December 15, 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 (Appeals Bureau decision)[2] denied, in part, a petition for redetermination filed by CSI Aliso, Inc. (appellant) of a Notice of Determination (NOD) dated July 7, 2011. The NOD is for $882,870.15 in tax, plus applicable interest for the period January 1, 2007, through December 31, 2009 (liability period).

In the Opinion, OTA considered whether adjustments were warranted to an assessment of tax resulting from CDTFA's disallowance of appellant's claimed sales for resale. OTA found that appellant was a construction contractor that entered into a construction contract with Big West of California, LLC (Big West). OTA concluded that, in the course of the construction contract, appellant furnished and installed materials and fixtures.

OTA also examined appellant's receipt of an October 31, 2006 resale certificate from Big West. OTA noted that there was no dispute that appellant timely received a resale certificate

[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.

[2] The underlying OTA Opinion referred to this as CDTFA's Decision. In this Opinion on Petition for Rehearing, OTA will refer to it as the Appeal Bureau decision. (See Cal. Code Regs., tit. 18, § 30102(h).)

in the proper form, from Big West. However, OTA found that appellant failed to act in good faith when it received the resale certificate. OTA's conclusion was based on the limitation set forth in California Code of Regulations, title 18, (Regulation) section 1521(b)(6)(A) that "[a] contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him or her by taking a resale certificate from the prime contractor, interior decorators, designers, department stores or others." (Cal. Code Regs. tit. 18, § 1521(b)(6)(A).)

OTA addressed arguments related to Regulation section 1521(b)(6)(A), including: that (1) CDTFA is estopped from questioning appellant's good faith receipt of a resale certificate; and (2) that Regulation section 1521(b)(6)(A) conflicts with Revenue and Taxation (R&TC) sections 6091 through 6093 and is invalid. Appellant's estoppel argument was based on a statement in the Appeals Bureau decision that appellant received the resale certificate in good faith. In the Opinion, OTA found that in questioning appellant's good faith receipt of the resale certificate, CDTFA had not raised a new matter but had "merely changed its theory for why tax applies." OTA noted that it had limited authority to grant equitable relief and that the grounds for such relief are not applicable to appellant's case. OTA also found that it lacked authority to overturn Regulation section 1521, or to address whether Regulation section 1521 was in conflict with the R&TC.

OTA also found that appellant had not provided sufficient evidence to warrant a reduction to the measure of tax.

On January 16, 2023, appellant timely petitioned for a rehearing with OTA on the basis that: there was an irregularity in the proceedings that prevented the fair consideration of the appeal; that an accident or surprise occurred, which ordinary caution could not have prevented; that there is insufficient evidence to justify the written Opinion; that the Opinion is contrary to law; and that there was an error in law that occurred during the appeals hearing. Appellant's arguments can be broadly categorized as the following issues: (1) whether OTA failed to review, consider, or analyze documentary evidence and witness testimony; (2) whether CDTFA made concessions on factual issues, which are akin to stipulations, and therefore binding; and (3) whether OTA erroneously failed to declare that Regulation section 1521, pertaining to resale certificates is invalid. Appellant asserts multiple grounds for rehearing for each of these three arguments. OTA concludes that the grounds set forth in this petition do not constitute a basis for a new hearing.

Grounds for Rehearing

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 occurring during the appeal proceeding 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 written Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law that occurred during the OTA 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, unless the context provides otherwise, the term material means and includes something which has the potential to change the holding or disposition of an appeal before OTA. (Cal. Code Regs., tit. 18, § 30102(s).)

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.

When an irregularity in the proceeding is asserted, OTA must determine whether appellant has established that there was an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal. (Cal. Code Regs., tit. 18, § 30604(a)(1).) An irregularity in the proceedings warranting a rehearing generally includes any departure from the due and orderly method of conducting the appeal proceedings by which the substantial rights of a party have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Gay v. Torrance* (1904) 145 Cal. 144, 149.)

With respect to accident or surprise, a rehearing 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.*) 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 Muttis* (1948) 31 Cal.2d 429, 432.) 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*.)

Under the prior version of OTA's Rules for Tax Appeals whether there was insufficient evidence to justify the written opinion and whether the opinion is contrary to law were interconnected as a single ground for rehearing. (See Cal. Code Regs., tit. 18, § 30604(d) [effective January 2, 2019, through February 28, 2021].) The March 1, 2021 revision to OTA's Rules for Tax Appeals separated the insufficient evidence and contrary to law grounds into two separate grounds and added a new explanation that "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(a)(4) & (5), 30604(b) [effective March 1, 2021].)[3] The revision serves to make clear that the analysis may now focus solely on the insufficiency of the evidence or contrary to law or both, as relevant. (Cal. Code Regs., tit. 18, § 30604(a)(4)-(5).)

To find that there is 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 panel clearly should have reached a different opinion. (Code Civ. Proc. § 657; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 684.)

The contrary to law ground "does not import a situation in which the court weighs the evidence and finds a balance against the [holding], as it does in considering the ground of insufficiency of the evidence." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*), citing *Musgrave v. Ambrose Properties* (1978) 87 Cal.App.3d 44, 56.) Rather a holding is contrary to law "only if it was unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a [holding] against the party[y] in whose favor the [holding was] returned." (*Sanchez-Corea*, *supra*, 38 Cal.3d at 907, citing *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.) This requires indulging "in all legitimate and reasonable inferences" to uphold the Opinion. (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907; see also *Appeals of Swat-Fame, Inc. et al.*, 2020-OTA-045P.) The question does not involve examining the quality or nature of the reasoning behind [OTA's Opinion], but whether [the Opinion] can or cannot be valid according to the law." (*Appeal of NASSCO Holdings, Inc.*, (2010-SBE-001) 2010 WL 5626976.)

Finally, for the purposes of granting a rehearing, a procedural error in law shall mean an error in the appeals hearing or proceeding, other than a legal error in the Opinion. (Cal. Code Regs., tit. 18, § 30604(b).) A new hearing may be granted based on an error in law if its original

[3] This aspect of OTA's Rules for Tax Appeals remains unchanged following the June 30, 2023 revisions.

ruling as a matter of law was erroneous. (*Collins v. Sutter Memorial Hospital* (2011)196 Cal.App.4th 1, 17-18, citing *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong. For example, an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 Cal.App. 487.)

Issue 1: Whether OTA failed to review, consider, or analyze documentary evidence and witness testimony.

In the petition for rehearing, appellant primarily asserts that OTA failed to properly review, consider, or analyze submissions, evidence, and witness testimony and this failure constitutes an error in law during the appeals proceeding. For example, appellant asserts that it submitted a May 14, 2021 motion (Motion), which was not mentioned in the Opinion. Appellant's Motion argues that CDTFA previously conducted a reaudit to deduct installation labor from the taxable measure, but that CDTFA failed to remove all of the nontaxable labor. Appellant argues that OTA accepted the audit's methodology, but then failed to consider that appellant's Motion sets forth its own calculation of the taxable measure (excluding additional installation labor) on an actual basis. Appellant contends that instead of considering the Motion, OTA referenced an old report (also provided by appellant) in the Opinion. Appellant argues that the figures in the old report were specifically replaced by those contained in the Motion.

Additionally, appellant asserts that OTA erroneously refers to missing invoices in the evidentiary record before OTA in its analysis. Appellant contends that the audit workpapers list the invoices disallowed by CDTFA during the audit to be numbers: 14, 15, 16, 18, 19, 21, 24, 26, 27, 28, 31, 36, 38, 40, 45, and 63. Appellant contends that it provided 15 out of 16 disallowed invoices to OTA. With respect to the unprovided invoice (Invoice 45), appellant asserts that it provided other evidence of the contract amounts. Appellant asserts that OTA's allegedly erroneous statement that "appellant only provided 15 out of 63 invoices," is a material error because it is part of OTA's rationale that appellant did not meet its burden of proof.

Appellant also contends that OTA did not consider extensive and uncontroverted testimony from an independent third-party witness. Appellant argues that the Opinion only mentions the witness testimony one time and otherwise ignores it in the analysis. Appellant contends that this is a material error because witness testimony is contemporaneous direct evidence that must be considered and weighed accordingly. Appellant argues that in this case,

the witness testimony was uncontradicted and uncontroverted and therefore must be given such weight that OTA should have relied upon the testimony in the Opinion.

As discussed above, a procedural error in law shall mean an error in the appeals hearing or proceeding, other than a legal error in the Opinion. (Cal. Code Regs., tit. 18, § 30604(b).) Here, OTA received appellant's Motion prior to the hearing, considered its contents, and issued a timely ruling on August 11, 2021. In that Order, OTA stated that a dispute over the audit measure could not be resolved through issuance of a directed outcome and that resolution of a substantive issue required the consideration by a panel of three administrative law judges. In other words, OTA refused to make a substantive decision to reduce the measure of tax prior to the oral hearing. This is consistent with Government Code sections 15672 and 15674, which confer the duty to decide tax appeals on a three-member panel. (Gov. Code §§ 15672, 15674.) Further, the Rules for Tax Appeals do not authorize administrative law judges to decide the outcome of a case individually. (See Cal. Code Regs., tit. 18, § 30213.)[4] Thus, OTA finds that no procedural error in law occurred prior to the hearing based on OTA's refusal to direct a reaudit. Similarly, OTA finds that no irregularity in the proceedings occurred because OTA did not depart from the due and orderly method of conducting the appeal in its consideration of appellant's Motion.

Next, in considering whether there was a procedural error in law during or after the hearing, OTA notes that appellant's witness testimony and 26 exhibits were admitted into the record without objection. As such, there was no procedural error in law with respect to the admission of the evidence, or testimony. Instead, the issue is whether there was an error in law with respect to OTA's consideration of the admitted evidence, and the testimony.

In the Opinion, OTA found that CDTFA met its initial burden of showing that the determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Accordingly, the burden of proof shifted to appellant. (*Ibid*.) To meet that burden, appellant must establish that the circumstances it asserts are more likely than not to be correct. (*Appeal of AMG Care Collective*, 2020-OTA-173P.) Here, appellant's Motion, documentary evidence, and witness testimony are all summarized in the Opinion's finding of facts. Such inclusion is indicative of OTA's review and consideration of the record. While any party may provide

[4] OTA notes a limited exception: a single administrative law judge may decide an appeal when an eligible appellant requests to participate in OTA's Small Case Program. (Cal. Code Regs., tit. 18, § 30209.1.) However, that exception does not apply in this matter.

argument with respect to the evidentiary weight, the evaluation and assignment of such weight is left to OTA. (Cal. Code Regs., tit. 18, § 30214(f)((4).) Despite its review and consideration, OTA found that appellant failed to provide sufficient evidence to meet its burden of proof. Accordingly, OTA finds that no procedural error in law occurred based on OTA's acceptance or review of the available evidence.

Next, OTA's Opinion states that "appellant only provided 15 out of 63 invoices." As discussed above, appellant provided a nonsequential series of invoices, including invoices: 14, 15, 16, 18, 19, 21, 24, 26, 27, 28, 31, 36, 38, 40, and 63. Thus, it was reasonable for OTA to conclude that there were at least 63 invoices that appellant issued to Big West in connection with furnishing and installing the SCR system. OTA notes that the invoices provided on appeal pertain only to the disallowed claimed exempt transactions. However, on appeal, appellant argued that the entirety of the work performed (represented by all 63 invoices) constitutes two separate contacts: (1) a contract for the sale of the SCR systems, and (2) a later the contact to furnish and install those systems. Appellant did not submit to OTA the entirety of the invoices covering the transaction(s) at issue (furnishing and installation of the SCR system) to substantiate its argument.

Nevertheless, OTA's conclusion that appellant failed to meet its burden rests on the lack of other substantiating documentation, not just the invoices. For example, as discussed in the Opinion, appellant failed to provide purchase orders and some of the documentary evidence was illegible. Similarly, any reference by OTA to a superseded report does not materially affect appellant's rights, because OTA's conclusion does not rest on the report, but instead is based on the lack of evidence that a reduction to the taxable measure is warranted. As such, OTA finds no basis to grant a rehearing based on an alleged procedural error in the Opinion.

OTA also considers the Motion and available invoices in the context of whether there was sufficient evidence to justify the Opinion. For appellant to prevail on this ground, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the panel clearly should have reached a different opinion. (Code Civ. Proc. § 657; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 684.) Here, the record shows that during the reaudit, CDTFA considered the available invoices and reduced the taxable measure for civil/structural mechanical and electrical work performed by subcontractors Total-Western Inc., and Adamson Electric. These reductions affected invoices: 16, 18, 19,21, 24, 26, 28, 31, and 36.

Each of these invoices contained a heading that stated "Subcontractor" and then a line-item charge for either "Mechanical" or "Electrical."

Appellant's Motion asserts that additional reductions were required. Specifically, appellant argues that reductions to the taxable measure are required for invoices 27, 38, and 45, for nontaxable charges labeled "mechanical" and "electrical." Appellant asserts that these reductions would be consistent with other reductions to the taxable measure. Appellant refers to the master agreement for the construction contract as support for the contention that charges contained in invoices 38 and 45 were for nontaxable installation labor. Appellant asserts that invoice 38 reflects a 10 percent retention amount that was invoiced at the end of the project for Mechanical and Electrical. Appellant asserts that Invoice 45 contained a contingency amount for installation that is discussed in the master agreement for the construction contract.

Appellant also argues that the taxable measure should be reduced by amounts for "Construction Management," which include engineering and nontaxable installation labor. In support of the contention that engineering charges are not subject to tax, appellant cites to a March 21, 2014 memorandum from CDTFA, which states, "[t]he auditor agrees that any engineering service related to installation as well as testing service after installation should not be included in the taxable measure."

In addition to "construction management" charges, appellant also argues that some invoices separately stated nontaxable "engineering" charges. Appellant asserts that the associated nontaxable labor charges include: the setup of a field office; staffing; construction work; commissioning; performance testing; systems turnover to Client operation; submission of operating manuals to clients; operator and procedures training; and spare parts for one year of operation. Appellant argues that the nontaxable construction management charges were included on invoices: 15, 18, 19, 21, 24, 26, 27, 28, 31, 26, and 38. In addition, appellant argues that materials were not subject to tax. In total, appellant requests a reduction of the taxable measure from $8,992,649.90 to $1,762,998.70.

In the Opinion, OTA found that appellant failed to provide sufficient evidence to support a reduction of the determination. In reviewing the evidence for appellant's petition for rehearing, OTA notes several things. First, appellant did not provide Invoice 45 to CDTFA for the audit or to OTA for the appeal. As such, appellant failed to provide a complete set of invoices for the disallowed transactions. With the Motion, appellant included a copy of its sales journal, which

includes an entry for Invoice 45. However, there are no details within the sales journal to indicate the purposes of the charges on Invoice 45. Thus, the sales journal does not provide sufficient evidence to show that the recorded charges are solely for nontaxable installation labor. The Motion also refers to the Master Service Agreement citing to the following language:

> The Phase 2 construction shall be invoiced based on milestone payments as presented in Attachment 2. The basis of these progress payments shall be the amount of $3,012,395, which represents the total of Phase 2 construction less contingency of $523,805. Upon completion of construction cost increase by construction subcontractor, if any, shall be invoiced at cost and shall be paid from project contingency. Such invoice against project contingency shall be supported with subcontractors invoicing showing the total final cost of construction subcontracts. In the unlikely event that the construction cost increase exceeds contingency, cost exceedance shall be shared 50/50 by Flying J and AUS. This is not a likely scenario, however, in fast pace projects with schedule being the primary focus, cost is generally sacrificed in favor of maintaining the project on schedule.

This language, which is part of the Master Service Agreement, Attachment 2, includes amounts charged on Invoice 45 (as recorded in appellant's sales journal for Invoice 45). There is no language identifying that the contingency amount is solely for nontaxable installation labor. Rather, this amount could be for any additional subcontractor costs. Further, the attachment clause is annotated to say "Deleted: to be agreed upon by Flying J and AUS at a later date." As such, it is not clear whether this language was ever actually agreed upon. Thus, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA cannot conclude that the panel should have reached a different opinion with respect to Invoice 45.

With respect to the other invoices, OTA notes differences exist between the invoiced charges that CDTFA allowed as nontaxable labor, and the invoiced charges that CDTFA disallowed. It is unclear what the differences on the invoices represent. For example, CDTFA did not allow charges for construction management. Appellant bears the burden of showing that reductions to the taxable measure are warranted. In this case, that means appellant was required to show that the invoiced charges were solely for nontaxable installation labor. As noted in the Opinion, appellant failed to provide purchase orders, complete and signed agreements, or even legible documentation. OTA has considered the attachments included with the Motion and found no evidence that it clearly should have come to a different conclusion. Accordingly, OTA does not find a basis to grant a rehearing based on insufficiency of the evidence to support the Opinion.

In summary, OTA does not find any grounds upon which a rehearing may be granted based on the alleged failure to consider evidence or witness testimony. As detailed above, OTA considered appellant's evidence and witness testimony when coming to a decision. That OTA came to a different conclusion than appellant regarding the probative value of the available testimony and evidence does not amount to an error of law. OTA does not find a procedural error occurred, nor are there any other grounds upon which a rehearing shall be granted based on this contention. Additionally, OTA has weighed the evidence and does not find that it clearly should have come to a different conclusion. Therefore, OTA finds no basis to grant a rehearing based on sufficiency of the evidence. OTA finds no other grounds upon which a rehearing may be granted based on the contention that OTA failed to consider evidence or witness testimony.

Issue 2: Whether CDTFA made concessions on factual issues, which are akin to stipulations, and therefore binding.

Appellant asserts that prior to the hearing, CDTFA agreed to factual findings, which, like stipulations, are binding on CDTFA, OTA, and appellant. Specifically, appellant contends that prior to the hearing, CDTFA agreed that "the disputed items involve two transactions with Big West," and "the two transactions involve a contract for the installation of an SCR system." Additionally, appellant cites to a footnote in the Appeals Bureau decision, which states that "the audit working papers indicate that the Department does not dispute that [appellant] accepted a timely and specific resale certificate from Big West in good faith." Appellant argues that this footnote amounts to a stipulation, which OTA should have accepted in good faith. Appellant also asserts that in each of these agreements, CDTFA wrongfully changed its position, which amounts to an irregularity in the proceeding and a surprise.

Prior to the hearing, OTA issued a Minutes and Orders document (M&O) finding that certain facts were agreed upon by the parties. The M&O listed the question of "good faith" as a disputed issue for OTA to decide in this appeal. At the oral hearing, CDTFA timely objected to one of the items listed as agreed in the M&O: that it was undisputed that there were two separate transactions. CDTFA instead asserted that it was one continuous transaction. Thus, it is apparent from CDTFA's objection that this item was not agreed upon. Moreover, appellant had the opportunity to address these items at the hearing. Indeed, a review of the hearing transcript reveals appellant made arguments that the disputed items involved two transactions. Thus, OTA

concludes that there was no departure from the due and orderly conduct of the hearing because CDTFA timely objected to the M&O.

Further, OTA finds that appellant was not placed in a detrimental situation that materially affected its rights. Here, OTA's Opinion made no specific findings or holdings on the number of transactions at issue.[5] Such a finding would not have been material to the analysis. Instead, the pertinent analysis in the Opinion focused on: (1) appellant's knowledge and responsibilities at the time it accepted the resale certificate; and (2) whether the transaction or transactions involved a taxable sale of tangible personal property. While the above is dispositive, OTA notes that the parties did not submit written stipulations signed by both parties; nevertheless, a party may withdraw, and OTA may strike, a signed stipulation upon a showing of good cause. (See *Appeal of Praxair*, 2019-OTA-301P.) Accordingly, OTA concludes that that the requirements for granting a rehearing based on an irregularity in the proceeding or surprise are not met.

Next, appellant previously argued that CDTFA is estopped from arguing that appellant could not have taken a resale certificate in good faith. Appellant's contention was based on a statement in the Appeals Bureau decision that "the audit working papers indicate that the Department does not dispute that [appellant] accepted a timely and specific resale certificate from Big West in good faith." In the Opinion, OTA acknowledged the Appeals Bureau's statement as a CDTFA concession. However, OTA also found that CDTFA merely changed its legal theory for why tax applies and there was no new matter because there was no change in the tax liability due to the change in position, which would result in the shifting of the burden of proof, citing *Appeal of Praxair*, *supra*. CDTFA's change in legal position did not change the tax liability or require new evidence; therefore, the Opinion was correct in holding there was no new matter. (See *Appeal of Praxair*, *supra*.) OTA went on to conclude that it did not have the power to apply the doctrine of equitable estoppel to grant relief based on statements made in the

[5] Factual finding #40 actually refers to the contract as "these transactions"; however, it appears OTA did not intend to make a specific finding on the number of transactions because the analysis later said the second "line of inquiry is whether the transaction or transactions [involve the sale of tangible personal property]."

Appeals Bureau decision.[6] Appellant's petition for rehearing attempts to reframe this question as one that defines statements made in an Appeals Bureau decision as a stipulation binding on CDTFA.

A stipulation is an agreement between opposing counsel ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action, and serves "to obviate need for proof or to narrow the range of litigable issues." (*In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 992.)

Here, CDTFA changed its position with respect to a statement in the Appeals Bureau decision. CDTFA appeals are subject to the requirements of R&TC sections 6561 through 6566 and their corresponding regulations. When a taxpayer appeals an audit determination, the appeal is referred to CDTFA's Appeals Bureau for a decision. (Cal. Code Regs., tit. 18, §§ 35060, 35064, 35065.) However, there is no requirement that CDTFA agree with the Appeals Bureau decision. This is supported by the fact that either party may file a request for reconsideration with the Appeals Bureau. (Cal. Code Regs., tit. 18, §§ 35065, 35066.) As such, a statement contained within the Appeals Bureau decision (and which is made prior to even filing the appeal before OTA) cannot constitute a stipulation by CDTFA in the appeal before OTA, nor does it foreclose CDTFA's right to change legal theories.[7]

CDTFA asserted the question of appellant's good faith receipt of the resale certificate as early as its opening brief to OTA. Appellant's briefing and the oral hearing transcript reveal that appellant had ample time to prepare and present arguments with respect to the resale certificate. Thus, while appellant may not agree with CDTFA changing its position, OTA finds that appellant's substantial rights were not materially affected.

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[6] On the other hand, the Opinion noted that OTA is authorized to apply the doctrine of equitable estoppel if a taxpayer reasonably relied on written advice from an agency under R&TC section 6596. OTA found that no such written advice was received by appellant from CDTFA. When the doctrine of equitable estoppel has been applied without invoking R&TC section 6596, it has been found to apply only when detrimental reliance results in an increased tax liability, which is not the case here. (See *Appeal of Lopert* (82-SBE-011) 1982 WL 11689.) Therefore, this PFR Opinion does not need to address the Opinion's determination on OTA's authority as to application of the doctrine of equitable estoppel, as equitable estoppel does not apply whether through R&TC section 6596 or otherwise.

[7] Though, as discussed above, if there is a new matter on appeal, the burden of proof shifts, but that is not the case here. (Cal. Code Regs., tit. 18 § 30219(a); See also *Appeal of Praxair*, *supra*.)

Issue 3: Whether OTA erroneously failed to declare that Regulation section 1521 is invalid.

Appellant contends that the Opinion is contrary to law due to the application of Regulation section 1521 and R&TC section 6092. Appellant cites to Regulation section 1521(b)(6)(A), which states in relevant part:

> A contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him or her by taking a resale certificate from the prime contractor, interior decorators, designers, department stores, or others.

Appellant asserts that the Opinion is contrary to law for two reasons: (1) Regulation section 1521(b)(6)(A) does not apply because appellant's customer, Big West, is not a prime contractor, interior decorator, designer, department store, or other; and (2) Regulation section 1521 is in conflict with R&TC section 6092. Appellant appears to assert that by declining to invalidate Regulation section 1521, OTA has failed to follow R&TC section 6092. Appellant argues that even if OTA is not permitted to invalidate a regulation, it is also not permitted to invalidate the enabling statute.

A state agency cannot refuse to follow its own regulations. (See *Newco Leasing, Inc. v. State Bd. of Equalization* (1983) 143 Cal.App.3d 120, 124. (*Newco*).)

Under California Government Code section 11350, any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. (Cal. Gov. Code section 11350(a).) OTA is not a tax court, nor are its panels operated or construed as such. (Gov. Code, § 15672.)

The conclusion of the Opinion that OTA cannot invalidate Regulation section 1521(b)(6)(A) is not contrary to law. The regulation was created by CDTFA, which exercised its delegated substantive rulemaking power pursuant to R&TC section 7051. (See *Appeal of Micelle Laboratories*, 2020-OTA-290P.) Therefore, OTA cannot rule it to be invalid. (See *Appeal of Talavera*, 2020-OTA-022P; *Appeal of Bodywise*, 2020-OTA-022P.) Appellant does not point to any statutory authority that would allow this agency to invalidate the regulation. In addition, OTA cannot find any such authority. As to appellant's contention that OTA may not invalidate a statute, OTA agrees. Accordingly, OTA's determination with respect to Regulation section 1521 is not contrary to law.

Therefore, OTA finds no basis to grant a rehearing.

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Keith T. Long
Administrative Law Judge

We concur:

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Josh Lambert
Administrative Law Judge

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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 10/6/2023