OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **INTEGRITY REBAR PLACERS**	OTA Case No. 20035950 CDTFA Case IDs: 212-085, 212-086

OPINION

Representing the Parties:

For Appellant: Jesse McClellan, Attorney

For Respondent: Jarrett Noble, Attorney
Cary Huxsoll, Attorney
Jason Parker, Chief of Headquarters Ops.

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Integrity Rebar Placers (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's petition for redetermination of the Notice of Determination (NOD) dated April 22, 2015. The NOD is for $832,294.79 in tax, plus accrued interest, for the period July 1, 2011, through June 30, 2014 (liability period).[1]

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Andrew J. Kwee, and Sheriene Anne Ridenour held an oral hearing for this matter in Sacramento, California, on September 21, 2023. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

[1] Sales and use taxes (and other business taxes and fees) were formerly administered by the State Board of Equalization (BOE). In 2017, the California Legislature transferred functions of BOE relevant to this case to CDTFA. The effective date of the transfer of all but adjudicatory functions was July 1, 2017. (Adjudicatory functions were transferred to the Office of Tax Appeals effective January 1, 2018.) Thus, when this Opinion refers to events that occurred before July 1, 2017, "CDTFA" shall refer to BOE.

ISSUES

1. Whether OTA has jurisdiction to determine if CDTFA's policy of applying an interpretation represented in an annotation constitutes a regulation without legal effect unless adopted in compliance with the Administrative Procedure Act (APA), and if so, whether the policy was promulgated in accordance with the APA.
2. Whether appellant's purchases of materials were subject to tax at the time of purchase.
3. Whether interest has been properly computed.
4. Whether appellant is eligible for relief of interest pursuant to R&TC section 6593.5.

FACTUAL FINDINGS

1. Appellant is a California corporation that holds a seller's permit effective as of April 14, 2011. Appellant is a construction contractor[2] that furnishes and installs rebar steel materials[3] for highway expansion projects, pursuant to lump-sum contracts.[4]
2. For substantially all the purchased materials, appellant consumed the rebar in the performance of construction contracts and reported use tax at the time of consumption. Appellant states that it also makes some sales of rebar steel (unverified resales),[5] including sales to other construction contractors (verified resales).[6] In addition, appellant states that it advertises and sells pre-assembled rebar cages on its website.
3. During the liability period, appellant purchased rebar steel materials in the amount of $53,641,586 under resale certificates with no tax or tax reimbursement paid at the time of

[2] A construction contractor is a person who agrees to perform and does perform a construction contract. (Cal. Code Regs., tit. 18, § 1521(a)(2).) A construction contract includes a contract to erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property. (Cal. Code Regs., tit. 18, § 1521(a)(1)(A)1.)

[3] There is no dispute that the rebar steel at issue herein were materials.

[4] A lump-sum contract is a contract under which the contractor for a stated sum agrees to furnish and install materials, or fixtures, or both. (Cal. Code Regs., tit. 18, § 1521(a)(8).)

[5] CDTFA's decision erroneously refers to these as "[over the counter] OTC (retail) sales." However, appellant did not have a "counter" or retail selling location so these are not OTC sales. In addition, appellant reported $0 in retail sales for the liability period so "retail" is also incorrect. For ease of analysis, this Opinion refers to these sales as "unverified resales" because CDTFA did not accept them as such and, because there is no way to trace these sales to transactions in the audit, it is unclear how or even whether they were reported.

[6] CDTFA accepted 256 resale transactions to a single customer, United Steel Fabricator, hereinafter "verified resales." OTA notes that while CDTFA's decision refers to 259 resale transactions, three of those transactions are deemed "credit memos" in the audit workpapers.

purchase, some of which was purchased from one out-of-state vendor who was not registered as a seller with CDTFA.

4. Initially, CDTFA found that appellant made no sales of the materials at issue for the liability period.

5. On August 15, 2017, appellant provided, in pertinent part, the following information, which CDTFA reviewed and determined was sufficient to show appellant made "some" sales of rebar:[7]

    a. A four-page excel spreadsheet containing six columns of data, which appellant identified as a list of its sales to customers (sales spreadsheet). The columns are "Contractor," "Date," "Invoice," "Job," "Location/Reference," and "IRP Billed." The sales spreadsheet contains no amounts listed for sales tax.

    b. Four invoices, all issued to appellant's customers, which appellant identified as supporting documentation for the sales spreadsheet. All four invoices show $0.00 in sales tax, a tax rate of $0.00%, and collectively total $107,653.

    c. A picture of a rebar cage with the following text: "Pre-assembled cages save time and increase safety . . . [w]e will ship them premade and ready to set in the ground." Appellant identifies this as a printout of its website. The printout contains no web address, and there is no indication where the pictures came from and no way to identify the pictures as belonging to appellant.

    d. A one-page excel spreadsheet containing the same columns as the sales spreadsheet, which appellant identified as sales of rebar cages from its website (website sales spreadsheet). This spreadsheet contains no amounts listed for tax. The website sales spreadsheet contains 45 rows; however, it does not include a summary total for the listed transactions.[8] Appellant provided no supporting invoices for any of the transactions listed on the website sales spreadsheet.

6. CDTFA accepted that appellant made 256 verified resales totaling $4,880,682 during the liability period, to one customer United Steel Fabricators (USF), for a total of $5,082,029

[7] OTA finds this information insufficient to establish additional rebar sales beyond the 256 verified resales already accepted by CDTFA.

[8] CDTFA's decision indicates that the total for all transactions (website and non-website) was $1,685 for 2012, $160,549 for 2013, and $39,111 through June 30, 2014. The total for the liability period is $201,345.

of sales of materials, which is approximately 9.5 percent of its total purchases of materials for the liability period ($5,082,029 ÷ $53,641,586).

7. After reviewing the information, CDTFA concluded that, "at best:" for the period July through December 2011, appellant made no sales of materials but made purchases of approximately $3 million; during 2012, appellant sold approximately 2 percent of its approximately $14 million in material purchases for the period; during 2013, appellant sold approximately 21 percent of its $21 million in material purchases for the period; and from January to June 2014, appellant sold less than 1 percent of its approximately $15 million in material purchases for the period.[9]

8. Appellant reported use tax only after it completed its construction jobs (i.e., after it consumed the materials) and reported sales tax for any materials sold at the time of sale.

9. For the liability period, appellant reported gross sales of $97,980,791; purchases of fixed assets subject to use tax of $366,449; claimed deductions for nontaxable sales for resale of $1,589,993 (for the second quarter of 2013 [2Q13] only); and nontaxable exempt labor of $56,909,919, resulting in a total reported taxable measure of $39,847,328 (representing $366,449 in fixed assets; $39,480,879 in materials consumption; and $0 in retail sales).

10. Appellant concedes that, for the liability period, appellant recorded net taxable rebar purchases (materials consumption) of $48,141,896, and only reported installed rebar of $39,480,879, resulting in an admitted underreporting of taxable purchases of $8,661,017 for the liability period at issue in this appeal ($48,141,896 - $39,480,879 = $8,661,017). With respect to the $8,661,017 underreporting, appellant states that: "The issue here is one of timing of the reporting. There is no dispute over the taxability of the materials." Appellant contends that if one considers the two subsequent audit periods, they more than offset the $8,661,017 underreporting in the current audit period, by resulting in an overreporting in the subsequent audit periods (primarily, the $8,661,017 that was not reported in the current period).

11. CDTFA compared the cost of materials available for consumption on construction contracts for the liability period ($48,760,903) with appellant's reported taxable measure on materials consumption and fixed assets for the liability period of $39,847,328, and

[9] According the "Net Taxable Rebar Purchase" schedule, for 3Q14, appellant's total recorded sales were approximately 2 percent of its total recorded purchases for the period, and appellant had total recorded sales of zero from 4Q14 to 2Q17.

computed a difference of $8,913,575. CDTFA divided the reported taxable measure for each year by the difference to arrive at error rates of 1.17 percent for 2011, 14.08 percent for 2012, 7.72 percent for 2013, and 64.79 percent for 2014. Applying these error rates to each quarter within the audit period, CDTFA computed unreported ex-tax purchases of construction materials of $8,912,575.

12. Based on the foregoing, CDTFA found that appellant was not in the business of selling materials because appellant's sales were not significant or substantial. Therefore, CDTFA found that appellant was not justified in using resale certificates to purchase materials ex-tax, and therefore appellant owed tax at the time it purchased the materials, measured by the cost of the materials.[10]
13. Based on the foregoing and as relevant here, CDTFA concluded that the $53,641,586 of purchased materials were taxable at the time of purchase and issued the NOD[11] and subsequently the February 20, 2018 decision.
14. This timely appeal followed.
15. On appeal, appellant submitted a completed CDTFA Form 735 - Request for Relief of Interest for the period July 1, 2011, through June 30, 2014. CDTFA denied the request.[12]

DISCUSSION

Issue 1: Whether OTA has jurisdiction to determine if CDTFA's policy of applying an interpretation represented in an annotation constitutes a regulation without legal effect unless adopted in compliance with the APA, and if so, whether the policy was promulgated in accordance with the APA.

CDTFA Sales and Use Tax Annotations (annotations) 190.0208 and 190.0161 interpret Regulation section 1521(b)(6)(A),[13] and state that a construction contractor "may issue a resale

[10] Appellant does not dispute that it was the consumer of the materials it furnished and installed in the performance of construction contracts.

[11] Specifically, the NOD determined an aggregate deficiency measure of $19,004,904 (rounded) consisting of two items, only one of which remains in dispute: audit item 1, unreported ex-tax purchases of construction materials of $8,912,575. Appellant also timely filed a protective claim for refund for $1 or more for the period July 1, 2011, through December 31, 2016.

[12] Appellant states it is no longer pursuing interest relief pursuant to R&TC section 6596.

[13] Regulation section 1521(b)(6)(A) states that construction contractors may not purchase materials for resale unless they are also in the business of selling materials.

certificate only when purchasing the materials as a fungible, commingled lot, a significant portion of which you intend to resell and a portion of which you will consume, but at the time of your purchase you do not know which items you will consume and which you will resell." In *Martinez Steel*, 2020-OTA-74P (*Martinez Steel*), OTA stated that it was not applying an underground regulation or erroneous rule by finding the annotations to be persuasive and that it was within its authority to interpret Regulation section 1521(b)(6)(A).

In this case, CDTFA found that appellant was not in the business of selling materials pursuant to Regulation section 1521(b)(6)(A) because appellant's sales were not a significant portion of its materials. Appellant asserts that CDTFA's rule that sales must be "significant" is not found in Regulation section 1521 or the R&TC, and because it was not adopted in accordance with the APA, it is invalid.

The APA requires every administrative agency guideline that qualifies as a "regulation," as defined by the APA, to be adopted according to specific procedures. (Gov. Code, § 11340.5(a), (b); *People v. Medina* (*Medina*) (2009) 171 Cal.App.4th 805, 813.) A regulation found not to have been properly adopted is termed an "underground regulation." (*Medina*, *supra*, 171 Cal.App.4th at pp. 813-814.) The Office of Administrative Law (OAL) is charged with, among other functions, enforcing this requirement.[14] (Gov. Code, §§ 11340.2, 11340.5(b); *Medina*, *supra*, 171 Cal.App.4th at p. 813.)[15]

Unlike OAL, OTA is not authorized to determine whether CDTFA did not comply with the procedural rulemaking requirements of the APA.[16] Here, no determination has been made by OAL or the courts that the annotations at issue are underground regulations.[17] And pursuant to

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[14] See also Gov. Code, § 11340.1(a) ["The Legislature therefore declares that it is in the public interest to establish an [OAL] which shall be charged with the orderly review of adopted regulations."]; Gov. Code, § 11342.4 ["The office shall adopt, amend, or repeal regulations for the purpose of carrying out the provisions of this chapter."]

[15] See also Gov. Code, § 11340.6, stating that, except for certain exceptions, "any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation . . . ."

[16] Appellant cites to 1999 OAL Determination No. 26., where OAL determined that certain BOE annotations were regulations and invalid because they were not adopted pursuant to the APA. However, that determination supports OTA's conclusion, as OAL is legally authorized to make such determinations. (See *Medina*, *supra*, at p. 813; Gov. Code, § 11340.5(c); see also Cal Code Regs., tit. 18, §§ 250(a), 260(g).)

[17] A court may determine an underground regulation to be invalid because it was not adopted in substantial compliance with the procedures of the APA, though it may independently determine the interpretation is correct. (See *Medina*, *supra*, at p. 813; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577.)

Government Code section 11340.9, CDTFA's annotations are exempt from the APA because they are summaries of legal rulings of counsel. (Cal. Code Regs., tit. 18, § 35101(a)(1)). Accordingly, OTA lacks jurisdiction to consider the merits of appellant's arguments.

As stated in *Martinez Steel*, while CDTFA's annotations are not regulations, they have substantial precedential effect within CDTFA, and the interpretation represented in the annotations is certainly entitled to some consideration by OTA, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15. In the current appeal, OTA follows the precedent established in *Martinez Steel*, which determined that annotations 190.0208 and 190.0161 are a persuasive interpretation of Regulation section 1521(b)(6)(A).

Issue 2: Whether appellant's purchases of materials were subject to tax at the time of purchase.

California imposes sales tax on a retailer's retail sales in this state of tangible personal property, measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) In addition, the storage, use, or other consumption of tangible personal property in California is subject to use tax, unless otherwise exempt or excluded. (R&TC § 6201.) The use tax is imposed on the person storing, using, or otherwise consuming the property. (R&TC, § 6202(a).)

Construction contractors are the consumers of materials that they furnish and install in the performance of construction contracts, and therefore they owe use tax on their use of the materials, with certain exceptions.[18] (Cal. Code Regs., tit. 18, § 1521(b)(2)(A)1; R&TC §§, 6201, 6202(a).) Construction contractors may not purchase materials for resale unless they are also in the business of selling materials. (Cal. Code Regs., tit. 18, § 1521(b)(6)(A).) It is improper for a retailer to issue a resale certificate for property the purchaser knows at the time of purchase will be used rather than resold.[19] (R&TC, § 6094.5(b); Cal. Code Regs., tit. 18,

[18] "Materials" means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. (Cal. Code Regs., tit. 18, § 1521(a)(4).)

[19] The statutory definition of "seller" consists of both retailers and wholesalers. (*Davis Wire Corp. v. State Board of Equalization* (1976) 17 Cal.3d 761.) As relevant here, wholesales are sales for resale.

§ 1668(d)(2).) A purchaser who properly issues a resale certificate and thereafter makes any taxable storage or use of the property is liable for the tax and the tax is imposed at the time the property is first stored or used. (Cal. Code Regs., tit. 18, § 1668 (g).) A purchaser who improperly issues a resale certificate for property which the purchaser knows at the time of purchase is not to be resold in the regular course of business is liable for the tax, and the tax is imposed at the time of the sale to that purchaser. (Cal. Code Regs., tit. 18, § 1668(g).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Appellant argues that, whether a construction contractor is in the business of selling under Regulation section 1521, should be guided by Regulation section 1595, which states that "a person who makes three or more sales for substantial amounts in a period of 12 months is required to hold a seller's permit regardless of whether the sales are at retail or are for resale." CDTFA contends that appellant is not in the business of selling because its percentage of sales to purchases was 9.1 percent during the audit period. CDTFA also asserts that the sales were to one customer, which means that it was just an anomaly.[20]

As discussed above, *Martinez Steel* is precedential authority for OTA, and *Martinez Steel* concluded that annotations 190.0208 and 190.0161 are persuasive. According to annotations 190.0208 and 190.0161, a construction contractor may issue a resale certificate only when purchasing the materials as a fungible, commingled lot, a significant portion of which it intends to resell and a portion of which it will consume, but at the time of purchase it does not know which items it will consume and which it will resell. Thus, the question OTA must answer here is whether it was proper for appellant to issue a resale certificate on the basis that appellant sold a sufficiently significant portion of its materials (rebar) such that appellant could not be said to have known, at the time of purchase, that it was purchasing the rebar for purposes of resale to

[20] The sales contract is not in the record, though there are multiple invoices for different sales.

other contractors (i.e., nontaxable resale) as opposed to purchasing the rebar for purposes of consumption in the performance of a construction contract (i.e., taxable use). (See Cal. Code Regs., tit. 18, § 1668(g).)

For the period July through December 2011, appellant made no sales of materials; during 2012, appellant sold approximately 2 percent of its material purchases for the period;[21] during 2013, appellant sold approximately 21 percent of its material purchases for the period; and from January to June 2014, appellant sold approximately 1 percent of its material purchases for the period.[22] Most of these sales were comprised of sales to USF.

At the hearing, appellant's controller, E. Webster testified that appellant's purchasing practice was primarily designed around purchasing large quantities of steel based on market trends and advantageous prices.[23] E. Webster stated that appellant's purchases were based on what it could afford knowing it was continuing to bid projects and that random customers would ask for materials and place orders with little to no notice. E. Webster stated that at the time of purchasing it was not known whether the steel purchased would be used in a construction contract or sold over the counter.

Appellant has not established that it satisfies the requirements of Regulation section 1521(b)(2)(A). Appellant's actual sales were minimal as compared to purchases in 2011, 2012, 2014, and in subsequent periods. Appellant made sales of approximately 21 percent of its purchases in 2013, though it made sales of approximately 9 percent of its purchases over the entire liability period. Based on E. Webster's testimony, it was not known whether the purchased materials would be used in a contract or sold, and purchases were based on advantageous pricing and not based on in-place or anticipated sales contracts, which does not establish that appellant had an intent to sell a significant portion of the materials. Accordingly, OTA finds that, whether examined individually, or as a whole, the percentages here of 0 percent, 2 percent, 21 percent, and 1 percent for 2011, 2012, 2013, and 2014, respectively, and 9 percent for the liability period, do not qualify as selling a sufficiently "significant portion" of materials

[21] Appellant started making sales of materials at the end of 2012 and were mostly comprised of 17 sales to USF.

[22] There is also no evidence in the record that appellant made significant sales prior to the liability period.

[23] E. Webster stated that she is "responsible for preparing contracts" and "also deal[s] with purchasing contracts . . . ."

for purposes of properly issuing a resale certificate. Therefore, appellant has not provided evidence establishing that it was in the business of making sales of materials under Regulation section 1521(b)(2)(A) for the liability period.

As to appellant's argument that three sales in a year should qualify it as being in the business of selling for purposes of Regulation section 1521, OTA does not find this argument persuasive because Regulation section 1595 deals with the requirements for a seller's permit, as opposed to whether a construction contractor may issue a resale certificate pursuant to Regulation section 1521(b)(6)(A), which was addressed by OTA in *Martinez Steel*, *supra*.

Issue 3: Whether interest has been properly computed.

The amount of the determination, exclusive of penalties, shall bear interest at the modified adjusted rate per month, or fraction thereof, established pursuant to R&TC section 6591.5, from the last day of the month following the quarterly period for which the amount or any portion thereof should have been returned until the date of payment. (R&TC, § 6482.)

In making a determination, CDTFA may offset overpayments for a period or periods, together with interest on the overpayments, against underpayments for another period or periods, against penalties, and against the interest on the underpayments. (R&TC, § 6483.) The interest on underpayments and overpayments shall be computed in the manner set forth in R&TC sections 6591 and 6907. (*Ibid.*) Interest at the modified adjusted rate per month, or fraction thereof, established pursuant to R&TC section 6591.5, from the date on which the tax or the amount of tax required to be collected became due and payable to the state until the date of payment.

Appellant asserts that the tax due for 2Q14 for purchases of materials was paid in 3Q14 and 4Q14; therefore, interest should have stopped accruing at those quarters. Appellant asserts that approximately $8 million held at the end of 2Q14 was sold or consumed by the end of 4Q14, with applicable taxes paid in 3Q14 and 4Q14. Therefore, appellant argues that interest must be adjusted for amounts paid during 3Q14 and 4Q14 for material purchases being assessed in this audit using a first in first out (FIFO) approach to the inventory held at the end of 2Q14. Appellant asserts that interest is due on unpaid tax, "until the date of payment," citing R&TC sections 6482 and 6591. CDTFA asserts that the audit for the period March 1, 2014, through April 30, 2017, disclosed a tax deficiency and there were no overpayments in 3Q14 or 4Q14 to

offset the liabilities at issue in this appeal. Therefore, CDTFA argues that no re-computation of interest is warranted.

Appellant made payments with its Sales and Use Tax Returns for 3Q14 and 4Q14 and now appears to request those payments to be applied to a separate period and replaced as payments applicable to 2Q14. According to Section 707.020 of the CDTFA's Compliance Policy and Procedures Manual, if a payment voucher is submitted with a payment, the payment will be applied according to the direction information contained in the voucher. A debtor who has made a direction as to application of funds may not change the direction so as to require application to another obligation after the creditor has made the application originally directed. (*Appeal of Jhirmack Enterprises, Inc.* (79-SBE-175) 1979 WL 4216.)

In addition, pursuant to R&TC section 6483, CDTFA may offset overpayments for a period or periods, together with interest on the overpayments, against underpayments for another period or periods, against penalties, and against the interest on the underpayments. (R&TC, § 6483.) In this case, there are no overpayments in 3Q14 or 4Q14, which is the period appellant contends the tax was paid on the materials.[24] Therefore, appellant has not shown that interest should be recomputed.

Issue 4: Whether appellant is eligible for relief of interest pursuant to R&TC section 6593.5.

The law allows CDTFA, in its discretion, to grant relief of all or any part of the interest imposed on a person under the Sales and Use Tax Law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of CDTFA acting in his or her official capacity. (R&TC, §§ 20, 6593.5(a)(1).) Such an error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b).) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c).)

OTA will generally defer to CDTFA's decision not to grant interest relief absent evidence of an abuse of discretion. (*Appeal of Micelle Laboratories, Inc.*, 2020-OTA-290P.) To show an abuse of discretion, a taxpayer must establish that, in refusing to relieve interest,

[24] Furthermore, while appellant argues it used the FIFO accounting method and E. Webster testified to this, appellant also asserts that the materials at issue were fungible goods and held in a commingled state, meaning appellant could not actually know which piece of fungible steel material was going to be either consumed or sold.

CDTFA exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Adventures by the Sea, Inc.*, 2023-OTA-284P.)

Appellant argues that it is entitled to interest relief for the period July 1, 2011, through June 30, 2014. Appellant asserts that it has taken eight years for CDTFA to perform the audit and address the related issues in this appeal. Appellant asserts that the primary issue arises from a rule that CDTFA failed to adopt in accordance with the APA, and that appellant was never informed of the rule prior to the audit. Appellant states that it relied upon the plain language of Regulation section 1521 to establish its business operations and tax reporting practices and, but for the internally created rule, the audit would have been completed in 2014 and there would have been no appeal. Appellant asserts that CDTFA's failure to properly adopt its rule and notify taxpayers of the rule is cause for the delay. CDTFA asserts that, in *Martinez Steel*, OTA previously found there was no underground regulation with respect to the applicable law in this appeal, and annotations 190.0161 and 190.0208 were published and publicly available prior to any of the periods at issue.

Appellant does not provide evidence to show there was an unreasonable error or delay by an employee of CDTFA. Appellant has not shown that there was an unreasonable failure to work on the appeal. (See *Appeal of Micelle Laboratories, Inc.*, *supra*.) In addition, interest relief does not extend to an allegedly "unreasonable" position taken on appeal, that is otherwise being actively maintained. (*Ibid.*) Therefore, CDTFA's reliance on the annotations here does not qualify as a basis for interest relief. Furthermore, as discussed above in Issue 1, CDTFA's annotations are exempt from the APA pursuant to Government Code section 11340.9, and no determination has been made that the annotations at issue are underground regulations by OAL or the courts. Accordingly, appellant has not shown that it is entitled to interest relief.

HOLDINGS

1. OTA does not have jurisdiction to determine if CDTFA's policy of applying an interpretation represented in an annotation constitutes a regulation without legal effect unless adopted in compliance with the APA.
2. Appellant's purchases of materials were subject to tax at the time of purchase.
3. Interest has been properly computed.
4. Appellant is not eligible for relief of interest pursuant to R&TC section 6593.5.

DISPOSITION

CDTFA's action is sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
3CADA62FB4864CB...

Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 11/14/2023