OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **S & I CONSTRUCTION, INC.**	OTA Case No. 18093713

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Erez Solomon, EA

For Respondent: D'Arcy Dewey, Attorney

R. TAY, Administrative Law Judge: On November 14, 2023, the Office of Tax Appeals (OTA) issued an Opinion modifying the proposed assessment of tax by respondent Franchise Tax Board (FTB). In the Opinion, OTA held appellant had not shown it was entitled to an additional deduction amount for cost of goods sold (COGS) or subcontractor expenses, except as allowed by FTB on appeal. Appellant timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellant's petition, OTA concludes appellant has not established a basis for a rehearing.

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 that prevented the fair consideration of the appeal; (2) an accident or surprise that occurred during the appeal proceeding, which ordinary caution could not have prevented; (3) newly discovered, material 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).)

Appellant first alleges an accident or surprise occurred during the appeal proceeding. As provided in *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654, it is appropriate for OTA to look to Code of Civil Procedure (CCP) 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 CCP, 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.) To constitute an accident or surprise, a party must have been 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*, *supra*.) Moreover, "the 'surprise' mentioned by the statute must be the result of some fact or circumstance or situation occurring at the trial which could not in the nature of the case reasonably have been anticipated would arise and which is of such importance or magnitude in its influence upon the result arrived at from the trial as to have produced as against him or his rights injury or damage." (*Wilson v. Kopp* (1952) 114 Cal.App.2d 198, 206.)

Here, no such accident or surprise occurred. Appellant refers to the death of Mr. Shaul Ibgvi, which prevented him from being a witness at the hearing.[1] However, appellant does not show how the death of Mr. Ibgvi materially affected the rights of or caused injury or damage to appellant in this appeal. (*Wilson v. Kopp*, *supra*, at p. 206.) Appellant contends Mr. Igbvi's knowledge of the audit was material to the appeal; however, appellant does not indicate what Mr. Igbvi would have testified to that was of such importance or magnitude that its omission influenced the result and produced injury or damage to appellant. Notably, OTA received the testimony of Jonathan Igbvi, Mr. Shaul Igbvi's son and appellant's current CEO, who credibly testified regarding appellant's business practices and procedures during 2010, and appellant's conduct during FTB's audit. OTA finds no evidence appellant was "unexpectedly placed in a detrimental condition or situation" because of the death of Mr. Shaul Igbvi, and thus, no accident or surprise occurred to justify a rehearing.

Appellant also alleges there was insufficient evidence to justify OTA's Opinion. Specifically, appellant alleges there is no explanation for applying a different profit margin percentage to the invoices provided to establish appellant's COGS for 2010.

To find that there is insufficient evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different Opinion. (Code Civ. Proc., § 657;

[1] Appellant provides neither the date of death nor a death certificate.

Appeals of Swat-Fame Inc., et al., 2020-OTA-045P.) OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Appeals of Swat-Fame Inc., et al., supra*.)

Appellant's argument is similar to that which was made on appeal. A plain reading of OTA's Opinion reveals OTA based its decision on the sufficiency of appellant's evidence. Specifically, appellant provided invoices and bank statements which showed its expenses totaled 83 percent of its gross receipts. This number was based on the most reliable evidence in the record. Appellant has provided no better evidence and no other reason to show OTA "clearly should have reached a different Opinion." As such, appellant has not demonstrated OTA's Opinion was based on insufficient evidence.

For the reasons above, OTA rejects appellant's petition.

DocuSigned by:
F8E81582726F448...

Richard Tay
Administrative Law Judge

We concur:

DocuSigned by:
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

DocuSigned by:
873D9797B9E64E1...

John O. Johnson
Administrative Law Judge

Date Issued: 6/7/2024