OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **CITIES OF FILLMORE, LOS ANGELES, ONTARIO, PALM SPRINGS, SAN DIEGO, SAN JOSE, AND COUNTY OF SACRAMENTO**	OTA Case No. 18011887 CDTFA Case ID 468771

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Michael Cataldo, Attorney

For Respondents: Janis Varney, Representative

For Agency: Chad T. Bacchus, Attorney

S. RIDENOUR, Administrative Law Judge: On June 19, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining a Supplemental Decision and Recommendation (SD&R) issued by respondent California Department of Tax and Fee Administration (CDTFA). CDTFA's SD&R granted, in part, the petitions for reallocation of local tax revenue filed by the respondents Cities of Los Angeles, Ontario, Palm Springs, San Diego, San Jose, and County of Sacramento (collectively, petitioners). Specifically, the SD&R held that, of the $1,214,373 in local tax Retailer (i.e., the taxpayer) directly reported to the City of Fillmore (appellant) during the period April 1, 2007, through December 31, 2007 (allocation period): $838,937 be reallocated directly or indirectly to petitioners; $364,967 be reallocated directly, indirectly, or through countywide pools, to non-petitioning jurisdictions; and $10,469 be retained by appellant.

Appellant filed a timely petition for rehearing (PFR) based on the grounds that there is insufficient evidence to justify the Opinion, and the Opinion is contrary to law. Upon consideration of appellant's PFR, OTA concludes appellant has not established a basis for a 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 (here, appellant): (1) an irregularity

in the appeal proceedings which occurred prior to the 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);[1] *Appeal of Do*, 2018-OTA-002P.)

Insufficient Evidence

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; *Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.)

Retailer sold jet fuel exclusively to its parent international air carrier company (Parent) and to the parent company's affiliates and subsidiaries (collectively, Customer). Appellant contends that there is insufficient evidence to justify OTA's finding that Customer's communication to Retailer in Houston, Texas, were the actual fuel orders placed in accordance with Article II, section 7 of the Master Sale Agreement (MSA).[2] Appellant asserts that OTA's finding is based solely on tax advisor W. Coursey's statement that Retailer knew how much fuel to make available at each location based on the needs Customer communicated to Retailer at its corporate headquarters in Houston. Appellant argues that Article II, section 7 of the MSA simply states that Customer shall notify Retailer when specific deliveries are required, and Article II, section 7 "does not change the fact that no sales were made unless and until" the

[1] California Code of Regulations, title 18, section 30604 is essentially based upon the provisions of California Code of Civil Procedure section 657; therefore, the language of California Code of Civil Procedure section 657 and applicable caselaw are appropriate and relevant guidance in determining whether a ground has been met to grant a rehearing. (*Appeal of Martinez Steel Corp.*, 2020-OTA-074P.)

[2] Article II, section 7 of the MSA, under the heading "Delivery Order," provides:

> [Customer] shall notify [Retailer] or [Retailer's] Agent [(i.e., Inspired)] when specific deliveries are required. [Customer's] delivery orders shall indicate the delivery location, manufacturer, model number, quantity desired and preferred delivery date.

conditions set forth in Article II, section 11 of the MSA were met.[3]

As noted in the Opinion, there is no evidence in the record establishing that Customer's orders, as required by Article II, section 7 of the MSA, were received by Retailer at the Fillmore office. Instead, as explained by W. Coursey during the March 8, 2016 appeals conference administered by CDTFA's Appeals Bureau (appeals conference), Retailer knew how much fuel to make available at each location based on the needs Customer communicated to Retailer at Retailer's corporate headquarters in Houston, Texas. OTA notes that W. Coursey appeared at the appeals conference *on appellant's behalf*. Additionally, W. Coursey signed a declaration dated October 19, 2015, declaring that he "regularly provided services to" Retailer and Customer as Director of the tax services firm Ryan & Company, Inc.

Despite appellant's contention, OTA did not make a finding based solely on W. Coursey's statement. Article II, section 7 of the MSA required Customer to notify Retailer or Inspired Development, LLC (Inspired) (i.e., Retailer's agent) when specific deliveries were needed, and delineated specific information (i.e., the delivery location, manufacturer, model number, quantity desired, and preferred delivery date) Customer was required to provide Retailer when placing such orders. The orders Customer sent to the Fillmore office did not include the information that Article II, section 7 of the MSA required. As for appellant's argument that the requirements of Article II, section 7 do "not change the fact that no sales were made unless and until" the conditions set forth in Article II, section 11 of the MSA were met, appellant's argument is misplaced. As explained in the Opinion, the sale occurs when title passes and, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods. (Cal. U. Com. Code, § 2401(2).) Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest, which

[3] Article II, section 11 of the MSA, under the heading "Transfer of Title and Ownership," provides:

> With regard to any particular Good or Goods, and notwithstanding the timing of the transfer of possession and risk of loss, transfer of title and ownership from [Retailer] to [Customer] shall not occur until each and every one of the following conditions is met:
>
> a. [Customer] has received [Retailer's] Notification of Approval in accordance with the provision set forth in this Article; and
> b. [Retailer's] Agent has physically received [Customer's] Acceptance of [Retailer's] Notification of Approval in Fillmore, California[,] and has confirmed that [Customer's] Acceptance was timely achieved via the authorized means; and
> c. [Customer] has fully paid the Purchase Price, together with any accrued interest due thereon, or has otherwise satisfied the full debt to [Retailer].

has no bearing on when the sale occurs. (Cal. U. Com. Code, § 2401(1) & (2).) Thus, Article II, section 11 of the MSA stating that the transfer of title and ownership would not occur, regardless of when possession and risk of loss was transferred, until each of the denoted conditions were met, merely created a reservation of a security interest for Retailer. Despite appellant's contention to the contrary, Article II, section 11 has no bearing as to when the sale occurred. OTA finds that there was sufficient evidence to justify the Opinion; therefore, OTA cannot grant a rehearing based on this ground.

Contrary to Law

The contrary to law standard of review involves reviewing the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) The question of whether the Opinion is contrary to law requires a finding that the Opinion is "unsupported by any substantial evidence"; that is, the record would justify a directed verdict against the prevailing party. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging "in all legitimate and reasonable inferences" to uphold the Opinion. (*Ibid.*; see also *Appeals of Swat-Fame Inc., et al.*, *supra*.) 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 Martinez Steel Corp.*, *supra*.) OTA considers the evidence in the light most favorable to the prevailing party (here, petitioners). (*Appeal of Shanahan*, 2024-OTA-040P.)

Appellant contends that the Opinion is contrary to law. Specifically, appellant contends that: (1) the Fillmore office was Retailer's place of business; (2) Retailer participated in the sales made from the Fillmore office; (3) the Opinion ignores the regulation for a buying company; (4) the Opinion ignores legislation on local tax allocation of jet fuel sales; (5) the Opinion ignores Revenue and Taxation Code (R&TC) section 7224; (6) the Opinion incorrectly held that laches cannot be applied against CDTFA; and (7) the Opinion violates appellant's Constitutional rights. OTA will address each contention below.

Retailer's place of business

Appellant asserts that the Opinion "cites multiple reasons the Fillmore office was not Retailer's place of business, all unavailing and contrary to law." Specifically, appellant's assertions include that the Opinion: (1) ignores well-settled California law on contracts and agency; (2) assumes one must be a party to the lease of real property at which a business is located before that can be considered a place of business;[4] (3) ignores the "ample" evidence of the sales activities conducted in the Fillmore office by Inspired on behalf of Retailer; (4) improperly shifts the burden of proof onto appellant; (5) erroneously cites to the lack of external indicia of Retailer at the Fillmore office since the "lack of signs or advertising in this case are irrelevant since a 'place of business' is not required to serve or solicit sales from the general public"; (6) ignores Retailer's lease of the Fillmore location and that Inspired was acting at the direction of Retailer as Retailer's agent pursuant to a valid agency agreement; (7) improperly cites to *Borders Online, LLC v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179 (*Borders*) as authority for the proposition that the acts of an agent do not transmute the location from which the agent performed those acts into a location of the principal; (8) unavailingly distinguished the underlying appeal from *Borders* and *Scripto, Inc. v. Carson* (1960) 362 U.S. 207 (*Scripto*), cases involving use tax collection requirements, since "the California sales tax is imposed to the fullest extent permitted by the U.S. Constitution"; (9) erroneously holds that a principal cannot establish a place of business through its agents, which is inconsistent with California agency law, *Scripto*, and *Borders*;[5] (10) incorrectly finds that Retailer lacked proprietary interest in the Fillmore office "despite the overwhelming

[4] Appellant also contends that since the September 28, 2006 meeting to execute the MSA predates the allocation period, it is "irrelevant to this matter" and "has no bearing on whether Retailer had a place of business" in the Fillmore office during the allocation period. However, during the underlying appeal, appellant argued that Retailer and Customer negotiated the material terms of the MSA and executed the contract at the Fillmore office, thereby participating in the sales. Thus, whether the meeting took place at Retailer's place of business was of importance, especially if the execution of the MSA was found to be participation in the sales by the Fillmore office, which OTA found it was not.

[5] Appellant contends that the activities of the agent must be attributed to the principal and a place of business can be established for a principal by its agent. Appellant, noting that the Opinion held that there is no authority for the proposition that an agent's place of business qualifies as the principal's place of business, states that while it agrees that an agent's place of business does not always qualify as the principal's place of business, there are circumstances where it does qualify, such as when "the agency agreement itself directs the agent to establish a sales office on behalf of the principal, then that sales office is established for the principal, and is a place of business of the principal." It appears to OTA that appellant seems to be misconstruing agency law and whether a retailer was "engaged in business" due to activities of its agent for local use tax purposes, with the requirement for local sales tax allocation purposes that the location must be the retailer's "place of business," as discussed further below.

evidence to the contrary"; and (11) erroneously concludes that Retailer's seller's permit should be revoked, and that it may be revoked retroactively.

As explained in the Opinion, for local sales tax allocation purposes, it must be the retailer's place of business that participates in the sale (Cal. Code Regs., tit. 18, § 1620(a)(2)(A)), and the acts of an agent do not transmute the location from which the agent performed those acts into a location of the principal. (See *Borders*, *supra*, 129 Cal.App.4th 1179.) While an agent may conduct business for a principal at a location, that does not by itself make the location a place of business of the principal. Regarding the sublease that Retailer and Inspired entered into, OTA did not "ignore" the sublease, as appellant contends. Rather, OTA, noting that the sublease was for Retailer's nonexclusive use of office space located in the Fillmore office for a monthly rent of $100, found that while a lease for the nonexclusive use of a portion of a location may create a right of use for the lessee, it does not, however, create the required proprietary interest for the lessee.[6]

Appellant contends that the Opinion, in finding that there was no evidence that Retailer made any use of the Fillmore office, "ignores ample evidence of the sales activities conducted in Fillmore by Inspired on behalf of Retailer" and the Opinion "fails to impute the activities of Inspired to Retailer as its agent." Despite appellant's contentions, OTA did not ignore the various activities conducted by Inspired at the Fillmore office. Rather, OTA discussed the activities Inspired conducted and held that regardless of the activities performed by Inspired as Retailer's agent, activities of an agent do not transmute the agent's place of business to that of the principal.

Based on appellant's *Scripto* and *Borders* arguments, it appears that appellant misconstrues agency law and whether a principal was "engaged in business" due to activities of

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[6] Section 1 of the sublease states:

> PREMISES AND TERM: LESSOR hereby leases to LESSEE for the term commencing on the 1st day of October, 2006 and ending on the 30th day of' September, 2015, (the "TERM") the following described premises in its present condition, located in Ventura County, California: Suite 3A of the facility whose street address is commonly known as 751-F Ventura Street, Fillmore, California 93015 together with 24 hour non-exclusive access to the common areas of the facility to include reception areas, conference facilities, kitchen and bath facilities (hereinafter called the "'PREMISES or LEASED PREMISES".

Appellant asserts that "[o]nly the common areas of the Fillmore facility were for the nonexclusive use" under Retailer's lease agreement with Inspired and that there "is simply no basis in the law that a location with any shared areas cannot be a place of business of a lease."

its agent for local use tax purposes (R&TC, § 6203; Cal. Code Regs., tit. 18, § 1684), with the requirement for local sales tax allocation purposes that the location must be the principal's (i.e., the *retailer's*) "place of business" (R&TC, § 6051; Cal. Code Regs., tit. 18, § 1620). Appellant argues that the agent in *Borders* did not establish a place of business for the principal "because the agent simply accepted returns of the principal's products (not enough to establish an office)," and the agent "did not establish and operate a sales office like Inspired did for Retailer pursuant to the agency agreement." As explained in the Opinion, neither *Borders* nor *Scripto* involve the imposition of sales tax; rather, both involve whether an authorized agent's selling activities undertaken in the state on behalf of an out-of-state retailer created a use tax obligation on the retailer. Specifically, in *Borders*, the Court of Appeal found that the retailer's authorized agent in California engaged in selling activity such that the principal was "engaged in business" in California under R&TC section 6203[7] for purposes of retailer's use tax collection obligation. (*Borders*, *supra*, 129 Cal.App.4th at pp. 1188-1191.)

As noted in the Opinion, the court in *Borders* did not address whether the presence and activity of an agent's employee at a given location transmutes that location into the principal's "place of business." (*Borders*, *supra*, 129 Cal.App.4th 1179.) Appellant contends that this "highlights"[8] appellant's assertion that one must look to the activities of the agent conducted on behalf of the principal to determine whether the agent established a place of business for the principal; however, appellant's contention is misplaced. The court in *Borders* did not address whether the activity of an agent at a location transmutes that location into the principal's "place of business" because the activities of an agent impact whether the principal "engaged in business" for use tax purposes, not, as appellant mistakenly believes, whether the agent's location is transmuted to the principal's place of business. The same is true for *Scripto*, where

[7] A retailer "engaged in business in this state," including any retailer with substantial nexus with this state for purposes of the commerce clause of the United States Constitution, is required to collect the use tax from the purchaser. (R&TC, § 6203.)

[8] Specifically, appellant writes:

> After citing *Borders* as authority for the proposition that "the acts of an agent do not transmute the location from which the agent performed those acts into a location of the principal," the Opinion goes on to state at p. 17, footnote 29, that "the court in *Borders* did not address whether the presence and activity of an agent's employee at a given location transmutes that location into the principal's 'place of business.'" The Opinion then claims that "the principal in *Borders* would have had a sales tax liability rather than a use tax collection obligation."

the issue was whether the principal, an out-of-state corporation, had a use tax obligation in Florida based on the activities of its independent contractors. In *Scripto*, the United States Supreme Court found that the independent contractors' activities created "a sufficient nexus," such that the principal had a use tax obligation. (*Scripto*, *supra*, 362 U.S. at pp. 210-211.) Similar to *Borders*, there was no discussion in *Scripto* regarding whether the independent contractors' locations transmuted into the principal's place of business, because the activities of an independent contractor (or agent) at a location have no bearing on whether the location is the principal's place of business.

Appellant, citing to *Long Beach Container Terminal, Inc.* (SBE Memo.) 1994 WL 719051, contends that the Opinion's distinction between the underlying matter with *Borders* and *Scripto*, since they involved use tax collection requirements, is "unavailing, as the California sales tax is imposed to the fullest extent permitted by the U.S. Constitution."[9] California state sales tax applies to a retail sale of tangible personal property if: (1) title passes (i.e., the sale occurs) in California; and (2) there is some participation in the sale by a California location of the retailer. (R&TC, § 6051; Cal. Code Regs., tit. 18, § 1620(a)(1) & (2).) It is only if *both* of the requirements are met that sales tax applies. (R&TC, § 6051; Cal. Code Regs., tit. 18, § 1620(a)(1) & (2).) OTA found that appellant failed to meet either of the requirements for sales tax to apply; therefore, there is no imposing sales tax "to the fullest extent permitted by the U.S. Constitution." Furthermore, neither *Borders* nor *Scripto* involved the imposition of sales tax; therefore, OTA finds the Opinion's distinction to be proper.

Appellant, quoting *Scripto*, *supra*, 362 U.S. at p. 211, also contends that the distinction between an employee and an independent contractor "is without constitutional significance."[10]

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[9] *Long Beach Container Terminal, Inc.*, *supra*, 1994 WL 719051 at p.*2, states:

> There is a difference in the constitutional nexus requirements for purposes of liability for collection of use tax owed by a customer and for purposes of direct liability for sales tax. Nexus, for purposes of sales tax liability, requires that a California office of the seller participate in the sale.

[10] *Scripto*, *supra*, 362 U.S. at p. 211, states:

> True, the 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida. . . . To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance.

OTA finds appellant's contention is misplaced. The distinction between an employee and an independent contractor may be "without constitutional significance" when determining whether the principal is "engaged in business" for use tax purposes. However, the same does not hold true when determining whether a location is the principal's place of business for sales tax purposes. As explained in the Opinion, appellant's contention is inapplicable in a local sales tax context because for local sales tax allocation purposes, it must be the *retailer's* place of business that participates in the sale (Cal. Code Regs., tit. 18, § 1620(a)(2)(A)), and the acts of an agent (or independent contractor) do not transmute the location from which the agent performed those acts into a location of the principal. (See *Borders, supra,* 129 Cal.App.4th 1179.)

In its PFR, appellant makes numerous contentions that the Opinion "improperly shifts the burden of proof" to appellant. Petitioners seeking reallocation of local tax bear the burden of proving, by a preponderance of the evidence, that there was an incorrect allocation of local or district tax. (Cal. Code Regs., tit. 18, § 35056(c)(3); see also former Cal. Code Regs., tit. 18, § 1807(b)(2) & (d)(5).) The burden of showing something by a preponderance of the evidence requires establishing by documentation or other evidence that the circumstances asserted are more likely than not to be correct. (*Appeal of Black*, 2023-OTA-023P.) As the Supreme Court of California stated, preponderance of the evidence "simply means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*People v. Miller* (1916) 171 Cal. 649, 652.)

Despite appellant's belief, OTA did not "shift the burden of proof" to appellant. OTA evaluated and weighed the evidence presented by both parties. OTA found the evidence presented to establish that Retailer incorrectly allocated the local tax outweighed the evidence presented to establish that Retailer correctly allocated the local tax. Therefore, OTA found that petitioners met their burden of proving by a preponderance of the evidence that Retailer's allocation of the local tax to appellant as sales tax was incorrect.

Appellant also contends that the Opinion "erroneously concludes that Retailer's seller's permit should be revoked, and that it may be revoked retroactively." A person engaged in the business of selling tangible personal property within this state, and only a person actively so engaged, must hold a seller's permit for each place of business at which that person transacts or intends to transact business. (R&TC, § 6066(a); Cal. Code Regs., tit. 18, § 1699(a).) As such, a

required element for a valid seller's permit is that the location is the person's (here, Retailer's) "place of business." Furthermore, even if a location is a person's place of business, if the business location has no stock of goods, does not customarily negotiate sales, or does not take orders for sales, then the location should not hold a seller's permit. As explained in the Opinion, since OTA found that the Fillmore office was not Retailer's place of business, OTA also found that Retailer improperly held a seller's permit for the Fillmore office.

Appellant's contention that the Opinion erroneously revoked the seller's permit "retroactively" is misplaced. The Fillmore office was not Retailer's place of business, let alone Retailer's place of business engaged in the business of selling tangible personal property, at any point since issuance of the seller's permit; therefore, Retailer was never "actively engaged in business as a seller of tangible personal property" at the Fillmore office since issuance of the seller's permit. (Cal. Code Regs., tit. 18, § 1699(a) & (f).) Nevertheless, the revocation date of the seller's permit, whether retroactive or not, has no bearing on the underlying Opinion. As explained in the Opinion, R&TC section 6066 and California Code of Regulations, title 18, (Regulation) section 1699 require a seller to hold a permit under certain criteria. Neither authority, however, supports the proposition that being issued a seller's permit creates a presumption that the location is a place of business of the seller, nor that the issuance of a seller's permit is determinative of local tax allocation. Therefore, regardless of the date of revocation of the seller's permit, since the Fillmore office was not Retailer's place of business, and Retailer did not meaningfully participate from that location in the disputed sales, the tax applicable to Retailer's sales was use tax.

Based on all of the above, OTA finds that appellant's arguments regarding the Fillmore office and place of business do not establish that the Opinion is contrary to law.

Participation in the sale

Appellant contends that the Opinion incorrectly found that the activities conducted at the Fillmore office did not have some meaningful effect on the sales process and, therefore, did not constitute participation in the sale for purposes of Regulation section 1620. Specifically, appellant's contentions include that the Opinion: (1) disregards the activities conducted by Inspired at the Fillmore office on behalf of Retailer, as agreed to by contract; (2) incorrectly finds that negotiations for the MSA did not occur at the Fillmore office; (3) erroneously holds that participation by parties in negotiating and executing a requirements contract is not

participation in the sale; (4) incorrectly finds that billing in all cases is not participation in the sale; (5) erroneously finds that the purchase orders were not a necessary part of the sales process under the MSA and served no real purpose; and (6) calls into question the declaration of J. Cooperman.

Appellant asserts that the Opinion "disregards all of the activities" Inspired conducted at the Fillmore office on behalf of Retailer, as agreed to by contract. However, the Opinion did not "disregard" Inspired's activities. Rather, OTA discussed the activities Inspired conducted, and concluded that the activities, regardless of who performed them, had no meaningful effect on the sale process and, therefore, did not constitute participation in the sale for purposes of Regulation section 1620.

As for the MSA, appellant argues that J. Misner authorized R. Avant and D. Bowman to negotiate the MSA at the September 28, 2006 meeting. J. Misner was Executive Vice President and CFO of Parent and was Manager of Retailer. Appellant contends that J. Misner authorized R. Avant and D. Bowman "to execute 'a' MSA – not 'the' MSA," which "clearly was intended to allow [R.] Avant and [D.] Bowman to negotiate 'a' MSA before executing 'the' MSA." Despite appellant's contention, the evidence does not show that J. Misner "clearly intended" to allow R. Avant and D. Bowman to negotiate the MSA. As explained in the Opinion, J. Misner delegated *only* his authority to execute the agreement on behalf of Parent to R. Avant, and separately delegated *only* his authority to execute the agreement on behalf of Retailer to D. Bowman. There is no evidence that J. Misner delegated any other authority to R. Avant or to D. Bowman, nor any evidence that they had any authority whatsoever to *negotiate* any of the terms in the agreement. Thus, OTA found that the MSA was not negotiated at the Fillmore office.

Appellant further argues that negotiating and executing a requirements contract (i.e., the MSA) is participation in the sale. Specifically, appellant contends that there is no support in law for the conclusion that negotiating terms in contemplation of a sale is not participation in the sale in any way, and that the Opinion's overly "narrow interpretation" of activities that constitute participation in the sale is "at complete odds" with Regulation section 1620(a)(2)(A) and an August 31, 2016 nonprecedential State Board of Equalization (BOE) summary decision *Appeal of Cities of Ontario, et al.* (*Cities of Ontario*)[11] that concerned "an indistinguishable jet fuel sales

[11] See www.boe.ca.gov/legal/pdf/Cities_of_Ontario_et_al_525325_525326.pdf

requirements contract." As explained in the Opinion, a requirements contract is a contract that *contemplates* a sale of goods, but it is not itself a contract that transfers title to any tangible personal property for consideration, and therefore it is not a sale of tangible personal property. Thus, participation by the parties in negotiating and executing a requirements contract is *not* participation in the actual subsequent sale of tangible personal property, and thus, it is not participation *in the sale* for purposes of Regulation section 1620. Regarding appellant's contention that the Opinion is "at complete odds" with *Cities of Ontario*, OTA notes that *Cities of Ontario* is a nonprecedential summary decision. In any event, even if *Cities of Ontario* been made precedential, appellant's contention is nevertheless misplaced. Based on the specific facts in that appeal, *Cities of Ontario, supra*, found that the separate purchase orders made for each sale constituted participation in the sale for purposes of Regulation section 1620. Contrary to appellant's assertion, *Cities of Ontario* did not find that the requirements contract was participation in the sale.

Appellant also contends that the Opinion "is wrong to assert that billing in all cases is not participation in the sale." Appellant asserts that billing was necessary for title to transfer under the MSA, which required payment before title transferred. However, as stated above, any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest, and any such reservation of interest has no bearing on when the sale occurs. (Cal. U. Com. Code, § 2401(1) & (2).) Rather, the sale occurs when title passes and, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods, despite any reservation of a security interest. (Cal. U. Com. Code, § 2401(2).)

Moreover, the Sales and Use Tax Law provides that a sale or purchase includes any transfer of title *or* possession in lieu of a transfer of title, conditional or otherwise. (R&TC, §§ 6006(a), 6010(a).) In simplest terms, if there is a transfer of title, there is a sale; additionally, if there is a transfer of possession in lieu of title, there is a sale. When both elements are met, the sale occurs upon the earlier of title transfer or transfer of possession in lieu of title. A seller retaining title is simply of no consequence under the Sales and Use Tax Law, which only requires a transfer of "title or possession" to constitute a sale, irrespective of the parties' intent. (R&TC, §§ 6006(a), 6010(a); *Appeal of Snowflake Factory LLC*, 2020–OTA–270P.) Thus,

when the seller retains title as security (regardless of the reason), the sale will occur as soon as the purchaser obtains possession of the property, even though title transfers at some later date. (*Ibid*.)

Here, the sale occurred, and title passed, when Retailer delivered the fuel to Customer; any agreed reservation of title by Retailer was merely a security interest. To have meaningful effect on the sales process, the "participation in anyway" must occur before or at the time of title passage, despite any reservation of a security interest. Furthermore, appellant's contention is misplaced; OTA did not find that billing "in all cases" does not constitute participation in the sale. In fact, OTA included "billing" in a list of possible activities that constitute "participation in any way." OTA expanded by noting that billing can be done before title passes and the sale occurs or after, and OTA found that while billing before the sale would certainly qualify as participation in the sale under Regulation section 1620(a)(2)(A) (and also for purposes of Regulation section 1802), billing after the sale cannot qualify as participation in the sale.

Appellant contends that the "MSA require[d] billing and payment before title to the jet fuel transferred." However, such a provision is merely a reservation of a security interest and, therefore, has no bearing as to when the sale occurs. Additionally, the evidence contradicts appellant's contention. The evidence includes monthly purchase orders and inventory release authorization forms for February 2007 through December 2007, and monthly sales invoices for April 2007 through December 2007. Each of the nine sales invoices was dated after the billed jet fuel was delivered to Customer. For example, for April 2007, the purchase order was signed by Customer and J. Cooperman on March 27, 2007, and April 9, 2007, respectively, and the inventory release authorization form was signed by J. Cooperman on April 9, 2007. Subsequently, Retailer prepared a sales invoice dated May 7, 2007, for "Monthly Billing for the sale of Fuel in California – April 2007." Since the invoices were issued monthly after delivery of the fuel to the aircraft, OTA found that the invoices were issued after the sale and, therefore, did not constitute participation in the transaction for purposes of Regulation section 1620.

Additionally, appellant, noting that the Opinion mentioned inconsistencies in J. Cooperman's declaration and the evidence provided, argues that "[e]ven if there was an oversight, that is not a basis to disregard the entire declaration." Despite appellant's contention, OTA did not disregard J. Cooperman's declaration; rather, OTA evaluated and weighed J. Cooperman's declaration and found that the inconsistencies "call[ed] into question"

J. Cooperman's declaration. Specifically, OTA questioned the veracity of J. Cooperman's statement that she reviewed the purchase orders, ensured the orders were within the requirements as set forth in the MSA, and if not, it was her duty to reject the order, when the statement was compared to the purchase orders, all of which provided a maximum and minimum amount of jet fuel inconsistent with the MSA. Moreover, OTA found that even if the amounts on the purchase orders matched those stated on the MSA and Customer's purchases did not exceed the amounts indicated on the purchase orders, the purchase orders (and the processing of the purchase orders) nevertheless served no real purpose in the actual sales process. OTA found that the purchase orders merely restated what was already known by the parties by virtue of the MSA (i.e., Customer intended to purchase from Retailer an amount of jet fuel to be specified at a later date). Pursuant to Regulation section 30214(f), OTA evaluated the evidence presented, including J. Cooperman's declaration, weighed the evidence, and then made the necessary factual findings in the Opinion.

Based on all of the above, OTA finds that appellant's arguments regarding participation in the sale do not establish that the Opinion is contrary to law.

Buying company

Appellant contends that the Opinion "completely ignores what is required to be a 'buying company' and [the Opinion's] findings and conclusions of law fail to attribute to Retailer the activities required to qualify as a buying company." Appellant asserts that a buying company "shall be issued a seller's permit" pursuant to Regulation section 1699(i), and that there "is no basis to revoke Retailer's seller's permit since it is a buying company, and 'issues an invoice or otherwise accounts for the transaction.'" Appellant also asserts that the "Opinion disregards the regulatory history of the buying company regulation." Specifically, appellant asserts that the "buying company regulation was adopted as a solution to the problem of difficult audits questioning the validity of the buying companies and their impact on local tax allocation. [BOE] did not adopt the buying company regulation to shift the same inquiry of the validity of a buying company's activities to Regulation [section] 1802 or Regulation [section] 1620…," and that the "Opinion ignores the intent of the buying company regulation, and improperly shifts the audit burden sought to be avoided to Regulation [section] 1802 and Regulation [section] 1620."

Appellant essentially asserts that merely qualifying as a buying company is sufficient to impose sales tax on that company and allocate the sales tax to its place of business. Appellant's

argument lacks merit. As explained in the Opinion, the fact that Retailer was a buying company for Parent does not affect the analysis in the underlying appeal because a buying company still must satisfy the requirements of Regulation section 1620(a)(2)(A) in order to properly allocate the local sales tax to the buying company's location. (See *Cities of Agoura Hills, et al.* (SBE Memo.) 2012 WL 12535748.) OTA found that the Fillmore office was not Retailer's place of business, and that Retailer did not meaningfully participate from that location in the disputed sales; accordingly, Retailer's status as a buying company is immaterial as to the proper allocation of the tax at issue. Since OTA found that the Fillmore office was not Retailer's place of business, OTA also found that Retailer improperly held a seller's permit for the Fillmore office. OTA finds that appellant's buying company arguments do not establish that the Opinion is contrary to law.

Legislation on local tax allocation of jet fuel sales

Appellant contends that the Opinion "ignores legislation on local tax allocation of jet fuel sales." Specifically, appellant contends that BOE and the California Legislature "already addressed how local sales tax is allocated when buying companies are used to procure jet fuel: For periods prior to 2008, local sales tax is allocated to the location of the buying company if the buying company has only one location, as is the case here, in Fillmore." Appellant asserts that "despite the urging of [BOE] staff and various California cities, in 2005 [BOE] refused to repeal the existing regulation or to reallocate sales tax from Oakland to these other cities. [BOE] understood that repealing the regulation would result in retroactive reallocations of sales tax, and

refused to do so. Instead [BOE] ordered staff to begin an Interested Parties process. . . ."[12] (Original underline.) Appellant also asserts that the California Legislature, aware of a revenue sharing agreement between the City of Oakland and United Airlines, and the agreement being "legal,"[13] attempted to enact Assembly Bill (AB) 2466, a bill nearly identical to AB 451,[14] that would have been operative July 1, 2005; however, the Governor vetoed the bill, deciding that the required state auditor report should be part of any policy discussion before enacting new changes in the Bradley-Burns Uniform Local Sales and Use Tax Law. Appellant contends that since the allocation period at issue is before January 1, 2008, and Retailer was a buying company with only one California location, there is no basis for reallocation. Appellant argues that BOE "decided early on in the rule-making process that buying company sales tax allocation issues must be addressed" under Regulation section 1699, which only requires that "Retailer '[i]ssues an invoice or otherwise accounts for the transaction,' which it clearly did." Appellant contends that "even if" Regulation sections 1620 and 1802 "could somehow change this treatment, the evidence in this matter shows it does not."

OTA finds that the Opinion does not "ignore" legislation on local tax allocation of jet fuel sales. The Opinion does not apply R&TC sections 7204.03 and 7205, as amended by AB 451, since the allocation period at issue ends on December 31, 2007, which predates January 1, 2008. As discussed above, for jet fuel allocation periods ending before

[12] While unclear, it appears to OTA that appellant refers to a March 1, 2005 internal BOE Memorandum from its Chief Counsel's Office to the board members, with a staff recommendation in response to petitions from cities to amend or repeal then-Regulation section 1699(h). The Memorandum reminds the board members that upon receipt of a petition requesting the amendment or repeal of a regulation, the two available options are to: (1) deny each petition in whole or in part; or (2) initiate the rulemaking process by scheduling the matter for a public hearing. The Memorandum states that should the board members decide to schedule the matter for public hearing, they may first hold public discussions for the proposal, referring the matter to the Business Taxes Committee (BTC). The Memorandum recommended that if the board members decided to initiate the rulemaking process, that the board first refer the matter to BTC, since BTC provides a forum for interested members of the public. The Memorandum makes no mention that repealing the regulation would result in "retroactive" reallocations in sales tax and makes no recommendation to "refuse" to repeal the regulation.

[13] Appellant refers to a legislative document regarding AB 2644 that states: "Although the agreement between Oakland and United is inconsistent with the intent of AB 66, it is legal." OTA notes that the Opinion did not discuss the legality of the agreement between appellant and Retailer, as its legality was not at issue; rather, OTA looked to whether the Fillmore office was a place of business of Retailer throughout the allocation period and, if so, whether the Fillmore office participated in the subject sales.

[14] AB 451 amended R&TC sections 7204.03 and 7205 regarding the sale of jet fuel. For sales of jet fuel on or after January 1, 2008, the rules for allocating local tax on sales of jet fuel changed such that the place of sale is the point of delivery of the jet fuel to the aircraft. (R&TC, §§ 7204.03, 7205(b)(2); Cal. Code Regs., tit. 18, § 1802(b)(6)(B).)

January 1, 2008, like the underlying appeal, a buying company still must satisfy the requirements of Regulation section 1620(a)(2)(A) in order to properly allocate the local sales tax to the buying company's location. As for appellant's contention that BOE "understood that repealing the regulation would result in retroactive reallocations of sales tax, and refused to do so," OTA notes that local tax revenue is routinely reallocated retroactively when the tax is found improperly allocated. (See *Cities of Agoura Hills, et al., supra*; *City of Fillmore v. State Bd. of Equalization* (2011) 194 Cal.App.4th 716; *City of South San Francisco v. State Bd. of Equalization* (2014) 232 Cal.App.4th 707.) OTA finds that appellant's arguments regarding legislation on local tax allocation of jet fuel sales do not establish that the Opinion is contrary to law.

R&TC section 7224

R&TC section 7224 states that "Each local jurisdiction has the right to have the law administered in a uniform manner." Appellant, referring to *Cities of Ontario, supra*, argues that the Opinion ignores R&TC section 7224. Appellant asserts that the arrangement between it and Retailer is similar to an arrangement between the City of Oakland and United Airlines in *Cities of Ontario*, and, in that matter, BOE concluded that the local sales tax was properly allocated to Oakland. Appellant argues that "[t]he local sales tax should not be administered in a way that provides one result for Oakland, and another for [appellant] under the same circumstances"; rather, "it should be administered in a uniform matter consistent with the legislation eliminating these arrangements beginning in 2008, not before." Appellant contends that the Opinion "fails to hold CDTFA accountable" under R&TC section 7224.

As noted in the Opinion, *Cities of Ontario, supra*, like the underlying appeal in this matter, involved jet fuel sales made on or before December 31, 2007; however, unlike the underlying appeal, there was no dispute in *Cities of Ontario* that the taxpayer (i.e., the retailer) had a business location in Oakland. Furthermore, BOE found that the taxpayer's Oakland office participated in the sales at issue and was the taxpayer's only California business location. As explained in the Opinion, the proper allocation of local tax is not determined by an arrangement or agreement between parties. Rather, the allocation of local tax depends on whether the sales occurred inside California, and, if so, whether the taxpayer (i.e., the retailer) had any California place of business that participated in the sales. In other words, for sales that occurred in California, the proper allocation of local tax depends on the actions taken (i.e., participation in

the sale) and the location of such actions (i.e., the retailer's California place of business), regardless of any arrangement or agreement. In the Opinion, OTA held that Retailer did not have a California place of business that participated in the sales. Thus, despite appellant's contentions, the circumstances between the underlying appeal and *Cities of Ontario* were not "the same," and the Opinion did not "ignore" R&TC section 7224. OTA finds that appellant's R&TC section 7224 arguments do not establish that the Opinion is contrary to law.

Laches

Appellant contends that the "Opinion's conclusion that CDTFA is immune from a claim of laches in a sales tax reallocation case is contrary to law." Specifically, appellant contends that the defense of laches provides no limitation on its applicability in barring CDTFA from reallocating local taxes since CDTFA is not asserting a right; rather, laches "requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." Furthermore, appellant asserts that laches may apply to proceedings before a local administrative agency exercising quasi-judicial functions (such as CDTFA in local tax allocation matters) and is particularly applicable when there is no statute of limitations. In support, appellant provides a timeline of events already considered in the Opinion. Appellant further contends the Opinion's finding that appellant had a significant role in the delay "is contrary to law and the evidence." Appellant also asserts that the "Opinion is covered with statements complaining of insufficient evidence," and "holds this evidentiary insufficiency against [a]ppellant in each instance," resulting in prejudice against appellant.

Laches is an equitable defense developed by courts "to protect defendants against 'unreasonable, prejudicial delay in commencing suit.' (*SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC* (2017) 580 U.S. 328, 333, citing *Petrella v. Metro-Goldwyn-Mayer, Inc.* (2014) 572 U.S. 663, 667.) As the Opinion explained, CDTFA is

neither a "plaintiff nor a defendant"[15] when a jurisdiction files a petition for reallocation. Rather, CDTFA investigates and makes a finding regarding the proper allocation of local tax; CDTFA is not commencing a "suit" (i.e., the underlying action taken against a taxpayer, such as the issuance of a Notice of Determination) against appellant from which appellant is entitled to protection from unreasonable, prejudicial delay. In other words, CDTFA is the first level trier of fact in local tax allocation matters. Appellant has provided no law, and OTA is not aware that any such law exists, supporting a proposition that laches is applicable to a trier of fact. Based on CDTFA being a trier of fact in a local tax allocation matter, OTA found that laches is inapplicable as a defense against CDTFA and its reallocation of local tax. OTA finds that appellant has not established that the Opinion's finding is contrary to law.

As for appellant's remaining laches arguments, such as whether appellant had a significant role or whether appellant was prejudiced by the asserted delay, OTA notes that since the Opinion already found laches inapplicable as a defense against a trier of fact (such as CDTFA in local tax allocation matters) and, therefore, inapplicable in the underlying appeal, the Opinion addressed appellant's remaining arguments merely out of an abundance of caution. Nevertheless, OTA also finds that appellant's remaining laches arguments do not establish that the Opinion is contrary to law.

Appellant's Constitutional rights

Appellant argues that the Opinion violates appellant's due process rights under the federal and California constitutions. However, OTA is generally precluded from considering

[15] Furthermore, when a jurisdiction files an appeal with OTA appealing CDTFA's Appeals Bureau's decision regarding a petition for reallocation (OTA local tax allocation appeal), as appellant did in the underlying appeal, CDTFA is neither the appellant nor the respondent. Rather, CDTFA's participation in an OTA local tax allocation appeal is due to CDTFA's contracted responsibility with local jurisdictions to perform all functions incident to the administration or operation of the sales and use tax ordinance of the local jurisdictions. (See R&TC, §§ 7202, 7204.3, 7222, 7223.)

In keeping with CDTFA's role in OTA local tax allocation appeals, OTA notes that while its opinions usually list CDTFA as "Respondent" (since it is CDTFA who commenced the underlying action against a taxpayer ultimately leading to the appeal before OTA), its opinions for local tax allocation matters differ. Specifically, OTA opinions for local tax allocation matters, like the underlying Opinion in this appeal, lists: (1) a petitioning jurisdiction as "Respondent" (since it is a jurisdiction who commenced the underlying action by filing at least one petition for reallocation); (2) a jurisdiction appealing the decision issued by CDTFA's Appeals Bureau regarding a petition for reallocation as "Appellant" (since it is a jurisdiction that filed an appeal with OTA); and (3) CDTFA as "Agency" (since CDTFA does not commence an underlying action against a taxpayer in local tax allocation matters but rather is the first tier of fact).

constitutional arguments (see Cal. Const., art. III, § 3.5; Cal. Code Regs., tit. 18, § 30104); therefore, constitutional arguments, such as asserted due process violations, are not a basis for a rehearing.[16] OTA finds that appellant's constitutional arguments do not establish that the Opinion is contrary to law.

Conclusion

For the aforementioned reasons, OTA finds that appellant has not established that a ground exists for a rehearing pursuant to Regulation section 30604(a). Furthermore, as to appellant's repeated arguments which were considered and rejected in the Opinion, OTA continues to find those arguments unpersuasive. (*Appeal of Graham and Smith*, 2018-OTA-154P.) Likewise, appellant's dissatisfaction with the outcome of its appeal is not grounds for a rehearing. (*Ibid.*) Accordingly, appellant's PFR is denied.

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

We concur:

Signed by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

Date Issued: 10/24/2024

[16] There are limited exceptions to OTA's jurisdiction to review alleged due process violations; however, none are applicable in this matter. (Cal. Code Regs., tit. 18, § 30104(e).)