OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **USA HOIST COMPANY, INC.**	OTA Case No.: 20116890 CDTFA Case ID: 776-106

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: David A. Hughes, Attorney
Samantha K. Breslow, Attorney

For Respondent: Jarrett Noble, Attorney

A. WONG, Administrative Law Judge: On June 13, 2024, the Office of Tax Appeals (OTA) issued an Opinion modifying a decision by respondent California Department of Tax and Fee Administration (CDTFA).[1] CDTFA's decision denied USA Hoist Company, Inc.'s (appellant's) petition for redetermination of a Notice of Determination (NOD) dated December 18, 2018. The NOD is for tax of $280,658, plus applicable interest, for the period January 1, 2013, through March 31, 2016 (liability period). As relevant here, OTA's Opinion arrived at the following conclusions: (1) appellant's charges for jump-tower extensions were taxable charges for fabrication labor and rent rather than nontaxable installation charges; and (2) five subcontracts regarding hoists constituted taxable leases rather than nontaxable service agreements.[2]

On July 15, 2024, appellant timely petitioned OTA for a rehearing, alleging the following three bases: (1) newly discovered material evidence; (2) insufficient evidence to justify the

[1] The State Board of Equalization (board) formerly administered sales and use taxes. On July 1, 2017, the board's administrative functions relevant to this case transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, if this Opinion refers to events occurring before July 1, 2017, "CDTFA" refers to the board.

[2] OTA's Opinion modified CDTFA's decision with respect to communication systems, finding that appellant's rental receipts for these were not taxable because appellant leased them in substantially the same form as acquired. Additionally, in its petition for rehearing, appellant conceded that one of the five subcontracts was a taxable lease.

Opinion; and (3) the Opinion is contrary to law. OTA concludes that the three grounds alleged in appellant's petition for rehearing do not constitute a basis for granting a new hearing.

OTA will grant a rehearing where one of the following six grounds for a rehearing exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

Newly Discovered Material Evidence

In its petition for rehearing, appellant contends that OTA's Opinion misunderstood and mischaracterized the nature and taxability of the labor associated with jump-tower extensions but that it can provide a video to clarify. Appellant alleges that such a video was "not available at the time of filing,"[3] and further alleges that it thoroughly reviewed its records for evidence depicting "jump-tower labor" but did not have access to a video at the time of the OTA oral hearing on March 12, 2024. Appellant asserts that such a video is material to the taxability of its charges for jump-tower extensions, which were in fact nontaxable installation charges.

A party seeking a rehearing based on newly discovered material evidence must show the following: (1) the evidence is newly discovered; (2) the party exercised reasonable diligence in discovering and producing it; and (3) the evidence materially affects the substantial rights of the party. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.)[4] Newly discovered evidence is looked upon with suspicion and disfavor, and the party must make a showing of the necessary requirements to support rehearing on this ground. (See *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138.) A party seeking a hearing based on newly discovered evidence must show that it exercised reasonable diligence in discovering and producing it. (See *Doe v. United Air Lines, Inc.*, *supra*, 160 Cal.App.4th at p. 1506.) A general averment of diligence is insufficient; the party seeking rehearing must specify the particular acts or

[3] Appellant does not specify the "filing" to which it is referring.

[4] Since California Code of Regulations, title 18, (Regulation) section 30604 is based on Code of Civil Procedure section 657, case law pertaining to that statute's operation constitutes relevant guidance in interpreting Regulation section 30604. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1595 WL 1320; see also *Appeal of Do*, 2018-OTA-002P.)

circumstances that establish diligence. (See *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 154.)

Here, appellant has not explained why it now has access to video evidence that was purportedly unavailable until after OTA issued its Opinion or why it could not have produced such video evidence at an earlier time. Further, appellant fails to show that it exercised reasonable diligence in discovering such a video or to specify the acts establishing such diligence. For these reasons, OTA concludes that a rehearing based on the ground of newly discovered material evidence is not warranted.

Insufficient Evidence

In its petition for rehearing, appellant contends that there was insufficient evidence to support the following two findings in the Opinion: (1) appellant's charges for the jump-tower extensions were taxable charges for fabrication labor and rent; and (2) the subcontracts regarding hoists constituted taxable leases rather than nontaxable service agreements.

To find that there is insufficient evidence to justify the Opinion, the OTA Panel considering a petition for rehearing must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Opinion clearly should have reached a different result. (*Appeals of Swat-Fame Inc., et al.*, 2020-OTA-045P.) The OTA Panel has the affirmative duty to independently appraise the evidence and to grant the petition for rehearing where the preponderance of the evidence is opposed to the findings in the Opinion. (See *Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 739.) The OTA Panel may disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom that are contrary to the factual findings in the Opinion. (See *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1159-1160.)

(1) Jump-Tower Extensions

Regarding the first finding, appellant highlights hearing testimony that charges for "jump tower labor" were only for installation services and unrelated to any physical jump-tower extensions or additional tower pieces it furnished. Appellant contends that there is a lack of evidence for construing the "jump tower labor" charges as charges for the lease of property.

However, hearing testimony that "jump tower labor" charges were only for nontaxable installation is belied by exhibits illustrating the results of "jumping." "Fabricate" means to construct by assembling the necessary parts and components. (*A.S. Schulman Electric Co. v. State Bd. of Equalization* (1975) 49 Cal.App.3d 180, 183.) Fabricating includes any operation or step in a process resulting in the creation or production of tangible personal property. (Cal.

Code Regs., tit. 18, § 1526(b).) Images admitted into the evidentiary record show hoist towers both before and after the process of "jumping." This process entailed appellant adding physical jump-tower sections/extensions (a.k.a., "additional levels") to an existing hoist tower. OTA finds that this "jumping" process constituted fabrication because appellant was creating or constructing a taller hoist tower (i.e., tangible personal property). Contractual charges for "jump-tower labor" must have related to such fabrication labor, as well as the temporary physical possession of the additional jump-tower sections, because the subcontracts did not otherwise account for them. Businesses providing tangible personal property on a temporary basis are expected to charge a fair rental/lease price for them. Accordingly, after an independent review of the evidentiary record, this OTA Panel finds that a preponderance of the evidence still supports the Opinion's findings regarding the jump-tower extensions.

(2) Subcontracts

Regarding the second finding, appellant contends that the evidentiary record (including the terms of the subcontracts, hearing testimony, and affidavits of its general contractor customers) indicates that four of the five subcontracts at issue are nontaxable service agreements rather than taxable leases of tangible personal property.[5] Specifically, appellant argues that the evidence shows appellant directed and controlled the hoists; provided/selected/discharged operators for them; handled their maintenance and repairs (otherwise it was liable for any resulting harm/damage); and was required to insure the hoists during the construction projects at issue.

Whether agreements are taxable leases or nontaxable service contracts depends on the answers to two main questions: (1) who operated the tangible personal property; and (2) who was responsible for their operation. (See *Entremont v. Whitsell* (1939) 13 Cal.2d 290, 296 (*Entremont*).) Regarding the first question, the chief characteristic of a lease is the lessor giving up possession of tangible personal property to the lessee so that the lessee uses and controls the leased property. (*Id*. at p. 295.) An important factor in determining who used/controlled the tangible personal property is who had the power of selecting and discharging the operators of that property. (*Ibid*.) Regarding the second question, factors in determining responsibility for the tangible personal property's operation include who was responsible for the following:

[5] The subcontracts were related to the following five projects in the Los Angeles area: (1) Wilshire Towers Renovation; (2) 1801 Avenue of the Stars Demolition; (3) Wilshire Grand Hotel Demolition; (4) Masonic Temple Renovation; and (5) Wilshire Grand Hotel Shoring/Excavation. As noted earlier in footnote 2, in its petition for rehearing, appellant conceded that the subcontract for (1) the Wilshire Towers Renovation, was a taxable lease.

repairs; necessary operating supplies; workers' compensation insurance for operators; and liability/damages from the operation of the tangible personal property. (*Ibid*.) In *Entremont*, the California Supreme Court noted two other factors that were somewhat important but not conclusive: (1) whether the agreement was illegal and void if held to be a lease (a factor not relevant here); and (2) how a party conceived the agreement as evidenced by its ensuing tax reporting. (*Entremont*, *supra*, 13 Cal.2d at pp. 296-297.) The Court mainly examined the parties' contract in light of these factors and concluded, "[T]he contract, denominated by the parties as a 'Service Agreement,' was for the transportation of property by motor vehicle, and was not for the renting or leasing of tools or equipment." (*Id*. at p. 294.) However, even though all these factors suggested a nontaxable service agreement, the Court noted that its conclusion was still "not entirely free from doubt." (*Id*. at p. 295.)

Here, after reappraising the evidentiary record, OTA still finds that a preponderance of the evidence indicates the four subcontracts at issue are leases of tangible personal property. By their own wording, all four subcontracts related to the rental or lease of hoists/lifts. Two subcontracts (for the 1801 Avenue of the Stars Demolition and the Wilshire Grand Hotel Demolition) stated that appellant's general contractor customers were responsible for providing (i.e., selecting/discharging) hoist operators, insuring the hoist equipment, and paying for their maintenance/repair, which indicates that appellant's general contractor customers controlled and were responsible for the hoists under these two subcontracts. Accordingly, OTA still concludes that these two subcontracts were taxable leases.

The subcontract for the Masonic Temple Renovation specifically excluded a hoist operator from the agreement and gave appellant's general contractor customer the option of choosing an operator from appellant. This indicates that appellant's general contractor customer possessed the power of selecting the hoist operator, whether it be appellant or a third party. Also under the subcontract, the general contractor was responsible for paying for the hoist's maintenance and repairs. Together, these facts suggest that appellant's general contractor customer controlled and was responsible for the hoists, and so OTA still concludes that the Masonic Temple Renovation subcontract was a taxable lease.

The subcontract for the Wilshire Grand Hotel Shoring/Excavation was silent as to who would be responsible for providing an operator during the rental period of seven hoists. The fact that such terms were not originally included or formally incorporated into this subcontract indicates to OTA that this agreement must have been a lease for equipment rather than a service contract. Moreover, this subcontract contained a provision that the general contractor must approve appellant's "key personnel" who were assigned to or removed from the project,

and OTA infers that a hoist operator would qualify as "key personnel" based on hearing testimony about the skills, training, and testing required for this profession.[6] Accordingly, based on the evidence (and reasonable inferences therefrom), OTA still finds that appellant's general contractor customer controlled the hoists during their rental period and concludes that the Wilshire Grand Hotel Shoring/Excavation subcontract was a taxable lease.

In its petition for rehearing, appellant notes affidavits/testimony stating that appellant's general contractor customers did not possess or control the hoists and appellant provided operators for the hoists. However, as recounted above, the evidentiary record indicates to OTA that appellant's general contractor customers were not contractually obligated to use operators provided by appellant in connection with the hoists. Appellant also notes terms in the subcontracts indicating that appellant was responsible for insuring the hoists, which suggests that appellant was responsible for the hoists' operation. Like the Supreme Court in *Entremont*, OTA acknowledges that its conclusions may not be entirely free from doubt given conflicting contractual terms but notes the following: "beyond doubt" is not the applicable standard; and significant factors per *Entremont* and a preponderance of evidence still suggest that the subcontracts at issue are taxable leases in this OTA Panel's estimation. Therefore, for the above-described reasons, OTA concludes that a rehearing based on an insufficiency of evidence is not warranted.

Contrary to Law

In its petition for rehearing, appellant contends that OTA's Opinion was contrary to law based on several arguments that OTA will examine below (if valid).[7]

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 is not one that involves a weighing of the evidence, but instead, 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 Riedel*, 2024-OTA-004P.) This

[6] To the extent appellant argues this inference lacked a factual basis, OTA finds this argument unpersuasive.

[7] For two of its arguments that the Opinion is contrary to law, appellant fails to cite the law being contradicted. In one argument, appellant disagrees with the Opinion's analysis of appellant's argument on appeal regarding the amount of control an optional operator exerts over a hoist. In another argument, appellant expresses concern about the alleged impact of the Opinion based of public policy grounds. However, regarding the former argument, appellant fails to cite any authority for its conception of the law; and regarding the latter argument, OTA notes that "contrary to public policy" is not one of the grounds for rehearing. Accordingly, OTA will not discuss these two arguments further.

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 if possible. (*Ibid*.) On a petition for rehearing, the question before OTA does not involve examining the quality of the reasoning behind OTA's Opinion, but whether that Opinion can or cannot be valid according to the law. (*Ibid*.; see also *Appeals of Swat-Fame Inc., et al.*, *supra*.)

First, appellant argues that the Opinion misapplied the factors in *Entremont* to the evidence when determining whether the subcontracts at issue were taxable leases or nontaxable service contracts. To the extent that appellant is requesting a rehearing based on a reappraisal of the evidentiary record, OTA has already reappraised the evidentiary record in the prior section regarding insufficiency of evidence and will not address appellant's argument again here.

Second, appellant argues that OTA misconstrued *Entremont's* reference to a "power of selection," arguing that it concerned who had the power to hire and fire the operators, not whether the provider of the hoists always provided an operator. In this regard, appellant argues that it had the exclusive power to hire or fire its operators because they were its employees. Appellant misconstrues the power of selection. Here, the issue is whether, contractually, appellant's general contractor customers *must* use an operator provided by appellant to acquire the hoists' services or, alternatively, they could acquire the hoists without an operator provided by appellant and independently select an operator of their choice (including those employed by appellant). In the former scenario, the contract is a nontaxable service agreement; in the latter case, the contracts are taxable leases (which is the case here). Appellant's argument that the power of selection relates to the dynamic between it and its employees misses the mark, and OTA finds this argument unpersuasive.

Third, appellant argues that by providing operators to its general contractor customers, along with the hoists, it retained possession and control of the hoists, so the transactions at issue are nontaxable service contracts. For authority, appellant cites two cases that OTA did not find relevant in its Opinion, arguing that OTA's determination was contrary to law.[8] OTA's Opinion did not find these two cases instructive because they did not involve operators provided pursuant to a lease of tangible personal property, and OTA still finds that these two cases are factually distinguishable. Accordingly, OTA remains unpersuaded by this argument.

[8] The two cases cited are *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86 and *Bar Master Inc. v. State Bd. of Equalization* (1976) 65 Cal.App.3d 408.

Fourth, citing *Appeal of Adventures by the Sea, Inc.* (2023-OTA-284P) (*Adventures by the Sea, Inc.*) and CDTFA Sales and Use Tax Annotation (Annotation) 330.2283 (01/08/75),[9] appellant argues that no weight should be given to whether an operator was a mandatory part of a hoist agreement when determining whether the agreement was a taxable lease. However, whether an operator was mandatory or optional was not at issue in *Adventures by the Sea, Inc.* In that case, the issue was whether charges for bicycles and kayaks included in a tour group package (and operated by the tour provider's customers) were for taxable rental income or nontaxable transportation services. OTA concluded that the charges for bicycles and kayaks were taxable rental charges since the customers themselves operated the bicycles and kayaks. But such charges would not necessarily become nontaxable service charges if the tour operator provided its customers with individual operators for the bicycles and kayaks (as appellant appears to argue here). In that scenario, the issue of whether an operator was optional or mandatory per the agreement becomes relevant for determining whether charges for the temporary possession of tangible personal property are taxable (as was the case here).[10] Since these were not the facts nor the legal issue in *Adventures by the Sea, Inc.*, OTA finds that case distinguishable. As for Annotation 330.2283, CDTFA deleted it in 2021 (*Appeal of Adventures by the Sea, Inc.*, *supra*, fn. 14), so OTA affords it no weight.[11]

Finally, appellant argues that OTA's Opinion is contrary to law because it failed to apply the substance-over-form doctrine. Specifically, appellant alleges that the Opinion concluded the four subcontracts at issue were taxable leases because they were labeled as such, thus elevating form over substance. However, OTA's Opinion merely noted how the parties themselves framed the subcontracts before analyzing the subcontracts in light of the *Entremont*

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[9] Annotations are not binding authority and do not have the force or effect of law. (Cal. Code Regs., tit. 18, § 35101(a)(1); *Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) However, OTA may give some consideration to annotations and will independently determine the appropriate weight to afford an annotation. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15; *Appeal of Martinez Steel Corporation*, *supra*.)

[10] In *Adventures by the Sea, Inc.*, with respect to tour group packages, the parties agreed that charges for a tour guide qualified as nontaxable *optional* service charges. Here, appellant argues that if it provided optional hoist operators to its general contractor customers along with the hoists, then it provided nontaxable services. However, the taxable measure at issue did not include charges for such optional hoist operator services. Further, the taxability of the hoist operators' services would depend on whether the hoists and the operators were transferred in either a "bundled" transaction or a "mixed" transaction. (See generally *Dell, Inc. v. Superior Court* (2008) 159 Cal.App.4th 911.) During its internal appeals process, CDTFA determined these were bundled transactions whose true objects were the hoists and not the operators, so no reduction for services was warranted.

[11] CDTFA may "depublish" an annotation because it is in error or conflicts with another annotation. (See Cal. Code Regs., tit. 18, § 35101(e).)

factors. Even the Supreme Court in *Entremont* noted how the parties "denominated" the contract at issue there. (See *Entremont*, *supra*, 13 Cal.2d at p. 294.) And as OTA explained in its Opinion, substantive contractual terms (not mere labels) led OTA to its conclusion on the subcontracts at issue. Thus, OTA finds appellant's substance-over-form argument lacking in merit.

Therefore, for the above-described reasons, OTA concludes that a rehearing based on the contrary to law ground is not warranted. And because appellant has failed to establish any grounds for a rehearing, appellant's petition for rehearing is denied.

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Andrew Wong
Administrative Law Judge

We concur:

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