

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
JAX LOGISTICS, INC., ) OTA NO. 18011926  
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 )  
 APPELLANT. )  
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TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, February 20, 2019

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
355 South Grand Avenue, South Tower, 23rd Floor,  
Los Angeles, California, 90012, commencing  
at 1:08 p.m. and concluding at 1:45 p.m. on  
Wednesday, February 20, 2019, reported by  
Ernalyn M. Alonzo, Hearing Reporter in and  
for the State of California.

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APPEARANCES:

Panel Lead: Hon. MICHAEL GEARY

Panel Members: Hon. ANDREW KWEE  
Hon. DANIEL CHO

For the Appellant: MANUEL A. ALMEIDA,  
Representative

For the Respondent: State of California  
Franchise Tax Board  
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I N D E X

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Los Angeles, California; Wednesday, February 20, 2019

1:08 p.m.

ADMINISTRATIVE LAW JUDGE GEARY: Good afternoon, ladies and gentlemen. Thank you for joining us today at our offices in Los Angeles for the hearing in the matter of Jax Logistics, Inc. That's Office of Tax Appeals Case No. 18011926.

My name is Michael Geary. I will be the lead judge today. I am joined on the panel by two of my colleagues, Andrew Kwee and Daniel Cho. Daniel is here in the place of Amanda Vassigh who was originally noticed as a judge. She had a family emergency, and could not attend in Los Angeles today, and Judge Cho kindly agreed to step into her place.

Let's start with the identification of the parties beginning with the Appellant. Who is appearing for the Appellant?

MR. ALMEIDA: Manny Almeida.

MR. PALMER: And Jeff Palmer.

ADMINISTRATIVE LAW JUDGE GEARY: Mr. Palmer, what is your title and role?

MR. PALMER: I'm the accountant for JAX at this point.

ADMINISTRATIVE LAW JUDGE GEARY: Okay.

1 MR. ALMEIDA: Judge, as I mentioned on the  
2 preliminary call, Kelly Jones who was the president and  
3 CEO of the company passed away back in November of 2017, I  
4 believe. And so --

5 ADMINISTRATIVE LAW JUDGE GEARY: Okay. Thank  
6 you. And who is here to represent the California  
7 Department of Tax and Fee Administration?

8 MS. HE: Mengjun He.

9 MR. CLAREMON: Scott Claremon.

10 MS. RENATI: Lisa Renati.

11 ADMINISTRATIVE LAW JUDGE GEARY: Thank you. I  
12 want to mention before we get into the meat of this case  
13 in particular. OTA is an independent agency completely  
14 separate and apart from the taxing agencies that appear  
15 before us. And this is an appeal from a determination by  
16 the California Department of Tax and Fee Administration.  
17 And I'll refer to that agency as simply the Department  
18 afterwards in my presentation or its predecessor, the  
19 Board of Equalization.

20 Jax Logistics, Inc., the Appellant in this case,  
21 is liable for use tax plus interest measured by unreported  
22 rental receipts, totaling \$2,204,514 for the period  
23 July 1st, 2010, through June 30th 2013. The Department  
24 alleges that the liability was established by an audit.

25 And I should mention now as I did in any

1 prehearing conference minutes and order, that the audit  
2 also determined that the Appellant was liable for tax on  
3 underreported excess tax purchases subject to use tax,  
4 measuring \$6,648, and tax on unsupported alleged  
5 nontaxable sales in interstate commerce. Neither of which  
6 are issues in this proceeding. We are only here to talk  
7 about the tax on the \$2,204,514 measure for rental  
8 receipts.

9 The Appellant concedes in this case that it  
10 purchased tangible personal property from out of state  
11 sellers without paying tax to the sellers or to the  
12 Department or its predecessor, the Board of Equalization.  
13 It concedes that it did not elect to pay use tax in the  
14 state measured by the purchase price it paid for that  
15 tangible personal property by reporting that tax for the  
16 period during which Appellant first placed that tangible  
17 personal property into service.

18 It concedes that it rented or leased that same  
19 tangible personal property in the state, and it concedes  
20 that it did not remit use tax in the state measured by the  
21 rental or lease payments accrued during the audit period,  
22 which is the period I mentioned before.

23 The parties have agreed that the sole issue to be  
24 addressed in this hearing is whether Appellant entitled to  
25 reduction of the \$2,204,514 measure of tax. I asked the

1 parties to submit evidence in advance. The Department  
2 submitted no exhibits or proposed exhibits for this  
3 hearing. Am I correct the Department does not intend  
4 to --

5 MS. HE: No. We had three, Exhibits A, B, and C.  
6 A is the NOD issued on June 20th, 2014. Exhibit B is a  
7 DNR issued on October 5th, 2017. And Exhibit C selected  
8 of audit working papers on the tax measures at issue. And  
9 we did e-mail Claudia Lopez at the e-mail address  
10 indicated in the order.

11 ADMINISTRATIVE LAW JUDGE GEARY: After the  
12 prehearing conference?

13 MS. HE: Right. After. Yes, before the deadline  
14 specified in the order.

15 ADMINISTRATIVE LAW JUDGE GEARY: I was not aware  
16 of that, and I did not see it in my electronic file. Did  
17 you send a copy to Mr. Almeida?

18 MS. HE: Yes.

19 ADMINISTRATIVE LAW JUDGE GEARY: Mr. Almeida do  
20 you have those documents?

21 MR. ALMEIDA: No.

22 MS. HE: Yeah. I can bring that e-mail up right  
23 away. I was not aware that your office has not received  
24 the e-mail.

25 ADMINISTRATIVE LAW JUDGE GEARY: Let's go off the



1 record for a second while we work this out, and I'll put  
2 it on the record after.

3 (There was a pause in the proceeding.)

4 ADMINISTRATIVE LAW JUDGE GEARY: Let's go back on  
5 the record, please.

6 While we were off the record, representative for  
7 the Department indicated that she had a copy of an e-mail  
8 that forwarded the Department's Exhibits A, B, and C to  
9 Claudia Lopez at my office and to Mr. Almeida, the  
10 representative for the taxpayer. Mr. Almeida indicated  
11 that he had received those documents.

12 I indicated to the parties that we do need to see  
13 hard copies of those today. If at any point in this  
14 proceeding we need to look at copies, we'll stop the  
15 proceeding and get them. Because I believe that counsel  
16 indicated that there were only 27 pages.

17 MS. HE: Yeah. I guess we're skipping the DNR  
18 since that was already on the record as an attachment to  
19 the opening brief, the Exhibit C. It's only 17 pages.

20 ADMINISTRATIVE LAW JUDGE GEARY: Okay. I don't  
21 think we need to see any of those right now. If we do not  
22 have them when we get back to our office in Sacramento,  
23 and electronic copy, I will have staff follow up with you.

24 Let's see. That brings me to our discussion of  
25 the arguments. I think it was a little unclear initially

1 whether there would be testimony. It's now clear from my  
2 discussion with Mr. Almeida before we went on the record,  
3 there will not be any live testimony. This is only for  
4 the purposes of the hearings. We're going to be hearing  
5 oral argument. We're not taking any evidentiary  
6 testimony.

7 I have indicated to Mr. Almeida during our  
8 telephone conference that I would allow 15 minutes for his  
9 opening argument. He felt that would be adequate. I'll  
10 allow 15 minutes for the Department's response. And then  
11 I think the Department indicated that would be adequate.

12 And Mr. Almeida, if you want it, we will allow  
13 you an additional five minutes in rebuttal.

14 MR. ALMEIDA: Thank you.

15 ADMINISTRATIVE LAW JUDGE GEARY: All right.

16 Mr. Almeida provided two exhibits, and let me go to those  
17 so I can describe them more accurately. It is -- the  
18 first exhibit which we've mark for identification as  
19 Exhibit 1 is entitled JAX, with J-A-X all capped,  
20 Equipment Purchases Sales Tax. It's a one-page document.

21 The second document, which we have marked for  
22 identification as Exhibit 2 is entitled Equipment  
23 Purchases QuickBooks Detail 2010 through 2013. That's  
24 four pages.

25 Mr. Almeida, those are the only pieces of

1 documentary evidence you propose to be admitted in this  
2 hearing?

3 MR. ALMEIDA: Correct, Judge.

4 ADMINISTRATIVE LAW JUDGE GEARY: All right. Has  
5 the Department received those documents?

6 MS. HE: Yes, we have.

7 ADMINISTRATIVE LAW JUDGE GEARY: Any objection to  
8 the admission of those documents?

9 MS. HE: No, objections.

10 ADMINISTRATIVE LAW JUDGE GEARY: Those documents  
11 are admitted.

12 (All Exhibits presented today were received  
13 in evidence by the Administrative Law Judge.)

14 ADMINISTRATIVE LAW JUDGE GEARY: I should indicate  
15 as to the Exhibits A, B, and C. You said that it was the  
16 Notice of Determination, which I'm certain that  
17 Mr. Almeida has seen the decision and recommendation that  
18 was issued by the Appeals Bureau. And 17 pages of --

19 MS. HE: Audit --

20 ADMINISTRATIVE LAW JUDGE GEARY: Audit papers.  
21 All right. I don't have those documents before me. I  
22 think we all know I will get those documents either at my  
23 office, or if I have to have staff request additional  
24 copies. We're going to admit those documents also into  
25 evidence today.

1 MS. HE: Thank you.

2 ADMINISTRATIVE LAW JUDGE GEARY: All right. I'm  
3 ready to hear -- we are ready to hear the arguments. Are  
4 you ready, Mr. Almeida?

5 MR. ALMEIDA: I am.

6 THE WITNESS: Proceed.

7

8 OPENING STATEMENT

9 MR. ALMEIDA: Thank you. Again, this has been  
10 one of those situations where, you know, we've been  
11 dealing over the years with, you know, certain taxpayers  
12 in this particular situation where we have transactions  
13 involving out-of-state vendors that were either not  
14 registered to collect use tax here in California, or, you  
15 know, were not collecting use tax itself.

16 So ultimately what the client was doing was  
17 leasing these trusses to individuals; a lot of companies  
18 in the entertainment industry. And is generally the case  
19 in the entertainment industry, there's, you know,  
20 significant exemptions and significant transactions  
21 involved where the vendor or the retailer are on the  
22 production company, in this particular case, is the  
23 consumer.

24 So the historical -- when you step back and look  
25 at the historical arguments back and forth between the

1 Department during the audit and everything subsequent to  
2 this day, is well, we understand what regulation 1660,  
3 which is basically where we focus our arguments on;  
4 leasing and making an election to pay the tax cost,  
5 equipment that is ultimately is the lease.

6 And for the most part, the taxpayer was  
7 purchasing equipment. It was commingle. Some was resold.  
8 Sales tax collected, ultimately, other than the amounts  
9 that are not in question today would be under statement  
10 for commerce, transactions, or other sales that may not be  
11 properly taxed. Other than those, the issue here involves  
12 did the taxpayer fully understand, and did they did, in  
13 fact, make an election to pay the tax based on the stream  
14 lease payments.

15 And, you know, we have a Supreme Court case that  
16 just came down June 21st. We now have the new regulations  
17 that are going to involve the collection of the use tax  
18 here in California, effective April 1st, where you gonna  
19 basically require a vendor meeting certain thresholds to  
20 collect and remit tax based on delivery and not  
21 necessarily where they have a physical presence or nexus,  
22 as we've known it to be over the last, you know, 30-some  
23 odd years.

24 But our concern is, and has always been the  
25 concern is, did the taxpayer clearly understand that they

1 had to make an election. And when they're purchasing  
2 something from an out of state vendor, then the question  
3 here becomes, you know, should they be required to make an  
4 election to pay use tax when the reality is based on these  
5 decisions that have occurred over the last several months?

6 Did they make an election not knowing that they  
7 have to accrue and pay use tax? Hence, that's why we're  
8 having vendors collect and remit going forward, effective  
9 April 1st in California. But, you know, the question  
10 really becomes did they have an opportunity? And if  
11 companies -- and you know, we've had this issue come up  
12 before with companies -- have a situation where the intent  
13 is to pay the tax on the cost or assume that the tax was  
14 collected and paid by the vendor because that's another  
15 area.

16 How do we know? I mean, historically we've had  
17 situation with audit where anytime you have a use tax  
18 transaction, the first thing we try to do is we try to  
19 have the auditor look to see if the vendor is registered  
20 to collect the use tax in California. Was there any  
21 subsequent questionnaire that may have been sent to that  
22 vendor by the former Board of Equalization, now the CDTFA  
23 Department? You know, would they do their due diligence  
24 that way?

25 Potentially there is a situation where we have

1 two different parties being assessed for the same tax.  
2 And that was one of the areas that we were obviously  
3 concerned with. Because the assumption was, you know  
4 what? These folks are doing significant amount of  
5 businesses in the California. I'm talking about the  
6 vendor or the vendors in particular. You know,  
7 potentially would they have nexus?

8 I understand primary responsible is on the  
9 purchaser to pay use tax. But the question then comes  
10 back to well, if you didn't pay the use tax or the vendor  
11 didn't collect it, have you made an election to collect it  
12 on a stream of lease payments? I can see that transaction  
13 being a lot easier to understand or, I guess, in a certain  
14 way to default to, if you're using a California vendor  
15 that collects sales tax.

16 Because unless you issue them a resale  
17 certificate so you're basically making a positive move to  
18 say, you know what. I'm go to issue a resale certificate,  
19 and I'm going to collect tax on the stream of lease  
20 payments. In this particular case, the taxpayer never  
21 issued a resale certificate. The vendor, whether they  
22 ultimately paid use tax to the State of California, we  
23 never really found out because we never really got any  
24 feedback throughout the appeals process to determine that.

25 So you know, the argument is really, have they

1 made an election? Did they -- have they made a conscious  
2 election to pay the use tax on the stream of lease  
3 payments? And here, again, the amounts in question, as  
4 you can see on the exhibits that we provided, there's a  
5 significant difference when you're looking at the cost of  
6 the equipment that was in -- that was leased versus the  
7 stream of lease payments. Which, again, the taxpayer  
8 never collected. Therefore, they didn't intend to collect  
9 tax.

10 The entertainment industry has a tendency to  
11 believe that everything that they do is exempt from tax,  
12 even though it's not always the case. But, you know,  
13 there's an avenue there in addition to that. Customers  
14 get audited in this industry all the time. If the vendor  
15 did not collect the use tax from the lessee, did the  
16 lessee get out of it, and ultimately have to pay the use  
17 tax? Because here again, you have a two-way Street.

18 The auditor can come after the lessor, or they  
19 can go after the lessee. And if one party pays it, then  
20 technically the other party doesn't have to pay it. So  
21 assuming that the lessee may have been audited -- or the  
22 lessees may have been audited somewhere along the way, did  
23 they actually get an offset?

24 And, you know, so those are some of the concerns  
25 that we have in this particular situation. Or ultimately,



1 we don't feel the Department did their due diligence to  
2 get to a point where, number one, do we really have an  
3 election? Can we say there was an election made even  
4 though it defaulted into a nontaxable transaction on the  
5 purchase price? And then what happened subsequently with  
6 the ultimate lessee?

7 And that's really in a nutshell our position, and  
8 it's been our position all along. But again, you have to  
9 understand, you know, this has been a family-owned  
10 operated business. When you assess someone 2.2 million  
11 dollars, and you're trying to, you know, arrange some sort  
12 of a, you know, conclusion that's reasonable and equitable  
13 to the taxpayer, and you're making the right decision, you  
14 know, based on the facts available, you know, we just feel  
15 that wasn't done.

16 Therefore, we're here today to present in front  
17 of the administrative law judges here of the OTA. And we  
18 appreciate the time to do that.

19 ADMINISTRATIVE LAW JUDGE GEARY: Okay. Thank  
20 you.

21 MR. ALMEIDA: Thank you.

22 ADMINISTRATIVE LAW JUDGE GEARY: Judges, do you  
23 have any questions for Mr. Almeida?

24 ADMINISTRATIVE LAW JUDGE KWEE: Yes, I did have  
25 one basic question for Jax. I'm just curious. What

1 exactly is a truss? Could you explain what it is you're  
2 renting out?

3 MR. ALMEIDA: Yeah. Do you want to explain it or  
4 do you want me to do it?

5 MR. PALMER: A truss is tubular steel arranged  
6 and fabricated various ways. You'll see it at a place  
7 like the auto show or a convention center. It holds up --  
8 it holds up lights and rigging and stuff like that.  
9 You'll see it at concerts.

10 ADMINISTRATIVE LAW JUDGE KWEE: So do you  
11 pre-fabric them yourselves, or do you purchase it in a  
12 completed condition?

13 MR. ALMEIDA: They're in a completed condition.

14 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

15 MR. ALMEIDA: Only sales and leases is what Jax  
16 Logistics does.

17 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Cool. And  
18 one other question. You had mentioned that you weren't  
19 sure the lessees had possibly paid the use tax?

20 MR. ALMEIDA: Yeah. We -- we tried to get the  
21 Department to do due diligence to determine if maybe --  
22 'cause again, you could have -- because it is a use tax  
23 transaction, you could potentially have multiple parties  
24 paying the use tax.

25 ADMINISTRATIVE LAW JUDGE GEARY: Did you ever

1 provide, like, a list of your customers so that it could  
2 be provided?

3 MR. ALMEIDA: Yup. Those were available.

4 ADMINISTRATIVE LAW JUDGE GEARY: Judge Cho?

5 ADMINISTRATIVE LAW JUDGE CHO: No questions.

6 ADMINISTRATIVE LAW JUDGE GEARY: I have a  
7 question. Mr. Almeida, is it your contention that there  
8 has to be evidence that Jax Logistics made a conscious  
9 election in order for the liability to be upheld?

10 MR. ALMEIDA: Correct.

11 ADMINISTRATIVE LAW JUDGE GEARY: And what's your  
12 support for that proposition?

13 MR. ALMEIDA: Well, the support just comes along  
14 with the fact that use tax is a very complex area, and  
15 when you're purchasing from a local vendor, again, the  
16 sales tax transaction, if you issue them a resales  
17 certificate, for all intense purposes in my mind, you made  
18 an election.

19 However, because this is a use tax transaction,  
20 we believe that the intent was to pay the tax at cost, and  
21 the assumption was as long as we didn't collect it on a  
22 stream of lease payments, we've made that election. But  
23 as is the case in a lot of cases, you think the vendors  
24 are paying the tax without knowing whether the vendor was  
25 registered to collect the tax in California or not.

1 I think the vendors were located maybe in Texas  
2 and some of the other states nearby and the Midwest side  
3 of the country. So yeah, at the end of the day, that's  
4 our position. And again, it clearly demonstrates, you  
5 know, based on the Wayfair case based on the decision to  
6 require retailers in California now to collect the  
7 district taxes across southern counties, we believe  
8 there's some inconsistencies there that, you know, for all  
9 intents and purposes, it's a use tax. You're requiring  
10 the retailer to collect it.

11 So it's more ambiguity when it comes to these  
12 transactions and stating okay, we're going to assess based  
13 on the fact you made an election to collect. Well, we  
14 didn't in this particular case. Thank you.

15 ADMINISTRATIVE LAW JUDGE GEARY: Thank you. Is  
16 the Department prepared to give its argument?

17 MS. HE: Yes. Thank you.

18

19 OPENING STATEMENT

20 MS. HE: So on the sale issue here on the record  
21 makes it very clear that no reduction is warranted to the  
22 audit of \$2,204,514 measure of tax, which was based on  
23 Appellant's own recorded but unreported rental receipts,  
24 which Appellant concedes untaxable. As you know,  
25 generally, a lease of tangible personal property or TPP

1 for short. A lease of TPP is a continuing sale of  
2 purchase for the duration of the lease, and taxes due on  
3 the rentals payable.

4 As relevant here, however, a lease is not a  
5 continuous -- TPP is not a continuous sale of purchase if  
6 the TPP is leased substantially in the same form as  
7 required, and the lessor has paid sales tax reimbursements  
8 or use tax measured by the purchase price at the time of  
9 the purchase or the lessor has made a timely election to  
10 pay tax measured by the purchase price with its return for  
11 the period during which the TPP is placed into rental  
12 service.

13 If the lessor does not make a timely election to  
14 pay tax based on the purchase price, then the lessor may  
15 not retroactive itself. Here first as the owner's  
16 prehearing conference minutes and order shows and as also  
17 documented in Department's Exhibit B, the DNR on pages 4  
18 and 21 through 27, Appellant conceded the following:

19 First, Appellant purchase the TPP at issue from  
20 out of state sellers without paying tax or tax  
21 reimbursements at the time of the purchase.

22 Two, Appellant rented or leased the same TPP in  
23 California.

24 And three, Appellant did not report or pay tax  
25 measured by the purchase price with the return for the

1 period during which this TPP was first placed into rental  
2 service.

3 And four, Appellant also did not remit use tax in  
4 California measured by the rental receipts approved during  
5 the audit period. Accordingly, there can be no dispute  
6 that taxes due on the rentals payable.

7 And also on this, I want to emphasis that as I  
8 just discussed. There are actually two requirements  
9 before the election for this option to pay the tax based  
10 on purchase price to apply. The TPP has to be leased in  
11 substantially the same formed as required.

12 The Department -- it's in the Department's  
13 position that's not approved. In fact as showing in the  
14 Department's Exhibit C, I know you don't have it in front  
15 of you right now.

16 ADMINISTRATIVE LAW JUDGE GEARY: Actually, I've  
17 been told that it's now in our electronic files.

18 MS. HE: Oh. Okay. That's great. So Exhibit C,  
19 page 4, that's our overall exhibit package, page number  
20 15. The Department notes for the record that Appellant  
21 actually has not established the TPP was leased in  
22 substantially the same form as required for to be able to  
23 use lessee option to pay tax based on purchase price.

24 This is because of the TPP that is at issue,  
25 required assembly. I guess if you go to Appellant's

1 website, you can see all these trusses, stages, or  
2 whatever other thing. They are huge. So they were not in  
3 assembled form. The lessee who leases this property, had  
4 to do the assembly themselves. So therefore, they were  
5 not leased in substantially the same form as provided for  
6 the election to write it off. But then, of course,  
7 there's no election to pay the purchase price that was  
8 ever made.

9 And secondly, the audit measure was based on  
10 Appellant's own general ledger records on actual basis as  
11 reflected on all the schedules the Department provided in  
12 Exhibit C. That's pages 12 through 19. And Appellant has  
13 not proved or even alleged any error in its own records.

14 Regarding Appellant's contentions, first,  
15 Appellant states it was unaware or unfamiliar with the  
16 sales use Tax Law Regulation 1660. Even if it's true,  
17 unfortunately there's no provision relevant to sales and  
18 use tax law that would relieve the tax payer from tax  
19 liability based on the ignorance of the law.

20 The Department also actually notes for that issue  
21 that the Appellant was represented by California-based  
22 sales and use tax representatives since at least since  
23 2008. As a point of reference, the audit period is from  
24 July 1st, of 2010 through June 30th of 2013. So that's at  
25 issue.

1           And regarding Appellant's contention that  
2           Department did not do due diligence to investigate whether  
3           it's rental customers or it's out-of-state vendors pay the  
4           use tax. First, as Appellant already conceded, Appellant  
5           did not pay to out-of-state vendors tax or tax  
6           reimbursements. So it's highly unlikely the out-of-state  
7           vendors paid any tax to California.

8           Then on the customer side, Appellant has not  
9           provided any rental invoice showing the name of the  
10          customers of the rentals or provided any other information  
11          that would allow the Department to identify instrumental  
12          customers or to verify if any of them would indeed have  
13          reported or paid any use tax on their own sales and use  
14          tax to warrant any offset.

15          And also that Appellant's total tax would be much  
16          less if it had made a timely election to pay tax based on  
17          the purchase price is of no legal consequence. As  
18          Regulation 1660 makes abundantly clear and also as the  
19          Court of Appeals held in Action Trailer Sales Inc., v.  
20          State Board of Equalization: If the lessor does not make  
21          a timely election to pay tax based on the purchase price,  
22          then the lessor may not retroactively do so.

23          And the taxpayer's contention is the election for  
24          the tax to apply to the Appellant, the election had to be  
25          a conscious election by the taxpayer to pay tax based on



1 the rental receipts. That's not what the law says.

2 The law says very clearly, if you lease the TPP  
3 in substantially the same form, the election to get out of  
4 the box to pay tax on the rental receipts the election to  
5 pay based on the purchase price. You have to either pay  
6 at the time of the purchase or at the time you file a  
7 return for the period when the TPP was placed into rental  
8 service.

9 Because there's no dispute as to the application  
10 of the law here or to the measure of the tax with regard  
11 to this determination and amount of Appellant's measure  
12 are legally relevant, the Department's determination  
13 should be sustained and this appeal should be denied.

14 Thank you.

15 ADMINISTRATIVE LAW JUDGE GEARY: Thank you. Any  
16 questions Judge Kwee?

17 ADMINISTRATIVE LAW JUDGE KWEE: Yeah. I have a  
18 quick question for the Department. Was it -- did you say  
19 your position was that if all the taxpayer did was  
20 assemble products, that would disqualify it from being  
21 leased in substantially the same form?

22 MS. HE: If all the TPP leased require assembly,  
23 then it was not leased in substantially the same form as  
24 required. That's the Department's position.

25 MR. PALMER: It hasn't been established that it

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was.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

ADMINISTRATIVE LAW JUDGE GEARY: Judge Cho, any questions?

ADMINISTRATIVE LAW JUDGE CHO: No questions here.

ADMINISTRATIVE LAW JUDGE GEARY: You made a representation that the Appellant did not identify the various vendors from which it purchased the subject tangible personal property; correct?

MS. HE: Did not identify its vendors -- the customers. I'm sorry.

ADMINISTRATIVE LAW JUDGE GEARY: The customers.

MS. HE: Yeah. I did not say they did not identify the vendors. I say they probably have some vendor information on file. But point is since Appellant never paid those vendors tax or tax reimbursements, it's mostly pointless.

ADMINISTRATIVE LAW JUDGE GEARY: I understand. I just wanted the clarification. You did say customers. I just -- for some reason I heard something else.

Mr. Almeida, you have five minutes if you'd like it to rebut.

MR. ALMEIDA: Sure. Yes, I would.

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1 CLOSING STATEMENT

2 MR. ALMEIDA: Yeah. With respect to stating that  
3 if an out-of-state vendor failed to collect use tax from a  
4 California customer, I don't believe you can make an  
5 assumption that that vendor never paid the tax. Because,  
6 again, as in many cases in California, Board of  
7 Equalization, and I'm sure the Department now, will send  
8 1164, I guess CDTFA 1164 any time that they suspect that  
9 an out-of-state vendor is performing or has activities  
10 here in California. Obviously, now with Wayfair case  
11 different set of circumstances.

12 But, you know, historically those questionnaires  
13 will be sent out and there is an inquiry that goes on with  
14 those vendors and to the extent that those vendors were  
15 considered to have nexus in California. There would be  
16 potentially an assessment or at least a self-audit or a  
17 managed audit where those vendors would be required to pay  
18 the tax and not necessarily reimbursing themselves for the  
19 tax that they failed to collect from the customer.

20 So from that perspective, you know, we're  
21 certainly not in agreement with the Department. In  
22 addition to that, I don't believe that statement that the  
23 customer names were not provided. That's not accurate.  
24 That we did ask them simply on the basis that -- because  
25 it's -- these transactions are classified as use tax that

1 we felt that if they did, the lessees were audited or they  
2 were self-reporting the tax, that we could get  
3 confirmation.

4 Again, it's something that normally we wouldn't  
5 go back to a customer and try to get that information  
6 because it is confidential. So it would be something that  
7 only the auditor would be able to do assess through the  
8 Department's website or their internal website.

9 So again, I know it wasn't above early on in the  
10 audit. That may have been the case early on in the audit,  
11 but once I got involve in the audit, that was one of the  
12 criteria that we were trying to have the Department review  
13 to make sure it was the same, tax was not paid by  
14 different parties; whether it be the vendor or the  
15 customer.

16 ADMINISTRATIVE LAW JUDGE GEARY: Okay. Is that  
17 it for your closing?

18 MR. ALMEIDA: That's it. Yes.

19 ADMINISTRATIVE LAW JUDGE GEARY: Thank you.  
20 Questions, Judges?

21 ADMINISTRATIVE LAW JUDGE KWEE: I guess I have  
22 one more question for CDTFA. If the taxpayer were to have  
23 provided a list, what would be the Department's policy on  
24 cross-checking customers to see if use tax was paid by the  
25 customers in the context of a lease of items like this?

1 MS. RENATI: The Department had received copies  
2 of the purchase invoices for the --

3 ADMINISTRATIVE LAW JUDGE KWEE: Or if they just  
4 --

5 MS. RENATI: Or on the sales invoices?

6 ADMINISTRATIVE LAW JUDGE KWEE: I think that they  
7 were saying they just had customer list names available.  
8 I mean, was that correct?

9 MR. ALMEIDA: Yeah. We have both vendor and  
10 customers. Yeah.

11 MS. RENATI: According to our Exhibit C and B, no  
12 rental invoices and no sale -- rental invoices which is  
13 are the sales to their customers or purchase invoices were  
14 provided. Had they been provided, we could have looked --  
15 contacted the vendors to see if use tax had been paid, or  
16 they had a permit to collect tax through our internal  
17 database.

18 On their rentals, we could have looked at  
19 customers to see if they had reported it. Generally it's  
20 not -- it's very rare that a customer would report the  
21 rental, but we would check into that and look at audits.  
22 But there's no evidence that those invoices were ever  
23 supplied for either rentals or purchases.

24 MR. CLAREMON: In both cases there's going to be  
25 concurrent liability. So regardless if we can check it as

1 an actual matter, but it doesn't affect the taxpayer's  
2 liability.

3 ADMINISTRATIVE LAW JUDGE GEARY: Judge Cho?

4 ADMINISTRATIVE LAW JUDGE CHO: No. No questions  
5 here.

6 ADMINISTRATIVE LAW JUDGE GEARY: And I have no  
7 questions. Thank you for appearing. I'm going to close  
8 the record. We will take the matter under submission.  
9 The judges will get together to deliberate, and within  
10 100 days of today's date we will issue a written decision,  
11 and send a copy of that decision to the parties.

12 Any questions?

13 MS. HE: No.

14 MR. ALMEIDA: Thank you judge.

15 ADMINISTRATIVE LAW JUDGE GEARY: Thank you for  
16 appearing, everybody.

17 I'm closing this hearing.

18 (Proceedings adjourned at 1:45 p.m.)  
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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 16th day of March, 2019.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER