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HEARING  
OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA

In the Matter of the Franchise and  
Income Tax Appeals Hearing of: NO. 18011756  
ROBERT HALF INTERNATIONAL INC.  
and SUBSIDIARIES,  
Appellants.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, JUNE 25, 2019

1:05 P.M.

OFFICE OF TAX APPEALS  
400 R STREET  
SACRAMENTO, CALIFORNIA

Reported by AMY E. PERRY, CSR No. 11880

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JOHN JOHNSON, ADMINISTRATIVE LAW JUDGE  
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EXHIBITS

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(Exhibits premarked, described  
and retained by Administrative  
Law Judges.)

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TUESDAY, JUNE 25, 2019 - 1:05 P.M.

ALJ JOHNSON: This is the appeal of Robert Half International, Inc., and Subsidiaries. It is Case No. 18011756. It is 1:05 p.m. on June 25, 2019, here in sunny Sacramento, California.

I am the lead Administrative Law Judge for this hearing, John Johnson. And let me say good afternoon to my co-panelists today. Good afternoon, Judge Angeja, and good afternoon, Judge Gast.

ALJ GAST: Good afternoon.

ALJ JOHNSON: The sole issue on appeal is whether value added tax imposed on the provision of services should be included in the sales factor of the apportionment formula. This is for the 2008 tax year.

The exhibits that we are now going to admit into the record include Appellant's Exhibits 1 through 12, 16 and 17; Respondent's Exhibit A and B; and Exhibit J1, a joint Statement of Facts.

(Exhibits admitted into evidence.)

ALJ JOHNSON: Appellants, we're going to start with your arguments. You'll have 30 minutes.

Do you have any questions before we begin?

MR. FULLER: We do not.

1 ALJ JOHNSON: When you're ready, you can  
2 start.

3 MR. FULLER: Okay. Your Honors, are we  
4 introducing ourselves?

5 ALJ JOHNSON: Oh, sorry. Yes, please. All  
6 parties introduce themselves.

7 MR. FULLER: Anthony Fuller with Deloitte Tax  
8 representing Appellant Robert Half International.

9 MR. GROSSMAN: Josh Grossman with Deloitte  
10 Tax representing Appellant Robert Half International.

11 MARK JAMATI: Mark Jamati DT Tax, Robert Half  
12 International.

13 ALJ JOHNSON: Thank you. And will Franchise  
14 Tax Board, while we're at it, introduce themselves.

15 MS. WILLIAMS: Melissa Williams, Franchise  
16 Tax Board.

17 MR. SWIESO: Craig Swieso, Franchise Tax  
18 Board.

19 ALJ JOHNSON: Thank you very much. You may  
20 begin.

21 MR. FULLER: Your Honors, thank you for your  
22 attention to this matter, and we do appreciate the  
23 opportunity to speak before you today. The parties to  
24 this appeal agree that the facts are not in dispute  
25 and this case involves a discreet issue of law, that

1 is whether excise taxes included as part of the  
2 purchase price of services such as VAT, value added  
3 tax, or GST, goods and services tax, are part of  
4 Taxpayer's gross receipts for sales factor purposes.

5 This case, as you know, has been extensively  
6 briefed. Appellants have submitted five briefs to  
7 Respondent's four briefs. While there is plenty of  
8 supportive case law, we believe this case simply comes  
9 down to the very broad definition of sales and the  
10 statute, California Revenue and Taxation Section  
11 25120(e) in that sales means that all gross receipts  
12 and the California Supreme Court's affirmation of that  
13 definition stating gross implies the whole amount  
14 received, we plan to highlight the following four  
15 points during our case-in-chief:

16 Our first point, we will give a brief  
17 background on how foreign excise taxes are levied and  
18 show how they are included as part of the purchase  
19 price, invoiced and received from Robert Half's  
20 customers.

21 And our second point, Revenue and California  
22 Taxation Code 25120(e) is the core of our position and  
23 the controlling statute for this issue because it  
24 defines sales. Section 25120 is also the proper  
25 statute to make any exclusion from the definition of

1 gross receipts, and is where a dozen exclusions were  
2 inserted as amendments for tax years beginning on or  
3 after January 1, 2011.

4 California corporate income tax filing  
5 methodology defaults to worldwide filing. So foreign  
6 excise taxes charged are consequential receipts for  
7 worldwide filers. I will note that filers are -- that  
8 worldwide filers are likely the minority as water's  
9 edge elections are prevalent.

10 The Legislature and Franchise Tax Board had  
11 the opportunity to exclude excise taxes as part of the  
12 2011 amendments, but did not. Thus, Section 25120  
13 continues to require that the full amount invoiced and  
14 collected by Robert Half constitutes its gross  
15 receipts for sales tax purposes, and these gross  
16 receipts would include excise taxes invoiced as part  
17 of the purchase price of Appellant services.

18 Our third point is California Case Law and  
19 Board of Equalization decision supports our position  
20 because they have consistently defined gross receipts  
21 for sales factor purposes as broadly inclusive of the  
22 full amount received in transaction channeling  
23 business income.

24 And our fourth and last point, Regulation  
25 Section 25134 also supports our position, and as a

1 corollary, if the silence in subdivision (a)(1)(C) of  
2 this regulation were construed to create a specific  
3 exclusion, that part of the regulation would be in  
4 direct conflict with the definition of the sales in  
5 25120(e). Now, your Honors, we would begin our  
6 case-in-chief.

7 MR. GROSSMAN: Thanks, Tony. As my colleague  
8 noted, I'd like to provide a little background on  
9 excise taxes on services and how they're levied in  
10 foreign jurisdictions. Excise taxes such as VAT or  
11 GST are imposed in many foreign jurisdictions as a  
12 consumption tax on the sales of goods and services.

13 As described in the FTB's Audit Branch  
14 Procedure Statement 99-6, a VAT is an excise tax that  
15 functions very similarly to a sales tax. As applied  
16 in the context of services where there are no discreet  
17 stages of manufacturing, excise taxes such as VAT are  
18 simply included as a line item on the purchase price  
19 reflected on the invoice or receipt provided to the  
20 customer.

21 To help illustrate how Robert Half  
22 International invoiced and collected foreign excise  
23 taxes on the services during the time frame on appeal,  
24 Appellant has provided Exhibit A for this hearing  
25 consisting of four sample invoices from 2007 to 2008.



1           These invoices are intended to be emblematic  
2 of how VAT or excise taxes in general were collected  
3 by foreign jurisdictions. The jurisdictions included  
4 in the exhibit are Australia and Canada.

5           And turning to the invoices themselves, you  
6 can see the computation of the service charge, the  
7 line item inclusion of the excise tax, it ranges  
8 between jurisdictions and years. In some years it's  
9 five percent or six percent. And then the full amount  
10 due under the invoice is a line item at the bottom.

11           Generally these, as I said, are reflective of  
12 how the excise taxes were being collected during the  
13 years at issue. As a general matter, the FTB agrees  
14 in the Multistate Audit Technique manual, and other  
15 administrative documents that excise taxes such as VAT  
16 invoiced on the sale of tangible goods must be  
17 included in the sales factor. It is only with regard  
18 to excise taxes on services that there's any  
19 disagreement.

20           With this background, we'd like to revisit a  
21 few of the points made in our briefs addressing why  
22 the full purchase price of the appellant's services  
23 including excise taxes such as VAT constitute the  
24 appellant's gross receipts includable in the sales  
25 factor.

1           First, Section 25120(e) is the controlling  
2 statute defined in sales. And it requires the full  
3 amount of gross receipts received by Robert Half,  
4 including excise taxes to be included in the sales  
5 factor.

6           During the time frame on appeal, Section  
7 25120 defines sales to mean all gross receipts not  
8 allocated under Sections 25123 to 25127. The statute  
9 made no distinction between sales of tangible property  
10 or goods and sales of services.

11           Within this traditional definition of sales  
12 from the Uniform Division of Income for Tax Purposes  
13 Act or UDITPA, the term all gross receipts is not  
14 specifically defined by statute or regulation.  
15 However, court cases in VOE decisions have given this  
16 phrase a broadly expansive meaning.

17           The definitive case addressing the definition  
18 of sales in California is Microsoft vs. Franchise Tax  
19 Board from 2006. Microsoft dealt with two issues,  
20 first whether Microsoft's proceeds from sales of  
21 short-term treasury securities were includable in the  
22 definition of sales under Section 25120.

23           And second, whether it included these gross  
24 receipts would distort in state business activity  
25 sufficiently to warrant exclusion under an alternative

1 formula authorized by Section 25137. The issue we're  
2 concerned with here today is very similar to the first  
3 issue in Microsoft because it fundamentally deals with  
4 the scope of the definition of services or sales  
5 rather.

6 The only real difference is that here, both  
7 sides agree that there is no distortion. It's not an  
8 issue in this case. Because Microsoft directly  
9 addressed the meaning of gross receipts for sales  
10 factor purposes, we believe the holding in that case  
11 is determinative and requires that excise taxes such  
12 as value added tax included in the purchase price must  
13 be included as part of the taxpayer's gross receipts.

14 In Microsoft, the court based its definition  
15 of all gross receipts on the plain language of the  
16 statute and prior Board of Equalization decisions. In  
17 its holding, the court wrote that for purposes of the  
18 definition of sales, gross implies the whole amount  
19 received and contemplates the total amount of money or  
20 other consideration received by a business taxpayer  
21 for goods sold or services performed during the year.

22 The court reiterated that this definition was  
23 consistent with the legislative history of UDITPA and  
24 the definition of sales contained therein which  
25 Section 25120(e) adopts almost verbatim.

1           Furthermore, this broadly includes the  
2 approach to the definition of sales was noted to be  
3 consistent with Board of Equalization decisions such  
4 as appeal of the Pacific Telephone Telegraph and the  
5 Appeal of Merrill Lynch.

6           Subsequent court cases such as The Limited  
7 and General Mills also affirmed this broad  
8 construction of the definition of sales. Rather than  
9 seeking to define sales by what is included or --  
10 included or allowable, all of these cases begin with a  
11 broadly inconclusive definition of all gross receipts,  
12 and then use Section 25137 to gauge whether this  
13 broadly inclusive definition should be departed from.

14           Turning to the appellant's facts, the  
15 invoices provided on Exhibit A illustrate that foreign  
16 excise taxes are undeniably part of the purchase price  
17 of Robert Half services. Under all available  
18 precedents addressing the definition of sales, the  
19 full amount Robert Half receives for rendering  
20 services including excise taxes constitute its gross  
21 receipts within the meaning of Section 25120.

22           I'd also like to address why Regulation 25134  
23 offers support for this conclusion. At the outset, no  
24 statute or California regulation states that excise  
25 taxes on services are excluded from the definition of

1 sales. Concerning services, Regulation 25134(a)(1),  
2 capital (C) clarifies how the sales factor should  
3 operate for certain service providers.

4 The regulation simply states that in the case  
5 of a taxpayer engaged in providing services such as  
6 the operation of an advertising agency or the  
7 performance of equipment service contracts or research  
8 and development contracts, the sales includes the  
9 gross receipts from the performance of such services,  
10 including these commissions and similar items.

11 This language helps provide clarification of  
12 what is included in the sales factor in certain  
13 circumstances such as advertising services, equipment  
14 service contracts, and research and development  
15 services. No language in this subdivision of the  
16 regulation reads in an exclusionary or limited manner.

17 In fact, concerning the few types of services  
18 mentioned in subdivision (a)(1), cap (C), the  
19 regulation is permissive in its inclusion of these  
20 commissions and similar items.

21 The limited types of services mentioned in  
22 this regulation are described inclusively. And as  
23 applied or as analogous to the appellant's staffing  
24 services, the available guidance in subdivision  
25 (a)(1)(C) of Regulation 25134 purports that excise

1 taxes included within the purchase price would be  
2 included in the sales factor just the same as fees,  
3 commissions and similar items for the types of service  
4 Provider's described in the regulation.

5 It's also worth noting that the California  
6 Supreme Court has explicitly rejected attempts to  
7 interpret silence in Regulation 25134 in an  
8 exclusionary or limiting manner.

9 Specifically, as a backup position in  
10 Microsoft, the FTB attempted to argue that because  
11 Regulation 25134(a)(1), cap (A) mentions all interest  
12 income but is silent on return principle from sales of  
13 securities, that by negative implication, silence  
14 means that the principle sales price is excluded from  
15 the definition of sales.

16 The California Supreme Court rejected this  
17 argument, and refused to read silence in Regulation  
18 25134 as a sales factor exclusion. Rather, the court  
19 construed this regulation as including interest  
20 income, in addition to amounts not specifically  
21 mentioned in the regulation.

22 In part, the court wrote it does not support  
23 a reading of gross receipts that includes interest,  
24 but excludes the principle sale price. In this  
25 regard, the court was clear that the silence in the

1 Regulation 25134 does not impact or limit the  
2 definition of sales in Section 25120.

3 As a related matter, a thorough review of the  
4 rule making file on the Regulation 25134 shows there  
5 is no mention in any part of this of the rule making  
6 file about subdivision (a)(1), capital (C) being  
7 intended to operate to exclude excise taxes on  
8 services.

9 And this makes sense because the underlying  
10 statute, Regulation 25134 is not the statute defining  
11 sales. Instead, it is Section 25120 that defines  
12 sales and the judicial interpretations of that  
13 statutory definition are what determine whether  
14 receipts at issue are includable in factor.

15 Back to my colleague.

16 MR. FULLER: Appellant would also like to  
17 address Respondent's contentions in its briefs that,  
18 quote, nothing in Microsoft says that VAT is  
19 includable as a gross receipt, unquote, and that,  
20 quote, the legislature must amend the underlying  
21 statute to include VAT in the sales factor."

22 We submit that Respondent's proposed approach  
23 to the definition of sales is simply contrary to both  
24 the legislature's and court's interpretation of the  
25 UDITPA definition of sales. This definition has been

1 interpreted as the whole amount received, and more  
2 recently, to list the specific exclusions now  
3 contained in Section 25120(f). Thus, the term all  
4 gross receipts would require the inclusion of excise  
5 taxes on services unless one of two things happens:

6 One, there is a specific statutory  
7 inclusion -- exclusion; or two, such receipts are  
8 distorted warranting application of alternative  
9 apportionment under 25137.

10 With regard to No. 1, the statutory  
11 exclusion, the Franchise Tax Board is very good at  
12 writing regulations and they know how to write an  
13 exclusion into a rule. Silence is not an exclusion.  
14 And with regard to Point 2, both parties as you  
15 mentioned, your Honors, that both parties agreed in  
16 briefing sufficient distortion does not arise in this  
17 case. Alternative apportionment is not triggered.

18 We like to think of alternative apportionment  
19 as the safety valve when something's out of whack.  
20 And in this case, that safety valve isn't triggered.  
21 I believe the difference in the sales factor in 2008  
22 was about 1.5 percent. Thus, nothing out of whack, so  
23 alternative apportionment is really not an issue as we  
24 discussed and comes down to that first issue in  
25 Microsoft, is this a gross receipt.



1           Respondent's narrow construction of gross  
2 receipts was rejected by the California Supreme Court  
3 in Microsoft, and similarly rejected by the State  
4 Board of Equalization in decisions including Appeal of  
5 Polaroid Corporation and Appeal of Bechtel. While not  
6 precedential, the SBE gave us helpful language in  
7 Polaroid in that, quote, the plain meaning of gross  
8 receipts appears to be quite expansive and because no  
9 California case or regulation has narrowed the  
10 definition of gross receipts, there is no authority to  
11 look behind the plain term -- behind the term's plain  
12 meaning.

13           In Appeal of Bechtel, the Board of  
14 Equalization also stayed true to this theme stating,  
15 quote, We find that the level of income-producing  
16 business activity to be represented by the sales  
17 factor is best represented by inclusion of the full  
18 amount of the cost plus contract."

19           Additionally, the definition of sales has  
20 never been limited to a list of categories of gross  
21 receipts approved by the legislature or the courts.  
22 Consider that when the legislature amended Section  
23 25120 in 2011, they did not enact in their own  
24 definition of gross receipts and then add a laundry  
25 list of receipts, categories to include, they did the

1 opposite. They added a broadly expansive definition  
2 of gross receipts paralleling Microsoft and followed  
3 that with a dozen specific exclusions, none of which  
4 mentioned VAT or excise taxes.

5 They could have excluded VAT then, and that  
6 would have been the time and the place to do it in  
7 Section 25120(f). If as Respondent asserts the  
8 statute must be amended to include VAT on services,  
9 then every newly inventive revenue stream concept  
10 would also require statutory amendment before  
11 inclusion in the factor.

12 Consider blockchain and cryptocurrency  
13 revenue. There is no specific inclusion for these  
14 items. Such an approach would be burdensome to  
15 administer and lead to obscured results. The original  
16 UDITPA definition of sales was broad for a reason and  
17 was designed to promote uniformity among the states.

18 In wrapping up our case-in-chief, we agree  
19 with the Franchise Tax Board that the sales factor  
20 should include excise taxes on goods charged to and  
21 received from the customer. We disagree, however,  
22 that excise taxes on services should be treated any  
23 differently. There is no meaningful difference  
24 between an excise tax on goods versus an excise tax on  
25 services.

1           Nowhere in the law is there an exclusion of  
2 excise taxes on services from the sales factor. The  
3 Franchise Tax Board knows how to write exclusionary  
4 language, and silence in Regulation 25134 is not an  
5 exclusion.

6           The statute Section 25120 in the case law,  
7 including Microsoft confirmed the broad definition of  
8 sales is all gross receipts and the whole amount  
9 received. Thus, excise taxes on services should be  
10 included in the sales factor. This concludes  
11 Appellant's case-in-chief.

12           ALJ JOHNSON: Thank you. Franchise Tax  
13 Board, you'll have 30 minutes, whenever you're ready  
14 to start, Ms. Williams.

15           MS. WILLIAMS: Okay. Thank you. In its  
16 original return, Appellant included foreign value  
17 added tax, what we've been talking about, VAT from  
18 sales of services in the denominator of its sales  
19 factor. At FTB audit, audit eliminated the VAT from  
20 Appellant sales factor. There is no statute,  
21 regulation, court precedent or other authority that  
22 provides that VAT on services is a gross receipt  
23 includable in the sales factor in the California  
24 apportionment formula.

25           That is permissibly includable as a gross

1 receipt and the sales factor where there is a sale of  
2 tangible personal property. This is pursuant to  
3 Regulation 25134(a)(1)(A). And I'm going to read it  
4 to you.

5 In the case of a taxpayer engaged in  
6 manufacturing and selling or purchasing and reselling  
7 or goods or products, sales includes all gross  
8 receipts from the sales of such goods or products or  
9 other property of a kind which would properly be  
10 included in the inventory of the taxpayer if on hand  
11 the close of the income year held by the taxpayer  
12 primarily for sales to customers in the ordinary  
13 course of its trade or business.

14 Gross receipts for this purpose means gross  
15 sales less returns and allowances, and includes all  
16 interest, income, service charges, caring charges or  
17 time priced charges incidental to such sales. Federal  
18 and state excise taxes including sales taxes should be  
19 included as part of such receipts if such taxes are  
20 passed on to the buyer or included as part of the  
21 selling price of the product.

22 Conversely, according to Regulation  
23 25134(a)(1)(C), VAT is not included as a gross receipt  
24 when it is a sale on services. And I'm going to read  
25 that section, much shorter to you.

1           In the case of taxpayer or -- excuse me.

2           In the case of a taxpayer engaged in  
3 providing services such as the operation of an  
4 advertising agency or their performance of the  
5 equipment service contracts, research and development  
6 contracts, sales includes gross receipts from the  
7 performance of such services, including fees,  
8 commissions and similar items.

9           Based on my reading of the subsection  
10 25134(c)(1)(C), there is no intention of including the  
11 VAT on sales on services. That language is absent in  
12 that provision. It's not absent in (c)(1)(A), but it  
13 is absent in (c)(1)(C). The language just isn't  
14 there. So why isn't the language there?

15           Well, when 25134 was promulgated by FTB,  
16 there existed a sales tax for tangible personal  
17 property that balanced inclusion of foreign VAT on  
18 sales of tangible personal property. However, on the  
19 side of sales of services, Regulation 25134(a)(1)(C),  
20 there was no comparable sales tax on services and,  
21 therefore, there could be no symmetry for services as  
22 there was for tangible personal property.

23           So in connection with Regulation 25134, what  
24 are the rules when construing regulations. I've got  
25 about six to talk about. Number 1, give the ordinary

1 meaning to the words. Appellant calls this a strange  
2 reading.

3 Number 2, if no -- if there is no ambiguity,  
4 the reduction is that the rule makers meant what they  
5 said, and the plain meaning of the words govern. The  
6 insertion of the word VAT is clearly inappropriate.

7 25134(a)(1)(C) is intentionally and  
8 specifically silent on VAT on services. And I want to  
9 point out unlike Appellant's argument, Respondent's  
10 interpretation of that subdivision does not alter or  
11 enlarge that regulation. It doesn't add to it. We'll  
12 just read the plain language and stop there.

13 Number 3, a specific regulatory provision is  
14 considered to be an exception to a general regulatory  
15 provision. But 25137 -- or excuse me, 134(a)(1)(C) is  
16 not an exception to the general rule. It is its own  
17 provision of equal weight just like Regulation  
18 25134(a)(1)(A).

19 When construing administrative regulations,  
20 an agency's expertise with respect to pertinent and  
21 regulatory issues lends presumptive value to  
22 interpretive -- to interpret regulations. Long-time  
23 consistent interpretation by an agency is given great  
24 value to the regulation interpretation.

25 Weigh in favor of more deference where there

1 has been compliance with AP rule making, which there  
2 was in connection with 25134. Appellant says it's not  
3 given as much authority as when a regulation is  
4 directed or authorized approval by legislature.

5 However, I want to point out that is there is  
6 no other -- excuse me -- other authority on this  
7 matter. 25135 -- 134 is the statute and regulation of  
8 sales of tangible personal property and services. It  
9 is the sales factor. It is not subservient in its  
10 operation to 25120. They must be read in harmony.

11 Regulation 25134 is well within Respondent's  
12 expertise since it was our agency that promulgated  
13 that regulation. Therefore, this is No. 6,  
14 Respondent's interpretation of Regulation 25134 is  
15 presumptively correct.

16 The provisions of subdivisions 25134(a)(1)(A)  
17 and (C) are clear. And that two subdivisions, when  
18 taken together, are not ambiguous because each applies  
19 to a different situation. 25134(a)(1)(A) applies by  
20 its terms to taxpayers engaged in manufacturing and  
21 selling or purchasing and reselling goods or products,  
22 while 25134(a)(1)(C) applies to taxpayers engaged in  
23 providing services.

24 Appellant makes numerous arguments. I'm only  
25 really going to address some of them here. First,

1 contrary to what is said, what is stated otherwise in  
2 Regulation 25134, Appellant makes the argument that  
3 Regulation 25134(a)(1)(A) and (C) do not define gross  
4 receipts, and that only code 25120(e) does.

5           However, I want to point out language in  
6 25134(a)(1) that states sales are governed by Code  
7 25120, subsection (3) and that Regulation 25134(a)(1)  
8 provides, quote, rules for determining sales in  
9 various situations, end quote.

10           Second, Appellant argues that 25120(e) and  
11 Microsoft control the interpretation of gross receipts  
12 and somehow justify adding the words value added tax  
13 to 25134(a)(1)(C) which, as I stated earlier, those  
14 words do not exist in that regulation or in that  
15 subdivision of that regulation.

16           My first thought is not about 25134 at all.  
17 It is about Code Section 25120, subsection (e). And  
18 Regulation 25134 is not about Code 25120(e), but it is  
19 about the sales factor in general. It is the sales  
20 factor statute and regulation and how to determine  
21 sales in connection with tangible personal property  
22 and services.

23           By its own terms, Regulation 25134(a)(1)  
24 explicitly states that it provides for situations  
25 involving the sales of tangible personal property and



1 sales of services. Microsoft deals exclusively with  
2 gross proceeds from treasury department operations in  
3 the sales factor. Microsoft does not provide guidance  
4 in this VAT case.

5 Contrary to Appellant's argument, Regulation  
6 25134(c) does -- (a)(1)(C) does not conflict with Code  
7 25120, subsection (e). Code and Regulation 25134 is  
8 about the sales factor generally. And Code 25120(e)  
9 is about gross receipts. They act harmoniously  
10 together.

11 Appellant argues that 25120(e) unambiguously  
12 requires all excise taxes including VAT be included in  
13 the sales factor. But Code 25120, subsection (e) does  
14 not mention that. And the definition of gross  
15 receipts under Code 25120, subsection (e) is not an  
16 open-ended depository of income. Code 25120(e), in  
17 fact, excludes certain items as gross receipts,  
18 including repayment of the principle on a loan,  
19 pension reversion, hedging transactions, litigation  
20 just to name a few.

21 Third, Appellant points to 25134(a)(1)(C)  
22 where it says sales include the -- quote, sales  
23 includes the gross receipts from the performance of  
24 services including fees -- excuse me -- fees,  
25 commissions and similar items. Appellant argues,

1 quote, similar items, end quote, is permissive  
2 language to be interpreted as including VAT. There is  
3 no reasonable interpretation that similar items is a  
4 reference to VAT. Similar items is a reference to  
5 fees and commissions stated a few words before. VAT  
6 is not fees, commissions and similar items.

7 Fourth, Appellant argues that Regulation  
8 25134(a)(1)(C) is not an affirmative exclusion of VAT.  
9 Taking Appellant's argument to its limits, you could  
10 say that anything is includable in 25134 including  
11 non-business income because Appellant argues there are  
12 no affirmative exclusions in Regulation  
13 25134(a)(1)(C).

14 Fifth, Appellant also points out the 2011  
15 legislature amended the definition of gross receipts  
16 and did not include any mention of VAT when they did  
17 that. When amending Code 25120, subsection (e), the  
18 California Legislature did not comment on Regulation  
19 25134.

20 By not mentioning VAT in either code sections  
21 in 25120(e) or 25134, the California Legislature was  
22 affirmatively confirming that treatment that is  
23 implicit in Regulation 25134, that VAT on services is  
24 not includable in the sales factor.

25 Sixth, Appellant states that in its brief,

1 that the legislature did not limit the inclusion of  
2 VAT in the sales factor. Conversely, the California  
3 Legislature did not include VAT as gross receipts  
4 either.

5 Seventh, Appellant also asserts that an  
6 internal memo issued to Respondent's auditors 20 years  
7 ago, and this is the audit branch procedure statement  
8 99-6, is controlling. I think we need to read that,  
9 and I have it right here. This is actually attached  
10 to Appellant's opening brief as Exhibit K.

11 Issue, Regulation 25134(a)(1)(A), not (C),  
12 (a)(1)(A) states in part, quote, Federal and State  
13 excise taxes including sales taxes should be -- shall  
14 be included as part of such receipts if such receipts  
15 are passed on to the buyer or included as a part of  
16 the selling price of the product, end quote.

17 In regards to the value added tax, VAT,  
18 charged by many foreign countries, the issue of  
19 inclusion of the VAT in the sales factor rests on the  
20 definition of federal and state and the determination  
21 if the VAT is an excise tax.

22 That says nothing about 25134(c)1)(C). It  
23 says nothing about services. It mentioned product as  
24 part of the selling price of the product. Clearly,  
25 it's only talking about 25136, subsection (a)(1)(A).

1 And with that, I rest.

2 ALJ JOHNSON: Thank you. Appellant, you have  
3 ten minutes to provide rebuttal.

4 MR. FULLER: Thank you. Can I steal this  
5 back?

6 MS. WILLIAMS: Yes.

7 MR. FULLER: Okay. I think I would start by  
8 reading Section 25134. So Regulation Section 25134  
9 modifies the Statute 25134 which is one sentence, and  
10 I'll read it.

11 The sales factor is a fraction. The  
12 numerator of which is the total sales of the taxpayer  
13 in the state during the taxable year. And the  
14 denominator of which is the total sales of the  
15 taxpayer everywhere during the taxable year.

16 So 25134, the sales factor is a fraction. It  
17 is Section 25120 that provides definitions. It is the  
18 definitional section. It defines sales that was  
19 modified in 2011. But the purpose of Statute 25120 is  
20 to provide the definitions and the definitions of  
21 sales. And even the regulation Ms. Williams just read  
22 state -- refers to 25120(e) as defining the term  
23 sales. It makes that reference.

24 We respect Franchise Tax Board's ability to  
25 write regulations very much, and we do not believe the

1 way that we think that 25 -- the Regulation 25134  
2 should be interpreted, it is invalid. We think it is  
3 valid. We do not think the way it's written, we do  
4 not believe that it limits 25120.

5 If it were interpreted to limit 25120, we  
6 would think then that it has exceeded rule making  
7 authority and it would be invalid. But we do not  
8 believe that it is doing that. I think it is more  
9 likely that simply when this Section (a)(1)(A) versus  
10 (a)(1)(C) was written, VAT on services was not  
11 considered. We believe it was an omission.

12 I was involved in the '90s when I believe the  
13 Franchise Tax Board was looking at VAT in the sales  
14 factor as the first impression. We had a case. And I  
15 was impressed. I was young in my career, but I was  
16 impressed by Franchise Tax Board. They dedicated some  
17 significant resources in looking at the issue and  
18 asked us to provide a European VAT expert to answer  
19 questions and help them understand.

20 So they spent, they invested time and spent  
21 money really looking at this issue and I think did a  
22 good job. At the time it was VAT and goods. I think  
23 that was more common. And because California doesn't  
24 have a sales tax on service, a broad sales tax on  
25 service, they have I think limited sales tax on

1 services, it just was something that was not --  
2 forefront was not considered as probably not as  
3 common.

4 But that doesn't change, that doesn't create  
5 an exclusion in 25120 which has been consistently  
6 broadly interpreted. It has broad language. It has  
7 consistent broad interpretation. To create an  
8 exclusion would be a significant step. And there's  
9 nothing in the language as we've discussed, there's  
10 nothing in the language of 25134 that should be read  
11 as an exclusion.

12 If anything, it's written in a broad manner  
13 to potentially have a sweeping inclusion, and similar  
14 items is not, to me, the type of language that you  
15 would put in to create an exclusion. It may not  
16 specifically address VAT, but again, I don't believe  
17 VAT was part of the consideration. My colleague can  
18 discuss in a moment a little bit more about the rule  
19 making and the regulation.

20 One more point I'll make before I pass it  
21 over, as far as non-business income, non --  
22 Ms. Williams mentioned non-business income as an  
23 address -- is now addressed whether it's required to  
24 have a transaction generating business income for  
25 receipts to be included in the sales tax of today.

1 That was added in the amendment of 25120 in 2011. It  
2 was not an amendment to 25134. The proper place to  
3 amend the definition of sales is in Section 25120 and  
4 that's where it took place.

5 MR. GROSSMAN: On that topic, I would also  
6 clarify that independent of the 2011 amendments, the  
7 prior definition of sales, if you look at the  
8 language, it limits itself to gross receipts from  
9 transactions other than those governed by 25120  
10 through 25127, which are the non-business allocation  
11 statutes. So by the language of 25120(e) as it  
12 existed during the years of question, it could never  
13 contemplate transactions generating non-business  
14 income.

15 I also, I did briefly want to revisit the  
16 history of the 25134 regulations, that it was adopted  
17 in two pieces, the first part in 1971 and the second  
18 part in 1973. And I think at the time, it's probably  
19 reflected when we review the rule making file, we  
20 don't see any mention of excise taxes or excise taxes  
21 on services. It seems to have been motivated by an  
22 effort to promote conformity between states adopting  
23 the UDITPA definition of sales.

24 I think that the difference in language is  
25 probably the most reasonable explanation is the

1 relative, you know, uncommon nature of excise taxes on  
2 services at that time. And I don't think reading  
3 silence in an exclusionary manner has ever been  
4 accomplished by, quote, interpreting the definition of  
5 sales.

6 Just to reiterate, as I had mentioned, 25134,  
7 the statute, it simply defines the sales factor as a  
8 fraction. When courts have been interpreting what is  
9 or is not a gross receipt, they always look at first  
10 Section 25120, and whether it is within the definition  
11 of all gross receipts. And I did want to revisit  
12 that.

13 I think to the extent that if silence were  
14 given any meaning, which we don't believe it should  
15 be, but even if you did go down that road, the  
16 linguistic differences would have been overwritten by  
17 the Microsoft decision's interpretation of the  
18 definition of sales in 2006, which is several decades  
19 after the regulation was adopted in early 1970s.

20 MR. FULLER: That concludes our rebuttal.

21 ALJ JOHNSON: Okay. We'll go to questions  
22 from the panel, and we'll start with Judge Gast.

23 ALJ GAST: Thank you. Thank you for the  
24 presentations, by the way. They were both really well  
25 done. I think I'll start with the taxpayer with



1 questions.

2           Why shouldn't we give FTB's Regulation  
3 25134(a)(1)(C) their interpretation of it to exclude  
4 VAT deference? They've applied it consistently, it's  
5 been in their audit manual for a while, I think. So  
6 why shouldn't we just give some deference on that?

7           MR. GROSSMAN: Yeah. Sure. I think that as  
8 two points, the first point is when looking at the  
9 rule making file, I think looking at the history  
10 contemporaneous with its adoption illustrates that  
11 that interpretation was not contemplated at the time  
12 of adoption. That would be my first point.

13           And I think my second point would be that as  
14 an interpretive regulation, so this is not a quasi  
15 legislative regulation, the difference being there's  
16 no specific legislative grant of rule making authority  
17 like you would see in 25136 that says, please  
18 promulgate regulations. This is under general  
19 interpretive authority, which is owed less deference  
20 than specific quasi legislative grants of rule making  
21 authority. So that's the starting point with the type  
22 of regulation we're dealing with.

23           And then when you go from there, when you  
24 look at cases like the appeal of Savemart or the  
25 Yamaha decision from the California Supreme Court,

1 they frequently compare the language of the regulation  
2 in the statute that it's trying to interpret. And  
3 when doing that, they look at the validity of the  
4 reasoning behind what the differences are between the  
5 regulation and the statute.

6 So here, if you put the language together  
7 side by side, you see that the statute itself does not  
8 define sales. It simply defines sales factor as a  
9 fraction. When you think about the analysis in the  
10 appeal of Savemart, when you look to whether it  
11 expands and alters the language of the statute, I  
12 think you reach the conclusion that the 25134  
13 regulation would be a broad expansion of the 25134  
14 statute, which has nothing to do with the definition  
15 of sales which is contained in a totally separate  
16 statute.

17 ALJ GAST: Okay. But let me ask you this,  
18 when you're saying that under 25134(a)(1)(C), a VAT,  
19 and GST wasn't contemplated at the time, aren't you  
20 asking us to read into it, you know, to read into that  
21 provision a VAT that is contemplated, that never was  
22 there by the drafters, either FTB or the FTC, can we  
23 do that?

24 MR. FULLER: I think it's the way you think  
25 of the concept. If you take Respondent's argument

1 that the definition of gross receipts is narrow and  
2 every item of receipt needs to be listed, if you don't  
3 have a list of includable items, you don't have a  
4 receipt, then I think what you said about the fact  
5 that 25134(a)(1)(C) does not mention VAT, that would  
6 be valid.

7 But I give you the premise that it's the  
8 opposite of that. What we have and what's workable  
9 because it was the framers of UDITPA that all gross  
10 receipts, we're stating with a broad, all gross  
11 receipts. You cannot -- you can't have the foresight  
12 to know what all the different revenue streams of  
13 gross receipts are going to be. So you start with all  
14 of them. And if something doesn't make sense, you  
15 exclude it.

16 And we believe that that's what should  
17 happen. That is what has happened. And excise taxes  
18 have not been excluded. And what was specifically  
19 included for sale of goods, they were not addressed in  
20 services and there's no meaningful distinction between  
21 the two.

22 MR. GROSSMAN: To build upon that, I think I  
23 would add that the language of 25134(a)(1), cap (C) is  
24 addressing services in certain limited circumstances.  
25 I believe it mentioned three types of services. I

1 don't think taken to its logical conclusion, if you  
2 read silence as an exclusion there, you run down the  
3 gamut of anything not listed becomes excluded.

4 And I think the risk there is that would  
5 operate to reverse the definition of sales that courts  
6 and the Board of Equalization have been following  
7 since the late 1970s.

8 MR. FULLER: Well, to follow on what he just  
9 said, in the regulation, it lists three types of  
10 services. If you were to read that literally, that  
11 only three types of services should be included in  
12 gross receipts, I don't think anybody here would think  
13 that that would be the proper result.

14 ALJ GAST: Okay. Since this is an MTC  
15 regulation that was adopted by FTB, is there any other  
16 state out there that has dealt with this issue?

17 MR. GROSSMAN: I think from when you say  
18 dealt with this issue, do you mean that has a excise  
19 tax on services or that has --

20 ALJ GAST: Yeah. How they treated this  
21 issue, because I think other states have a similar  
22 regulation. So what have they done, if anything?

23 MR. GROSSMAN: Right. You find similar  
24 language in many state regulations. Because I think  
25 at the time, many states were adopting that model

1 regulation, UDITPA regulation defined in 25134.  
2 Again, as a general matter that was happening back in  
3 the '70s when there wasn't great prevalence of excise  
4 taxes on services, surveying the states out there, we  
5 haven't seen anybody speaking directly to this, this  
6 particular issue.

7 You know, I think it stems from that these  
8 model regulations were often adopted at the time when  
9 people weren't thinking about whether excise taxes on  
10 services were contemplated.

11 ALJ GAST: Okay. Thank you. I have a few  
12 questions for FTB.

13 My first is, you know, if Regulation 25134  
14 contains the exclusive definition of what gross  
15 receipts means under 25120, why did Microsoft and  
16 General Motors and General Mills have to even discuss  
17 whether the treasury receipts at issue in that case  
18 were gross receipts to begin with? Why couldn't they  
19 just go to 25134 and say, here, it is, you know, it's  
20 a gross receipt?

21 MS. WILLIAMS: Well, we had the statute for  
22 the definition of gross receipts is 25120(e), and  
23 that's what Microsoft was part of, et cetera. I  
24 don't -- I'm not -- I wasn't trying to say that the  
25 25134 provided a definition of gross receipts. It

1 provides a method of assigning sales of tangible  
2 personal property and services. It doesn't get into  
3 gross receipts.

4 It does say that for tangible personal  
5 property, excise taxes definitely include them, but it  
6 doesn't say that proceed. That's not an omission,  
7 that's not a mistake. It's just not done at the time  
8 because of the lack of symmetry because we weren't --  
9 we don't tax services.

10 ALJ GAST: Yeah.

11 MR. SWIESO: If I may, your question, if I  
12 may restate is basically why is Microsoft, General  
13 Mills and the other case you mentioned, they did not  
14 address 25134, correct? They seemed to focus on  
15 25120(e). You're correct. Within respect to those  
16 cases, the overall issue was what is a, quote/unquote,  
17 gross receipt.

18 In this case, in this case we have additional  
19 rules. And the additional rules are 25 -- the  
20 additional rules that on their face appear to be  
21 controlling, those are which we've addressed before,  
22 25134(c)(1)(A) and 25134(c)(1)(C), they are in --  
23 they're validly promulgated regulations that on the  
24 face appear to be applicable.

25 In those cases you mentioned, Microsoft,

1 General Mills, whatever, they were not applicable so  
2 there was no need to address them in those cases. So  
3 what we're looking at here, what's the gist of this  
4 case basically comes down is, is 25(c)(1)(A) and  
5 21(c)(1)(C), pardon me, 25C14 [sic], you understand.

6 ALJ GAST: 25134.

7 MR. SWIESO: Thank you. Are they controlling  
8 in this fact pattern regarding the VAT. No question,  
9 Microsoft, General Mills was a discussion in an  
10 abstract sense about what is a gross receipt for sales  
11 factor purposes. Arguably, this does qualify what is  
12 a gross receipt even though it's embedded in the sales  
13 factor rules, not the gross receipts rules. But  
14 nevertheless, it is still applicable. It cannot --  
15 (c)(1)(A) and (c)(1)(C) cannot be ignored.

16 ALJ GAST: So I'm a little confused about  
17 what you said on the last part. You're saying  
18 Microsoft made a distinction between gross receipts  
19 and sales?

20 MR. SWIESO: In Microsoft, as you know, the  
21 issue was treasury function.

22 ALJ GAST: Right.

23 MR. SWIESO: And they were selling and buying  
24 short-term investments. And the question was whether  
25 or not the principle in the investment of transaction

1 should be reflected in the sales factor denominator or  
2 not. So the issue really -- 25134 was not the focus  
3 of Microsoft.

4 What was the focus in Microsoft was about the  
5 gross receipts. Specifically, the rules that were at  
6 contention in this case were not applicable in  
7 Microsoft. That's why they weren't addressed.

8 Today, we're focussing on (c)(1)(A) and  
9 (c)(1)(C) because they appear to have applicability  
10 with respect to the VAT being reflected in gross  
11 receipts, which is gross receipts are sales. Sales  
12 are what combines the sales factor.

13 ALJ GAST: Okay.

14 MR. SWIESO: It just wasn't an issue in  
15 Microsoft.

16 ALJ GAST: Like why couldn't they just point  
17 to 25134 and say, you know, redemption of marketable  
18 securities, oh, that's a gross receipt, they couldn't  
19 do that in that case, is that what you're saying?

20 MR. SWIESO: I can't answer as to why the  
21 court did not do that or what -- why that wasn't  
22 briefed.

23 ALJ GAST: Okay. Thank you.

24 MR. GROSSMAN: Pardon me. I mentioned that  
25 in my case-in-chief. It was briefed. And they tried



1 to argue that because it doesn't explicitly mention  
2 the return principle, that it should be excluded. The  
3 court rejected that.

4 ALJ GAST: Was that in the context of  
5 interest income though?

6 MR. GROSSMAN: It was -- so I pulled out the  
7 case. The argument was that because 25134(a)(1), cap  
8 (A) mentions all interest income, that it should be  
9 interpreted to only contemplate that and not the  
10 return of principle. That argument was rejected.

11 ALJ GAST: Okay.

12 MR. SWIESO: Then I stand corrected.

13 ALJ GAST: I think -- okay. One more  
14 question for FTB.

15 If you could clarify what you were talking  
16 about in your presentation with 25134(a)(1)(C) about  
17 how the use of the word similar items is not a VAT,  
18 but could you also address why that reg subsection  
19 uses the word includes, doesn't seem like it's an  
20 exclusive list.

21 MS. WILLIAMS: It may not be, but the  
22 language that they tried to very respectfully hang  
23 their hat on to include VAT is that third item in that  
24 provision. I'm sorry, I have to get my glasses on.  
25 And it says -- and you're right.

1           It says, includes, it doesn't say excludes,  
2 but it's only including fees, commissions and similar  
3 items. Fees, commissions are not VAT, are not excise  
4 taxes. They're entirely different animals.

5           And so my point was similar items doesn't  
6 hook on with VAT because you've got fees, commissions  
7 and similar items. So they've got to be similar to  
8 fees and commissions. Does that make sense?

9           ALJ GAST: Yes, that makes sense. Thank you.  
10 One more question actually, and this is for the  
11 taxpayer here.

12           If we rule in your favor, what does that do  
13 for 25120(f)(2) in 2011 going forward, does that  
14 affect whether VAT's included under that new  
15 definition for gross or amended definition for gross  
16 receipts going forward, or is this just limited to  
17 prior to 2011, if that makes sense?

18           MR. FULLER: I think it does.

19           MR. GROSSMAN: Yes, it does as a practical  
20 matter. It's an interesting question, good question.  
21 Two things come to mind. I think the first is that  
22 the structure of the amendments, it borrows from the  
23 broad definition of sales in Microsoft, and then  
24 builds in, you know, a number of limited exclusions  
25 from the definition of gross receipts. Because none

1 of them mention excise taxes on services, I would  
2 postulate that the law would be the same before and  
3 after unless and until a specific exclusion were  
4 codified. I think that's the first thing that comes  
5 to mind.

6 ALJ GAST: But if I may interject there,  
7 isn't it tied to what's recognized for federal income  
8 tax purposes? So is it, you know, would we have to go  
9 down the path in this case of saying --

10 MR. FULLER: You're right, your Honor. It is  
11 tied to receipts related to a transaction that is  
12 recognized, generally it's business income. So it's  
13 not the receipt itself that is part of a transaction  
14 that is recognized in the year that's the timing so  
15 that the sales match up in the correct year with  
16 timing.

17 It also needs to be realized there's a  
18 completed transaction. Those are elements. And I  
19 don't think that that would change the result here.  
20 And I think, just to back up a little bit, we did --  
21 we disagree with Respondent's characterization that  
22 we're hanging our hat on 25134(a)(1)(C) in the  
23 regulation.

24 We are hanging our hat on 25120(e) and now  
25 the fact that (f) is not included. So I think that

1 does get to your question. We start with a broad  
2 definition of sales. And if we're going to -- and  
3 that would include excise taxes, but because it's not  
4 excluded in 25120, I think if you held in our favor,  
5 that would reaffirm that. I don't think that the  
6 Regulation 25134 contradicts this because there's no  
7 explicit exclusion in there.

8           There's some clarifying language that is  
9 helpful when -- should excise taxes on goods be  
10 included, that was a fairly -- that was much more  
11 common scenario. So it was providing guidance to  
12 taxpayers that have the issue. Yes, that should be  
13 included.

14           I don't believe it was contemplated for  
15 services because it doesn't come up very much. It's  
16 starting to more, and California may, you know, if  
17 California has a bill, right now they had four over  
18 the last decade, but they have a pending bill right  
19 now to potentially enact a broad base sales tax.

20           So it's failed three times before, but it  
21 seems like this keeps coming up and keeps getting  
22 closer. I don't, you know, if we're talking about  
23 symmetry, I wouldn't think that if California were to  
24 enact a broad based bill imposing sales tax on  
25 services, that that should change the result. Like

1 suddenly if we have symmetry, it should be included  
2 versus excluded.

3 So I think what we need to give deference to  
4 is the statute and the case law interpreting it.

5 MR. GROSSMAN: I would say under our  
6 interpretation, it would be, I think, fairly clear  
7 that if a bill like that passed, those amounts would  
8 be -- the extent delivered to California customers  
9 would become included in the numerator.

10 ALJ GAST: Okay. Going back to my question,  
11 was VAT included in gross income for California  
12 Franchise Tax purposes during 2008 on the return, is  
13 that technically how that's supposed to work and then  
14 you get a deduction?

15 MR. FULLER: Well, so VAT, what we understand  
16 what would happen, so VAT would be an expense incurred  
17 by Robert Half. They are not required to charge their  
18 customers the VAT. If they did not charge their  
19 customers, their profits would decrease. So it would  
20 be a cost against their margins on providing services.

21 If they do charge it, what that does is that  
22 increases the profit margin on that sale. So in that  
23 sense, it's part of the --

24 ALJ GAST: So that would have been reported  
25 on line 1(c) of the California return, or I don't

1 know, maybe you don't know, that's okay.

2 MR. JAMATI: No, it would not.

3 ALJ GAST: It would not, okay. All right.  
4 That's all the questions I have.

5 ALJ JOHNSON: Thank you, Judge Gast. Judge  
6 Angeja?

7 ALJ ANGEJA: I have two, both for Franchise  
8 Tax Board. The VAT is the same substantively, it's  
9 charged on the invoice, passed through the customer,  
10 the customer pays it and the taxpayer receives it.

11 What's the substantive difference for that  
12 being included in gross receipts when the underlying  
13 transaction is the sale of TPP compared to when it's  
14 the sale of service?

15 MR. SWIESO: What's the substantive  
16 difference?

17 ALJ ANGEJA: If it's gross receipts for one,  
18 why is it not gross receipts for the other when  
19 they're functionally the same thing in both instances?

20 MR. SWIESO: Functionally the point is that  
21 it goes back to the symmetry issue. For the years at  
22 issue, California would not have had an excise tax  
23 VAT, whatever on the receipts pertaining to services.  
24 So what you're going to have is, look, the numerator,  
25 the sum of all the numerators in the sales factor, all

1 the jurisdictions is supposed to equal the  
2 denominator. What you're going to have is you're  
3 going to have a denominator without numerator  
4 reflection. You're going to have that and so that's  
5 the lack of symmetry.

6 ALJ ANGEJA: Okay. The other question, they  
7 mentioned the cryptocurrency. I thought that was  
8 interesting that nobody addressed it after that. I  
9 don't know if it was just illustrative but  
10 25134(a)(1)(C) doesn't mention cryptocurrency,  
11 bitcoin, so if that were the gross receipts from a  
12 sale of service, would that not be included either?

13 MR. SWIESO: I can't respond to that because  
14 I don't -- you're talking like bitcoin, is bitcoin a  
15 service or a product?

16 ALJ ANGEJA: It's consideration for the  
17 payment of service that's not listed in  
18 25134(a)(1)(C).

19 MS. WILLIAMS: No. We have not -- we're  
20 addressing that issue. We are investigating that  
21 issue, so it's a little before our time.

22 ALJ ANGEJA: All right.

23 MR. SWIESO: If you know the answer, I'd love  
24 to hear it. I mean, it's a very -- it's a burgeoning  
25 issue.

1           ALJ ANGEJA: I was intrigued with the example  
2 so I wanted to hear the answer. I have no further  
3 questions.

4           ALJ JOHNSON: Thank you. I have a couple  
5 questions. I'll stay with Franchise Tax Board. I  
6 know Appellant discussed a little bit a potential for  
7 California law change that would possibly include ban  
8 on services or tax on services.

9           If that were to happen, from your  
10 perspective, would that change the policy argument and  
11 the concern about symmetry?

12           MR. SWIESO: So you're saying that there's a  
13 proposal or I heard you say -- could you repeat that,  
14 in Los Angeles there's a --

15           ALJ JOHNSON: I'm sorry, just in California  
16 if there is a tax excise services, would that  
17 change --

18           MR. SWIESO: Well, then you wouldn't have  
19 concerns about symmetry.

20           ALJ JOHNSON: Okay. All right. I'll change  
21 it here into a simple question.

22           The Franchise Tax Board, do you have any  
23 arguments over the calculation of the VAT that  
24 Taxpayer claimed?

25           MS. WILLIAMS: No.



1           ALJ JOHNSON: And for Appellant, did you  
2 collect any VAT on sales of TPP or is it entirely  
3 services?

4           MR. JAMATI: There may have been incidental  
5 to TPP software. If some countries consider that  
6 tangible property, we would have collected that on  
7 that as well, but in general, we do not sell  
8 [inaudible] --

9           ALJ JOHNSON: So there was incidentals?

10          MR. JAMATI: Yes.

11          ALJ JOHNSON: On some of the sample invoices  
12 you provided, I believe it was the Canadian ones, it  
13 said GSD, slash, TPS. I'm not familiar with what that  
14 is.

15          MR. GROSSMAN: I believe it's the French  
16 equivalent, correct? I did -- one of the things that  
17 was said that was fascinating about the numerator  
18 should add up to the denominator. I did want to flesh  
19 that out a little bit. It's a fascinating concept. I  
20 think when you're dealing with a water's edge filer,  
21 that there is some logic there, but I don't know that  
22 it would be the case that the numerators would add up  
23 to the denominator.

24                 I mean, if you extrapolate it, like U.S.  
25 domestic taxation system onto foreign jurisdiction, it

1 would, but many -- I would assume most of them do not  
2 have the same apportionment concepts we do.

3 ALJ JOHNSON: Thank you. And last question  
4 is going to be for both. I'll start with the  
5 Appellant if you want to answer it.

6 But originally, all the briefing deals with  
7 the VAT tax, which I believe it's being used on the  
8 general term excise tax on services.

9 Just so I'm clear, that is going to include  
10 the decision that we make on VAT would include  
11 anything on goods and services tax as well, right?

12 MR. GROSSMAN: That was a great question. I  
13 was figuring somebody was going to ask that. The  
14 nomenclature of these excise taxes vary from country  
15 to country. I think you frequently see them as it's  
16 one tax by multiple names. The different  
17 terminologies aside, most common are either a VAT or a  
18 GSD. So it would encompass both.

19 ALJ JOHNSON: And Franchise Tax Board, is  
20 that correct on your sense as well?

21 MS. WILLIAMS: I don't know.

22 MR. GROSSMAN: If it helps, some of the audit  
23 work papers when they were verifying the amounts were  
24 using the term both.

25 MS. WILLIAMS: Okay. I have no reason to

1 disbelieve Mr. Grossman.

2 ALJ JOHNSON: Thank you. Let me check one  
3 more time with the panel, see if any new questions  
4 have arose. Judge Gast?

5 ALJ GAST: No further questions.

6 ALJ JOHNSON: Judge Angeja?

7 ALJ ANGEJA: No.

8 ALJ JOHNSON: With that, we'll go to our  
9 closing arguments. Each side will have five minutes.  
10 Franchise Tax Board, we'll start with you,  
11 Ms. Williams.

12 MS. WILLIAMS: All right. First, I want to  
13 say that the 24 -- or excuse me, the 25134(a)(1)(C),  
14 the VAT is not an omission it was intentionally left  
15 out for symmetry reasons. And I'd also like to close  
16 with Appellant misreads Regulation 25134 making  
17 assumptions that are misguided and probably  
18 inappropriate about a Regulation 25134. And Appellant  
19 also is attempting to impermissibly broaden the  
20 definition of gross receipts under 25, Code 25120,  
21 subsection (e). And with that, I close.

22 ALJ JOHNSON: Thank you. And Appellants.

23 MR. GROSSMAN: First, I wanted to thank  
24 everybody for their attention in this matter. The  
25 first time heard in front of the OTA, it was truly a

1 pleasure. I just want to say thank you as an opening.

2 To Melissa's point in her closing, that I did  
3 want to emphasize that nothing in rule making files  
4 suggests that the omission of excise taxes on services  
5 within the 25134 regulation suggests it was  
6 intentional. We didn't see anything in the rule  
7 making file suggesting that was the intent at the  
8 time.

9 The issue in this case remains a  
10 straightforward issue of statutory interpretation.  
11 Section 25134 and its related regulation are not the  
12 controlling authority in this case because it is  
13 Section 25120 that defines sales. Revenue Taxation  
14 Code Section 25120(e) plainly defines sales to include  
15 all gross receipts.

16 The California Supreme Court's Microsoft  
17 decision broadly construed this statutory definition  
18 to mean the whole amount received the transactions  
19 generating business income. Similarly, decisions of  
20 Board of Equalization stretching back to the 1970s  
21 have approached this definition of sales in a broadly  
22 inclusive manner.

23 Simply put, many of those cases such as  
24 appeal of Pacific Telephone and Telegraph or Merrill  
25 Lynch could have been decided on other grounds, but

1 they weren't. They started with a broadly inclusive  
2 definition of gross receipts, and then they analyzed  
3 whether that should be departed from.

4 I think with this history in mind, if  
5 Respondent's attempt to narrow the definition of sales  
6 in this case were upheld, it would reverse  
7 approximately four decades of consistent California  
8 precedents construing of definition of sales for  
9 apportionment purposes.

10 Thus, as a basic matter of statutory  
11 interpretation, the appellant's original return  
12 position must prevail and the FTB's attempt to narrow  
13 the definition of sales which directly contradicts  
14 this holding in Microsoft must be rejected.

15 Accordingly, the appellant respectfully  
16 requests that the OTA reject to FTB's adjustments to  
17 exclude excise taxes from Robert Half's sales factor.  
18 Thank you.

19 ALJ JOHNSON: Thank you. With that, we have  
20 your evidence, your arguments and your briefs. We've  
21 heard arguments today. We have a complete record on  
22 which to base our decision. I wish to thank both  
23 parties for appearing on appeal and providing the  
24 briefs and exhibits thus far. The record is now  
25 closed. This will conclude our hearing on this

1 appeal. The judges will meet and decide the case  
2 based on the arguments that have been presented. We  
3 will hand both parties our decision no later than 100  
4 days from today, June 25, 2019. With that, we are now  
5 off the record. This concludes our hearings for today  
6 and we are adjourned. Thank you.

7 (Whereupon the proceedings were  
8 adjourned at 2:15 p.m.)

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REPORTER'S CERTIFICATE

I, Amy E. Perry, a Certified Shorthand Reporter in and for the State of California, duly appointed and commissioned to administer oaths, do hereby certify:

That I am a disinterested person herein; that the foregoing hearing was reported in shorthand by me, Amy E. Perry, a duly qualified Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewritten form by means of computer-aided transcription.

I further certify that I am not of counsel or attorney for any of the parties to said hearing or in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of July, 2019.

\_\_\_\_\_  
AMY E. PERRY  
Certified Shorthand Reporter  
License No. 11880