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HEARING

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

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In the Matter of the Franchise and

Business Tax Appeals Hearing of:

TFCG, INC.

Appellant.

NO. 18083543

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JULY 18, 2019

10:00 A.M.

 ORIGINAL

OFFICE OF TAX APPEALS
855 M STREET
FRESNO, CALIFORNIA

Reported by GRACIE E. BECERRA, CSR No. 13136

1 APPEARANCES

2
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10 MICHAEL GEARY, ADMINISTRATIVE LAW JUDGE
11 SARA HOSEY, ADMINISTRATIVE LAW JUDGE

12 For Appellant:

13 TONY WILHELM, TAXPAYER

14 For Department of Tax and Fee Administration:

15 MENGJUN HE, TAX COUNSEL
16 STEPHEN SMITH, TAX COUNSEL
17 LISA RENATI, HEARING REPRESENTATIVE
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THURSDAY, JULY 18, 2019 - 10:00 A.M.

ALJ ANGEJA: We're now on the record in the Office of Tax Appeals oral hearing for the appeal of TFCG, Inc., case I.D. -- case number is 18083543. We are in Fresno, California, and the date is Thursday, July 18th, 2019, and it's 10 o'clock. I am Jeff Angeja, and I'm the lead administrative law judge for this hearing. My fellow co-panelists today are Mike Geary and Sara Hosey.

ALJ HOSEY: Good morning.

ALJ ANGEJA: Good morning. Turned off, didn't it? No, I'm still on.

So -- and we are co-equal panelists, and we'll be deciding this case.

Appellant, can I get you to identify yourself for the record.

THE APPELLANT: My name is Tony Wilhelm with TFCG, Inc. --

ALJ ANGEJA: All right.

THE APPELLANT: -- dba Extreme Communications.

ALJ ANGEJA: Thank you.

Go ahead. Sorry.

MS. HE: Mengjun He.

MR. SMITH: Steve Smith.

ALJ ANGEJA: All right.

1 MR. SMITH: Or Steven Smith, I guess.

2 MS. RENATI: And Lisa Renati.

3 ALJ ANGEJA: All right. Thank you.

4 And at the time of our prehearing conference we
5 had three disputed issues in this appeal by e-mail on July
6 11th. CDTFA has conceded the transactions that were
7 involving the Indian tribes leaving us with just the one
8 disputed issue, which is whether the transaction with Wild
9 Electric, Inc. was a nontaxable sale for resale.

10 Just for my notes, the amount of that reduction in
11 measure was how much? I know it's audit -- item 3 -- I just
12 want to get it on the record.

13 MR. SMITH: The remaining measure is \$120,681.

14 MS. HE: Wait. Are you asking about the fees or the
15 sale for resale?

16 ALJ ANGEJA: The concession amount.

17 It shuts off every time we don't talk.

18 I wanted to get the amount of the concession on
19 the record. I know it's more than half the measure that was
20 originally 337,904.

21 MS. RENATI: Oh, for the whole thing?

22 ALJ ANGEJA: Yeah.

23 MS. HE: Two hun -- two hundred thousand something.
24 Let me bring up the schedule.

25 ALJ ANGEJA: Okay.

1 MS. RENATI: It should be the sum of the two numbers.

2 MR. SMITH: 213?

3 MS. RENATI: No. The total. Two thousand --

4 MS. HE: 213,468.

5 MS. RENATI: Oh, yes. You're correct.

6 ALJ ANGEJA: Okay. That's the reduction in measure for
7 item 3 that's no longer --

8 MS. HE: So it's zero now.

9 ALJ ANGEJA: Right. Thank you. I just wanted to make
10 sure we had that on the record. Leaving us with item 1. I
11 know the disputed amount is 120 -- I had it --

12 MR. SMITH: 681.

13 ALJ ANGEJA: There's a portion that's not disputed
14 that's in addition to that.

15 MR. SMITH: It's a credit to the taxpayer, actually.

16 ALJ ANGEJA: All right. Okay. And we had Exhibits A
17 and B from CDTFA that include these extra additional pages
18 that I inadvertently omitted from our hearing binder, but
19 they are submitted for evidence. There's no objections. We
20 talked prior to the hearing. I will admit those. And for
21 appellant, you had Exhibit 1. CDTFA had no exhibits --
22 sorry -- no objections to those exhibits, and so I'll admit
23 everybody's exhibits into the record.

24 (CDTFA's Exhibits A and B and Appellant's Exhibit 1 admitted
25 into evidence.)

1 ALJ ANGEJA: It's my understanding from our prehearing
2 conference nobody has any witnesses for today.

3 I could swear you in, then your testimony would be
4 evidence, otherwise you're just making argument. I know we
5 had talked about that at the hearing -- at the prehearing
6 conference. We didn't resolve it either way. I can swear
7 you in.

8 THE APPELLANT: Whatever is best. I don't really --

9 ALJ ANGEJA: Let me swear you in.

10 THE APPELLANT: I don't have a preference.

11 ALJ GEARY: Mr. Wilhelm, is your mic on?

12 THE APPELLANT: I don't know. Testing, testing.

13 ALJ GEARY: It doesn't sound like it. Is there a green
14 light lit at the bottom? Press the button, see if a green
15 light lights.

16 THE APPELLANT: Green light's lit.

17 ALJ GEARY: Leave it on.

18 ALJ ANGEJA: There we go.

19 THE APPELLANT: There we go.

20 ALJ GEARY: Mr. Smith, is that mic on?

21 MS. HE: Yeah. It just turned on.

22 ALJ GEARY: Okay.

23 MS. HE: Sorry about it.

24 ALJ GEARY: It's all right.

25 MS. HE: Yeah, we just noticed.

1 ALJ GEARY: Thank you.

2 ALJ ANGEJA: Can I get you to stand and please raise
3 your right hand.

4

5 TONY WILHELM,

6 the appellant herein, after having been previously
7 duly sworn by the administrative law judge, testified
8 as follows:

9

10 ALJ ANGEJA: All right. I was going to say the truth,
11 the whole truth and nothing but truth --

12 THE APPELLANT: Yeah. I was going to say --

13 ALJ ANGEJA: -- but that seems redundant, so we just
14 get to the point.

15 All right. So we'll have you as a witness. We
16 had agreed that your testimony wouldn't exceed approximately
17 15 minutes and the Department, for ease of reference,
18 instead of saying CDTFA, they'll be allowed to ask
19 questions. They'll testify for -- testify -- they'll have
20 ten minutes to make their argument. You can ask questions,
21 the panel could ask questions, and then you'll have a
22 rebuttal up to five minutes or so, if you like, then the
23 panel may have questions for both parties, and then we would
24 close the record and we'll have a hundred days in which to
25 issue a decision, assuming we close the evidence today.

1 So with that, would you like to get started?

2 THE APPELLANT: Certainly. Thank you. This is -- we
3 talked briefly about this. This is -- goes back -- it
4 started, I think, in, oh, 2009, so we're -- we're talking
5 ten years of recollection and memory, so -- and I prepped
6 for this every two to three years and gotten knowledge and
7 then it goes away, so bear with me as I kind of go through.
8 I've drawn -- I take some notes just to kind of do this.

9 In regards to Wild Electric, I want to be careful
10 how I say this, I'm not objecting that there should be a
11 sales tax. I'm objecting to who would be -- who -- who
12 should be responsible for it. That's been my contention all
13 along.

14 A little background on Extreme. You know, I
15 worked for another company out of the Bay Area, a dot com
16 company in Fresno for many years. Dot com blew up.
17 Everybody went out of business. I started Extreme
18 Communication, my wife and I, in 2002. Okay? Our intent
19 back then -- you know, honestly, our focus was small
20 business. We're ironically working for the State. We do a
21 lot of work for Department of Transportation because small
22 business, you know, requirements, you know, put us in a
23 really good position being a small business. Back then
24 schools were just starting to take -- schools back then
25 weren't really what they were. Prevailing wage, public

1 works projects in general weren't really our focus. We
2 did -- we -- we tried to do all the right things. We went
3 to prevailing wage seminars, learned prevailing wage,
4 certified payroll. And, you know, the -- the techs make
5 twice as much money, the company makes a lot less money. So
6 it really wasn't a focus. We were more of a design, build,
7 working with small business, that sort of thing.

8 I had an acquaint -- at -- at the time we had been
9 -- had been in business for six or seven years, you know,
10 roughly doing under a million dollars a year, 800, \$900,000
11 a year, you know, holding our own, doing stuff for, like,
12 Pelco, companies like that. I got a call from a friend that
13 said, hey, Wild Electric had a job out at Willow and
14 International, a public works school. Not knowing how that
15 whole process worked -- I -- I know now, after the fact, how
16 this process works. One of the reasons I don't do it is
17 basically what had happened is they had gotten a bid from
18 somebody else and decided to shop, but after the fact. And
19 I got a call from a friend that knew the estimator that
20 said, hey, this guy has a project out there. He's got
21 \$350,000. Can you do it? Well, okay. Well, shoot, I don't
22 have to bid it, I don't have to go through this whole
23 process of paperwork and bonding. This guy's just calling
24 me, like, after the fact, and so, hey, I'll look at it. So,
25 of course, being a business, it was a good opportunity to

1 kind of break in, somebody knew somebody.

2 I called them. I -- I -- I kind of went along the
3 lines of, you know, these guys have been doing this for a
4 long time. I didn't do the research then, but I have now is
5 -- you know, at the time they had been in business for 40
6 years averaging \$8,000,000 a year. You know, they just tell
7 me what to do. I'm just a subcontractor. Hey, how do I do
8 this? What do you want me to do? You know, I basically
9 give them a two-page scope of work for \$350,000 based off
10 this -- plans and specs they sent us for voice and data
11 cabling. They were the electrician on the project. They
12 were doing all the conduit, the wiring. It was a brand-new
13 building. Soletek Pacific was the general. At one point I
14 had asked, I said, okay, now, how do you want me to break
15 this up, materials, tax, labor and this, that. They said
16 no, don't worry about tax. We're covering that because, you
17 know, we're contracted to Soletek Pacific and we don't want
18 to double tax it kind of a thing. So if you tax me and then
19 they tax -- if -- if I tax it to them and then Soletek taxes
20 them, then it's double tax. So I -- I -- I took it, you
21 know, at face value, \$350,000. I gave them a quote, you
22 know, they gave me a contract, we move on with the work.

23 We did the work. Everything was happy. You know,
24 there's a lot of paperwork floating around. You know, at
25 the time the type of cable that was used was in high demand,

1 so we have some paperwork in here supporting the fact that
2 we weren't going to be ready for the physical cabling for 12
3 months, but prices were fluctuating, so we did a buy and
4 hold agreement with Graybar, escrow account. They held it.
5 So we basically purchased the cable, they held it at
6 Graybar. The State Center Community College people, the
7 contractors all came down and saw it, they took pictures,
8 they signed off on it, which I don't know if it's actually
9 relevant or not, but I'm just giving you the history on
10 that.

11 ALJ ANGEJA: Okay. Thank you.

12 THE APPELLANT: So push come to shove, you know,
13 several years later, we get audited. The auditor spent 95
14 hours in our office. You know, nice enough guy. He's -- no
15 offense. He's a state guy and they do their thing and they
16 eat their lunch and they take their breaks and they -- we
17 give them piles of paperwork. And -- and he came through
18 after two weeks and he said, oh, good news is we owe you
19 guys money. I'm, like, cool. This is great. Accrual
20 basis, cash basis, you know, we're a small business.
21 QuickBooks, my wife does the books. So there were some
22 learning lessons, well, this should have been like this and
23 this should have been like that. And he helped fix some of
24 the -- the back-end stuff. They ultimately ended up owing
25 us money.

1 They went back, turned it in to his supervisor and
2 he came back a couple weeks later and he had this, like,
3 look on his face, like, you know. He goes, actually, my
4 supervisor reviewed it and he -- even though it's been
5 tossed out, he came back with the Indian tribe sovereign
6 nation, you know, that whole thing and there's Wild
7 Electric. You guys owe us \$20,000. So we argued that
8 because it had been ten years. Just recently, weeks go, the
9 Indian stuff was found to be in our favor, that we were
10 right and we did all the right stuff. So this is the --
11 this is the only thing left.

12 In this process I have in my documents -- and I --
13 I don't know if you want me to reference pages, but
14 basically the very first bill we sent to them for the cable
15 that got put in storage had sales tax on it.

16 ALJ ANGEJA: Right.

17 THE APPELLANT: Here's your bill, sales tax. I have an
18 e-mail -- or, actually, at the time it was a fax from the
19 controller from Wild Electric that said, oh, we need you to
20 subtract the sales tax based on your conversation with the
21 estimator and whatever. Here's our resale certificate. Fax
22 also showed -- you know, this is a fax trail that she sent
23 to my wife who's the control -- you know, the CFO. We
24 rebilled it without tax. You know, they sent the resale
25 certificate over. They sent it to us all over. Again,

1 we're just kind of going off, hey, they just --

2 THE REPORTER: Slow down, please. Slow down just a
3 little.

4 ALJ ANGEJA: Sorry.

5 THE APPELLANT: Oh. They just --

6 ALJ ANGEJA: She's got to track down --

7 THE APPELLANT: Gotcha.

8 ALJ ANGEJA: -- every word that we take. And I talk
9 pretty fast. You're talking faster than I do, so...

10 THE APPELLANT: Okay. So, you know, that was -- that
11 -- that paper trail there, we just did what they told us to
12 do at -- at face value. We re invoiced it without tax. We
13 finished the project, all said and done.

14 When they questioned it and after, you know,
15 looking at Regulation, what, 1521 and all this kind of
16 stuff, the consumer, materials, I mean, I get it. I kind of
17 wanted to reference the public works thing because when we
18 did the prevailing wage rate, there's a lot of shady stuff
19 that goes on out there. I'm not pointing fingers at any
20 other contractor, but one of our philosophies was and -- and
21 the -- the verbiage that I refer back to in the public works
22 stuff is as long as it doesn't happen more than once
23 basically and there's no malicious intent, you're not trying
24 to screw the system, you're trying to do things right. I
25 kind of use that as an example of what we did. I wasn't

1 screwing -- it was just what I understood as they, big
2 electrical contractor, told me --

3 ALJ ANGEJA: Sure.

4 THE APPELLANT: -- little ol' voltage contractor.

5 They go to Wild Electric with, oh, we need an XYZ
6 letter. Oh, well, gosh, we're not paying sales tax. Of
7 course they're going to sign the XYZ letter saying that
8 they're not. And that's kind of what this whole decision is
9 based on. And so I'm not necessarily saying the tax isn't
10 due. I'm saying that I think the responsibility falls on
11 Wild Electric --

12 ALJ ANGEJA: Okay.

13 THE APPELLANT: -- as a subcontractor to the general
14 contractor who told me not to -- you know, and that was all
15 verbal through the estimator, the estimating guy, you know,
16 supported by fax documents saying please take the tax off,
17 here's our resale number.

18 I mean, I don't know for me that it gets any
19 clearer. I agree that if I did this today, I wouldn't do
20 that. I'd say here's your tax. If you want to short pay it
21 or do something to that effect, I would do the paper trail
22 different. Of course everything's by e-mail now. But here
23 we are ten years later still trying to deal with the same
24 thing. You know, at the time I stood big on principle. You
25 know, I'm right, I mean, as far as I'm concerned with the

1 Indian stuff and with this. I wasn't going to hire a
2 lawyer, hire a tax accountant. I mean, it's just the way I
3 look at it is if I really needed to, I'd go back to the
4 Indians and just give them a change order, because it was
5 all in my paperwork, but I didn't think this would take ten
6 years and the dollar amount would double when it came to
7 interest.

8 So now I'm kind of, like, aw, you know. So I'm
9 kind of at your guys' mercy to kind of see it from a -- you
10 know, an impartial view. Because I know that I've appealed
11 this several times through the BOE. I've tried to do the
12 settlement, you know, hey -- I mean, honestly, at one point
13 I thought the settlement would be, like, hey, just take the
14 interest off, we'll meet in the middle kind of thing. And
15 they offered some settlement number, and it wasn't even on
16 paper or an e-mail. It was, like, verbal. We'll give you
17 -- instead of 40,000, we'll settle for 35, some silly
18 number. And I'm, like, no, I don't think so. So -- and
19 there is no paper trail or e-mail trail. That's an all
20 verbal conversation, so. The CDFA came along and said, hey,
21 we're a third party, impartial. That made a lot of sense to
22 me. I'm not arguing, I'm not appealing this to people that
23 work for the BOE and have BOE e-mails, that sort of thing,
24 so it made sense to me.

25 I think the fact that -- that the Indian thing has

1 been dismissed or whatever the term for that is is -- kind
2 of supports all this documentation that we -- we feel what
3 we did was right. Was it a hundred percent right crossing
4 T's and dotting I's? Maybe not. But there was no malicious
5 intent. It was done all above board.

6 We've been in business now -- we just celebrated
7 17 years.

8 ALJ ANGEJA: Congratulations.

9 THE APPELLANT: We still don't do a lot of public
10 works. We don't do a lot of prevailing wage stuff. It's --
11 it's a different market. So I'm just kind of -- that's
12 really all I have to say is I'm just kind of putting it out
13 there in black and white. When you look at it --

14 ALJ ANGEJA: Okay.

15 THE APPELLANT: -- it seems pretty straightforward to
16 me as an impartial person looking at paperwork. It's, like,
17 well, obviously, they should have known and they sent you
18 the stuff anyway, so send them the bill.

19 ALJ ANGEJA: Sure.

20 THE APPELLANT: I mean...

21 ALJ ANGEJA: Okay. Does that conclude your --

22 THE APPELLANT: Yes. I'm sorry.

23 ALJ ANGEJA: Do you have any questions yet?

24 ALJ HOSEY: No. Thank you.

25 ALJ ANGEJA: I wanted to clarify one quick thing. My

1 review shows we don't have the resale certificate in the
2 record, but that it's not disputed that Wild Electric issued
3 one.

4 MS. HE: It was in the taxpayer's --

5 THE APPELLANT: Yeah.

6 MS. HE: -- opening brief pile.

7 THE APPELLANT: Yeah. It was a fax they sent us --

8 ALJ ANGEJA: Okay.

9 THE APPELLANT: -- with a fax cover sheet.

10 ALJ ANGEJA: Because I saw the invoices. I don't know
11 that I saw the resale certificate. But we don't have to --
12 if it's in there, that's fine.

13 THE APPELLANT: Yeah. I think the exhibits --

14 MS. HE: Yes, in the exhibit.

15 THE APPELLANT: -- it's around page -- between 70 and
16 75 of --

17 ALJ ANGEJA: Okay.

18 THE APPELLANT: -- of our exhibit. I believe it's the
19 original invoice, the fax requesting a new invoice, the
20 resale certificate, and then a fax cover, and a new
21 invoice --

22 ALJ ANGEJA: I saw --

23 THE APPELLANT: -- from us back to them. So it's,
24 like, five pages right around 70 --

25 ALJ ANGEJA: I saw the invoices. I must have missed

1 the resale certificate. Okay. I didn't mean to interrupt.
2 I just wanted to make sure I asked and got that figured out
3 before we went on.

4 To Department, would you like to start your
5 presentation?

6 MS. HE: Yes. Thank you.

7 This appeal should be denied because under
8 Regulation 1521, appellant was and could only be the
9 consumer, not the retailer, of materials, the cables at
10 issue here, which appellant furnished and installed in its
11 lump sum construction subcontract. And, further, as a
12 subcontractor, appellant could not take a resale certificate
13 from its prime contractor to avoid a tax liability.
14 Therefore, the Department properly determined that appellant
15 owes a tax on the ex-tax cable purchases measured by the
16 audited costs and appellant has not proved error in the
17 Department's determination.

18 The facts on this issue are simple and
19 straightforward. Appellant entered into a construction
20 subcontract with Wild Electric to provide and install
21 cables, which are materials, to provide a telecommunication
22 infrastructure cabling system. The subcontract states only
23 a lump sum of \$350,000 for the contract, although the
24 proposal and the subsequent invoice, dated separately, state
25 a price for the cables. Appellant purchased the cables

1 ex-tax and neither appellant nor Wild Electric reported or
2 paid a tax on the cables. Appellant initially tried to
3 charge Wild Electric tax reimbursements, but then removed
4 the tax reimbursement charge upon request by Wild Electric
5 and received a resale certificate from Wild Electric. So
6 the only issue in dispute here is whether, and as such -- as
7 stated facts here, appellant could be a retailer of the
8 cables and then take a resale certificate from its prime
9 contractor to avoid the tax otherwise due.

10 As you know, pursuant to Regulation 1521,
11 generally as a construction contractor, appellant is deemed
12 to be the consumer of the materials, such as the cables at
13 issue here which appellant furnished and installed pursuant
14 to a construction contract, and either sales tax or use tax
15 applies with -- with re -- applies with respect to the sales
16 of the cables to or the use of cables by appellant unless
17 appellant can establish otherwise. For appellant to
18 establish otherwise here that he was not a consumer but a
19 retailer of the cables, Regulation 1521 subdivision
20 (b)(2)(A)(2) requires that, I quote, "If the contract
21 explicitly provides for the transfer title to the materials
22 prior to the time the materials are installed, and
23 separately states the sales price of the materials,
24 exclusive of the charge for installation." End quote. Here
25 appellant's subcontract with Wild Electric simply states

1 under subcontract amount on page 1 a lump sum of \$350,000.
2 A lump sum contract by definition does not separately state
3 the sales price of the materials. In addition, the
4 subcontract itself does not explicitly provide for transfer
5 title to the materials prior to the time the materials are
6 installed. Therefore, the subcontract does not meet either
7 requirement under Regulation 1521 subdivision (b)(2)(a)(2),
8 which are necessary for appellant to be a retailer of the
9 materials.

10 While appellant subsequently issued an invoice
11 separately stating the charge for the materials, Regulation
12 1521 subdivision (a)(8) explicitly provides, I quote, "A
13 lump sum contract does not become a time and material
14 contract when the amounts attributable to materials,
15 fixtures, label and tax are separately stated." So the
16 invoice is of no legal consequence here.

17 Similarly, appellant's proposal, which separately
18 provides for material cost, cannot change the fact that the
19 contract itself is a lump sum contract. Since appellant
20 cannot establish that it was a retailer of the material,
21 under Regulation 1521 subdivision (b)(2)(A)(2) appellant was
22 a consumer of the cables furnished and installed in the lump
23 sum contract. As a consumer, there's no occasion whatsoever
24 under which appellant could take from anyone a resale
25 certificate for cables appellant consumed itself.

1 In addition, Regulation 1521 subdivision (b)(6)(A)
2 provides, I quote a direct quote, "A contractor cannot avoid
3 a liability for sales or use tax on materials or fixtures
4 furnished and installed by him or her by taking a resale
5 certificate from the prime contractor." End quote. And the
6 only exception the regulation provided is for a leased
7 fixture situation, not applicable here.

8 So here it's undisputed Wild Electric was the
9 prime contractor as a subcontract because the agreement is
10 titled subcontract, and the subcontract identifies Wild
11 Electric as contractor on line two and appellant as a
12 subcontractor on line three. So even if appellant were the
13 retailer of the cables, which it was not, as I just
14 discussed, still the sale of the cables would just be a
15 retail sale, not a sale for resale pursuant to Regulation
16 1521 subdivision (b)(6)(A), so appellant could not avoid its
17 liability for sales of use tax on the cables by taking a
18 resale certificate from its prime contractor, Wild Electric.

19 In conclusion, since it's undisputed that
20 appellant purchased the cable ex-tax and neither appellant
21 nor Wild Electric reported or paid a tax on the cables and
22 further given that appellant has not established any
23 applicable exclusion or exemption from the tax due,
24 appellant owes the tax on its ex-tax purchase of the cables
25 and later consumed in the lump sum construction subcontract

1 as determined by the audit, based on the audit cost. And
2 the appellant's acceptance of the resale certificate from
3 its prime contractor is improper and cannot change the tax
4 result here.

5 Therefore, the appeal should be denied. Thank
6 you.

7 ALJ ANGEJA: All right. Thank you.

8 Questions from my panelists yet?

9 ALJ GEARY: No. Thank you.

10 ALJ ANGEJA: All right.

11 ALJ HOSEY: No. Thank you.

12 ALJ ANGEJA: Would you like to have a rebuttal?

13 THE APPELLANT: Sure. My -- a couple things here. I
14 -- I don't know if it's applicable, but I'm going to bring
15 it up. Subcontract from Wild Electric at no point states
16 sales tax is due, so that's just a note that I made to
17 myself that it's -- it's a three-page subcontract again from
18 a multi-million dollar electrician that doesn't say anything
19 about sales tax responsibility, so...

20 Secondly is I don't -- I want to be clear. I'm
21 not trying to claim that I have an exemption. I'm -- I'm --
22 because the whole 1521 paragraph this, paragraph that, today
23 I agree with that verbiage. What I'm -- what I'm trying to
24 claim or explain is -- is the responsibility of that should
25 fall on the electrician, not on me. So I'm not looking for

1 an exemption. I'm not looking for a regulation that
2 disqualifies me from paying that. I'm just stating the
3 actual facts of how this -- this all transpired, so...

4 ALJ ANGEJA: Okay.

5 THE APPELLANT: And then the other -- the last thing is
6 if by chance I lose the claim or the appeal, I would ask
7 that they would consider a reduction in interest. Because
8 as we discussed previously, the -- the interest has
9 accumulated over 11 years, which I think is, you know, way
10 too long of a process. I'm not blaming the State, but, I
11 mean -- I know, the wheels turn slowly, but, you know, ten
12 or 11 years may be exceeding, you know, realistic, you know,
13 interest on ten or 11 years. If by chance that it comes
14 down and you guys say, hey, you know, I would -- you know,
15 you're owed the sales tax and I had to eat that, then I
16 would hope that we could limit or disallow the interest for
17 ten years to be part of that number.

18 ALJ ANGEJA: So the Office of Tax Appeals can't settle
19 or compromise a case in that regard, but you're free to
20 contact CDTFA. I know that they've got a settlement
21 division on -- offers and compromise division that --
22 regardless of what we do, take that up with them after the
23 fact --

24 THE APPELLANT: Okay.

25 ALJ ANGEJA: -- because we -- we're obligated to look

1 at the case on the merits.

2 THE APPELLANT: Sure.

3 ALJ ANGEJA: And we can't do the settlement type that
4 you're asking. But I understand where you're coming from.
5 We don't have the power to do that.

6 THE APPELLANT: Okay.

7 ALJ ANGEJA: They can look into that, so...

8 THE APPELLANT: Hopefully I won't have to worry about
9 that. But if I do, then I can address that after the fact
10 with them.

11 ALJ ANGEJA: All right. Do my panelists have
12 questions?

13 ALJ GEARY: No. Thank you.

14 ALJ HOSEY: No. Thank you.

15 ALJ ANGEJA: I had only one -- or two. One is -- I
16 believe it was said, I just wanted to confirm. No other
17 party has paid tax in connection with this liability?

18 MS. HE: That's correct.

19 ALJ ANGEJA: Wild Electric did not. The prime --
20 unless Wild Electric was the prime. Or were they still a
21 sub?

22 MS. HE: The -- the information available to us only
23 showed appellant and Wild Electric. I know in his opening
24 statement he mentioned another party as a general to Wild
25 Electric.

1 THE APPELLANT: Soletek. Soletek Pacific.

2 MS. HE: But we were never aware of that. But
3 regardless, as I said in my portion, as a sub, we only --
4 it's on the sub to pay the use tax if it was purchased from
5 out of state or a sales tax from an in-state retailer on the
6 cable purchases, so regardless. So it's another layer for
7 prime above Wild Electric. It's still the same law.

8 ALJ ANGEJA: No, I understand that. I just want to
9 make sure it hasn't been paid by someone else in the chain,
10 because if it has been, it could be offset. But we don't
11 have evidence that it has been, so...

12 MR. SMITH: Well, we --

13 THE APPELLANT: Do we have evidence it hasn't been?

14 MR. SMITH: We did send an XYZ letter, I believe, to
15 the -- to --

16 ALJ ANGEJA: Wild.

17 MR. SMITH: -- to Wild Electric --

18 ALJ ANGEJA: Right.

19 MR. SMITH: -- and they said tax hadn't been paid.

20 ALJ ANGEJA: And, no, I was questioning if there was
21 one level above that that might have. There's not a penalty
22 in play.

23 And so then my last question is just to confirm my
24 numbers. This audit item was originally 145,117. And as a
25 result of the second revised -- or reaudit it's 133. This

1 transaction is 120, right?

2 MR. SMITH: Yeah.

3 ALJ ANGEJA: And then audit -- item 1 is a credit
4 measure.

5 MR. SMITH: Right. So in the revised audit schedules
6 that I submitted right before this hearing started it's --
7 the first quarter of 2009, the claimed sales for resale
8 where it says 120,681 --

9 ALJ ANGEJA: That's this transaction.

10 MR. SMITH: That's this transaction.

11 ALJ ANGEJA: Because I'm showing that as one -- hold
12 on. We've got the invoice.

13 MR. SMITH: In the decision it says 122,400 and it
14 didn't include --

15 ALJ ANGEJA: Yes.

16 MR. SMITH: -- another \$10,000 invoice. I'm not sure
17 why. But we're down to 120,681.

18 ALJ ANGEJA: For this transaction.

19 MR. SMITH: For this transaction. And I kind of
20 misspoke earlier when I said -- when you asked about the
21 stuff that's not in dispute and I mentioned the credit item,
22 which is column 12(a) for 20,681. But there is also not in
23 dispute the difference in column 12(d) between the
24 133,398 --

25 ALJ ANGEJA: Yes.

1 MR. SMITH: -- total, less --

2 ALJ ANGEJA: Yeah. The 1 -- right.

3 MR. SMITH: Yeah.

4 ALJ ANGEJA: 133,398 minus this 120,681.

5 MR. SMITH: Yeah. And column 12(e) is the column that
6 we conceded, the 213.

7 ALJ ANGEJA: Gotcha. I'm sorry to do those types of
8 housekeeping matters, but I want to make sure I've got the
9 numbers right or I mess it up for everyone.

10 ALJ GEARY: Before we --

11 THE APPELLANT: Can I --

12 ALJ GEARY: Before we close, can we take a two-minute
13 recess so that I can talk to my co-panelists outside for
14 just a second?

15 ALJ ANGEJA: Sure. So we'll take a break for two
16 minutes.

17 (Recess taken.)

18 ALJ ANGEJA: So the -- what we discussed in private was
19 that you've raised an issue of interest relief based on
20 unreasonable delay, whether you know it or not. I can't
21 recall as I sit here if it was addressed in the DNR.

22 MS. HE: It was never raised in appeal.

23 ALJ ANGEJA: So it hasn't been --

24 MS. HE: Although he kept on saying --

25 ALJ ANGEJA: Right.

1 MS. HE: -- the interest was going up and it was taking
2 too long.

3 ALJ ANGEJA: And --

4 MS. HE: But he didn't specifically request interest
5 relief. So we didn't have an occasion to actually pull up
6 all the process and timeline or get a response from the
7 appropriate sections whether there was any delay.

8 ALJ ANGEJA: And as I was paying attention to the
9 argument and not delving down into that thought process, I
10 know there's been settlement. So generally -- usually a
11 settlement process can account for some of that time. That
12 doesn't mean there's not delay in a settlement process. So
13 if we don't -- and we don't have the facts in the record and
14 it hasn't been addressed to this point. So I'm inclined to
15 hold this open for additional briefing. I know we're
16 talking quick.

17 There's -- one of the statutory provisions allows
18 for relief of interest based on unreasonable error or delay
19 by the Department. You've implicitly raised that. If we
20 don't have it addressed, we're not going to be able to
21 address it after the fact. So we're going to hold this
22 record open so that the matter can be briefed. It would
23 help if I can -- I don't know how much time you may need, 15
24 days or 30 days. But if we can have you make an argument,
25 which you've essentially made here. I -- I don't feel

1 necessarily the need to have you tell me again that it took
2 eight years, because I understand that. What we would need
3 is basically I'll have them brief it and they effectively
4 account for the time where this appeal was from the time of
5 the audit until OTA took over. The test is essentially if
6 there's an unexplained absence of work being done, that
7 would be an unreasonable error. If there's a reason it took
8 the time that it took, that's not an unreasonable error. So
9 sometimes there's reasons for the length of time, but
10 neither party has addressed it and we would need facts to
11 examine that and give both parties an opportunity to argue
12 it.

13 I'm thinking in this case maybe we have them brief
14 it first and we give him the chance to respond is a more
15 effective, meaningful input for the taxpayer.

16 ALJ GEARY: I think, Mr. Wilhelm, your position, which
17 you stated a while ago, is that it's taken a long time and
18 at least implicit in that is that you think it's been an
19 unreasonably long time. Would that be a fair statement?

20 THE APPELLANT: That's fair to say, yes.

21 ALJ GEARY: And as Judge Angeja mentioned, there are
22 provisions that allow for a reduction of interest when there
23 is unreasonable delay by either the BOE, if they had the
24 case earlier, or CDTFA. I think that with his statement
25 here the Department has the ability to go back and find out

1 where this appeal was and give us a timeline. I think that
2 probably the Department should provide some type of a
3 factual statement and analysis first and then give the
4 appellant an opportunity to reply.

5 ALJ ANGEJA: So --

6 THE APPELLANT: Is that even possible if the BOE
7 doesn't exist anymore or...

8 ALJ ANGEJA: CDTFA.

9 THE APPELLANT: Oh, okay.

10 ALJ ANGEJA: They -- they merged and took over, so...

11 THE APPELLANT: So that whole thing changed and that
12 was --

13 ALJ ANGEJA: Effectively it's a name change.

14 THE APPELLANT: Okay.

15 ALJ ANGEJA: How much time do you think you need for
16 that? I'm going to -- I'd rather 15, you're going to tell
17 me 30. You might tell me more than 30.

18 MS. RENATI: 60.

19 MR. SMITH: Not more than 30, but certainly at least 15
20 days.

21 ALJ ANGEJA: All right. Let's go with -- can we go
22 with 30 days?

23 MR. SMITH: Okay.

24 ALJ ANGEJA: So what they'll do is they'll have a brief
25 with facts and an -- an outline of a timeline --

1 THE APPELLANT: Sure.

2 ALJ ANGEJA: -- and their argument and opinion as to
3 whether that was reasonable or unreasonable. We'll give you
4 up to 30 days to respond to that, and then we'll hold this
5 record open. We don't decide this case until we get your
6 response and then we will have -- I'll let you --

7 THE APPELLANT: Which is only applicable to the
8 interest. If we find that I'm not due the tax --

9 ALJ ANGEJA: That's true.

10 THE APPELLANT: -- then that's not really applicable,
11 right?

12 ALJ ANGEJA: That's true. That is correct.

13 ALJ GEARY: Yes. We can't wait for that. We will make
14 one -- issue one decision --

15 THE APPELLANT: Absent that. Okay.

16 ALJ GEARY: -- in this case. We have to --

17 THE APPELLANT: Okay. So you have to address the --

18 ALJ GEARY: We have to make the determination.

19 THE APPELLANT: -- interest issue first, regardless of
20 what the overall --

21 ALJ ANGEJA: Yes.

22 THE APPELLANT: -- outcome would be, not the other way
23 around. Okay.

24 ALJ ANGEJA: Because we -- if we were to decide against
25 you on the main issue, we won't have the ability to then --

1 THE APPELLANT: Gotcha. Fair enough.

2 ALJ ANGEJA: -- reopen it and re-entertain, so...

3 THE APPELLANT: Okay.

4 ALJ ANGEJA: So we'll do that. I'll issue an order to
5 memorialize that, but the clock's ticking. I'm saying now
6 you guys got 30 and you'll have 30 days to respond. I will
7 issue an order to close that record and that will set our
8 deadline within which to issue a decision, so...

9 Okay. Does anybody have any else -- anything
10 else?

11 ALJ GEARY: Nothing.

12 ALJ ANGEJA: Well, then the record's not closed. We're
13 holding it open for additional briefing, but that will
14 conclude the hearing. Thank you for coming.

15

16 (The proceedings concluded.)

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STATE OF CALIFORNIA)
) SS
COUNTY OF FRESNO)

I, Gracie E. Becerra, CSR No. 13136, a Certified Shorthand Reporter in and for the County of Fresno, State of California, do hereby certify:

I am the person who stenographically recorded the Business Tax Appeal Hearing held on July 18, 2019.

The foregoing transcript is a true record of said proceedings.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 5th day of August, 2019.

Gracie E. Becerra
CSR No. 13136