

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
NEWELL WINDOW FURNISHINGS, INC., ) OTA NO. 18124134  
)  
                                  ) APPELLANT.  
)  
\_\_\_\_\_)

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, November 19, 2019

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
400 R Street, Sacramento, California, 95811,  
commencing at 10:50 a.m. and concluding  
at 11:36 a.m. on Tuesday, November 19, 2019,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ JEFF ANGEJA

Panel Members: ALJ ALBERTO ROSAS  
ALJ SUZANNE BROWN

For the Appellant: CARLEY A. ROBERTS  
HUY "MIKE" LE

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
By: CHAD BACCHUS  
STEPHEN SMITH  
KEVIN HANKS

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I N D E X

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(Department's Exhibits were received at page 6.)

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1 Sacramento, California; Tuesday, November 19, 2019

2 10:50 a.m.

3

4 JUDGE ANGEJA: We are now on the record in the  
5 Office of Tax Appeals oral hearing, for the appeal of  
6 Newell Window Furnishings. The Case ID is 18124134.  
7 We're in Sacramento California. The date is Tuesday,  
8 November 19th, 2019, and the time is approximately 10:50.  
9 My name is Jeff Angeja. I am the lead Administrative Law  
10 Judge for this hearing. My fellow co-panelists today are  
11 Alberto Rosas and Suzanne Brown.

12 And, Appellant, can you please identify yourself  
13 for the record.

14 MS. ROBERTS: Carley Roberts with Pillsbury for  
15 Newell.

16 MR. LE: Mike Le with Pillsbury for Newell.

17 JUDGE ANGEJA: You'll have to speak more clearly  
18 into that microphone. Sorry.

19 MR. LE: Mike Le with Pillsbury for Newell.

20 JUDGE ANGEJA: It's not so much for our benefit,  
21 but so that we can have the court reporter get it.

22 Off the record.

23 (There was a pause in the proceedings.)

24 JUDGE ANGEJA: All right. We'll go back on the  
25 record.

1           So, CDTFA, could you introduce yourselves for the  
2     record.

3           MR. BACCHUS:  Chad Bacchus.

4           MR. SMITH:  Steven Smith.

5           MR. HANKS:  And Kevin Hanks.

6           JUDGE ANGEJA:  All right.  Thank you.

7           This appeal involves one procedural issue, which  
8     is:  Whether Appellant timely filed its appeal with the  
9     Office of Tax Appeals.

10          And during our prehearing conference, the parties  
11     agreed to the admission into evidence of Appellant's  
12     Exhibits 1 through 9 and CDTFA's Exhibits A and B.  Neither  
13     party had any objection at that time to the admission of  
14     those exhibits into the record.  Is that still the case?

15          MS. ROBERTS:  Yes.

16          JUDGE ANGEJA:  All right.  And hereby admit those  
17     exhibits into evidence.

18          (Appellant's Exhibits 1-9 were received  
19     in evidence by the Administrative Law Judge.)

20          (Department's Exhibits A-B were received in  
21     evidence by the Administrative Law Judge.)

22          And based on our prehearing conference, it's my  
23     understanding that neither party has any witnesses today.  
24     Is that still the case?

25          MS. ROBERTS:  That's correct.

1 MR. BACCHUS: Correct.

2 JUDGE ANGEJA: All right. And we had agreed that  
3 we would begin with Appellant's argument, which should not  
4 exceed 30 minutes, after which the panel of judges may ask  
5 questions. CDTFA would then make its presentation not to  
6 exceed 15 minutes, and the panelists could ask questions  
7 if they wish. And then we will allow Appellant a  
8 five-minute rebuttal.

9 And I think we're ready to begin. You guys --  
10 all parties here have done this before, so the less you  
11 hear from me and we jump right to it, the better we are.  
12 Go ahead and begin.

13 MS. ROBERTS: I have one housekeeping matter.

14 JUDGE ANGEJA: Oh, sure.

15 MS. ROBERTS: We brought a demonstrative with us  
16 today, and we've given opposing Counsel a copy of that  
17 demonstrative. We have copies for each of you as well,  
18 and I'll have it here on the easel. I think maybe the  
19 Department wants to put something in the record with  
20 regard to, you know, reliance on the facts. It's a  
21 timeline with all the facts in this particular case. But  
22 I'll turn it over to the Department if there's an  
23 objection.

24 JUDGE ANGEJA: You're offering it as an exhibit  
25 for factual or just for demonstrative --

1 MS. ROBERTS: Just demonstrate.  
2 JUDGE ANGEJA: -- for illustration for today's  
3 purposes. In other words, it's not even going into the  
4 evidentiary record.  
5 MS. ROBERTS: Correct.  
6 JUDGE ANGEJA: Any Objections --  
7 MR. BACCHUS: No. We don't object --  
8 JUDGE ANGEJA: On that basis?  
9 MR. BACCHUS: On that basis.  
10 JUDGE ANGEJA: Okay. That's fine.  
11 MS. ROBERTS: And if it's all right if I deliver  
12 my argument standing up?  
13 JUDGE ANGEJA: Sure.  
14 MR. ROBERTS: Okay.  
15 JUDGE ANGEJA: We try to be informal but --  
16 MS. ROBERTS: Judge Angeja, is it okay if I  
17 approach with three copies?  
18 JUDGE ANGEJA: Yes. I don't have a problem with  
19 that. Sure.  
20 MS. ROBERTS: Okay.

21

22 OPENING STATEMENT

23 MS. ROBERTS: And so good morning, Judge Angeja,  
24 Judge Brown, Judge Rosas. As noted, this is a  
25 single-issue case. The case has been bifurcated for



1 issues only dealing with the jurisdictional issue here of  
2 whether or not the OTA has jurisdiction to hear this  
3 appeal by Newell.

4 The Appellant's position is that, yes, this  
5 tribunal does have jurisdiction. And the reason that the  
6 OTA has jurisdiction is because there is ineffective  
7 service of notice by the Department in this matter. And  
8 that ineffective service has really two components. One,  
9 being there was ineffective service to the taxpayer  
10 itself, and there was also ineffective service to the  
11 taxpayer's representatives.

12 I think it's very helpful because this  
13 jurisdictional issue really centers around a discrete  
14 period of time to walk through the various facts. So this  
15 is why I have the demonstrative that I have put up and had  
16 handed out. I'd like to walk through that, if I could.

17 Can everybody hear me okay if I talk from here?  
18 Are you good?

19 JUDGE ANGEJA: Yes.

20 MS. ROBERTS: Okay. So the very first event that  
21 we have that takes place is actually in 2015. And this is  
22 when we had a POA that was executed by Newell's  
23 representatives at this time. There were two individuals  
24 listed on that POA. After that time, the next key date is  
25 when the BOE Form 82 was filed by the taxpayer. This is

1 the form that authorizes e-mail transmission of  
2 confidential taxpayer information that would authorize the  
3 Department to send notices by e-mail.

4 JUDGE ANGEJA: Let me stop you real quick. I've  
5 just been advised. It's for the video, where you're  
6 standing because this is live streamed, they can't see  
7 you. And is it the live stream mic that -- yeah. Online  
8 they won't hear you at all. So we can still hear you. It  
9 makes a presentation.

10 MS. ROBERTS: All right I can do this.

11 JUDGE ANGEJA: The million YouTube followers  
12 would not be happy at this point, but not to interrupt  
13 your presentation.

14 MS. ROBERTS: No worries. I got this. Is this  
15 better?

16 JUDGE ANGEJA: Is that still on camera? I don't  
17 have it pulled up. Sorry.

18 MS. ROBERTS: Okay. Got it. I'm going to stay  
19 right here.

20 All right. So you have a POA that's issued in  
21 2015. And then you have the BOE Form 82 on the electronic  
22 transition of data filed in November of 2017. The next  
23 key date is when the appeals conference -- original  
24 appeals conference was held, which was on  
25 January 4th, 2018. After that, you have the decision that

1 actually comes out, the original decision of  
2 recommendation that comes out on April 18th.

3 So you have the original decision that comes out  
4 on the 18th. And that decision at that time is sent by  
5 e-mail to the taxpayer, to the director of Newell, the tax  
6 record of Newell. And it was also sent by U.S. mail to  
7 both of the representatives that were listed in the power  
8 of attorney. The appeals conference attorney for that  
9 decision was Mr. Daniel Cho. At some point after  
10 April 18th, Mr. Cho leaves the Department. On May 18th  
11 the taxpayer files a timely petition for reconsideration.

12 And I'm going to skip a couple of these dates  
13 because I want to follow the train of the events here  
14 related to the notice. So the -- unbeknownst to the  
15 taxpayer, Mr. Cho had left, and a new attorney had been  
16 assigned at the appeals conference level who was the one  
17 who wrote the supplemental decision, Mr. Charles Potter.  
18 And, when Mr. Potter was done with that decision, he did  
19 not serve it by e-mail to the tax director, and he did not  
20 send it by U.S. mail or other permissible means of service  
21 to either of the representatives, both of the  
22 representatives in the power of attorney.

23 So a period of time goes by from the time the  
24 reconsideration is put in, May of 2018. And then on  
25 November 7th -- this is the date of the -- I'm sorry.

1 November 9th, 2018, this is when the supplemental decision  
2 is issued. The supplemental decision was not sent by  
3 e-mail to the taxpayer or the representatives. It was  
4 sent by U.S. mail to both of the representative at Newell  
5 and to only one of the two attorneys in the POA.

6 At that same time, Newell had undergone a  
7 reduction in workforce. That was in -- on December -- I'm  
8 sorry, October 31st, of 2018. This was not an expected  
9 rift. And, you know, everybody in the company was  
10 impacted, particularly in the tax Department. And only a  
11 week later Newell's tax Department, its offices were  
12 relocated somewhere else. By the time the decision -- the  
13 supplemental decision made it to the tax director at the  
14 new location -- because of course it went to the old  
15 location -- there had not been enough time to file the new  
16 updated address. Everything happened very quickly. And  
17 so the time that it gets to the tax director at Newell is  
18 on December 10th, 2018.

19 At that same time, the tax director immediately  
20 contacted the appeals conference officer, Mr. Potter, to  
21 let him know the situation. And there was nothing at that  
22 point in time that was shared by Mr. Potter along the  
23 lines of, you know, you still have time to file, or I'm  
24 sorry we didn't e-mail it to you. There was nothing along  
25 those lines. So Newell files its appeal with the OTA on

1 December 21st.

2 Now, there are a couple of other key dates on  
3 here that I didn't go over yet, but they mostly pertain to  
4 the two representatives that were representing Newell at  
5 the time. Because I know before, the two representatives  
6 both were -- at the POA, they were both sent by U.S. mail  
7 and served copies of the original decision. On the  
8 supplemental decision, for whatever reason, it was only  
9 sent to one of the two representatives. The  
10 representative that it went to was not in the office  
11 between the dates of November and December. He was  
12 tending to a very ill mother. So had it gone to both  
13 representatives, the other representative would have  
14 received it timely and would have been able to verify with  
15 Newell that an appeal needed to be filed.

16 One of the contentions that the Department brings  
17 up in its brief, is that Newell would have had an extra 10  
18 days because of the service rules in the regulations that  
19 state that if it's -- the notice is mailed by U.S. mail  
20 out of state, that there will be a 10-day extension of  
21 time. Unfortunately, that rule only exist in the OTA's  
22 final regulations. The regulations in effect in December  
23 were the emergency regulations, which did not have this  
24 rule for purposes of business tax appeals. There was only  
25 a rule for Franchise Tax Board appeals.

1           So even at the time, you know, had the tax  
2 director when they reached out -- when he reached out to  
3 the Department to tell the appeals officer, "Look, I just  
4 got this. Here are all these things that just happened."  
5 You know, even at that point, if there was some notion by  
6 the Department that there was still time, in fact, nine  
7 more days to be able to file an appeal, you would think  
8 that would have been communicated. And even though the  
9 rules didn't specify it, I'm confident my client would  
10 have filed an OTA protective appeal just because an  
11 attorney had instructed him to. But that never  
12 transpired. So we're left with the appeal date of  
13 December 21st.

14           As I noted, there were two ways there was  
15 ineffective service with the taxpayer as well as the  
16 representatives. With the taxpayer, we believe that  
17 there's ineffective service because the taxpayer had  
18 executed Form BOE-82. This form was filed in November of  
19 2017. And consistent with this filing, the original  
20 appeals officer sent the original decision by e-mail to  
21 the taxpayer.

22           With the supplemental decision, there seemed to  
23 have been a lack of awareness of the BOE Form 82. It is  
24 our contention that the regulation on point -- it is OTA  
25 Regulation 35002(i). It's the definition of mail. Mail

1 means by United States Postal Service and by other  
2 carriers and also means electronic transmission, such as  
3 e-mail. E-mail containing confidential taxpayer  
4 information will be sent by CDTFA only with the taxpayer's  
5 written consent.

6 It's a taxpayer's contention that this allows  
7 effective service by e-mail via BOE Form 82. The  
8 Department's unwillingness to acknowledge that the  
9 taxpayer's execution of this form requires e-mail  
10 transmission for all communications renders meaningless a  
11 portion of the regulation that defines mail to include  
12 e-mail.

13 Stated a different way, Regulation 35002  
14 subdivision (i) defines e-mail to include -- defines mail  
15 to include e-mail that the only way the Department will  
16 send a communication via e-mail is if the taxpayer  
17 executes Form BOE-82. But if the Department is permitted  
18 to ignore the existence of a properly executed Form BOE-82  
19 and claim mail by U.S. Postal Service constitutes  
20 effective service, then a regulatory definition of mail  
21 that includes electronic transmission is rendered  
22 meaningless.

23 The second way there was ineffective service goes  
24 back to the representatives through the POA. The power of  
25 attorney was executed in 2015. The representatives never

1 changed. At the conclusion of the appeals conference and  
2 when the issue -- the decision was issued in April of  
3 2018, the Hearing Officer sent the -- both  
4 representatives, by U.S. mail, a copy of the decision.

5 When the new appeals conference Hearing Officer  
6 sent the supplemental decision in November of 2018, only  
7 one of the representatives in the POA was served a copy by  
8 U.S. mail. The other representative was not served a  
9 copy. And for the reasons I noted before, that individual  
10 was dealing with a seriously ill mother and was not in the  
11 office.

12 A lot of times that's why we have two  
13 representatives on the POA is just for these instances  
14 where one attorney may be tied up, out, et cetera. It's  
15 always done to be able to prevent this type of situation.  
16 And, unfortunately, there was no service to the other  
17 representative in this case.

18 Finally, Newell contends that in the event that  
19 the OTA determines that there has been effective service,  
20 it contends that an equitable remedy is required under  
21 these circumstances.

22 This OTA when it was created in 2017 and the  
23 enacting legislation in addition, the amended legislation  
24 that followed on its heels, in Government Code  
25 Section 15672, it states that, "The Office of Tax Appeals



1 is the successor to and is vested with all of the duties,  
2 powers, and responsibilities of the State Board of  
3 Equalization necessary or appropriate to conduct appeals  
4 hearing."

5 There's a long line of BOE case law that allows  
6 for the BOE to have been capable of issuing equitable  
7 remedies. One of the best decisions on point is the  
8 appeal of Winkenbach. It's W-i-n-k-e-n-b-a-c-h. The case  
9 number is 75-SBE-081, dated December 16th, 1975. In  
10 relevant part it states, "It is our opinion that we are  
11 bound to apply judicially accepted doctrines."

12 The Board in this decision walked through early  
13 California case law where there were decisions that stated  
14 that administrative agencies that were created by statute,  
15 such as the OTA and, you know, many other tribunal-type  
16 boards and commissions that sit in California, that they  
17 were not allowed to handle anything that was for the  
18 judiciary, particularly constitutional issues. And that  
19 was kind of early up through the late 1950s.

20 And then jurisprudence came after that in the  
21 following decades that said, "No, the recognizing that  
22 these agencies exercise quasi-judicial -- adjudicatory or  
23 adjudicating power," acknowledging that the only real  
24 difference exist in the matter of jurisdictional review.

25 And what was meant there was that at a point in

1 time you had to file a separate complaint or separate  
2 declaration seeking equitable remedies. And that  
3 disappeared as a requirement, jurisdictionally. And as  
4 that disappeared, that was allowed for Boards like this  
5 and the Board of Equalization to be able to apply  
6 equitable remedies. In this case we believe equitable  
7 estoppel is applicable, as well as equitable tolling.

8 In appeal of Western Colorprint, Board of  
9 Equalization Decision 78-SBE-071, August 15th, 1978, the  
10 Board laid out four elements for the estoppel doctrine.  
11 The party to the estoppel must be apprised of the facts.  
12 Newell apprised the Department of the facts. The party  
13 must intend that his conduct shall be acted upon or must  
14 so act that the party asserting the estoppel has a right  
15 to believe it was so intended. By issuing the  
16 supplemental decision on that date in November, there was  
17 a clear indication that the statute of limitations began  
18 to run from November 7th.

19 The third requirement, the other party must be  
20 ignorant of the true stated facts. Newell was not aware  
21 of these facts until December 10th when it received the  
22 physical copy of the decision. The last element, the  
23 party must rely upon the conduct to his injury. So here  
24 is the detrimental reliance. There is a pattern of  
25 conduct by the Department by sending the e-mail with the

1 original decision, and that timely made it to the  
2 taxpayer. And despite the fact that there was a change in  
3 Hearing Officers, the second Hearing Officer should have  
4 known there was a BOE Form-82 on file and that there was a  
5 full anticipation by the taxpayer that it would also  
6 receive the supplemental decision by e-mail. So we have  
7 detrimental reliance, meaning, all four elements of  
8 estoppel.

9           With regard to equitable tolling, the best  
10 decision on point is the California Supreme Court  
11 Decision. It's McDonald versus Antelope Valley Community  
12 College District. That's 45 Cal. 4th 88. This decision  
13 is from 2008 stating, "Equitable tolling is a judicial  
14 created doctrine that operates independently upon -- sorry  
15 -- operated independently of codified statutes of  
16 limitations."

17           Under McDonald, equitable tolling is allowed  
18 unless the statute clearly states that is -- states list  
19 of tolling bases is exhausted. We do not have that here.  
20 There is nothing in the regulation that suggest there is  
21 an exhaustive list of what must be done in order to file  
22 within the 30 days of statute limitation.

23           Second, either a text of a statute or a manifest  
24 legislative policy underlines it, cannot be reconciled  
25 with permitting equitable tolling. We also have nothing

1 like that that applies to the regulation -- the  
2 regulations that apply to this case.

3 So in closing, Newell contends that there is  
4 ineffective service, both to the taxpayer and its  
5 representatives, and that in the event that the OTA finds  
6 that there was effective service, that it is entitled to  
7 equitable relief in this case. Thank you.

8 JUDGE ANGEJA: All right. Thank you.

9 And questions from my panel? No. All right.

10 CDTFA, you can begin your presentation.

11

12 OPENING STATEMENT

13 MR. BACCHUS: That facts before are not in  
14 dispute. The Appeals Bureau mailed its decision to  
15 Appellant and its representative on April 18th, 2018. And  
16 pursuant to a verbal request made at the appeals  
17 conference, the appeals attorney sends an electronic copy  
18 of the decision to Appellant's director of indirect tax,  
19 John Goss. Pursuant to Appellant's request for  
20 reconsideration of the decision, the Appeals Bureau mailed  
21 its supplemental decision to Appellant and to its  
22 representative on November 9th, 2018.

23 According to Appellant's opening brief, Mr. Goss'  
24 office was in the process of relocating at the time the  
25 supplemental decision was mailed, causing Mr. Goss not to

1 receive the supplemental decision until  
2 December 10th, 2018. The Appellant filed the appeal at  
3 issue with the Office of Tax Appeals 11 days later on  
4 December 21st, 2018. According to the Office of Tax  
5 Appeal's rules for tax appeals, found in Regulation  
6 30203(b) (1), a taxpayer has 30 days from the date of the  
7 Appeals Bureau's decision, including supplemental  
8 decisions, are mailed to file an appeal.

9           Accordingly, Appellant had until  
10 December 9th, 2018 to file its appeal. However, Appellant  
11 did not file its appeal until December 21st, 2018.  
12 Therefore, pursuant to regulation 30103(b), the appeal is  
13 not timely, and the Office of Tax Appeals does not have  
14 jurisdiction to hear the appeal. Appellant's argument  
15 that the Department failed to properly serve the  
16 supplemental decision ignores the law.

17           The Department's rules for tax appeals in  
18 Regulation 35004 state -- states that any notice given by  
19 the Appeals Bureau must be served in the manner prescribed  
20 by Revenue and Taxation Code Section 6486, which states  
21 that a notice of deficiency determination must be mailed  
22 to the taxpayer's address as it appears in the records of  
23 the Department.

24           Regulations 35006(e) and 35006(b) (d) state that  
25 the Appeals Bureau will mail a copy of its decision or

1 supplemental decision to the taxpayer. According to  
2 Regulation 35002(i), mail means mailing by the United  
3 States Postal Service and also means by electronic  
4 transmission, but only when a taxpayer has given written  
5 consent to transmit its confidential information  
6 electronically.

7           There's no dispute that the Appeals Bureau mailed  
8 the supplemental decision to Appellant's address on record  
9 with the Department, both to Appellant and to its  
10 designated representative. We note that the supplemental  
11 was only sent to Mr. Shaffer's attention, but we also note  
12 that both Mr. Shaffer and Mr. Levinson worked in the same  
13 office. It was the same address.

14           So our argument is that taxpayer's  
15 representative, PricewaterhouseCoopers, receives notice,  
16 given that it was addressed to the same office. And that,  
17 therefore, the mailing requirements of Section 6486 and  
18 Regulations 35002(i), 35004, and 35006 have been  
19 satisfied. While the Appeals Bureau did not send an  
20 electronic version of the supplemental decision, there's  
21 no record that Appellant requested that the supplemental  
22 decision be sent electronically, and Appellant does not  
23 argue that there was a separate request made.

24           We note that even Appellant had requested an  
25 electronic version of the supplemental decision, such a

1 request would not make service by mail invalid. Pursuant  
2 to the authorities already discussed, mailing a  
3 supplemental decision to a taxpayer's address of record is  
4 always sufficient for purposes of serving notice by the  
5 Appeals Bureau.

6 Likewise, the BOE 82 Form signed by Appellant  
7 only gives the Department authorization to send documents  
8 containing confidential taxpayer information  
9 electronically. It does not require that the Appeals  
10 Bureau or the Department send every document  
11 electronically. Accordingly, it's the Department's  
12 position that the appeal filed to the Office of Tax  
13 Appeals on December 21st, 2018, was late, and the Office  
14 of Tax Appeals must follow its rules. And its rules do  
15 not allow the acceptance of a late-filing appeal.

16 Regarding the argument about the equitable powers  
17 of the Board of Equalization and by -- and also the Office  
18 of Tax Appeals, the Board of Equalization did not possess  
19 equitable powers despite what they may have decided in  
20 some of their cases.

21 And that is all for our Department. Thank you.

22 JUDGE ANGEJA: I'll hold off on asking questions  
23 until after the rebuttal.

24 Appellant, would you like to take five minutes to  
25 rebut what they've said -- if you wish -- undisputed

1 facts. We don't need to hear the same thing again, but I  
2 want to give you the opportunity.

3

4

REBUTTAL STATEMENT

5 MS. ROBERTS: I have only two points that I'd  
6 like to raise, and I'll take them in reverse order. The  
7 Department argues that somehow there needs to be a request  
8 for electronic transmission, and that there wasn't such a  
9 request to send the supplemental decision. I would note  
10 that in Form 82, it specifically states that the  
11 authorization will remain in effect until rescinded in  
12 writing.

13 Everything on this form contains the case  
14 identification number, the correct taxpayer fee account  
15 number. There's no reason why the Appeals Hearing Officer  
16 would not have been aware of this form. In addition,  
17 there wasn't another hearing in which Mr. Goss could have  
18 made another request. The fact that he made a request and  
19 executed the form is what requires the communications to  
20 come by e-mail.

21 The second point is the Department's reliance on  
22 Rev and Tax Code 6486 with regard to how notice of -- how  
23 notice of determination should be served. I want to be  
24 clear that 6486 does not apply in this case. What  
25 authorizes taxpayers to be able to appeal an Appeals Board



1 decision, formally would have been called the decision and  
2 recommendation, is now in the Government Code at 15570.54.

3 This is a statute that authorizes taxpayers to  
4 appeal the Appeal Board's decisions to the OTA. And  
5 within the powers that are granted to the OTA with the  
6 tool making, the only law applicable to the notice  
7 requirements are going to be the regulate -- the  
8 regulations that have been promulgated by the CDTFA and  
9 OTA, which are consistent on the definitions of mail.

10 One last point. On last point, the Department  
11 makes the assertion that because the two representatives  
12 were in the same office, that even though it was only  
13 addressed to one of the representatives, that the other  
14 representative should be aware. I want to make sure that  
15 it's clear that this wasn't a small office. This was an  
16 office of PWC of approximately 200 individuals.

17 So the fact that something came in with  
18 somebody's name and went to somebody's desk, doesn't mean  
19 that someone was aware that it should be copied or given  
20 to another representative.

21 That concludes my rebuttal. Thank you.

22 JUDGE ANGEJA: All right. Questions from my  
23 co-panelists? Ms. Brown?

24 JUDGE BROWN: Not at the time.

25 JUDGE ROSAS: I do.

1 JUDGE ANGEJA: Okay. Go ahead.

2 JUDGE ROSAS: Just to Respondent, upon learning  
3 from Appellant that Respondent had failed to e-mail the  
4 supplemental decision, were there any follow-up measures  
5 that were available to Respondent for Respondent to take?

6 MR. BACCHUS: As far as -- you mean -- I'm not  
7 sure I understand the question. So after Mr. Goss  
8 contacted the appeals attorney, is that what you're  
9 referring to?

10 JUDGE ROSAS: Correct.

11 MR. BACCHUS: So the question -- I'm sorry. I'm  
12 trying to understand the question. The question is what  
13 could have been done at that point in time?

14 JUDGE ROSAS: Correct.

15 MR. BACCHUS: Nothing that would have -- I mean,  
16 he could have been sent a copy at that point, but I  
17 don't -- it wouldn't have mattered. Like, I don't --  
18 there's not really anything that could have happened at  
19 that point in time.

20 JUDGE ROSAS: Speaking generalities, I would like  
21 to get a sense of Respondent's practices and procedures.  
22 So generally speaking, in situations in which Respondent  
23 learns that an attempt -- a notice has failed, actually  
24 failed, what are the types of follow-up measures generally  
25 available to Respondent?

1           MR. BACCHUS:  When you say that attempted notice  
2   has failed, meaning that -- meaning what exactly?

3           JUDGE ROSAS:  Answer that however you wish, just  
4   notice failed for whatever reason.

5           MR. SMITH:  When we issue a notice in their  
6   address of record via U.S. Mail, we've served to notice,  
7   period.  We'll stop.

8           JUDGE ROSAS:  Let's say there's a situation where  
9   a taxpayer informs Respondent of a change of address, but  
10   Respondent's staff fails to send the notice to the new  
11   address and sends it to the old address, in that situation  
12   notice failed.  What are some of the follow-up measures  
13   that may be available to Respondent?

14          MR. BACCHUS:  At that point in time, once they  
15   are made aware of it, they would reissue the -- reissue,  
16   in this case, the supplemental decision, if they had sent  
17   it to a wrong address.  And assuming that the statute --  
18   that the timelines hadn't lapsed, then notice would be  
19   given as of the new date of the -- the date of the mailing  
20   to the correct address.

21          JUDGE ROSAS:  This question is going to be  
22   directed to both parties, follow up to what you just said.  
23   So under the facts and circumstances of this case, would  
24   it have been reasonable for Respondent to reissue the  
25   supplemental decision via e-mail and to both attorneys, in

1 fact, with a new date of issue? Why or why not?

2 And I'll direct first to Appellant.

3 MS. ROBERTS: Yes. When the Department was made  
4 aware on December 10th that this service had been  
5 effective at that point in time, the Department should  
6 have reissued the supplemental decision. And the reason  
7 they should have done that was because they were made  
8 aware of the failure to send by electronic transmission  
9 the decision, as well as the fact the decision was not  
10 sent to both representatives.

11 In both cases there was ineffective service.  
12 Similar to your example of, you know, taxpayer reports,  
13 the new address but somehow it gets overlooked and the  
14 notice goes to the old address. That would be  
15 ineffective. It's our position that the ineffective  
16 service with the lack of e-mail to the tax director of the  
17 company, as well as the lack of U.S. postal mail to both  
18 representatives made it ineffective. So when the  
19 Department was made aware on December 10th, it should have  
20 reissued the supplemental decision.

21 JUDGE ROSAS: Same question to Respondent.

22 MR. BACCHUS: In a situation, if we're talking  
23 about the situation, the Department's position is that  
24 service was effective. And so a new or a secondary notice  
25 of the supplemental decision would not have been -- there

1 would have been no need to mail it a second time.

2 JUDGE ROSAS: Thank you. One more question here.  
3 I know we've been discussing effective versus ineffective  
4 service. I'd like to ask both parties to discuss whether  
5 the manner in which the supplemental decision was served,  
6 whether that manner complied with procedural due process?  
7 Why or why not?

8 And I'll start with Appellant.

9 MS. ROBERTS: To make sure I'm clear on the  
10 question, the question is whether or not the Department  
11 followed the procedures for effective notice?

12 JUDGE ROSAS: I'm trying to take a step back from  
13 the discussion of effective versus ineffective and brought  
14 into scope in terms of procedure of due process. I'm  
15 trying to get a sense of whether there is a procedure and  
16 due process issue. Maybe not, but I'd like both parties  
17 to discuss.

18 MS. ROBERTS: So the procedural due process  
19 failure, to the taxpayer in this case, was that the -- the  
20 real problem here is that there was a change of Hearing  
21 Officer. And the second Hearing Officer was not diligent  
22 in looking to see what was done before with regard to the  
23 original service when it -- the original decision when it  
24 was served. The original decision was served properly in  
25 all ways. Procedural due process met.

1           On the supplemental decision, it's lacking in  
2           procedural due process because that same pattern of  
3           conduct was not followed for the second decision. The  
4           taxpayer relied on a form that they filed that allows and,  
5           you know, is saying to the Department, "I want all  
6           communications by e-mail." And there's no requirement by  
7           regulation that you have to make a continuing request or  
8           have to request a copy. You know, the fact that you're  
9           filing a form means you should be getting it by e-mail.

10           Does that mean that you can't also receive it by  
11           U.S. Postal Mail? No. I mean, if they want to send it  
12           both ways, that's fine. But in this case, it should have  
13           also been sent by e-mail, and I think that's the  
14           procedural due process. And then the second piece as well  
15           on the service upon the representatives, which is  
16           required. They had the power of attorney, and the power  
17           of attorney requires that the information be sent to the  
18           representative.

19           So by sending it to only one representative and  
20           not the other, now you have a procedural due process  
21           problem again, because it didn't go to both  
22           representatives, which would have prevented this problem  
23           as well.

24           JUDGE ROSAS: To Respondent.

25           MR. BACCHUS: The Department does not believe

1 any -- there were any problems with procedural due  
2 process. Again, the mailing requirements were satisfied.  
3 We'll restate the BOE or CDTFA 82 Form, while it does give  
4 authorization to the Department to send confidential  
5 information electronically, it does not require that every  
6 single communication with the taxpayer be sent  
7 electronically. There's no wording on that form that  
8 requires everything to be sent. It is a courtesy that the  
9 Department extends in situations where a taxpayer would  
10 like to receive their information, the documentation,  
11 their notices electronically.

12 As for the service to taxpayer's representative,  
13 their taxpayer's representative was PWC,  
14 PricewaterhouseCoopers, and they had two individuals  
15 listed on their power of attorney. And while the decision  
16 did send a courtesy copy to both representatives to their  
17 attention, the supplemental only sent it to the attention  
18 of only one of them, but again, at the same office. And  
19 if Mr. Shaffer was on an extended leave, we would expect  
20 that a firm such as PWC would know to direct any mail  
21 concerning a specific client to all parties involved at  
22 that office.

23 JUDGE ROSAS: No further questions.

24 JUDGE ANGEJA: Ms. Brown?

25 MS. BROWN: No. I don't think I have any

1 questions.

2 JUDGE ANGEJA: And I have no questions. If  
3 neither party have anything further to add, that will  
4 conclude this hearing.

5 MS. ROBERTS: May I make one rebuttal point?

6 JUDGE ANGEJA: Sure.

7 MS. ROBERTS: It's on the BOE Form-802 -- or 82.  
8 It's difficult for me to understand how a taxpayer or a  
9 taxpayer representative would fill out this form and not  
10 have an anticipation that everything moving forward in  
11 that case would come via e-mail. Having been someone who  
12 has practiced before the State Board of Equalization with  
13 sale and use tax case for over 20 years, anytime I have  
14 had this form filled out, which is a majority of my cases,  
15 I receive everything by e-mail. And I do not think that  
16 it's unusual that a taxpayer would rely on this type of  
17 form and believe that everything would be sent by e-mail.

18 JUDGE ANGEJA: Before I close it, I did have one  
19 actual question. And I think it's a minor point, but  
20 you're reminding me. CDTFA is not taking the position,  
21 although, I heard you say it. You are not -- are you  
22 still taking the position that a new BOE 82 Form has to be  
23 filled out with every SD&R; right?

24 MR. BACCHUS: No.

25 JUDGE ANGEJA: Because unlike a resell



1 certificate, it's valid until revoked?

2 MR. BACCHUS: Correct.

3 JUDGE ANGEJA: So not withstanding all of the  
4 arguments that we've heard, the one that they provided on  
5 11/27/17 would have been sufficient for any and all  
6 e-mails from here to eternity?

7 MR. BACCHUS: Correct.

8 JUDGE ANGEJA: Okay. I just wanted to nail that  
9 one shut. Okay. I have no other questions. If the  
10 parties are good, then at this point I'll close the record  
11 and conclude the hearing.

12 I want to thank each party for coming in today.  
13 Following this hearing, my co-panelists and I will discuss  
14 the evidence and argument, and we will issue a written  
15 opinion within 100 days.

16 Thank you everybody for coming, and that will do.

17 (Proceedings adjourned at 11:36 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 11th day of December, 2019.

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