

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
SULLY GREEN, INC.,) OTA NO. 18053172
)
APPELLANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Friday, January 24, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
12900 Park Plaza Dr., Cerritos, California, 90703,
commencing at 1:18 p.m. and concluding
at 3:42 p.m. on Friday, January 24, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ MICHAEL GEARY

Panel Members: ALJ ANDREW KWEE
ALJ RICHARD TAY

For the Appellant: RUSSELL L. DAVIS
NEIL SULLIVAN
KEVIN CAHILL

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION
By: CHAD BACCHUS
SCOTT CLAREMON
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits were received at page 12.)
(Department's Exhibits were received at page 16 and 97.)

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Neil Sullivan	24			
Kevin Cahill	52			

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1 Cerritos, California; Friday, January 24, 2020

2 1:18 p.m.

3

4 JUDGE GEARY: On the record.

5 Good afternoon. Everybody. We are here today at
6 OTA's hearing room in Cerritos, California to take
7 evidence and hear arguments in the appeal of Sully Green,
8 Inc., OTA Case Number 18053172. Today is
9 January 24th, 2020, and the time is approximately 1:18.

10 I am joined on the panel today by my colleagues,
11 Judges Kwee and Tay. And while as lead I will be doing
12 most of the talking, at least during these introductory
13 comments, we three will decide the issues with each of us
14 having an equal vote.

15 Our stenographer attempts to take down everything
16 that is said on the record. And to help us make a clear
17 record, I'm going to ask everyone to please speak clearly
18 and slowly. Do not speak while someone else is speaking.

19 And if something is said out loud in this room
20 while we're on the record, it will be included on the
21 transcript. So if you wish to have a private conversation
22 among yourselves or between representatives and the party,
23 I suggest you speak very quietly or ask to go off the
24 record or ask for a break to leave the room and have that
25 conversation.

1 Let's begin with the parties stating their
2 appearances. Who is here to represent the Appellant?

3 MR. DAVIS: My name is Russell Davis. I'm
4 attorney for Appellants.

5 JUDGE GEARY: Thank you, Mr. Davis. And who is
6 with you today?

7 MR. DAVIS: I have -- on behalf of the taxpayer,
8 I have Neil Sullivan to my right and to my left CPA Kevin
9 Cahill.

10 JUDGE GEARY: Thank you. Welcome, gentlemen.

11 And who is here to represent the California
12 Department of Tax and Fee Administration?

13 MR. BACCHUS: My name is Chad Bacchus. To my
14 left is Scott Claremon, and to his left is Jason Parker.

15 JUDGE GEARY: Thank you. Welcome, gentlemen.

16 All right. This is ab appeal from a decision and
17 recommendation and a subsequent supplemental decision
18 issued by Respondent, Department, denying in part
19 Appellant's petition for redetermination of a Notice of
20 Determination that was issued -- excuse me for a moment.

21 That was issued on October 11th, 2012 for the
22 period of January 16, 2009 through December 31st, 2011.
23 The Notice of Determination determined the liability of
24 \$71,221.65 in tax, accrued interest, and a 10 percent
25 negligent penalty, which penalty has since been deleted by

1 the Department.

2 The Notice of Determination was based on an
3 August 3rd, 2012, audit report that determined a
4 deficiency measure of \$829,490, consisting of two items:
5 Unreported taxable sales measured by \$1,514,488, and
6 unclaimed deductions for tax-paid purchases resold
7 measured by \$684,958.

8 It's my understanding that the over-arching issue
9 is whether Appellant is entitled to adjustments to the
10 measure of unreported taxable sales. We discussed this in
11 our prehearing conference, but included within that issue
12 are sub-issues which are identified. And Appellant's
13 contentions are as follows:

14 First, the Appellant contends that the Department
15 erred in classifying the custom wood shutters as fixtures.
16 The Appellant alleges that the shutter components are
17 materials which are incorporated into the real property,
18 losing their identity to become an integral and
19 inseparable part of the real property. On this basis,
20 Appellant alleges that it correctly paid tax on its cost
21 of the materials used to construct the shutters, and that
22 no additional tax is due.

23 To the extent the Department argues that
24 Appellant's position is contrary to the California Code of
25 Regulations Title 18, Section 1521, Appellant contends

1 that regulation is unconstitutionally vague.
2 Alternatively, and only in the event this panel is not
3 persuaded by Appellant's arguments just stated and
4 concludes that the shutters are fixtures, Appellant argues
5 that the credit allowed by the Department for tax-paid
6 purchases incorporated into the shutters is based on
7 erroneous assumptions and is incorrect.

8 Mr. Russell, let me ask you first. Have I fairly
9 stated the issues that you wish this panel to consider?

10 MR. DAVIS: Generally, yes, that's correct, Your
11 Honor, with an explanation on our behalf.

12 JUDGE GEARY: Let's have the explanation now so
13 that I can cover it.

14 MR. DAVIS: Okay. It would be part of my
15 opening. What you said is what has transpired so far.

16 JUDGE GEARY: Okay. Have I identified the issues
17 correctly?

18 MR. DAVIS: Yes. I see it as number one, a legal
19 issue in calculating the taxable measure. And if we're
20 wrong on that, we have objections to the calculations. So
21 I see that as two matters before us.

22 JUDGE GEARY: Okay. Department, from your
23 perspective, have I stated the issues as you understand
24 them to be?

25 MR. BACCHUS: Yes.

1 JUDGE GEARY: There was some suggestion in the
2 documents that I've reviewed -- we all have reviewed -- we
3 on the dais -- that the Appellant argues or has at least
4 argued in the past that it is entitled to some relief
5 based on reasonable reliance on written advice from the
6 Board. Is that an issue, Mr. Russell?

7 MR. DAVIS: I think not, Your Honor. We reported
8 a different way, and it was approved the way we reported
9 previously. I don't have something written other than it
10 was accepted. I have letters of acceptance of our method
11 of reporting.

12 JUDGE GEARY: Do you intend to cover that matter
13 in evidence or to argue that? Because if you do, it
14 should be identified up front as an issue in this case.

15 MR. DAVIS: It is an exhibit that we have listed,
16 Your Honor.

17 JUDGE GEARY: Are you arguing that your client
18 reasonably relied on prior written advice?

19 MR. DAVIS: I guess I'm having trouble with the
20 word "written advice". What we had is the audit was
21 approved and -- within the way we reported it. It was
22 accepted with no change. That may be considered. What we
23 certainly did rely on, and certainly verbal acceptance,
24 and the acceptance of the reporting of the tax returns.

25 JUDGE GEARY: There are provisions in the law

1 that include reliance on a prior audit. And if your
2 contention is that based upon written information
3 contained in that prior audit or prior audit work papers,
4 then I think I should probably include that as an issue we
5 will be covering.

6 Are you contending that there was action taken by
7 the Department in a prior audit, and not prior to the one
8 at issue, that your client reasonably relied upon to treat
9 his cost of materials the way he did in the current audit?

10 MR. DAVIS: There's a technicality, Your Honor.
11 I don't want to mislead the court. We -- it was one
12 corporation at -- when -- and became a different
13 corporation, a different company. So it may be that the
14 reliance by one corporation on advice given to the other
15 corporation, even though the shareholders were the same,
16 may not be acceptable as a defense of this.

17 But, nonetheless, what we have is a taxpayer in
18 the same business, and then a new business, a new
19 corporation which formed years later, and they just went
20 back and reported it the same way they did in the previous
21 years. I was notified. The Board of Equalization was
22 notified of the way it was reported. It was audited, and
23 there was a "no change".

24 JUDGE GEARY: I think that -- I think that I'm
25 going to indicate that you are presenting this as an

1 issue, reliance of prior written advice. You can make
2 your arguments and present whatever evidence you have in
3 support of that. Because there are circumstances where
4 there may be separate companies with some common
5 ownership -- some degree of common ownership where that
6 argument can find support in evidence.

7 So I'm going to include that as an issue we're
8 covering in this hearing. My recollection is it was
9 covered in one of the decisions within the Department
10 level. We'll include it as an issue here, and you can
11 present whatever evidence and arguments you have.

12 Let's talk about the evidence. The Appellant has
13 offered 30 exhibits that number approximately 242 pages.
14 Those exhibits have been marked 1 through 34 for
15 identification, and they are included in the hearing
16 binder, a digital version of which has been supplied to
17 the parties. I believe my prehearing conference order
18 required parties to state objections to proffered evidence
19 several days ago. I don't have any record of having
20 received any objections.

21 Department, do you have any objections to the 30
22 exhibits that Appellant has offered?

23 MR. BACCHUS: No, we do not.

24 JUDGE GEARY: Those 30 exhibits are admitted.

25 ///

1 (Appellant's Exhibits 1-34 were received
2 in evidence by the Administrative Law Judge.)

3 JUDGE GEARY: The Department -- well, before I
4 get to the Department, Appellant also indicated, during
5 the prehearing conference, that he was going to call two
6 witnesses. And those are the two gentleman he identified
7 who are with him at the table. Do you still intend to
8 call those witnesses?

9 MR. DAVIS: Yes, Your Honor.

10 JUDGE GEARY: All right. Did you have any
11 physical evidence today that is not covered within the
12 exhibits now admitted, 1 through 30? Do you have any
13 other physical evidence that you brought with you today
14 that you want to have offered into evidence?

15 MR. DAVIS: Yes, Your Honor. Whether it's
16 offered into evidence or not, they are panel shutters to
17 illustrate to the panel what we're talking about. But I'm
18 not sure how they're offered into evidence, but it would
19 be helpful for understanding of the issues.

20 JUDGE GEARY: I -- it's been suggested that we
21 can take a photo of it. However, it sounds to me like you
22 want to use this as demonstrable evidence.

23 MR. DAVIS: Yes, Your Honor.

24 JUDGE GEARY: I don't intend to carry a shutter
25 back with me to Sacramento, and I don't think I need to.

1 MR. SULLIVAN: It's small. It'll fit into your
2 car.

3 JUDGE GEARY: Yeah. I'm not driving to
4 Sacramento.

5 Why don't we hold off on whether we're going to
6 admit anything connected with that. We'll see how you use
7 it. You're going to use it during your examination of
8 your witnesses. Let's wait and see. I doubt seriously
9 we'll need to have it admitted, but my colleague and I
10 will confer, and we'll decide how to -- whether it should
11 be admitted a little later in the proceeding. Do you have
12 any evidence today we've not already discussed?

13 MR. DAVIS: I do not.

14 JUDGE GEARY: All right. Turning to the
15 Department. The Department has offered five exhibits that
16 have been marked Exhibits A through E for identification.
17 Exhibits A through D number approximately 114 pages. But
18 Exhibit E are the audit or is the audit work papers, which
19 can sometimes number in the thousands. And frankly, I did
20 not count the number of pages in that exhibit, and I don't
21 intend to.

22 Again, copies of those exhibits were included in
23 the digital hearing binder that was provided to the
24 parties. And asked Mr. Russell to state objections to any
25 of those proffered exhibits several days -- by several

1 days ago. I think it was June 21st.

2 Mr. Russell, do you have any objection to the
3 admission of the Department's proffered Exhibits A through
4 E?

5 MR. DAVIS: Are those exhibits that were just
6 offered within the last week or so?

7 JUDGE GEARY: They were all -- well, they were
8 offered during the briefing phase, and we included them in
9 the binder that we talked about in our prehearing
10 conference. And that would have been -- you should have
11 received an e-mail that told you the binder was available
12 for download at a website. I'm not sure whether you did
13 that, but it was there of all the documents you and your
14 clients have seen.

15 MR. DAVIS: I did not receive such an e-mail with
16 a binder. I did put in a call to Claudia Lopez asking
17 where it was. I did not get a call back.

18 JUDGE GEARY: Okay. Department, did you get an
19 e-mail about a download?

20 MR. BACCHUS: We did last Friday.

21 JUDGE GEARY: Was it -- can you tell me
22 whether -- can you call it up and tell me whether
23 Mr. Davis' e-mail was listed on there? Usually, they send
24 them to everybody together. Let me look and see what I
25 have. I might actually be able to pull it up. And it's

1 -- even if we pull it up and find that you're listed,
2 that's not going to resolve our problem of making sure you
3 have copies.

4 JUDGE KWEE: So that's ataxdoc@aol.com for
5 Mr. Russell Davis?

6 MR. DAVIS: Say it again?

7 JUDGE KWEE: The e-mail address that it was sent
8 to is ata --

9 MR. DAVIS: No. It's ataxdo is my --
10 ataxdoc@aol.com.

11 JUDGE KWEE: Yes.

12 JUDGE GEARY: That's where it was sent.

13 MR. DAVIS: Oh, it was. I think that I'm not
14 going to have an objection.

15 JUDGE GEARY: Okay. Do want me -- you don't have
16 a computer with you, do you?

17 MR. DAVIS: I do not.

18 JUDGE GEARY: Okay. Then I'm not going to bother
19 sending you that. It wouldn't do you any good for me to
20 send you a copy now, would it? Okay.

21 MR. DAVIS: Maybe when it was sent it went into
22 spam, and I missed the information.

23 JUDGE GEARY: Possibly. All right. No objection
24 you've indicated. Those documents are also admitted.

25 ///

1 (Department's Exhibits A-E were received in
2 evidence by the Administrative Law Judge.)

3 JUDGE GEARY: Let me get back to where I was.
4 Does the Department have any other physical evidence today
5 that was not included within its Exhibits A through E?

6 MR. BACCHUS: We do not. We're trying to figure
7 out what the -- what the new issue of reliance on the
8 prior audit. Just trying to make sure that some evidence
9 that we do have was included in whether it's Appellant's
10 evidence or our evidence. So we just want to make sure
11 that we have evidence to submit or to present on today.

12 JUDGE GEARY: Can we -- let's do this. You can
13 do whatever you need to do to make that determination, and
14 at the end of the today's proceedings if you -- because
15 it's sort of somewhat of a new issue. Because from my
16 perspective it wasn't clearly identified by Mr. Russell in
17 his briefing, but I saw that it was discussed in the
18 decisions issued at the Department level. And I thought I
19 and my colleagues decided we need to clarify.

20 And it may be that Mr. Russell at the end of the
21 day will not be representing the argument in the sense
22 that I understand it, but I will leave it open for the
23 Department. In the interim, it can look through whatever
24 documents it has. I can listen to Mr. Russell's argument,
25 determine what documents he makes reference to. And if

1 the Department needs some additional time to make sure
2 that it has submitted all the documents it wishes to
3 submit to address that issue, we will give additional
4 time.

5 MR. BACCHUS: Okay. Thank you.

6 JUDGE GEARY: Does the Department have any
7 other -- other than that -- any additional documents that
8 you have today that you wish to offer into evidence?

9 MR. BACCHUS: No, we do.

10 JUDGE GEARY: And does the Department have any
11 live witnesses?

12 MR. BACCHUS: We do not.

13 JUDGE GEARY: All right. Because the Appellant
14 plans to call two live witnesses, I typically allow an
15 opening statement and I believe I told the parties during
16 our prehearing conference that I typically allow short
17 opening statements for the sole purpose of outlying those
18 witness' testimony very briefly and to the extent
19 necessary making reference, perhaps, to the physical
20 evidence that the witnesses plan to make reference to.

21 It's not mandatory. Mr. Russell, we are all
22 lawyers up here on the dais. We are all familiar with the
23 files. Don't feel you have to give us a guide, but if you
24 want to, I'll allow it. Did you want to give an opening
25 statement?

1 MR. DAVIS: I would, Your Honor.

2 JUDGE GEARY: All right. And let's keep it
3 brief, less than ten minutes, certainly. And Department
4 I'll give you an opportunity when he's done, should you
5 want to make one.

6 Go ahead, Mr. Russell [sic].

7 MR. DAVIS: Thank you, Your Honor.

8

9 OPENING STATEMENT

10 MR. DAVIS: Basically, again, my client's
11 business is manufacturing shutters. And distinctly from
12 most other shutter companies, this shutter company makes
13 their shutters from scratch. They buy the raw lumber.
14 They buy whatever is needed to piece these pieces together
15 and make a shutter custom to the measurements of each
16 customer. The majority -- overwhelming majority of almost
17 all other shutters companies buy the fabricated boxes and
18 install them.

19 So I bring that up only to understand that
20 there's a distinction in the way they're taxed. Prior to
21 this company being formed, there was another company
22 formed in 1991 called Sullivan Shutters owned by the same
23 principal, Bob Sullivan. The Bob Sullivan is now
24 deceased. The gentleman to my right is Neil Sullivan who
25 is a son who has taken over the businesses.

1 When the company first came out, they reported
2 tax differently. The taxes at that time the way to
3 calculate the taxable measure, according to the code, is
4 if a contractor is a manufacturer of the fixture, the
5 taxable measure is based upon core of the cost price,
6 which is sold to other contractors.

7 When they had an audit back in the early '90s,
8 '93, '94, '95, that's how they arrived at the taxable
9 measure because they sold to other contractors at the
10 time. Since that time, the company got bigger, and they
11 no longer were selling to other contractors. So it had to
12 be a new way to determine the cost price for the taxable
13 measure.

14 And what happened is they were audited in 2001,
15 '02, and '03, and the auditor then -- it was a very
16 complicated calculation doing it the old way. And the
17 discussion with the auditor, who was Wayne Lovett, agreed
18 that they could calculate the tax of the taxable measure
19 if the tax were prepaid.

20 In other words, they went out and bought all the
21 lumber. They bought it out of state. They paid a use
22 tax. They bought -- everything they did was tax prepaid;
23 all the tax was paid. And it was then reported that way.
24 In 1999 is when they changed their method of reporting,
25 sent a letter to the Board of Equalization, that said

1 we're changing our format. This is how we're going to do
2 it.

3 Now, they were then audited for the few years
4 after that, 2001, '02, and '03, and the auditor accepted
5 it. It went to the district principal, Carl Herth who was
6 in Riverside, and he accepted it. It was all accepted.
7 This was the method of doing it. It was agreed with the
8 auditor. He was delighted it could be done this way
9 because it was so complicated to go in and try and find
10 out what portion of the contract price or the cost price.

11 They tend to do all sorts of allocation and
12 remove certain portions and add other portions. Very --
13 he was delighted to have this method of reporting the
14 taxable measure. Now, we have a new corporation. Bob
15 Sullivan, head of the company, relied on the way it was
16 all agreed beforehand and reports it the same way. Always
17 paid taxes to the source and reported it that way. Now,
18 we have new people coming in and saying you can't do it
19 that way.

20 He says I don't understand, the law hasn't
21 changed. What's changed is there are new principals in
22 the Board of Equalization who interpret it differently.
23 So anyway, that's part of the dispute. And even so --
24 even so we go back and we look at the law, and we find
25 that this is the proper method under the law. I don't

1 think the regulations are unconstitutional because they're
2 vague.

3 What I did beforehand is in the 90s before we
4 changed, I phoned the legal Department of the Board of
5 Equalization and I ran it by them. I got opinions from
6 two attorneys there that say this was the proper way to
7 report it. The regulation that talks about the difference
8 between materials and fixtures and when they talked about
9 shutters being fixtures, he specifically told me, he said
10 the reason that regulation was written is because it was
11 pursuant to a ruling request by a company that fabricated
12 shutters, and they provided that ruling.

13 And the shutters -- that ruling applied to
14 shutters that were fabricated and sold. That wasn't our
15 case. I got the stamp of approval from the attorneys from
16 the legal Department. I do have their names, and that's
17 the advice I gave the client that this is what the Board
18 of Equalization says is proper. So this is how it was
19 reported.

20 Now, the second issue. Now, everything is
21 properly reported, according to our position. If the
22 court agrees that the reporting was proper as we show,
23 then there is no further tax due. If perhaps the court
24 says it is not the proper way, then we have to go in and
25 do all the calculations of what part of the cost of the

1 shutter is deemed for purposes of determining taxable
2 measure. Installation is taken out.

3 And then the -- there were all sorts of changes
4 by the agent in his position with one thing he did do. He
5 says okay. If you put your shutter on a doorway,
6 regulation say that's a door, and a door is a material.
7 We won't tax that. But if the shutter is put where a
8 window is, that's subject to a tax.

9 We can't -- we have a hard time seeing the
10 distinction. A shutter is a shutter. What we did is the
11 client, they just manufactured the shutters from raw
12 materials, took them out, everyone is a custom shutter,
13 affixed to the real estate. The way we read the law; this
14 is a material that is affixed to the real estate. Before
15 it gets affixed, it isn't a shutter. It only becomes a
16 shutter when the component parts are put together on the
17 real estate.

18 And I will have my first witness -- excuse my
19 voice. Sorry. Mr. Sullivan will testify about the
20 process of the manufacturing. And I will have Mr. Cahill,
21 who's been representing the company for well over 15 years
22 and the prior company and can testify about the
23 calculations.

24 Thank you very much, Your Honor.

25 JUDGE GEARY: Thank you, Mr. Davis.

1 Does the Department wish to make an opening
2 statement?

3 MR. BACCHUS: No, we do not.

4 JUDGE GEARY: All right. For the purposes of
5 giving testimony, we don't have -- because our
6 stenographer is occupying what may sometime in the future
7 be the witness's chair, your witnesses will testify from
8 the table. We have one microphone. So what I'm going to
9 do is administer an oath or affirmation to both of these
10 gentlemen.

11 And then we can just put the microphone somewhere
12 between you and your witness, so that we can pick up both
13 voices. And if you speak loudly enough, it'll be okay
14 probably.

15 And who are you going to call first?

16 MR. DAVIS: I'm going to call Mr. Sullivan, Neil
17 Sullivan.

18 JUDGE GEARY: All right. Let's have both
19 gentlemen please stand and raise your right hand.

20

21 NEIL SULLIVAN,
22 produced as a witness, and having been first duly sworn by
23 the Administrative Law Judge, was examined and testified
24 as follows:

25

KEVIN CAHILL,

1 produced as a witness, and having been first duly sworn by
2 the Administrative Law Judge, was examined and testified
3 as follows:

4

5 JUDGE GEARY: Thank you. You may sit.

6 And Mr. Davis, you may begin when you're ready.

7 MR. DAVIS: Thank you.

8

9

DIRECT EXAMINATION

10 BY MR. DAVIS:

11 Q Would you state your name for the record, please?

12 A Neil Sullivan.

13 Q And Mr. Sullivan, what is your connection with
14 the Appellant?

15 A I'm the -- well, I run the company. I'm the
16 owner of the business.

17 Q And are you the sole owner?

18 A No.

19 Q Okay. What's the name of your company?

20 A Sully Green, Inc.

21 Q And was your father an owner of that company as
22 well?

23 A Yes.

24 Q And where is your father today?

25 A He's deceased.

1 Q When did he die?

2 A February of 2017.

3 Q Are you familiar with the manufacturing process
4 of the shutters?

5 A Yes, I am.

6 Q When were you first involved with Sully Green?

7 A Sully Green started in 2008, but I was involved
8 in the previous corporation, Sullivan Group. And I
9 started in 1995 in October.

10 Q Is there any difference between the manufacturing
11 process of Sully Green and Sullivan Shutters?

12 A No, there's not.

13 Q Okay. Can you describe the manufacturing process
14 of the shutter?

15 A Yes. So all of our -- we buy all of our lumber
16 out of state, Wisconsin. And it's trucked in via
17 truckload. It's all -- it comes in as all raw lumber.
18 We've got varying board widths, thicknesses, different
19 stock types, whatever you want to call it. It's across --
20 it's all across the board as far as how the lumber comes
21 in. So it's completely raw material.

22 When it arrives in our shop, we stick dry and so
23 it acclimates to the desert for usually about four to five
24 weeks. And then at that point, we bring it into the
25 factory. We start the milling process where we mill

1 louvers, stiles, rails, frames, the main component parts
2 that make up the shutter.

3 Q Well, let's start right there. If we can bring
4 your shutter here and explain what the various parts of
5 the shutter are?

6 A So this is -- this is a typical shutter. In
7 fact, I made this in our shop yesterday.

8 Q And what are the various parts?

9 A This is -- these are the louvers here. Okay. So
10 this makes up the operable part of the shutter, and it can
11 close. This cross section here is called a rail. There
12 is one at the top and one at the bottom. These vertical
13 sections here on the side, they are called styles. And,
14 of course, this outside perimeter frame is the actual
15 framework of the shutter that's actually attached to the
16 wall.

17 Here we've got a latch. So this allows the
18 shutter to be locked. And then you can see here, if I
19 open this up, it's got a catch and a strike here. And up
20 here it hinges that attach the shutter to the frame. So
21 that's basically what we have here is a shutter there.

22 JUDGE GEARY: Mr. Sullivan, spell stiles for me.

23 MR. SULLIVAN: It's s-t-i-l-e-s. Stiles are used
24 in the construction of doors also. Is the exact same.
25 Every door in the world is manufactured with stiles and

1 rails just like the shutters are.

2 BY MR. DAVIS:

3 Q And when you purchase wood, do you purchase all
4 the same kind of wood?

5 A Yes. There are different -- the same species but
6 different grades.

7 Q And why do you have different grades?

8 A It depends on what we're going to use the
9 material for and what's available.

10 Q Well, do you use different grades in a shutter?

11 A Yes.

12 Q What are those grades?

13 A Select and better, 1A common and 2A common.

14 Q What would you use those for?

15 A We try to use the best material we can find
16 typically for the frames because that's kind of the part
17 that need to be -- it's kind of the face of the shutter.

18 Q Okay. How about for the louvers?

19 A Louvers are finger joined, which I can show you
20 on the panel. Usually we'll use a lesser expensive stock
21 for that.

22 Q So is there any difference when -- in the use of
23 the wood in terms of waste when you cut the wood?

24 A I mean, I think there's more waste with the
25 frames.

1 Q Okay.

2 A Yeah.

3 Q Would you explain the process then if someone is
4 ordering a shutter?

5 A Yeah. We would send a salesperson out to the
6 house. They would take field measurements, bring those
7 field measurements back to the shop. We have a software
8 that we use. It produces cut sheets for all the various
9 parts that I just showed you, the stiles and various
10 rails, frames.

11 That goes out into the shop to the different
12 departments. Those departments get the cut sheets, and
13 they cut those parts to order. And then they are
14 assembled. Components are assembled together and
15 fabricated like this. And the frames are prepared, and
16 everything is painted and sent out to the field for
17 installation.

18 Q When it goes out in the field for installation,
19 is it a completed shutter?

20 A The shutters are complete. The frames are not --
21 they're not -- typically they are not mitered up yet.
22 They are not put together.

23 THE STENOGRAPHER: I'm sorry. You said not what?

24 MR. SULLIVAN: No mitered.

25 THE STENOGRAPHER: Mitered?

1 MR. SULLIVAN: Yeah. M-i-t-e-r.

2 THE STENOGRAPHER: Thank you.

3 BY MR. DAVIS:

4 Q So when it arrives at the location of the
5 residence, you said -- is that -- is any of the piece a
6 completed shutter?

7 A Yes. I mean, the panel has been put together in
8 the shop so that it has time to cure. The frame is put
9 together in the field. So the installer will take the
10 measurements of the window to make sure he has an exact
11 fit. And then he'll prepare the frame to fit the
12 specifics of the window and then put the shutter panel.

13 Q So it's not a full shutter until it's affixed to
14 the real estate?

15 A Correct.

16 JUDGE GEARY: Mr. Sullivan, pardon me for
17 interrupting. So the rails, stiles, and louvers are
18 assembled, but the frame is not?

19 MR. SULLIVAN: The frame not.

20 JUDGE GEARY: Okay. Is any -- are any of the
21 materials painted?

22 MR. SULLIVAN: Everything is painted. They are
23 all -- they're all painted together so they will --

24 JUDGE GEARY: All right. I'm sorry, Mr. Davis.

25 MR. SULLIVAN: There's -- there is one note

1 though that I probably should make. When they're -- when
2 they are in the shop, they're -- you know, they will
3 typically paint everything together. So the frames
4 will -- they'll -- they'll drop the frames in. We call it
5 dropping the frames in around the panels they are going to
6 go in. So we make sure that we've got enough frame stock
7 to accommodate whatever the window is going to be.

8 So they are just moving overage there, and then
9 they are painted all in succession with each other.
10 Because what we have found over the years is if the frames
11 and the panels are not painted together, different groups
12 of paints will be slightly different from each other.

13 So you could have -- if you paint all the frames
14 in one run, and you paint all the panels in the next run,
15 if the paint aren't boxed together, you'll get a slightly
16 different color. So they have to be -- the panels and the
17 frames have to be together in the shop in order to, you
18 know, do it.

19 BY MR. DAVIS:

20 Q Do you sometimes put shutters, windows, and
21 doors?

22 A Yes, all the time.

23 Q Why would a shutter be placed on a door?

24 A They go in front of sliding doors. We mount them
25 on French doors, closet doors, laundry doors. They

1 sometimes act as doors going into bathrooms or different
2 rooms.

3 Q And you're aware how the audit has calculated or
4 determined the taxable -- how do I say it -- whether the
5 shuttered door is included for the sales tax?

6 A Yes.

7 Q What do they include?

8 A From what I understand, the doors are classified
9 strictly as materials only. And the shutters are -- if a
10 shutter is -- let me clarify. If a shutter is installed
11 over a door, it's classified as a material. If a shutter
12 is installed over a window, the frames are material but
13 the shutter panel, which is the louvers, stiles, and rails
14 are classified as fixture.

15 If we had -- you know, if I took this shutter and
16 there was a window here and a door there, and I mounted
17 this onto a door, it will be considered material. If
18 there's a window next to it -- and I manufacturer the
19 shutter the exact same way that I manufacture this one --
20 that would be considered a fixture. But only the shutter
21 mount, not the frame.

22 Q When you say it's considered that way, who
23 considers it that way?

24 A Well, that's -- that was the audit.

25 Q Pardon?

1 A The audit.

2 Q Are you aware of how the audit was handled
3 previously in the Sullivan shutter company?

4 A Yes.

5 Q How was it handled there?

6 JUDGE GEARY: Before you answer that question,
7 let me ask you something by way of foundation. Are you
8 aware of it because you participated in it, or are you
9 aware of it because of conversations you've had with
10 Mr. Davis? Just with those two choices, which one?

11 MR. SULLIVAN: I was there. I came on board. I
12 was 26 years old in October of 1995. Our first audit with
13 Wayne Lovett was in 1997. So I was there. And I was a
14 part of it because during that time I was doing sales. So
15 I was -- there was a desk setup in the main office and,
16 you know, Wayne was here with us for probably two months.
17 He was kind of a fixture there for quite a while.

18 JUDGE GEARY: If you're testifying from anything
19 other than personal knowledge having participated let us
20 know. Let us know so that we can incorporate that into
21 our analysis of the facts you're testifying to. Okay?

22 MR. SULLIVAN: Okay.

23 JUDGE GEARY: Great.

24 MR. DAVIS: Your Honor, I'm not going into depth
25 in that because I have Mr. Cahill who was the one who

1 handled that audit.

2 JUDGE GEARY: Okay. Thank you.

3 MR. DAVIS: Thank you for that. I want to cover
4 one other thing with Mr. Sullivan.

5 BY MR. DAVIS:

6 Q Once these shutters are affixed to the real
7 estate, can they be easily removed?

8 A No, it can't.

9 Q What would happen if you tried to remove a
10 shutter from a residence?

11 A You'd have drywall damage, paint damage, a mess
12 basically. It would require at least two other trades,
13 maybe a drywall repair person and a painter to come in and
14 repair whatever was left behind. The shutters are -- they
15 are either nailed into the wall, screwed into the wall via
16 the frame. And they are always caulked in on the outside
17 perimeter and the inside perimeter.

18 We do that on every single window to prevent air
19 leakage. So in order to remove them -- I mean, even for
20 our guys, if they have to remove something for whatever
21 reason, it's not an easy process. I mean, they are
22 installed with the intent that they're not coming out
23 ever.

24 Q Are you familiar with the installation of
25 venetian blinds?

1 A Yes.

2 Q Would you explain that, please?

3 A They use a -- they have a metal rail across the
4 top typically. And they have these little clips that are
5 single screw clips, and you just clip into the clip.

6 Q Once a venetian blind is affixed or installed,
7 can those be removed?

8 A Yes. Without any tools or anything.

9 Q Can they be removed without any damage to the
10 property?

11 A Yes, they can, except the clips. The clips would
12 leave a single -- a single hole where each clip was taken
13 out.

14 Q Are you familiar with other shutter companies?

15 A Yes.

16 Q Yeah. Throughout the State of California?

17 A Hm-hm.

18 Q How do most of the other shutter companies
19 operate?

20 A There are very few -- at least in Southern
21 California that actually manufacture their shutters from
22 scratch. There is one in Colton called Avalon Shutters.
23 There's us. I think there was one -- there's one in San
24 Diego. And there was one recently in L.A. called Danmer
25 that recently filed for bankruptcy.

1 And what distinguished us from, you know, us,
2 Avalon, and Danmer from everybody else, is we actually
3 mold all of our parts. So these louvres that I was
4 showing you earlier, this little profile, these stiles,
5 and these rails, these are actually molded in a Weinig
6 Moulder.

7 THE STENOGRAPHER: I'm sorry. In a what moulder?

8 MR. SULLIVAN: It's a Weinig, W-e-i-n-i-g,
9 Weinig.

10 THE STENOGRAPHER: Thank you.

11 MR. SULLIVAN. And if we have these massive heads
12 that are about 10 inches long. We put these knives in the
13 heads. And then the knives that are in the heads
14 duplicate these shapes just like when you see, like, base
15 molding and crown molding, and things like that. Those
16 are all done in a molder, and that's how we're able to get
17 those shapes. We have the machine that machines those
18 parts for us.

19 So the reason that's -- what's interesting about
20 it is most companies that sell shutters are either buying
21 them from out of the country. They are buying them from
22 out of state, or they are buying those premolded parts
23 already molded. So they are buying them from a lumber
24 company or somebody else who has got a molder, a Weinig
25 Moulder.

1 And they are molding those parts for that
2 company, and that company is making those parts. They are
3 buying units of those parts. They are cutting those parts
4 into the sizes that they need, and then assembling those
5 parts and then installing the shutters. And in that
6 case -- in my mind anyway -- you know, that's somebody who
7 is fabricating a shutter.

8 You know, for us, we're taking it even a step
9 beyond that where we're actually doing all that stuff
10 in-house. We're actually manufacturing it right from
11 scratch, right from the raw lumber.

12 JUDGE GEARY: Did you say that all of the parts
13 of the panel are molded or just the louvers?

14 MR. SULLIVAN: All the parts of the panel.
15 Everything. Yeah. Every wood component that goes into
16 our shutters, including the dowels, which we can't see
17 here. But there are dowels that make the joinery of the
18 panel. We actually make all of our own dowels too.

19 MR. DAVIS: I have no further questions of this
20 witness.

21 JUDGE GEARY: Department, do you have any
22 questions of the witness?

23 MR. BACCHUS: We do not.

24 JUDGE KWEE: Yes. I'm curious about the
25 relationship between the prior entity and this entity, at

1 least in relation to them.

2 MR. DAVIS: Excuse me. I cannot hear you. Would
3 you please speak into the microphone?

4 JUDGE KWEE: Oh, I'm sorry.

5 MR. DAVIS: Thank you.

6 JUDGE KWEE: Hi. Is this better? I'm interested
7 in the relationship between the two -- the prior entity
8 and the current entity, at least in relation to the
9 argument for reliance on the prior audit. So I understand
10 the prior entity was the Sullivan Group; is that correct?

11 MR. SULLIVAN: Yes.

12 JUDGE KWEE: And what was the ownership of the
13 Sullivan group?

14 MR. SULLIVAN: It was owned by my father, my
15 stepmother, and -- I'm trying to think. I mean, I think
16 I had some ownership in that company as well.

17 JUDGE KWEE: Do you know what the percentage of
18 ownership was?

19 MR. SULLIVAN: Mine or theirs?

20 JUDGE KWEE: For all owners.

21 MR. SULLIVAN: Well, mine had to be at least
22 10 percent because I was the one who had the license.

23 MR. CAHILL: Because it's true, 45, 45 and 10.

24 MR. SULLIVAN: Yeah.

25 JUDGE KWEE: 45, 45, 10. And as far as the

1 corporation at issue, Sullivan -- Sully Green, what's the
2 breakdown of ownership of that corporation?

3 MR. SULLIVAN: Let's see. It's 40 percent --
4 it's 40, 40, 10. So right now it's in a trust, but I own
5 40 percent of the company --

6 MR. DAVIS: May I --

7 MR. SULLIVAN: -- and my siblings own the rest.

8 MR. DAVIS: May I interject here? Remember, his
9 father is recently passed away. So his interest has now
10 evolved on the family, including -- Bob Sullivan was the
11 owner -- the primary owner of the first corporation and
12 the second corporation. But when he died, the ownership
13 portions changed.

14 JUDGE KWEE: Okay. I see. So I'm -- I guess at
15 the time of the audit -- I mean, I'm just -- because I
16 think in the regulation, that for reliance on a prior
17 audit if there was -- had another requirement, is that the
18 ownership has to be at least 50 percent the same from the
19 prior corporation into the current corporation?

20 MR. SULLIVAN: It is. Basically, it was. Yeah,
21 it was more than that.

22 JUDGE KWEE: Okay. Thank you.

23 JUDGE GEARY: Could you be a bit more specific
24 and tell me how it was exact -- how it was the same. Give
25 us the percentages and who had them in the old corporation

1 and the percentages and who had them in the replacement
2 corporation.

3 MR. SULLIVAN: I'll do my best to be accurate.
4 So the Sullivan Group was owned by my father, Bob Sullivan
5 and his then-wife Patricia Sullivan. And I was a part
6 owner of that company by way of holding a license for the
7 company. The second corporation -- they' had been
8 divorced at that point in time. My dad owned -- Robert
9 Sullivan -- 90 percent.

10 MR. CAHILL: 70 percent.

11 MR. SULLIVAN: Is it 70 percent?

12 MR. CAHILL: Yes.

13 MR. SULLIVAN: 70 percent. And then the rest was
14 divided among some stockholders. So until February of
15 2017, he owned 70 percent of the company.

16 JUDGE GEARY: So he had 45 before, according to
17 Mr. Cahill.

18 MR. CAHILL: But he was married.

19 MR. SULLIVAN: Yeah, he was married.

20 MR. CAHILL: Community property was --

21 THE STENOGRAPHER: Hold on. One at a time.

22 JUDGE GEARY: Mr. Cahill, you haven't been
23 examined on direct, but you seem to have a handle on this.
24 Let me ask you to state what was the percentages. What
25 were -- pardon me? What were the percentages of ownership

1 in the old corporation when these prior audits happened?

2 MR. CAHILL: The very first audit was '93, '94,
3 '95. He referenced '97 only because that was when it was
4 concluded. At that time it was Bob, Pat, and then when
5 Neil came in, he received his 10 percent. So when it
6 started in '91, it would have been Bob and Pat 50, 50.
7 Neil comes in and gets 10 percent. That's at that point
8 in time.

9 JUDGE GEARY: So when Neil came in it was 45, 45,
10 10?

11 MR. CAHILL: 45, 45, 10. Then --

12 JUDGE GEARY: We're interested primarily in when
13 the audit report would have been issued. So those are at
14 the conclusion of the audit.

15 MR. CAHILL: That would have been '97, '97 and
16 stayed the same at that time.

17 JUDGE GEARY: Okay.

18 MR. CAHILL: And then there was second audit as
19 we referenced 2000, 2001, 2002, same ownership structure,
20 a no change audit. That's also referenced in one of the
21 exhibits.

22 JUDGE GEARY: Okay. And then when the new
23 corporation came into existence, then --

24 MR. CAHILL: Then Bob was 70 percent, as he
25 mentioned the divorce.

1 JUDGE GEARY: Okay.

2 MR. CAHILL: And all the employees stayed. Neil
3 dropped to 15 percent. And then it went 5, 5, and 5 with
4 a couple of their very trusted department heads.

5 JUDGE GEARY: Okay. You said it dropped to 15.
6 Wouldn't that have been an increase to 15.

7 MR. CAHILL: Well, when I say dropped, I mean
8 accounted for 15 percent at that point.

9 JUDGE GEARY: Okay. All right. I don't expect
10 you to give all your testimony now because we may have
11 other questions. From Mr. Sullivan, just state your
12 questions -- or did you have more?

13 JUDGE KWEE: Oh, I wasn't done actually.

14 JUDGE GEARY: Oh, I thought you were. Go ahead.

15 JUDGE KWEE: I'm sorry. So I'm -- I'm just
16 curious on the 2008, that's when Sully Green, Inc., was
17 incorporated?

18 MR. CAHILL: I think 2008 or 2009.

19 JUDGE KWEE: So how was -- how did the
20 corporation entity transfer from the Sullivan Group over
21 to Sully Green?

22 MR. CAHILL: He filed in bankruptcy court.

23 JUDGE KWEE: Oh, okay. And for the 2003 audit,
24 were you there in the corporation?

25 MR. CAHILL: I was.

1 JUDGE KWEE: So you're familiar with what was
2 discussed during the audit?

3 MR. CAHILL: 17 years ago, but yeah. I'm fairly
4 familiar.

5 JUDGE KWEE: I'm -- I've just -- if you could go
6 over, was the application of tax applied to purchased tax
7 and cost, that was discussed in the prior audit?

8 MR. CAHILL: Yeah. From my recollection, that
9 audit was a no change audit, and it was signed off by
10 Kathleen Shackle as being a no change audit.

11 JUDGE KWEE: Okay. And as far as accounting with
12 the methods and like, I guess, the books and records, the
13 process was that the same from the two --

14 THE WITNESS: Identical. Nothing was changed.

15 MR. SULLIVAN: Nothing was changed.

16 JUDGE KWEE: Okay. Thank you.

17 JUDGE GEARY: Judge Tay?

18 JUDGE TAY: Mr. Davis, in your opening you
19 mentioned that you asked Board of Equalization attorneys
20 about tax treatment.

21 MR. DAVIS: Your Honor, I can't hear you. I know
22 it's me and my hearing, but I'd appreciate it if you'd --

23 JUDGE TAY: My apologies. I'll do that -- I'll
24 try that again.

25 MR. DAVIS: Thank you.

1 JUDGE TAY: Mr. Davis, you mentioned asking BOE
2 attorneys -- I'm sorry -- Board of Equalization attorneys
3 about tax treatment and consistency.

4 MR. DAVIS: Yes.

5 JUDGE TAY: Did you ever get anything in writing
6 on that?

7 MR. DAVIS: Did I get what?

8 JUDGE TAY: Anything in writing?

9 MR. DAVIS: I did not.

10 JUDGE TAY: Okay. Mr. --

11 MR. DAVIS: Excuse me. I think -- I got nothing
12 in writing from the attorneys at the legal department, but
13 what we did was confirm upon audit.

14 JUDGE TAY: Fair enough. Thank you.

15 Mr. Sullivan, my compliments on the
16 craftsmanship. Just to clarify, Sullivan Shutters and
17 Sullivan Group, are they the same company? Because both
18 of those names were mentioned, and I just wanted to
19 clarify that.

20 MR. SULLIVAN: Yeah. The Sullivan Group was the
21 original company that started back in 1992.

22 JUDGE TAY: Okay. In 2008 when Sully Green
23 purchased the assets of Sullivan Group, in terms of the
24 accounting function, did they also rehire the entire
25 accounting Department, such that all of the employees were

1 exactly the same?

2 MR. CAHILL: Yes.

3 MR. SULLIVAN: With one exception. Patricia
4 Sullivan who was then my dad's ex-wife was the only person
5 we did not hire. But the other office staff that were
6 present were hired, and the accounting didn't change one
7 bit.

8 JUDGE TAY: Okay. Thank you. And then, sorry,
9 one last question. With regards to installation now, in a
10 perfect world all windows are, I guess, and window frames
11 are perfectly rectangular. If there are irregularities to
12 that, how would an installer go about kind of modifying
13 what you had built in the warehouse onsite?

14 MR. SULLIVAN: That's a good question. I mean if
15 they -- if there are scenarios where they're installing
16 something where -- like if we use this as an example and
17 you've got a wall that's furred out and then maybe there's
18 another wall here that's furred out and then a window
19 that's actually sitting in between those two walls.

20 So, obviously, if you're going to put a level on
21 it, you'd probably find that this wall is out a little bit
22 somewhere. Maybe this wall over here is out a little bit
23 somewhere. So in those type of cases, using that as an
24 analogy, the installer is going to have to figure out
25 where the smallest point is. And then he's going to have

1 to conduct the installation based off that measurement.

2 So it will put him in a position where he's going
3 to trim the frame. He may have to even go in and trim the
4 panel itself. There is -- there is where it's going flush
5 up to a ceiling, and maybe the ceiling is not level where
6 he's going to trim the bottom of the panel so that it will
7 keep the gap on the bottom consistent. So there's --
8 there's quite a --

9 MR. CAHILL: There's a little bit more to that.

10 MR. SULLIVAN: What's that?

11 MR. CAHILL: The back splash will prohibit --

12 MR. SULLIVAN: Yeah, back splash. Yeah. And
13 they've got -- you know, they have things that they have
14 to notch around if they've got, you know, a kitchen window
15 with a back splash around it, so on and so forth. So
16 there's -- there's a -- it's not a -- it's not something
17 like an untrained person can go out and learn right away.

18 It usually takes somebody three or four years or
19 so before they really kind of come to terms with all the
20 different challenges that you have in the field. And they
21 definitely have to, you know, do things in the field in
22 order to support the installation of a shutter.

23 JUDGE TAY: Thank you. I have nothing further.

24 JUDGE GEARY: Department?

25 MR. BACCHUS: No questions.

1 JUDGE GEARY: I'd like you to go into maybe a
2 little bit more detail about -- about how the operation
3 works in general. You told us about the lumber and how
4 you make everything, basically, from scratch with raw
5 lumber. Is every -- is every piece in production for a
6 specific installation? In other words, you get an order,
7 then you make the shutters for that installation. You do
8 not keep stock of goods because windows are different
9 sizes. Is that fair?

10 MR. SULLIVAN: Yes. Yeah. That's accurate.

11 JUDGE GEARY: Okay. All right. Let's talk a
12 little bit more about the measuring process and how you
13 make sure that the product that is produced for that
14 specific window or doorway will fit. Is the -- is the
15 term "reveal", does that -- does that have a -- is that
16 the space around the edges?

17 MR. SULLIVAN: Yeah.

18 JUDGE GEARY: When you buy doors these days
19 pre-hung -- many of them are pre-hung. Most of them are
20 pre-hung, and the whole unit goes into the wall. There's
21 a lot more give when you're -- a lot more room for error,
22 but you've got to have -- a door has to swing perfectly
23 with the right -- you want even reveal around the three
24 edges that aren't -- all four sides of the door, so it
25 closes properly. Is that anything at all like what you

1 have to do?

2 MR. SULLIVAN: That's exactly what we do. Yeah.

3 JUDGE GEARY: So you don't produce pre-hung
4 shutters where the frames are brought in, the wall --
5 sheetrock is torn out. You don't install them directly,
6 but you do the same thing with framing it on-site?

7 MR. SULLIVAN: Yeah. There's a little trick to
8 it. What the installers will do is they'll mount the
9 piece that has the hinge on it first, so this -- this
10 section here. It's got the miter here, and this is where
11 the frame will be with the miter on the bottom. So the
12 trick to it is they will come in, and they will level that
13 first section out. So that -- that piece of the frame
14 that actually has the hinge attached to it.

15 And by doing that, they are able to get --
16 regardless of what the reveals are and everything else,
17 their objective here is to make sure that it's square and
18 plumb -- in plain. So they will set that hinge piece, the
19 hinged butted to the side of the frame, level and plain,
20 and then build the rest of the frame off it.

21 Much like the doors that you were describing, you
22 know they have those, the jambs on the door. And if you
23 look at the framed building, you look at the pre-hung
24 door, there's a big gap there. And that's why we have
25 casing that goes around the door. It's just like this

1 door that's behind the officer, it's got a metal casing
2 around it.

3 If I tore that casing off, there would be a big
4 gap there between the drywall and the -- and the building
5 itself. And that casing is designed to make up for
6 whatever inequities that surrounds that door so it will
7 open and close properly. It may not be 100 percent
8 square, but it will have an equal reveal on all sides, and
9 it will open and close the way it's supposed to. Shutters
10 are installed basically using that same principal.

11 JUDGE GEARY: I have an old home, and it's -- all
12 the windows have trim on them. Is it most common for you
13 to install your shutters in window spaces that are already
14 trimmed?

15 MR. SULLIVAN: We do that, yeah. Those are the
16 kind of houses I don't like to install in.

17 JUDGE GEARY: Okay. So some of the ones you
18 install, the window trim hasn't been installed yet?

19 MR. SULLIVAN: Sometimes. In those cases, like,
20 if you have a -- let's say you've got an older home that's
21 got traditional trim around the windows. In those cases,
22 we would actually come in, if we can, and if there's an
23 existing window jamb that's a wood jamb, like, a six-inch
24 wood jamb or even a four-inch wood jamb, we'll come in and
25 we will mortise your jamb that's part of the house and

1 then attach the shutter right to it without -- without
2 putting the frame on it.

3 The frame is there in most cases where we don't
4 have that option available. But in those types of
5 installations where you're dealing with an older home
6 that's got traditional sash-style windows where you've got
7 a wood jamb that's part of the building, we'll actually
8 affix the shutter right to your jamb.

9 We'll mortise the jamb out and put the hinges in
10 there and put a little stock frame around the back of it
11 that you can't see from the front. And then that'll be
12 you're installation.

13 JUDGE GEARY: Typically, you would on an older
14 installation like that, you would not remove the trim?
15 You would not need to remove the trim?

16 MR. SULLIVAN: We would not, no. So it becomes,
17 you know, in those types of installations there are --
18 usually, we do those type of installations, we will
19 actually not finish the shutters until after they have
20 been installed. So we'll bring them out raw wood.

21 They will trim -- they'll trim the stiles and the
22 rails and whatever they have to trim to get it to fit
23 properly into that type of an opening. They'll leave half
24 of the hinge there at the house, bring the panel back to
25 the shop, finish it, and then bring up, put the pins in,

1 and it's done.

2 JUDGE GEARY: Tell me about the shutters that
3 function as doors. Give me examples of where your company
4 has done those kinds of installations?

5 MR. SULLIVAN: We may have, like, for French
6 doors. We have a shutter that looks identical to this one
7 that would might mount right onto the door proper. So if
8 you think of a French door where it's all glass, and then
9 you've got the stiles and the rails. Which, you know,
10 usually on French doors they are about six inches wide.

11 That frame is mounted right onto those stiles and
12 rails. In those cases where you've got a French style
13 handle or a lever-style handle, we actually make a cut out
14 in the shutter panel to accommodate that handle. So when
15 the shutter is attached to the door properly, the shutter
16 becomes inseparable to the door. In other words, that
17 shutter is locked on to the door. It becomes apart from
18 the door. The door will open and close and the shutter
19 will stay there.

20 If you need to clean the glass, the shutter
21 because it's hinged can often open independently of the
22 door in order to get at the glass or you have to replace
23 the glass. The shutter will open. Otherwise, when you
24 close it the magnetic hinges -- the magnetic catches are
25 designed to keep that panel fastened and right to the

1 frame. It's fastened to the door.

2 JUDGE GEARY: What's the function of a wood
3 shutter?

4 MR. SULLIVAN: The function of a wood shutter?
5 Well, I mean, in a lot of ways I think people consider
6 them to be security. When they're closed, it's very
7 difficult -- if you were going to try to get into a house,
8 and they've got shutters on the windows, it puts a barrier
9 in front of those windows. It's almost -- it's not
10 impossible to get through, but it's a lot easier to break
11 a piece of glass on a French door than it would be to
12 break a window or a door that's got a shutter attached to
13 it. Because when they're closed, these louvers are a half
14 inch thick. So from the back it's pretty solid. It's not
15 going to go anywhere.

16 JUDGE GEARY: What other functions with --

17 MR. SULLIVAN: They insulate. They have an R3
18 insulation value, which is significant. Yeah. And they
19 also, you know, obviously with the louvers they are also
20 able to control the view and control the light.

21 JUDGE KWEE: So just a quick question. You were
22 saying they provide security. Does -- is there a lock on
23 the shutter?

24 MR. SULLIVAN: We do have -- yeah. This has got
25 a hasp lock on it. This is something that we offer to our

1 customers. Not everybody chooses to have it, but this is
2 like a little locking mechanism. So if you're going to
3 try to open this from the outside, you couldn't do it.
4 You could break this off if you're really applying a point
5 load to it, but it's not easy.

6 MR. CAHILL: And knew exactly where the latch
7 was.

8 MR. SULLIVAN: Yeah.

9 JUDGE GEARY: Okay. I have no other questions.
10 Judges any other questions? Department?

11 MR. BACCHUS: We do not.

12 JUDGE GEARY: And Mr. Davis, any follow-up for
13 this witness?

14 MR. DAVIS: No, Your Honor.

15 JUDGE GEARY: All right. Thank you. Would you
16 like to have your next witness testify?

17 MR. DAVIS: Yes, Your Honor.

18 JUDGE GEARY: Go right ahead.

19 MR. DAVIS: I call Kevin Cahill.

20

21 DIRECT EXAMINATION

22 BY MR. DAVIS:

23 Q Would you state your name for the record?

24 A Kevin Cahill.

25 Q What is your occupation?

1 A Certified Public Accountant.

2 Q And in the course of being a certified public
3 accountant, did you ever represent a company owned by Bob
4 Sullivan?

5 A On numerous occasions.

6 Q What company was that?

7 A Sullivan Group, initially.

8 Q Did that include Sullivan Shutters?

9 A Yes.

10 Q And did you also represent any other subsequent
11 companies owned by Bob Sullivan?

12 A The first audit I represented him. The second
13 audit I represented him. The most current audit the one
14 under hearing today, I represented him. And then there's
15 a fourth that we're waiting for the outcome in this
16 hearing that I'll be representing him on.

17 Q Were you involved in the preparation of the Sales
18 Tax Returns?

19 A Yes, I was.

20 Q And when were you first involved in preparing tax
21 returns -- Sales Tax Returns?

22 A In -- I got involved in the first audit in 1997,
23 '98, when Wayne Lovett finished his audit. I was asked to
24 get involved with you -- legal counsel as to his positions
25 and his results.

1 Q And who is Wayne Lovett?

2 A Wayne Lovett was the auditor at that time for the
3 Board of Equalization.

4 Q And what was the result of that audit?

5 A The best term to use is that it was a no change.
6 What had happened is the complications associated with the
7 way that Bob started this business, he was required to
8 sell to contractors because he didn't have the personnel
9 or staff to do his own installations.

10 He also sold to interior decorators so that he
11 could get his name and the image of the business out into
12 the public. And then there were some sales to the
13 consumer. So it was -- it was a three-fold type of a
14 sales process at that time.

15 Q And did that effect the calculation of the
16 taxable measure?

17 A It complicated it. Yes, it did. So what had
18 happened is when the audit concluded, Wayne Lovett, we had
19 correspondence, agreed with his supervisor at the time
20 that there has to be a better way to calculate what the
21 taxable measure should be.

22 Q Excuse me. Before you get to that, wasn't the
23 taxable measure calculated when Sullivan was selling to
24 other contractors? Did he sell -- he did sell to other
25 contractors --

1 A Yes, he did.

2 Q -- at one time?

3 A Yes.

4 Q And is it correct that the way to calculate the
5 taxable measure was the price that was charged to the
6 contractor?

7 A For that part of the sales process, yes, that was
8 one piece.

9 Q If you're not selling to contractors, then a
10 different calculation is used; is that correct?

11 A Yes.

12 Q So was there a change in the way Sullivan's
13 calculated the taxable measure for shutters sometime in
14 1999?

15 A Admittedly. What had happened is after doing
16 various studies when I got involved together with Wayne
17 Lovett and his supervisor, we were able to demonstrate the
18 paying at the source generated as much or more sales tax
19 than the method that they applied.

20 Q Excuse me for one second. I know these judges
21 are familiar with that, but for the record, would you
22 please explain "paying at the source"?

23 A Lumber from out of state use tax, paid tax on.
24 Paint, paid tax on it. Hinges, paid tax on it.
25 Sandpaper, paid tax. Everything necessary to produce the

1 shutter has a tax associated with it when they purchase
2 it, paying at the source.

3 Q Was that done by one of the Sullivan
4 corporations?

5 A Yes. Look, what had happened is in their study
6 they agreed when they looked at paying at the source, that
7 it generated a proper amount of sales tax, effective
8 April 1st, 1999, it's Exhibit 1. That the Board of
9 Equalization was put on notice via correspondence that we
10 will now be paying at the source. And as a matter of
11 fact, we requested a refund. Two months later they got
12 their refund.

13 Q You say they requested a refund?

14 A The company. The company. Because there was an
15 overpayment of sales tax.

16 Q And was there an audit of the company when tax
17 was being paid at the source?

18 A Yes. That 2000, 2001, 2002, the audit was
19 conducted by Kathleen Shackelford who happened to be
20 involved in this most recent audit. And it was also
21 supervised by a Jess Salazar. Carl Herth was the
22 supervising manager, I believe is the position they used.
23 And the results of the audit, it's also shown as an
24 exhibit, of a no change. And there's reference that
25 paying at the source is the proper taxable measure. It is

1 in the audit.

2 Q Are you referring to Exhibit 2?

3 A Yes.

4 Q And that was at a no change?

5 A No change.

6 Q If I may, the second page on Exhibit 2, the
7 auditor recommends no change in taxable measure and has
8 closed out the affirmed, effective June 30, '03, since
9 taxpayer is obligated to pay tax on purchases and
10 consumers use tax application has been obtained from the
11 corporation.

12 Again the record -- and you mentioned an approval
13 by Carl Herth, and I mentioned to the court Exhibit
14 Number 3 which Carl Herth, that I mentioned to the Court,
15 Exhibit Number 3. Which Carl Herth is now retired was the
16 district principal auditor who completely reviewed the
17 examination report and approved it, and that would be
18 Exhibit Number 3.

19 And when the audit that we're talking about that
20 was approved paying a tax at the source, could you explain
21 how that was done? What was recorded in a Sales Tax
22 Return?

23 A The -- as I stated, the wood. So they examined
24 all the material invoices paid because the wood is out of
25 state. Paint, hinges, as I stated, all the components

1 necessary. They pulled all invoices to ensure that sales
2 tax was paid.

3 Q And that was verified; is that correct?

4 A Verified in the audit.

5 Q Okay. At some point in time there was another
6 audit for the years 2009 to 2011. Were you involved in
7 that audit?

8 A Yes. I got involved September 12th, 2012. What
9 had happened is Bob was aware of it. He was in an audit.

10 Q Bob who?

11 A Bob Sullivan. And he said, "Kevin, we don't have
12 any issues. You don't need to get involved." I'm not the
13 cheapest guy in the world. So he said, "We will go ahead
14 and handle this." Bob then, at the conclusion of the
15 audit, work papers submitted June of '12 after doing '09,
16 '10 and '11. The results shocked Bob.

17 He couldn't even understand why the Board changed
18 their positions. I was then contacted. By the time he
19 got the Notice of Determination together with the
20 supporting work papers, that's when I was called. Okay.
21 You need to get involved now.

22 Q What were your primary concerns with the approach
23 of the BOE auditor in the work papers dated June 28, 2012?

24 A Well, there were several changes that the auditor
25 made. Initially, their understanding of the business was

1 adequate. What Bob had done was in talking with
2 Mr. Pruitt, he was the auditor -- I don't want to use the
3 word bait -- but basically 'cause I deal with a lot of
4 audit agencies -- Mr. Pruitt was asking the question she
5 was interested in getting answers to.

6 So Bob said there was pretty much four
7 components, four costs that go into developing his sales
8 price. So he had the cost of wood, obviously, cost of
9 labor, installation cost, and then the last is profit. So
10 he put together generically just brown numbers based upon
11 his understanding of the manufacturing process not knowing
12 at the time that Mr. Pruitt was going to dissect those
13 numbers and not look at invoices as it pertains to the
14 payment of sales tax.

15 There was no indication to Bob that an approach
16 was going to be changed as it pertains to how the Board at
17 that time was going to calculate taxable measure.

18 JUDGE GEARY: Mr. Cahill, let me ask you
19 something. You said you weren't there during the audit
20 itself. You got involved after issuance of the report; is
21 that right?

22 MR. CAHILL: The first one.

23 JUDGE GEARY: Okay. I'm talking about '09 to '11
24 one?

25 MR. CAHILL: Well, '09 to '11 there were several

1 changes to it. But, yes, I was involved in that. My
2 point is Mr. Pruitt changed his work papers and changed
3 his approach numerous times.

4 JUDGE GEARY: Okay. And you know this was
5 because you were actually involved in that process?

6 MR. CAHILL: Yes. The first Notice of
7 Determination when I looked at it, I was just -- I was
8 appalled. So I went in and started looking at the pieces.
9 The Board uses this approach pretty much in different
10 areas; whether or not they're dealing with liquor,
11 consumption; whether or not they're dealing with the wood
12 retail sales.

13 I'm familiar with the work paper approach that
14 the Board uses. It's a building block approach. In
15 looking at the building block that Mr. Pruitt started
16 with, numerous errors. He didn't think it through. So
17 when I saw that, I said we need to readdress these
18 calculations. These calculations are not correct.

19 So a good example, the four pieces that Bob
20 indicated wood, labor, install, and profit. Bob would
21 hope to have profit. But you can see in our exhibits, he
22 didn't have profit during this three-year time period.
23 That's pretty much, you know, the economy at the time. So
24 he was covering cost.

25 So that -- you've got to carve that piece out.

1 Then what was left was installation cost, which there was
2 an understanding. Bob agreed with Mr. Pruitt. \$4.25
3 represent installation cost, not installation labor, cost.
4 Then what's left is your \$17 to figure out what piece is
5 work, what piece is labor. And then you have other
6 components such as utilities, car leases, and it just went
7 on down the line, you know, what shows up in any business.

8 BY MR. DAVIS:

9 Q When you mentioned \$4.25, isn't it \$4.25 per
10 square four --

11 A Per square foot.

12 Q -- to determine an allocation?

13 A To determine the \$21.25. So we agreed on that.
14 Okay. Well, let's carve that out. We don't have a
15 problem with that. The problem we had is what Mr. Pruitt
16 was coming up as taxable, tax exempt, and the easiest way
17 to explain material versus fixture.

18 Mr. Pruitt was trying to take the position that
19 because you can remove by hinges this shutter panel, that
20 truly the only material is the frame. That is what was
21 just argued, you know, 20 minutes ago. That's his
22 argument. We disagree. Now, in disagreeing because we
23 have to take a look at the calculations that we're forced
24 with.

25 We disagree with the components. So his first

1 June 12th audit addressed wood but didn't split it out
2 between frame and shutter. I said how can you do that?
3 He looked at labor. He didn't split it out between frame
4 and shutter. I said, if you're going to go down this
5 path, you need to be more defined in your calculations.
6 Everybody agreed at that point in time, you cannot rely on
7 that audit, but the Board could.

8 Q Let me ask just to clarify. We never get to the
9 necessity to do calculations if taxes paid at the source
10 if they are deemed materials; is that correct?

11 A Actually, there's no reason for it because we
12 don't job cost.

13 Q That's a yes?

14 A That's a yes.

15 Q Okay. So because that wasn't accepted, it was
16 necessary to do calculations. Would you please explain,
17 for the record, what calculations are necessary if they're
18 considered some of our fixtures?

19 A You need to breakout the wood, the paint, the
20 other materials that go into two components, to the extent
21 that it is deemed there's two components. You have the
22 frame and then the shutter panel. In going through those
23 calculations this stopped -- I believe it was 2012, and
24 then Bob had a lung transplant. He couldn't get involved.
25 This went on hold for four years.

1 In 2016 it picked back up when Bob was able to
2 come back to the business. And it was agreed that
3 Mr. Pruitt physically show back up at the facility, at the
4 manufacturing process. We would meet and discuss these
5 pieces. Now, simply, if you were to look just at that,
6 take a picture, he would say there's, "More shutters,"
7 wouldn't you? Wrong.

8 The wood that is in the frame, that's the part
9 that Mr. Pruitt could not understand. The process of
10 building a frame requires more pieces of wood because of
11 the gluing, the lamination. And it's through that process
12 that we were able to convince him. What you're looking at
13 is 36 percent is frame. 64 percent is shutter.

14 That might visually to somebody appear to be the
15 case, but it's not the case in the actual application of
16 the wood. So he came over. We went through his study.
17 He was -- he said, "Okay. I will go ahead and revisit
18 this. Let's select," and we did. We decided in '16 to
19 select certain jobs, even though the audit was '09, '10,
20 and '11. Because the process did not change.

21 Now, in that sample, the issue -- and we use the
22 term "cherry picked". But very simply the Board used six
23 jobs. Of those jobs that I looked at, the six I looked
24 at, only three of the six that I looked at were actually
25 used by the Board. They didn't use mine. My

1 determination of the wood, typically, was based on a study
2 of looking at different pieces.

3 That -- generally that size would be something we
4 would have built over a shower window, okay, as an
5 example. So we studied the shower. We studied the master
6 bedroom. And then we studied three jobs. Because
7 somebody's house could include windows and a slider.

8 In that study, it was closer to 50/50. Okay.
9 50 percent wood in the frame. 50 percent wood in the
10 shutter panel. Mr. Pruitt wouldn't accept it, but that's
11 what we determined. Now, the issue at hand is the waste.
12 He was looking at certain jobs as to board footage when
13 the job was finished. But the wood that goes into the
14 frame, there's a lot of waste. Okay.

15 So that was one thing we couldn't convince
16 Mr. Pruitt of. There was one other very important issue
17 Neil touched on but didn't have a chance to really get
18 into detail. When he mentioned 1-A, 2-A and base, the
19 cheapest wood at that time was \$0.57 a square foot. The
20 most expensive at that point in time was \$0.91. I've got
21 an excellent memory.

22 Mr. Pruitt said, "Well, you've already admitted
23 then, that you could use the cheaper wood for the frames."

24 Well, here's the problem. Bob being in a cash
25 flow standpoint, not in a perfect world, be able to say,

1 in the next two or three months I've got 10,000 square
2 feet I'm going to install. 10,000 here.

3 So what I'm going to do is I'm going to buy wood
4 based upon the different pieces, where you would normally
5 do to save money. He had to take what he could get
6 because he was living off of credit cards. So in any one
7 case, some of the most expensive wood could have been used
8 on the frame. And then you have issues with knots.

9 So Mr. Pruitt would not even go down this road.
10 So his analyses basically took the understanding of the
11 frame is the cheapest. We're going to apply the cheapest
12 rate to the frame. If this is the most expensive, the
13 style because that's where it has to be truly the most
14 proper from the straightness, we're going to apply that
15 price there. We couldn't agree on what the price should
16 be.

17 We had an average cost, and we did an analysis
18 much higher than his average cost. So it -- every time we
19 looked at a piece, whether or not it was wood, whether or
20 not it was labor, we could -- we could not agree. So I
21 finally just said, Mr. Pruitt -- because we both agree
22 what sales are. We got a Sales Tax Return. We got
23 federal income tax returns. I do compile financial
24 statements for this client. Nobody disagrees on total
25 revenue.

1 So I asked Mr. Pruitt, "Did you tie up? Did you
2 extrapolate? Using your number, did you tie up when you
3 got finished what labor would be using your cost per out?"

4 "No, I didn't."

5 "Did you tie out material cost as to what they
6 would be?"

7 "No, I didn't."

8 I did. His numbers make no sense. So it was at
9 that point that we went one step further, and he said
10 okay. You've got to give me a labor analysis. That takes
11 us to the first week in September, January and September.
12 So Jolene who worked there at the time, one of the
13 accountants, said here's the people that work for the
14 company. She -- I'm not going to inadvertently -- but she
15 listed two people that do nothing but install. Because as
16 Neil mentioned, you've got to be experts at this. But
17 they're not the only installers.

18 So what had happened is this takes us to
19 January 30th. We had no idea what Mr. Pruitt was going to
20 do. On January 30th, the \$4.25 that was agreed to as
21 installation cost, removed. He gave us \$0.73. And then
22 he called that an installation labor. I said what about
23 the cost? What about the trucks? What about the
24 vehicles? That's when Bob was done. He said, "Kevin I'm
25 finished with it." And then he died a couple of weeks

1 later.

2 But that's where it takes us. Those are the
3 results of where we are now.

4 Q So just to tie this together. The significance
5 of his allocation is because some portions are taxable,
6 and some are nontaxable; is that correct?

7 A According to the position of the Board wants to
8 take.

9 Q Right.

10 A We disagree with that.

11 Q In other words, if they don't accept our premise
12 that they are materials then we have to go into the
13 allocation of the items?

14 A Right.

15 Q Now, for example, wood and construction material.
16 Are those taxable items?

17 A Depending on if it goes -- according to the
18 Board -- if it goes on the frame, no. If it goes on the
19 shutter panel, yes. The Board took the position that the
20 company was the consumer as it pertains to the frame
21 portion, the sales tax portion. Because you've got to
22 have a consumer somewhere. But that's the position that
23 the Board took.

24 Q How about paint, hinges, sanding, and
25 construction labor?

1 A Same. It's applicable to both components.

2 Q Are they taxable items? Are they included in the
3 taxable calculation?

4 A Should it be? No. Are they now in their
5 calculations? Yes.

6 Q Let me rephrase it. Is this what Mr. Pruitt
7 proposed?

8 A Yes.

9 Q Taxable. And what items did he allow as
10 nontaxable items?

11 A The only nontaxable item was \$0.73 a foot for
12 installation, which was previously agreed to \$4.25. And
13 then the pieces associated with the frame, according to
14 their work papers.

15 Q And how about trim?

16 A Trim. I'm thinking frame and shutters when you
17 say trim.

18 Q Okay.

19 A Okay. Trim and frame. He -- here was the issue,
20 and it's in an exhibit. He starts out by saying wooden
21 construction material. Then he goes and mentions paint,
22 hinges, and labor. Then he mentions trim and framing.
23 Then he mentions installation cost. That was in the first
24 audit. That's where we couldn't agree because the only
25 item that truly you can carve out is installation cost.

1 The other pieces need to be split. His thinking
2 of trim and frame is that outside piece. That's his
3 thinking, but that is not what was taking place. So the
4 numbers that he used to build up to \$21.25 -- because he
5 had to build up to what the sales price is. The
6 allocations were wrong in the original June of '12 work
7 papers. They were wrong.

8 Q How difficult is it then using these allocations
9 between taxable and nontaxable items to prepare a Sales
10 Tax Return?

11 A Extremely. Because as I mentioned, we -- they
12 sampled six jobs, and we sampled six. They go anywhere
13 from a low of 38, 39 percent frame to a high of 61, 62
14 percent frame depending upon the job. So to job cost
15 every job to try to determination these calculations is
16 too much work.

17 Q And how did Mr. Pruitt treat shutters that were
18 installed over doors?

19 A Excluded them as nontaxable taxes and basically
20 not subject to sales tax.

21 Q And was that because he construed them as doors?

22 A He did, yes.

23 Q And as a door -- do regulations say a door is a
24 material?

25 A Material.

1 Q Do you have other disagreements with the --
2 Mr. Pruitt's calculations?

3 A Wood was one. The second was labor. On average
4 he was at \$8.35. I'm using my memory. No. \$8.36. We
5 were at \$7.57. We tied out to the financial statements.
6 He did not. The other area had to do -- they refer to it
7 as tax-paid credit.

8 Q Can you explain that, so we understand, please.

9 A Okay. They pay sales tax at the source,
10 obviously. We sat down at the conclusion when the
11 January '17 work papers came out. And then Bob dies.
12 We -- this goes to April, goes to May, goes to June. It
13 kind of got pushed back a little bit because of Bob's
14 death.

15 But the positions taken by the Board continue to
16 change. So we sat down and had a meeting with Lisa
17 Nickerson -- she's Carl Herth's replacement -- and sat
18 down with Mr. Pruitt and with another representative. And
19 they then agreed at that point. They said, well, I tell
20 you what. If you disagree with 36 percent, 64 percent,
21 how about if we give 50/50?

22 And I'm thinking -- we looked at it and said if
23 this is the only position, we still want to argue this in
24 law. But this is because they didn't have the ability to
25 make that decision. They had to stand with what they had

1 already audited. That's the reason we're here.

2 But from the standpoint of the approach, if you
3 want to agree to 50/50, we will rework the numbers. So
4 they came into a meeting with green paper, blue paper,
5 yellow paper with different numbers. And I looked at
6 these numbers. And what had happened is the tax did not
7 change. The reason the tax didn't change is as they gave
8 us a larger percentage of what we deemed to be nontaxable,
9 the frame, they took away the tax we paid.

10 I said what? I said how can you to that? So it
11 didn't matter if the frame was 40 percent and the shutter
12 was 60. Of all the tax we already paid, they take away
13 40. Okay. So there you are. If they change it to 50/50,
14 of all the tax we already paid, they took away 50 percent.

15 I said wait. This isn't going anywhere. That's
16 when we reached a stalemate and contacted the Taxpayer's
17 Advocate Office.

18 Q And what did they tell you at the Taxpayer's
19 Advocate Office?

20 A A Mr. Wang reviewed the work papers and disagreed
21 what the positions by Mr. Pruitt and at that time CDTFA.
22 He disagreed as it pertains to the tax-paid credit.

23 Q And do you have written notes to the memorandum?

24 A Yes.

25 Q That's Exhibit 11?

1 A Yes. Mr. -- go ahead. Go ahead.

2 Q And Exhibit 12 was the follow-up on that?

3 A Yes.

4 Q Okay. Go ahead.

5 A Mr. Wang -- let me back up just one second. I
6 had a conversation with Mr. Lovett years and years ago.
7 He left the Board, but I was able to hunt him down. And I
8 told him the current position that they were taking
9 because his argument was, "Are we calculating the proper
10 amount of tax?" He never thought for one second this
11 would be two pieces.

12 He said, "Are you kidding me, Kevin? They're
13 treating this as two pieces? Where did they come up with
14 that?" And that's a statement that Mr. Lovett made.

15 So, obviously, there's a disagreement as it
16 pertains to employees conducting the audit and the
17 interpretation of the law. I mean, there's obviously a
18 disagreement. So as we went a little bit further with
19 this, I wanted to make sure that somebody independent --
20 and that's Mr. Wang -- would at least look at it. Are we
21 going down the right road if it comes to a calculation
22 issue?

23 He takes the position that tax-paid credits
24 should never be calculated using cost. They should always
25 be calculated using gross profit, and he explicitly states

1 that. The issue that we have, and it's pretty simple.
2 Mr. Wang's first e-mail was of a generic nature. To the
3 extent that you have wholesale cost, you need to determine
4 a gross profit on that. We -- we sent these e-mails to, I
5 think, different representatives of the Board. And they
6 said, well, develop a wholesale cost.

7 I got ahold of Mr. Wang. I said we don't have a
8 wholesale cost. To the extent that Neil would be
9 fortunate to lay the developer that let's say builds 50
10 homes. And they're cookie cutter. There're five
11 different models. And they were to say to Neil, "Here's
12 what I want for the five models."

13 Would Neil give him a whole price and let them do
14 the install in connection with building the home? Of
15 course, he would. But that's not the nature of the
16 business. So I explained this to Mr. Wang that we don't
17 have any wholesale. But the Board was hanging on that and
18 would not accept his memo and his positions as it pertains
19 to this gross profit.

20 So the true calculation of gross profit is sales
21 less cost, since we have no profit. And we can
22 demonstrate that what's left over is labor, basically.
23 Using that approach we come up with a tax that's owed.
24 And I mention this to Neil to the extent that we lose on
25 this. The tax we came up with is around 39 grand. It's

1 in one of the exhibits. But it's not the 71,000, based
2 upon this understanding of how taxes already paid should
3 be utilized in this calculation.

4 Q Do you have anything further?

5 A No that's about it.

6 MR. DAVIS: I don't have further questions for
7 Mr. Cahill.

8 MR. CAHILL: But -- excuse me. One more item.
9 One thing Neil didn't have a chance to do, and we did this
10 with Mr. Pruitt. If you have a \$1,288,000 in shutter
11 sales -- we all agree the shutter piece is not applicable
12 to sales tax as you can carve out the doors. If you were
13 to divide that by \$21.25 because you the consumer that's
14 what you're going to pay.

15 You're not -- it's not what we're paying for the
16 wood. Now, that's what you are going to pay. You come up
17 approximately 64,000 -- 63,000 square feet of wood. If
18 you multiply that by \$0.73, the position of the Board is
19 taking that \$1.3 million of sales cost you \$43,000,
20 \$44,000 to install. It's ludicrous. It makes no sense.

21 But they wouldn't accept that because, again --
22 and I want to reiterate this. The Board changed its
23 position from installation costs, plural, to installation
24 labor. They changed their position. That's it.

25 JUDGE GEARY: Are you through? You, Mr. Davis,

1 are you done with this witness?

2 MR. DAVIS: Yes, Your Honor.

3 JUDGE GEARY: All right. Department, any
4 questions?

5 MR. BACCHUS: We do not have any questions.

6 JUDGE GEARY: Fellow Judges, questions?

7 JUDGE KWEE: Not for the witness. I will have
8 one for CDTFA.

9 JUDGE GEARY: All right. For the witness. All
10 right. Go ahead.

11 MR. CAHILL: After all that prep, I don't get
12 questions?

13 JUDGE KWEE: Did CDTFA have an opportunity to do
14 their opening presentation yet?

15 JUDGE GEARY: They haven't finished witnesses
16 yet.

17 JUDGE KWEE: Right. So I'll wait until after
18 their --

19 JUDGE GEARY: You want their argument first?

20 JUDGE KWEE: Yes.

21 JUDGE GEARY: All right. Well, we're ready for
22 the -- the evidentiary phase is concluded. Does anybody
23 need a few minutes to get a drink of water or use the
24 restroom?

25 MR. BACCHUS: The Department would request, yes.

1 JUDGE GEARY: Is five minutes okay to take a
2 five-minute recess?

3 MR. BACCHUS: Yes.

4 JUDGE GEARY: Let's do that. Let's come back at
5 about 3:00. That's about five minutes.

6 (There is a pause in the proceedings.)

7 JUDGE GEARY: We're back on the record.

8 And I believe what we talked about were 15-minute
9 closings and a 10-minute rebuttal. Isn't that what you
10 requested, Mr. Davis?

11 MR. DAVIS: Yes. But hopefully it won't be that
12 long, Your Honor.

13 JUDGE GEARY: Okay. That's fine. If you are
14 ready to give your opening argument -- oh, before you
15 do --

16 MR. DAVIS: Yes.

17 JUDGE GEARY: Judge Kwee you had a question. Did
18 you want to wait until the Department is done with their
19 argument?

20 JUDGE KWEE: Oh, I -- I was going to ask them to
21 clarify an argument, but I'll wait for them to see if they
22 answer my question.

23 JUDGE GEARY: Okay. All right. Great. So,
24 Mr. Davis, if you're prepared to give your first closing,
25 you may begin.

1 MR. DAVIS: Well, you said my first opening. Do
2 you mean the closing?

3 JUDGE GEARY: First closing -- yeah. You're
4 first closing argument. You'll have a rebuttal after
5 that, but you can give your main closing now.

6 MR. DAVIS: Thank you.

7

8 CLOSING STATEMENT

9 MR. DAVIS: Our position has been very
10 consistent. We think the way the taxable measure was
11 calculated back in the 90s, and it was accepted by the
12 Court as a matter of fact of law, it should be the same
13 way it's been reported.

14 In other words, the shutters -- well, let me just
15 say the Appellant taxpayer is a construction contractor.
16 It takes raw materials, puts them together, affixes them
17 to the real estate. It becomes by definition, it's a
18 material. The item is not a stand-alone type of feature
19 of personal property until they're all put together. And
20 that's one of the reasons -- the main reason I would say,
21 that we have a construction contractor adding something to
22 the real estate, and they reported as a material properly.

23 There's nothing wrong with the agreement of the
24 Board of Equalization at the time. They reported as
25 tax-paid sales and filed the returns that way consistently

1 throughout. Never deviated until they were audited, and
2 Bob was -- Bob Sullivan was just thrown for a loop when he
3 found out it was not accepted.

4 But even as a matter of law, when you go back and
5 read the regulations -- I don't mean to say the
6 regulations are wrong or misinterpreted. What I'm
7 suggesting is in the regulations it talks about that doors
8 are materials. Okay. We accept that. I don't understand
9 the rationale for it, because you can put a door on, and
10 you can remove it. It seems to me it's a fixture. But,
11 nonetheless, we're not arguing with that.

12 The agent or the auditor when it came to it, it
13 was like he put blinders on and says okay, doors are
14 materials. So if you take your shutter and you put it
15 over a door, it's not taxable. But if you take your
16 shutter and you put it over a window, it's a taxable item.
17 I don't see that distinction.

18 And I don't blame Mr. Pruitt. I mean, he's there
19 to look at the law. But I think we have to look a little
20 further into it. And when I inquired about the reason why
21 shutters were classified that way, I was told by the legal
22 Department that was done as a result of a ruling of a
23 company in the shutter business that wanted a ruling who
24 fabricated shutters. They never considered a company that
25 manufactured from raw materials.

1 So we did it what we thought was according to
2 law, and we had the blessings of the Board of
3 Equalization, and it was reported that way. So now we
4 come into the later years. It's new corporation. We
5 reported that way, and they object to it. So is that
6 right? I submit to you that it's in accordance with the
7 law the way they did it. These shutters are not by nature
8 a fixture, if a fixture is determined as a stand-alone
9 feature that is an item that stands by itself and then is
10 affixed to real estate.

11 These shutters are not stand-alone until they are
12 put together and affixed to the real estate. So that's
13 our argument. Now, if that argument doesn't stand -- I
14 mean, if it stands then we don't have to go any further.
15 If our argument is wrong, what the auditor wants us to do
16 is do an allocation of items that go into the shutters to
17 determine the taxable measure.

18 I submitted Exhibit Number 19, which shows the
19 auditor's allocation of items as which ones are taxable,
20 and which ones are not taxable. We don't agree with the
21 calculations and the way he has allocated them. But --
22 but this is one horrendous job of doing a Sales Tax Return
23 of having to go into every sale to determine which items
24 that go into the door, how much was the paint? How much
25 were the hinges? How much was the sanding? How much was

1 the construction labor? How much was the wood? How much
2 wood is being allocated to this shutter?

3 All are used on a shutter to determine the
4 taxable measure. I can't believe that that's what was
5 adopted by the legislature or by the Board of Equalization
6 when the regulations were adopted. Even so, we're saying
7 the calculations by the sales tax auditor were just
8 improper. They're skewed in favor of the taxable amount
9 without proper justification as Mr. Cahill demonstrated
10 the amount in the taxable amount \$7.25 for the wood and
11 construction and \$4.00 for the shutter, fixture, and
12 manufacturing labor. \$4.00. That's \$11.25 of the \$18.25
13 for the shutter.

14 The taxable amount being \$11.25, and the
15 nontaxable amount being \$7.00. It's just -- it's just not
16 right. We've demonstrated that. And we'll just submit to
17 the Court, Your Honor, that we're asking the Court to look
18 at this as a tax paid -- all taxes have been paid prepaid
19 on all of the items. These are materials. That is the
20 proper way to calculate the sales tax on the manufacturer
21 and installation of shutters, which we believe are defined
22 as materials.

23 Thank you very much.

24 JUDGE GEARY: Thank you. Technically, we're not
25 a court either, Mr. Davis.

1 MR. DAVIS: I know.

2 JUDGE GEARY: We're a tribunal of some kind.

3 MR. DAVIS: Yes. Thank you.

4 JUDGE GEARY: Department, are you ready to give
5 your only closing argument?

6 MR. BACCHUS: We are.

7 JUDGE GEARY: All right. Proceed.

8

9 CLOSING STATEMENT

10 MR. BACCHUS: In this an appeal there's no
11 dispute that Appellant is a construction contractor that
12 furnished installed plantation-style shutters in
13 California under lump sum construction contracts. In
14 addition, there's no dispute that Appellant either
15 purchased all of its raw construction materials tax paid
16 at the source of purchase, or Appellant paid use tax on a
17 sales and use tax returns measured by the cost of the raw
18 materials.

19 Under regulation 1521(b)(2), construction
20 contractors are generally either consumers of materials or
21 retailers of fixtures they furnish and install in the
22 performance of construction contracts. Regulation 1521
23 defines materials as construction materials and components
24 and other tangible personal property incorporated into,
25 attached to, or affixed to real property which loses its

1 identity to become an integral and inseparable part of the
2 real property.

3 Regulation 1521 defines fixtures as items which
4 are accessory to a building or other structure and do not
5 lose their identity as accessories when installed.
6 Appendix (a) to Regulation 1521 list typical items that
7 are classified as materials and includes materials such as
8 windows, doors, mill work, and other items that become an
9 integral and inseparable part of the real property.

10 Appendix (b) to regulation 1521 list typical
11 items that are classified as fixtures, and includes items
12 such as venetian blinds, awnings, alarms, and other items
13 that do not lose their identity when installed.

14 According to sales and use tax annotations
15 190.1790 and 190.0829, interior shutters including
16 plantation-style shutters are fixtures. And construction
17 contractors are the retailers of the shutters they furnish
18 and install as part of a construction contract. And the
19 retailers owe sales tax on those retail sales.

20 Here Appellant furnished and installed
21 plantation-style shutters as part of construction
22 contracts. Plantation-style shutters are an accessory to
23 a building. They do not lose their identity as
24 accessories when they are installed. Moreover, shutters
25 do not become an integral or inseparable part of the real

1 property.

2 Therefore, the shutters are fixtures and
3 Appellant owes sales tax on those retail sales pursuant to
4 Regulation 1521(b). However, we note that Appellant is
5 entitled to a credit for the tax it paid on the raw
6 materials that were incorporated into the shutter panels.
7 In objecting to the Department's determination that their
8 shutters are fixtures, Appellant attempts to create a new
9 way to distinguish between materials and fixtures.

10 Appellant proposes that a manufacturer or a
11 person that builds from raw materials should always be
12 treated as consumers of raw materials they consume to
13 construct an item like their plantation shutters.
14 Appellant attempts to distinguish between manufacturers
15 and fabricators, which are people who -- that purchase
16 pre-made supplies and either assembled them or purchased a
17 pre-made shutter panel.

18 This is not a relevant distinction to determine
19 whether something is a fixture or material under
20 Regulation 1521. Under regulation 1521, a fixture is
21 property which does not lose its identity upon
22 installation in reality or real property. The condition
23 in which it is acquired by the contractor is irrelevant to
24 its identity as a fixture and is only a factor in
25 determining the sale price of the fixture.

1 In fact, Regulation 1521(b)(2)(B) specifically
2 describes how the price is determined when the contractor
3 is the manufacturer of the fixture, which is done by
4 abrogating several items, including the cost of materials
5 to the contractor.

6 While Appellant cites to various annotations
7 involving fixtures that were purchased by the contractor
8 prefabricated, those annotations do not state or stand for
9 the proposition that a contractor could not be the
10 manufacturer of a fixture. As such would be directly
11 contrary to the plain language of Regulation 1521. Based
12 on the foregoing, Appellant's shutters are appropriately
13 classified as fixtures, and Appellant owes sales tax on
14 its retail sales of the shutter panels.

15 Moving on to the audit methodology. The
16 Department determined that the percentage of Appellant's
17 shutter sales by using -- or they determined the
18 percentage of Appellant's shutter sales by using a
19 segregation test for the third quarter of 2009.

20 I will mention now that the Department excluded
21 doors from -- from the calculation. So, essentially,
22 they're segregating the sales of doors from the sales of
23 the plantation-style shutters.

24 JUDGE GEARY: By sales of doors, you mean
25 shutters installed on doors?

1 MR. BACCHUS: I do not.

2 JUDGE GEARY: Okay.

3 MR. BACCHUS: By doors, I mean actual doors,
4 shutters used in place of doors.

5 JUDGE GEARY: Okay.

6 MR. BACCHUS: That is another distinction that we
7 would like to clarify. Shutters installed on doors are
8 fixtures.

9 MR. CLAREMON: Or in front of doors.

10 MR. BACCHUS: Or in front of doors. Shutters
11 installed in place of a door would be considered a
12 material as they would be acting as a door, which is
13 specifically classified as material in Appendix (a) of
14 Regulation 1521.

15 JUDGE GEARY: And that's how the auditor did it?

16 MR. BACCHUS: Correct.

17 JUDGE GEARY: Okay. Go ahead. Proceed.

18 MR. BACCHUS: The Department determined that
19 74.73 percent of Appellant's sales were for shutters.
20 Accordingly, the Department calculated total sales of
21 shutters for the liability period of 2 -- of just under
22 two-and-a-half-million dollars. The Department then used
23 Appellant's cost sheet to determine the proration between
24 the taxable sale of shutter panels and the nontaxable sale
25 of shutter frames.

1 The Department initially determined that
2 61.64 percent of Appellant's total shutter cost were
3 taxable or attributable to the shutter panel. And 38.26
4 percent was nontaxable or attributable to the framing.
5 Upon re-audit the Department reviewed additional
6 information provided by Appellant and recalculated the
7 proration of cost and found that 58.04 percent of
8 Appellant's cost were taxable, and 41.96 percent were
9 nontaxable.

10 During a second re-audit the Department again
11 reduced the taxable percentage to 52.45 percent and
12 increased the nontaxable percentage to 47.55 percent. The
13 reduction in the second re-audit is based solely on
14 assertions made by Appellant and not on any documentation
15 or other evidence. Appellant has not provided any
16 additional documentation, and has thus failed to meet its
17 burden of proof that additional adjustments are warranted.

18 Finally, Appellant paid tax or tax reimbursement
19 measured by cost on all of the raw materials it purchased.
20 So it is entitled to a credit for tax-paid purchases that
21 it resells. Accordingly, when the Department initially
22 determined that Appellant resold 61.64 percent of raw
23 materials, Appellant would have been entitled to a credit
24 for the tax paid on the purchases of those 61.64 percent
25 of materials.

1 Because the Department ultimately determined that
2 Appellant only resold 52.45 percent of the raw materials,
3 Appellant is only entitled to a credit for the tax paid on
4 that 52.45 percent of purchases. The amount of the credit
5 was, therefore, appropriately reduced to reflect that
6 approximately 9 percent of the materials initially
7 determined to be resold were actually consumed by
8 Appellant.

9 If the amount of the tax-paid purchase resold
10 credit is not decreased with the decrease in taxable sales
11 as Appellant argues, Appellant would receive a credit for
12 tax-paid purchases resold on items that it did not resell
13 but, in fact, consumed.

14 Now, as to the 6596 or reliance on the prior
15 audit, we'll note that the Sullivan Group, which was the
16 prior company, is a distinct and separate company.
17 There's no argument that Sully Green incorporated is the
18 successor to the Sullivan Group. And so the provisions of
19 Section 6596 would not be available to Sully Green as far
20 as relying on that prior audit.

21 Moreover, in March of 2010 after Sully Green --
22 after Appellant opened its seller's permit, the Department
23 looked into how they were reporting tax and a -- there's
24 an e-mail we have from Mariella Tellez that -- that she
25 first called and talked to Mr. Sullivan to explain to him

1 the tax implications of the business, and to clarify that
2 what was previously done in that prior audit was not the
3 appropriate way to handle the tax on shutter sales.

4 She followed up that conversation with the e-mail
5 like I mentioned on March 17, 2010. And in that e-mail
6 she specifically states and lists -- gives the annotations
7 specifically stating that shutters are in fact fixtures.
8 So even if there was an argument or a decision made that
9 Sully Green was the successor of the Sullivan Group, which
10 we do not believe is the case, by virtue of the Department
11 informing Mr. Sullivan that fixture -- that the shutters
12 were fixtures in 2010, Sully Green or Appellant would not
13 be able to rely on that prior erroneous advice.

14 JUDGE GEARY: And the e-mails are in --

15 MR. BACCHUS: Sorry. So that's what -- that's
16 the only distinction we have. Sorry. The e-mail is not
17 part of our exhibits, and we would request that we could
18 provide that after the fact.

19 JUDGE GEARY: Do you have them today?

20 MR. BACCHUS: I do.

21 JUDGE GEARY: Can we get copies made of these
22 e-mails or whatever other evidence Counsel has that they
23 would like to supplement the records with? Mr. Bacchus,
24 if you could give Nia the documents, I will have -- ask
25 her to make copies for each of the judges and also for --

1 Mr. Davis, do you need more than one copy of
2 these documents to look at today?

3 MR. DAVIS: I'll settle for one, Your Honor, for
4 expeditious purpose.

5 JUDGE GEARY: Okay.

6 MR. CLAREMON: Also on the issue of the reliance
7 on advice. One thing that wanted to also bring up is
8 there was a mention of an element of Regulation 1705
9 related to 50 percent or greater ownership. That's
10 something that I can speak on. It was added in 2014 as
11 part of subparagraphs 1, 2, 3 and then subparagraph 3, A,
12 B, and C to subdivision C to 1705.

13 And essentially what it states is that someone
14 who has common ownership and shared accounting function
15 with a person who received audit advice can also rely on
16 that audit advice. What that's intended to remedy is when
17 you have two businesses running concurrently that are
18 related, that are sharing -- that are both commonly owed
19 and are sharing -- specifically sharing. And that word is
20 used specifically, accounting functions.

21 Meaning that one of them was audited. They
22 received this advice in their audit. The exact same --
23 and you can see that in one of the elements in
24 subparagraph(c) (3) (b) when it's talking about they have
25 shared accounting staff. So it's not talking about

1 successive businesses. It's literally talking about when
2 there are two businesses that have common ownership and
3 shared accounting staff.

4 And it would be reasonable in that instance for
5 the company of the two-related companies that was not
6 relied -- that was not audited -- excuse me -- to rely on
7 the advice that the singular accounting staff received.
8 And it's actually -- I think there's a provision in there
9 that explicitly states that, which is the first sentence
10 in that next paragraph after subdivision (c), which says
11 these requirements must be established as existing during
12 the period for which relief is sought.

13 In other words, there needs to be common
14 ownership in shared accounting while this is going on. So
15 we're not talking about a situation where, you know, you
16 have successive companies. And again, as Mr. Bacchus
17 pointed out, they are not a successor. And those
18 provisions for statutory for successor were already in the
19 regulation when this was promulgated.

20 So there was no need to address the situation of
21 the successor because those provisions are here. This was
22 specifically to address two concurrently running --
23 related companies. And I think it explicitly doesn't
24 apply because of that sentence right there.

25 JUDGE GEARY: I don't have the regulation in

1 front of me. Does it -- are you saying that before the
2 amendments, it already had a provision that addressed
3 claims of reliance by a successor corporation?

4 MR. CLAREMON: I believe that -- and I can
5 confirm this. But I believe the provisions allowing for
6 reliance in, for instance, subparagraph -- sorry --
7 subdivision(a) that it could -- that an audited person --
8 that can be relied on by an audited person or by legal or
9 statutory successor to those persons. I believe those
10 predated 2014.

11 JUDGE KWEE: On the statutory successor, would
12 that include the acquisition or merger? I'm not familiar
13 with the site. But doesn't generally the statutory
14 successor include the acquisition of another corporation
15 in its entirety?

16 MR. CLAREMON: Yeah, I'm not sure under the
17 circumstances.

18 MR. BACCHUS: Specifically, yes. A successor is
19 someone who purchases a business of another person. Based
20 on my knowledge of the facts that we have here, that's not
21 being argued, and I don't think that would be the case.
22 In this instance, my understanding is that Mr. Sullivan
23 purchased the assets or the machinery, the tools, from the
24 bankruptcy court and didn't, in fact, purchase the
25 Sullivan Group.

1 JUDGE GEARY: And the Department is -- CDTFA's
2 view is that does not qualify as a legal successor in this
3 context?

4 MR. BACCHUS: Correct.

5 JUDGE GEARY: Okay.

6 JUDGE TAY: What is a distinct and separate
7 company then?

8 MR. BACCHUS: I'm sorry.

9 JUDGE TAY: What is a distinct and separate
10 company? You said that in your argument that the
11 distinct -- it is a distinct and separate company, so
12 reliance does not apply under 6596.

13 MR. BACCHUS: Right. So the Sully Green
14 Incorporated is its own entity. It didn't purchase the
15 Sullivan Group. It didn't purchase other than the tools
16 or the assets of the company. It didn't purchase the
17 goodwill. It didn't purchase the -- it didn't purchase
18 the accounts receivable or accounts payable.

19 It purchased a very specific thing. We would --
20 normally in a case involving a successor, we would see a
21 bill of sale of the company. You would see just other
22 evidence. And, again, it's not being argued that they are
23 the successor.

24 JUDGE TAY: How would it apply to something like
25 an F-reorg?

1 MR. BACCHUS: I'm not familiar with that.

2 JUDGE TAY: A mere change in form. So if a
3 company decides to reincorporate as a Delaware company, it
4 just got a new corporate number. It's a distinct entity
5 for legal purposes, but it maintains the same exact
6 ownership and business.

7 MR. BACCHUS: So the same business --

8 JUDGE TAY: It would be --

9 MR. BACCHUS: -- just reorganizes -- just
10 reorganizes?

11 JUDGE TAY: Yeah.

12 MR. BACCHUS: So that would -- that is a
13 successor company. It's the same thing.

14 JUDGE TAY: Okay. So even though it's a
15 different corporation, it would be a successor company?

16 MR. BACCHUS: Right. I think in most instances
17 the successor company is going to be -- is going to be a
18 new entity.

19 JUDGE TAY: Okay. So then what about acquisition
20 by asset sale?

21 MR. BACCHUS: Again, you'll have to explain that
22 to me. I don't -- I'm not familiar with it.

23 JUDGE TAY: If a company decides to buy another
24 company and all of its functions just by purchasing
25 assets. It does so for favorable tax treatment.

1 MR. BACCHUS: Again I -- we would have to look at
2 the specific facts of the case. In my experience dealing
3 with successor liability cases, only purchasing the assets
4 of a company, specifically, like the machinery or the
5 equipment, that is not in and of itself sufficient to
6 trigger successor liability. Again --

7 JUDGE KWEE: Successor liability is entirely
8 separate from a successor -- statutory successor. One is
9 under corporate scope, the other is under the tax code.

10 MR. BACCHUS: Then I'm not familiar with it.

11 JUDGE KWEE: Okay. And -- I'm sorry.

12 MR. BACCHUS: Again, this wasn't -- this wasn't
13 something that was -- is being argued. And so we would
14 request -- if this an argument, we would request the
15 ability to brief the specific questions post hearing.

16 JUDGE GEARY: Any further questions now?

17 JUDGE TAY: No.

18 JUDGE KWEE: I'm not sure. Are you intending to
19 do additional briefing?

20 JUDGE GEARY: Possibly. I haven't discussed that
21 yet. But do you have any other questions?

22 JUDGE KWEE: Well, depending on whether or not
23 there's additional briefing. I did have a question on
24 whether or not -- assuming the statutory successor or
25 other element were met, would CDTFA have a position on

1 whether or not there was this -- there was advice provided
2 in a prior audit that it was reported in this manner. And
3 I haven't look at the e-mail yet on your argument that
4 there was --

5 MR. BACCHUS: Right. So, essentially, our
6 position -- the Department's position is that, yes, there
7 was erroneous advice given in the prior audit. But that
8 advice was cured via the e-mail that I referenced.

9 JUDGE KWEE: Okay. Thank you.

10 JUDGE GEARY: Yes. Go ahead.

11 JUDGE TAY: The e-mail is dated in 2010?

12 MR. BACCHUS: Correct.

13 JUDGE TAY: The audited period starts in 2009; is
14 that right?

15 MR. BACCHUS: Correct.

16 JUDGE TAY: So would that relieve them of, like,
17 half the time or --

18 MR. BACCHUS: Potentially.

19 JUDGE TAY: Okay. And -- okay. I'll just ask
20 it. In the D&R, the Department mentions that because
21 Patricia Sullivan owned 100 percent of the company at some
22 point in time, that common ownership does not exist, and,
23 therefore, reliance is not available. Is that accurate?
24 Is that still your position?

25 MR. BACCHUS: Not necessarily. Based on what we

1 discussed today I think is more appropriately our
2 position.

3 JUDGE TAY: Okay. Thank you.

4 JUDGE GEARY: Mr. Bacchus, we have three pages of
5 documents. Would the Department be okay if we simply
6 marked this exhibit now for identification, I think F, as
7 in Frank?

8 JUDGE TAY: Four pages.

9 JUDGE GEARY: Oh, I've got -- I only have three
10 pages.

11 JUDGE KWEE: You took my copy.

12 JUDGE GEARY: Are there four pages?

13 JUDGE TAY: I have two of --

14 JUDGE GEARY: Okay. All right. So there's four
15 pages. So this will be -- you're offering this as the
16 Department's -- Respondent's Exhibit F, I believe?

17 MR. BACCHUS: Correct.

18 JUDGE GEARY: And has Appellant had an
19 opportunity to look at these four pages? And if so, does
20 the Appellant have an objection to the admission of these
21 documents?

22 MR. SULLIVAN: I just have --

23 JUDGE GEARY: Do you need a few seconds to look
24 at those?

25 MR. DAVIS: Just a minute, Your Honor.

1 JUDGE GEARY: All right. That's fine.

2 MR. DAVIS: It's just the last page. I've seen
3 the first one.

4 JUDGE GEARY: All right. That's fine. Sure.

5 MR. DAVIS: I'm not going to object to these,
6 Your Honor. I know they're late. I can object to them,
7 but they should be before the Court, or tribunal I should
8 say.

9 JUDGE GEARY: Thank you. So the Department's
10 proffered Exhibit F is admitted. Four pages are admitted.

11 (Department's Exhibits F was received in
12 evidence by the Administrative Law Judge.)

13 JUDGE GEARY: Now, let's talk for a second about
14 whether or not we need or should be allowing an
15 opportunity for additional briefing. We do not always
16 close the record immediately after the hearing is
17 concluded at the end of closing arguments. And I realize
18 you still have your rebuttal. But let's talk about this
19 first.

20 Is the Department going to request an
21 opportunity -- or does the Department request an
22 opportunity to file additional briefing post hearing on
23 this issue of reasonable reliance and prior advice?

24 MR. BACCHUS: Yes, we do.

25 JUDGE GEARY: Okay. I'm probably going to grant

1 that. I don't really have a basis for denying it. And it
2 seems to me that -- I can tell you. I wasn't clear on
3 whether the issue was going to be presented today. What
4 we probably will do -- what I will do -- although, I'm
5 open to input from the parties and my co-panelist.

6 What I intend to do is grant the Department
7 30 days to submit a written brief on that issue. And
8 upon -- when they file their written brief with us, a
9 copy, of course, would be sent to you, Mr. Davis. And you
10 would have 30 days from that date within which to file a
11 responsive brief is what I plan to do.

12 Will 30 days be sufficient for you -- for the
13 Department, Mr. Bacchus?

14 MR. BACCHUS: Yes.

15 JUDGE GEARY: All right. And 30 additional days
16 for you would be sufficient for you, Mr. Davis?

17 MR. DAVIS: Yes, Your Honor.

18 JUDGE GEARY: All right. That's what we'll do
19 then. And Mr. Davis, you have an opportunity for rebuttal
20 if you'd like to do a rebuttal. You're not required to,
21 but I'm happy to give you that chance.

22 MR. DAVIS: I'll take a few minutes.

23 JUDGE GEARY: All right. Go ahead whenever
24 you're ready.

25 MR. DAVIS: Very briefly the exhibit -- what

1 exhibit number was the --

2 MR. CAHILL: The last three.

3 JUDGE GEARY: The newest one?

4 MR. DAVIS: Yes.

5 JUDGE GEARY: These last four pages are F, as in
6 Frank.

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REBUTTAL STATEMENT

9 MR. DAVIS: F. On Exhibit F which is an e-mail
10 dated March 17th, 2010. I'm sure Mr. Sullivan received
11 it. I believe he talked to me. If we look at the second
12 paragraph, there's a regulation cited 190.1780. But if
13 you look --

14 JUDGE GEARY: That's an annotation. I'm sure you
15 meant that.

16 MR. DAVIS: Annotation, yes. It refers to when
17 the contractor purchases and sells completed and finished
18 shutters and bills customers a lump sum. This is not the
19 case here. We don't have completed and finished shutters
20 being sold. We have a construction contractor who is
21 building the shutters, and there's nothing wrong with the
22 application as set forth in here.

23 But we concluded that this is not applicable to
24 the Appellant here. It's a different form of taxable
25 measure, and that's why he consulted me. And, again, it

1 was the people that I contacted. They were either the
2 legal Department or Taxpayer's Advocate Office. I do have
3 their names, if that's any relevance to this Court, of the
4 people that I talked to. One gentleman was --

5 JUDGE GEARY: Mr. Davis, it's not necessary to
6 identify these individuals.

7 MR. DAVIS: Okay. The point is this was the
8 legal interpretation. I don't see that Counsel has added
9 anything of significance in terms of the legal argument
10 that these are materials that should be taxed as the way
11 we want it. Bear with me for one moment, please.

12 And clearly as demonstrated, the testimony was
13 once these shutters and their frames were attached to the
14 real estate, they were not easily removed without damage.
15 And that is a very important factor in determining a
16 fixture as opposed to a material.

17 Thank you very much.

18 JUDGE GEARY: Thank you.

19 MR. DAVIS: I appreciate your time and
20 consideration.

21 JUDGE GEARY: You're welcome.

22 Thank you all for coming in and for making your
23 presentations. Timing wise I am not closing the record
24 because we are keeping it open. And according to my
25 calculations 30 days from today's date is going to be on

1 the weekend of February 23rd, if I counted that correctly.
2 And we will allow to the following workday, February 25th,
3 for the Department to file its brief on -- specifically on
4 the issue of reasonable reliance on prior advice.

5 And when you serve a copy -- when you file it
6 with the Department, or with OTA I should say, do you
7 typically individually serve or does OTA serve your briefs
8 for you? I am not familiar with that process. So how
9 would you do it, Mr. Bacchus?

10 MR. BACCHUS: I would do it individually.

11 JUDGE GEARY: Okay. So somehow indicate to us
12 that it's been sent. And then I will know from the date
13 we get it, that it was sent to you at the same time.
14 Electronically is how you're doing it?

15 MR. BACCHUS: Correct.

16 JUDGE GEARY: And so you're able to file -- serve
17 electronically on Mr. Davis; correct?

18 MR. BACCHUS: Correct.

19 MR. DAVIS: Yes.

20 JUDGE GEARY: Okay. Then I'll know the date you
21 get it. You can just assume, Mr. Davis, that the date
22 that you receive it is the beginning of your 30 days to
23 file your responsive brief. I didn't count it out since
24 it's going to be sometime near the end of March. And when
25 I receive your brief, the record will be closed.

1 Do we typically issue separate orders just
2 advising the parties that the record is closed?

3 JUDGE KWEE: Claudia normally sends out an order
4 saying on this date the record is closed.

5 JUDGE GEARY: Okay. All right. So staff will
6 send out an order after we receive your brief indicating
7 the record has been closed. And for everybody's
8 knowledge -- people from the Department know already
9 because they appear before us pretty regularly. You,
10 Mr. Davis, may not know other than having sat in the
11 audience this morning. 100 days after the record
12 closes -- within 100 days typically we will have a written
13 decision issued and sent to the parties.

14 Thank you everybody for coming in, and this
15 concludes the hearing. And this concludes these hearing
16 days. So we're through for the day.

17 (Proceedings adjourned at 3:42 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 24th day of February, 2020

ERNALYN M. ALONZO
HEARING REPORTER