

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

(OPEN HEARING)

IN THE MATTER OF THE APPEAL OF,)
)
T-MOBILE RESOURCES CORPORATION,) OTA NO. 18012040
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, September 29, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

(OPEN HEARING)

IN THE MATTER OF THE APPEAL OF,)
T-MOBILE RESOURCES CORPORATION,) OTA NO. 18012040
APPELLANT.)
_____)

Transcript of Proceedings, taken at
400 R Street, Sacramento, California, 95811,
commencing at 10:00 a.m. and concluding
at 10:40 a.m. on Tuesday, September 29, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

1 APPEARANCES:

2

3 Panel Lead: ALJ ANDREW KWEE

4

5 Panel Members: ALJ JOSHUA ALDRICH
ALJ KEITH LONG

6 For the Appellant: ERIC S. TRESH
TIMOTHY A. GUSTAFSON
7 ELIZABETH S. CHA

8

9 For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION

10

11 KEVIN SMITH
MONICA SILVA
JASON PARKER

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-7 were received at page 8.)
(Department's Exhibits A-C were received at page 8.)

OPENING STATEMENT

| | <u>PAGE</u> |
|------------------|-------------|
| By Mr. Gustafson | 12 |
| By Mr. Smith | 20 |

CLOSING STATEMENT

| | <u>PAGE</u> |
|------------------|-------------|
| By Mr. Gustafson | 31 |

1 Sacramento, California; Tuesday, September 29, 2020

2 10:00 a.m.

3

4 JUDGE KWEE: We're going on the record.

5 So we're opening the record in the appeal of
6 T-Mobile Resources Corporation. The OTA Case Number is
7 18012040, and today's date is Tuesday
8 September 29th, 2020. The time is approximately
9 10:00 a.m., and today's hearing is noticed for Sacramento,
10 California and is being conducted electronically with the
11 agreement of the parties.

12 Today's panel consist of three Administrative Law
13 Judges. My name is Andrew Kwee, and I'll be the lead
14 judge. Judge Joshua Aldrich and Judge Keith Long are the
15 other members of this panel. Although, there will be --
16 I'm sorry. All three judges will meet after today's
17 hearing and produce a written decision as equal
18 participants. Although the lead judge, that's myself,
19 will conduct the hearing, any judge on this panel may ask
20 any questions necessary or otherwise participate in this
21 proceeding in order to ensure that we have all the
22 information necessary to decide this appeal.

23 For the record, I'd ask that the parties please
24 state their names and who they represent, starting with
25 representatives for CDTFA.

1 MR. SMITH: This is Kevin Smith. I'm from CDTFA
2 legal department.

3 JUDGE KWEE: This is Andrew Kwee. Would the
4 other representatives for CDTFA please state their names
5 for the record.

6 MR. PARKER: This is Jason Parker, Chief of
7 Headquarters Operations Bureau.

8 MS. SILVA: Monica Silva representing CDTFA.

9 JUDGE KWEE: Thank you. And again, this is
10 Judge Kwee. Will the representatives for the taxpayer
11 please state their names for the record.

12 MR. TRESH: Good morning, Your Honors. My name
13 is Eric Tresh, the law firm of Eversheds Sutherland, and I
14 represent T-Mobile Resources in this matter.

15 MR. GUSTAFSON: Good morning, Your Honors. I am
16 Tim Gustafson. I'm also with Eversheds Sutherland,
17 representing Appellant T-Mobile Resources Corporation.

18 JUDGE KWEE: I believe the third representative
19 is muted. This is Judge Kwee.

20 MR. DRURY: My name is Lee Drury. I'm an
21 employee of T-Mobile.

22 MS. CHA: Apologies. I'll try that again, if I
23 may.

24 JUDGE KWEE: Yes, please go ahead.

25 MS. CHA: I'm sorry about that. Good morning.

1 I'm also with Eversheds Sutherland representing T-Mobile
2 Resources Corporation today.

3 MR. TRESH: Liz Cha.

4 MS. CHA: Yes, Liz Cha. Apologies.

5 JUDGE KWEE: Okay. This is Judge Kwee. Thank
6 you. Was there a fifth person for T-Mobile today, or is
7 that everyone for T-Mobile.

8 MR.HSU: Yeah. Good morning, my name is
9 ShihFeng Hsu. I'm an employee of T-Mobile.

10 JUDGE KWEE: Okay. Great. Thank you everyone.
11 I'm just going to briefly go over some procedural matters
12 to make sure that we're all on the same page before we
13 start with the opening presentation.

14 So I understand that there are two witnesses, and
15 both of the witnesses will be called to testify and solely
16 for the issue to the closed session portion, which is
17 whether a refund claim is warranted. And I understand
18 that both witnesses are present, which is Lee Drury with
19 T-Mobile and ShihFeng Hsu, also with T-Mobile; is that
20 correct?

21 MR. TRESH: Yes, Your Honor.

22 JUDGE KWEE: Okay. And for CDTFA, do you have
23 any objections to hearing testimony from these two
24 witnesses?

25 MR. SMITH: This is Kevin Smith. No we do not.

1 JUDGE KWEE: Okay. Thank you. And as far as the
2 exhibits, I understand CDTFA has Exhibits A through C.
3 These exhibits have been distributed to the parties, and
4 Appellant has no objection to CDTFA's exhibit. Is that
5 correct Appellant -- for the Appellant?

6 MR. TRESH: It is, Your Honor. No objection.

7 JUDGE KWEE: Okay. Thank you.

8 And for Appellant, we have Appellant's Exhibits 1
9 through 7, and those were also distributed to the parties.
10 And I understand that CDTFA did have an objection to these
11 Exhibits, that correct for CDTFA?

12 MR. SMITH: I don't believe so.

13 JUDGE KWEE: Okay. I'm sorry.

14 MR. SMITH: No. I don't think we have an
15 objection.

16 JUDGE KWEE: Okay. So if CDTFA has no objections
17 to the taxpayer's Exhibits 1 through 7, then I will go
18 ahead and admit all of the Exhibits A through C and 1
19 through 7 for the parties without objection. Thank you.

20 (Appellant's Exhibits 1-7 were received
21 in evidence by the Administrative Law Judge.)

22 (Department's Exhibits A-C were received in
23 evidence by the Administrative Law Judge.)

24 And so with that said, I also had an item, which
25 during our prehearing conference I had mentioned that OTA

1 intended to take official notice of the BOE minutes of
2 hearing and the BOE public agenda notice, and I did not
3 receive any objections. Is that correct for Appellant?

4 MR. TRESH: It is correct, Your Honor. No
5 objection.

6 JUDGE KWEE: Okay. And for CDTFA, is that also
7 correct for CDTFA?

8 MR. SMITH: This is Kevin Smith. Yes, that is
9 correct.

10 JUDGE KWEE: Okay. Thank you.

11 So OTA will be taking official notice of those
12 two items in connection with the first issue, which was
13 the -- whether or not there's a timely claim for refund.

14 And during the prehearing conference, I had also
15 notified the parties that OTA was raising the timeliness
16 issue, Issue 1, which will be heard during the open
17 session. And both parties were offered an opportunity to
18 provide additional briefing or post hearing briefing.
19 Does either party know, at this point, whether they will
20 be requesting an opportunity to provide post-hearing
21 briefing or if they are satisfied with handling this
22 entirely during the presentations today.

23 I'll start with CDTFA. Are you going to be -- or
24 do you know if you're going to be requesting additional
25 time?

1 MR. SMITH: This is Kevin Smith. No, we will not
2 be requesting additional time. We believe is sufficient
3 to handle the matter.

4 JUDGE KWEE: Okay. And for Appellant, do you
5 know if Appellant will be requesting additional time?

6 MR. TRESH: Your Honor, this is Eric Tresh. May
7 I reserve the right to inform the Office of Tax Appeals at
8 the conclusion of this hearing whether we would like to
9 request post trial briefs -- post hearing briefs?

10 JUDGE KWEE: Yes, certainly. Thank you. I will
11 follow up with the parties at the conclusion of the
12 hearing to find out if we're going to hold the record open
13 at that time.

14 Okay. And just a quick summary then. There's
15 going to be two issues. Those two issues are one, whether
16 the refund claim is timely. This issue is going to be
17 addressed during the open session, which is currently
18 being live-streamed. Upon the conclusion of the
19 presentation for Issue 1, we're going to turn off the
20 live-stream and move to a closed session.

21 At that point, we're going to address Issue 2,
22 which is whether Appellant is entitled to a refund of tax
23 paid. And then this will be held during -- also, the
24 balance of the hearing after Issue 1 is going to be during
25 a closed session.

1 So basically, we've set out a time frame for
2 Issue 1, which was 5 minutes per party for an opening
3 presentation and 5 minutes for per party for a closing
4 presentation. For Issue 2, the refund claim, we set up a
5 time frame of 30 minutes per party for an opening
6 presentation, 60 minutes for witness testimony, and 5
7 minutes per party for closing presentations with the
8 possibility of slight modifications for preserving time if
9 additional time is needed for witness testimony,
10 additional time from the opening presentations, to allow
11 for additional time during witness testimony. So there is
12 some flexibility here during the presentations.

13 Is this the understanding of both parties?

14 MR. TRESH: This is Eric Tresh, Your Honor. Yes,
15 it is --

16 JUDGE KWEE: Okay.

17 MR. TRESH: -- for T-Mobile.

18 MR. SMITH: This is Kevin Smith. Yes, it is.

19 JUDGE KWEE: Okay. Great. Thank you very much.

20 So before we move on to the opening
21 presentations, would either party like to ask any
22 questions about the process or any questions about this
23 appeal?

24 MR. TRESH: No, Your Honor.

25 MR. SMITH: We have no questions. This is Kevin

1 Smith.

2 JUDGE KWEE: Okay. Great. Thank you very much.

3 Then I'm going to turn it over to the
4 representatives for Appellant T-Mobile to start with their
5 opening presentations. You have approximately 30 minutes.
6 You may proceed.

7

8 OPENING STATEMENT

9 MR. GUSTAFSON: This is Tim Gustafson. Thank you
10 very much, Your Honor.

11 With regard to the issued and the question of
12 jurisdiction, just to give you the bottom-line up front,
13 that the Office of Tax Appeals has jurisdiction to hear
14 this appeal that's pursuant to OTA's rules for tax appeals
15 section 30103(b)(1). That's a timely appeal from an
16 adverse Appeals Bureau decision. This adverse decision is
17 the Department's decision and recommendation dated,
18 October 23, 2017.

19 How do we get here? This adverse decision, this
20 D&R represented the culmination of the appeal process with
21 the Department for a refund claim filed by Appellant on
22 July 20, 2016. Now, the only issue raised in that refund
23 claim is the markup issue presently before this panel.
24 And I'll speak to why this refund claim on the markup
25 issues was both timely and a necessity -- unnecessary at

1 the moment, but some clarification is in order because
2 this question of jurisdiction arises from two prior refund
3 claims regarding a separate issue that were filed by
4 Appellant in 2011 -- 2011 and 2014 for a total of
5 \$12 million.

6 Now, these prior refund claims cover the period
7 April 2009 through March 2013; one claim for first couple
8 of years, and the second for the last couple of years.
9 And which Your Honors -- and this time frame, which
10 Your Honors will note, is basically the same periods
11 presently at issue on the markup claim. But the key
12 difference is that these earlier refund claims raise a
13 single issue, and that issue was related to the taxability
14 of electronically delivered software.

15 So we have two refund claims that we're going to
16 be talking about. So for ease of reference, I'll refer to
17 these earlier claims collectively as the software claim;
18 and the claim pending, on appeal before your panel, as the
19 markup claim. Now, when Appellant filed the software
20 claim, the Department, formally the Board of Equalization
21 staff -- again, for ease of reference and for the record,
22 I'll just refer to the agency as the Department.

23 The Department audited Appellant's returns for
24 the periods at issue. Now, as a result of that audit, the
25 Department recommended granting that software claim in its

1 entirety. But the Department also affirmatively raised a
2 markup issue as an adjustment. And considering that
3 adjustment in isolation, that would be a deficiency
4 adjustment. So -- and this markup issue, this adjustment,
5 was valued at approximately \$300,000. And the Department
6 recommended applying that \$300,000 as an offset against
7 the software claim, that \$12 million claim.

8 And so this meant that the Department ultimately
9 recommended a payment to Appellant of about \$11.7 million.
10 At the end of this -- at the end of the audit, they
11 have -- the Department staff has this recommendation. But
12 given the size of the refund that's recommended, the
13 five-member Board, Board of Equalization, had to weigh in
14 on it; and had to weigh in on the Department's staff's
15 recommendation. And that's what brings us to the
16 January 26th, 2016, Board meeting.

17 Now, at that meeting, which is the -- what
18 Your Honors took judicial -- official notice, judicial
19 notice of the minutes in the agenda. The five-member
20 Board considered staff's audit recommendation for
21 Appellant's refund. Now, that's the software claim, along
22 with all the other staff recommendation for refund
23 exceeding \$100,000, the single agenda item.

24 So when Appellant's refund was brought into this
25 item, it was alongside a whole host of other refund items

1 for separate taxpayers, separate issues all because of
2 this threshold amount that the Board itself had to review.
3 So for example, if you look at page 8 of the minutes for
4 that meeting, you'll see that there was a single unanimous
5 vote on the entire agenda of staff recommendations.
6 That's just the consent agenda item.

7 And you'll find T-Mobile's, Appellant's item at
8 the bottom of page 9, right. So you've got two pages and
9 plus some, that were all considered a single vote. And I
10 think it's important to note what this action -- what that
11 Board action was not. So this was not a Board of
12 Equalization acting on any appeal related to the software
13 claim because there was no appeal. The Department had
14 just wrapped up its audit.

15 So if you compare that consent item with the item
16 on the bottom of page 2 of the minutes for the
17 January 26, 2016, meeting, there the minutes reflect that
18 there was a sales and use tax appeal hearing in the matter
19 of New NGC, Inc. And final action on that appeal was
20 taken later in the meeting on that same day, as reflecting
21 on page 17. So that -- that's what the Board did with
22 regard to that taxpayer, hearing of an appeal and ruling
23 and acting on that appeal in a sales and use tax case,
24 that's not what they did with regard to Appellant.

25 And so on -- again, with what they did with

1 regard to Appellant is that they merely approved the
2 staff's recommendation, their audit recommendation as the
3 Board was required to do for a refund over \$100,000. And
4 subsequent to the Board acting on the -- approving the
5 staff -- or recommendation, the Department issued a Notice
6 of Refund to Appellant on January 27th, 2016, of
7 approximately \$11.7 million.

8 Now, again, this amount reflected the Department
9 granting the software claim effectively in full, but
10 taking payment for the markup issue at the same time in
11 the form of an offset. And when the Department sent this
12 Notice of Refund to Appellant, it included a cover letter.
13 And this cover letter stated that if Appellant disagreed
14 with the offset, it would need to file a refund claim
15 within six months. And that's what the Appellant did.
16 And when Appellant did that, the Department treated that
17 claim as timely and continues to treat it as timely, and
18 rightly so. And why is that?

19 Well, for our purposes, we're going to turn to
20 some of the statutes and rules that Your Honor identified
21 in the -- in the order from the pre-hearing conference.
22 But for our purposes, Revenue & Taxation Code Section 6902
23 provides that a refund claim must be filed within six
24 months from the date a determination becomes filed or six
25 months from the date of overpayment. Now, when the

1 Department issued that Notice of Refund on January 27,
2 2016, the determination on -- the audit determination of
3 that markup issue became final.

4 So kind of viewing it another way, when the
5 Department issued that Notice of Refund, it effectively
6 collected an involuntary payment from Appellant on the
7 markup issue in the form of an offset. And when Appellant
8 filed its markup claim on July 20, 2016, that was within
9 six months from the date of that Notice of Refund. It's
10 kind of -- give another parallel, it is one can look at
11 this even though there may have been even a three-year
12 statute of limitations to file a refund claim. And that
13 would be under Revenue & Taxation Code Section 6902.3.

14 Now, that provides that a refund claim for
15 overpayment of tax that is collected by the Department
16 through quote, "Enforcement" -- quote, unquote,
17 "Enforcement procedures is timely filed within three years
18 of overpayment." Right. So this -- this taking of an
19 offset from money at the time they were also issuing
20 money -- taking an -- taking an offset on the market issue
21 at the time they are issuing a refund -- a full refund on
22 a software issue is -- is, again, it can do -- an
23 involuntary payment over something along the lines of
24 these enforcement procedures.

25 But, again, when the Department mailed Appellant

1 that Notice of Refund, it informed Appellant it had six
2 months to file a claim of refund, which Appellant did.
3 And now Your Honors have asked about certain other
4 authorities and whether they apply with regard to the
5 Board of Equalization's action in January 2016. First,
6 former BOE regulation, now CDTFA, Regulation 5561
7 governing petition for rehearing, for that regulation to
8 apply, there needs to be an appeal, and there needs to be
9 a hearing on that appeal. And here there was neither.

10 Again, this was the Board simply approving audit
11 staff recommendation on the software claim. There
12 wasn't -- there was -- and they granted that claim in its
13 entirety. There was no appeal pending, and there was no
14 hearing like that other sales and use tax appeal for that
15 other taxpayer. So the software claim was just a matter
16 on the Board's consent agenda.

17 And turning to Revenue & Taxation Code
18 Section 6933 and -- which is the basis for a refund action
19 in court, this statute supports a finding of jurisdiction
20 on the markup claim and -- because that statute provides
21 that an action for refund is limited to the grounds stated
22 in the administrative claim. Now, the only grounds stated
23 in the software claim -- the one that -- that's the one
24 the Board acted on as parting of the consenting agenda in
25 January 2016 -- was the taxability of electronically

1 delivered software, which the Board granted.

2 So the markup issue was not in that software
3 claim. Appellant could not as a matter of law bring an
4 action to court on the markup issue at that time. You
5 know, in fact, in order to preserve its rights to do that,
6 Appellant had to file a new refund claim with the
7 Department. Which it did within six months from that
8 Notice of Refund. So -- and if Appellant hadn't done
9 that, hadn't file a new claim with the markup issue stated
10 as grounds for that claim, then it could never -- it would
11 never be able to pursue action for refund in court under
12 Section 6933.

13 Lastly, one more -- one thing I'd like to note is
14 that something the -- the Department never issued a Notice
15 of Denial of Refund Claim to Appellant. It only issued a
16 Notice of Refund. And that's because, you know, the
17 Board -- the Department granted Appellant's software
18 claim. It took payment from Appellant on the markup issue
19 in the form of an offset, and then Appellant filed that --
20 the refund claim, the markup claim within six months of
21 that payment.

22 And I'll -- I'll just reserve any remaining time
23 for a response.

24 JUDGE KWEE: Okay. This is Judge Kwee. Thank
25 you. And I believe there will be questions, but before we

1 move to questions, I would like to give CDTFA the
2 opportunity to do their opening presentation.

3

4

5

OPENING STATEMENT

6

MR. SMITH: Thank you.

7

8 I just have a brief statement. With respect to
9 the issue of timeliness, our position is that the Office
10 of Tax Appeals has jurisdiction to hear this appeal.
11 However, as stated previously, the Department defers to
12 OTA to determine whether it will accept the appeal as
timely, pursuant to OTA's regulations.

13

Thank you.

14

15 JUDGE KWEE: Okay. This is Judge Kwee. I did
16 have a couple of questions. I guess I'll start with
17 CDTFA. And so in listening to the Appellant's arguments,
18 I just had a question to get CDTFA's input or to address
19 those arguments. And so in Revenue and Taxation Code
20 Section 6902, there's that language of the time frame to
21 file a claim refund. And one of the provisions is with
22 respect to determinations made under Article 2, you have
six months from the date the termination becomes final.

23

24

25

Does CDTFA have a position on whether it issued a
determination in this case; whether the refund notice was
the determination which would allow for the six-month

1 period to file a claim for refund?

2 MR. SMITH: Claim for refund or whether granting
3 a claim refund will be seen as a final determination. We
4 just believe that taxpayer was told they had six months to
5 file the appeal, and they filed it within six months. So
6 we believe it's timely.

7 JUDGE KWEE: Okay. Thank you. So I'm just
8 curious because CDTFA's decision had said that the
9 taxpayer was misinformed, that they had six months to
10 file. And so under CDTFA's interpretation, what is the
11 correct time frame and what is the authority for the
12 correct time frame? Is it a statute of regulation or a
13 policy?

14 MR. SMITH: Well, the regulation is governing the
15 matters before the Board. We believe in this case we
16 can't say definitively because of the way the case went to
17 the Board, but we believe it could have been 30 days. But
18 again, we told them six months. So that's -- that's we
19 think is fair that we stick with that six months. And it
20 was filed within that six months. So --

21 JUDGE KWEE: Okay. This is Judge Kwee. So I'm
22 just curious. So is it CDTFA's position that the taxpayer
23 could or not have filed a petition for rehearing after
24 receiving the refund notice on January 28th or there
25 about?

1 MR. SMITH: No. We agree with the taxpayer that
2 a petition for a rehearing would not have made sense
3 because there was no hearing with the Board, which is on
4 the consent calendar due to, you know, public records
5 laws. So petition for rehearing wouldn't have made sense.

6 JUDGE KWEE: Okay. And just so I'm
7 understanding, was the refund -- is the refund already
8 been paid or is that still pending an appeal?

9 MR. SMITH: Do you mean the \$11 million refund?

10 JUDGE KWEE: The yes. \$11.7 refund, yes.

11 MR. SMITH: As far as I know that's been paid. I
12 don't have it in front of me whether it's been paid out,
13 but I would assume by this point it's been paid out.
14 Because, again, it was granted by the Board, the Board of
15 Equalization, per the matter on their consent calendar
16 granted the claim for refund of the \$11 million. The only
17 issue that the taxpayer continued to have was the offset
18 of the \$300,000. So, but the \$11 million claim should
19 be -- was handled and granted. So --

20 JUDGE KWEE: Okay. And I also have a question
21 for the taxpayer just so I'm just understanding just the
22 basis of the refund claim. So my understanding was that
23 there was a \$12 million refund claim. It was granted as
24 to \$11.7 million and disallowed with the respect to
25 \$300,000 on the markup offset; is that -- is that correct?

1 MR. GUSTAFSON: This is Tim Gustafson. I believe
2 that the refund amount, the refund claim that would be the
3 software claim, effectively was granted in its entirety.
4 But the payment amount was -- that refund claim for 12
5 million, the payment amount was 11.7 million because of
6 this affirmative audit adjustment to offset the \$300,000
7 off of the amount.

8 At that time, the Department owed Appellant -- so
9 the Department owed Appellant 12. Department asserted
10 Appellant owed it \$300,000. And so even the Notice of
11 Refund Claim, it just netted those amounts off. So
12 it's -- it just -- I'm describing again. It took payment
13 at that time of \$300,000 when it only paid 11.7 million.

14 JUDGE KWEE: Okay. I understand what you're
15 saying. Thank you. And so this amount has already been
16 refunded to the taxpayer; is that correct or not correct?

17 MR. GUSTAFSON: This is Tim Gustafson. That's
18 correct, Your Honor.

19 JUDGE KWEE: Okay.

20 MR. GUSTAFSON: The \$11.7 million.

21 JUDGE KWEE: Okay. And I'm going to briefly turn
22 it over to my panel members at this point to see if my
23 panel members have any questions of the parties.
24 Judge Aldrich, do you have any questions?

25 JUDGE ALDRICH: I have a brief question for

1 CDTFA. Under 69 -- 6902.3, the enforcement proceedings,
2 could you give an example of that typical kind of case?

3 MR. SMITH: The enforcement one. So a typical
4 one would be one where we file a maybe a lien against
5 somebody's party. And then we -- we go maybe into the
6 bank account and take money from them involuntarily.
7 That's usually the typical 6902.3, involuntary payment
8 situation.

9 JUDGE ALDRICH: Thank you. I'm going to turn it
10 back over to Judge Kwee.

11 JUDGE KWEE: Okay. Thank you. This is
12 Judge Kwee.

13 Judge Keith Long, do you have any questions for
14 the parties at this time?

15 JUDGE LONG: No questions. Thank you.

16 JUDGE KWEE: Okay. And I think -- this is
17 Judge Kwee. I think I have just one more question. So
18 the notice that went out on January 27, 2016, that was a
19 notice of the Board's action or on the refund claim? I'm
20 trying to understand the procedure here. If the taxpayer
21 had disagreed with the decision by the Board to offset the
22 \$300,000, I'm just trying to understand what the correct,
23 in CDTFA's position, what the correct procedure would have
24 been at that point. Is -- are they -- is it CDTFA's
25 position that a second claim for refund is the correct

1 procedure or is there a different procedure that just
2 wasn't exactly communicated to the taxpayer? I'm trying
3 to understand what that procedure should have been.

4 MR. SMITH: Well, I mean, the procedure that
5 occurred here was that we informed them they had six
6 months to file a claim for refund. They filed a claim for
7 refund within six months. We believe it was a timely
8 claim, and that's -- I mean that's it, really.

9 JUDGE KWEE: Right. So I guess I'm just not
10 understanding because, yeah, you know, 6902 limitations
11 period, the only way that it seems that you could fit, you
12 know. Because, yeah, six months from the date of payment
13 that wasn't met three years after the last day of the
14 calendar following the period for which the overpayment
15 was made, that wasn't met.

16 The only -- it seems the only option is six
17 months from the day the determination becomes final, I
18 don't see a determination here. I'm not understanding how
19 that fits into 6902.

20 MR. SMITH: I mean, I think we defer to you to
21 make that decision.

22 JUDGE KWEE: Okay. And I --

23 MR. SMITH: We think this appeal should continue.
24 That's our position.

25 JUDGE KWEE: Okay. Thank you.

1 MR. GUSTAFSON: Your Honor, this is Tim
2 Gustafson. If I may comment on your last question?

3 JUDGE KWEE: Yes, please do.

4 MR. GUSTAFSON: So thinking about it, in the
5 decision and recommendation, that footnote, the Department
6 states that -- at least in that footnote -- put forth that
7 it should have said that there's 30 days to request an
8 appeal of the hearing under Regulation -- Board of
9 Equalization Regulation 5235. And that's governing action
10 on a refund.

11 But, again, the taxpayer had no action on its
12 claim for refund. A claim for refund was granted. So
13 there was never going to be any appeal on the claim for
14 refund that was filed, the software claim. That
15 Regulation 5235 provides that. So just -- and just
16 thinking simply that if a taxpayer, for example, if that
17 regulation were to govern and the taxpayer didn't within
18 30 days file an appeal or request for a hearing, that
19 regulation implies that the Board would issue a Notice of
20 Denial of -- on a Claim For Refund.

21 And so there was never any Notice of Denial
22 issue. There was -- because there was no denial. And
23 going back to Revenue & Taxation Code 6933, the taxpayer
24 had to file a refund on the markup issue in order to be
25 able to pursue it. And the only -- and so there has to be

1 a mechanism for the taxpayer to be able to do that,
2 because you had, again, a refund claim that was filed for
3 a period of years.

4 The CDTFA, the Department, audited that claim.
5 And during the course of the audit, and only during the
6 course of the audit, they raise this affirmative issue,
7 this -- this markup issue. And then take, again, as
8 we're, I think, characterizing it as an involuntary
9 payment against that offset, functions as an involuntary
10 payment against that refund that was granted. And the
11 Regulation 5238, it talks about offsets applying
12 against -- we have an amount of offsets that are due and
13 payable. So as of January 26th, that deficiency on the
14 markup was due and payable, and so they took that payment
15 from the refund claim that was granted on the software
16 claim.

17 And there has to be a mechanism for Appellant to
18 file a claim. Because again, if -- even if Appellant
19 could have done -- appeal that or requested a hearing
20 and -- on the markup issue at that time, if the Board
21 denied it, refused it -- if the Board denied it -- or if
22 Department denied it and -- and just say it would appeal
23 either to the former, Board of Equalization, or here
24 before your panel and you denied it, then the taxpayer
25 would be done.

1 Because under section -- Revenue and Taxation
2 Code Section 6933, any action in court is limited to the
3 grounds for refund that are in the administrative claim.
4 So there had to be the ability for the taxpayer to file an
5 administrative claim for refund on this issue that was
6 audited, and it makes under 6902 that six-month window;
7 whether it's from that notice of refund being a
8 determination on the markup issue or six months from
9 overpayment. Because again, once that refund of
10 \$11.7 million was paid, that was effectively Appellant
11 paying \$300,000 at that time. You have the six-month
12 window to file the claim for refund.

13 I guess another way to think about it is, if that
14 Notice of Action wasn't a determination, then the
15 Department never issued a determination. So we would
16 still be within the time for the Appellant to file a claim
17 for refund.

18 JUDGE KWEE: Okay. This is Judge Kwee. Thank
19 you. I appreciate that, and that is helpful.

20 I -- before we move on to closing statements, I
21 would just like to make sure my panel is ready to proceed
22 or ready to conclude the Issue 1 presentation. So
23 Judge Aldrich, do you have any further questions before we
24 conclude?

25 JUDGE ALDRICH: I have no further questions.

1 JUDGE KWEE: Okay. Thank you.

2 And Judge Long, do you have any further questions
3 before we proceed.

4 JUDGE LONG: This is Judge Long. Yes, I do. I
5 just want to clarify that both parties agree -- I'm sorry.
6 I'm muted?

7 JUDGE KWEE: You're not muted. We could hear
8 you, Judge Long.

9 JUDGE LONG: Okay. It appears to me that both
10 parties agree that there was no hearing in front of the
11 Board, and that the Notice of Refund was the determination
12 that allowed CDTFA's Appeals Bureau to go forward with
13 this Decision and Recommendation; is that correct?

14 MR. GUSTAFSON: This is Tim Gustafson. You know,
15 Appellant agrees that there was no hearing for the Board
16 on anything; not the software claim and certainly not the
17 markup issue, which is currently pending in this appeal.
18 And the reason that CDTFA, the Department, is able to go
19 ahead with the issue of D&R was because there was a timely
20 refund claim filed within the six months of the Notice of
21 Refund, which then kicked up the separate, second
22 administrative process which ultimately brings us here.

23 JUDGE LONG: Okay. And CDTFA, do you agree with
24 that?

25 MR. SMITH: This is Kevin Smith. We agree there

1 was no hearing before the Board. And, again, we just want
2 to reiterate. We think this, you know, this was timely
3 and that you guys have jurisdiction to hear this. That's
4 our position.

5 JUDGE KWEE: So this is Judge Kwee again. I
6 mean, I guess in the context not just, I guess, of how we
7 would apply this type of case, but CDTFA is not taking a
8 position on whether or not the appropriate time frame to
9 respond should be or is, under the law, six months from
10 the date of an offset on the basis that the offset is
11 essentially a determination from which a -- which is an
12 additional six months to -- to file a refund claim? Is
13 CDTFA not taking a position on that, or they are --

14 MR. SMITH: That's correct.

15 JUDGE KWEE: Okay.

16 MR. SMITH: We are not taking a position on that.

17 JUDGE KWEE: Sorry. I'm just taking notes. With
18 that said I believe we're ready to move on to closing
19 presentations. If the parties would like to make closing
20 presentations, I'll turn it over first to Appellant.

21 You have five minutes to make any final arguments
22 you may wish to make.

23 MR. GUSTAFSON: This is Tim Gustafson. Thank
24 you, Your Honor.

25 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CLOSING STATEMENT

MR. GUSTAFSON: Again, just to reiterate, we believe that there was a timely refund claim filed. CDTFA, it's their position that there was a timely refund claim filed. There's no question that the procedure from the filing of that claim bringing this matter to the -- to the Office of Tax Appeals wasn't timely. Again, there was the D&R, and then an appeal from that D&R, all of that is timely. And under the Rules For Tax Appeals, the taxpayer has a certain period of time to appeal an adverse decision from the Appeals Division, which is what they did.

Going back to that Notice of Refund and, again, remember, you know, keeping in mind that the initial refund claim, the software claim was granted in full. The markup was an affirmative adjustment, an audit adjustment. It was -- again, looking at it in isolation, that was a deficiency assessment. That was an assessment against the Appellant. And it just -- Appellant paid the assessment in January 2016 in the form of an offset. It didn't pay -- there was no assessment back when it filed the returns. There was no assessment before -- in the years leading up to 2016.

The assessment was the audit that happened through 2015 that was the staff recommendation was approved by the Board in January 2016, and a Notice of

1 Refund was issued that said, here you go Appellant. Here
2 is your refund in full. But, oh, by the way, we have to
3 take payment on this new issue, this new deficiency
4 assessment, \$300,000. We are taking that now.

5 In order for the taxpayer to make any claim to
6 get -- to argue that issue at all and to be able to argue
7 that issue at every stage in the process, there has to be
8 a mechanism for it to file a time -- a claim for refund.
9 And that's exactly what Appellant did. It filed it within
10 six months. And if that Notice of Refund is a
11 determination, it was that the refund claim in July 2016
12 was six months from that. If that -- that's also six
13 months of over payment.

14 The over payment was when CDTFA took that
15 \$300,000 in January 2016. And, again, just looking at
16 6902.3 as a parallel, as an analogy, those are liens,
17 levies where there's an enforcement procedure. So the
18 statutes specifically says liens, levies, or other
19 enforcement procedures; and that's basically what this
20 offset is. The regulations provide that when there's a
21 refund -- and this is, again, 5238 when there is refund
22 that goes up. And before it gets paid, if there are any
23 off sets due and payable, then you reduce that refund
24 amount. That's exactly what happened here. There was
25 something that the Department said was due and payable,

1 and so they took it.

2 And if there is no mechanism for the taxpayer to
3 file a claim for refund, then it cannot bring an action in
4 court under 6933 because there was never any refund claim.
5 That software claim did not have the markup issue listed
6 in the grounds. And so I think it's clear under the
7 statute 6902, and then the way the inequity is on this
8 that the taxpayer had to file a new refund claim in order
9 to take this issue and be able to argue it throughout
10 every single level, that your panel should find that there
11 is jurisdiction that it has.

12 Again, CDTFA, as Mr. Smith has said, is of the
13 position that a timely refund was filed. They treated it
14 as timely. And so we feel there's no question that your
15 panel has jurisdiction to hear this.

16 Thank you.

17 JUDGE KWEE: Okay. Thank you. This is
18 Judge Kwee. I will turn it over to CDTFA at this point.

19 If they would make closing remarks, now is your
20 opportunity.

21 MR. SMITH: No. We don't have anything in
22 closing.

23 JUDGE KWEE: Okay. Thank you. We're ready to
24 conclude the open portion of today's hearing. The balance
25 of today's hearing in the appeal of T-Mobile is going to

1 be held during a closed session. That means we're going
2 to cut the live stream, and we will resume at
3 approximately 1:00 o'clock p.m. in the afternoon with the
4 next scheduled hearing for the day.

5 So I'm going to go off the record just for one
6 moment. So while we cut the live stream and let you know
7 when we're ready to proceed.

8 Off the record.

9 (END OF OPEN PORTION OF HEARING)

10

11 (Proceedings adjourned at 10:40 a.m.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 19th day
of October, 2020.

ERNALYN M. ALONZO
HEARING REPORTER