

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
NATIONAL WOOD PRODUCTS, INC., ) OTA NO. 18011952  
)  
APPELLANT. )  
)  
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TRANSCRIPT OF VIRTUAL PROCEEDINGS

Thursday, February 18, 2021

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Virtual Proceedings,  
commencing at 1:06 p.m. and concluding  
at 1:54 p.m. on Thursday, February 18, 2021,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ NGUYEN DANG  
ALJ DANIEL CHO

For the Appellant: S. JUDY HIRAHARA

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
KEVIN SMITH  
STEPHEN SMITH  
RANDY SUAZO

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-76 were received at page 8.)  
(Department's Exhibits A-I were received at page 8.)

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1 State of California; Thursday, February 18, 2021

2 1:06 p.m.

3

4 JUDGE KWEE: Okay. We're going on the record in  
5 the Appeal of National Wood Products, Inc. This matter is  
6 being held before the Office of Tax Appeals. The case  
7 number with OTA is 18011952. And today's date is  
8 Thursday, February 18th, 2021, and the time is  
9 approximately 1:06 p.m. This hearing is being conducted  
10 virtually with the agreement of the participants.

11 And today's hearing is being heard by a panel of  
12 three Administrative Law Judges. My name is Andrew Kwee,  
13 and I'm going to be the lead judge for this hearing.  
14 Joining with me today are Judge Daniel Cho and  
15 Judge Nguyen Dang, and they are the other two members of  
16 this tax appeals panel. All three judges will meet after  
17 the hearing and will produce a written decision as equal  
18 participants.

19 Although the lead judge, that's myself, will  
20 conduct today's hearing, any person, any judge on this  
21 panel may ask questions or otherwise participate in the  
22 proceedings to ensure that we have all the information  
23 needed to decide this appeal.

24 Just for the record, I'm going to ask the parties  
25 to please say their names again and who they represent,

1 and I'll start with the representatives for the taxpayers.

2 Would you please identify yourself.

3 MS. HIRAHARA: Judy Hirahara here on behalf of  
4 National Wood Products, Inc.

5 JUDGE KWEE: Okay. And is -- did you have  
6 Mr. Thomas Cadden on the line, or is it just going to be  
7 you today?

8 MS. HIRAHARA: It will be me today, Your Honor.

9 JUDGE KWEE: Okay. Thank you.

10 And for CDTFA, may I ask who is representing  
11 CDTFA today?

12 MR. KEVIN SMITH: This is Kevin Smith on behalf  
13 of CDTFA.

14 MR. STEPHEN SMITH: I'm Stephen Smith on behalf  
15 of CDTFA.

16 MR. SUAZO: Randy Suazo on behalf of CDTFA.

17 JUDGE KWEE: Okay. And there was one new  
18 development after the hearing. I believe we originally  
19 listed a witness of Chris Dennis, branch manager for  
20 National Wood Products. But then my understanding is that  
21 he will no longer be testifying today. So today's hearing  
22 will only consist of legal arguments for Appellant; is  
23 that correct?

24 MS. HIRAHARA: Yes, Your Honor.

25 JUDGE KWEE: Okay. Thank you.

1           And for the exhibits I -- for CDTFA's exhibits, I  
2           have Exhibits A through I. These exhibits are the same  
3           documents that were attached to the minutes and orders and  
4           e-mailed to the parties after our prehearing conference  
5           earlier this month. And I understand Appellant does not  
6           have any objections to submitting CDTFA's exhibits.

7           CDTFA -- I'm sorry. Did we just lose someone? I  
8           heard a beep on the line. It looks like we have everyone,  
9           so I -- oh, okay. There were two hosts. I apologize, and  
10          we're good to go.

11          So for CDTFA, is the exhibit summary I just  
12          provided, Exhibits A through I, is that correct for you?

13          MR. KEVIN SMITH: This is Kevin Smith. Yes,  
14          that's correct.

15          JUDGE KWEE: Okay. And Appellant is it correct  
16          that you don't have any objections to these exhibits?

17          MS. HIRAHARA: Judy Hirahara. Yes, no  
18          objections.

19          JUDGE KWEE: Okay. And for Appellant, I have  
20          Exhibits 1 through 76. These exhibits were attached to  
21          the minutes and orders and distributed after the  
22          prehearing conference to the parties. I understand that  
23          CDTFA does not have any objections to Appellant's  
24          exhibits. So for CDTFA is that correct, you don't have  
25          any objection to the Exhibits 1 through 76?

1           MR. KEVIN SMITH: This is Kevin Smith. Yes, we  
2 have no objections.

3           JUDGE KWEE: Okay. And for Appellant, is the  
4 listing that I gave, 1 through 76, is that correct for  
5 your exhibit?

6           MS. HIRAHARA: Judy Hirahara. Yes, Your Honor.

7           JUDGE KWEE: Okay. Thank you.

8           So I will admit all of the documents. That's  
9 Exhibits A through I for CDTFA and 1 through 76. I'll  
10 admit those into the evidence -- into evidence without  
11 objection from either party.

12           (Appellant's Exhibits 1-76 were received  
13 in evidence by the Administrative Law Judge.)

14           (Department's Exhibits A-I were received in  
15 evidence by the Administrative Law Judge.)

16           And as far as issues to be heard, there -- I  
17 understand that there's just one issue in this appeal, and  
18 that was whether Appellant was required to charge and  
19 collect the lumber products assessment. We did discuss  
20 this issue during the prehearing conference, and I'd just  
21 like to briefly go over the scope of the issue in more  
22 details to make sure everyone is on the same page.

23           So the question -- I guess the first question I  
24 have is it looks like the amount of the lumber products  
25 assessment that was picked up in the audit was \$10,122 in



1 amount, but then if -- looking at CDTFA's Exhibit G, it  
2 looks like there were 605 transactions that were -- and it  
3 looks like more than 55 were disallowed.

4 So I just wanted to know, am I correct in  
5 understanding that only 55 transactions are disputed, but  
6 there's actually more than 55 transactions that were  
7 examined and disallowed. So, I mean, in other words, the  
8 total disputed amount is less than the \$10,122 in lumber  
9 fee -- in lumber products assessment that was assessed, or  
10 am I -- or was this the 55 customers that were disputed,  
11 so the entire amount is disputed?

12 MR. KEVIN SMITH: Let me try. This is Kevin  
13 Smith. I believe there's 55 customers with, yeah,  
14 approximately 600 transactions. The amount that we agreed  
15 upon previously is \$10,122. So that's the number that I  
16 have.

17 JUDGE KWEE: Okay. Thank you. I probably didn't  
18 say that clearly. I just wanted to make sure that the  
19 entire \$10,122 is in dispute or was the actual disputed --  
20 were there any conceded transactions -- transactions or  
21 customers that is what -- what I wanted to clarify. I  
22 guess I just confirm with the taxpayer or there is dispute  
23 in the entire \$10,122 or if there were any -- if that --  
24 if that 55 disallowed transactions represent all the  
25 transactions that were disallowed -- customers that were

1 disallowed?

2 MS. HIRAHARA: We're disputing \$10,122. This is  
3 Judy Hirahara. I apologize.

4 JUDGE KWEE: Okay. Perfect. Thank you.

5 And so I did have one further question on that.  
6 Do we know if sales tax was paid on the disputed  
7 transactions, or were the -- because I'm wondering if  
8 there's an excess sales tax -- potential excess sales tax  
9 reimbursement issue, or was sales tax not paid on the  
10 disputed transaction?

11 MS. HIRAHARA: This is Judy Hirahara. There are  
12 sales tax paid that were admitted by National Wood. And  
13 so at this point, this appeal has to do with the  
14 one percent lumber products assessment tax.

15 JUDGE KWEE: Okay. So this is Judge Kwee. And  
16 so just, I guess, a quick clarification or follow up on  
17 that. So I understand your position from the prehearing  
18 conference that you're only disputing the lumber products  
19 assessment and not the sales tax. I'm -- I just want to  
20 clarify the scope of OTA's review.

21 So for example, to the extent that OTA were to  
22 conclude that some of the disallowed 55 customers  
23 represented nontaxable sales for resale that were not  
24 subjected to the lumber products assessment. I believe  
25 that potentially could create an issue where there would

1 be excess sales tax reimbursement for those transactions  
2 to the extent Appellant pays sales tax.

3 And so, for example, to the extent that OTA  
4 determined their -- or to the extent it were determined  
5 that there was excess sales tax reimbursement on any  
6 transactions, and I'm not saying there is or there isn't,  
7 but I'm just saying to the extent that that did become an  
8 issue, is Appellant waiving any potential claim that  
9 excess sales tax reimbursement be refunded to the  
10 individual customers from whom Appellant collected the  
11 sales tax, or would there be a potential claim that  
12 Appellant is requesting that the excess sales tax  
13 reimbursement be refunded to the customers?

14 MS. HIRAHARA: Judy Hirahara. If there's a  
15 finding of that nature, then the -- National Wood would  
16 request that reimbursement.

17 JUDGE KWEE: Okay. And I would turn to CDTFA.  
18 CDTFA, did you have any -- anything that you would like to  
19 add or comment about that at this time?

20 MR. KEVIN SMITH: This is Kevin Smith. No, I  
21 don't think we do.

22 JUDGE KWEE: Okay. And would CDTFA -- does CDTFA  
23 have any position on whether or not if OTA were to make a  
24 finding that some of the disallowed transactions were --  
25 taxable sales for resale that -- that there would be a

1 potential excess reimbursement -- sales tax reimbursement  
2 issue?

3 MR. KEVIN SMITH: This is Kevin Smith. Yeah. We  
4 would agree that if we were to find these were sales for  
5 resale then the sales tax collected would be excess tax.  
6 We agree.

7 JUDGE KWEE: Okay. Great. Oh, and I just -- I  
8 believe one of the panel members had a question to ask  
9 about that. Did any of -- did either of the panel members  
10 have a question they specifically wanted to ask about this  
11 issue?

12 JUDGE CHO: This is Judge Cho. I just wanted to  
13 clarify with respect to the adjustment that was made  
14 between the decision versus in the reaudit. I believe  
15 that the taxpayer was saying that all those sales were  
16 retail -- they're not retail sales, but they collected  
17 sales tax reimbursement on all those sales. Would any  
18 adjustment be made for those sales on a sales tax side  
19 then?

20 MS. HIRAHARA: This is Judy Hirahara.

21 MR. KEVIN SMITH: Sorry. Go ahead, Ms. Hirahara.

22 MS. HIRAHARA: Yes. There should be a  
23 reimbursement.

24 JUDGE KWEE: This is Judge Kwee. I apologize  
25 that we're going back and forth here. I just didn't catch

1 what you said. Did you say that there already was  
2 reimbursement or that you are requesting reimbursement for  
3 transactions that were already allowed?

4 MS. HIRAHARA: This is Judy Hirahara. Those were  
5 found to be sales for resale, then the reimbursement.  
6 There should be reimbursement in those sales tax.

7 JUDGE KWEE: Okay. And so CDTFA, I'm not sure if  
8 this is a new issue for you. Does CDTFA have any comments  
9 that they would like to address at this point before we  
10 start the hearing?

11 MR. KEVIN SMITH: No. This is Kevin Smith. I  
12 just wanted to point out. If there was excess tax  
13 reimbursement, they would have to refund it to their  
14 customers first. That's the proper procedure for excess  
15 tax reimbursement.

16 JUDGE KWEE: Okay. Thank you. This is  
17 Judge Kwee. And CDTFA, would you need time after the  
18 hearing to determine whether and to what extent there  
19 were -- was excess sales tax reimbursement for any of the  
20 transactions which CDTFA has already conceded?

21 MR. STEPHEN SMITH: Mr. Kwee, I think Mr. Suazo  
22 can correct me if I'm wrong. But for the adjustments that  
23 were made previously, our understanding is that the  
24 customers took a tax-paid purchases resold deduction when  
25 they made retail sales. When they reported the retail

1 sales, they also reported a tax-paid purchases resold  
2 deduction. And that was the basis for the adjustments  
3 that were made previously.

4 JUDGE KWEE: Okay. Thank you. And I believe I  
5 have all the information I need. It sounds like the scope  
6 of this issue is the lumber products assessment for the 55  
7 transactions. And to the extent sales tax was paid on any  
8 of those 55 transactions, there could be potential excess  
9 reimbursement -- sales tax reimbursement claim, but any of  
10 the previously conceded transactions are not at issue. Is  
11 that your understanding then, CDTFA?

12 MR. KEVIN SMITH: Yes, that's our understanding.

13 JUDGE KWEE: Okay. And for Appellant's  
14 representative, is that also your understanding? Is that  
15 okay with you?

16 MS. HIRAHARA: Judy Hirahara. Yes.

17 JUDGE KWEE: Okay. Great. Thank you for bearing  
18 with me with those procedural aspects. And so just the  
19 structure of the hearing, we had agreed that -- to  
20 allocate approximately 20 minutes to the taxpayer's  
21 opening presentation followed by 15 minutes to CDTFA's  
22 opening presentation. And then each party would be given  
23 5 minutes on rebuttal for closing arguments -- or I mean,  
24 for closing arguments. Is that time estimate, does that  
25 still work for everyone? I just wanted to make sure

1 because we no longer have the witness testifying.

2 For Appellant, is that time frame -- does that  
3 time framework for you?

4 MS. HIRAHARA: Judy Hirahara. Yes, Your Honor.

5 JUDGE KWEE: Okay. And for CDTFA, does that time  
6 frame still work for you?

7 MR. KEVIN SMITH: Kevin Smith. Yes, that works  
8 for us.

9 JUDGE KWEE: Okay. Great. So we are ready to  
10 move on to opening presentations. Does anyone have  
11 questions that they would like to ask before we proceed  
12 with the opening presentation?

13 MS. HIRAHARA: Judy Hirahara. No.

14 MR. KEVIN SMITH: Kevin Smith. No.

15 JUDGE KWEE: Okay. Thank you very much. So I  
16 will turn it over to Appellant's representative,  
17 Ms. Hirahara, for her opening presentation.

18 You have 20 minutes now.

19

20 PRESENTATION

21 MS. HIRAHARA: Thank you. Judy Hirahara  
22 appearing on behalf of National Wood Products, Inc.  
23 Before I begin, I would just like to thank the Office of  
24 Tax Appeals and Your Honors for allowing National Wood to  
25 present its claim and be heard today.

1           As such, specifically, National Woods' brief and  
2 moving papers, National Wood contends that the  
3 transactions with the 55 customers are sales for resale  
4 and, therefore, it is not liable for the 1 percent lumber  
5 assessment -- lumber products assessment on the following  
6 grounds:

7           First, National Wood is a wholesaler of lumber  
8 and wood products, not a retailer and, therefore, exempt  
9 from the LPA. National Wood is not a retailer under the  
10 California Lumber Products Assessment Law that provides  
11 that only a retailer is charged with collecting and  
12 remitting the LPA. California Revenue & Taxation Code  
13 6015(a)(1) defines a retailer to include every seller who  
14 makes any retail sales or sales of tangible personal  
15 property and every person engaged in the business of --  
16 excuse me -- making retail sales at auction of tangible  
17 personal property owned by the person or others.

18           California Revenue & Taxation Code 6007 defines  
19 retail sale as a sale or a purpose other than resale in  
20 the regular course of business in the form of tangible  
21 personal property. In other words, the sale of property  
22 is not a retail sale subject to the sales tax if the buyer  
23 plans to resell the product in the regular course of his  
24 business. That's Precision Aerospace Corporation versus  
25 State Board of Equalization (2018) Cal App. 3rd 188, 192,



1 1990 -- I'm sorry. I apologize. 218 Cal. App. 3rd 1300,  
2 1309 1990.

3 National Wood, as I mentioned, is a wholesaler of  
4 lumber and wood products who sold materials to its  
5 customers who incorporated the materials into their  
6 manufactured products, for example, wood cabinets, which  
7 were then resold. Thus, National is not a retailer.  
8 These sales were sales for resale and, therefore, National  
9 is not subject to the LPA.

10 Second, National Wood sale of lumber and wood  
11 products to its customer who incorporated the materials  
12 into the manufactured products, which were resold are  
13 sales for resale or tangible personal property is sold as  
14 a raw material to be used as a component part manufactured  
15 article, which is then -- excuse me -- sold. The sale of  
16 the raw material is considered a sale for resale and not  
17 retail sale subject to sales tax.

18 Regulation 1525(b) of Title 18, California Code  
19 of Regulations, provides that tax does not apply to sales  
20 of tangible personal property to persons who purchase it  
21 for the purpose of incorporating it into the manufactured  
22 article to be sold, as, for example, any raw material  
23 becoming an ingredient or component part of the  
24 manufactured article. The California Supreme Court has  
25 interpreted Rule 1525 to mean that products incorporated

1 into resale of goods during the manufacturing process are  
2 not retail sales for tax purposes and has offered guidance  
3 when there is some doubt as to a particular sale.

4 In determining whether a sale is taxable as a  
5 retail sale or exempt as a sale for resale, the California  
6 courts consistently look to the primary intent of the  
7 purchaser or the primary purpose of the purchase. Kaiser  
8 Steel Corporation versus the Board of Equalization 24 Cal  
9 3rd 188, 192 1979, in determining whether the property  
10 qualifies as a retail or resale purchase, the primary  
11 intent of the purchaser or otherwise stating the primary  
12 purpose of the purchase may be a critical factor.

13 The XYZ letters and declarations, which were  
14 submitted in National Products exhibit binders, Exhibit  
15 Numbers 1 through 55 and 57 through 76, confirm the  
16 customer's primary intent pr primary purpose of their  
17 purchases that they were sales for resale, that the  
18 materials that were purchased were incorporated into  
19 manufactured products, which were then resold. Therefore,  
20 these transactions were sales for resale, not retail  
21 sales. National Wood is not a retailer and thus, exempt  
22 from the LPA.

23 Third, CDTFA's investigation was insufficient.  
24 National Wood's evidence, the XYZ letters and  
25 declarations, were disregarded without an explanation why.

1 Other than providing vague statements that such  
2 information is private and an assertion that the audit was  
3 conducted properly. CDTFA's efforts to substantiate the  
4 XYZ letters were often insufficient. CDTFA reviewed sales  
5 return forms, checked customer websites, and checked to  
6 see if customers had seller's permits.

7 None of these efforts is sufficient to make a  
8 determination as to the primary intent of the purchaser  
9 the primary purpose of the purchase. Moreover, the  
10 efforts weren't sufficient to make a determination that  
11 any of the transactions in the XYZ -- supported by the XYZ  
12 letters were not sales for resale. CDTFA did not give  
13 appropriate weight to all the XYZ letters or declarations  
14 since it cleared transactions of 17 customers, who have  
15 seller's permits and submitted XYZ letters and  
16 declarations. However, there are 24 customers who also  
17 have seller's permits, but CDTFA did clear those  
18 transactions.

19 CDTFA should have conducted a thorough  
20 investigation, including calling the customers, to take  
21 into account the customer's primary intent of the  
22 purchase, the primary purpose of the purchase as required  
23 by California law. They failed to do so. Whether or not  
24 National Wood's customers charged sales tax as reported on  
25 the form, is not determinative of whether National Wood's

1 customers purchased from National Wood with the intent for  
2 resale. Likewise, the volume of goods sold does not  
3 establish the intent of the purchase.

4 Moreover, the audit and the audit reports do not  
5 disclose any determination whether the 41 customers  
6 lacking seller's permits were required to have a seller's  
7 permit, which they were tasked to do pursuant to the  
8 Decision and Recommendation by the Appeals Board. A sale  
9 may be a resale even without a seller's permit if the  
10 purchaser makes sufficient sales to be required to hold a  
11 seller's permit.

12 It's in Business Taxes Law Guide, annotation  
13 475.0020 October 6, 1965, stating that a seller who does  
14 not have a resale certificate on file may show by other  
15 evidence that the property was resold in the purchaser's  
16 regular course of business even if the purchaser does not  
17 have a seller's permit. In the reports, there were no  
18 determinations made whether the customer is lacking a  
19 seller's permit made sales sufficient to be required to  
20 hold a seller's permit. They failed to do that.

21 As set forth in National Wood's brief and moving  
22 papers, National Wood would request that you find it is  
23 not liable for the 1 percent on the products assessment on  
24 the disputed transactions, or find that another reaudit  
25 involving a thorough investigation is in order.

1 Thank you.

2 JUDGE KWEE: Okay. Thank you.

3 At this point I will turn it over to CDTFA for  
4 their opening presentation, and then I'll open it up to  
5 question of either party after.

6 So, CDTFA, you have 15 minutes for your opening  
7 presentation.

8

9

PRESENTATION

10 MR. KEVIN SMITH: Thank you. Good afternoon.

11 At issue today is whether Appellant was required  
12 to charge and collect the lumber products assessment on  
13 sale of lumber products. As shown on Exhibit C, disputed  
14 sales relate to 55 of Appellant's customers and the amount  
15 in dispute after every audit the application of a credit  
16 of \$1,470 is \$10,122.

17 The Department conducted an audit of Appellant's  
18 books and records for both sales and use tax and the  
19 products assessment. As shown in Exhibit B, the audit  
20 period for sales and use tax was April 1st, 2010 through  
21 March 31st, 2013. The audit period for the lumber  
22 products assessment was limited to the first quarter of  
23 2013 because the lumber products assessment went into  
24 effect on January 1st, 2013.

25 The lumber products assessment audit was

1 conducted on an actual basis, which means that the  
2 Department examined every transaction in the audit period.  
3 In determining whether a customer was a consumer of  
4 materials or retailer of fixtures, the Department looked  
5 at three indicators.

6 First, whether the customer reported making sales  
7 on a sales and use tax returns that exceeded its purchases  
8 from Appellant. Second, if the customer reported making  
9 any taxable sales on its sales and use tax return. Or  
10 third, if the customer took a tax-paid purchases resold  
11 deduction on its return. When none of those indicators  
12 were present and no resale certificate was on file for the  
13 customer, the Department determined that the lumber  
14 product assessment should have been collected by  
15 Appellant.

16 The Department found Appellant liable for sales  
17 measuring \$2,021,977. And after a reaudit the measure was  
18 reduced to \$1,000,159 -- sorry -- \$1,159,163, as shown on  
19 Exhibit C. Under the lumber products assessment, a  
20 purchase -- a person who purchases a lumber product or  
21 engineered wood product for storage use or other  
22 consumption in California is liable for the assessment at  
23 the rate of 1 percent of the sales price.

24 Retailers of qualifying lumber products and  
25 engineered wood products must charge and collect the

1 assessment from their customers, separately state the  
2 amount of the assessment on the receipt provided to  
3 purchaser at the time of sale, and timely report and pay  
4 the assessment to the Department.

5 Pursuant to Public Resources Code  
6 Section 4629.5(g), the terms "use," "purchase," and  
7 "retailer" have the same meanings as Revenue & Taxation  
8 Code Sections 6009, 6010, and 6015, respectively. These  
9 are located in the sales and use tax law. Retailers of  
10 lumber products or engineered wood products report and pay  
11 the lumber products assessment to the Department on their  
12 sales and use tax returns. It is presumed that tangible  
13 personal property, including lumber and lumber products,  
14 sold by any person in the state is sold for storage use  
15 rather than consumption in the state.

16 Unless the retailer obtains from its customer a  
17 resell certificate that states the property is purchased  
18 for resale, Appellant bears the burden of establishing its  
19 entitlement to any claimed deduction or exemption. If a  
20 resale certificate is not obtained, the seller can use any  
21 verifiable method to show that it should be relieved of  
22 liability for the tax, including the use of XYZ letters  
23 that ask the retailer's customers to confirm in writing  
24 that it was a sale for resale.

25 Because the sales and the sales and use tax and

1 the lumber products assessment are imposed on a similar  
2 manner upon a retail sale of tangible personal property,  
3 and because the lumber products assessment laws  
4 specifically provides the key terms -- of the key terms  
5 use, purchase, and retailer, have the same meaning as they  
6 do under the sales and use tax law where the transaction  
7 is a retail sale for sales and use tax purposes, there  
8 will also be a retail sale for purposes of the imposition  
9 on the lumber products assessment.

10 On July 8th, 2019, OTA requested additional  
11 documentation from Appellant regarding the disputed  
12 transactions, specifically, any documentation showing they  
13 were sales for resale. In response, Appellant provided  
14 invoices to OTA for each disputed transaction that is  
15 contained -- sorry -- transaction. This is contained in  
16 Appellant's Exhibits 1 to 55. Every one of the invoices  
17 include a line item for sales tax and lists an amount of  
18 sales tax collected. Collecting sales tax reimbursement  
19 on the sale of qualified lumber products is inconsistent  
20 with these transactions being sales for resale.

21 If they were sales for resale, then we would  
22 expect Appellant to not collect sales tax reimbursement.  
23 But that's not what occurred here. In all instances the  
24 invoices provided by Appellant showed -- show that they  
25 collected sales tax reimbursement. Therefore, these were



1 not sales for resale, and Appellant was required to  
2 collect the lumber products assessment.

3 While this is dispositive of the issue, as stated  
4 above and as shown in Exhibit B, the customers involved in  
5 the disputed transactions are construction contract --  
6 contractors who reported sales and use tax in a manner  
7 consistent with a contractor being a consumer and not a  
8 retailer of tangible personal property. That is, they are  
9 consumers of materials and retailers of fixtures, and  
10 Appellant was required to collect the lumber products  
11 assessment from them.

12 This concludes my presentation. Thank you.

13 JUDGE KWEE: Thank you. This is Judge Kwee. So  
14 just a quick follow up on that. So I think CDTFA had  
15 indicated that for the remaining disputed transactions,  
16 you had looked at three factors. And then also, if none  
17 of those factors were present, you'd look to see if there  
18 was a resale certificate on file. But then for Appellant,  
19 I thought Appellant indicated that for 24 of the  
20 transactions -- not a resales certificate. I meant you  
21 would look to see whether or not they have a seller's  
22 permit on file. And I thought Appellant's representative  
23 indicated that for 24 of the transactions there was a  
24 seller's permit on file, or did I not hear that correctly?  
25 Am I -- or did I miss something?

1 MS. HIRAHARA: This is Judy Hirahara. Yes, there  
2 are 24 customers with seller's permits, but those  
3 transactions were not removed from the taxable measure.

4 JUDGE KWEE: Okay. So I would -- this is  
5 Judge Kwee. I would turn it over to CDTFA. So was that  
6 not your -- why -- why were the 24 transactions not  
7 allowed if they had the XYZ letter plus a seller's permit  
8 on file, or was that not your understanding?

9 MR. KEVIN SMITH: I don't think we believe a  
10 seller's permit -- only a seller's permit alone is enough.  
11 I think, you know, I just listed the three indicators that  
12 we looked at; whether they were making, you know, sales or  
13 tax-based purchases resold as indicators of whether these  
14 were sales for resale. Of course, holding a seller's  
15 permit alone doesn't make -- mean that everything you  
16 purchase is a sale for resale.

17 JUDGE KWEE: Okay. Would either of the -- do  
18 either of the panel members have questions they would like  
19 to ask?

20 JUDGE DANG: This is Judge Dang. I have a  
21 question for Appellant'S representative, Ms. Hirahara. As  
22 I was reviewing your Exhibits 1 through 55, it appears  
23 that I think most, if not all of these customers, are  
24 cabinet manufacturers. If I could direct your attention  
25 to Regulation 1521, particularly subdivision(a) (1) (2).

1 And maybe a little background, but I believe this is  
2 mentioned in your briefs that the application of tax,  
3 whether or not this is a retail sale or sale for resale  
4 turns on whether or not these customers who are  
5 contractors consumed the materials or resold fixtures.

6 The subdivision that I've just highlighted  
7 provides the definition for when cabinets would be  
8 considered a fixture, and that is a 90 percent test. Let  
9 me just read briefly. It would be considered to be  
10 prefabricated and a fixture when 90 percent of the total  
11 direct cost of labor and material in fabricating and  
12 installing the cabinet is incurred prior to affixation to  
13 the reality. And it goes on a little bit more in detail.

14 My question is when I was examining these  
15 exhibits I wasn't able to find whether or not the  
16 90 percent test has been met in this case. Would you be  
17 able to offer any kind of clarification on that?

18 MS. HIRAHARA: This is Judy Hirahara. No, Your  
19 Honor, we do not have that information.

20 JUDGE DANG: This is Judge Dang. Thank you. My  
21 second question is that I also noticed several of these  
22 customers are engaged in either millwork or casework. If  
23 I could direct your attention to the same Regulation 1521  
24 appendix A. In that table, millwork is specifically  
25 listed as a material, meaning, that customers who purchase

1     lumber to produce millwork would be making a retail sale,  
2     I believe, of materials. The only instance in which a  
3     material would -- could be resold, I believe, is under a  
4     time and materials contract, which is also stated in 1521  
5     subdivision(b) (2) (a) (1).

6             My question then is, given that in California,  
7     generally, home improvement contracts cannot be made under  
8     a time and materials basis. If you had any clarification  
9     whether these customers who are engaged in millwork or  
10    casework, whether they had any -- whether you have any  
11    clarification whether they actually resold these  
12    materials?

13            MS. HIRAHARA: Judy Hirahara. Excuse me. No,  
14    Your Honor, we do not have information with respect to  
15    that issue.

16            JUDGE DANG: Okay. Thank you. And my final  
17    question is, under our regulations Rules for Tax Appeals  
18    Section 30219, the burden of proof is upon the taxpayer as  
19    to all factual matters. I'm wondering, therefore, what  
20    the relevance of your argument regarding the Department's  
21    or the deficiencies in the Department's verification  
22    theses -- of the evidence that you had presented, what  
23    bearing that might have when the taxpayer is the one that  
24    needs to come forward with the sufficient evidence to  
25    prove that these sales were at resale?

1 MS. HIRAHARA: Judy Hirahara. Your Honor, the  
2 decision and recommendation task for CDTFA to conduct an  
3 investigation to substantiate the XYZ letters, and we're  
4 stating that the CDTFA should have contacted the customers  
5 to find out the primary intent of this purchase. They  
6 submitted the XYZ letters, and we also obtained  
7 declaration -- not for all of the XYZ letters -- but for  
8 the ones that we were able to do so.

9 And with those declarations, Your Honor, they  
10 state that the materials were purchased for resale that  
11 they incorporated the materials into their manufactured  
12 products, which were then resold. And so as a result, our  
13 position is that those are sales for resale.

14 JUDGE DANG: This is Judge Dang speaking. Thank  
15 you, Ms. Hirahara. I have no further questions.

16 JUDGE KWEE: This is Judge Kwee. I just had one  
17 additional follow-up question. So for Appellant's  
18 representative, you had mentioned that there were 24  
19 customers that had seller's permits among the 55  
20 disallowed customers with transactions. And I'm wondering  
21 was there any follow up as to -- because the period at  
22 issue was only that first quarter 2013. So, like, on a  
23 going forward basis, are these repeat customers that --  
24 were they allowed in a later period as making sales for  
25 resale, or were these treated as retail sales in later

1 periods? Was there examination or evidence of how this  
2 was treated in later transactions with the same customers?

3 MS. HIRAHARA: This is Judy Hirahara. No, Your  
4 Honor, we just have the information that these customers  
5 who had seller's permit set forth in the CDTFA' reaudit  
6 report. They were not -- those transactions were not  
7 cleared on a taxable measure.

8 JUDGE KWEE: Okay. And I guess a question for  
9 CDTFA because -- or just about the process, you know, with  
10 the use of one that when the one customer fails to provide  
11 a timely resale certificate, they're not relieved of the  
12 burden. But then they can use other methods to try and  
13 meet their burden, such as the use of the XYZ letters.  
14 And in this case it looks like the taxpayer did get XYZ  
15 letters and declarations. So it looks like the question  
16 was whether or not CDTFA was willing to accept the  
17 responses.

18 And Regulation, you know, 1668 it says that, you  
19 know, the Board is not required to relieve the seller from  
20 a liability based on response to an XYZ, but it may in its  
21 discretion, verify the information provided in the XYZ  
22 letters. And one of the ways it may verify listed is that  
23 it may make contact with the purchaser to determine, you  
24 know, what happened with the property.

25 And I'm -- and from the factors that you

1 indicated during the presentation, it sounded like you  
2 were looking more at how they're reported, but it wasn't  
3 clear whether or not CDTFA actually attempted to make  
4 contact with the customers directly. Is that not a  
5 procedure that you use? Do you mainly look at their  
6 compliance history and their permit status? Or can you  
7 clarify just basically that and versus, you know, the  
8 procedure set forth in the regulation of contacting the  
9 purchaser to verify?

10 MR. KEVIN SMITH: What I believe that happened in  
11 this case is that they looked at what some of the  
12 reporting indicators to try to determine whether they were  
13 sales for resale. And that, coupled with the fact that  
14 they were, you know, claiming they were collecting sales  
15 tax on these transactions led to the conclusion that  
16 these -- that they should have been collecting the lumber  
17 products assessment.

18 JUDGE KWEE: Okay. This is Judge Kwee. Thank  
19 you.

20 Do the panel members have any additional  
21 questions that they would like to ask at this time?

22 JUDGE CHO: This is Judge Cho. I just wanted to  
23 go off of your question, Judge Kwee.

24 So just to CDTFA, just to confirm there's no  
25 attempt to actually request clarification from the

1 customers as to what the lumber products were eventually  
2 used for, such as to ask them if their cabinet  
3 manufacturer whether they used the lumber manufacture --  
4 used the lumber and built the cabinets before attachment  
5 to real property, or if they built the cabinets on real  
6 property?

7 MR. KEVIN SMITH: My understanding is there's  
8 not.

9 JUDGE CHO: This is Judge Cho. Thank you. That  
10 is the only question I had.

11 JUDGE KWEE: This is Judge Kwee. Maybe just one  
12 more follow-up question for the CDTFA's process. As a  
13 procedural matter, do you -- would you ever contact the  
14 customers to verify that response to an XYZ letter, or is  
15 the practice -- the current practice, as set forth in this  
16 appeal, is just to go off of the information that's  
17 available without contacting the customers?

18 MR. KEVIN SMITH: Maybe I'll have Mr. Suazo --  
19 can you maybe speak to the general way that these audits  
20 would occur?

21 MR. SUAZO: Well, looking at the worksheets,  
22 basically, it looks like 12 of the 24 that are in dispute,  
23 or that she's saying that they had permit on, it looks  
24 like they were old permits. So they were either closed  
25 out at the time of sale, or the permit was gotten after



1 the time of sale. So they didn't have a permit at the  
2 time of sale.

3 On the 12 other ones that apparently did have a  
4 permit, it looks like the sales were exempt. Like they  
5 would -- I don't know. Like, for example, \$10,000 but  
6 they take an exemption of \$10,000 for labor, so report  
7 zero taxable sales because they're using this in the  
8 installation of the product to reality as Judge Dang  
9 stated. They probably didn't meet the 90 percent rule.  
10 So they would be consumers of the item that they are  
11 purchasing.

12 As to the XYZ letter process for verification,  
13 they would look at the XYZ letter process. They would go  
14 into the system, either Cross Or Iris. Probably Iris at  
15 the time. They would look to see if the permit was on  
16 file. This is where they found out that they had old  
17 permits on there. They would also see that the reporting,  
18 how they reported. This is where they saw that most of  
19 these sales were either -- they might have reported  
20 something online, one for total sales, but then they  
21 deducted everything out. Meaning, that basically they  
22 were the consumer of the product at the end, not meeting  
23 the 90 percent rule.

24 And in addition to that, some of them that did  
25 have sales that did not have the -- that could have had

1 sales, like, let's say they bought \$12,000 worth of  
2 product from National Wood, but they only reported maybe  
3 \$4,000 in sales -- retail sales, which would mean that  
4 they would have a negative markup if they just sold  
5 National Wood Product. Chances are that's not the only  
6 vender that they would have.

7 So chances are that whatever they bought from  
8 National Wood, since they also paid tax on the product  
9 when they purchased it from National Wood, as National  
10 Wood had invoiced them on the specific line item for the  
11 item, it seems like these were sales for their own  
12 consumption.

13 JUDGE KWEE: This is Judge Kwee. Thank you for  
14 the clarification and discussion about that.

15 So if there are no further questions from the  
16 panel, I would turn it back to the parties for their  
17 closing presentations. And at this point I'd start with  
18 Appellant's representative, Ms. Hirahara.

19 You have five minutes. You may proceed.  
20

21 CLOSING STATEMENT

22 MS. HIRAHARA: This is Judy Hirahara. As stated  
23 in my arguments and as well as in the briefs and moving  
24 papers, National contends that, you know, that these sales  
25 were sales for resale. National is a wholesaler of lumber

1 and wood products. Their customers are primarily cabinet  
2 makers. They -- some do are -- do no work in case work.  
3 But the majority of them manufacturer these products, use  
4 the materials that were purchased from National Wood  
5 Products and resold. And, therefore, this 1 percent of  
6 lumber product assessment should not be assessed against  
7 National Wood. Excuse me.

8 As set forth in the Decision and Recommendation  
9 by the Appeals Board, the CDTFA was tasked to investigate  
10 or substantiate the XYZ letters. They did not. They  
11 looked at sales return forms -- excuse me. They did not  
12 contact the customers. They did not look to see what the  
13 primary intent of the purchase was, and the primary intent  
14 of the purchase. We believe that that's significant here  
15 when the sales are in doubt as to whether they're retail  
16 or for resale.

17 We believe that the CDTFA should have conducted a  
18 more thorough investigation. They did not. Moreover, the  
19 Decision and Recommendation did also task the CDTFA to  
20 look at those 41 customers lacking seller's permits to see  
21 whether or not they were required to do so, and they did  
22 not do that in their reports.

23 So based on the documentation and the XYZ letters  
24 and declarations submitted to the OTA, and the arguments  
25 made in the briefs, National Wood contends and request

1 that the Court finds that these were sales for resale and  
2 not assess that 1 percent.

3 Thank you.

4 JUDGE KWEE: Thank you.

5 And I will turn it over to CDTFA to have their  
6 closing arguments.

7

8 CLOSING STATEMENT

9 MR. KEVIN SMITH: Thank you. This is Kevin  
10 Smith.

11 I just want to briefly reiterate that every one  
12 of the invoices included a line item for sales tax and the  
13 amount of sales tax collected. And, again, this is  
14 inconsistent. Collecting sales tax on these sales is  
15 inconsistent with not collecting the lumber product  
16 assessment and these being sales for resale. Therefore,  
17 we think that these are sales for resale and Appellant  
18 should have required -- sorry -- should have collected the  
19 lumber products assessment from all its customers.

20 Thank you.

21 JUDGE KWEE: Okay. Thank you.

22 So at this point I'd like to see if the panel has  
23 any final questions before we conclude today's hearing.

24 JUDGE CHO: This is Judge Cho. I don't have any  
25 questions. Thank you.

1                   JUDGE DANG: This is Judge Dang. Thank you,  
2 Judge Kwee. I have no questions.

3                   JUDGE KWEE: Okay. So with that said, I believe  
4 we're ready to close. So I'd like to thank everyone for  
5 coming in. And we're going to submit this case on  
6 Thursday, February 18, 2021. The record is now closed for  
7 this appeal.

8                   So thank you everyone. And the judges are going  
9 to meet and decide this case after today's hearing, and  
10 we'll send a written opinion of our decision within  
11 100 days from today's date. And so today's hearing in the  
12 Appeal of National Wood Products is now adjourned.

13                   And this concludes the oral hearing calendar for  
14 this week. The next calendar will start on the following  
15 week. Okay. Thank you everyone.

16                   (Proceedings adjourned at 1:54 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 8th day of March, 2021.

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