

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
PROMOTIONAL DESIGN CONCEPTS, INC., ) OTA NO. 18083552  
)  
APPELLANT. )  
)  
\_\_\_\_\_ )

TRANSCRIPT OF VIRTUAL PROCEEDINGS

Wednesday, February 24, 2021

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

IN THE MATTER OF THE APPEAL OF, )  
)  
PROMOTIONAL DESIGN CONCEPTS, INC., ) OTA NO. 18083552  
)  
APPELLANT. )  
)  
\_\_\_\_\_ )

Transcript of Virtual Proceedings,  
commencing at 1:06 p.m. and concluding  
at 2:08 p.m. on Wednesday, February 24, 2021,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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

APPEARANCES:

Panel Lead: ALJ JOSHUA LAMBERT

Panel Members: ALJ NGUYEN DANG  
ALJ SUZANNE BROWN

For the Appellant: JAVIER RAMIREZ  
JUAN PARTIDA  
ADAM MELENDEZ

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
KEVIN SMITH  
SCOTT CLAREMON  
JASON PARKER

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 1-14 were received at page 7.)  
(Department's Exhibits A-G were received at page 7.)

OPENING STATEMENT

	<u>PAGE</u>
By Mr. Ramirez	8

PRESENTATION

	<u>PAGE</u>
By Mr. Ramirez	19
By Mr. Smith	31

WITNESS TESTIMONY

	<u>PAGE</u>
By Mr. Melendez	10

CLOSING STATEMENT

	<u>PAGE</u>
By Mr. Ramirez	48

1 State of California; Wednesday, February 24, 2021

2 1:06 p.m.

3

4 JUDGE LAMBERT: We are now on the record in the  
5 Office of Tax Appeals' oral hearing for the Appeal of  
6 Promotional Design Concepts, Case Number 18083552. The  
7 date is January 24th, 2021, and the time is 1:06 p.m.

8 Due to ongoing health concerns related to Covid,  
9 we're holding these hearings electronically with the  
10 agreement of all the parties. My name is Josh Lambert,  
11 and I am the lead Administrative Law Judge for purposes of  
12 conducting this hearing. And my co-panelists today are  
13 Judge Brown and Judge Dang.

14 Respondent, could you please introduce yourselves  
15 for the record.

16 MR. RAMIREZ: Javier Ramirez for the taxpayer.

17 JUDGE LAMBERT: I'm sorry. Maybe CDTFA could  
18 introduce themselves first, and then after that,  
19 Mr. Ramirez, you guys can introduce yourselves.

20 MR. SMITH: Yes. This is Kevin Smith from the  
21 Legal Department of CDTFA.

22 MR. CLAREMON: And this is Scott Claremon from  
23 the Legal Division of CDTFA.

24 MR. PARKER: And Jason Parker, Chief of  
25 Headquarters Operation Bureau with CDTFA.

1 JUDGE LAMBERT: Thanks.

2 Mr. Ramirez, Appellant, you can now introduce  
3 yourselves, please.

4 MR. RAMIREZ: This is Javier Ramirez  
5 representative of the taxpayer, Promotional Design.

6 MR. PARTIDA: This is Juan Partida,  
7 representative for Promotional Design.

8 JUDGE LAMBERT: Thanks.

9 And I believe we have an Adam Melendez here as  
10 well.

11 So just to confirm the issue for the record is  
12 whether further adjustments are warranted to the  
13 disallowed claimed nontaxable labor sales.

14 Mr. Ramirez, do you agree that's the issue?

15 MR. RAMIREZ: This is Mr. Ramirez. And, yes, I  
16 do concur that's the issue.

17 JUDGE LAMBERT: And, Mr. Parker, do you agree  
18 that's the issue?

19 MR. SMITH: Yes, I agree that's the issue.

20 JUDGE LAMBERT: Or Mr. Smith?

21 MR. SMITH: This is Kevin Smith. Yes, that's the  
22 issue. Thank you.

23 JUDGE LAMBERT: Appellant provides Exhibits 1  
24 through 14. Respondent provides Exhibits A through G.

25 Mr. Ramirez, do you have -- you don't have any

1 objection, or do you have any objections to that evidence?

2 MR. RAMIREZ: This is Mr. Ramirez. Yeah, I have  
3 no objections.

4 JUDGE LAMBERT: Okay. And, Mr. Smith, are there  
5 any objections by Respondent?

6 MR. SMITH: This is Kevin Smith. No, we have no  
7 objections to Appellant's exhibits.

8 JUDGE LAMBERT: Thanks.

9 The evidence is now in the record.

10 (Appellant's Exhibits 1-14 were received  
11 in evidence by the administrative Law Judge.)

12 (Department's Exhibits A-G were received in  
13 evidence by the Administrative Law Judge.)

14 First, we'll have Appellant provide their  
15 presentation, which will be 40 minutes. There will be  
16 questions by the judges and CDTFA.

17 Respondent, you can give your presentation for  
18 20 minutes. There will be questions by the judges.

19 And then, Appellant, you'll have five-minutes for  
20 closing remarks. So now, Appellant, now is your time to  
21 give your presentation and to explain your position. And  
22 when you are ready to have your witness testify, just let  
23 me know, and I'll swear him in. And we'll just keep time,  
24 so you'll have 40 minutes. So please proceed.

25 MR. RAMIREZ: Yeah. This is Javier Ramirez.

1 Judge Lambert, we will not be needing 40 minutes since the  
2 interest abatement issue is no longer in question. We had  
3 calculated that into our time. So we will probably come  
4 in significantly shorter than that.

5 JUDGE LAMBERT: Okay.

6

7

OPENING STATEMENT

8 MR. RAMIREZ: I'm Javier Ramirez, representative  
9 for Promotional Design. We're here to contest the audit  
10 prepared by the State Board of Equalization, now the  
11 CDTFA; specifically, the allocation of nontaxable labor  
12 and taxable labor originally identified as installation  
13 labor. It is our contention that the methodology of the  
14 auditor utilized is flawed, and should be adjusted to  
15 conform with the analysis and observations test provided  
16 by Promotional Design.

17 We would like to first talk about the invoicing  
18 and how Promotional Design actually contracts with its  
19 customer. The first, there is no formal. There has never  
20 been, especially, during this audit 2004 through 2007, no  
21 actual contracts that were signed between Promotional  
22 Design and its customers. They use invoices as a means to  
23 actually document their transactions.

24 Typically, they have their rental charge stated  
25 followed by the labor and installation, which was the



1 assembly and installation. Any additional charges that  
2 were -- that were on the invoices would be contracted as  
3 an optional service. And so that's typically how they  
4 normally would have contracted with their customers. Now,  
5 we provided in Exhibit 9 a sampling of invoices, kind of,  
6 showing that -- how Promotional Design actually contracted  
7 or how they documented their transactions.

8           You'll see that there are, specifically,  
9 transactions identified. If a charge was made, it would  
10 be documented on the actual invoice. Now, we want to make  
11 clear that those services were optional and not mandatory.  
12 The auditor's contention that these -- these transactions  
13 are on every transaction and, therefore, subject -- and  
14 made mandatory is not correct. We can show you on those  
15 specific nine invoices that those invoices do not have the  
16 same charges on every invoice.

17           This is a transaction that is really negotiated  
18 by the customer and Promotional Design. So it's clear  
19 that these transactions are specific to Regulation 1660  
20 are deemed optional and not mandatory.

21           At this time, Judge Lambert, I'd like to have our  
22 expert witness or Adam Melendez, owner of the company and  
23 someone who materially participated in the audit testify.

24           JUDGE LAMBERT: Okay. I wouldn't say he's an  
25 expert witness but just a witness.

1 MR. RAMIREZ: Just a witness, yeah.

2 JUDGE LAMBERT: Okay. I don't see him, but I  
3 guess you could raise your right hand, Mr. Melendez.

4 MR. MELENDEZ: Yeah.

5

6

ADAM MELENDEZ,

7 produced as a witness, and having been first duly sworn by  
8 the Administrative Law Judge, was examined and testified  
9 as follows:

10

11 JUDGE LAMBERT: Thanks.

12 MR. RAMIREZ: Thank you.

13

14

DIRECT EXAMINATION

15 BY MR. RAMIREZ:

16 Q Mr. Melendez, I would like to ask you our first  
17 question, which was to clarify you were the owner at the  
18 time of the audit?

19 A Yes.

20 Q And that you participated in the audit by  
21 responding to -- responding to and discussing issues with  
22 the auditor?

23 A Oh, yeah -- yes.

24 Q So it is safe to say that you are very familiar  
25 with the audit issues and everything that came up in the

1       audit?

2             A     Yes.

3             Q     Mr. Melendez, did you, at the time of the audit  
4       between 2004 and 2007, charge your customers for delivery?

5             A     No, we did not.

6             Q     Is there any particular reason why you chose not  
7       to invoice your customer for delivery?

8             A     We pretty much -- the delivery was more of a  
9       courtesy thing. So we didn't charge for -- for delivery.

10            Q     And you did not separately state delivery charges  
11       on your invoice; correct?

12            A     I'm sorry. What's that again?

13            Q     You did not separately state delivery charges on  
14       your invoices; correct?

15            A     No.

16            Q     Mr. Melendez, was it normal practice to  
17       separately state on your invoices optional charges, such  
18       as tear down and/or cleaning services?

19            A     If we charged for teardown and cleaning, it would  
20       be separate on the invoice. This is, again, optional.  
21       Sometimes the client does the cleaning themselves. And,  
22       like, for the larger projects, we typically do it out of  
23       courtesy. So we'll go ahead and do it ourselves,  
24       especially, when they're repeat customers and they keep  
25       coming back to us, or it's a big installation. So yeah,

1 so that's optional.

2 Q So you clearly did not consider these services  
3 mandatory, and they are not on every invoice?

4 A Yes, they're not mandatory.

5 Q Can you give an example or a situation when the  
6 client might come, say, pickup at your site, rent, and  
7 return where there's no assembly, no installation, no  
8 setup, no cleaning fee?

9 A We -- one good example would probably be the  
10 movie industry. Some of the movie studios, they actually  
11 would come by and pick up the tents. And we would just,  
12 basically, tell them just bring -- make sure they bring  
13 them back clean. And so that's pretty much they would do  
14 the installation. They would do the takedown and the  
15 cleaning. And if they didn't clean it, like I said --  
16 mentioned before, they're a good customer then we didn't  
17 mind. We'd just go ahead and clean it ourselves. Yeah.

18 Q By chance did you, during the audit, notify the  
19 auditor that these were optional and not mandatory  
20 services?

21 A Yeah. I think if you're talking about -- I think  
22 it was Don, yes. He was well-aware of it.

23 Q Mr. Melendez, you had an opportunity to evaluate  
24 the auditor's contention regarding, like, the assemble and  
25 nontaxable installation; correct?

1           A    Yes.

2           Q    So in the third reaudit there's an allocation of  
3 approximately 55 percent to assembly and about 45 percent  
4 to installation. Do you agree with this allocation?

5           A    Not at all. I don't think that's accurate. I've  
6 done my share of tent installs and -- for several years.  
7 And so when you compare, like, the assembly to the  
8 installation, it's closer to maybe 10 percent assembly and  
9 around 90 percent installation. Which is pretty much  
10 what's shown in the video that was submitted as evidence  
11 to the State Board.

12                   The reason for that is that staking and  
13 tethering, which is used for anchoring the tents, usually  
14 is the most involved process of an installation. Putting  
15 in a stake that's 3-foot long by 1-inch diameter stake can  
16 be very involved. And depending on the ground surface, it  
17 can take up to 30 minutes per stake. Sometimes --  
18 sometimes below the surface of the asphalt or the dirt  
19 there's, like, a layer of cement, which makes the  
20 installation more difficult. And it can take up to 2 to 3  
21 times, even longer, per stake. This is very common, and  
22 we come across this often at most businesses.

23                   The other part of anchoring, which is tethering  
24 the rope or ratchet straps from the tent top frame to the  
25 stake, that alone can also take about 10 to 15 minutes.

1 So it -- it's extremely involved. It's not -- it's not --  
2 it's not that simple. So --

3 Q Thank you, Mr. Melendez. Can you -- let's  
4 quickly jump to the inflatables. Are inflatables the same  
5 as a tent?

6 A No, not at all.

7 Q Okay. Can you briefly explain what an  
8 inflatable -- what the inflatables are?

9 A It's made out of plastic or rubber. It's -- it's  
10 an object or device that -- that you can either fill it  
11 with continuous air, or it could be airtight. And the way  
12 we normally work with is what's called cold air  
13 inflatable, which has a continuous air blower and -- but  
14 there is -- there's absolutely no assembly whatsoever.  
15 Because once it's inflated, all you do is just tether  
16 either -- if it's on a rooftop, by way of an eyebolt, or  
17 if it's on the ground, you can do with stakes and tethers  
18 as well.

19 Q Thank you, Mr. Melendez. So just to be clear,  
20 there's absolutely no assembly when dealing with  
21 inflatables; correct?

22 A None whatsoever.

23 Q So, Mr. Melendez, do you offer optional services,  
24 such as cleaning or take down?

25 A Yeah, we do. But that's an optional service that

1 we provide as well.

2 Q So customers have the option to clean them  
3 themselves and then deliver them back to you?

4 A Yeah, they do. Sometimes we do it as a courtesy.  
5 That's usually, like, with long-term customers or a  
6 customer that, you know, they order, like, multitude of  
7 tents or inflatables.

8 Q Thank you, Mr. Melendez. So just to be clear, so  
9 if a customer was to call you and ask you, like, they  
10 wanted to rent one of your inflatables, and you gave them  
11 their options: This is how much it is for the rental.  
12 This is how much it is for cleaning. And the customer  
13 would then say, I -- I will clean it myself, that is an  
14 option? They -- you would accept that?

15 A Oh, yeah. Yeah.

16 Q Once again just to clarify, do you charge when  
17 you deliver these inflatables? Do you make a delivery  
18 charge?

19 A No. No.

20 Q So it's just clearly -- it's clearly a courtesy  
21 when you do that. So you -- it's part of the just your  
22 just normal -- your normal every day? You -- you do not  
23 put that charge actually separately stated on an actual  
24 invoice during the audit?

25 A Yeah, no. No.

1 Q Thank you, Mr. Melendez.

2 MR. RAMIREZ: Mr. Lambert, those are my questions  
3 for Mr. Melendez. Do you have any questions for  
4 Mr. Melendez for point of clarification?

5 JUDGE LAMBERT: Sure. Let me ask CDTFA if you  
6 have any questions for the witness.

7 MR. SMITH: This is Kevin Smith. No, I do not.

8 JUDGE LAMBERT: And I'll ask my panel.  
9 Judge Dang, do you have any questions for the witness?

10 JUDGE DANG: Hi. This is Judge Dang. I just had  
11 one brief point of clarification. Do you charge for  
12 travel time and loading and unloading of the tents on any  
13 of these invoices?

14 MR. MELENDEZ: No.

15 JUDGE DANG: No. Okay. I think I had seen  
16 something in the audit working papers that had a breakdown  
17 of the charges, and it appears that there were charges on  
18 there for travel time, loading and unloading. Do you  
19 happen to know what I'm referring to?

20 MR. MELENDEZ: You know what, I don't remember  
21 that part. I'd have to -- like I said, I don't remember  
22 that at all.

23 MR. RAMIREZ: Okay, Judge. That is -- that is  
24 part of our presentation. So we'll actually get into it  
25 in just a minute with regards to that spectacular section



1 of the audit. So it is something we will address.

2 JUDGE DANG: Okay. This is Judge Dang. I just  
3 want to make sure. If these charges were something that  
4 were claimed, do you happen to know if these were charges  
5 that were claimed as nontaxable labor during this audit  
6 period?

7 MR. MELENDEZ: Is that question for me, or is it  
8 for Mr. Ramirez?

9 JUDGE DANG: I was wondering if you could answer  
10 that.

11 MR. RAMIREZ: Okay. Can you clare [sic] --  
12 Judge, can you clarify your question for me one more time,  
13 please?

14 JUDGE DANG: I just wanted to know if travel time  
15 and labor -- I'm sorry -- travel time and loading and  
16 unloading of any of these items was a charge that was  
17 claimed as nontaxable during the audit period?

18 MR. RAMIREZ: And to answer your question, Judge,  
19 that -- no, they were not. They never invoiced for these  
20 charges, and they never became part -- any part of the  
21 nontaxable labor total. So they --

22 JUDGE DANG: Thank you so much.

23 MR. RAMIREZ: Although, in the -- in the  
24 auditor's work papers he did put that in his analysis, and  
25 we did leave a section in there for unloading, primarily,

1 just as part of the assembly. So we made an allocation in  
2 the analysis. So we allowed -- from our perspective, we  
3 did accept that there is an unloading portion as part of  
4 the assembly.

5 So we allowed that to be included in the numbers  
6 based on our evaluation. So -- so we did account for  
7 that, there are -- there are absolutely no charges that  
8 were made for unloading and loading and/or delivering back  
9 and forth.

10 JUDGE DANG: Thank you, Mr. Ramirez. I have no  
11 further questions.

12 JUDGE LAMBERT: And, Judge Brown, do you have any  
13 questions for the witness at this time?

14 JUDGE BROWN: This is Judge Brown. I think I  
15 just have one question. Mr. Melendez, when you testified  
16 that you provide what you described as an optional  
17 service, like, cleaning that you'll charge for that in the  
18 invoices. But then you also indicated that sometimes  
19 you'll do that as a courtesy for a long-time customer or a  
20 large -- a large order or something to that effect, if I  
21 understood correctly.

22 So my question is, when you performed these  
23 services that you characterize as optional, are they  
24 listed on the invoice, like, listed with the service and  
25 then you list them as a fee of zero? Or are they not

1 listed on the invoice?

2 MR. MELENDEZ: No. They're not listed on the  
3 invoice at all. There's nothing to invoice, yes. Yeah.  
4 Since we -- yeah.

5 JUDGE BROWN: Okay. Thank you. That was my  
6 question, and I don't have any further questions right  
7 now.

8 JUDGE LAMBERT: Okay. I don't have any questions  
9 at this time. So, Mr. Ramirez, you can continue with your  
10 presentation.

11 MR. RAMIREZ: Thank you. Thank you,  
12 Judge Lambert.

13

14 PRESENTATION

15 MR. RAMIREZ: At this time -- excuse me. This is  
16 Javier. I would like to go to the audit analysis provided  
17 by the CDTFA. So I would ask the panel if everybody had  
18 the opportunity to view the tent assembly and installation  
19 video.

20 JUDGE BROWN: Yes.

21 JUDGE LAMBERT: Yes, we did.

22 MR. RAMIREZ: Okay. I believe it's clear in the  
23 video and as discussed by Mr. Melendez that at  
24 approximately 12 -- 14 minutes into the 112-minute video,  
25 assembly of the tent is complete. The remaining time in

1 the video was for installation, securing the tent to the  
2 ground.

3 So I would like to direct everybody to  
4 Exhibit 13, which is our side by side comparison. This is  
5 directly from the audit work papers, and all we did was  
6 provide our analysis next to the CDTFA's analysis. In the  
7 auditor's work papers you will see a breakdown of labor  
8 time with the auditor's allocation to come up with the  
9 installation to total labor ratio. This is Reference  
10 R3-12C4. This ratio comes from the previous schedule,  
11 which is R3-124A. We modified these ratios to compare  
12 with the actual time evaluated in the video.

13 And as you can see, once we modified the assembly  
14 minutes and installation minutes based on the video, the  
15 weighted installation ratio jumps close to 90 percent,  
16 which is exactly what we're contending. So if we jump  
17 back to our schedule -- or the audit Schedule R3-12CF,  
18 you'll see that the first line item is installation. And  
19 the auditors on average, allocated time based on the size  
20 of the tent, which we agree with. We know that certain  
21 tents are going to be quicker than others.

22 So we don't disagree that there's an allocation  
23 or -- or that some installation will be less than others.  
24 Now, these are times -- these times are auditor's  
25 assumptions based on their evaluation as well as the

1 evaluation provided by RJJ and/or Promotional Design.  
2 Now, I want to be clear that these numbers do not tieback  
3 to installation labor or reported nontaxable labor charges  
4 on any invoice. Instead, it only serves to derive a  
5 percentage of installation labor to all labor.

6 Now, this is -- this is where we believe it is  
7 inherently flawed. The auditors are making a very general  
8 assumption and adding time or diluting the installation  
9 time and/or nontaxable time by including delivery time.  
10 So if you look at the analysis, there are four line items  
11 in their analysis which relate to delivering a tent or an  
12 inflatable. That's -- they actually allocated time for  
13 picking up and taking to the site and then actually --  
14 then driving back to their location after installation,  
15 and then driving back to the location to pick up, and then  
16 coming back to their location.

17 Our client doesn't charge for delivery. This  
18 time that they're adding only serves to dilute the  
19 installation and nontaxable labor and allocate a larger  
20 value to the taxable labor. So this analysis derives an  
21 installation factor that is then applied to the reported  
22 exempt labor, the balance of which becomes taxable labor.  
23 We see that in Schedule R3-12C3. So once, again, the  
24 client did not charge for delivery or pick up.

25 The CDTFA is actually imputing a delivery charge

1 in its evaluation by allocating time for delivery in its  
2 evaluation of nontaxable labor. This is -- this is  
3 absolutely not appropriate. As delivery is only taxable  
4 if separately stated and charged. So once, again, since  
5 our -- Promotional Design never invoiced clients for  
6 delivery, it's -- this is a charge that should not be  
7 included in the calculation.

8           Additionally, if the -- if it was to be included,  
9 the auditor never took into consideration whether or not  
10 the items were delivered in the client's vehicles or used  
11 third-party delivery. This was never discussed. So that  
12 does -- that becomes a problem for the audit because it's  
13 a flawed audit. So they're not actually accounting for  
14 things correctly. In our opinion this allocation should  
15 be removed from the analysis.

16           Additionally, the CDTFA makes mandatory all  
17 optional services in their allocation. So the teardown  
18 and the cleaning should not be included in the computation  
19 of taxable labor. The CDTFA method of trying to evaluate  
20 total nontaxable and taxable labor per job must be  
21 adjusted to exclude time that is not part of the invoices.  
22 So the CDTFA is basically comparing apples and oranges.

23           They're taking reported nontaxable labor, which  
24 includes typically assembly installation, teardown and  
25 cleaning, and then adding delivery to their equation; time

1 that's not part of reported taxable labor. It's not in  
2 the basis. So delivery is not included in our client's  
3 invoices and should be excluded from the computation of  
4 taxable labor.

5 So that's for the tents, but I'm going to now  
6 jump into the inflatables. So the CDTFA auditor, they --  
7 has duplicated the same allocations for tents and  
8 effectively applied it to the inflatables. As you heard  
9 from Mr. Melendez, inflatable are not the same as tents.  
10 There's absolutely no assembly required. Now, once again  
11 as they added all optional services as mandatory services,  
12 it only services to dilute the nontaxable labor by adding  
13 these times into the taxable ratio.

14 Has everybody had an opportunity to review  
15 Exhibit 7, which is labeled, "How to Properly Set Up a  
16 Bounce House."

17 JUDGE LAMBERT: Yes, we did.

18 MR. RAMIREZ: Okay. So if you take the time to  
19 review that video, you'll see that unlike a tent where  
20 you're actually erecting and you're putting things  
21 together on the assembly side, there is no assembly  
22 required for an inflatable. Those, they are -- it's just  
23 one piece. They're -- it's brought. It's tethered to the  
24 ground. If there's any assembly that would be required,  
25 it's tethering it to the blower, which takes what, a

1 minute? 30 second to a minute?

2 It's relatively zero assembly. It's 100 percent  
3 installation. So once again, we're here in what we  
4 believe to be a flawed calculation because the auditor is  
5 now basically thinking the same assumptions for a tent and  
6 applying it to an inflatable, which has a completely  
7 different ratio and a -- it's completely different in its  
8 form.

9 The CDTFA cannot treat inflatables as the same  
10 way that they evaluate a tent. It's just not appropriate.  
11 They have to make -- they would have to make a separate  
12 allocation. So after evaluating and adjusting to remove  
13 the time added by the CDTFA to dilute the installation and  
14 nontaxable labor, the average installation ratio jumps  
15 from an average of 10 to 15 percent nontaxable labor to 65  
16 to 72 percent of nontaxable installation time as reflected  
17 on Schedule R3-12C4, in our side-by-side comparison.

18 These adjustments effectively reduce the  
19 percentage of error from close to 14 percent down to  
20 7 percent. So we are respectfully requesting this be  
21 taken into consideration and an adjustment be granted to  
22 the -- to Promotional Design as it is clear that the State  
23 is adding into their taxable labor computation items that  
24 should not be there. By -- by including that percentage  
25 and diluting the nontaxable portion for installation,



1 they're just driving the taxable percentage.

2 Now, and the reason that it's not equitable is  
3 because in the nontaxable portion of -- of what they  
4 reported is nontaxable in their invoices, these items are  
5 not included. They're not in -- they're not on invoices.  
6 They're not part of any or part of the computation. So  
7 they're adding to the basis for something that's not in  
8 the basis. So it has to be removed. It should be removed  
9 as we believe it's truly inappropriate for the State to  
10 take these -- this type of allocation and apply it to both  
11 tents and apply it to the inflatables.

12 And that would conclude our presentation or our  
13 discussion on the -- for Promotional Design. I'd ask if  
14 you have any questions.

15 JUDGE LAMBERT: Thanks.

16 Yeah, I'll ask the panel if they have any  
17 questions. Judge Dang, do you have any questions?

18 JUDGE DANG: This is Judge Dang. I do have a few  
19 questions for the Appellant's representative. Please,  
20 correct me if I'm wrong, but my understanding is that  
21 roughly -- of the charges billed, the labor portion was  
22 roughly around 75 percent of the entire -- on average of  
23 the entire fees charged; is that correct, Mr. Ramirez?

24 MR. RAMIREZ: Are -- are you asking if they  
25 billed 75 percent as nontaxable?

1           JUDGE DANG: Correct, as nontaxable labor.

2           MR. RAMIREZ: Yeah. So I believe that when they  
3 were -- they were given some -- some guidance, historical  
4 guidance. And they were applying a 75 percent factor to  
5 nontaxable labor based on what they were -- what they were  
6 told. And so that's what they were applying as nontaxable  
7 installation labor, and they were applying a small factor  
8 for assembly. And, of course, the CDTFA reversed that,  
9 and now they're at -- they basically said it 55 percent  
10 assembly and 45 percent installation.

11           JUDGE DANG: Thank you. This is Judge Dang  
12 again. So my understanding with the tents is your  
13 argument, your position is that there's quite a  
14 substantial amount of labor involved in staking the tents,  
15 putting together the different components, and that would,  
16 essentially, justify the 75 percent labor charge, and that  
17 none of that charge consisted of any kind of travel time  
18 or cleaning fees or what you would say are optional  
19 services?

20           MR. RAMIREZ: That's correct. Now, if I -- if I  
21 can just make a clarifying point. I don't think they were  
22 actually charging 75 percent installation or they -- I  
23 believe they were charging no assembly. So I believe  
24 100 percent they assumed all assembly and installation was  
25 nontaxable. The auditor came back in their audit, and

1 that's when the Promotional Design, the taxpayer, made the  
2 contention that 75 percent was -- should be a correct  
3 number based on some factors that they brought in.

4 So -- but after evaluation and looking at it and  
5 breaking it down, you know, that 75 percent, we believe  
6 should be closer to 90 percent.

7 JUDGE DANG: Okay. Thank you. This is Judge  
8 Dang speaking again. And for the inflatables, I think you  
9 had mentioned and it does make sense to me that there's  
10 not a lot of labor involved setting these up. You're  
11 essentially staking them and inflating them with the  
12 machinery. How does that justify such a large charge on  
13 the invoice for those inflatables if there's no delivery  
14 or transportation or any other type of service being  
15 involved?

16 MR. RAMIREZ: Yeah, I can clarify that. So,  
17 actually, that's -- that's -- when you say that there's  
18 not a lot of time for installation, actually, there's just  
19 as much time for installation to secure these to the  
20 ground. Remember that where they're securing these,  
21 they're pretty much using the same methodology as they do  
22 for a tent. So they actually do have a significant amount  
23 of installation time, if not more, for an inflatable that  
24 might blow away.

25 So staking to the ground and how they secure it

1 is very important, and it is very time consuming. So the  
2 charges that they make for the inflatables is -- is valid.  
3 It's a valid charge for them because they do spend a  
4 significant amount of time anchoring it to the ground.

5 JUDGE DANG: This is Judge Dang again. Would you  
6 say the amount of labor involved, however you want to --  
7 however, you would, you know, categorize that or classify  
8 for tax purposes, the amount of labor involved in  
9 preparing the inflatable, are you saying it's the same in  
10 total as the tents?

11 MR. RAMIREZ: And so if you're -- what I'm saying  
12 is that how you stake, when they drive a stake into the  
13 ground for purposes of securing a tent, is the same  
14 process as they would take in securing an inflatable. If  
15 they're driving -- if they have to secure to concrete,  
16 they are going to drill, and they're going to drive  
17 that -- I think it's a three or four-foot stake into the  
18 ground.

19 So from that perspective, yes, it's the same.  
20 It's the same amount of effort in securing that tent as  
21 they do for an inflatable because you're doing the exact  
22 same methodology of drilling into the ground and driving a  
23 four or five-foot stake into the ground to secure it. So  
24 yes, the amount of time in the installation part of it is  
25 relatively the same, but the assembly -- but the

1 difference -- the difference is that there's no assembly  
2 required, right. So they drop it down, and then they  
3 start securing it. And then they blow it up, and then  
4 they further secure it.

5 MR. MELENDEZ: Yes, Javier. Mr. Ramirez, can I  
6 interject something that's very important that hasn't been  
7 mentioned? Most of our installs are on roof tops. So it  
8 actually takes much longer to get the balloon up on top of  
9 the roof, the blower, the tethers, and then putting the  
10 anchors into the roof. It's actually more time consuming.  
11 So -- so you're looking at, let's say, a 30-foot rooftop  
12 alone. You're probably looking at anywhere from maybe  
13 3 -- 3 to 4 hours of installation time with -- with two  
14 individuals.

15 MR. RAMIREZ: Thank you, Mr. Melendez.

16 JUDGE DANG: Thank you. This is Judge Dang.  
17 Thank you, again, for your clarifications. I have no  
18 further questions.

19 JUDGE LAMBERT: Judge Brown, do you have any  
20 questions?

21 JUDGE BROWN: This is Judge Brown. I may have  
22 just one or two right now. I think, actually, not based  
23 on the arguments but just based on my -- my particular  
24 question is based on my review of all the briefs that the  
25 parties have submitted. The Appellant raised, I think, in

1 its open brief Regulation 1583 as a comparison for how we  
2 should analyze this. And that regulation concerns modular  
3 furniture. And I was wondering if the Appellant could  
4 address how do we get from tents and inflatables to  
5 modular furniture? I mean, how do we read Regulation 1583  
6 as applying to these -- to installation and assembly for  
7 tents and inflatables?

8 MR. RAMIREZ: I -- I'm not familiar with the --  
9 where that is in the arguments. I referenced Regulation  
10 1660, Leases of Tangible Personal Property. So I'm not  
11 exactly sure where that was referenced.

12 JUDGE BROWN: Okay. Then -- this is Judge Brown.  
13 If you're not making that argument, I won't ask you to  
14 support it.

15 MR. RAMIREZ: Yeah. We're not making that  
16 argument.

17 JUDGE BROWN: Okay.

18 MR. RAMIREZ: But I think they were -- in  
19 previous times they might have been looking at the  
20 mandatory versus optional services. And so they were  
21 probably trying to connect that -- they're probably trying  
22 to use that annotation or that regulation to suspect the  
23 position that optional services are not subject to  
24 taxation versus the mandatory services.

25 JUDGE BROWN: This is Judge Brown. Then those

1 are all my questions for right now. Thank you.

2 JUDGE LAMBERT: Thanks.

3 I don't have any questions at this moment. So  
4 CDTEFA, you'll have 20 minutes to give your presentation.

5 MR. SMITH: Thank you.

6

7

PRESENTATION

8 MR. SMITH: This is Kevin Smith with CDTEFA. Good  
9 afternoon.

10 At issue today is whether further adjustments to  
11 the disallowed claimed deductions for nontaxable labor are  
12 warranted. Appellant is a manufacturer, wholesaler,  
13 retailer, leaser of custom-made tents and inflatables used  
14 for promotional and advertising purposes. The Department  
15 conducted an audit of Appellant's books and records for  
16 the period from October 1, 2004, to September 31st of  
17 2007.

18 As shown in Exhibit D upon audit, the Department  
19 determined that the books and records Appellant provided  
20 were adequate for sale and use tax purposes. After spot  
21 testing Appellant's sales invoices for various quarters in  
22 2005, 2006, and 2007, the Department noted errors with  
23 respect to claimed deductions for sales, for resale, sales  
24 in interstate commerce in the taxable labor.

25 Due to the volume of invoices for the audit

1 period, the Department and Appellant agreed to conduct a  
2 block test using the sales and invoices in the third  
3 quarter of 2006 --

4 JUDGE LAMBERT: Mr. Smith?

5 MR. SMITH: Yes.

6 JUDGE LAMBERT: Could I ask you to slow down a  
7 little bit so that it would be easier for Ms. Alonzo.

8 MR. SMITH: Sure.

9 JUDGE LAMBERT: Thanks.

10 MR. SMITH: -- which they agreed was  
11 representative of the audit period.

12 Because Appellant manufactures the tents and  
13 inflatables, these items are not leased in substantially  
14 the same form as acquired. Therefore, the lease of these  
15 tents and inflatables qualifies as a continuing sale and  
16 use tax applies to the lease measured by rental receipts.

17 As shown in Exhibit D, Appellant billed customers  
18 a sum amount with tax charged on 25 percent of the total  
19 invoices and no tax charge on the remaining 75 percent,  
20 which Appellant attributed to labor. During the audit  
21 there's a portion attributed to labor by Appellant. Only  
22 the amount characterizes installation time on the  
23 breakdown provided by Appellant, on page 17 of Exhibit A,  
24 was considered possible exempt labor.

25 The other items, such as takedown time, tent



1 cleaning and tent loading and unloading were not  
2 considered to be exempt labor. For example, on page 17  
3 Exhibit A, there are a total of approximately 13 hours  
4 that are attributed to labor, but only one hour is  
5 attributed to installation time. The rest is attributed  
6 to the other nonexempt items described above. For that  
7 portion of labor characterizes installation time, the  
8 Department estimated that 33 percent of the claimed exempt  
9 labor was not nontaxable installation labor. The  
10 remaining 67 percent was taxable exempt labor.

11 This is based on the assumption that absent  
12 verifiable contradictory evidence, the time required for  
13 assembly would exceed installation time. After Appellant  
14 provided additional documentation, the 33 percent  
15 allowance for nontaxable labor was increased to 47.12  
16 percent for 20-by-20 tents, 40.45 percent for 20-by-40  
17 tents, 44.94 percent for all other tents and inflatables.  
18 This is shown in Exhibit G.

19 The Department then divided the total amount of  
20 disallowed exempt labor sales by the total claimed exempt  
21 sales for the third quarter of 2006 to derive an error  
22 rate of 13.87 percent, as shown in Exhibit G. The  
23 Department then applied the error to total claimed exempt  
24 sales for the entire audit period to calculate disallowed  
25 exempt labor sales.

1           Generally, the lease of tangible personal  
2 property in California is a continuing purchase and a  
3 continuing sale. Unless otherwise exempt, the lease as a  
4 continuous sale is subject to use tax. The lessee owes  
5 the tax and the lessor is required to collect from the  
6 lessee and pay the tax to CDTFA. Use tax is measured by  
7 the sales price of the property. Sales price means the  
8 total amount for which tangible personal property sold or  
9 leased or rented, including the cost of labor or services  
10 as well as any services that is part of the sale.

11           Sales price, however, does not include the amount  
12 charged for installing or applying the property sold. See  
13 Revenue & Taxation Code 1611(c)(3), that does include an  
14 amount charged for the removal or takedown of property.  
15 Installation is the affixing of tangible personal property  
16 to realty. Here, installation labor is staking a tent or  
17 inflatable to realty, and includes the act of drilling a  
18 hole into the ground and hammering a stake into it, and  
19 tethering the tent or inflatable to the stakes.

20           Assembly labor, on the other hand, is the act of  
21 putting the tent or inflatable together with regards to a  
22 tent -- sorry -- or inflatable together. Excuse me. With  
23 regards to a tent, assembly labor includes any or all of  
24 the following: Laying out, connecting and fastening tent  
25 poles, assembling and raising the roof and frame, aligning

1 holes, inserting and fastening pins, pinning or attaching  
2 the tent fabric to the tent pole, and accessorizing the  
3 tent's interior.

4 Here, the Appellant bears the burden of proving  
5 the Department's allowance for nontaxable installation  
6 labor is too low and should be increased. Appellant  
7 provided additional documentation, which lead to the  
8 adjustment to the allowance for nontaxable labor from 33  
9 percent to 47.12 percent for 20-by-20 tents, 40.45 percent  
10 for 20-by-24 tents, and 44.94 percent for all other tents  
11 and inflatables.

12 However, Appellant has failed to submit any other  
13 evidence demonstrating that a higher allowance for  
14 nontaxable installation labor is warranted.

15 This concludes my presentation. Thank you.

16 JUDGE LAMBERT: Thank you, Mr. Smith.

17 I'm going to ask my panel if they have any  
18 questions. Judge Dang, do you have any questions?

19 JUDGE DANG: Judge Dang. Just a quick question  
20 for CDTFA. I was just wondering, as a matter of general  
21 principle, what CDTFA's position is on the difference  
22 between installation and assembly labor?

23 MR. SMITH: This is Kevin Smith. Well, so  
24 Regulation 1526 state that installation is not taxable,  
25 but assembly is. This is also discussed in the

1 annotations. For example, Annotation 330 states that  
2 amounts charged for labor or services rendered in  
3 installing leased property are not taxable.

4 It's been the Department's long-standing position  
5 that installation means the affixing of tangible personal  
6 property to realty. Regulation 1583 covering a different  
7 area is useful here. It's in the context of modular  
8 furniture systems. And it states that labor to affixed  
9 bolt fastener to realty is installation labor.

10 Therefore, based on the regulations and  
11 annotations and our longstanding position, we believe that  
12 installation means the affixing of tangible personal  
13 property to realty. Which, in this case, is the  
14 installation of the anchor for the tents or inflatables,  
15 and the tying of tent or inflatables to the anchor system.  
16 Other actions such as assembly pole tent and hanging  
17 various fixtures in the tents are not assembly.

18 MR. CLAREMON: This is -- oh, I'm sorry.

19 JUDGE LAMBERT: Go ahead.

20 MR. CLAREMON: This is Scott Claremon. I just  
21 wanted to point out that, you know, installation can occur  
22 in multiple contexts. So in this case we -- we consider  
23 it to be when it's affixed to realty. You can also have  
24 installation into a vehicle or other forms of TPP. So I  
25 think, you know, as Mr. Smith pointed out, it generally is

1 affixing it to something other than the TPP that's being  
2 sold itself, as opposed to when the pieces of that TPP are  
3 being put together. But it is going to be fact-specific  
4 based on what type of TPP is being sold, and how it's  
5 being sold.

6 JUDGE DANG: Thank you, Mr. Claremon. That  
7 actually leads me to my, kind of, follow-up question to  
8 that. Given the nature of the property that Appellant's  
9 leased, the tents they were meant to be assembled and then  
10 just disassembled. The inflatables are meant to be  
11 inflated and then deflated. With each use of the  
12 property, is that in effect the calculus in the situation  
13 as to whether or not it might be installation or assembly  
14 labor?

15 MR. CLAREMON: I think we do -- this is Mr.  
16 Claremon, Scott Claremon again. We do have annotations  
17 that analyze this principle for Regulation 1660, leases.  
18 And they do note that even in the context of leases,  
19 you're still going to have a distinction between  
20 installation and assembly labor. So it probably does  
21 affect it in some regard, but there's still a difference  
22 to installation and assembly when you're talking about  
23 items that are leased repeatedly.

24 JUDGE DANG: Thank you, Mr. Claremon. This is  
25 Judge Dang speaking again. And I guess, before I

1 conclude, I just would like to get your position -- be  
2 clear on CDTFA's position as to whether the, kind of,  
3 impermanent nature of these items would tend to make labor  
4 involved in putting it together more in the nature of  
5 installation than assembly, or does CDTFA still maintain  
6 that only the portion relating to affixing the property to  
7 realty is installation?

8 MR. SMITH: I mean, our -- this is Kevin Smith.  
9 Our position continues to be that only labor affixing to  
10 real property would be installation labor. That's our  
11 position.

12 JUDGE DANG: This is Judge Dang. Thank you. I  
13 don't have any further questions.

14 JUDGE LAMBERT: Judge Brown, do you have any  
15 questions?

16 JUDGE BROWN: This is Judge Brown. Let me pick  
17 up with one question. And, actually, I heard Mr. Smith  
18 mention one of the Annotations 330, and I didn't hear  
19 which one you mentioned. If you could clear that up for  
20 just a second.

21 MR. SMITH: Sure. This is Kevin Smith. It was  
22 330 --

23 JUDGE BROWN: Yes.

24 MR. SMITH: -- dot 3320.

25 JUDGE BROWN: 3320. Okay. Thank you. I wanted

1 to ask about a related nearby annotation, which is  
2 330.3280 referring to dismantling charges. And it says  
3 that, "Separately stated charges for dismantling leased  
4 personal property," in this instance tents and  
5 scaffolding, "are excluded from taxable rental receipts."

6 JUDGE LAMBERT: I think we've lost Kevin Smith.

7 JUDGE BROWN: Oh, I'll wait.

8 JUDGE LAMBERT: He's back.

9 Can you hear us?

10 I think he's having technical issues.

11 Can you hear us?

12 Oh, he's back.

13 MR. SMITH: This is Kevin Smith. Are you able to  
14 hear me?

15 JUDGE LAMBERT: Yes, we can hear you now.

16 MR. SMITH: Okay.

17 JUDGE LAMBERT: Judge Brown, you can go back to  
18 what you're asking.

19 JUDGE BROWN: My question is for CDTFA, and if I  
20 should repeat any part of it, let me know. I'll try and  
21 backtrack a little bit. I was saying that my question is  
22 about -- or starts with the annotation 330.3280,  
23 dismantling charges. And it reads, "Separately stated  
24 charges for dismantling leased personal property (tents  
25 and scaffolding) are excludable from taxable rental

1 receipts if the lessee is free to lease the property  
2 without having to hire the lessor to do the dismantling."

3 I wanted to ask how you think that -- if you  
4 think that annotation does or does not apply here? And if  
5 so, why? How do we read that annotation for analyzing  
6 this case?

7 MR. SMITH: Kevin Smith. I'll try to direct  
8 that. So when we looked at the invoices, they only had --  
9 they basically had one charge for labor and one charge for  
10 the tent itself or the inflatable itself. It didn't break  
11 down what made up that labor. They just had one, kind of,  
12 lump sum that they charged to their customers. And we,  
13 you know, basically allocated 25 percent towards the TPP,  
14 which is tangible personal property, and 75 percent to  
15 like -- so we had no way of breaking down that further.

16 When we asked for further explanation, they  
17 provided what is on page -- I described during my  
18 presentation -- was at the time their Exhibit 1, on  
19 page 17 of Exhibit A. And that showed their breakdown of  
20 the labor. It included an item for removal of the items.  
21 And so we believe that, you know, removal is not part of  
22 installation. It should be your tax is due on the removal  
23 charge. That would be a charge as part of the lump sum  
24 they charge the customers.

25 Thank you.



1 JUDGE BROWN: Okay. This is Judge Brown. Thank  
2 you. I think that's my only question at this time.

3 JUDGE LAMBERT: Okay. Thanks. I just had a  
4 question. Maybe you can clarify the inflatables versus  
5 the tent times or the amounts, like, a percentage of the  
6 total amount at issue of the inflatables versus the tents,  
7 if you know at this time or have an estimate or --

8 Mr. Smith, can you hear me?

9 MR. SMITH: Yeah. Was that question for me? I'm  
10 sorry.

11 JUDGE LAMBERT: Yeah. Sorry.

12 MR. SMITH: Okay. I wasn't sure who the --  
13 you're asking what the --

14 JUDGE LAMBERT: Out of the amount at issue, how  
15 much is for tents and how much is for inflatables?

16 MR. SMITH: I don't know. I don't have that in  
17 my notes.

18 JUDGE LAMBERT: Okay.

19 MR. PARKER: Yeah. This is Jason Parker. In  
20 looking at the audit working papers, we would have to do  
21 some calculations to come up with those amounts because  
22 they have all the invoices and we would have to separate  
23 those out. They didn't separate out those compared to  
24 other items. And they have some things in there that are  
25 just outright sales and not actually leases of things as

1 well.

2 JUDGE LAMBERT: Okay. I see. Yeah. I looked at  
3 the list and it looks like a lot of inflatables, I think,  
4 and a lot of tents. But you can see it's something we  
5 need to calculate, but we can take a look ourselves. And  
6 this is for Mr. Smith, if you can hear me, or perhaps  
7 you're having technical issues is again. I think we've  
8 lost Mr. Smith.

9 MR. CLAREMON: Judge Lambert, I can try to  
10 address your questions if he's having technical  
11 difficulty.

12 JUDGE LAMBERT: Okay. I was just wondering in  
13 defining installation as affixing to realty in this case,  
14 and it's the stakes and tethering. I'm wondering if when  
15 you have a tent, when it's affixed it looks like there's  
16 maybe multiple steps that go into affixing, and some of  
17 the installation. Maybe when it's all the poles are up  
18 and you have to do some assembly so that by the time to  
19 get it sturdy and actually affixed so the poles are not  
20 falling down, perhaps there's multiple steps that may  
21 include things that may be a mix of things that may be  
22 assembly but also things required to actually install the  
23 tent so it's finally sturdy in the ground.

24 And -- I guess Appellant may be able to answer,  
25 Mr. Melendez, but it seems like there's a lot of steps,

1 including doing the ropes and that happens after. The  
2 entire tent is already -- almost all the poles are in the  
3 ground and everything is attached. So would it just be  
4 installing the stakes and just tethering, or do you think  
5 there's other aspects to where when it's finally and  
6 firmly in place?

7 MR. MELENDEZ: There's actually more to it  
8 involved. I think I just briefly mentioned maybe the  
9 tethering and the staking, but there's also leveling.  
10 That is one of the most important things is to make sure  
11 that the tent is level by adjusting the legs. Because if  
12 it's not -- if it's not level, if one of the legs is  
13 crooked, it can actually bend very easily, even when it's  
14 staked.

15 Also, putting in base plates as well. Those base  
16 plates also have D-rings on the base plates. So aside  
17 from the ropes, we also have to put a ratchet. This is to  
18 tension the tent even more. So sometimes that's required  
19 more so in high-wind areas, which is what we're doing now  
20 even more so. So it's a pretty involved process, that  
21 alone. I think that probably takes at least maybe 80  
22 percent.

23 The other -- just other peripherals, you know,  
24 maybe fire extinguishers and stuff like that and putting  
25 up other signage as well. But -- but that's what it

1 takes. So it -- it's pretty involved.

2 JUDGE LAMBERT: Mr. Claremon, do you have any  
3 comments on what he said?

4 MR. CLAREMON: I mean, our estimate, which was  
5 revised from 33 percent to closer to 50 percent, is based  
6 on reviewing the videos. And I think our review does take  
7 into account that it's just not the specific act of  
8 putting in the stakes but it's also, you know, other  
9 things that are affixing it. And I think it does -- it  
10 will depend to some degree on the nature of the TPP. But  
11 then there's certain parts of assembly that aren't  
12 specific -- that might be necessary to stand up a tent but  
13 aren't necessary to affix it to the -- install it or affix  
14 it to the realty, which we would not consider to be  
15 installation.

16 I also -- I also just want to reiterate a point  
17 that Mr. Smith made in his presentation, that this  
18 breakdown of 45 percent, 55 percent, or 33 percent to  
19 two-thirds, this is just talking about the installation  
20 versus assembly. When these were billed, they were billed  
21 as labor and install, and it was a single lump sum charge  
22 for labor and install. When -- when the auditor asked for  
23 the information what type of labor was included in that,  
24 we were provided with a sheet that we're referencing.

25 For instance, on a 10-by-10 tent, it said that

1 labor and install was one hour, and that the total labor,  
2 including unloading, loading, cleaning, and everything  
3 else that's listed on the information provided by the  
4 taxpayer was closer to 12 hours. And, essentially, what  
5 taxpayer is saying -- or Appellant is saying in this  
6 hearing is that that was all free. That the entire labor  
7 charge was for 1 hour of install assembly, and that 11 to  
8 12 hours of other labor was provided for free.

9 And so that, you know, all the labor that happens  
10 to be non -- or excuse me -- taxable labor was actually  
11 just provided gratis or optional. And that's not the  
12 information that was provided during the audit. The  
13 information provided during the audit was, "We charge for  
14 labor. Here's the labor involved in the rental of the  
15 tent."

16 And it's also not reasonable to assume that over  
17 90 percent of the labor that went into the rental of a  
18 tent was free and provided free of charge. So we just  
19 want to point out that that's inconsistent with what was  
20 provided to the auditor at the time of the audit.

21 JUDGE LAMBERT: Mr. Ramirez, it seems like you  
22 want to say something.

23 MR. RAMIREZ: Yeah, point of clarification. The  
24 CDTFA continues to make the statement that this is a lump  
25 sum charge. That is just a -- and everything is included

1 in the installation. That's absolutely not the case.  
2 Where labor -- and -- and we have invoices that actually  
3 prove and show that if a large -- if a charge was made, it  
4 was separately stated on the invoice.

5 So just making the assumption on the statement  
6 that, oh, everything is included in labor, and that's what  
7 the client intended. That's absolutely false.  
8 Assembly -- and they actually did have charges for  
9 takedown. They made it -- and they're separately stated.  
10 They had separately stated charges for cleaning. They had  
11 separate charges for other item. They're not -- it's not  
12 an all-inclusive number that the CDTFA would like you to  
13 believe.

14 And I would also like to reference the comment  
15 from the CDTFA stating that nothing is deemed optional.  
16 If you look at that regulation that was pointed out,  
17 330.3280, it clearly states in there that the assembly or  
18 delivery charges for the assembly or disassembly charges  
19 are deemed optional in a lease are exempt from taxation.  
20 So there is no catch all, everything must be deemed  
21 taxable.

22 It's -- it's clear in the annotation that was  
23 pointed out and Regulation 1660 that if -- if there are  
24 optional charges, which we've shown that they're optional,  
25 that -- that they are not subject to taxation. And they

1 don't all get lumped into an all catchall, everything is  
2 included in installation. That is just absolutely not the  
3 case.

4 And Mr. Melendez was part of that audit. He was  
5 present at that audit, and he would be happy to attest to  
6 the fact that -- that he notified the auditor clearly that  
7 they separately state everything on their invoices and a  
8 lot of the things -- a lot of the things that they do were  
9 as a courtesy because the amounts were so large, the  
10 rentals were so large.

11 And -- and so this isn't a catch all number that  
12 the auditor -- that the CDTFA would have you -- would like  
13 you to believe. It is -- it is an amount of time that  
14 they spent to assemble and to install these tents.  
15 These -- and that same allocation that they used on the  
16 tents, they're applying to inflatables.

17 So clearly there's -- there's a disconnect on the  
18 CDTFA's side because they're -- it just doesn't make sense  
19 what they're saying. And once again, I'll make it clear.  
20 They separately stated on their invoices if there was a  
21 charge for it. So if a client elected to do a cleaning or  
22 a takedown, they would put it on an invoice. It wasn't a,  
23 oh, it's all lumped into installation.

24 That was my --

25 JUDGE LAMBERT: Thanks.

1 MR. RAMIREZ: -- comments. Thank you.

2 JUDGE LAMBERT: Thanks.

3 CDTFA, do you have anything to add?

4 MR. SMITH: This is Kevin Smith. Yeah. I'll  
5 point out that, yeah, the limited invoices that they did  
6 provide showed rental and one charge for all of the --  
7 charge for everything. That's why we had to ask them how  
8 those charges are separated out. I'll also point out  
9 their Exhibit 9, which contain -- all those invoices are  
10 from outside -- I believe from outside the audit period.

11 MR. PARKER: This is Jason Parker. I would also  
12 like to point out that in the audit working papers the  
13 invoices and items that they were referencing were  
14 typically listed as an inflatable or a tent or Astro Turf  
15 or misting station or something like that. And I didn't  
16 note any invoices specifically regarding takedown that  
17 they included in their Exhibit 9.

18 JUDGE LAMBERT: Thank you.

19 Okay. At this time, Mr. Ramirez, you can give  
20 some closing remarks for five minutes.

21 MR. RAMIREZ: Thank you.

22

23 CLOSING STATEMENT

24 MR. RAMIREZ: This is Mr. Ramirez. We strongly  
25 believe that the CDTFA erred in its audit approach related



1 to the nontaxable labor. The way CDTFA approached the  
2 allocation of taxable versus nontaxable labor is flawed  
3 and includes items such as delivery, which is an item that  
4 is not billed or invoiced, an optional service which  
5 should be backed out of the calculation and included in  
6 the nontaxable percentage.

7 Additionally, CDTFA has made inflatables equal to  
8 that of a tent. There is no assembly required for  
9 inflatables. Yet, the CDTFA has clearly made an  
10 allocation for assembly as if inflatables were equal to  
11 that of a tent.

12 We are respectfully requesting an adjustment to  
13 accurately reflect the installation based on the  
14 information provided in this hearing.

15 JUDGE LAMBERT: Thank you.

16 I'll just ask my co-panelists one more time if  
17 they have any final questions. Judge Dang, do you have  
18 any questions?

19 JUDGE DANG: This is Judge Dang. Thank you,  
20 Judge Lambert. I have no further questions.

21 JUDGE LAMBERT: And, Judge Brown, do you have any  
22 questions?

23 JUDGE BROWN: This is Judge Brown. I don't have  
24 any further questions. Thank you.

25 JUDGE LAMBERT: I have no further questions

1 myself. So there's nothing further. I'm going to close  
2 the record and conclude the hearing.

3 I want to thank each party for appearing today.  
4 We will issue a written opinion within 100 days.

5 Thank you. This hearing is now closed.

6 (Proceedings adjourned at 2:08.)

7 ~0~

8

9

10

11

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 [!DAY OF DEPO] day of [!MONTH OF DEPO], [!YEAR OF DEPO].

---

ERNALYN M. ALONZO  
HEARING REPORTER