

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
BODY WISE INTERNATIONAL, LLC,) OTA NO. 19125567
)
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APPELLANT.)
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CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, June 21, 2022

Reported by:

SARAH M. TUMAN, RPR
HEARING REPORTER

Job No:
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Transcript of Proceedings, taken at
400 R Street, Sacramento, California, 95811,
commencing at 1:02 p.m. and concluding
at 2:50 p.m., on Tuesday, June 21, 2022,
reported by Sarah M. Tuman, RPR, Hearing Reporter,
in and for the State of California.

1 APPEARANCES:

2
3 Panel Lead: ALJ ANDREW KWEE

4 Panel Members: ALJ JOSHUA LAMBERT
ALJ KEITH LONG

5 For the Appellant: JESSE MCCLELLAN
6 LUCIAN KHAN

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

9 JOSEPH BONIWELL
10 SCOTT CLAREMON
JASON PARKER

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(Appellant's Exhibits 1-12 were received at page 8.)

(Department's Exhibits A-N were received at page 8.)

1 Sacramento, California; Tuesday, June 21, 2022

2 1:02 p.m.

3
4
5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So we're
6 opening the record, now, in the Appeal of Body Wise
7 International, LLC.

8 This matter is being held before the Office of
9 Tax Appeals. The OTA Case No. is 19125567, and today's
10 date is Tuesday, June 21, 2022. The time is approximately
11 1:02 p.m., and this hearing is being conducted in person
12 in Sacramento, California. And we're also livestreaming
13 on our YouTube channel.

14 Today's hearing is being heard by our -- a panel
15 of three Administrative Law Judges. My name is Andrew
16 Kwee, and also on this panel are Judges Keith Long and
17 Judges -- and Judge Josh Lambert. The three of us are the
18 members of the panel. So all three of us will be able to
19 meet and produce a written decision as equal participants.

20 Although I will be leading the hearings today,
21 any Judge on this panel may ask questions or otherwise
22 participate in these proceedings in order to ensure the
23 Office of Tax Appeals has all the information necessary to
24 decide this Appeal.

25 So for the record, would the parties please say

1 their names and who they represent. And I'd start with
2 the representatives from CDTFA, the tax agency.

3 MR. CLAREMON: I'm Scott Claremon with the CDTFA.

4 MR. BONIWELL: I'm Joseph Boniwell with the
5 CDTFA.

6 MR. PARKER: And I'm Jason Parker with CDTFA.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

8 And I'll turn over to the representatives for the
9 Appellant. Would you please identify yourselves for the
10 record?

11 MR. MCCLELLAN: Yes. Thank you.

12 Jesse McClellan of McClellan Davis on behalf of
13 the Appellant, Body Wise International. And I'm joined by
14 Lucian Khan.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

16 And there's just one preliminary matter. We did
17 have a last-minute panel change. I believe both parties
18 should have received the updated Notice of Panel at the
19 end of last week.

20 Basically, Judge Josh Aldrich was originally on
21 this panel. He's not available today; so in his place,
22 Judge Keith Long will be substituting. And I would just
23 like to verify that there are no objections to the panel
24 substitution.

25 CDTFA, do you have any objections?

1 MR. CLAREMON: We do not have any objections.

2 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

3 And for Appellant, do you have any objections?

4 MR. MCCLELLAN: No.

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

6 Thank you.

7 So moving over, witnesses -- we don't have any
8 witnesses scheduled to testify today. So that's easy.

9 The next up is exhibits. I'm just going to,
10 basically, do a recap of the -- some of the current
11 information, before we turn it over to the parties for
12 their presentation, to make sure that we're all on the
13 same page.

14 So for the exhibits, I have Exhibits A through
15 N -- N, as in Nancy -- for CDTFA. These exhibits -- we
16 discussed those at the third prehearing conference. And
17 they were also attached to the minutes and orders. And my
18 understanding is there are no additional exhibits and no
19 objections to those exhibits from either party.

20 CDTFA, is that summary correct?

21 MR. CLAREMON: That's correct.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

23 And for Appellant, is the summary that I provided
24 correct? There's no objections?

25 MR. MCCLELLAN: That's correct.

1 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

2 And then, for Appellant's exhibits, I have
3 Exhibits Nos. 1-12. We also discussed those at the third
4 prehearing conference. And I attached those as an -- I --
5 I attached those to the minutes and orders that were sent
6 out after the prehearing conference.

7 I understand that there's no additional exhibits
8 and that neither party has objections -- or, I guess,
9 Appellant doesn't have -- or CDTFA doesn't have any
10 objections to Exhibits 1 through 12 for Appellant.

11 Is -- I'll start with Appellant. Is that a
12 correct summary of the exhibits?

13 MR. MCCLELLAN: Yes, it is.

14 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

15 And for CDTFA, is that correct? That you have no
16 objections to admitting these as -- evidence?

17 MR. CLAREMON: That's correct.

18 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

19 So the Exhibits 1 through 12 for Appellant and A
20 through N for CDTFA are admitted into the evidentiary
21 record.

22 (Appellant's Exhibit Nos. 1-12 were received in
23 evidence by the Administrative Law Judge.)

24 (Department's Exhibit Nos. A-N were received in
25 evidence by the Administrative Law Judge.)

1 ADMINISTRATIVE LAW JUDGE KWEE: There was one
2 follow-up we had at the prehearing conferences. We had
3 discussed some items which were agreed to by the parties
4 and not in dispute. And Appellant contacted us after the
5 third prehearing conference to raise a concern with the
6 phrasing of the third item -- that was bullet point three.

7 And, basically, what that had said was this:
8 "Disputed transactions involved nontaxable or exempt sales
9 of property shipped from a point within this state to a
10 point outside the state." That's the sentence that was at
11 issue.

12 And the concern was it wasn't nontaxable or
13 exempt transactions everywhere. It wanted to clarify that
14 the amount that was agreed to by the parties -- that it
15 was nontaxable or exempt in California.

16 So the request was to rephrase -- basically, rephrase
17 that to say that the disputed transactions involved sales
18 of property shipped from a point within this state to a
19 point outside this state and which are exempt or excluded
20 from California sales tax.

21 And I -- and that was the phrasing of the issue
22 statement. So I don't think that would present an issue.
23 But CDTFA, do you -- did you have any concerns with the
24 rephrasing to clarify that these are California nontaxable
25 exempt, as opposed to saying that they're nontaxable or

1 exempt transactions?

2 MR. CLAREMON: I don't think that's necessary.

3 It's -- this is a California administrative body
4 ruling on California law. And we would urge the OTA to
5 phrase it how they would want to phrase it and not phrase
6 it the way one of the parties wants them to if it's
7 different than how they would normally just phrase the
8 issue.

9 ADMINISTRATIVE LAW JUDGE KWEE: Oh, yes.

10 And -- and to clarify, I was talking about the --
11 the stipulations -- the agreed items that the parties --
12 the facts that the parties agreed were not in dispute.

13 So that's -- so the issue statement, I
14 understand. But this was something that we had understood
15 that CDTFA and the Appellant -- it was a fact that was
16 agreed to by both parties.

17 So I -- my understanding was that it was agreed
18 to by both parties -- that their -- that the transactions
19 were -- the disputed transactions were not subject to
20 sales use tax in California.

21 And if -- so the way I -- we phrased it is, is
22 there an objection on that rule about that phrasing.

23 MR. CLAREMON: No. We don't -- we don't have an
24 objection to that.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Perfect.

1 Thank you.

2 So then, Appellant, since that was your request,
3 I assume that you're -- you're fine with the rephrasing?

4 MR. MCCLELLAN: I am. And thank you.

5 ADMINISTRATIVE LAW JUDGE KWEE: Certainly.

6 So with that said, I'm not going to restate the
7 remaining items, which were stipulated agreed facts. I
8 just wanted to clarify that one because there was a
9 follow-up question about it -- concern about that.

10 So these will be listed as factual findings, or
11 they may be listed as factual findings summarized as
12 agreed to by the parties in the opinion.

13 And I'll move on to the issues. We had
14 listed the three issues for this Appeal.

15 The first one was whether the tax amount that
16 Appellant collected from out-of-state customers on
17 California exempt or nontaxable transactions must be
18 remitted to California.

19 The second issue that we're hearing today is
20 whether the OTA has jurisdiction to determine whether
21 CDTFA improperly granted Appellant a credit for taxes paid
22 to other states.

23 And then the third one is, if it is determined we
24 have jurisdiction on the second issue, did CDTFA
25 improperly grant Appellant credit for taxes paid to the

1 other states?

2 Is that a correct -- so that was sent out with
3 the minutes and orders. I assume that's a correct summary
4 of issue statement for the both of you, CDTFA?

5 MR. CLAREMON: That is a correct summary of what
6 was discussed at the -- in the -- at the prehearing
7 conference, yes.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

9 And Appellant, is that -- are you -- a correct
10 summary of the issue statement for you?

11 MR. MCCLELLAN: Yes, it is.

12 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

13 So then just a quick recap of how the hearing is
14 going to be structured: We'll have 45 minutes for the
15 Appellant's opening presentation followed by 30 minutes
16 for CDTFA's presentation.

17 There's no witness testimony. So after the
18 opening presentations, we're going to move to closing
19 remarks. And for closing remarks, we have allotted 10
20 minutes per party. I estimate that this will carry us
21 over to about an hour and a half to an hour-forty-five for
22 the hearing.

23 Are there any questions from either party before
24 we turn it over to Appellant for Appellant's presentation?

25 MR. CLAREMON: I -- I do have one issue,

1 actually, going back to the undisputed facts.

2 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

3 MR. CLAREMON: Something I just noticed is, in
4 the summary of undisputed facts from the second prehearing
5 conference, it states that for the first audit period --
6 Case ID 552589 -- the dollar amount is \$100,672 at issue.

7 It's our understanding that there was a
8 concession during this appeals process by the -- as
9 discussed in the SD&R in that case -- of -- of
10 approximately \$40,917 in taxes that Petitioner conceded it
11 owed to the Board.

12 So as the conclusion of the SD&R was that,
13 although the overall measure was 103,780, the amount in
14 dispute was actually only 62,863. And that was the
15 conclusion of the SD&R in that first case.

16 So with the reduction from 103,780 to the -- the
17 number stated in the minutes and orders, 100,672, it's our
18 understanding that there's still that concession by
19 Appellant.

20 So that the amount at issue in that first case is
21 59,755. Because there's still that \$40,000 -- \$41,000
22 concession.

23 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I'll
24 just double check with Appellant.

25 Was -- is that your understanding, also? That

1 there was a concession for the second case ID which --
2 which would reduce the amount of -- at issue in this
3 Appeal?

4 MR. MCCLELLAN: Generally speaking, what
5 Mr. Claremon is referring to is something that I'm
6 familiar with. It's been such a long time since I've
7 really looked at that aspect of the case.

8 But to the best of my recollection, there were
9 some transactions inside California where, I think, there
10 was an underpayment.

11 And to the extent that's what he's referring to,
12 then we would stipulate that -- well, that we're not
13 contesting that liability.

14 MR. CLAREMON: And I know I'm bringing this up at
15 the hearing. So it's -- it is discussed in Exhibit A in
16 the SD&R. And, I mean, obviously, I don't want to force
17 anyone to make a concession on the spot.

18 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So -- and
19 that -- that summary -- just the amount at issue -- I
20 could -- yeah. So I'll just make a note of it -- that
21 it's this amount, less any -- any concessions by the
22 parties.

23 And I'll leave it like that since it's not
24 pertinent to the outcome of this Appeal. It would be we
25 determined later anyways. So I'll just make a note that

1 there was a concession which might have reduced some of
2 that amount at issue. Okay?

3 MR. CLAREMON: I have no objection.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

5 Are there any additional questions, comments,
6 other concerns before we get started with the hearing?

7 MR. MCCLELLAN: None. No.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

9 MR. MCCLELLAN: None from us.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

11 So I will turn it over to Mr. McClellan for your
12 opening presentation. You have 45 minutes -- until
13 2:00 o'clock.

14 MR. MCCLELLAN: Okay.

15
16 PRESENTATION

17 BY MR. MCCLELLAN:

18 Thank you, Judge Kwee and other panelists.

19 My name is Jesse McClellan of McClellan Davis.
20 I'm joined by Lucian Khan, both appearing on behalf of
21 Body Wise International.

22 Appellant operates a multilevel marketing
23 business that sells weight loss and nutritional food
24 supplements through independent sales representatives
25 throughout North America and Canada.

1 The transactions at issue are sales to customers
2 located outside California; on which, Appellant added
3 out-of-state tax if it was applicable based upon
4 destination rates and laws.

5 Exhibit 8 includes several sample invoices that
6 we'll be using for our presentation today. As we will
7 explain in detail, Appellant did not charge California
8 tax, or tax that was represented as California tax, to
9 customers located outside California.

10 Appellant was registered in dozens of states and
11 remitted the tax collected to the vast majority of those
12 states. There was a small percentage of the out-of-state
13 taxes collected that were not remitted.

14 Upon audit by California, the auditor took the
15 unusual step of reviewing Appellant's tax accrual account
16 for all states, territories, and Canada. There is, we
17 find, no support under the California law, or under
18 CDTFA's Sales and Use Tax Audit Manual, for an auditor to
19 audit business activities of other states -- clearly, for
20 jurisdictional purposes.

21 There is no dispute the transactions at issue are
22 exempt sales and interstate commerce for California
23 purposes. I think we just addressed that. That should
24 have ended the audit review for the transactions in the
25 audit.

1 Nonetheless, and despite the lack of legal and
2 procedural authority to -- to do so, the audit staff went
3 ahead and assessed California tax liability on the entire
4 amounts that were accrued for all jurisdictions unless
5 Appellant was able to demonstrate payments were made to
6 other states, territories, or Canada.

7 To the extent such payments were made, CDTFA did
8 not assert such taxes were anything other than
9 out-of-state taxes. If the tax amount was not paid to the
10 destination jurisdiction, CDTFA asserts that such taxes
11 become California excess tax. It is those transactions
12 that are under dispute.

13 Appellant maintains that the taxes of other
14 states cannot constitute California excess tax under the
15 law, and that CDTFA does not have jurisdiction to demand
16 taxes of other states.

17 So what does the law say about this? This case
18 really centers around Revenue and Taxation Code 6901.5,
19 which establishes the rule CDTFA must follow for excess
20 tax reimbursement purposes.

21 6901.5 states in relevant part, when an amount
22 represented by a person to a customer as constituting
23 reimbursement for taxes due under this part is computed on
24 an amount that is not taxable -- or in excess of the
25 taxable amount -- excuse me -- the amount so paid shall be

1 returned by the person to the customer. And in the event
2 of his failure to do so, the amount so paid shall be paid
3 by that person to this state.

4 It goes on to say that, notwithstanding
5 Subdivision (b) of Section 6904, those amounts remitted to
6 the state shall be credited by the Board on any amounts
7 due and payable under this part of the same transaction
8 from the person by whom it was paid to this state. And
9 the balance, if any, shall constitute an obligation due
10 from the person to this state.

11 So in -- in dissecting 6901, we'd first like to
12 draw your attention to the fact that it refers to taxes,
13 quote/unquote, "due and payable under this part" in two
14 separate sentences.

15 The statute is referring to, part one, sales and
16 use taxes, of division two, other taxes, of the California
17 Revenue and Taxation Code -- in other words, California
18 tax. It does not authorize CDTFA to demand taxes of other
19 states.

20 Code Section 6003 "Sales Tax" defines sales tax
21 as meaning "the tax imposed by Chapter 2 of this part."
22 It's common terminology.

23 "Use Tax," similarly, is defined by 6004 as
24 meaning "taxes imposed by Chapter 3 of this part."

25 So the law is saying, "Look. We're -- we're

1 authorizing the imposition of sales and/or use tax. And
2 when we refer to 'of this part,' we're referring to the
3 California Revenue and Taxation Code."

4 So in summary, in order to charge California
5 excess tax reimbursement under 6901.5, a person must, one,
6 make charges that are represented as California tax; and,
7 two, the tax must become computed on an amount that is not
8 taxable or in excess of the taxable amount. And, when
9 this occurs, the amounts must be paid to the customer or
10 this state.

11 The Statute and Regulation 1700 also allows for
12 credits against taxes due and payable under this part if
13 the excess is part of the same transaction in which the
14 tax was also applied under.

15 There is no authority under Section 6901.5, or
16 any other section of the law, to permit CDTFA to demand
17 taxes of -- of jurisdictions outside California. If
18 California taxes were actually collected or represented as
19 having been collected, there is authority -- there is no
20 authority to pay those taxes to other states. But that's
21 something that we have going on here.

22 We think this point helps shine light on the
23 truth of the matter in this case. CDTFA has given credit
24 to Appellant for taxes it paid other states. Which is
25 evidence that CDTFA knows we're not dealing with

1 California excess tax reimbursement; we're dealing with
2 taxes of other states. Otherwise, of course, they
3 wouldn't provide credit for a legitimate California
4 liability if it was paid to a different state.

5 And -- and that's part of the reason why, during
6 the prehearing conference, I emphasized my desire to make
7 certain that's addressed. Because, if you look at that
8 aspect of the case, it helps to -- it helps to show
9 that -- well, of course we're not dealing with California
10 excess tax. You can't pay a tax obligation to Nevada or
11 New York or any other state that's actually due California
12 and satisfy it.

13 But the Department says that that's the case.
14 But not really because, frankly, they know it's taxes of
15 the other state.

16 What we'll get to, and what kind of explains
17 it -- because there has to be some explanation for that;
18 right? -- I mean, everybody knows you don't pay a tax
19 obligation to another state and satisfy it for California.
20 That would be crazy. But -- but what, you know -- what
21 they essentially landed on is, well, it becomes California
22 tax.

23 Kind of like turning water into wine, it's --
24 it's magic, I guess. Because there's no legal authority
25 that actually says that that should be done. So this --

1 it -- it begs the question, how is this occurring?

2 Well, frankly, it shouldn't be. Ultimately,
3 this -- this case is a matter between Appellant and the
4 states in which the taxes were collected.

5 That's the sum of it. I've got a lot of details
6 here that -- that -- that -- that I will share within the
7 timeframe that I'm allotted. Actually, I think it'll be
8 less than that, but I'll carry on here.

9 We will demonstrate, today, that the charges
10 under dispute were not represented as California sales
11 tax. And, if they weren't, the law says they're not
12 California excess tax.

13 The charges were not computed on nontaxable
14 amounts or in excess of the rate that applied in the
15 destinations in which the sales occurred. Thus the
16 charges are not California excess tax reimbursement as
17 defined under the law 6901.5.

18 So turning back to the -- the first element under
19 6901.5 -- making charges that are represented as
20 California tax. Well, who's the party that gets to make
21 the representation? Who's representing? It's the seller;
22 right? In this case it's Appellant. And Appellant did
23 not represent to its customers that it was charging
24 California tax.

25 CDTFA has acknowledged that. Stating in its

1 decisions -- three of them in briefs, too -- that
2 Appellant and its customers agreed the tax was intended
3 for the destination jurisdictions. As it must, since the
4 tax was charged based on the destination rules and rates.
5 And we'll demonstrate that in our exhibits today.

6 That really should be the end of it.

7 To better address what is meant by "represented
8 as California's tax," it helps to look at -- examine what
9 California's law says about collecting California sales
10 tax.

11 So, there, we look to Civil Code Section 1656.1
12 in Regulation 1700, which establishes that a tax
13 collection is solely a matter of contract in between the
14 parties. In other words, Appellant has a right to collect
15 California sales tax or not. It's up to Appellant.

16 Appellant did not collect California sales tax on
17 its out-of-state sales; and it did not represent to its
18 customers that it collected California tax. There's no
19 evidence to support that. As you will see, the facts make
20 that clear.

21 So how did Appellant charge tax on the sales?
22 Glad you asked. Appellant used a software system called
23 Vertex. Its -- its one of the first systems that was
24 designed specifically for sales and use tax purposes.

25 The Vertex system computes the tax based upon the

1 ship-to address provided on each and every invoice. When
2 an invoice is placed and an address is entered into the
3 system, the Vertex system will establish if tax applies
4 based on the rules of the destination state. And, if tax
5 applies, the rate is determined based on the ship-to
6 address.

7 Exhibit 6 is a summary report from the Vertex
8 system of the taxes collected by jurisdiction by Appellant
9 during the liability period. It shows that the system
10 specifically charged and segregated the taxes charged
11 based on the destination jurisdictions.

12 Exhibit 7 are South Carolina sales for first
13 quarter '06, which ties into and validates the report in
14 Exhibit 6. So we know it's accurate.

15 Exhibit 8 are copies of invoices from three
16 different states and Canada where you will find that each
17 rate charged coincides with a rate that's applicable to
18 the customer address, including California. According to
19 Mr. Boniwell's email of December 21, 2021, CDTFA does not
20 dispute that the rate applies based on the customer's
21 address.

22 Exhibit 9 are Vertex screenshots, which -- if we
23 can, and if you will go to those -- I think this is worth
24 taking a look at. So page 2 of Exhibit 9 -- let me know
25 when you get there.

1 ADMINISTRATIVE LAW JUDGE KWEE: The sales
2 order -- the sales order inquiry page?

3 MR. MCCLELLAN: Let's see what it says here.

4 So there's Exhibit 9. Let me make sure I've got
5 these. Yeah. It's not 9, and not 10. So there's four
6 pages in Exhibit 9. Page 2 and it's -- what it
7 actually -- it's-- it's -- it says "Sales Order 4239666"
8 on the right-hand side?

9 ADMINISTRATIVE LAW JUDGE KWEE: Yes. I have that
10 page. Thank you.

11 MR. MCCLELLAN: Okay. So what this is -- it's --
12 it's called a "tax transaction inquiry." And it's -- it's
13 something you do by going into the Vertex system and --
14 for any transaction that exists -- and it shows you how
15 the tax was computed.

16 And, in this case -- this is an Illinois
17 transaction, an Illinois sale -- you'll see that there's a
18 State amount of 1 percent that's applied to that \$79.95
19 sale. And -- and, not to lose track -- you don't have to
20 look at it right away -- but this coincides with page 18
21 of our Exhibit 8.

22 So if you hold these up next to each other,
23 it's -- it's one in the same transaction -- the same
24 person, same amount, same date so forth -- same
25 transaction.

1 So then you also have the -- the County rate. So
2 Cook County -- 1 percent applied to the tax base \$79.95.
3 We've got the city of Chicago where the tax doesn't apply.

4 Ultimately, it's -- it's a 2 percent rate that
5 applies. It's referred to as "Illinois low rate." And I
6 don't know how much more clear it can be that in -- on
7 this transaction -- and this exists for every other
8 transaction -- that out-of-state tax is being applied
9 here.

10 And it's a retailer's occupation tax. It's not
11 even called a sales tax. It's 2 percent. There's no 2
12 percent rate in California, or anything close to that.

13 Exhibit 10 is a Penalty of Perjury Declaration by
14 Martin Pajor, CFO, in which he describes how their system
15 operates. And he testifies that California was not
16 charged -- the tax was not charged to California
17 customers -- I'm sorry -- the tax was not charged -- the
18 California tax was not charged to customers outside
19 California.

20 Customers inside California were charged
21 California tax not under dispute. And to the extent there
22 were charges on those that were applied on nontaxable
23 items or in excess of the rate, i.e., California excess
24 tax reimbursement, we don't have a dispute with that.
25 It -- it really is the transactions outside the state.

1 So remember Civil Code Section 6 -- 1656.1, in
2 Regulation 1700, establishes that it is Appellant that
3 chooses whether it charges California sales tax. And it
4 is Appellant that makes any such representation. Okay?
5 It's up to them.

6 They did not charge California tax on
7 out-of-state sales; and they did not represent that they
8 were charging California tax on out-of-state sales.

9 Mr. Pajor testifies in his declaration that its
10 employees and independent distributors are trained to tax
11 and charge based upon the location of the customer and
12 that customers have always been informed that the tax is
13 charged based upon on the customer jurisdiction rates and
14 rules.

15 Turning to Exhibit 11, it's a summary of the tax
16 laws that apply to the products in general to all the
17 states. And -- and this is what the taxpayer uses to set
18 up and program his Vertex system.

19 So if there's a sale in Illinois, then it's the
20 Illinois rate. It's the Illinois laws that are guiding
21 whether or not tax applies and, if it applies, what the
22 rate is. It coincides specifically with the address
23 stated on each invoice, the ship-to, and the purchaser.
24 Which is, frankly, how it's supposed to work; right?

25 I mean, that's how it works. You look at the

1 invoice, you look at the ship-to address, and that's the
2 tax you're supposed to apply.

3 Unless, perhaps, you don't have nexus -- and,
4 without going into too much detail there, of course, those
5 rules have changed to some degree with the local rates and
6 so forth in California -- but nonetheless, that's the way
7 you were supposed to do it. So they were -- they were
8 doing it right.

9 Ultimately, the example that I just walked you
10 through is just an example. That exists for every
11 transaction. So when the order was placed, the computer
12 system would tag it based on the ship-to location. It
13 would, based on the way it was programmed, determine
14 whether or not it was taxable. And then -- based on its
15 capabilities to, essentially, have a GPS real-time rate --
16 would apply the rate based on the location.

17 So to summarize the discussion up to this point,
18 to have California excess tax, you must have charges
19 represented as constituting California tax, too, that are
20 computed on non-taxable items or in excess of the actual
21 rate.

22 Here, Appellant established whether a product is
23 taxable based upon the laws in the destination state. If
24 tax applied, the destination state tax was applied
25 automatically by its software. If tax did not apply, then

1 Appellant's system would not apply tax -- like in the case
2 of the city of Chicago that we just looked at.

3 So as to sort of the second element, tax computed
4 on nontaxable items or in excess of the rate -- that
5 doesn't exist. So they don't have a -- a tax represented
6 as California tax; and it's not being applied on a
7 nontaxable amount. It's being applied to a taxable
8 amount.

9 Plus, there can be no excess tax reimbursement on
10 the transactions under dispute, and Appellant's refund and
11 petition should be granted.

12 We think it's really that simple. Appellant gets
13 to choose whether it collects tax -- California tax
14 reimbursement; it didn't. There can be no California
15 excess tax reimbursement as CDTFA claims.

16 So what does CDTFA have to say about all of this?
17 How does it seek to justify taking taxes of other states?
18 I mean, that's kind of weird; right? We're not used to
19 seeing that.

20 I was an auditor at one point and certainly was
21 never trained to, you know, look at transactions in other
22 states and audit other states and suggest that we have
23 jurisdiction in other states. I looked at the Audit
24 Manual recently and didn't see anything that suggested
25 that was the case.

1 So over the course of eight years and three
2 separate written decisions and two separate briefs, CDTFA
3 made the following conclusion: We conclude that
4 petitioner and its customers in other states and Canada
5 agreed that the indicated tax was sales tax that would be
6 remitted to the appropriate jurisdiction; right?

7 Everything's good.

8 Well, petitioner failed to remit the amount. The
9 unremitted amount became excess tax reimbursement payable
10 to the Board if not refunded to customers.

11 Wow. That's -- that's an interesting concept. I
12 don't know how it becomes that. Nobody's ever explained
13 that.

14 So, you know, how do taxes that were charged
15 become something else? What authority supports that? How
16 does that even happen? That's crazy; right?

17 At -- at what point did they become something
18 else? Was it immediately after the return was due in the
19 destination state? Was it a day? A month? A year?

20 What legal authority says that, if taxes are not
21 paid to the destination jurisdiction, they become
22 California excess tax reimbursement? I mean, that would
23 be unconstitutional for -- for California to even attempt
24 to do that.

25 Of course, the Legislature would never attempt to

1 do that, and it hasn't attempted to do that. It's not
2 looking to turn water into wine here.

3 Ultimately, these -- these -- these are
4 transactions that are between Appellant and the
5 destination state. And there's never been an answer to
6 these questions because there's -- frankly, there's not an
7 answer that -- that is one that someone is willing to say
8 up to this point.

9 We -- we believe the answer is simple, in that
10 the taxes didn't become something else. They didn't
11 become California excess sales tax reimbursement. There's
12 no legal authority which supports they can.

13 If the taxes were charged for the destination
14 jurisdiction -- as they were, and as CDTFA has admitted --
15 then they were not represented as constituting California
16 tax. And there can be no California excess tax
17 reimbursement.

18 Ultimately, to suggest that they change really
19 goes against a well-established principle that the tax is
20 established at the time of the transaction. It really
21 is -- is contrary to well-established constitutional
22 principles -- with respect to jurisdiction, and
23 sovereignty, double taxation, and probably some others --
24 that another state can reach beyond its borders and start
25 taking taxes due other states.

1 I'm sure California wouldn't like it if some
2 other state did it to it.

3 We think CDTFA recognized the basis of this case
4 that we just discussed was fatally flawed. So of course,
5 the taxes don't magically become something else if not
6 remitted. They don't change. Since CDTFA recently come
7 up with a new theory in its -- in its second brief for why
8 it claims to have a jurisdiction over the right to the
9 out-of-state taxes.

10 So CDTFA, now, apparently claims that the taxes
11 that it charged out of state customers were California
12 taxes all along. They don't need to change that way; they
13 were just California taxes all along.

14 Well, that's inconsistent with the facts of this
15 case. And, ultimately, what -- what they do in support of
16 the theory is to say, okay. There's legislative history
17 of a now-repealed Revenue and Taxation Code 6054.5 -- that
18 was repealed in 1978 more than 40 years ago -- they cite
19 the Decorative Carpets and an annotation.

20 Upon review of those, none of the authorities
21 cited by CDTFA supports its actions in this case. It
22 either supports Appellant's position -- as we'll
23 explain -- or the facts are materially distinct --
24 materially distinct -- what they're siting.

25 So, first, it is undisputed that Code Section

1 6901.5 is the controlling code section -- we just
2 explained that -- in order to applicable, the taxes must
3 be represented as California reimbursement and computed on
4 a nontaxable item or in excess at the rate.

5 If the taxes were not represented as California
6 tax, then the law does not authorize CDTFA to make a
7 demand for -- for the taxes. And CDTFA's Exhibit L says
8 the same thing.

9 If you look at page 2 of Exhibit L -- which is
10 legislative history that CDTFA has presented as an
11 exhibit -- essentially shows that -- that in -- in large
12 part, the code section that existed mirrors the existing
13 code section in that it needs to have been represented as
14 taxes due under this part that are computed on a
15 nontaxable charge.

16 The legislative history emphasizes this point on
17 page 2, where it says now, "Therefore, it is the intent of
18 this legislation to discourage such a practice by
19 preventing persons from profiting from such erroneous
20 collection of tax reimbursement authorized by this part."

21 I repeat, "authorized by this part." So if it's
22 not authorized by this part, then it doesn't fall within
23 the code section. CDTFA doesn't have the authority.

24 So the Legislature is saying the same thing we
25 are -- that California excess tax reimbursement is limited

1 to California tax. I think that's natural and obvious.
2 As, of course, it must due to constitutional principles.

3 Did California authorize the Illinois tax of 2
4 percent -- the retailer's occupation tax -- we just went
5 through? No.

6 Did California authorize taxes in any other
7 states? No. Of course, it didn't. It doesn't have the
8 authority to do that. It's well beyond its jurisdictional
9 authority.

10 According to -- to California's legislature,
11 which is the body that makes the rules CDTFA is required
12 to follow, excess tax reimbursements only applies to taxes
13 authorized by California. Ultimately, Exhibit L supports
14 our position in this case.

15 Turning to Decorative Carpets, the taxpayer in
16 that case was a construction contractor that installed
17 materials inside California. As a materials contractor,
18 tax was due on its costs -- erroneously charged California
19 sales tax on nontaxable installation labor on its mark-up.

20 In other words, charged California tax that
21 wasn't disputed in the case on sales to California
22 customers on items that were nontaxable or exempt.
23 Classic reimbursement -- excess reimbursement scenario.

24 At the time of Decorative Carpets, Code Section
25 6901.5, or its predecessor section, did not exist. But

1 the facts in this case are entirely distinct from
2 Decorative Carpets.

3 The sales at issue here are to customers outside
4 the state. And the taxpayer charged the out-of-state tax
5 at the specific rates following the -- the out-of-state's
6 laws that it says that it has to.

7 They did fail to remit some of the tax in some of
8 the jurisdictions they were operating. It was a small
9 percentage. But that doesn't make it California tax.

10 Equally important -- 6901.5 now exists. So while
11 there may have been a -- a basis for the Court to act in
12 equity, we know that -- that CDTFA doesn't have authority
13 to act in equity. I mean, that, frankly, is not something
14 that it's authorized to do, I think, for good reason.

15 They are bound by the statutes that the
16 Legislature follows. The Court would now be bound by
17 6901.5. It cited the legislative history in its decision.
18 It saw what the Leg. was thinking.

19 And, frankly, I think it made a reasonable
20 decision. If the facts were the same, here, as they were
21 in Decorative Carpets, we're not sitting here. I mean,
22 we've already stipulated that if there's California excess
23 tax, and it's not returned -- and as you guys, I think,
24 know, this -- this taxpayer went to great lengths to
25 return this.

1 They have been in contact with all of these
2 states, which, frankly, is irrelevant. But this is
3 something they intend to work out and resolve. They can't
4 do it when California has its money or is otherwise making
5 it a claim.

6 The other point I was going to reiterate is --
7 is -- is, again, that -- that the fact that we have a case
8 where if Appellant pays it to another state, the claim by
9 CDTFA goes away. I think, realistically, we see what the
10 reality is here. It's that these -- this isn't a
11 California obligation. I mean, you can't pay it to
12 another state. That's crazy.

13 It's just it -- it -- and -- and that's why it's
14 something -- when, in our brief, we went into our requests
15 to look at the entire statutory scheme, which is how it's
16 supposed to be interpreted in the -- in the process of
17 figuring out the construction and the meaning of it, not
18 to just zero in on a specific section or a -- a specific
19 sentence.

20 And -- and, frankly, my understanding is that we
21 had an agree -- agreement on that. And the fact that --
22 that, at least by my understanding, CDTFA has -- has
23 changed its position, calls into question their position
24 in our opinion.

25 In an email, they essentially, now, are saying

1 that they don't agree, if I understood it correctly --
2 I've got it as an exhibit -- but that they don't agree
3 that the taxes that were charged were intended for the
4 destination jurisdiction.

5 Well, one question I would have is why? You
6 know, what changed?

7 Mr. Claremon signed one of the briefs in which
8 that position was adopted. So -- so I would be curious to
9 know if there were facts that came to light. You know,
10 what -- what changed?

11 And, if not, then why the change? Why disagree
12 with eight years of written decisions in -- which were
13 incorporated into briefs that were adopted by the
14 Department?

15 We've got some other issues that -- that we may
16 address. They are addressed in our brief. We would ask
17 you to, you know, to look at everything that we've said
18 and all of the evidence that we've presented.

19 To the extent I do have time remaining, can we
20 reserve that on rebuttal?

21 ADMINISTRATIVE LAW JUDGE KWEE: Yes. You can
22 continue, with your closing presentation, to use any
23 additional time you have left.

24 MR. MCCLELLAN: Thank you.

25 ADMINISTRATIVE LAW JUDGE KWEE: So I guess you

1 have 15 minutes that you're reserving. So you'll have
2 25 minutes on -- in your closing presentation.

3 MR. MCCLELLAN: Thank you.

4 ADMINISTRATIVE LAW JUDGE KWEE: I did have one
5 question.

6 I'd like to go back to the Vertex tax transaction
7 inquiry that you had talked about earlier. That was the
8 Exhibit 9 four-page document. And we were looking at page
9 2. I believe that was the Illinois tax transaction detail
10 which showed you, like, Cook County, 1 percent; 0 percent
11 for Chicago.

12 Was that sort of breakdown with the rates and the
13 cities -- that, you know, what rate applies to what
14 city -- was that provided to the customer? Or was that
15 only available to Body Wise, your client?

16 MR. MCCLELLAN: Ultimately, I don't believe they
17 provided these with each invoice. But if you look at the
18 invoice, it's readily apparent that it's 2 percent; right?

19 As a customer -- as a consumer myself, if you're
20 charged an excess of what you expect to see, then -- then,
21 ultimately, you would inquire.

22 And in -- in discussions with my client -- and
23 this occurs in basically all cases that I deal with
24 clients, virtually -- there's questions that are asked:
25 "Hey. Why am I charged tax? This is a food item."

1 You know, it's a nutritional supplement, which --
2 which creates sort of the wrinkle in the law that -- that
3 generally creates the taxability.

4 And they'll explain it to them. And -- and
5 they'll provide these to them if -- if they're requested,
6 certainly.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And as far
8 as the invoice, you know, it was only for -- for \$80. Is
9 that a typical transaction size for -- for your client?

10 You know, like, I guess these are nutritional
11 supplements. Would the average client be, you know, like,
12 an \$80 sale? A \$40 sale? Or -- or do you have really
13 large sales in there?

14 MR. MCCLELLAN: Well, I mean these are randomly
15 selected invoices. And -- and it seems to be on the lower
16 side. Here's one for -- for 39 -- so that's -- that's
17 less -- 500, 34, 515.

18 There were some transactions that I saw in the
19 audit that were for resale. Those tended to be larger.

20 But by and large, this is going to in-use
21 consumers. So, yeah. Just flipping through this -- I
22 have not analyzed the transactions in any sort of detail.
23 But it -- it seems to be fairly representative.

24 And there's other invoices in here.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

1 One other question, as far as what the
2 customer -- I -- I guess, my understanding is this -- you
3 have, you know, a California warehouse -- a California
4 warehouse ships the nutritional supplements to the various
5 customers in different states.

6 Was there anything on the invoices that discussed
7 title transfer? Or was that -- were the invoices and
8 sales agreements -- were they -- were they silent on title
9 transfer or title with transfer?

10 MR. MCCLELLAN: Judge Kwee, I don't know. But I
11 don't think that that's relevant. I think, ultimately --
12 I mean, I -- I -- we just explained at length what we
13 think is relevant.

14 To my knowledge, there was not any sort of title
15 clause. I could be wrong about that. It's not something
16 that we looked at.

17 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

18 MR. MCCLELLAN: Sure.

19 ADMINISTRATIVE LAW JUDGE KWEE: So I should turn
20 to my co-panelists.

21 Judge Long, did you have any questions for the
22 party -- for Appellant?

23 ADMINISTRATIVE LAW JUDGE LONG: Yes.

24 First, I just wanted to look at the declaration,
25 Exhibit 10. Point 11 is that Body Wise customers are

1 always informed of the tax charged is based upon the
2 customer's jurisdiction rates and rules.

3 When are they informed?

4 MR. MCCLELLAN: I'm sorry?

5 ADMINISTRATIVE LAW JUDGE LONG: Point -- point
6 number 11.

7 MR. MCCLELLAN: Point number 11? Okay.

8 I think what he is saying is that if there's a
9 question -- my understanding of this -- of course, I
10 helped him draft it -- is -- is the intent of the
11 statement that he's making under penalty of perjury is
12 that if there's an inquiry, they're always informed
13 that -- that this is how we compute the tax.

14 Which it can't really be disputed. I mean,
15 the -- the software shows that that's how it's computed.
16 And it's the taxpayer that's charging the tax. They're
17 making the representation.

18 I mean, as to how that is perceived by the
19 customer, frankly, in my opinion, I think it's the same
20 way it is by the vast majority of customers. Which is,
21 "Well, that's our rate. That's the rate I'm used to
22 paying when I go to the grocery store or shopping, or I'm
23 shopping online. That's, you know, that's the tax I
24 should be paying."

25 But they -- they are -- they get inquiries, you

1 know, by customers. And whenever those inquiries are
2 made, the facts that I just went through are what's
3 described to the customer.

4 ADMINISTRATIVE LAW JUDGE LONG: And then with
5 respect to whether the tax is represented as a California
6 tax, looking at the invoices -- let's look at invoice page
7 number 1, 11, 18, and 40. Because those are from the four
8 different states represented in -- in Exhibit 8.

9 MR. MCCLELLAN: Okay.

10 ADMINISTRATIVE LAW JUDGE LONG: How, as a -- as a
11 purchaser, am I to recognize that this is not the
12 California tax?

13 I understand that you're saying people might ask
14 if it's different than what they are expecting. But if
15 you look at, like, page 40, the Canadian tax, which is
16 \$23.46 -- it's approximately 7 percent.

17 MR. MCCLELLAN: Mm-hmm.

18 ADMINISTRATIVE LAW JUDGE LONG: How -- how am I
19 as a -- let's say, as a Canadian purchaser, to know that
20 that's the Canadian tax? Or prepare -- comparable
21 California tax?

22 MR. MCCLELLAN: Well, you know, I would -- I
23 would say probably the same way that any person would
24 know -- by -- by doing some math.

25 And -- and the fact that the law says the tax

1 applies based on the destination; right? And people
2 understand that. I mean, people know what the law says.

3 And so, if you look at the first page under that
4 exhibit, which is -- which I thought you called my
5 attention to -- which is a California transaction and it's
6 shipped to a California customer and the right rate is
7 applied because they have a computer system that precisely
8 does that.

9 I mean, why on earth would a Canada customer
10 think that -- think that they're being charged California
11 tax when their rate coincides with what they're seeing on
12 the document? To me, it -- it just is a part of general
13 commerce. That's the way things are done.

14 CDTFA, essentially, explained in their brief
15 that, well, it doesn't matter if it doesn't say California
16 tax. The -- the common practice is to just say "tax
17 amount." And, frankly, the law says the tax rate applies
18 based on destination rules. There's -- and -- and it
19 does.

20 In fact, if you just look past your nose and you
21 do some math, you see that you got the right rate. And
22 you understand the party that's making the representation,
23 which is Appellant in this case.

24 We've just demonstrated that they, quite
25 literally, compute the tax on every transaction at the

1 state and local levels. That's broken down and can
2 present that.

3 So in no way did they, number one, intend to
4 represent these taxes as California tax. We're not aware
5 of any evidence that the Department has where a customer
6 has made such allegations -- it wouldn't make sense to me
7 that it would be made -- and -- and, ultimately, we've
8 got evidence of the system.

9 I mean, we know California tax is not being
10 applied. You can't really dispute that. We just walked
11 through the exhibits to show how the system is set up
12 and -- and how it applies to tax.

13 There's no 2 percent rate, for example, in -- in
14 Illinois. And -- and if you look at the rates across the
15 board, frankly, a lot of these that we're looking at the
16 tax was remitted. So why is that not California tax? I
17 mean, why is not everything California tax?

18 I think you have to take a reasonable, pragmatic
19 approach and look at the facts as they stand. And in this
20 case, I think the facts make it clear. It's not
21 California tax. It wasn't charged as California tax --
22 never represented as a California tax.

23 No customer has ever alleged they've been charged
24 California tax. And, frankly, virtually every state has a
25 destination rule to the extent that if you're selling and

1 shipping into the particular state -- or even, for that
2 matter, selling intrastate -- tax applies based on the
3 destination.

4 ADMINISTRATIVE LAW JUDGE LONG: Thank you. I
5 don't have any more questions.

6 MR. MCCLELLAN: Thank you.

7 ADMINISTRATIVE LAW JUDGE KWEE: Judge Lambert,
8 did you have any questions for the Appellant?

9 ADMINISTRATIVE LAW JUDGE LAMBERT: Yes. I -- I
10 had a question.

11 Was there attempts made to repay the customers
12 for the reimbursements? Or refunded to them?

13 MR. MCCLELLAN: Yes. And in -- in fact, they
14 succeeded in those attempts to some degree -- not a
15 particularly significant degree. They sent out thousands
16 of notices to the customers -- to the -- notices to the
17 impacted customers.

18 We worked through the re-audit with the audit
19 staff. I believe the audit has made adjustments for those
20 amounts to the extent they've been returned to the
21 customers. They didn't have a significant response.
22 They -- they have been in contact with -- with the states
23 that -- that are applicable.

24 That information, frankly, is not relevant in our
25 opinion. I respect that perhaps there's some discomfort

1 that there were taxes collected that have been not been
2 remitted. But it's -- it's a matter between the other
3 states.

4 Just as it would be if another state audited a
5 business within its jurisdiction and it didn't pay all of
6 its California tax. I mean, of course it wouldn't have a
7 viable and legal claim to the tax due to California.

8 And, again, I go back to the fact that -- that we
9 know this. Because, otherwise, all the taxes paid to
10 Canada, all the taxes paid to all these other states --
11 there can't be a credit for a legitimate California
12 liability.

13 ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you.

14 ADMINISTRATIVE LAW JUDGE KWEE: Mr. McClellan, I
15 did have one question -- clarification in reading the
16 briefing.

17 My understanding was that Appellant was
18 registered in 35 states and that the transactions that
19 we're looking at were states in which they were not
20 registered and did not remit the -- the tax amounts
21 collected to those states.

22 And, I guess, I'm -- I'm wondering, from another
23 way of looking at it -- how would we say that this is, you
24 know, say, for example -- I don't know if Chicago has been
25 registered or not -- but say, as an example, why -- why

1 would you he say that this is a Chicago tax if Appellant
2 doesn't have nexus and isn't required to collect, you
3 know, tax for Chicago? As opposed to some other state?

4 Aside from, you know, just the rate. Is that the
5 only thing we're looking at? Because they collected the
6 Chicago rate; therefore, this must be a Chicago tax?

7 Do -- do you see what I'm saying? What makes you
8 say this is represented as a Chicago tax if your client
9 isn't registered to collect taxes for Chicago? And I'm
10 just using Chicago as an example. I don't know if they
11 are -- are registered in Chicago.

12 MR. MCCLELLAN: Sure. I guess that's a fair
13 question.

14 I mean, ultimately, they are registered in
15 Illinois and, ultimately, have remitted the tax. But the
16 question becomes, "What's the tax difference between that
17 and the ones that are not?"

18 I mean, the -- the reality of -- of this, as I
19 understand it, is there was someone on their accounting
20 staff that essentially set up their system to apply and
21 collect tax in the particular jurisdictions.

22 So if they're not registered in California but
23 they turn on the system, for their purposes, it -- it's
24 treated the exact same way as Illinois where they are
25 registered. The -- the system is established to apply tax

1 based on the laws of the destination state, which is how
2 it works, frankly.

3 Again, there's a -- I don't think there's a
4 dispute that California tax should apply to sales that are
5 sent outside of its borders or vice versa.

6 The other thing that you mentioned is that they
7 don't have nexus. Sure, they have nexus. I mean, they
8 sell through independent representatives. They have --
9 they have sales representatives. They have a physical
10 presence that -- that's well established under Scripto as
11 being sufficient. So -- so they do have nexus.

12 It was really just a matter of someone turning on
13 the system. And it became something that was uncovered in
14 the audit. So the system was turned on and set up in the
15 same way as every other state. You know, to -- to suggest
16 that, just because someone has a location in California --
17 and they did have another warehouse in Canada and possibly
18 one other.

19 I -- I -- my understanding is the vast majority
20 of these were shipped from California. But that's, I
21 mean, under tax law, for -- for what we're dealing with --
22 interstate commerce transactions if you will. I don't see
23 that that has any impact.

24 And I'm -- the Department hasn't presented any
25 evidence to say, "Well, one, the law says something

1 different."

2 Okay. So the law says, "Well wait a second. The
3 tax doesn't apply based on destination." Right? They've
4 not said that. I -- I don't think that's a supportable
5 claim.

6 And so if that's the norm -- and that's the
7 practice that's been in place for over a hundred years in
8 this nation -- I think the real question is, well, why
9 would a customer that has a product shipped to their
10 place -- to their home, sees that -- sees that the rate
11 coincides with the rate that they anticipate seeing -- it
12 would think that it's anything other than what the client
13 represented?

14 Keep in mind that you guys are asking questions
15 about the customer. And if you want to pull the
16 customers, or if you have evidence of the customer, I'd be
17 happy to see that. Otherwise, it's speculation.
18 Speculation is not evidence under the law.

19 What we do have is evidence of who is doing the
20 representing, which is -- which is Appellant. Appellant
21 is the one that makes the charges. Appellant is the one
22 that had a system in place to charge tax to the
23 destination states.

24 I mean, really, CDTFA agreed with that numerous
25 times -- that it was destination tax. I think, under the

1 facts, it's the only reasonable conclusion. What they've
2 said is, "Well, gosh. We kind of, under these
3 circumstances, have to recognize that this is, of course,
4 for the destination state. But if it wasn't paid, it
5 becomes something else."

6 So that's -- that's their position. But we don't
7 think it can become something else. We think the
8 evidence, in this case, makes it clear. We all know we're
9 not dealing with California excess tax. Because why, when
10 it's paid to Illinois, does the obligation go away in
11 California?

12 So it's -- it really -- that aspect of it -- I
13 think the best way we can say it is we see that as
14 evidence of what we're -- is -- of what we're putting
15 forth.

16 That -- that's -- CDTFA's own treatment of these
17 transactions is evidence that it's not California excess
18 tax reimbursement. It didn't become California excess tax
19 reimbursement.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

21 MR. MCCLELLAN: Sure.

22 ADMINISTRATIVE LAW JUDGE KWEE: With that, I will
23 turn it over to CDTFA for your opening presentation.

24 ///

25 ///

1 PRESENTATION

2 BY MR. CLAREMON:

3 Thank you, members of the panel. And bear with
4 me as I get used to this microphone. I think I'll have
5 some issues at first.

6 Good afternoon.

7 The Appellant in this matter, Body Wise
8 International, LLC, is a retailer of weight loss and
9 nutritional products which held a California's seller's
10 permit during the two separate audit periods at issue in
11 this Consolidated Appeal from April 1, 2005, through
12 December 31, 2009, and from April 1, 2010, through June
13 30, 2013.

14 The sole issue for both audit items -- audit
15 periods is whether Appellant is liable for excess tax
16 reimbursement that it collected on sales to out-of-state
17 customers totaling, as our calculation, \$59,755 for the
18 first audit period and \$97,443 for the second audit
19 period.

20 According to the information provided by
21 Appellant, its Canadian subsidiary exclusively serviced
22 customers in Canada. So all orders to United States
23 customers were shipped from Appellant's California
24 warehouse via common carrier.

25 And that's stated in Exhibit 5 -- Appellant's

1 Exhibit 5. It's stated in Exhibit M. And it's also
2 reflected in all of the decisions in this case, Exhibits A
3 and B.

4 There is also no evidence or contention that the
5 property was shipped subject to an FOB Destination Clause
6 or similar provision.

7 In the first audit, it was determined that
8 Appellant had excess sales tax accruals, even after
9 accounting for sales tax paid to California and other
10 jurisdictions.

11 Appellant has stated that the balance at issue
12 arises from transactions where the property was shipped to
13 customers and states in which Appellant was not registered
14 to collect or remit tax. And that's stated in Exhibit M,
15 page 4, and Exhibit N, pages 5, 6, and 23.

16 In the second audit, the liability is explicitly
17 from transactions shipped to states where Appellant was
18 not registered based on figures provided by Appellant.
19 And that's stated in Exhibit G, work -- Worksheets R1-12D
20 and R1-12D1.

21 Appellant has also stated on multiple occasions
22 throughout this Appeal that the excess tax reimbursement
23 was collected because of an error in how it set up its tax
24 collection software. In other words, Appellant did not
25 intend to collect these amounts and remit them to any

1 other jurisdiction. And that's stated in its opening
2 brief in this matter and also in Exhibits M and N to those
3 same page sets.

4 Appellant used the same invoices whether or not a
5 customer was located inside or outside of California and
6 whether or not tax reimbursement was collected. And
7 that's shown in Exhibit K and Appellant's Exhibits 7 and
8 8.

9 The customers information, including ship-to
10 address, is located at the top of the page above the order
11 information. At the bottom of the page below the order
12 information, the various charges are listed, including a
13 line for, quote, "tax amount."

14 Whether or not a customer was located in
15 California when a tax amount was charged on an invoice.
16 It did not identify the taxing jurisdiction or the rate
17 used to calculate the tax amount. In other words, for all
18 sales, including sales to California customers subject to
19 sales tax, the invoice simply shows a charge labeled as
20 "tax amount."

21 Turning to the applicable law, sales tax applies
22 to a retailer's retail sale of tangible personal property
23 in this state unless exempt or excluded by statute. A
24 retailer may collect sales tax reimbursement from its
25 customer if the contract of sale so provides, pursuant to

1 Civil Code Section 1656.1 and Regulation 1700 Subdivision
2 (a).

3 Under those provisions, showing an amount of
4 sales tax reimbursement on the document of sale is
5 sufficient to create presumption that the parties agreed
6 to its conclusion.

7 Pursuant to Section 6901.5, when an amount
8 represented to a customer as constituting reimbursement
9 for -- as -- excuse me -- when an amount represented to a
10 customer as constituting reimbursement for taxes due under
11 this part as computed and paid upon an amount that is not
12 taxable, the amount so paid shall be returned by the
13 person to the customer upon notification by the Department
14 or by the customer that such excess has been ascertained.

15 Failing that, the amount shall be remitted to the
16 State if knowingly or mistakenly computed. Regulation
17 1700 Subdivision (b)(1) defines such amounts as excess tax
18 reimbursement. Clarifying the term, quote, "represented
19 as tax due under this part" means an amount that is,
20 quote, "represented as constituting reimbursement for
21 sales tax."

22 Finally, the CDTFA previously concluded in Sales
23 and Use Tax Annotation 460.0242 that amounts in excess of
24 the sales price on exempt sales shipped out of state
25 constitute excess tax reimbursement when there is a

1 statement that, quote, "tax" is included.

2 Here, as described in the Decisions, the
3 transactions at issue by Appellant, a California retailer,
4 took place in California upon delivery to a common carrier
5 pursuant to Regulation 1628(b)(3)(D). As such, they would
6 have been subject to California sales tax if not for the
7 specific exemption that applies for sales shipped out of
8 state pursuant to Regulation 1620(a)(3)(B).

9 The charges at issues were clearly represented as
10 constituting reimbursement for sales tax as required by
11 Regulation 1700. A point highlighted by the fact that
12 they were made with that exact same representation as on
13 Appellant's invoices to California customers. And it is
14 also, essentially, the same representation described in
15 Annotation 460.0242 which involved amounts labeled as tax
16 to out-of-state purchases.

17 To rebut these facts, Appellant offers a single
18 declaration, which contains vague statements that are
19 contradicted by the only contemporaneous documentary
20 evidence -- the invoices themselves -- which simply
21 represent that a, quote, "tax amount" was collected.

22 The fact that Appellant's inadvertent back-end
23 programming was calculated in other states' rates does not
24 change the fact that was represented on the Document of
25 Sale -- a representation sufficient to create a

1 presumption under Civil Code Section 1656.1 -- was the
2 exact same representation as made on the Appellant's
3 taxable in-state transactions. These amounts fall
4 squarely within the definition of excess tax reimbursement
5 under Regulation 1700.

6 Before concluding, I'll turn to some of the
7 additional items and -- and issues listed in the June 3,
8 minutes and orders that we've not previously addressed.

9 With regard to the second and third issues listed
10 in the minutes and orders, pursuant to Regulation 30103
11 Subdivision (b), OTA does not have the jurisdiction to
12 issue a decision on amounts that are not the subject of an
13 adverse Appeals Bureau decision.

14 Here, the Department has not issued a
15 determination with regard to amounts paid to other
16 jurisdictions; and therefore, they are not the subject to
17 the adverse Appeals Bureau decisions issued in this matter
18 and are not within OTA's jurisdiction.

19 Nonetheless, with regard to the third issue, as
20 we stated in our additional brief dated February --
21 February 14, 2022, Section 6901.5 does not compel the
22 CDTFA to issue a determination on amounts that are paid to
23 the other states. To that point, and as Appellant has
24 reminded us, we must look to the entire statute.

25 The primary statement of law in 6901.5 is based

1 on ascertainment by the Board that such excess exists.
2 Even after that, liability to the state only arises if
3 such amounts that have been ascertained have been so
4 computed mistakenly or knowingly.

5 In two different places, the statute allows the
6 CDTFA the opportunity to examine whether an excess exists
7 before imposing liability. It provides ample authority
8 for the CDTFA to ascertain or determine that no excess
9 exists when the amounts have been -- have actually been
10 paid as tax to another jurisdiction.

11 I believe we have addressed most of the other
12 items listed in the minutes and orders either in our
13 additional brief or in our March 14, 2022, response to
14 Appellant's additional brief.

15 However, with regard to the third items -- the
16 question of whether tax was owed to another jurisdiction
17 or whether these amounts were collected for another
18 jurisdiction, which has also been discussed here today --
19 as I have already stated, Appellant did not intend to
20 collect these amounts -- amounts at all, much less intend
21 to collect them on behalf of another jurisdiction.

22 And as an unregistered out-of-state retailer,
23 Appellant would, generally, not even have been legally
24 authorized to collect them. Appellant's entire argument
25 rests on the fact that it accidentally programmed its

1 software and, on that basis alone, should be unjustly
2 enriched contrary to the explicit intent behind Section
3 6901.5 and its predecessor 6054.5.

4 Finally, the questions posed in the fourth item
5 listed in the minutes and orders regarding the nature of
6 tax and altering the nature of that tax is reflective of
7 Appellant's arguments throughout this Appeal -- which they
8 have repeated numerous times today -- which focus on
9 whether or not these amounts constituted California tax.

10 This framing is neither accurate nor relevant to
11 the issues in this Appeal. Put simply, tax is not an
12 issue in this Appeal. And I understand that's ironic
13 given the setting.

14 By definition, tax does not apply when excess tax
15 reimbursement is collected. So it is somewhat confusing
16 for Appellant to repeatedly insist that excess tax
17 reimbursement can only be collected when there is
18 California tax. Excess tax reimbursement can only be
19 collected when there is no California tax.

20 At issue are amounts charged by a customer to a
21 retailer. They did not constitute tax at the time they
22 were collected and have certainly never been paid as tax
23 to any other jurisdiction. Therefore, questions regarding
24 the nature of the tax or whether that nature can be
25 altered are not descriptive of the issues in this Appeal.

1 The relevant inquiry is simply whether the
2 amounts collected were represented as constituting
3 reimbursement for sales tax pursuant to Regulation 1700.

4 And to that point -- and, again, responding to
5 the discussion today -- any -- and alluding to what I just
6 said -- any invoice showing excess to tax reimbursement is
7 going to have indications that tax does not apply
8 including, specifically, that an incorrect rate was
9 charged.

10 So an indication that tax does not apply on the
11 invoice doesn't change the fact that the amounts were
12 represented as tax reimbursement. In fact, its inherent
13 in the nature of excess tax reimbursement that you will
14 representations on the invoice an incorrect tax rate,
15 sales to the U.S. Government --

16 I mean, there's a million reasons why excess tax
17 reimbursement may be collected on -- on an exempt sale.
18 There's no carve-out for when it's because the customer's
19 located out of state. If the amount is represented as
20 constituting excess tax reimbursement, it needs to be paid
21 back to the State.

22 To summarize, Appellant is a California retailer
23 that, over a period of eight years, collected these
24 amounts from customers on sales that took place in
25 California under the representation that they constituted

1 tax reimbursement. And it has refused to refund these
2 amounts for another nine years.

3 Having failed to refund the excess tax
4 reimbursement to its customers, Appellant is liable to the
5 State. Accordingly, Appellant's petition and claims for
6 refund should be denied.

7 Thank you.

8 ADMINISTRATIVE LAW JUDGE KWEE: Yes. Thank you.

9 I did just want to get one quick clarification.

10 So it seems like an important part of the
11 Appellant's position is they're citing, too, you know,
12 6901.5. In that language, that -- that has to be an
13 amount represented by a person or a customer, you know,
14 constituting reimbursement for taxes due under this part
15 you know, the Sales and Use Tax Law.

16 And then, you know, CDTFA, you're -- you're also
17 referring to the Regulation 1700, which uses similar, but
18 not identical, language that, you know, has to be
19 represented by a person or a customer to -- as
20 constituting reimbursement for -- for sales tax.

21 And I'm just trying to just make sure I
22 understand. CDTFA's position is that, basically -- that,
23 you know, 6901.5 and 1700 are consistent; and 1700 is just
24 saying that reimbursement for taxes due under this point
25 and sales tax is a tax due under the Sales and Use Tax

1 Law.

2 So that's -- that's, essentially, what -- what is
3 being asserted here. It doesn't necessarily have to be,
4 you know, California or -- sales tax versus a Nevada sales
5 tax; it just has to be listed as a sales tax or -- or, you
6 know, a tax due in that part.

7 Is that -- is that -- am I understanding your
8 position correctly?

9 MR. CLAREMON: That -- that is our position --
10 that Regulation 1700 validly interprets and implements
11 Section 6901.5. The term "represented as tax due under
12 this part" is -- it is -- it is a descriptive term that's
13 used in statute which is basically describing sales tax.

14 And I think, again, there's really no argument
15 here that it has to actually be represented as California
16 tax on the invoice; right? That's not really in dispute
17 here; right?

18 Like, so even though that's what is purported to
19 be the legal basis for their petition, they're not
20 actually arguing that California tax or California
21 reimbursement has to be represented on the invoice.
22 Because it's not on their California invoices, and it's
23 not on any receipt that you get.

24 So, I mean, this is -- so not only does
25 Regulation 1700 validly interpreting what it means to be

1 represented as taxes under this part, but it's an
2 interpretation that's consistent with, basically, common
3 practice.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

5 I'll turn over to Judge Long.

6 Judge Long, did you have any questions for
7 Respondent, CDTFA?

8 ADMINISTRATIVE LAW JUDGE LONG: No questions at
9 this time.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

11 And for Judge Josh Lambert, did you have any
12 questions for the Respondent, CDTFA?

13 ADMINISTRATIVE LAW JUDGE LAMBERT: Yes. Just a
14 couple.

15 Oh, sorry about that feedback.

16 But a couple of things -- just to clarify, I
17 think Appellant was saying that CDTFA -- your arguments
18 were changing. And before, it was stated that CDTFA could
19 collect this tax that was, you know, intended to be
20 collected from other states. And, now, it's being stated
21 that, you know, it was never intended to be collected and
22 its California tax.

23 And in looking at the early briefs by CDTFA, it
24 seems like there are arguments kind of that seem like they
25 were describing that CDTFA can, you know, collect tax --

1 these taxes to prevent, you know -- you know, some
2 injustice, you know.

3 So CDTFA now stating, if I understand correctly,
4 you know, that if it was intended to be collected for
5 those states -- other states -- then CDTFA would not have
6 the power to, you know, do this. Or -- are you -- is the
7 position changed as Appellant said?

8 MR. CLAREMON: Give me one second before I
9 respond.

10 Well, I -- what Appellant is referring to is a
11 single sentence in the decision in this matter that we --
12 that we do not agree with and we failed to correct until
13 our briefing -- our additional briefing in this case.

14 So that is not a position of the Department that
15 these were taxes that were other states' taxes that became
16 California excess tax reimbursement. It has always been
17 the position -- going back to the BOE Hearing, and you can
18 look at the Exhibit N, the BOE Hearing transcript -- that
19 these were never intended to be collected on behalf of
20 other jurisdictions.

21 Because, again, we stated in Exhibit N and during
22 that BOE Hearing that these -- this was an erroneous --
23 erroneous collection on behalf of the Appellant. But,
24 again, our position is that it's what's represented that
25 matters.

1 And so, while we are not compelled to issue a
2 determination for taxes that are actually paid to another
3 state -- I don't know exactly where the line is -- but
4 it's -- that's not -- as I stated, that's not the -- what
5 I would say, the descriptive framework -- that either has
6 to be represented as a reimbursement for California tax or
7 mutually exclusively it has to be another state's tax.

8 I don't think that's the framework in which we
9 discuss it; so it's certainly not our position, now.

10 ADMINISTRATIVE LAW JUDGE LAMBERT: Thanks for
11 clarifying.

12 I'll try to get back from the mic. I think
13 sometimes I get too close.

14 But -- and, also, just one more question.

15 Just to clarify, there's the Regulation 1700 and
16 then the -- the Statute 6901.5. And it seems like,
17 CDTFA -- you were saying that the regulation provides, you
18 know -- it seems, like, almost, like, broader authority
19 than when you think the regulation would be more specific
20 and the statute would kind of be encompassing the -- the
21 broader authority.

22 Correct me if I'm wrong, though.

23 MR. CLAREMON: I -- I guess, I just -- our
24 position is that it's not broader -- that -- that the
25 statute contains a term, read in its entirety,

1 "represented as sales tax" -- as tax -- excuse me --

2 "represented as taxes due under this part."

3 So I do think that the regulation, in saying
4 that -- what that means is "represented as sales tax" is
5 not necessarily broader; it's just interpreting what that
6 means. Because, again, in common practice, things are not
7 represented as California tax.

8 ADMINISTRATIVE LAW JUDGE LAMBERT: Thank you.

9 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

10 I believe we are ready to move on to the parties'
11 closing remarks.

12 And, Mr. McClellan, you had reserved 15 minutes
13 from your opening. So that means you would have 25 -- 10
14 plus 15 -- minutes on your closing presentation.

15 MR. MCCLELLAN: Appreciate that. I just had a
16 couple of comments, and then I'll turn it over to Lucian.

17
18 CLOSING ARGUMENT

19 BY MR. MCCLELLAN:

20 To be honest with you, I'm not really sure what
21 the Department's position is. I'm not sure how we deal
22 with that because it has shifted.

23 And I think what they're saying at this point --
24 and -- and maybe you guys can help me here -- is that all
25 of the transactions under audit included California --

1 and, when I say California tax, I, you know, just to
2 clarify, frankly, if California excess tax is going to
3 exist, I understand that, technically, it's not -- it
4 doesn't apply.

5 That's part of our argument -- is that, in fact,
6 it does apply in the destination where the sales are
7 actually taking place or the transactions are completed
8 and possession transfers to the customer. They're
9 required to deliver it outside of the state. So we think
10 tax does apply, frankly, because it does.

11 But is the Department saying that excess tax
12 reimbursement applies to all the transactions in the
13 audit? That -- that California excess tax reimbursement
14 applies to all the transactions in the audit?

15 I think that's kind of an important point to
16 clarify here.

17 ADMINISTRATIVE LAW JUDGE KWEE: This is Judge
18 Kwee.

19 I'm not sure that they were talking about
20 anything beyond the transactions that were at issue in
21 this Appeal.

22 And I'm not sure if CDTFA wants to clarify that
23 or not. They're, you know -- this is not a time to be
24 questioning each other about, you know, questions in the
25 audit.

1 But, you know -- and I'd like to focus on your
2 closing argument. But if CDTFA wants to respond to that,
3 you may; you're not required to.

4 MR. CLAREMON: No. We don't have any response at
5 this time.

6 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

7 MR. MCCLELLAN: So why wouldn't there be a
8 clarification to that question? I guess, like, I'm asking
9 a very clear question: Does CDTFA claim that there's
10 California excess tax reimbursement on all the sales? Or
11 just those where they weren't paid? Where there -- where
12 there wasn't payment to the destination state?

13 I mean, I guess what I can do is I'll just
14 hypothetically discuss it.

15 If -- if CDTFA's position -- which it doesn't
16 want to clarify for reasons that are baffling to me -- is
17 that excess tax -- California excess tax applies to all
18 transactions. Then how would it support its action to
19 allow that to be paid to another state?

20 It seems to belie its new claim. It's old
21 claim -- under the old claim that it made, it made sense.
22 You know, there was some sense of it in that, you know,
23 well, it's not California excess tax, but it becomes
24 California excess tax after it's not paid. It's like,
25 okay. Well, that -- that -- that makes some sense of it.

1 The problem that I think they ran into was --
2 "Well, wait a second. It can't really become something
3 else. We got to think of something else, here."

4 In any event, we would ask OTA to look at the
5 totality of the circumstances here. And -- and we think
6 those other transactions, frankly, are at issue. And look
7 at -- look at the entire taxing scheme. It's all part of
8 the same audit.

9 So if the conclusion is "well, this is all
10 California excess tax reimbursement," then the question
11 becomes "Well, how can it be paid to another state?"

12 Or, as we suggest, is the fact that it's paid to
13 another state and it's not disturbed and it's accepted,
14 essentially, as being taxes of the other states, that
15 that's evidence that it's not California excess tax
16 reimbursement?

17 As to the -- the error that -- that Mr. Claremon
18 points to -- and ultimately, they -- did they turn on the
19 system for the states at issue? Which my understanding,
20 based on the D&R's own wording, is that we're not only
21 dealing with taxes where they weren't registered -- that
22 there were underpayments in locations where they were
23 registered.

24 But to the extent they weren't registered and the
25 system was turned on, when at that point, it was, if you

1 will, intentionally charged. And it wasn't charged in
2 error. It was charged at the -- at the specific rate that
3 applied in the destination based on the destination rules
4 and based on the destination rates.

5 I mean, that's the way the system worked. It's
6 not like somebody made a clerical error each time an
7 invoice was issued. Really, the -- the error came in not
8 registering. That's -- that's where the error came in.
9 Not that tax didn't apply; tax did apply.

10 Let's see here. This, you know -- as to
11 Regulation 1700, I -- I think that, with -- with due
12 respect, they're getting a little cute here.

13 I mean, the law very clearly says that no
14 regulation adopted is valid or effective unless consistent
15 and not in conflict with the statute and reasonably
16 necessary to effectuate the purpose of the Statute.
17 Government Code 11342.2.

18 And there's, of course, a -- a slew of case law
19 that supports that concept. I don't think the Department
20 will dispute that. So it has to be consistent.

21 I'm not saying that Regulation 1700 is invalid.
22 What I'm saying is that the way it's being read is
23 invalid.

24 To -- to use the term "sales tax" in such a
25 way -- to say that it applies to sales tax of any state, I

1 think, is well beyond any authority California has and
2 it's right. In the legislative history, the Legislature
3 made it clear they're dealing with taxes due under this
4 part and that you have to represent it as being taxes due
5 under this part.

6 I think that's why you asked the questions you
7 asked. I, frankly, think you're on the right track.

8 I hope you agree with our conclusion. We think
9 the facts make it pretty clear that the person that's
10 representing these taxes -- which is our client, the
11 Appellant -- it's not the customer representing these
12 taxes; it's the seller, the Appellant -- that they have a
13 system designed very specifically to apply tax to the
14 state.

15 We have evidence that proves it. To say, "Well,
16 we think the customer may have thought it was from
17 California because they had a warehouse in California." --
18 guys, they had a warehouse in Canada as well. It's Body
19 Wise International.

20 It's like, who cares where their warehouse is
21 really? It doesn't impact the -- the application tax.
22 And we have a system that is designed to apply tax based
23 on the destination. And it's out-of-state tax. If we're
24 being real about this -- if we're being intellectually
25 honest about this -- it's out-of-state tax.

1 That's why, when it's paid to the other states,
2 California doesn't have a problem with it; CDTFA doesn't
3 have a problem with it. Because it would be, frankly,
4 ridiculous for them to.

5 ADMINISTRATIVE LAW JUDGE KWEE: Mr. --

6 MR. MCCLELLAN: Yes, sir?

7 ADMINISTRATIVE LAW JUDGE KWEE: Could you just
8 double check that your mic is on? I'm getting feedback
9 that they might be having a problem hearing -- picking up
10 your voice online.

11 MR. MCCLELLAN: Okay. I'll just say that all
12 over again. Just kidding. We -- we got it on the record;
13 right? Okay. Good.

14 As to unjust enrichment, frankly, CDTFA can't act
15 in equity. I understand that the purpose of the
16 legislation is to prevent people from holding out
17 California tax -- and when I say "California tax,"
18 representing it as California tax when it's not
19 actually -- actually due -- that in those cases, the
20 Legislature has said, "Well you give it back to the
21 customer, or we get it."

22 But the Legislature knows and -- and, frankly, it
23 couldn't get past a review committee -- if the Legislature
24 tried to establish a law and said, "We also get everybody
25 else's tax when it's not properly paid. And, hey. Why

1 limit it to sales tax? You know, let's -- let's -- let's
2 go for all."

3 I mean, the default, "If you're not paying your
4 taxes completely accurately, let's go after it all."

5 Well, that's not how it works. Everybody knows that.

6 I mean, there's constitutional principles that --
7 that very clearly prevent that. That's not the way
8 auditors are trained. There's nothing in the Audit Manual
9 that says "audit transactions of other states."

10 So, ultimately, we don't disagree the purpose
11 of -- of -- of the statute. But when there is a statute
12 on point, even the Court has to follow the statute. It
13 can no longer act in equity and go around the statute.
14 It's bound by it's rules. So, frankly, to say that is --
15 is, we think, without meaning.

16 I don't have anything to -- to add.

17 How much time do we have, Judge Kwee?

18 ADMINISTRATIVE LAW JUDGE KWEE: Sorry, my mic was
19 off.

20 I think you've used ten minutes. Now, you have
21 about 15 minutes.

22 MR. MCCLELLAN: Okay. I'll turn it over to
23 Lucian.

24 ///

25 ///

1 CLOSING ARGUMENT

2 BY MR. KHAN:

3 Thank you. Basically, CDTFA's whole case hinges
4 on this being -- sorry -- CDTFA's case hinges on this
5 being California excess sales tax reimbursement.

6 So again, I'm going to go over a few things here
7 in the statute and regulation and see if it even fits the
8 definition. It's got to be an amount represented by a
9 person to a customer as constituting taxes due under this
10 part.

11 Now, they've talked about the -- the invoices
12 being -- just showing the tax amount, not stating which
13 state's tax is being collected, and you'd have to do
14 calculations and figure out what the tax rate at the
15 destination state may be to determine if that's the tax
16 being collected. We've already said that that is how it's
17 happening.

18 But they talk about the invoices being ambiguous.
19 But at the same time, they think the invoices somehow show
20 that the retailer represented that it's California tax.
21 Well, how can it be ambiguous?

22 So you can't tell if, in the example that Jesse
23 presented -- that it's our tax; but yet they think that
24 there's enough on there to say this was represented as
25 California tax.

1 Well let's just look at the disputed fact, and,
2 well, we call it "undisputed." Maybe the Department will
3 disagree. But there's really two things here that I think
4 are important to keep in mind: That the amount billed in
5 these disputed transactions is commensurate with the
6 correct tax rate of the state of destination. And, in
7 each case, the customer's an out-of-state customer --
8 they're not a California customer.

9 It just seems impossible to believe that,
10 somehow, a customer who receives those invoices might be
11 fooled or somehow think that this is being represented as
12 California tax. Why would they have any such belief?

13 Whether they know that it's their tax -- that's
14 one thing. But I doubt that any Illinois customer, or any
15 out-of-state customer, would ever believe that California
16 tax is being collected. So to talk about the ambiguity
17 and the -- and the invoices, but say, yeah, it supports
18 their position it's represented as California tax is just
19 an erroneous opinion.

20 Now, let's get into excess reimbursement as it's
21 defined in Regulation 1700. Okay. It basically talks
22 about two circumstances where you would have excess tax
23 reimbursement: When an amount represented by a customer
24 as constituting sales tax is computed on an amount that is
25 not taxable or is in excess of the amount actually paid by

1 the customer.

2 Is this on the amount that's not taxable? In the
3 Illinois example, we had a taxable sale. The rate that
4 was billed was the correct rate; so it's not a nontaxable
5 sale. So it doesn't fit that definition.

6 And then, when you talk about an amount in excess
7 of the taxable amount, if the Illinois tax that was billed
8 was the correct amount, it's not in excess. So how does
9 it fit this definition?

10 They just want to ignore that that was Illinois
11 tax being billed. It was the correct amount and then,
12 somehow, call it California excess sales tax reimbursement
13 when it was never represented that way on the invoice --
14 where the Illinois customer would not believe that it's
15 California tax.

16 This is just, simply, an argument that's being
17 made to get tax that they feel that Body Wise -- if they
18 didn't -- if they didn't pay it to those states -- that
19 they should not get to keep it or dispose of it some other
20 way. This -- all of a sudden, California has jurisdiction
21 over this whole matter.

22 And the fact of the matter is they don't.
23 Because, if you look further in Regulation 1700, it starts
24 talking about offsets. Okay. Offsets are allowed under
25 Regulations 1700 in certain circumstances.

1 And one example that they give is you have a
2 construction contractor who uses materials in a
3 construction job -- and if you're familiar with Regulation
4 1521, they are the consumer, which means the sale to them
5 is a taxable event; they owe tax on their cost price --
6 but in the example given, the contractor failed to pay
7 tax.

8 This is a subcontractor. The prime contractor
9 collects tax from the landowner who contracted to have the
10 work done. Now, that -- what the prime contractor
11 collected -- was excess tax reimbursement because the only
12 tax that was due was by the subcontractor on his cost; but
13 yet they talk about offsets being allowed.

14 So they allow an offset for the amount paid by
15 the prime contractor that was collected from the customer.
16 They allow an offset for use tax due by the sub because
17 he's a consumer. The remainder is an excess tax
18 reimbursement. And then, under the rules, that remainder
19 must either stay with the state or it's refunded to the
20 customer.

21 But, again, it's what they call the "same
22 transactions" test. And, basically, it's defined under
23 the same transactions test as involving the same piece of
24 property.

25 Now, there's another example -- and I'm not going

1 to go into too much more detail on this -- it's entitled
2 lessor of tangible personal property.

3 You have a lessor who buys property that he's
4 going to lease. He pays tax on the property; so that is a
5 nontaxable lease. But what happens is the lessor, not
6 knowing any better, collects tax on the rental receipts.
7 There is no tax due because you're leasing taxed paid
8 property. So you never took the option of just collecting
9 tax from other receipts; so the amount collected was
10 totally excess tax reimbursement.

11 And what it says is that the amount of money
12 collected can be used, basically, to reimburse the lessor
13 up to the point that he's paid tax on the purchase price.
14 The rest, again, would be excess tax reimbursement -- it
15 stays with the State or goes back to the customer.

16 So these examples that they give -- these are for
17 transactions and things happening entirely in California.
18 It was never intended to fit this type of scenario. And
19 it's just simply not -- not excess tax reimbursement by
20 definition.

21 Getting to Annotation 460.0242 that was cited in
22 CDTFA's brief -- the facts are just simply not relevant
23 here. All that was was a California seller who was
24 selling wine. And there was out-of-state customers that
25 California sellers shipped to. And all the customers were

1 told was, "The wine will cost you X amount. And I'm going
2 to add on shipping and tax."

3 Well, ultimately, when the customers were billed,
4 they were not even billed a separate amount for tax. Now,
5 you could argue the facts are the same because you've got
6 an out-of-state customer. But what's really different is
7 then the seller -- after -- after -- after billing this
8 tax into the billed amount -- they took the correct tax
9 amount based on the sales price, and they paid it over to
10 BOE. So the seller considered that to be California tax,
11 and these worded themselves in interstate commerce.

12 But that's the big difference in this case.
13 Because there was never any intention that this would have
14 anything to do with California except for the fact that
15 the stuff was shipped from California to an out-of-state
16 location.

17 And finally, they've talked about Decorative
18 Carpets. It's just simply not relevant. Decorative
19 Carpets is a case before they ever had Revenue Tax Code
20 Section 6901.5 about excess reimbursement. And before
21 they even had the precursor to that 6054.5.

22 It involves a construction contractor who was
23 furnishing and installing carpet. And, again, under
24 Regulation 1521, that contractor would be the consumer of
25 the carpet owing tax on cost. But for some reason, when

1 they billed this stuff out, they would bill it as if they
2 were retailing the carpet.

3 So it would be the amount of tax that was
4 computed was based on the bill price -- and maybe even
5 they collected on labor sometimes -- but the point is tax
6 was only due on the cost of the carpet. They were
7 collecting the tax from the customer as if they were the
8 retailer. And by definition, they are only the consumer
9 of the carpet. So that was all excess tax reimbursement.

10 And in that case, what did we have? We had the
11 California construction contractor -- call him a retailer,
12 whatever you want -- you got a California consumer, and
13 they pay the tax to the state.

14 None of that has anything to do with this type of
15 fact pattern where you're shipping anything outside the
16 state. You're not talking about a rate that is calculated
17 for another state. And you don't have a customer from --
18 from California.

19 In -- in the present -- in this -- in this case
20 you've got a California consumer or customer -- homeowner
21 versus an out of the state resident in the current case.
22 So it's just simply not relevant.

23 And this all preceded the statute about excess
24 tax reimbursements. They were trying to do equity at a
25 time they didn't have statute to cover.

1 So the bottom line is, here -- is if you look at
2 the statue and the Reg. 6901.5 -- you look at the
3 regulation -- all the discussion is "What did the parties
4 understand?" And "Is that a reasonable interpretation
5 under the circumstances?" And it's not.

6 Our argument is this was never excess tax
7 reimbursement by definition. The facts don't fit. And so
8 therefore, if it's not excess tax reimbursement, 6901.5
9 doesn't apply. Neither does Regulation 1700. And CDTFA
10 should have just left it alone.

11 It just involved a taxpayer in another state.
12 They are not in charge with enforcing another state's law.

13 It's just one of these things where, if something
14 happens in another state, the person moves to
15 California -- California cannot take care of the problem.
16 It's the other state. That person has their problems with
17 another state. It just does not involve California. It's
18 a jurisdictional question.

19 Thank you.

20 MR. MCCLELLAN: Judge Kwee, I'm not sure how much
21 time we have, but this should be quick.

22 ADMINISTRATIVE LAW JUDGE KWEE: Yes. You still
23 have a five -- a little over five minutes left.

24 MR. MCCLELLAN: Okay.

25 Earlier, I -- I would just reiterate, of course,

1 everything that we said -- I think is important, which is
2 why we said it -- and I would just reiterate that what the
3 law says is represented; right?

4 It's -- it's not -- and it says "represented to
5 the customer." Okay? Which means that the person that's
6 representing it is Appellant.

7 We have evidence in -- in the form of a
8 declaration. We have evidence in the form of a software
9 system, which -- which I just want to make sure
10 that that -- that is going to be addressed in the opinion
11 and describe what these things are showing, which is that
12 the tax was specifically computed -- I don't think there
13 can be any dispute here. And if there is, I haven't heard
14 any -- it was specifically computed based on the
15 destination rates.

16 And -- and if you look at the exhibits, it's the
17 numbers that come from those destination rates that is
18 then represented as the amounts on the invoice. So I
19 don't believe that you can reasonably dispute that
20 Appellant represented tax of the destination state. That
21 was absolutely their intent; and that's what they actually
22 did.

23 Now, to say, "Well what did the customer think
24 about it?" You can speculate, but the speculation really
25 doesn't do us much good. You know, we describe what we

1 think a reasonable customer would think. For some reason
2 there's -- there's a different opinion.

3 Even if there's a 2 percent rate by way of
4 example, I don't think a customer in Illinois that -- that
5 has a 2 percent rate would think that it's California tax.
6 I don't think a California person that gets a 2 percent
7 rate on a bill is going to think it's California tax.
8 They're going to say, "Wait a second. Our rates are
9 higher."

10 And -- and, frankly, again, that's the way the
11 system works. I mean, sales tax, universally speaking, is
12 a destination based system.

13 So just, please, I would -- I would encourage you
14 and emphasize that the statute very clearly says
15 "represented to the customer." And -- and we do have
16 evidence to show what it was represented as.

17 We have no evidence to say that a customer
18 thought that it was California tax. None. And in the,
19 you know -- it would be one thing if there was a scheme
20 that made it that way, but there's not. So there's --
21 there's really no basis other than pulling it out of thin
22 air and speculating. And speculating isn't evidence.

23 Other than that, we appreciate your time. We
24 appreciate the opportunity being before you today.

25 We -- we do believe strongly that the amounts

1 that we're dealing with here are not California excess tax
2 reimbursement. We would ask you to grant both the refund
3 and the petition.

4 Thank you.

5 ADMINISTRATIVE LAW JUDGE KWEE: Yes. Thank you.

6 So we do have ten minutes left for CDTFA, if you
7 have any final remarks before we conclude today?

8 MR. CLAREMON: Thank you.

9
10 CLOSING ARGUMENT

11 BY MR. CLAREMON:

12 I don't have anything to add to our initial
13 presentation. I think we explained what our position is
14 with regard to the amounts in question.

15 I do want to respond to just a few of the points
16 they made in Appellant's closing.

17 First, the idea that, when the definition of
18 excess tax reimbursement being on an amount that is not
19 taxable -- the idea that that would be referring to
20 another state's tax and so that it can't be excess tax
21 reimbursement if it is taxable in another state is simply
22 contrary to law.

23 California law is referring to California tax.
24 So when it's saying it's not taxable, it's saying it's not
25 taxable in California. That's -- that's what it means.

1 Going further down, Regulation 1700 -- when in
2 the discussion of offsets, certainly, excess tax
3 reimbursement can be collected on sales for resale. It
4 can be collected when the wrong party on a transaction
5 pays tax. But that's not to say that it can't also be
6 collected when no tax is due on an exempt sale.

7 So the existence of rules for offsets in one
8 situation has literally no bearing on what the rules are
9 for when no tax is owed. So I don't see how that's
10 applicable in any way to this case.

11 And then, finally, Annotation 460.0242 -- you
12 know, regardless of what Appellant surmises from that
13 case, the facts -- the pertinent facts are the same. It
14 was a sale that was exempt as a sale in an interstate
15 commerce to an out-of-state customer. Tax was applied.

16 It was simply labeled as tax. We don't have any
17 knowledge of the intent of the retailer in that case. And
18 the conclusion that's been annotated by the CDTFA in that
19 case is that that amount constituted excess tax
20 reimbursement.

21 Thank you.

22 MR. MCCLELLAN: Judge Kwee, may I just respond,
23 briefly?

24 ADMINISTRATIVE LAW JUDGE KWEE: Sure. You can
25 have -- you still have a couple of minutes remaining. You

1 could use up your remaining minutes. I think about three
2 minutes or so.

3 MR. MCCLELLAN: Okay.

4 I think a point Mr. Claremon just made is a point
5 we've been trying to make all along. So it seems we may
6 have struck a chord here, which is, of course, when
7 California refers to tax, it is referring to California
8 tax. And that's something that -- that we would like to
9 emphasize.

10 As to the annotation, you know, it says here that
11 there was a charge for \$48 plus tax and shipping. And
12 then elsewhere on the internet order form, it -- it states
13 the shipping cost is \$8. It doesn't say the rate. It
14 doesn't say that the rate applied was the rate of the
15 destination. It doesn't say that the seller was
16 registered in numerous states.

17 It seems to be a very unsophisticated. It's an
18 order -- a telephone order process. I think there may
19 have been facsimiles involved. They clearly didn't have a
20 tax software system in place -- from a reading of it --
21 that supports that the tax of the destination was
22 specifically applied.

23 And we think that that is supported by the fact
24 that the seller thought they were collecting California
25 tax -- probably because they thought they should --

1 remitted it to California; said, "Well, wait a second.
2 This is a sale and interstate commerce. Tax doesn't
3 apply"; filed a claim for refund; was denied in part; and
4 accepted in part.

5 But, ultimately, we don't see any facts in that
6 annotation. Of course, it's not binding on OTA, or
7 anybody else. But, even if it was, we just don't see any
8 facts that are relevant.

9 Thank you.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

11 So Judge Long, did you have any final questions
12 before we conclude this hearing?

13 ADMINISTRATIVE LAW JUDGE LONG: No further
14 questions.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

16 And Judge Lambert, did you have any final
17 questions before we conclude today?

18 ADMINISTRATIVE LAW JUDGE LAMBERT: No further
19 questions. Thanks.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

21 With that, we are ready to conclude. And this
22 case is submitted on Tuesday, June 21, 2022 -- summer
23 solstice.

24 The record is now closed.

25 And I'd like to thank everyone for coming in

1 today -- this afternoon. The Judges will be meeting and
2 we will decide the case later on. We'll send you a
3 written opinion approximately within 100 days from today's
4 date.

5 The Hearing and Appeal of Body Wise International
6 is adjourned. That concludes our hearings for today.

7 Thank you.

8 MR. MCCLELLAN: Thank you.

9 MR. CLAREMON: Thank you.

10 (Proceedings conclude 2:50 p.m.)
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1 REPORTER'S CERTIFICATION

2
3 I, the undersigned, a Registered
4 Professional Reporter of the State of California, do
5 hereby certify:

6 That the foregoing proceedings were taken before
7 me at the time and place herein set forth; that any
8 witnesses in the foregoing proceedings, prior to
9 testifying, were duly sworn; that a record of the
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11 was thereafter transcribed under my direction; that the
12 foregoing transcript is a true record of the testimony
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14 Further, that if the foregoing pertains to the
15 original transcript of a deposition in a federal case,
16 before completion of the proceedings, review of the
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18 I further certify I am neither financially
19 interested in the action nor a relative or employee of any
20 attorney or party to this action.

21 IN WITNESS WHEREOF, I have this date subscribed
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23 Dated: July 12, 2022

24 *Sarah Tuman*
25

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