

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
K 1 SPEED, INC.,) OTA NO. 20015720
)
)
 APPELLANT.)
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TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, September 13, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
12900 Park Plaza Dr., Suite 300, Cerritos,
California, 91401, commencing at 1:30 p.m.
and concluding at 2:46 p.m. on Tuesday,
September 13, 2022, reported by Ernalyn M.
Alonzo, Hearing Reporter, in and for the
State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW WONG

Panel Members: ALJ NATASHA RALSTON
ALJ TERESA STANLEY

For the Appellant: STAN PINCURA
JOSH BOXER

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

JOSEPH BONIWELL
SCOTT CLAREMON
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-9 were received at page 7.)

(Department's Exhibits A-P were received at page 7.)

OPENING STATEMENT

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By Mr. Boniwell	30

CLOSING STATEMENT

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By Mr. Pincura	54

1 Cerritos, California; Tuesday, September 13, 2022

2 1:30 p.m.

3
4 JUDGE WONG: We are now going on the record.

5 We're opening the record in the Appeal of K-1
6 Speed Incorporated before the Office of Tax Appeals. This
7 is OTA Case Number 20015720. The date is Tuesday,
8 September 13th, 2022. The time is 1:30 p.m. We're
9 holding this hearing in person in Cerritos, California.

10 Individuals representing Appellant, the taxpayer,
11 please identify yourselves.

12 MR. PINCURA: Stan Pincura, representative.

13 JUDGE WONG: Thank you.

14 MR. BOXER: Josh Boxer, CFO.

15 JUDGE WONG: Thank you.

16 Individuals representing the California
17 Department of Tax and Fee Administration, which I will
18 refer to by its initials CDTFA, please identify
19 yourselves.

20 MR. BONIWELL: Joseph Boniwell.

21 JUDGE WONG: Thank you.

22 MR. CLAREMON: Scott Claremon.

23 JUDGE WONG: Thank you.

24 MR. CLAREMON: And we also have Jason Parker with
25 us.

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JUDGE WONG: Thank you.

I'm lead Administrative Law Judge Andrew Wong, and with me today are Judges Natasha Ralston and Teresa Stanley. We are the panel hearing and deciding this case. Due to scheduling conflict Judge Stanley is taking the place of Judge Andrew Kwee.

Mr. Pincura, did you have any objections to this substitution?

MR. PINCURA: I do not.

JUDGE WONG: Thank you.

CDTFA, did you have any objections?

MR. BONIWELL: No, we don't.

JUDGE WONG: Thank you.

All right. We're considering two issues today. Issue Number One, whether the transactions at issue are leases of karts for purposes of racing are solely for the providing of amusement; if they are leases, whether any of the transactions at issue are excluded from the term "lease" pursuant to Revenue & Taxation Code Section 6006.3 and, therefore, subject to taxation. Issue Number Two, whether annual license fees are subject to taxation.

Mr. Pincura, is that an accurate statement of the issues?

MR. PINCURA: Yes, it is.

JUDGE WONG: Thank you.

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CDTFA?

MR. BONIWELL: Yes.

JUDGE WONG: Thank you.

Appellant has identified and submitted proposed Exhibits 1 through 9 as evidence. They submitted proposed Exhibits 7 through 9 today. CDTFA objected based on timeliness and relevance, but the panel conferred and will be admitting the proposed exhibits, noting that the -- the proposed Exhibits 7 through 9 are from 2022, and the -- which is after the audit period at issue. So we will be admitting Appellant's proposed Exhibits 1 through 9 into the record as evidence.

(Appellant's Exhibits 1-9 were received in evidence by the Administrative Law Judge.)

CDTFA has identified and submitted proposed Exhibits A through P as evidence. CDTFA had no other exhibit to offer as evidence. Appellant had no objections to them and, therefore, CDTFA's Exhibits A through P will be admitted into the record as evidence.

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

Neither Appellant or CDTFA have any witnesses, and so we will now proceed with Appellant's presentation. He has requested 30 minutes.

And you may proceed.

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MR. PINCURA: Thank you.

OPENING STATEMENT

MR. PINCURA: Okay. So in general, I want to do a quick overview of K-1 Speed's business. They're an indoor racing venue and uses electric karts. They have multiple locations in California and out of state during the audit period, and these include out of state locations, Texas, Arizona, Washington, to name a few. Each K-1 Speed employer -- there's a K-1 Speed employer that monitors each race, and they can remotely reduce speeds to turn off karts as necessary during these races.

The karts are started up in the pits, slowed down when entering the pits, all done remotely by these -- done by the employee for each race. Each race lasts about ten minutes with pit time. You're talking maybe 10 to 15 minutes per race. Karts are randomly assigned to racers. Racers are required to exit the karts after each race. All races -- except the group packages, all races can be used at any location at any time during operating hours.

And I would like to present Exhibit 7, and here is a -- one individual. And what it shows is on 5/4/2022 he purchased races in Ontario, California. He used two races that day where it subtracts the 20 points. They're

1 on a point system at this point. And then he went to
2 Indiana on 5/28, and he used his races, which he bought
3 with those 1,000 points, out of state in Indiana.

4 The department under a decision had opined that
5 races cannot be used at any other location or any other
6 state because of a 2019 web page they pulled up that said
7 online races can only be used where purchased or at the
8 location purchased, where you indicate you want to race
9 at. One online purchase of races did not take place
10 during the audit period. That was until well after the
11 audit period, I believe actually 2019 when that began.

12 In their exhibits there's actually earlier web
13 pages from the Department that have no mention of buying
14 races online or able to buy races online. So we just want
15 to show that this is -- and this did -- was also available
16 during the audit period that you could use these races
17 where you would like.

18 So the races then are not required to be used on
19 the same day. So you could buy several races one day but
20 not required to use them on that day. They could be used
21 tomorrow, next week, a year from now. They could be used
22 five years from now. There's no requirement for when
23 they're used. Races are not nontransferable.

24 Along with the races you buy, you're required to
25 buy an annual license fee. It's like \$5.95 or \$6.00 on an

1 annual period, and it's renewed each 12-month period. So
2 every 12 months -- if you want to go back and race again
3 after a 12-month period, you need to purchase another
4 license fee. The license fee is also good for all
5 locations, and it does mention that on the brochure.

6 And the license is for the use of the helmet and
7 the Hothead sock while you're at K-1 Speed. Each helmet
8 and head sock is also returned after each race so that the
9 helmet is returned to K-1 Speed. They clean the helmet.
10 It goes back up on the rack. And if you race another race
11 that day you are going to be getting a new helmet or a
12 different helmet.

13 The various -- going to Exhibit 2, if you may,
14 there are several types of races available at K-1 Speed.
15 There is a single arrive and drive, which is one race for
16 14 laps which is \$20, and it includes a race result sheet.
17 You have different multiple races, like buy 2 get 1 free,
18 3 for \$50, 5 for \$75, 8 for \$100, also which includes the
19 race results. Group packages are for 8 or more, and these
20 include 2, 3, or 4 races depending on which package you
21 buy.

22 There's races for juniors. There's races for
23 teens. There's races for adults. The cost of the race is
24 per person. And this also includes a race result sheet
25 plus other premiums including trophies, T-shirts, medals,

1 podium photo. The T-shirts are only on the junior and
2 teen races.

3 Exhibit -- let go to Exhibit 1. There's an
4 example of a race result sheet. It's printed after each
5 race for each racer. It shows their best lap time on the
6 first page. On the left you can see where it shows your
7 best lap time, your average lap time, what your rank was
8 in the race you just completed. You can compare races to
9 overall K-1 racers on the bottom left. You can also
10 compare your time to the best times for the week.

11 The RS also includes tips on racing, track
12 layouts. It's on page 2. There's the track layout. Each
13 location by the way has -- there are various tracks
14 depending on the location you go to. They're not all the
15 same. It has tips for racing. It has hours of operation.
16 It also includes a \$5 coupon. Each race -- each race
17 result sheet is printed and picked up at the counter after
18 each race by the racers. So one -- as you can see this
19 one is in the individual's name. Everyone gets one of
20 these hard copies, printed, and it's picked up.

21 If you go to -- I'm going to jump around. If you
22 go to Exhibit 6, we have included invoices just to show
23 the cost of these items. The race result sheets, if you
24 go to the first two invoices, corporate colored printing
25 19710 and 19892, page 1 and 2 in Exhibit 6, the average

1 cost of a race result sheet for the California location is
2 five-and-a-half cents.

3 So you can see there that they're on the
4 invoices. They're listed by location. They have the
5 amount, the quantity purchased. I have averaged the two
6 together for the California locations, those
7 five-and-a-half cents per rate sheet. The group --
8 besides going back to Exhibit 2, the group packages also
9 include other items besides the race and result sheet. As
10 you can see, there's medals awarded. There's T-shirts for
11 the junior and teen races. There's podium photos for
12 everyone. The medals awarded are the trophies depending
13 on the race and the top three finishers.

14 Track size is about average 12 racers. So if you
15 have a group of 30, they'll split you up into 10 -- three
16 groups of 10. Each group will get a medal or trophy
17 depending on which race it is. So a lot of times they'll
18 have you -- the race -- the three groups go different
19 times. They'll take all the top racers put them maybe in
20 group A. Middle racers will be in B and C, but medals go
21 out to each group if there's a large number of people in a
22 party. So there actually can be more than three trophies
23 or medals issued depending on the size of the party that
24 is racing.

25 The medals, again, if you go to Exhibit 6, and

1 you look at the world -- page 4 -- no, excuse me -- page 5
2 and 6, the World Promotional Product and Merchandise. The
3 first invoice shows the cost of medals which they are
4 \$1.25 each. And page 6 of the exhibit is the cost of the
5 trophies. They're \$3.59 apiece.

6 Also, I'd like to show that in Exhibit 6, at page
7 3 and 4, are the T-shirts that are provided during these
8 group packages. The junior T-shirts are \$3.50. The teen
9 shirts are \$4.14 apiece, and each racer receives one who
10 participates. The one other item that's provided is a
11 podium photo. The podium photo is actually digital. So
12 basically a K-1 employee will -- has to spend time taking
13 the photo, and then they actually email those photos to
14 each individual that participated.

15 So it's more of a cost of labor that is involved
16 with the podium photo. It still has value. So based on a
17 \$12 per hour employee back in -- during the audit period,
18 we figured 20 minutes it takes them to do the photos and
19 send the emails. That's a labor cost of \$4 per each group
20 package for the podium photos. If you split those out
21 during the number of participants, you know, obviously, if
22 there are 8 participants and each get a photo, you're
23 looking at about 50 cents a photo. If it's 10 people,
24 you're looking at 40 cents a photo at cost.

25 Now getting into the audit, the Department

1 determined that the races were the releases of karts, and
2 the licensees were a charge required by the lease. K-1
3 contends the race fees are payments for amusement.
4 They're not leases of TPP. They also believe that control
5 of the karts are maintained by k-1, and that they are
6 excluded per Regulation 1660 from the term lease.

7 They also contend that the licenses are exempt
8 from membership fees per regulation -- are exempt
9 membership fees per Regulation 1584. They meet the
10 exclusion from the term lease, and they are not a charge
11 required by a lease. So getting into the race fee, the
12 true object of transaction is for amusement, not the lease
13 of the karts. Regulation 1501, service enterprise in
14 general, a distinction is between the sales of tangible
15 personal property or the transfer of the party. You know,
16 is it incidental to the performance of a service, or is
17 one of true object -- what is the true object of the
18 contract?

19 If the object sought by the buyers of service or
20 the property produced by the service -- or is it the
21 property produced by the service -- excuse me. So if the
22 true object is the service, the transaction is not subject
23 to tax even though some tangible personal property is
24 transferred. Applying to the case of K-1 Speed, the
25 customer is in the race for amusement.

1 From the racer's perspective, the true object of
2 the transaction is to race. They're not there renting
3 karts. They're racing against their friends, against the
4 clock. They're checking the race result sheets after each
5 race to see how they did in that race against others.
6 It's important to note that Regulation 51 specifically
7 states that whether it's a sale or a service depends on
8 the true object sought by the buyer.

9 K-1 Speed contends that the true object sought by
10 the buyer is amusement in the form of a race. It's not a
11 rental of a kart. I'd like to also state that K-1 has an
12 employee throughout the race, that monitors the race, that
13 starts the karts -- the karts in pit stop, that speeds up
14 the karts, slows down the karts. They can completely stop
15 the karts during the race if there's an accident, some
16 type of emergency. They will kick people -- individuals
17 off the track if they're racing dangerously.

18 And then so it's, you know, K-1 Speed also
19 maintain that the karts are still under their control,
20 that they have not given up the control to the user of the
21 kart, and definitely under Regulation 1660 it's not a
22 lease. Now whether or not -- now, K-1 Speed also contends
23 that the races do not meet the definition of a lease.
24 Each race whether it's an arrive and drive single race, a
25 discounted multiple race, a group package is less than 20

1 restricted for use on the premises of K-1 Speed, and is
2 for less than a continuous four-hour period.

3 Per the Regulation 1660, leases of tangible
4 personal property, Section (A)(1) states, a lease does not
5 include the use of a tangible property for a period of
6 less than one day, for a charge of less than 20, and when
7 the privilege to use, the property is restricted to the
8 use thereof on the premises or business location of the
9 grantor of the privilege. Regulation 1660(e)(1) further
10 discusses that use must be for a period of less than one
11 continuous 24-hour period.

12 It also defines use in (e)(2)(b) to include the
13 possession of or the exercise of any right or power over
14 personal property by grantee of privilege to use of
15 personal property. So we're going to discuss now why we
16 contend that the use is less than one 24-hour period. For
17 the single arrive and drive race, the race last, as I
18 said, maybe 10 minutes.

19 Maybe you're in the kart for 15 with being in the
20 pits. You must exit the kart after the race. You no
21 longer have possession or ability to exercise any right or
22 power of the kart once exiting. It's obviously less than
23 a continuous 24-hour period if you're buying one race and
24 you're racing for 15 minutes. So this meets the criteria.

25 For the discountable multiple races, this would

1 include the 3 for \$50, the 5 for \$75, the 8 for \$100.
2 You're buying three races. I'll talk about 3 races for
3 \$50 as an example. You're purchasing -- a racer is
4 purchasing three races at \$50 to take advantage of a
5 discount. Okay. They bought the three separate
6 individual races, and they're all being used at three
7 separate times. You cannot rent a kart for a single day,
8 for several days. You are actually purchasing three races
9 that are to be used for a 10 to 15-minute period at three
10 separate times, whether that's today, tomorrow, next week,
11 next year. There's no -- each race is a separate.

12 They actually support this. I would like to go
13 to Exhibit 8. And here we have several instances where
14 customers who bought race packages have requested -- had
15 used one or two of the races, for some reason never used
16 the third race, whether they didn't have time to finish it
17 that day, or whether somebody was in a kart accident,
18 whatever that may be, and they requested a refund of that
19 last race. I would like to point out here that the race
20 is refunded and it's prorated.

21 So if they bought -- in these examples, I think
22 they bought -- for the first example, they bought a couple
23 of race packages, one three-race package, another two
24 three-race packages. They used one race in each, so they
25 actually refunded them the difference on a prorated

1 amount. So it shows that each race is looked at
2 separately. It's not one purchase. It's actually you
3 purchasing three races at a discount, and each race is
4 separate and distinct from the other.

5 So -- in the supplemental decision the Department
6 had some hypothetical discussion on the rental of the skis
7 for the day. And they said, well, if I rent a pair of
8 skis for the day and then I -- I can go and turn those in
9 and throughout the day and get five different pairs. And
10 that -- you know, they're trying to compare that to what
11 K-1 Speed does. K-1 Speed actually -- first of all, you
12 never rent a kart for a day. There's no -- you cannot
13 rent a kart for the day. Two, you'd never have the
14 ability to on your terms or agreement where you can --
15 you're trading in karts.

16 You basically purchase three races. You have
17 three races that are available to you for a future race.
18 You don't actually have any use of the race at that time.
19 Not until you go redeem one of those races are you -- do
20 you speak -- you know, are you then at that point using
21 the vehicle once you get into that race. One race has no
22 bearing on the other race. The officer was stating that
23 if you lease one ski for the day and the bindings broke,
24 then you could go trade in those skis and get another ski
25 and it's still the same lease.

1 Again, karts aren't leased for a day. If I'm
2 racing my first race and the kart breaks, yeah, they're
3 going to come out. They're going to stop the race.
4 They're going to come out, give me a new kart, and we're
5 going to continue the race. But that has no bearing on my
6 second race. I'm not using that kart to replace in the
7 first race with the kart in the second race because at
8 that point each kart is given to you randomly every time
9 you go to redeem a race.

10 There's no connection between each race. You're
11 required to exit the kart. At the time the race -- at the
12 time you purchase the race, K-1 Speed doesn't even know
13 when the races will be redeemed, what location you will
14 redeem them at. Again, I can redeem one today at Irvine,
15 one tomorrow in Los Angeles, and then one a year from now
16 in Arizona. So there's no -- it's not a single
17 transaction for \$50 in that case. It's three separate
18 distinct races each \$16.67.

19 I want to state that the use does not take place
20 when purchased, it's when it's redeemed. Basically, the
21 racers -- when you purchase the races, you're holding for
22 a right for a future race. You have no use. There's no
23 agreement that -- and you have no use or power or
24 possession or control over the kart when it's purchased.
25 It's not until you go to the counter at some point and

1 redeem one race.

2 You can't redeem multiple races at a time because
3 you can't -- one, they're not transferable. And two, it's
4 physically impossible to be racing two karts at one time.
5 It's one race. You're required to exit the kart after
6 each race. So you can only have one kart in possession at
7 a time. The racer, as I stated, is required to exit the
8 kart after each race so the ability -- the possession or
9 ability to exercise any right or power over the kart at
10 that point is relinquished.

11 I have done my race. I'm required to exit, and
12 the kart goes back to K-1. After that race, before I race
13 again, there's other people in that kart racing it. I
14 possibly cannot have power -- I cannot have possession,
15 ability to exercise any right or power over the kart I was
16 just in when somebody else is using it. Again, you cannot
17 stay in a kart and race back-to-back races. You have to
18 exit the kart.

19 If you decide to race again that day, you have to
20 go back up to that counter, put your name in, and wait
21 until the next time slot is available where you can get
22 into a race. So since I no longer have possession or the
23 ability to exercise a right or power over a kart, I no
24 longer by definition Regulation 1660 have a use. And I
25 need a -- and for a lease to exist, there has to be a use.

1 Okay.

2 So, again, I already discussed that the next race
3 and subsequent uses of the race does not take place until
4 the next race is redeemed. K-1 has no agreement. You're
5 not going in there and say I'm going to buy three races.
6 I'm go to race one today at 2:00 o'clock, tomorrow 2:00
7 o'clock, and Monday at 2:00 o'clock. You buy your races.
8 They have no idea when those are going to be redeemed.
9 They don't know where you're going to redeem them.
10 There's no set agreement as to when you're going to use
11 the karts, and where you're going to use the karts. No
12 time.

13 For instance, this is to throw out. I had a
14 colleague that bought -- we went racing. We bought three
15 races. He didn't use one of those races. It was five
16 years ago. He still hasn't used that race. The
17 Department is telling ys that he's still renting the kart,
18 and it's been five years. So he's -- I guess he bought
19 three races for \$50. He's still using -- he's still
20 supposedly in possession of or in control over a kart five
21 years later. He's not.

22 There'd be thousands of people that have been
23 sitting in that kart for five years besides him. He has
24 not rented a specific kart that is designated to him that
25 he's in control and in possession of. When he goes -- he

1 has a son out in Arizona. If he goes to Arizona and uses
2 that race in Arizona, that's not even a use in California.

3 I want to point out Exhibit 3 that the Marian
4 Webster dictionary defines "continuous" as marked by
5 uninterpreted extension in space, time, or sequence. So
6 since each racer is required to exit the kart after each
7 race, there's an interruption in the use. Since each
8 racer's use is less than a continuous 24-hour period, the
9 criteria -- that is one if the criteria is to be excluded
10 from the definition of a lease has been met. There's not
11 a continuous possession or an ability to control a kart.

12 This also holds true for the group packages.
13 Each race is simple. It's a separate individual race.
14 The racers in the group are required to exit after each
15 race. There's other races going on between each group,
16 two races or three race. Each of those races or each of
17 those racers, less than in a 24-hour period -- actually,
18 in a group race you're racing them all in one day. So
19 there's really no argument. Even if you -- I mean, it's
20 all less than a 24-hour period.

21 You know, without just saying, hey, you're doing
22 them all in one day. But our argument is that they're
23 still separate individual races. Each racer, they're less
24 than a continuous 24-hour use of those karts. And, again,
25 you're getting different karts every time when you race.

1 They're randomly assigned to you. You're not given a
2 specific kart that's assigned to you for the day.

3 Now, we'll get into why the fee is less than \$20.
4 So K-1 contends that all race fees are less than \$20. Per
5 Regulation 1670 of gifts, marketing aids, premiums, and
6 prizes, when a premium is delivered with the merchandise
7 sold, the transaction is a sale of both articles. Tax
8 applies from the gross receipts for the goods and the
9 premium. If the premium is delivered along with an exempt
10 item, tax applies to the gross receipts from the sale of
11 the premium, which is a cost of the premium to the
12 retailer.

13 And that is, of course, unless there's evidences
14 that another amount is being received for those premiums.
15 Exhibit 4 is just an annotation that basically backs up
16 the regulation there. It says where the principal
17 merchandise is sold for resale in this case and the
18 sale -- is reseller for not taxable, but the premiums are
19 not sold for resale, it's necessary for the seller to
20 ascertain the portion of the total charge made by the
21 property applicable to the premium.

22 So in our case, since, you know, we're stating --
23 well, I'll get into it. But basically, for the single
24 arrive and drive were -- the single arrive and drive is
25 \$20. You go in, race one time, 15, 20 minutes. However,

1 you are given a race result receipt -- race result sheet
2 during that race, which has value. It's -- it's promoted
3 that you get the race result sheet. It's five-and-a-half
4 cents per sheet, which would be the cost if we don't -- if
5 there is no evidence to the contrary that it's being sold
6 for a different price.

7 Every arrive and drive race -- a single arrive
8 and drive race is \$19.95 to round it for easier purposes.
9 That's under \$20. There's no dispute that we have
10 instance -- that this is under \$20 when you take into
11 account the premium.

12 JUDGE WONG: Mr. Pincura.

13 MR. PINCURA: Yeah.

14 JUDGE WONG: I'm sorry to interrupt. You have
15 Four and a Half minutes left.

16 MR. PINCURA: Okay. So the group packages -- I
17 know it's a lot.

18 The group packages, again, the premiums also
19 include the trophies, the race medals, the photos. Again,
20 each race within each group would fall under 20 minutes.
21 These -- as noted these packages can be sold to each
22 individual person, not -- don't need to be necessarily
23 sold to one person for a group. Exhibit 9 shows an
24 invoice where actually a group package was purchased and
25 they were -- there's, I think, a billing for, like, ten

1 different people in the race. They were billed
2 separately.

3 Again, each individual in a group must sign a
4 liability waiver. Okay. So each individual in the group
5 even though purchased by one person has to go in and
6 register, sign a liability waiver. Each individual is
7 blocked for a race time, not the person or the company who
8 purchased the race. The group -- all the group racers
9 must exit after each race and relinquish control.
10 Annotation 330 -- 303708 -- 3078 can be looked at for
11 guidance.

12 Here a company purchased a bunch of coupons.
13 It's sent out to their employees to go get video rentals.
14 The tax wasn't due on the 20, you know, \$60,000 the
15 company paid when they purchased -- when they got the
16 coupons. They bought them from the video company. The
17 lease and the use happened when each individual employee
18 took their coupon and went to a store and turned it in.
19 Because the use didn't take place until the tape was in
20 their hand. It wasn't at the time the coupons were
21 purchased because that was just a purchase for a future
22 lease, but there was no use at that point.

23 It was when it was handed -- it was when --
24 sorry -- the employee presented the coupon for a video.
25 Any coupon is not redeemed not subject to tax. Any

1 coupons not redeemed were not subject to tax. Any coupons
2 redeemed in an out-of-state location were not subject to
3 tax in California.

4 So, again, what we're trying to get at here is
5 even if one person buys these races, they are distributing
6 them out to the ten people in the part. Each party is an
7 individual user for that race. Each race is a separate
8 race. I can have ten people start my group package and
9 maybe only eight go to the next round because they don't
10 like the racing; they got hurt; they're tired. A lot of
11 reasons. People have to leave to go get their kids. So
12 you could actually start with ten racers, go down to eight
13 racers by the second race. And all of a sudden you have
14 two karts not being used for that race. So it has to be
15 looked at as an individual race basis and a dollar per
16 race basis, not as, okay, ten bought \$49 a person so it's
17 \$490.

18 For the Junior Grand Prix, the Teen Grand Prix,
19 and the La Mans Endurance, the T-shirt immediately drops
20 the per race charge below \$20. So it's under \$20. The
21 Grand Prix and the Le Mans Endurance races the RRS, race
22 result sheet, lowers each race below \$20. And then for
23 the other three races -- actually if you take all the
24 premiums into consideration, the photos, the RRS, the
25 medals, that will drop each of those races on and

1 individual basis.

2 So you buy a race for \$49 per person. There's
3 three races -- or \$49, yeah. I think at \$49 there's two
4 races, but if you take all of those into account, you're
5 going to get under \$20 per race in that group race per
6 person. For the discounted multiple races, you're buying
7 basically -- again, saying that each race is a separate
8 individual, you know, buying two and get one free it's \$13
9 a race, three for \$50 it's \$16 a race. So all those right
10 away are already per race under \$20 and meet the criteria
11 that it's not a lease.

12 I just got to get to license fees here. So give
13 me like a minute, and I'll jump into it real fast. It's a
14 quick one. So anyways they're are not used until
15 redeemed. Again, the races aren't used until redeemed.
16 You can only redeem one race at a time. It's not a
17 continuous use if I have to exit the kart in between each
18 of those, like if I bought three races. I'm not
19 continuously using a kart. So it's not a lease. Okay.

20 So I'll get into the license fees. So for the
21 license fees they are basically saying these are an exempt
22 membership fee. If the fee is nominal. It's \$5.95. I
23 think that went -- changed to \$6 later on. They're
24 comparable. Races are sold to each -- whether you buy a
25 membership fee or you don't have to get a membership fee

1 because you get a group package. If you purchase another
2 race there's a comparable price of member or nonmember.
3 They're not charging the difference.

4 I think in the decision they were actually
5 comparing a arrive and drive race to a group package which
6 aren't comparable at all because they're different pricing
7 and the whole bit. And it's interesting to note that the
8 Department actually broke down those races by individual
9 race and gave each one a dollar amount to compare the two
10 as to whether a member is getting a better deal if they
11 bought a license fee than a nonmember. And their whole
12 argument is that these one-packaged amounts and you don't
13 break them down, but they broke them down for their
14 analysis.

15 JUDGE WONG: Your time is up. Did you want to
16 finish up in 30 seconds or --

17 MR. PINCURA: Yeah, I'll finish up. Like, yea, I
18 could do it real quick.

19 JUDGE WONG: Okay.

20 MR. PINCURA: I also want to say that they're
21 excluded from the definition of lease because it's only
22 \$6, less than \$20. It's for use of helmet and head sock.
23 That's what the \$6 is for. So every time you race you
24 wear -- you get to use a helmet. The helmet must be
25 returned after each race. The use is interrupted because

1 after each race I have to return it, whether I race again
2 later that day or another time. I don't have a continuous
3 use. I don't have continuous possession.

4 The one last thing, again, I think part of the
5 last argument is that the lease attached to the kart fees.
6 However, in order for that to take place, a fee required
7 on a lease you have to have a lease. And since we're
8 stating that all the race fees are based on the definition
9 of Regulation 1660 are excluded from a lease, you don't
10 have a fee that is attached to a lease because we don't
11 have a lease to begin with. They all meet the definition
12 that they're excluded from the definition of a lease.

13 So the license fee is on its own. It's a
14 separate payment. It's a separate use of a helmet and
15 head sock, and it doesn't attach. You can't just attach
16 it to an exempt, you know, item and put them together and
17 say, now you have a lease because we have two non-leases,
18 but we're going to stick them together and make them a
19 lease.

20 And that's all I have. Thank you.

21 JUDGE WONG: Thank you Mr. Pincura. You'll also
22 have ten minutes rebuttal and closing just to remind you.

23 Now, I will turn to my co-panelists to see if
24 they have any questions for Appellant, starting with
25 Judge Ralston.

1 JUDGE RALSTON: Not at this time.

2 JUDGE WONG: Thank you.

3 Judge Stanley, do you have any questions for
4 Appellant?

5 JUDGE STANLEY: I do not at this time either.

6 JUDGE WONG: All right. Thank you.

7 I also don't have any questions for Appellant at
8 this time. So now we will turn it over to CDTFA for their
9 presentation.

10 You have 30 minutes. Thank you.

11 MR. BONIWELL: Thank you.

12

13 PRESENTATION

14 MR. BONIWELL: So as you're aware from
15 Appellant's presentation, Appellant is a California-based
16 indoor go-kart racing business. The audit period at issue
17 for this hearing is April 1st, 2009, through
18 March 31st, 2012. It's undisputed that during the
19 liability period Appellant purchased electric go-karts
20 from Italy for use in California without payment of sales
21 or use tax.

22 So the Department's audit determined that
23 Appellant had not paid use tax on its leases of go-karts,
24 and a Notice of Determination was timely issued to
25 Appellant on October 6, 2014. This was for \$2,521,247 in

1 tax plus applicable interest. The disputed audit items,
2 they include leases of go-karts for group multiple race
3 packages, leases of go-karts for individual multiple races
4 packages, and leases of go-karts for individual
5 packages -- for individual races as well as mandatory
6 license fees. And the undisputed items include
7 out-of-state purchases of consumables, purchases of fixed
8 assets, and unreported sales of fixed assets.

9 Subsequent to the Appeals Bureau issuing its
10 decision, the Department conducted a reaudit and allowed a
11 tax-paid purchases resold adjustment of \$292,261, which
12 reduced the liability by \$25,032 to \$2,496,245. As
13 discussed at the prehearing conference and laid out today,
14 there are two primary issues at this hearing. First, is
15 whether Appellant's go-kart rentals are taxable leases
16 under Section 6006 and Regulation 1660. And if they are
17 leases, whether any of the transactions are excluded from
18 the term lease under Section 6006.3.

19 And the second issue is whether Appellant's
20 annual license fees are subject to taxation. So I'll
21 address each issue separately, but to some extent our
22 analysis of Issue One informs our position on Issue Two.

23 So the first issue concerns whether Appellant's
24 go-kart rentals are taxable leases under --

25 JUDGE WONG: Sorry Mr. Boniwell, could you pull

1 the microphone a little closer to you. I think the sound
2 is a little low. Thank you. Sorry to interrupt.

3 MR. BONIWELL: Is that better?

4 JUDGE WONG: Yes, thank you.

5 MR. BONIWELL: Okay. No worries.

6 So yeah. So the first issue concerns whether
7 Appellant's go-kart rentals are taxable leases under the
8 Revenue & Taxation Code. It is undisputed that the karts
9 at issue in this case were purchased from outside
10 California for use in California, but they were used in
11 the state, but the tax was not paid measured by the
12 purchase price of the karts.

13 Pursuant to Revenue & Taxation Code Section 6051,
14 California imposes a sales tax for the privilege of
15 selling tangible personal property at retail. Where the
16 sales tax does not apply, use tax applies if the property
17 was purchased from a retailer for use in California. A
18 sale or purchase includes any lease of tangible personal
19 property in any manner or by any means whatsoever for
20 consideration.

21 And when tangible personal property is purchased
22 outside of California and leased in the state, the lease
23 is a continuing sale and purchase, unless the lessor
24 timely pays use tax on the purchase price of the leased
25 property. A lease that is a continuing sale on purchase

1 is subject to use tax on the rentals payable, which the
2 lessor must collect from the lessee and remit to the
3 Department. And the rental is payable subject to tax to
4 include payments that are required by the lease.

5 Generally, pursuant to Regulation 1660
6 subdivision (a)(1), a contract under which a person
7 obtains temporary use of tangible personal property for
8 consideration is a lease. And the chief characteristic of
9 leasing is giving up a possession to the lessee so that
10 the lessee and not the lessor uses and controls the lease
11 property. And this is demonstrated in longstanding
12 Department annotations on this topic, including
13 330.2307.725 and 330.2650.

14 JUDGE WONG: Mr. Boniwell, sorry to interpret
15 again. The sound is dropping a little bit lower. Would
16 mind maybe tilting the -- yes. Perfect. Thank you.

17 MR. BONIWELL: Okay.

18 JUDGE WONG: Sorry to interrupt again.

19 MR. BONIWELL: That's okay. Is this a good
20 distance?

21 JUDGE WONG: Yes.

22 MR. BONIWELL: Okay. So, although, here
23 Appellant argues that its transactions are not leases,
24 this position is at odds with Appellant's representations
25 regarding its loans of go-karts and the structure of

1 Appellant's transactions. It's undisputed that
2 Appellant's customers paid Appellant various rates,
3 depending on the type of race package, in order to
4 participate in races and secure go-karts as demonstrated
5 in Exhibits H through M, which disclose Appellant's prices
6 during the audit period.

7 It's also undisputed that Appellant's customers
8 obtained temporary use of the karts. On page 5 of
9 Appellant's open brief, Appellant states that, quote, "The
10 karts are temporarily used by guests while racing, i.e.,
11 they have gained possession of a kart during the race,"
12 end quote. Appellant's briefing is also consistent with
13 the public representations that it made during the audit
14 period that it was renting go-karts to its customers, as
15 you can see in the Department's Exhibits E, F, and G.

16 So the evidence and Appellant's admissions
17 demonstrate that Appellant's customers lease the go-karts
18 because they were granted temporary use and control of the
19 go-karts in exchange for the consideration. While the
20 focus of Appellant's opposition to the Department's
21 treatment of its transactions of leases relies on the
22 exclusion under Section 6006.3, there are a couple of
23 arguments or explanations that Appellant has made that I
24 want to address before getting to the exclusion.

25 The first is the fact that Appellant's karts

1 can't be programmed to preset speeds but they can be
2 remotely turned off in emergency situations, this doesn't
3 change the fact that Appellant's customers took temporary
4 possession of the karts and controlled them by actively
5 operating them to engage in racing. Appellant's customers
6 specifically contracted with Appellant to operate the
7 karts subject to whatever programming is required for the
8 customer's skill level and didn't pay Appellant to be idle
9 passengers in karts that were operated by Appellant.

10 And, relatedly, Appellant argues under Regulation
11 1501 that the true object of its customers in entering
12 into contracts with Appellant was amusement and not the
13 lease of the karts, such that its transactions were
14 nontaxable services. As discussed in the decision, the
15 concept of lease and amusement aren't mutually exclusive.
16 In this instance, Appellant's customers only experienced
17 amusement by racing, which was only accomplished by
18 customers gaining actual possession and control of the
19 go-karts.

20 For the true object to be the service, the
21 transfer of tangible personal property has to be
22 incidental to the provision of service. And here the
23 transfer of the kart is clearly not incidental to the
24 transaction. As stated on page 2 of Exhibit E,
25 Appellant's goal is quote -- Appellant's goal, quote, "Is

1 to offer its customers an authentic and exciting race
2 experience," end quote.

3 As previously stated, Appellant's customers paid
4 the prices charged by Appellant to gain temporary
5 possession and control of the go-karts for racing and did
6 not pay Appellant to merely sit in the kart that was to be
7 operated by Appellant. That being the case, Appellant's
8 loan of go-karts are leases because Appellant's customers
9 contracted with Appellant to secure for consideration the
10 temporary use of the go-karts. Since Appellant did not
11 pay use tax measured by the purchase price of the karts or
12 otherwise elect to pay tax measured by the purchase price,
13 it owes use tax measured by the rentals payable.

14 But we do note here that even Appellant's
15 transactions or a portion thereof are determined not to be
16 leases, Appellant would at a minimum still owe use tax by
17 the purchase price of the karts placed into service during
18 the audit period. So in response to Appellant's primary
19 argument, its loans of karts are not excluded from the
20 term lease under Section 6006.3 and Regulation 1660
21 subdivision (e).

22 Pursuant to those provision, grant of a privilege
23 to use property is excluded from the term lease if the use
24 is for a period of less than one continuous 24-hour
25 period, the charge is less than \$20, and the use of the

1 property is restricted to use on the premises or at the
2 business location of the grantor for the privilege to use
3 the property.

4 So as Appellant described, they offer two basic
5 types of races. The first is a multiple-race package for
6 groups with a minimum of eight participants for which a
7 customer can make a reservation. The second is arrive and
8 drive where customers can borrow a kart without a
9 reservation and they can race against other arrive and
10 drive racers who are at the facility. And these arrive
11 and drive races are sold either in a multiple-race package
12 or as a single race.

13 So with regard to the group multi-race packages,
14 the Department maintains its position that Appellant's
15 loan of karts for these races were not excluded from the
16 term lease under Section 6006.3. There are several
17 different group multi-race packages as Appellant
18 discussed. Each package, again, required a minimum of
19 eight racers. There was a two-race mini Grand Prix which
20 cost a minimum of \$352. There was a three-race Grand Prix
21 which cost \$480. And there was the four-race La Mans
22 Endurance which cost \$640. Helmets and head socks were
23 included and a license was neither required nor included
24 in these group packages.

25 The only element of Section 6006.3 that's in

1 dispute is whether the charge for the lease of the karts
2 in the group multi-race package was less than \$20. Here,
3 Appellant sold the group multi-race packages as a single
4 contract for the lease of various pieces of tangible
5 personal property. Even on a per person basis, the charge
6 for each package was far above \$20, with the least
7 expensive package costing \$44 per person. However, for
8 purposes of Section 6006.3, the charge for the lease for a
9 customer purchasing a group multi-race package was at
10 least \$352, which significantly exceeded \$20. As such,
11 the exclusion does not apply, and Appellant is liable for
12 the use tax measured by the rentals payable for these
13 leases.

14 Appellant argues that the group multi-race
15 packages should be valued on a per person per race basis
16 as though a group multi-race package was a combination of
17 individual race purchases. Appellant has offered no
18 evidence demonstrating that its sales of group packages
19 were individual separate sales to each individual group
20 participant during the audit period. The transactions
21 were sold by Appellant as packages. They required an
22 eight-person minimum.

23 We have no evidence that during the audit period
24 an individual customer could purchase their own segment of
25 one of the packages, and the components of the group

1 packages can't be viewed as individual transactions with
2 each individual customer.

3 Furthermore, Appellant treated the participants
4 in each multi-race packages as a unified group. The group
5 participated in races among themselves making a multi-race
6 package a single sale of one event. So there's no basis
7 for viewing the purchase of a group multi-race package as
8 more than one single transaction. Relatedly, to the
9 extent that Appellant argues it contracted with each
10 individual in the group, Appellant has submitted no
11 evidence supporting this position. And if the contracts
12 Appellant is referring to are liability waivers, those
13 don't constitute contracts for multi-race packages.

14 To the extent that Appellant characterizes the
15 amounts received for the extras, the score sheet, the
16 T-shirt, the trophies, the medals as separate payments not
17 related to the lease of the karts and, thus, deductible
18 from the amount of the charge, this argument must fail.
19 Pursuant to Regulation 1660 subdivision (c) (1), for a
20 lease that is a continuing sale and purchase, such as
21 Appellant's go-kart leases, tax is measured by the rentals
22 payable which include any payment required by the lease.

23 There is no legal distinction between the amount
24 of the rentals payable under Regulation 1660 subdivision
25 (C) (1) and the amount of the charge under Section 6006.3

1 and Regulation 1660 subdivision (e). Both are referring
2 to the amount charged for the rentals. Here, Appellant's
3 customers were required to pay the amounts Appellant is
4 allocating to its extras in order to lease the go-karts.
5 There's no evidence that customers could pay less for a
6 group package and not receive the extras. There's no
7 evidence that they could purchase the extras a la kart.
8 Insofar as amounts of payments received by Appellant are
9 applicable to the extras, they are payments that were
10 required by the kart lease and, thus, included in the
11 rental's payable.

12 With regard to Regulation 1670 cited by Appellant
13 in support of its position that amounts should be
14 allocated to the extras, it concerns the application of
15 tax to premiums, and it is not relevant to the practical
16 calculation of rentals payable. That being said, even if
17 amounts related to the extras were deducted from the
18 charge for group multi-race packages, they would still
19 exceed \$20. As such, Appellant's group multi-race
20 packages are not eligible for exclusion under Section
21 6006.3, and Appellant is liable for the use tax that it
22 was required to have collected on the rentals payable for
23 those leases.

24 Now, I'm going to address the multi-race arrive
25 and drive packages. Appellant could also purchase these

1 types of packages, such as three races for \$50, five races
2 for \$75, or eight races for \$100. We maintain our
3 position that these multi-drive -- multi-race arrive and
4 drive leases are not excluded under Section 6006.3. Here
5 there is no dispute that the tangible personal property,
6 the karts, must be used on Appellant's premises.

7 With regard to the charge for the grant of the
8 use of the karts, it's at least \$50. That's the lowest
9 during the audit period, three races for \$50. Appellant
10 again argues that each race is a separate transaction
11 because each loan of a kart was a separate lease of a
12 kart, but that position is unsupportable. For each
13 multi-race arrive and drive package, there was a single
14 transaction for a single price covering all loans made
15 under each lease agreement.

16 This is akin to the tool rental example that's in
17 Regulation 1660 subdivision (e) (2) (c) where several
18 individual tool loans were made under a single agreement
19 and for a single price. And in that example the price for
20 each loan was even separately itemized. So being separate
21 loans does not equate to being separate transactions when
22 two or more such loans are made pursuant to the same
23 agreement such as these arrive and drive packages.

24 In furtherance of this position, Appellant also
25 relies on annotation 330.3078, which concerns a

1 transaction whereby a company sold coupons representing
2 the right to borrow a videotape for no charge, which the
3 company's customer intended to distribute at no charge to
4 its own customers. The coupon holders could then borrow
5 videotapes by redeeming their coupons. So the coupons
6 were effectively gift certificates.

7 And, generally, no tax applies when a gift
8 certificate is purchased but, instead, when it's redeemed
9 for tangible personal property tax applies to the value of
10 the gift certificate that's applied to the tangible
11 personal property. So with regard to the coupons in this
12 annotation, no tax applied when someone purchased the
13 coupon. But when the holder of the coupon redeemed it for
14 a video rental, use tax was due on the amount that they
15 paid for that rental.

16 So insofar as Appellant is arguing that its
17 multi-race packages constitute sales of tangible personal
18 property or continuing sales and purchases, we agree.
19 However, the annotation has no bearing on the taxability
20 on Appellant's multi-race packages. As stated in the
21 backup letter, the application of tax in the annotation is
22 based on the specific nature of that coupon being
23 evaluated. Appellant's packages were not gift
24 certificates or coupons that could be redeemed at a future
25 date. They were sold to specific individuals on an exact

1 date for a specific number of races for a specific charge.

2 Appellant did not give its customers coupons or
3 gift certificates that could be used to redeem races at a
4 later date, meaning here that these were not coupons or
5 gift certificates. And Appellant's transactions are not
6 sufficiently similar to those in the annotation such that
7 the annotation was relevant to the instant analysis.

8 Given the foregoing, Appellant charges for its
9 multi-race arrive and drive packages were never less than
10 \$20 and the transactions don't meet the Section 6006.3
11 exclusion requirements. In addition, under Section
12 6006.3, the exclusion applies only when the use authorized
13 by the agreement is limited to a period of less than one
14 continuous 24-hour period. Specifically, Regulation 1660
15 subdivision (e)(1) explains that certain restricted grants
16 of a privilege to use property are excluded from the term
17 lease. To fall within this exclusion, the use must be for
18 a period of less than one continuous 24-hour period.

19 It's worth noting here that continuous modifies a
20 24-hour period and not the use. So unless the agreement
21 restricts the borrower from using the property for a
22 period of one continuous 24-hour period or more, then the
23 agreement is a lease and cannot qualify for the exclusion.
24 Here Appellant's multi-race arrive and drive customers
25 were authorized to use karts over a period in excess of

1 one continuous 24-hour period.

2 So given that the multi-race arrive and drive
3 packages all exceed the \$20 threshold and grant a
4 privilege to use property for a period of more than one
5 continuous 24-hour period, the packages are not excluded
6 from the term lease and are continuing sales and
7 purchases, and Appellant is liable for these taxes due on
8 the rentals payable from these transactions.

9 Now, with regard to the single arrive and drive
10 races, these were sold for \$20 during the audit period.
11 There is no dispute that the kart must be used over a
12 period of less one day and that the use was limited to
13 Appellant's premises. However, there is insufficient
14 evidence demonstrating that the charge for the lease was
15 less than \$20. As a starting point, the price advertised
16 on Appellant's website for single arrive and drive races
17 during the audit period was \$20. This is in Department's
18 Exhibit H.

19 Appellant argues that the amount of the charge
20 for purpose of Section 6006.3 should be reduced by an
21 amount allocable to the score sheet. But as discussed
22 earlier, any payments related to the score sheet are
23 payments required by the go-kart lease and are included in
24 the rentals payable for the lease of the karts such that
25 they can't be deducted from the charge for purposes of

1 Section 6006.3. There is also no authority for the
2 proposition that the inclusion of a premium as defined
3 under Regulation 1670, would reduce the amount of rentals
4 payable as defined Regulation 1660 subdivision (c)(1).

5 With that being said, even reducing the charge by
6 the cost of the score sheet, which Appellant's evidence
7 shows to be about 5 to 5-and-a-half cents, would not
8 reduce the charge for the lease below \$20 because of the
9 \$5.95 to \$6 license fee is also a payment required by the
10 lease of the karts, and a portion of it is included in the
11 rental's payable for each arrive and drive lease.

12 So payment of the license fee as discussed by
13 Appellant was mandatory in order race. It must be paid
14 every 12 months and it entitled the license holder to use
15 of the required helmet and head sock while racing. In
16 other words, the license fee was a charge for the loan of
17 tangible personal property required to be used during and,
18 in fact, only used during the lease of a kart pursuant to
19 an arrive and drive race. As such, the purchase of the
20 arrive and drive race is linked to the purchase of a
21 license based on the concurrent loan of the helmet and the
22 head sock.

23 Therefore, pursuant to Regulation 1660
24 subdivision (c)(1), the license fee is a payment required
25 by the lease of the karts properly included in rentals

1 payable and not deductible from the rental charge.
2 Meaning, based on all the available evidence, the charge
3 for a single arrive and drive race was at least \$20, and
4 the exclusion set forth in Section 6006.3 does not apply.

5 Now, continuing on the topic of the license fee,
6 Appellant argues that the fee is not taxable under
7 Regulation 1584, the regulation that governs membership
8 fees. However, the Department maintains its position that
9 the license fee is not a membership fee because a
10 membership fee that is paid in exchange for tangible
11 personal property is not a membership fee as contemplated
12 under Regulation 1584.

13 As discussed in the decision, former annotation
14 295.1540 the backup letter to which is the Department's
15 Exhibit O. It discussed the administrative practice that
16 was formalized in the regulation, and it explained that a
17 qualifying membership was not regarded as taxable because
18 it was regarded as a charge for processing the membership
19 application or membership renewal. In other words, when a
20 fee is simply not a charge for processing the membership,
21 then the fee is not eligible for nontaxable treatment,
22 even if otherwise meeting the applicable requirements of
23 the membership fee rule.

24 And this is further explicated in annotation
25 295.1508, which states quote, "When an initial membership

1 fee to purchase cosmetic products from a manufacturer
2 includes a training manual, a product brochure, and
3 videotape, the purchaser is receiving tangible personal
4 property in exchange for the fee. Under these
5 circumstances the initial membership fee is subject to
6 tax," end quote.

7 So as discussed throughout this hearing,
8 Appellant received the license fees in exchange for the
9 helmets and head socks significant items the customers
10 were required to wear to race. There's no evidence that
11 the fee is a charge primarily for processing the license,
12 and the license fees are not membership fees for purposes
13 of Regulation 1584 and are properly included in the
14 taxable measure.

15 Before I get to the summary, how much time do I
16 have?

17 JUDGE WONG: You have six minutes.

18 MR. BONIWELL: Okay. So I'm going to just
19 quickly address some of the evidence that was submitted
20 this afternoon before I summarize.

21 As I stated at the beginning of the hearing, we
22 object to each piece of evidence that was submitted based
23 on timeliness and based on relevance. As you will see
24 every document provided is from 2022, which means it does
25 not relate and is, therefore, not relevant to the audit

1 period which was from 2009 to 2012. Also, Appellant has
2 laid no clear foundation as to how this could be relevant
3 to the audit period. And so, therefore, it is not
4 relevant on that basis also.

5 Specifically looking at the first document,
6 according to Appellant, this demonstrates that one person
7 could purchase a package of races and use -- and redeem
8 those races in state and out of state.

9 JUDGE WONG: For the record you're referring to
10 Exhibit 7; is that correct?

11 MR. BONIWELL: Sorry. Yes, Exhibit 7.

12 And, you know, to the extent the property is not
13 used in the state, yes, it's not a continuing sale and
14 purchase. However, there's no evidence of this occurring
15 during the audit period for any specific instances that
16 would result in some sort of adjustment. On Exhibit 8 and
17 Exhibit 9 -- oh, it's both. Okay. Exhibit 8, these are
18 examples of people requesting and receiving refunds.
19 Again, these documents aren't relevant because they didn't
20 occur during the audit period, and there's no evidence
21 that these types of refunds occurred during the audit
22 period.

23 We would also argue that these present as
24 exceptional circumstances, such that they may not be
25 relevant, generally, to taxpayer's business. If you see

1 in the first set of emails, the first email says a lady
2 named Stephanie called me today about an issue with us and
3 the way we handled her and her family. That seem like a
4 unique circumstance for a refund.

5 And the second one also seems to be a specific
6 refund example relating to a child who was not able to
7 complete the races that they purchased that day. That
8 being said, these are examples of reversals that occurred
9 after the transaction. A prorated refund does not show
10 that each race was not an individual purchase. And
11 evidence doesn't show that refunds were a bargain for a
12 part of the transaction to start with. And even so, to
13 the extent that this, you know, demonstrates that refunds
14 were granted, it doesn't demonstrate that the charge ever
15 dropped below \$20 per transaction.

16 Now, the last document is a receipt that I'm
17 assuming is for a group multi-race package, and it appears
18 to be showing that there were multiple different credit
19 cards used to pay for the charge. First of all, again,
20 this is an example of a document that's out of the audit
21 period, and it doesn't relate to the audit period. And
22 there's no foundation as to how it could relate. It does
23 demonstrate to the extent that it could be relevant. It
24 does demonstrate that each multi-group race had one
25 charge, and here that one charge was \$908.

1 The fact that multiple VISA cards were used
2 doesn't demonstrate multiple individuals purchasing --
3 participating in the purchase of this. And even so, again
4 to the extent that it could be used, it doesn't show that
5 the charge was ever less than \$20 for a multi-race group
6 packages during the audit period.

7 So in summary, Appellant's loan of go-karts,
8 whether single or multiple arrive and drive or group
9 packages, these were leases because Appellant's customers
10 paid Appellant to gain temporary use and control of the
11 go-karts for racing. None of the transactions are
12 excluded under Section 6006.3. because there is
13 insufficient evidence demonstrating the charge for the
14 leases was ever less than \$20. And in the case of the
15 multi-race arrive and drive transactions, the privilege to
16 use the go-karts exceeded one continuous 24-hour period.

17 The license fee is a payment required by the kart
18 lease, and it's properly included in the rentals payable
19 for the kart lease. It is not a membership fee under
20 Regulation 1584. Since Appellant did not pay any tax on
21 the purchase price of its karts when it placed them into
22 service in California, Appellant is liable for the use tax
23 on the rentals payable for its leases during the audit
24 period, and this appeal should be denied.

25 Thank you.

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JUDGE WONG: Thank you, CDTFA.

I will now turn to my co-panelists to see if they have any questions, starting with Judge Ralston.

JUDGE RALSTON: Not at this time. Thank you.

JUDGE WONG: Thank you.

Judge Stanley?

JUDGE STANLEY: Yes, I do have a couple of questions for CDTFA. With respect to the 24-hour continuous use, do you have information that they were open 24 hours? I mean, would it even be possible for somebody to maintain control of a kart for 24 hours if they're not -- maybe I should ask them.

I don't know what your hours are.

MR. PINCURA: They are not open 24 hours. I think hours of operation are actually on one of the -- on Exhibit 2. Exhibit 1, page 2, Monday through Thursday is 12:00 to 10:00, Friday, Saturday 11:00 to 11:00, Sunday 11:00 to 7:00.

JUDGE STANLEY: Okay. Then Mr. Boniwell, do you want to respond to the question about how it could possibly be a 24-hour continuous use if the business is not open?

MR. CLAREMON: I can respond to that. This is Scott Claremon. So to be excluded from the definition of lease, the use has to be less than a continuous 24-hour

1 period. But there's no requirement for it to be a lease
2 in the first place that the use be continuous. And I
3 don't think there's any -- there's no dispute here that a
4 lease of a multi-race arrive and drive could be on one day
5 and then several days later, which would not be within a
6 continuous 24-hour period.

7 But there's no requirement for it to be taxable
8 that the use be in a continuous period. It's the other
9 way around. To be excluded from the definition of lease
10 it has to be a continuous period of less than 24 hours.

11 JUDGE STANLEY: Okay. And I'm also trying to
12 wrap my head around the Department's position on the
13 multi-race packages like the three for \$50. And I can
14 maybe help myself to do that if I gave you a little
15 hypothetical. Let's say I want to splurge for my kid's
16 birthday bounce house, and only \$15. It's not going to
17 happen, right. So I say, well, I want to get a bounce
18 house in January of next year and January the year after.
19 Would the Department consider that one transaction that's
20 taxable in December when I made the reservation for those
21 bounce houses?

22 MR. BONIWELL: I think it's difficult to opine on
23 the hypothetical without actually looking at the totality
24 of the agreement.

25 JUDGE STANLEY: Okay. That's fair. I surprised

1 you. And then the last question I have is with respect to
2 the \$6 license fee. Is the Department adding that to each
3 of the transactions, whether or not somebody bought 14
4 races or something else?

5 MR. BONIWELL: I mean, the license fee if it's --
6 if it's a multi-race package, it's part of each loan of
7 each kart because it's connected to the loan of each kart
8 because each loan of each kart requires a loan of helmet
9 and the head sock, which is paid for by the license fee.
10 So if you buy 14 single arrive and drive races, then the
11 license fee is allocated to those 14 races and is part of
12 the loan of each one of those karts.

13 JUDGE STANLEY: Okay. So I buy eight for a \$100,
14 and I have to pay a license fee. That's \$106. That would
15 still be \$13 per ride, right?

16 MR. BONIWELL: I'm not good at math on the fly,
17 but insofar as are you trying to get at the point that
18 there could be some point where the allocation gets to a
19 period where it's material?

20 JUDGE STANLEY: Where it can bring the cost of
21 the packages down if people do a lot of them.

22 MR. BONIWELL: Yeah, I could see -- right. I
23 hear what you're saying. I would say to the extent that
24 that's a hypothetical, it remains to be hypothetical. And
25 we don't have any evidence that the price for the charge

1 of any of these leases was every below \$20.

2 MR. CLAREMON: And, again, it's our position that
3 the lease is for all of those races. So the eight for
4 \$100, the amount of the lease the charge was \$100, it is
5 \$106. It's not \$13 individual per race.

6 JUDGE STANLEY: Okay. So you're not even -- to
7 get it straight, you're not breaking it into eight
8 different parts as they're proposing. You say it's a
9 package deal so it's taxable.

10 MR. BONIWELL: It's a package deal based on the
11 one charge for each package.

12 JUDGE STANLEY: Okay. Thank you.

13 JUDGE WONG: Thank you.

14 I have no questions for CDTFA at this time. So
15 we will now turn it back to Appellant for their rebuttal
16 and closing.

17 Mr. Pincura, you have ten minutes.

18 MR. PINCURA: Okay. And yeah. I can do a quick
19 rebuttal; is that correct?

20 JUDGE WONG: Yeah. You have ten minutes. You
21 can do what you want.

22

23 CLOSING STATEMENT

24 MR. PINCURA: Okay. So in response to the
25 Department I just want to say, if you go in -- because

1 we're saying the multi-races should be broken down per
2 race because there is not a continuous use, that even if
3 you add the \$6 license fee for all the multiple races per
4 race fee, it's still under \$20 for the three for \$50, for
5 the eight for \$100, for the \$575, if you add the \$6 for
6 license fee, break it up by the number of races, you're
7 still under \$20 per race.

8 Regarding the arrive and drive and their example
9 of the tools in the regulation, those tools were all
10 rented at one time under one single agreement. The
11 renter -- rentee, I guess, had all those tools in
12 possession with him at one time. You cannot have multiple
13 karts in your possession at one time. You cannot rent or
14 race more than one kart at one time. It's separate
15 transactions, and you must require to enter after each.
16 It's not a single agreement for three karts at one time in
17 a eight-hour period. It's one agreement for 15 minutes
18 for each race, and they're all separate and distinct.

19 Regarding the new evidence I will say this was
20 their -- how they still -- their processes back during the
21 audit period. I understand they're in 2022, but they have
22 not changed how that is done. Yeah, I know unfortunately
23 we couldn't get anything from ten years ago. It would
24 have been nice if we could, but at this point we wanted to
25 provide evidence that we did have available to show or to

1 counter some of their positions that they're saying these
2 couldn't be used out of state. They couldn't be used at
3 multiple locations.

4 I also want to point out in Exhibit 8, the
5 invoice. If you notice, they pointed out it says \$880,
6 but on the left it says 11 items times \$80. So that's 11
7 separate transactions that total \$800. And then these
8 were broken down by each individual's credit card who
9 paid. Again, individually paid individual races for the
10 group packages. Premiums lower those individual races for
11 each package below the \$20. Five of the races it's right
12 at \$20 before even taking into consideration the premiums,
13 which the T-shirt definitely adds value, if nothing else.
14 But they all have value as they all add value, the
15 trophies, the medals. People race they want a medal, they
16 want a trophy. So it's all valuable. It's all premiums
17 that are advertised with the race.

18 In closing I would just like to say K-1 Speed is
19 not in the business of leasing karts. It's an amusement.
20 Even if the Department doesn't feel that this is amusement
21 service and they just owe tax on the purchase price of
22 those karts, that none of these races -- individual races
23 are -- are not -- do not meet the definition of a lease.
24 They're all excluded from the term lease. Each race is
25 under \$20.

1 Each use is less than a 24-hour continuous
2 period. If I race one race today for \$15, is the
3 Department trying to tell me if I race another one a year
4 from now, I still have a use and it's continuous? I don't
5 know how that can be when I don't even have control or
6 possession of the kart.

7 And I also want to say that obviously all the use
8 is at the premises of the business. You can't take them
9 home with you. So there's an agreement for race for a
10 future period. You don't have a use at the time you
11 purchase a race not, until you actually go to the counter
12 and redeem one of those races is there a use, and you
13 don't -- and they're all redeemed individually. You
14 always have to exit a kart between when you redeem those
15 races. It's never a continuous race. You must exit after
16 each 15-minute period.

17 JUDGE WONG: Thank you, Mr. Pincura. I did have
18 one clarifying question for you about Exhibit 9, which you
19 just referred to.

20 MR. PINCURA: Sure.

21 JUDGE WONG: You mentioned that it was -- the
22 total was \$881 and it was 11 items times 80; is that
23 correct? Is that what you're referring to?

24 MR. PINCURA: Yeah. Looks like -- yes. Yes.
25 The first line, that's the group package. It's 11 items

1 because they are billed on a per-person basis, all the
2 group package. If you look in the Exhibit 2, it's a per
3 person charge.

4 JUDGE WONG: So it says group MGP. Is that
5 referring to like mini grand?

6 MR. PINCURA: Mini Grand Prix, I believe.

7 JUDGE WONG: Thank you. Okay.

8 I will now turn to my co-panelists for any final
9 questions.

10 Judge Ralston?

11 JUDGE RALSTON: No. Thank you.

12 JUDGE WONG: Thank you.

13 Judge Stanley, do you have any final questions
14 for either party?

15 JUDGE STANLEY: No, I don't. Thank you.

16 JUDGE WONG: Thank you.

17 Okay. So that concludes today's hearing. The
18 record is closed, and the case is submitted today. The
19 judges will meet and decide the case based on the exhibits
20 presented and admitted into evidences. We will send both
21 parties our written decision no later than 100 days from
22 today.

23 This oral hearing is now adjourned.

24 (Proceedings adjourned at 2:46 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 23rd day of September, 2022.

ERNALYN M. ALONZO
HEARING REPORTER