

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF)
)
CSI ALISO, INC.,) OTA NO. 18032469
)
 APPELLANT.)
_____)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

SACRAMENTO, CALIFORNIA

TUESDAY, SEPTEMBER 20, 2022

Reported by:

SARAH M. TUMAN, RPR
CSR No. 14463

Job No. :
38486 OTA(B)

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TRANSCRIPT OF PROCEEDINGS, taken at
400 R Street, Sacramento, California,
commencing at 1:01 p.m. and concluding
at 3:38 p.m. on Tuesday, September 20, 2022,
reported by Sarah M. Tuman, RPR, CSR No. 14463,
a Certified Shorthand Reporter in and for
the State of California.

APPEARANCES:

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ JOSHUA ALDRICH
ALJ SUZANNE BROWN

For the Appellant: JOSEPH A. VINATIERI, ESQ.
PATRICIA VERDUGO, ESQ.

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

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-26 were received at page 9)
(Department's Exhibits A-G were received at page 9)

PRESENTATION

BY MR. VINATIERI
BY MR. NOBEL

PAGE
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APPELLANT'S

WITNESS: DIRECT CROSS REDIRECT RECROSS

DAVID GUBSER 22

CLOSING ARGUMENT

BY MR. VINATIERI

PAGE
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Sacramento, California; Tuesday, September 20, 2022

1:01 p.m.

-- oOo --

JUDGE KWEE: Great. So we are ready to start the record. We are opening the record in the appeal of CSI Aliso, Inc. This matter is being held before the Office of Tax Appeals. The OTA Case Number is 18032469.

And today's date is Tuesday, September 20, 2022. The time is approximately 1:01 p.m. This hearing is being conducted in Sacramento, California. And it's also being livestreamed on our YouTube channel.

Today's hearing is being heard by a panel of three administrative law judges. My name is Andrew Kwee, and I'll be the lead judge. The other panel members are Judge Suzanne Brown and, to my right, Judge Josh Aldrich.

We are -- the three of us are the panel that will be deciding this appeal. All three judges will meet after the hearing and produce a written -- a written decision as equal participants.

Although I will be conducting this hearing, any judge on this panel may ask questions or otherwise participate in this appeal to ensure that OTA has all the information necessary to decide this appeal.

With that said, I would -- would the parties please state their names for the record and who they

<p style="text-align: right;">Page 6</p> <p>1 represent.</p> <p>2 I'll start with the representatives for CDTFA,</p> <p>3 please.</p> <p>4 MR. NOBEL: Jarrett Nobel with the California Tax</p> <p>5 and Fee Administration.</p> <p>6 MR. CLAREMON: Scott Claremon with CDTFA.</p> <p>7 MR. PARKER: And Jason Parker with CDTFA.</p> <p>8 JUDGE KWEE: Okay. And I'll turn to Appellant's</p> <p>9 representatives.</p> <p>10 MR. VINATIERI: Good afternoon. Joe Vinatieri on</p> <p>11 behalf of CSI Aliso.</p> <p>12 MS. VERDUGO: Patricia Verdugo on behalf of CSI</p> <p>13 Aliso.</p> <p>14 JUDGE KWEE: Okay. Thank you.</p> <p>15 And I understand, Mr. Vinatieri, that you also</p> <p>16 have one witness, David Gubser.</p> <p>17 Is your witness present in this room?</p> <p>18 MR. VINATIERI: He is present in the front row.</p> <p>19 JUDGE KWEE: Okay. Perfect. Thank you.</p> <p>20 So I understand that, with that, there is one</p> <p>21 witness testifying, and CDTFA does not have any objection</p> <p>22 to the witness testifying.</p> <p>23 Is that correct for CDTFA?</p> <p>24 MR. NOBEL: That's correct.</p> <p>25 JUDGE KWEE: Okay. And as far as the exhibits</p>	<p style="text-align: right;">Page 8</p> <p>1 And please remember to push the microphone button when</p> <p>2 you -- when you speak.</p> <p>3 Did you have any objections to any of CDTFA's</p> <p>4 Exhibits A through G?</p> <p>5 MR. VINATIERI: No.</p> <p>6 JUDGE KWEE: Okay. Great.</p> <p>7 And so, CDTFA, just to confirm, you don't have</p> <p>8 any additional exhibits; is that correct?</p> <p>9 MR. NOBEL: That is correct.</p> <p>10 JUDGE KWEE: Okay. And then I will turn over to</p> <p>11 Appellant's exhibits. For Appellant, I have Exhibits</p> <p>12 Numbers 1 through 26.</p> <p>13 I think Exhibits 1 through 22 were previously</p> <p>14 submitted during the briefing process. But they were just</p> <p>15 renumbered from prior Exhibits 1 to 18 to -- 1 to 18 to</p> <p>16 new Exhibits 1 through 22.</p> <p>17 In addition, there were four new exhibits --</p> <p>18 three pictures and the timeline that's on the chair over</p> <p>19 there, which I think is -- so my understanding is those</p> <p>20 four new exhibits are demonstrative evidence to be used</p> <p>21 with the witness testimony; is that correct?</p> <p>22 MR. VINATIERI: That's correct.</p> <p>23 JUDGE KWEE: Okay. So --</p> <p>24 MR. VINATIERI: That's correct.</p> <p>25 JUDGE KWEE: Okay. Thank you.</p>
<p style="text-align: right;">Page 7</p> <p>1 are concerned, I provided a copy of the exhibits via a</p> <p>2 digital link to the parties.</p> <p>3 So for CDTFA, it was attached to the minutes and</p> <p>4 orders. For Appellant's, it was an amended exhibit</p> <p>5 binder. So that it came up under separate cover via</p> <p>6 e-mail reminder. They were both SharePoint links.</p> <p>7 Did either party not receive exhibit binders? Or</p> <p>8 are we good with exhibit binders?</p> <p>9 CDTFA?</p> <p>10 MR. NOBEL: We received it. Thank you.</p> <p>11 JUDGE KWEE: Okay.</p> <p>12 MR. VINATIERI: And we are good.</p> <p>13 JUDGE KWEE: Okay. Great.</p> <p>14 So for CDTFA, we have Exhibits A through G. And</p> <p>15 these are the same as were discussed during the prehearing</p> <p>16 conference. And I understand that Appellant does not have</p> <p>17 any objections to CDTFA's exhibits.</p> <p>18 Exhibits A through D were previously submitted</p> <p>19 with the briefing, and there were three new Exhibits: E,</p> <p>20 F, and G. Oh, and they were submitted on the day of the</p> <p>21 prehearing conference.</p> <p>22 So I -- I think Appellant's representative didn't</p> <p>23 have an opportunity to look at them prior to the time of</p> <p>24 the prehearing conference.</p> <p>25 So I'll turn over to Appellant's representative.</p>	<p style="text-align: right;">Page 9</p> <p>1 Yeah. So I guess you have to toggle it so that</p> <p>2 the green shows up when you speak. Getting feedback</p> <p>3 online. Sorry about that.</p> <p>4 So with that said, you don't have any additional</p> <p>5 exhibits today, do you?</p> <p>6 MR. VINATIERI: We do not.</p> <p>7 JUDGE KWEE: Okay. And, CDTFA, do you have any</p> <p>8 objections to the Exhibits 1 through 26 as provided in the</p> <p>9 second revised exhibit binder?</p> <p>10 MR. NOBEL: We do not.</p> <p>11 JUDGE KWEE: Okay. Great. Then Appellant's</p> <p>12 Exhibits 1 through 26 and CDTFA's Exhibits A through G are</p> <p>13 admitted into evidence without objection from either</p> <p>14 party.</p> <p>15 (Appellant's Exhibit Nos. 1-26 were received in</p> <p>16 evidence by the Administrative Law Judge.)</p> <p>17 (Department's Exhibits A-G were received in</p> <p>18 evidence by the Administrative Law Judge.)</p> <p>19 JUDGE KWEE: I'll just -- so during the</p> <p>20 prehearing conference, we had discussed seven items, which</p> <p>21 were agreed by the parties and not in dispute.</p> <p>22 I -- I don't want to go over them again because</p> <p>23 we've already talked about them. But I'll just confirm</p> <p>24 they were summarized in the minutes and orders.</p> <p>25 And were those correctly summarized? CDTFA</p>

<p style="text-align: right;">Page 10</p> <p>1 did -- had -- had, I guess, agreed to those seven items?</p> <p>2 MR. NOBEL: There was one portion where it said</p> <p>3 it was undisputed that there were two separate</p> <p>4 transactions. So I think, looking at the exhibit index</p> <p>5 provided by Appellant, there was an initial contract and</p> <p>6 then an addendum to the contract.</p> <p>7 JUDGE KWEE: Okay. So, CDTFA, you no longer</p> <p>8 agree to, I think, that was Number 3, where it said the</p> <p>9 disputed items involved two transactions with Big West.</p> <p>10 So you don't -- you don't agree with that anymore?</p> <p>11 MR. NOBEL: It appears to be a continuous</p> <p>12 transaction -- contract and then a contract.</p> <p>13 Yeah. We don't agree. Correct.</p> <p>14 JUDGE KWEE: So I will strike Number 3. That</p> <p>15 leaves us six remaining items for Appellant.</p> <p>16 Did you have any issues with any of those</p> <p>17 remaining six items?</p> <p>18 MR. VINATIERI: We obviously disagree with the</p> <p>19 characterization of the -- that one item that was just</p> <p>20 presented. But other than that, we're good with this.</p> <p>21 JUDGE KWEE: Okay. Great. So then I'll make a</p> <p>22 note and during -- when we issue a written opinion, those</p> <p>23 remaining six items may be listed as factual findings</p> <p>24 which are not disputed by -- and which are agreed by both</p> <p>25 parties.</p>	<p style="text-align: right;">Page 12</p> <p>1 arguments that are presented. And if any revisions are --</p> <p>2 are necessary, we might potentially revise or tweak the</p> <p>3 issue statements based on the arguments and testimony</p> <p>4 provided by the parties today.</p> <p>5 But for the meantime, I will list them as</p> <p>6 currently summarized subject to potential revision as</p> <p>7 appropriately determined by the CD- -- I'm sorry -- by OTA</p> <p>8 after the hearing.</p> <p>9 Okay. So what I have in my notes is that we have</p> <p>10 a time estimate of approximately two hours for this</p> <p>11 hearing. So that would take us to shortly after 4:00 p.m.</p> <p>12 And the time estimate that I have -- the order of</p> <p>13 the presentation -- I'm sorry -- that I have is we'll</p> <p>14 start with the taxpayer's opening presentation. For that</p> <p>15 we have allocated 20 minutes followed by 60 minutes for</p> <p>16 witness testimony.</p> <p>17 And after that, CDTFA will have 25 minutes for</p> <p>18 their opening presentation followed by -- Appellant will</p> <p>19 have 10 minutes on final rebuttal. CDTFA has waived their</p> <p>20 final rebuttal.</p> <p>21 And I'm sorry. I -- I said that will take us to</p> <p>22 shortly after 4:00. I can't do math. 1:00 o'clock plus</p> <p>23 two hours takes us to 3:00 o'clock.</p> <p>24 And I'm also told -- I'm asked to -- to -- to --</p> <p>25 someone asked me to ask Mr. Vinatieri -- if you -- it's a</p>
<p style="text-align: right;">Page 11</p> <p>1 During the prehearing conference, we listed seven</p> <p>2 issues. And two of those issues has sub-issues --</p> <p>3 questions raised by OTA about whether or not we have</p> <p>4 jurisdiction.</p> <p>5 I -- I don't want to take up too much time</p> <p>6 restating all the issues because they were listed in the</p> <p>7 minutes and orders and they were listed on the agenda.</p> <p>8 But I would like to confirm with CDTFA, do you</p> <p>9 have any question -- objections or concerns with how those</p> <p>10 same issues were summarized in the minutes and orders?</p> <p>11 MR. NOBEL: No, we do not.</p> <p>12 JUDGE KWEE: Okay. And for Appellant's</p> <p>13 representative, are you also okay? Or do you have any</p> <p>14 concerns with how those issues were summarized in the</p> <p>15 minutes and orders?</p> <p>16 MR. VINATIERI: I think the way they are stated</p> <p>17 is -- it's okay. I'm not sure that candidly you'll --</p> <p>18 we'll be in our presentation that the -- the five are as</p> <p>19 characterized as they are here.</p> <p>20 I think you'll find out with testimony, it's a</p> <p>21 little bit different than estoppel, for example. But, I</p> <p>22 mean, we're still -- we're saying it, but it's not the</p> <p>23 issue that it used to be.</p> <p>24 JUDGE KWEE: Okay. I'll -- definitely, when we</p> <p>25 issue the decision, we'll take into consideration the</p>	<p style="text-align: right;">Page 13</p> <p>1 little hard to hear you. If -- you don't need to hold the</p> <p>2 button down. Just make sure the green light is on and</p> <p>3 then talk into the mic.</p> <p>4 I'm not sure if there's something wrong with --</p> <p>5 with your -- with your -- your microphone setup. But</p> <p>6 they're asking because it's hard to hear you online. If</p> <p>7 you potentially -- possibly you could speak a little</p> <p>8 closer to the mic.</p> <p>9 MR. VINATIERI: I will swallow the mic.</p> <p>10 JUDGE KWEE: All right. Thank you. I hope -- I</p> <p>11 hope that'll be sufficient. I don't want to keep</p> <p>12 bothering you about that.</p> <p>13 So with that order of presentation, two hours,</p> <p>14 are there any -- did I get anything wrong there?</p> <p>15 Or does that sound correct to you, CDTFA?</p> <p>16 MR. NOBEL: Sounds correct. Thank you.</p> <p>17 JUDGE KWEE: Okay. And, Mr. Vinatieri, does that</p> <p>18 order of presentation work for you too?</p> <p>19 MR. VINATIERI: Correct.</p> <p>20 JUDGE KWEE: Okay. Great.</p> <p>21 Then I will turn it over to you for your opening</p> <p>22 presentation. And I will have to swear in your witness</p> <p>23 before you start -- turn it over to witness testimony.</p> <p>24 MR. VINATIERI: Sure.</p> <p>25 JUDGE KWEE: All right. Thank you. You have</p>

<p style="text-align: right;">Page 14</p> <p>1 about 20 minutes until 1:30.</p> <p>2 MR. VINATIERI: Thank you. If for some reason</p> <p>3 you can't hear, then me let me know.</p> <p>4</p> <p>5 PRESENTATION</p> <p>6 MR. VINATIERI: So we say good afternoon to you.</p> <p>7 And we're Joe Vinatieri and Patricia Verdugo,</p> <p>8 Bewley Lassleben & Miller, LLP, Counsel for the Appellant.</p> <p>9 Matt Beale, President of Appellant CSI Aliso, is</p> <p>10 here behind me to my left. David Gubser is back here</p> <p>11 also. He's a witness for CSI Aliso.</p> <p>12 And we appreciate the opportunity to present our</p> <p>13 case. It's taken a long time to get here, to be candid</p> <p>14 with you. So this is our day, and we appreciate that.</p> <p>15 This case is relatively straightforward. CSI</p> <p>16 Aliso designs and fabricates through subcontractors</p> <p>17 sophisticated catalytic reactor systems utilized in oil</p> <p>18 refineries and other heavy process industries. And on</p> <p>19 occasion, they will install those systems, which is what</p> <p>20 happened here.</p> <p>21 However, we believe what was missed at the CDTFA</p> <p>22 appeals level was the fact that there were two</p> <p>23 transactions -- two separate and identifiable contracts.</p> <p>24 One contract for the design and fabrication of</p> <p>25 the selective catalytic reactor systems. And several</p>	<p style="text-align: right;">Page 16</p> <p>1 was given by Big West for emission control equipment and</p> <p>2 services. And I want you to note that was 10/31/06.</p> <p>3 Then 12/06, there was a request to bid on the</p> <p>4 installation of the -- the fabrication items that have</p> <p>5 been fabricated. So there was a request to us to</p> <p>6 basically bid on the installation. You're going to hear</p> <p>7 what that was all about.</p> <p>8 Thereafter, the second transaction took place</p> <p>9 2/9/07. There was an installation addendum to the Master</p> <p>10 Services Agreement. There was a cold commissioning once</p> <p>11 it'd been all assembled.</p> <p>12 And you'll hear about the erector set and -- and,</p> <p>13 from the ground up, cold commissioning to see if it worked</p> <p>14 on 5/23/07.</p> <p>15 And then on 6/07, operating permits -- and it's</p> <p>16 in the record, you know this -- but this was all about</p> <p>17 meeting AQMD requirements in Kern County for this</p> <p>18 refinery.</p> <p>19 So I'm going to keep coming back to this timeline</p> <p>20 over and over because it's important that you understand</p> <p>21 how this went down.</p> <p>22 At the time that -- at the time that we did</p> <p>23 the -- the first transaction, designing and fabrication,</p> <p>24 there was no contract for installation -- no contract for</p> <p>25 installation.</p>
<p style="text-align: right;">Page 15</p> <p>1 months later, a separate contract for the installation of</p> <p>2 those systems at the Big West Refinery in Bakersfield.</p> <p>3 So why is it important that there are two</p> <p>4 transactions and not just one overall contract for design,</p> <p>5 fabrication, and installation? For the answer, we need to</p> <p>6 look at the first transaction.</p> <p>7 Now, as you can see on our timeline here -- and</p> <p>8 which we'll be referring to quite frequently -- at the</p> <p>9 time the Appellant received a resale certificate that was</p> <p>10 given to in good faith, which was agreed to by the audit</p> <p>11 staff, the only contract in existence was a contract for</p> <p>12 the design and fabrication of the SCR System.</p> <p>13 Now, I'm going to go to the timeline and just</p> <p>14 point out to you -- it's a little difficult here, but this</p> <p>15 is our Exhibit 26 -- but the way we put this here is we</p> <p>16 have two transactions: The first one is for design and</p> <p>17 fabrication; the second one is for installation.</p> <p>18 So on 3/24/06, all the way to the left, we have</p> <p>19 what we call "Master Services Agreement." You're going to</p> <p>20 hear what that's all about.</p> <p>21 After that, in June, 6/12/06, there was an</p> <p>22 addendum to the MSA. And that served to -- to move</p> <p>23 certain -- certain things forward you're going to hear</p> <p>24 about.</p> <p>25 Then on 10/31/06 was the resale certificate that</p>	<p style="text-align: right;">Page 17</p> <p>1 It wasn't until December, as I just indicated,</p> <p>2 that Big West even requested that we bid on an</p> <p>3 installation contract of the items that we had designed</p> <p>4 and had fabricated by the subcontractors. That bid was</p> <p>5 accepted, as we see in the timeline here, in 2/9/07.</p> <p>6 So again, why is this critical? Because, at the</p> <p>7 time of the receipt of the resale certificate, 12/31/06,</p> <p>8 there was no construction contract for installation.</p> <p>9 In fact, much of the Appellant's business during</p> <p>10 the audit period related to design and fabrication, which</p> <p>11 was performed for a number of customers. Resale</p> <p>12 certificates were provided by those customers, and the</p> <p>13 audit staff in this audit accepted those resale</p> <p>14 certificates for those other customers.</p> <p>15 This is the only situation in the audit that was</p> <p>16 questioned by the auditor. And, assumedly, because the</p> <p>17 auditor believed that this was just one contract for</p> <p>18 design, fabrication, and installation when, in fact, there</p> <p>19 were actually two contracts and two transactions.</p> <p>20 Inclusion of the design and fab as taxable is</p> <p>21 erroneous as it should have been treated like all the</p> <p>22 other design and fab contracts that we did work on as a</p> <p>23 sale for resale.</p> <p>24 Now, the second transaction, over on the right</p> <p>25 side there, relates to the installation of the</p>

<p style="text-align: right;">Page 18</p> <p>1 fabricated -- by now, fabricated SCR System.</p> <p>2 And as you're going to hear, Big West came back</p> <p>3 to the Appellant, requested a bid, and then selected</p> <p>4 Appellant as the installation contractor.</p> <p>5 The installation, similar to your Praxair case,</p> <p>6 took place like an erector set -- one on top of another</p> <p>7 with equipment installed on equipment -- all the way from</p> <p>8 the ground up. It was not assembled on the ground at all.</p> <p>9 Also, importantly, most of the alleged taxable</p> <p>10 measure on the installation on the second transaction</p> <p>11 relates to installation labor, engineering charges, some</p> <p>12 further design, and other nontaxable charges.</p> <p>13 So we went back and reviewed the DNR, which</p> <p>14 directed the audit staff to re-audit for more possible</p> <p>15 tax -- nontaxable charges in the audited measure. The</p> <p>16 appeals attorney said go back and appeal -- look and see</p> <p>17 if there's some more nontaxable. The auditor did so but</p> <p>18 only partially.</p> <p>19 So we -- what we did -- Ms. Verdugo went back and</p> <p>20 reviewed all the alleged taxable measure, found numerous</p> <p>21 instances where installation labor and other items had not</p> <p>22 been deleted.</p> <p>23 So in an effort to economize this case, we</p> <p>24 brought this to your attention over a year ago asking that</p> <p>25 you direct CDTFA to go back and review the taxable measure</p>	<p style="text-align: right;">Page 20</p> <p>1 emission control and equipment and services, which is our</p> <p>2 Exhibit 4. You can see that resale certificate in there,</p> <p>3 as I indicated, 10/31/06.</p> <p>4 So we're going to be calling as a witness David</p> <p>5 Gubser who was with CSI Aliso's predecessor company and</p> <p>6 CSI Aliso when these two transactions took place. He was</p> <p>7 a project manager on the design and fabrication contract.</p> <p>8 And he was the project manager on the installation</p> <p>9 contract in Bakersfield.</p> <p>10 He has firsthand testimony regarding both</p> <p>11 contracts, the history of the Big West two projects. And</p> <p>12 he's worked closely with Ms. Verdugo in determining the</p> <p>13 amount of installation labor off of the work orders, et</p> <p>14 cetera, that should not be in the taxable measure.</p> <p>15 So our view on the first transaction -- there was</p> <p>16 a contract for design and fab, and the resale certificate</p> <p>17 was given. It was given in good faith because it was a</p> <p>18 sale for resale because it was all tangible personal</p> <p>19 property at that point in time.</p> <p>20 On the second transaction, based on the source</p> <p>21 documents, the taxable measure has to be reduced for</p> <p>22 installation labor, other nontaxable charges per the</p> <p>23 information that's provided -- and you're going to hear</p> <p>24 some testimony on it -- and it's provided in that motion</p> <p>25 dated May 2021.</p>
<p style="text-align: right;">Page 19</p> <p>1 where Ms. Verdugo and extensively reviewed source</p> <p>2 documents -- we have actual source documents -- and she</p> <p>3 had ticked and tied -- she put it together.</p> <p>4 Needless to say, we were disappointed that our</p> <p>5 efforts to streamline this case by giving you this</p> <p>6 information well in advance was denied.</p> <p>7 So today we are bringing you that information</p> <p>8 again. We ask you to accept that information, which will</p> <p>9 dramatically diminish the erroneously determined measure.</p> <p>10 So in the minutes and orders of the prehearing</p> <p>11 conference, you had the five issues on appeal were set</p> <p>12 forth. The first three issues relate to the resale</p> <p>13 certificate -- whether it was accepted in good faith,</p> <p>14 whether CDTFA is estopped, and whether reg 1521 is in</p> <p>15 conflict with Section 6092 of the R&T Code.</p> <p>16 In light of the fact that the resale certificate</p> <p>17 only relates to the first transaction --</p> <p>18 (Reporter admonition)</p> <p>19 MR. VINATIERI: Certainly. Okay.</p> <p>20 In light of the fact that the resale certificate</p> <p>21 only relates to the first transaction, the design and</p> <p>22 fabrication of the equipment -- remember there was no</p> <p>23 installation at this point -- those three issues really</p> <p>24 shouldn't be issues in light of the fact that the resale</p> <p>25 certificate was given in good faith for the purchase of</p>	<p style="text-align: right;">Page 21</p> <p>1 Bottom line, with respect to the first</p> <p>2 transaction and the second transaction, once you detail --</p> <p>3 detail it all out, there should be zero tax liability.</p> <p>4 Zero.</p> <p>5 So with that, I want to call David Gubser. And I</p> <p>6 would like you to make sure -- and I know you'll do it --</p> <p>7 but listen very carefully. Because he's both an expert</p> <p>8 witness and a percipient witness.</p> <p>9 He was there for the two transactions, and his --</p> <p>10 his testimony is critical to your adjudication of this</p> <p>11 matter.</p> <p>12 We call David Gubser. And we're going to do a</p> <p>13 little moving around here.</p> <p>14 JUDGE KWEE: Okay. Mr. Gubser, before you</p> <p>15 proceed, may I ask that you raise your hand? I'm going to</p> <p>16 swear you in.</p> <p>17</p> <p>18 DAVID GUBSER,</p> <p>19 called as a witness on behalf of the Appellant, having</p> <p>20 first been duly sworn by the Administrative Law Judge, was</p> <p>21 examined and testified as follows:</p> <p>22</p> <p>23 THE WITNESS: Yes, I do.</p> <p>24 JUDGE KWEE: Okay. Thank you. You may proceed.</p> <p>25 And just remember, the green light should be on</p>

<p style="text-align: right;">Page 22</p> <p>1 the microphone. You don't have to hold it. Just do speak 2 closely to the microphone, please.</p> <p>3 MS. VERDUGO: Good afternoon. This is Patricia 4 Verdugo.</p> <p>5 Can you hear me okay? 6 (Reporter responds)</p> <p>7 MS. VERDUGO: How about that? 8 (Reporter responds)</p> <p>9 MS. VERDUGO: I know it's kind of hard. I'm 10 going to be turning towards Mr. Gubser. So I apologize. 11 Just let me know.</p> <p>12</p> <p>13 DIRECT EXAMINATION</p> <p>14 BY MS. VERDUGO:</p> <p>15 Q Mr. Gubser, thank you so much for being here 16 today. For the record, can you state your full name.</p> <p>17 A My name is David Anthony Gubser.</p> <p>18 Q And could you describe your background, including 19 your education and professional credentials and -- and 20 your expertise?</p> <p>21 A Yes. I'm a mechanical engineer. I graduated in 22 engineering with a bachelor of science degree, mechanical 23 engineering, Loyola Marymount University. My background 24 has been primarily -- excuse me -- primarily in heat 25 transfer design, industrial processes, and food processing</p>	<p style="text-align: right;">Page 24</p> <p>1 In October -- excuse me -- in October of 2006, my 2 former CEO and current CEO of CSI/AUS called to meet me 3 for coffee one morning in October, and we were good 4 friends. We sat down and talked, exchanged normal 5 amenities.</p> <p>6 And then he says, "Dave, I'm in trouble." 7 I said, "What's wrong?"</p> <p>8 He said, "Well, we did sign a -- a contract with 9 Big West at the Flying J Refinery in Bakersfield. And the 10 work was to be a design and construct" -- I mean -- "a 11 design and fabricate equipment for the projects." 12 And he said, "We are severely behind schedule. I 13 really need you to come back."</p> <p>14 I said, "Bear with me, but, you know, I've 15 already been down this road with the company. I'd rather 16 not take on the responsibilities of a project and the 17 operation of the company."</p> <p>18 He said, "That's fine. You come back and take 19 care of this project, focus exclusively on this project, 20 and I will set you aside with a team. And you press on 21 because we have a lot of ground to make up."</p> <p>22 His estimate was we were two months behind on the 23 contract, and we had three months to finish it -- for a 24 five-month activity.</p> <p>25 Q And so you came back to CSI Aliso?</p>
<p style="text-align: right;">Page 23</p> <p>1 as well.</p> <p>2 During my career, I was involved in the work of 3 many power plants. Those power plants were designed to 4 burn coal, natural gas, and biomass.</p> <p>5 Prior to joining AUS, I worked for 19 years with 6 LG&E Energy. LG&E Energy was a wholly owned subsidiary of 7 Louisville Gas and Electric Utilities with Kentucky 8 Utilities in Kentucky. The LG&E was an independent 9 subsidiary.</p> <p>10 We designed -- we developed -- first of all, we 11 developed independent power projects that we developed. 12 We designed them. And in most cases, we constructed those 13 power plants.</p> <p>14 There were 22 power plants during my career, both 15 in the U.S. and South America.</p> <p>16 Q Thank you, Mr. Gubser. And could you describe 17 the positions that you held at the company CSI Aliso?</p> <p>18 A Yes. It's -- at AUS, I was the chief operating 19 officer through 2004. And following that, the president 20 until 2006. Whereupon, in the end of April of 2006, I 21 resigned my position to explore a new business 22 opportunity.</p> <p>23 And after I had left, I learned -- of course, 24 later on, you'll find out why -- AUS was sold to Catalytic 25 Solutions. And therefore, it became CSI Aliso.</p>	<p style="text-align: right;">Page 25</p> <p>1 A So I relented. I said, "Under those conditions, 2 I'll come back."</p> <p>3 So I joined them in mid-October 2006. And at 4 that time, I received the documents defining the scope and 5 the work relative to the design and fabricate equipment.</p> <p>6 And there was no mention in the addendum to the 7 agreement whatsoever, in the purchase order, of 8 installation.</p> <p>9 Q So just for the record, I mean, the documents 10 that you're referring to, Mr. Gubser -- is that the Master 11 Services Agreement of March 2006?</p> <p>12 You were still President and signed that 13 document; is that correct?</p> <p>14 A I was.</p> <p>15 Q Okay. So that was the March 2006.</p> <p>16 And then sometime in June or before you came 17 back, they finalized the scope of the work. And that's, 18 you know, for the, what we refer to as, an "addendum."</p> <p>19 And -- and you came back in October.</p> <p>20 When you came back in October, what was the scope 21 of the project?</p> <p>22 A The scope of the project was design and fabricate 23 equipment, ship it to the site for others to construct -- 24 or for someone to construct -- construct.</p> <p>25 MS. VERDUGO: So that is Appellant's</p>

<p style="text-align: right;">Page 26</p> <p>1 Exhibit 11 -- that's the June 2006 letter just for 2 reference. 3 BY MS. VERDUGO: 4 Q And -- and again, you were not there in June, but 5 when you came back in October, you reviewed those 6 documents; is that correct? 7 A I did. And -- and it was in the form of a 8 purchase order. 9 Now, let me go back to the Master Service 10 Agreement, if I might. 11 Master Service Agreement was an agreement as a 12 certified contractor -- by "contractor," I use that term 13 loosely because that doesn't mean anything but you're -- 14 you've been -- performed due diligence so that you can do 15 work for the refinery. 16 You know the rules. We have looked at your 17 experience and background. And we -- we say, "Okay. If 18 we give you some work, here are the general terms and 19 conditions of doing work at the Flying J Refinery." 20 There was no attachment as to the work that was 21 going to be involved. 22 Q And so what did you -- describe the work that was 23 to be involved. 24 A Well, there was a proposal -- a final proposal, I 25 learned when I returned in October. The final proposal</p>	<p style="text-align: right;">Page 28</p> <p>1 Q So this is all the third-party -- the third-party 2 subcontractors fabricated all the pieces of the SCR System 3 that A -- AUS/CSI Aliso designed? Is that engineered? 4 A Yes, we design and engineered them. They supply 5 it, and we ship -- delivered them to the site. 6 Q Mr. Gubser, I'm going to show you what is 7 Appellant's Exhibit 7 -- I'll give everyone a chance to 8 find that -- it's Appellant's Exhibit 7. 9 This is the Flying J SCR System schematic. And I 10 believe this explains what the SCR System is. 11 Using this exhibit, can you describe what this 12 SCR System is and its purpose? 13 A Yes. It's a -- a very complicated process, but 14 I'm going to simplify it significantly. 15 The refinery process is in -- involved in heaters 16 and -- and -- and boilers. They would fire their heaters 17 and boilers with natural gas and/or refinery gas that 18 would fire their product. 19 The pipe in the various processes contained the 20 product -- the product that they were going to refine into 21 other products. So there was no contact between the flue 22 gas or the refinery -- the hot gases that are going 23 through it. It was strictly a method of transferring heat 24 from the furnace to the product in the pipes. 25 And -- and in the process, it was heated to</p>
<p style="text-align: right;">Page 27</p> <p>1 presented in June of 2006 -- that was the substance of the 2 detailed proposal for the work -- for design and 3 fabrication. 4 Q And could you describe this design and 5 fabrication process of the system and your role once you 6 came back. 7 A I was a project manager. And therefore, I had 8 the responsibility of performance -- performance for 9 getting the equipment fabricated according to the 10 standards that we had, the -- the design specifications, 11 to ensure the quality was -- was present relative to all 12 the fabricators, and to administer the schedule to ensure 13 that we got things to the site as we -- as necessary. 14 Now, we -- we hired third-party contractors. And 15 we gave them specific specifications; timelines; terms and 16 conditions; and we also gave them what I discovered in the 17 Master Service Agreement and received in October -- the 18 tax-exempt certificate. 19 They all required it to be a part of the purchase 20 order that went to each third-party fabricator. 21 Those third-party fabricators were people that 22 made components -- the equipment: tanks, pumps, fans, 23 skids, structural steel, SCR reactors, catalyst, and items 24 such as that, and all the electrical equipment that goes 25 with it.</p>	<p style="text-align: right;">Page 29</p> <p>1 specific temperatures and then -- then the -- the gas, 2 after it was -- completed its heating process, went out to 3 the stack. 4 And at the green spot on that exhibit is where 5 that gas is diverted from the stack to our reactor. In 6 the reactor, there are two catalyst membranes that are 7 critical in reducing carbon monoxide and NOx, which are 8 criteria in the air pollution control district 9 specifications. 10 So the first catalyst is carbon monoxide -- what 11 we all know is a gas that has been focused in the media 12 and so forth to reduce our footprint on carbon monoxide -- 13 that was reduced in that first catalyst membrane, which 14 was an exotic metal membrane to -- from, say, a hundred 15 pounds of carbon monoxide to ten. So it was a 90 percent 16 reduction. 17 That gas then passes into that in-between 18 membrane with those little holes. And that's where the 19 ammonia vapor is injected ahead of the -- of the SCR 20 catalyst. 21 The tungsten molybdenum catalyst then reacts with 22 the ammonia. And that NOx is reduced to free nitrogen and 23 water. And that again is reduced by 90 percent. 24 So that's fundamentally what happens in the 25 reactor -- the SCR reactor. And then that same gas goes</p>

<p style="text-align: right;">Page 30</p> <p>1 back out to the same stack. Only, its -- its emissions 2 have been reduced to the required levels. 3 The -- you can see down at the bottom of that 4 example is where the ammonia tank is and then a vaporizing 5 skid, which we'll refer to later. 6 Q Thank you, Mr. Gubser. 7 And to reiterate what you said before, under the 8 MSA and the final scope, was the company contracted to 9 install the SCR System that it designed and fabricated at 10 that time? 11 A No. It was not -- it was not contracted to do 12 any installation whatsoever. 13 Q And at that time, did the company receive a 14 resale for the SCR System? 15 A Yes. When I returned in October, the resale 16 certificate came forward. 17 Now, it's also important to note that the 18 general, what I call, "boilerplate" Master Service 19 Agreement was just an authorization that you can do work, 20 and you're going to do some work -- whatever that's 21 defined -- sometime in the future. And that work had 22 various terms and conditions in it, as any contract would. 23 One of the items that's mentioned in that 24 contract specifically is that there would be a resale 25 certificate issued. And a part of what we did with the</p>	<p style="text-align: right;">Page 32</p> <p>1 deadline, if you recall from the agreement that you -- the 2 timeline over here, is that we had to be fully operational 3 and pass the test and receive our operating permit by 4 June 1 of '07. 5 So time was of the essence. We had equipment all 6 over the country -- and some out of the country -- that we 7 were building. And that had to all be fit into place and 8 installed and then commissioned, aligned, commissioned, 9 tested, certified as passed. 10 And the deadline was fixed. Flying J would have 11 to shut down those processes if we didn't achieve that. 12 It was a very intense time. 13 So in December, they -- they inquired, "Would you 14 please submit a quote for installation." 15 And we complied, put together a fixed price 16 quotation -- that -- it had to be fixed price -- and it 17 was submitted in January of '07. And in late January, we 18 were told we were awarded the installation contract. 19 And it was -- from the timeline, you can see it 20 was February 9th before we got the final amendment to the 21 Master Service Agreement for that installation process. 22 Q And, Mr. Gubser, once you had that installation 23 contract, what was your role with respect to the 24 installation? 25 A Well, I had that responsibility from the</p>
<p style="text-align: right;">Page 31</p> <p>1 individual fabricators was to -- we were required to pass 2 that resale certificate on to each and every fabricator, 3 which we did during our design and fabrication. 4 Q And, Mr. Gubser -- well, first, for the record, 5 the resale certificate we're referring to is Appellant's 6 Exhibit 4. 7 Mr. Gubser, was it common for the company to 8 receive resale certificates from these types of projects? 9 A Depending on the project configuration. But at 10 any time that we did a design and supply, which was a 11 number of times, we would receive a certificate. 12 So it was common in certain -- those 13 circumstances. 14 Q Thank you, Mr. Gubser. 15 Mr. Gubser, was there a point when the company 16 was contracted to install the system? 17 (Reporter admonition) 18 BY MS. VERDUGO: 19 Q Was there a point when the customer was 20 contracted to install the system? 21 A Excuse me for a minute. 22 Q Sure. 23 A During the critical phase of starting to deliver 24 the equipment that was contracted on -- on the first 25 contract, we were asked in December -- because the</p>	<p style="text-align: right;">Page 33</p> <p>1 beginning. And they didn't want to deviate; so I had the 2 responsibility at the end -- which was to set up the 3 construction site operation, which involved a number of 4 personnel and an office; a construction manager; 5 discipline inspectors; administrative staff for payroll 6 and so forth. That had to be set up. 7 In addition, we were preparing subcontract bids 8 from accepted Flying J Big West accepted subcontractors. 9 So we had to put together that team. 10 But my responsibility -- overall responsibility 11 was to ensure that the design was completed on schedule 12 and that the product met all the criteria. 13 Q So in the installation process -- can you 14 describe the installation process at the site? 15 A We knew that this project -- and it was designed 16 in such a way that this equipment would be -- would be 17 fabricated as an assembly -- as -- as a completed 18 component that had to be connected. 19 That included the -- the large fans, the 20 reactors, the continuous emission monitoring module, and 21 the duct work, and the structural steel. 22 So all of that material, after it was designed -- 23 we agreed with each individual supplier that it had to be 24 built in the largest shippable piece possible -- all the 25 steel, all the duct work, and the major components -- the</p>

<p style="text-align: right;">Page 34</p> <p>1 tank had to be completed with all of its components.</p> <p>2 And the skid was completely assembled so that,</p> <p>3 when it arrived, our responsibility was to fasten it to</p> <p>4 the foundations, do the necessary alignments, and then</p> <p>5 pick up these individual large shippable elements.</p> <p>6 Once the equipment was attached to the</p> <p>7 foundations, then we would start assembling this</p> <p>8 structural steel and the duct work -- much like you would</p> <p>9 put a LEGO set or an erector set together -- to reach</p> <p>10 the -- and you'll see when we show you a picture, the --</p> <p>11 the fact is that we got to go all the way up to the top of</p> <p>12 where the stack is and tie it in.</p> <p>13 So it was built from the ground up once</p> <p>14 everything was set on the ground.</p> <p>15 Q And you mentioned some contracts with</p> <p>16 subcontractors.</p> <p>17 What was the role of the subcontractors in the</p> <p>18 installation subcontract?</p> <p>19 A We had two major subcontractors: One was Total</p> <p>20 Western. That was an approved subcontractor by Big West.</p> <p>21 And they performed the civil and mechanical work.</p> <p>22 The civil work was to excavate, make foundations,</p> <p>23 pour the concrete, prepare the concrete to receive the</p> <p>24 components.</p> <p>25 Adamson Electric -- so they provided the -- the</p>	<p style="text-align: right;">Page 36</p> <p>1 You can see the refinery -- first of all, don't</p> <p>2 pay any attention to the date stamps on the -- I mean, on</p> <p>3 the photographs. You know, that's one of those early</p> <p>4 digital cameras that never could keep track of things.</p> <p>5 So you can see all the stacks and the other</p> <p>6 processes in the refinery in the -- the background.</p> <p>7 But what you're looking at in the foreground</p> <p>8 immediately is the ammonia skid. The one that vaporizes</p> <p>9 the liquid ammonia from the tank, heats it, vaporizes it,</p> <p>10 and send its off to the ammonia grid ahead of the SCR</p> <p>11 catalyst.</p> <p>12 Even when your tank is right adjacent -- because</p> <p>13 that's where the liquid ammonia is stored -- and those two</p> <p>14 items were set. First, the tank was set into its</p> <p>15 containment area and bolted down. And then the skid came</p> <p>16 in assembled with all the instruments you see there.</p> <p>17 Adamson Electric, to be specific, connected those</p> <p>18 little conduits and so forth to the motors and the control</p> <p>19 center. And -- and -- that connected everything to our</p> <p>20 control system.</p> <p>21 Q Thank you, Mr. Gubser.</p> <p>22 MS. VERDUGO: And the second picture we're going</p> <p>23 to show is Appellant's Exhibit 24, photo 2.</p> <p>24 BY MS. VERDUGO:</p> <p>25 Q Do you have this one?</p>
<p style="text-align: right;">Page 35</p> <p>1 labor and miscellaneous materials for that work.</p> <p>2 The electrical subcontractor was Adamson</p> <p>3 Electric -- again, an approved contractor. They were</p> <p>4 responsible for connecting the motors and the instruments</p> <p>5 such that they could communicate with our control system.</p> <p>6 And they provided the labor and the miscellaneous</p> <p>7 materials to do that.</p> <p>8 Q Thank you, Mr. Gubser.</p> <p>9 MS. VERDUGO: For the record and for reference,</p> <p>10 the two subcontractor agreements we're -- we're referring</p> <p>11 to are Appellant's Exhibit 14 and Appellant's Exhibit 15.</p> <p>12 BY MS. VERDUGO:</p> <p>13 Q Mr. Gubser, I have -- we have two pictures that</p> <p>14 we're going to show you, showing the SCR System already in</p> <p>15 place. For each picture, I'm going to ask you to describe</p> <p>16 what we're seeing and how the -- the system was installed.</p> <p>17 MS. VERDUGO: So the first one is -- the first</p> <p>18 picture is Appellant's Exhibit 23, photo 1. It looks like</p> <p>19 this. I don't know if anybody has to refer to it.</p> <p>20 BY MS. VERDUGO:</p> <p>21 Q Do you have this in front of you, Mr. Gubser?</p> <p>22 A Yes -- yes, I do.</p> <p>23 And if you refer back to this simple flow</p> <p>24 diagram, you'll see the ammonia tank and the skid. That's</p> <p>25 what we're looking at in the picture.</p>	<p style="text-align: right;">Page 37</p> <p>1 A Yes.</p> <p>2 Q Okay. Can you please describe what we're looking</p> <p>3 at there?</p> <p>4 A This gives you a -- a good appreciation of the --</p> <p>5 of the work.</p> <p>6 The first assignment we had very clearly</p> <p>7 stated -- was that the equipment had to be -- had to be</p> <p>8 placed in a location that didn't affect the refinery</p> <p>9 process at all.</p> <p>10 It couldn't interfere with its operation because</p> <p>11 it was still running. And it couldn't get in the way</p> <p>12 of -- of their maintenance requirements if they had to go</p> <p>13 in and do maintenance.</p> <p>14 So our responsibility was to do all of our work,</p> <p>15 set the equipment, build our erector set from the bottom</p> <p>16 up without affecting their operation so they could</p> <p>17 continue.</p> <p>18 It was -- so the process there that you</p> <p>19 see that -- to the top left -- is sort of a brownish</p> <p>20 stack -- that is the refinery stack.</p> <p>21 Those other two pipes that grip in the top of</p> <p>22 that vicinity -- the shiny one is the -- is the gas coming</p> <p>23 down that would have normally gone out the stack, has been</p> <p>24 redirected to come down to the grate, and go through the</p> <p>25 process that we described earlier.</p>

<p style="text-align: right;">Page 38</p> <p>1 The other one going back up is returning it back</p> <p>2 to the stack.</p> <p>3 So you can appreciate that all this happens --</p> <p>4 everything happens until you absolutely connect it to the</p> <p>5 stack. So everything's built independent of that.</p> <p>6 There's no tie-in to any of their structures.</p> <p>7 That was a challenge.</p> <p>8 Q And that was a requirement of the design?</p> <p>9 A That was a requirement and a challenge.</p> <p>10 Q So -- so -- if -- if I understand correctly, from</p> <p>11 the first contract, you had subcontractors who fabricated</p> <p>12 it.</p> <p>13 And they delivered those pieces preassembled to</p> <p>14 the site; is that correct?</p> <p>15 A Yes.</p> <p>16 Q And then your other subcontractors -- Total</p> <p>17 Western and Adamson Electric -- took those pieces and</p> <p>18 installed it from the ground up; is that correct?</p> <p>19 A That's correct.</p> <p>20 Q And then your team supervised and coordinated the</p> <p>21 whole process?</p> <p>22 A We did supervise the subcontractors, directed</p> <p>23 them. We made sure their equipment was put in and all the</p> <p>24 alignments prepared, all the cold commissioning was taken</p> <p>25 care of.</p>	<p style="text-align: right;">Page 40</p> <p>1 So taking it apart -- again, for the refinery</p> <p>2 process to operate, the gases could continue to go out the</p> <p>3 stack -- we just barely -- we shut off the -- the flow of</p> <p>4 gases out of and back into the stack, and they continue to</p> <p>5 operate.</p> <p>6 We disconnect, unbolt, and take apart the pieces</p> <p>7 we just put together. And then we unbolt the equipment at</p> <p>8 the -- from the foundations and lift them off with cranes</p> <p>9 and trucks and take them away.</p> <p>10 So it's significantly shorter than it takes to</p> <p>11 put things together and align everything.</p> <p>12 Q So you're saying, if the SCR System is removed,</p> <p>13 there would be no disruption --</p> <p>14 A None.</p> <p>15 Q -- to the operation?</p> <p>16 A There was just the same requirement that we had</p> <p>17 going in. We can't disrupt the refinery.</p> <p>18 Q So there -- there was a requirement that on</p> <p>19 installation.</p> <p>20 (Reporter admonition)</p> <p>21 BY MS. VERDUGO:</p> <p>22 Q So there was a requirement that, on installation,</p> <p>23 you couldn't disrupt operations. And, on removal, it --</p> <p>24 it wouldn't disrupt operations.</p> <p>25 A Correct.</p>
<p style="text-align: right;">Page 39</p> <p>1 And the schedule was frightening.</p> <p>2 Q Mr. Gubser, you described the installation from</p> <p>3 the ground up.</p> <p>4 Was there any fabrication performed on -- at the</p> <p>5 site? Meaning, were pieces put together prior to being</p> <p>6 placed on the ground?</p> <p>7 A No. As I said before, we had -- the criteria was</p> <p>8 to -- to ship the largest pieces we possibly could by</p> <p>9 truck, which had -- had to be delivered by truck.</p> <p>10 And then -- so that all we were -- had to do was</p> <p>11 to do the connections. The connections were the critical</p> <p>12 things. And they would speed up the whole process.</p> <p>13 So we performed all that work in the -- in the</p> <p>14 fabricator shop and did just the connections and the</p> <p>15 assembly and the building from the foundation up.</p> <p>16 Q Thank you, Mr. Gubser.</p> <p>17 In your extensive experience, could the SCR</p> <p>18 System be readily removed without damage to the structure</p> <p>19 or to itself once it was installed?</p> <p>20 A Well, it's not hard to imagine for anyone that</p> <p>21 has gone through what we suggested -- how it was put</p> <p>22 together. But it's much more difficult to fit those</p> <p>23 pieces together than it is to take them apart.</p> <p>24 You can demo a house much faster than you can</p> <p>25 assemble it. We all know that.</p>	<p style="text-align: right;">Page 41</p> <p>1 Q Is that correct?</p> <p>2 A Yes.</p> <p>3 Now, I might point out one of the process</p> <p>4 importance -- and this is from an engineer's point of</p> <p>5 view, maybe not yourselves. But the critical -- another</p> <p>6 critical component is that the -- the through point of the</p> <p>7 refinery could not change. Okay?</p> <p>8 So that was part of the operating permit that</p> <p>9 they would get. They couldn't change the flow because we</p> <p>10 did certain things to help their process.</p> <p>11 So likewise, in our design, we had to put in</p> <p>12 operating flexibility. Such that, not only could we meet</p> <p>13 the standard, but we could meet the standard under varying</p> <p>14 conditions.</p> <p>15 So that was a -- a -- a flexibility that had to</p> <p>16 be designed for our own protection to meet the guarantees.</p> <p>17 Q Thank you.</p> <p>18 MS. VERDUGO: So for the panel, I'm going to ask</p> <p>19 Mr. Gubser some questions on some of the invoices that are</p> <p>20 provided.</p> <p>21 And this is with respect to the motion that we</p> <p>22 submitted with respect to the taxable measure and some of</p> <p>23 the amounts we felt should have been excluded from the</p> <p>24 taxable measure.</p> <p>25 So for the record, this is Appellant's</p>

<p style="text-align: right;">Page 42</p> <p>1 Exhibit 21, which are the invoices referenced in the 2 motion.</p> <p>3 I'm just going to go through a couple of 4 examples, not all of them. The first one being Invoice 5 18, which, again, is part of Exhibit 21.</p> <p>6 BY MS. VERDUGO:</p> <p>7 Q Mr. Gubser, you have Invoice 18 in front of you; 8 is that correct?</p> <p>9 A Yes.</p> <p>10 Q Yes?</p> <p>11 And you've reviewed these invoices before with 12 me; is that right?</p> <p>13 A Yes. That was -- yes -- my responsibility. I 14 had to prepare the invoices.</p> <p>15 Q You prepared these invoices that were submitted 16 to Big West?</p> <p>17 A Well, I -- together with my accountant in the 18 office, yes.</p> <p>19 Q Can you explain, sort of, the different sections 20 of this invoice? And this, again, is Invoice Number 18, 21 dated March 1, 2007, as an example.</p> <p>22 A Yes. There are basically three elements here 23 that you can see divided by the double yellow lines.</p> <p>24 The first one is that Service Order ending in 25 "937." So what's going on here is that we're invoicing</p>	<p style="text-align: right;">Page 44</p> <p>1 The last item was the construction phase.</p> <p>2 That -- Service Order 992. And there is a charge for 3 "construction management," which was my construction team 4 and support services going on there.</p> <p>5 The cost and partial payments at those 6 percentages were for work complete for both the mechanical 7 contractor and the electrical contractor.</p> <p>8 Q So, Mr. Gubser, you -- you mentioned, to my 9 understanding, the first part says "total billing engineer 10 and equipment contract."</p> <p>11 That's the first contract for the design and 12 fabrication; is that correct?</p> <p>13 A Yes.</p> <p>14 Q First section.</p> <p>15 And then, the middle section, you said, was the 16 duct work. And the third section was the installation 17 contract.</p> <p>18 The construction management -- you mentioned 19 that's your installation and supervision?</p> <p>20 A Yes.</p> <p>21 Q And the subcontractor costs were total Big 22 Western and Adamson Electric; is that correct?</p> <p>23 A Yes.</p> <p>24 Q Thank you.</p> <p>25 So the next sample invoice that we want to note</p>
<p style="text-align: right;">Page 43</p> <p>1 for the final delivery of the SCR reactors.</p> <p>2 Then the CEMS was 75 percent done; so we had a -- 3 a partial payment on -- on that work. The CEMS, for your 4 information, is called a "Continuous Emission Monitoring 5 System."</p> <p>6 That system is continuously managing and 7 controlling our ammonia flow and our performance. It's 8 also recording and submitting to the agency, realtime, the 9 emission data. It's a very sophisticated control system.</p> <p>10 But again, that control system had nothing to do 11 with the refinery control system. It was completely 12 independent.</p> <p>13 So the next item is the -- the H11 fan, which was 14 delivered -- so the final payment on that. And the 15 instrumentation controls delivery, too. We had to break 16 it up into segments for different areas. So that value at 17 that point was for those items.</p> <p>18 The next group is Service Order ending in "103." 19 That was for the delivery of the duct work.</p> <p>20 Now, that was probably my fault that I used the 21 term "construction." But it was the delivery of the duct 22 work, period. And it's Phase 1. So that's an imperfect 23 description.</p> <p>24 The next one was all those -- both of those parts 25 were part of the design and fabricate.</p>	<p style="text-align: right;">Page 45</p> <p>1 is Invoice Number 38, dated June -- July 12, 2007. Again, 2 that's Exhibit 21, Invoice 38.</p> <p>3 A Okay. The first part is -- is the construction 4 management.</p> <p>5 Now, by the owner's -- by our agreement with the 6 owner, 10 percent retention was withheld from every 7 monthly progress payment for construction management.</p> <p>8 So once the project is completed, that 10 percent 9 retention was paid provided that the work was fully 10 submitted. And that's all the engineering work -- all the 11 drawings, all the specifications, and the manuals.</p> <p>12 The next item is the construction subcontractor. 13 10 percent was withheld from their payments. As you can 14 appreciate, you don't want to pay -- pay 100 percent of 15 any progress payment because you want to ensure the 16 quality is -- is complete, there aren't any problems or 17 corrections that have to be made.</p> <p>18 So that amount of money is withheld to -- to 19 ensure that, once everything is straightened out, we're 20 willing to accept their work, and that retention would be 21 paid.</p> <p>22 Q So this invoice, again, represents construction 23 management, which was the CSI Aliso installation --</p> <p>24 A Yes.</p> <p>25 (Reporter admonition)</p>

<p style="text-align: right;">Page 46</p> <p>1 BY MS. VERDUGO:</p> <p>2 Q So the construction management's 10 percent --</p> <p>3 those were invoices where you withheld 10 percent --</p> <p>4 (Reporter admonition)</p> <p>5 MS. VERDUGO: Sorry. I'll repeat myself.</p> <p>6 BY MS. VERDUGO:</p> <p>7 Q The construction management -- the 10 percent</p> <p>8 with -- withholding was on your installation supervision</p> <p>9 work.</p> <p>10 Would that be correct?</p> <p>11 A Yes.</p> <p>12 Q And then, the second part of that Phase 2</p> <p>13 construction subcontractor -- those are the 10 percent</p> <p>14 withheld with respect to work on the Total Western and</p> <p>15 Adamson Electric; is that correct?</p> <p>16 A Yes.</p> <p>17 Q Okay. So the next invoice we want to point --</p> <p>18 point out is the Invoice 63, also in Exhibit 21 -- Invoice</p> <p>19 63.</p> <p>20 A This was the -- the final closeout invoicing for</p> <p>21 the project.</p> <p>22 We had various provisions in the construction</p> <p>23 contract relative to contingencies and shared</p> <p>24 responsibilities. So all of that was accounted for and</p> <p>25 identified and agreed to with Flying J, or Big West.</p>	<p style="text-align: right;">Page 48</p> <p>1 Where we left off -- we were about to turn it to</p> <p>2 CDTFA, if they have any questions for the witness.</p> <p>3 MR. NOBEL: I'm sorry. We have no questions for</p> <p>4 the witness. Thank you.</p> <p>5 JUDGE KWEE: Okay. Then I think the panel has</p> <p>6 some questions for -- for the witness. I guess I'll</p> <p>7 start.</p> <p>8 The first is just a technical clarification. I</p> <p>9 think at some points -- were referring to the customer as</p> <p>10 "Big West" and at other points "Flying J."</p> <p>11 Is Flying J just a dba? Or is it the same?</p> <p>12 THE WITNESS: Well, Flying J is the Big West</p> <p>13 Refinery. That's the name of the refinery.</p> <p>14 JUDGE KWEE: Okay.</p> <p>15 THE WITNESS: So I -- I -- I've always just</p> <p>16 referred to it -- you'll have to excuse me -- Flying J</p> <p>17 because that's what we called it in -- in the work.</p> <p>18 JUDGE KWEE: Okay. That -- that's perfect.</p> <p>19 Thank you. I -- I just wasn't sure. Because I saw that</p> <p>20 in the invoices too. So that is helpful.</p> <p>21 And then, I did have a question -- because when</p> <p>22 you were talking about -- well, I guess, depending on the</p> <p>23 first transaction -- or the first half of the</p> <p>24 transaction -- I guess, depending on -- on which -- which</p> <p>25 side you're looking at -- where you had the design and the</p>
<p style="text-align: right;">Page 47</p> <p>1 And the equipment contract was a final payment on</p> <p>2 that project. So this is the final closeout billing for</p> <p>3 the work.</p> <p>4 Q Thank you, Mr. Gubser.</p> <p>5 MS. VERDUGO: And again, those invoices refer to</p> <p>6 the motion that we submitted and explained why some of the</p> <p>7 costs that were not removed by the auditors under the last</p> <p>8 appeal were not removed.</p> <p>9 They were clearly for installation labor, final</p> <p>10 payments, or withheld payments in addition to others that</p> <p>11 we pointed out in our motion.</p> <p>12 Thank you, Mr. Gubser, for your time.</p> <p>13 And I believe the Department goes next?</p> <p>14 JUDGE KWEE: First, I'd turn it over to the</p> <p>15 Department.</p> <p>16 Do you have any questions for this witness?</p> <p>17 MR. NOBEL: May we have five minutes to confer</p> <p>18 beforehand, please? Thank you.</p> <p>19 JUDGE KWEE: Yeah. Certainly. We'll go for a</p> <p>20 five-minute break.</p> <p>21 It's currently 2:00 o'clock. We'll reconvene at</p> <p>22 2:05. Thank you.</p> <p>23 (Recess taken)</p> <p>24 JUDGE KWEE: Okay. So then we're going back on</p> <p>25 the record in the Appeal of CSI Aliso, Inc.</p>	<p style="text-align: right;">Page 49</p> <p>1 fabrication.</p> <p>2 And you were talking about building it to the</p> <p>3 largest possible piece --</p> <p>4 THE WITNESS: Yes.</p> <p>5 JUDGE KWEE: -- before shipment?</p> <p>6 So was this, I guess, assembled outside -- in</p> <p>7 California? Or outside of California?</p> <p>8 THE WITNESS: It was -- you're -- you're really</p> <p>9 taxing my recollection. Okay?</p> <p>10 JUDGE KWEE: Okay.</p> <p>11 THE WITNESS: Because we're talking about</p> <p>12 16 years ago.</p> <p>13 So we had a number of projects going. So I --</p> <p>14 yes. Certainly, some of it was fabricated out of -- some</p> <p>15 of it or maybe most of it in California -- but some of</p> <p>16 it -- I know the fans were made back East.</p> <p>17 And of course, you wouldn't ship the steel very</p> <p>18 far; so that would be made locally. And -- and the duct</p> <p>19 work would be made locally.</p> <p>20 So I -- I -- I can't recall exactly where each</p> <p>21 major element was.</p> <p>22 The skid was made locally, the ammonia tank. The</p> <p>23 catalyst was made out of California for sure. I -- I can</p> <p>24 say that for sure.</p> <p>25 JUDGE KWEE: Okay. So some of it -- I guess -- I</p>

<p style="text-align: right;">Page 50</p> <p>1 guess they came from different sources -- some inside the 2 state, some outside the state. 3 THE WITNESS: Yes. 4 JUDGE KWEE: I got that. That is helpful. 5 And then, I guess, with respect to the design, 6 did that include everything that was required to install 7 it on-site? 8 Or was there additional work, like, you know -- 9 like, building a foundation? Or I -- I guess I'm just 10 wondering to what extent -- how complete was the designed 11 product under -- I'll call it "Phase 1" so as to not, you 12 know -- 13 THE WITNESS: Well -- 14 JUDGE KWEE: -- make a decision on one side or 15 the other yet. 16 THE WITNESS: Okay. Of course, the 17 contractors -- the subcontractors built what we drew on 18 our plans and specifications. So we designed the -- the 19 foundations. Okay? 20 We had to get building permits for the structures 21 and for the work. So we had to get local Bakersfield 22 building permits. So we did all of the design, and they 23 did the installation. 24 Does that answer your question? 25 JUDGE KWEE: Yes, I think that helps.</p>	<p style="text-align: right;">Page 52</p> <p>1 THE WITNESS: Okay? They would furnish the 2 concrete. That's the miscellaneous material. They 3 furnished that material. 4 We didn't go out and buy concrete. You can't 5 really do that. 6 JUDGE KWEE: Right. Yeah. I -- I guess what I 7 was just trying to figure out was to what extent, like, 8 everything was furnished by you in the first phase or if 9 it was a significant amount in the second phase of the 10 contract. 11 THE WITNESS: Okay. Let me see if I can help. 12 The equipment and all the skids and all the duct 13 work and all the steel was all furnished by us. 14 The -- the concrete couldn't be furnished by us 15 because it's -- it's an active product that would set up. 16 The rebar we didn't buy. It's much more efficient for 17 them to buy the rebar and supply the concrete and that. 18 Now, on the electrical side, there's -- there's 19 major components on the electrical side. We bought the 20 major components -- the motor control center, the 21 starters -- a lot of that electrical we bought and shipped 22 to the site. 23 The electrical contractor can then set it up on a 24 stand -- or it came in a -- in a -- a motor control 25 center -- it comes as a cabinet like you have around here.</p>
<p style="text-align: right;">Page 51</p> <p>1 And I guess I'm wondering -- so, for example, you 2 know, you designed the foundation. 3 Was the -- the cost of the -- is that cement mix, 4 like, for example -- like, the cost of those pieces -- 5 that was something that you paid for and furnished? 6 Or is that something that was furnished and 7 installed -- 8 THE WITNESS: No. No. The mechanical contractor 9 built the foundation to our specification for what 10 concrete to use, what rebar to use, and how deep it had -- 11 how thick it had to be, how deep it had to be. 12 So they did the installation -- all of it. They 13 didn't do any design. 14 JUDGE KWEE: Okay. So I guess, for example, with 15 some of the invoices that you were talking about just a 16 minute ago, with the 10 percent -- I think it was called, 17 like, a -- was it "retention"? -- or -- 18 THE WITNESS: Yes. 19 JUDGE KWEE: That was -- like, the subcontractor 20 would, for example -- they would purchase the specific 21 items that you said had to be used. And then they would 22 furnish and install that. And you would -- 23 THE WITNESS: They furnished -- I would call it 24 "miscellaneous materials." 25 JUDGE KWEE: Okay.</p>	<p style="text-align: right;">Page 53</p> <p>1 So those were all provided by us, and they set it 2 and connected the conduit to it. 3 Does that help? 4 JUDGE KWEE: Yeah. So, I mean, it sounds like 5 there -- there was a lot of work involved in the -- in the 6 installation of -- of the product that you designed and 7 fabricated and shipped to the sites. I guess -- 8 THE WITNESS: Well, yeah. There's -- there's -- 9 you have to put all of those components -- but they were 10 all large elements. 11 JUDGE KWEE: Okay. And when you were testifying 12 earlier, you had mentioned the disassembly aspect. And I 13 just -- to make sure I understand correctly -- this wasn't 14 disassembled. 15 You were just speaking hypothetically; correct. 16 THE WITNESS: Hypothetically, yes. 17 JUDGE KWEE: Okay. Sorry. Just one minute. I'm 18 just trying to see if there were other questions I was 19 going to ask. 20 In the meantime, actually, I will turn over -- I 21 believe the panel has questions too. So I'll turn it over 22 to Judge Aldrich. 23 Judge Aldrich, did you have questions for the 24 witness? 25 JUDGE ALDRICH: Hello. This is Judge Aldrich.</p>

<p style="text-align: right;">Page 54</p> <p>1 Welcome, Mr. Gubser. I had a couple of questions</p> <p>2 for you, if you don't mind.</p> <p>3 You had mentioned during -- as Judge Kwee</p> <p>4 referred to it "Phase 1" -- there was a requirement to</p> <p>5 design, fabricate, and ship it?</p> <p>6 THE WITNESS: Yes.</p> <p>7 JUDGE ALDRICH: And so was anything -- was all or</p> <p>8 part shipped before Phase 2?</p> <p>9 THE WITNESS: No. There are many components --</p> <p>10 some, very complex -- and they were awarded the contract</p> <p>11 in Phase 1 in '06. But some of those items didn't arrive</p> <p>12 to the site until '07 -- early in '07.</p> <p>13 JUDGE ALDRICH: And the "crunch factor" that</p> <p>14 you're referring to in the time frame, where you were two</p> <p>15 months in on a five-month contract -- was that referring</p> <p>16 to Phase 1? Or --</p> <p>17 THE WITNESS: Phase 1, yes.</p> <p>18 JUDGE ALDRICH: Okay. And then -- so when you</p> <p>19 were -- you had mentioned the -- the refinery would have</p> <p>20 to shut down if it -- if it wasn't fitted and commissioned</p> <p>21 in time.</p> <p>22 THE WITNESS: Yes.</p> <p>23 JUDGE ALDRICH: That's for Phase 2 at some point?</p> <p>24 THE WITNESS: What was?</p> <p>25 JUDGE ALDRICH: That would be referring to a</p>	<p style="text-align: right;">Page 56</p> <p>1 MS. VERDUGO: Yeah. I'm sorry I -- I don't have</p> <p>2 page numbers. I only have exhibits.</p> <p>3 JUDGE ALDRICH: Okay.</p> <p>4 MS. VERDUGO: So I don't know.</p> <p>5 JUDGE ALDRICH: Actually, we can come back to</p> <p>6 that.</p> <p>7 I'll refer it back to Judge Kwee and -- to see if</p> <p>8 there's any other additional questions.</p> <p>9 JUDGE KWE: Right. I was just looking at the</p> <p>10 exhibit binder to see if I could identify which exhibit</p> <p>11 that was. And it looks like it's marked Exhibit 4, page 5</p> <p>12 of -- one second. Let me -- let me get it larger --</p> <p>13 Exhibit 4, page 5 of 8 is listed on the bottom and page 6</p> <p>14 of 8.</p> <p>15 MS. VERDUGO: What exhibit was that?</p> <p>16 JUDGE KWE: I think the address -- so I see -- I</p> <p>17 think what Judge Aldrich is referring to -- there's an</p> <p>18 Exhibit 4, page 8 of 8. And it's the page right after</p> <p>19 that.</p> <p>20 And I think, on our Exhibit Index, that's listed</p> <p>21 under Exhibit 3. I think there was a renumbering of</p> <p>22 Exhibit 3.</p> <p>23 JUDGE BROWN: I think it's actually part of</p> <p>24 Exhibit 2 because Exhibit 3 starts at page 41.</p> <p>25 JUDGE KWE: Oh, I see. Okay.</p>
<p style="text-align: right;">Page 55</p> <p>1 later period?</p> <p>2 THE WITNESS: Yes. They had a deadline -- I</p> <p>3 believe it was June 1 -- it had to be not only done -- it</p> <p>4 had to be tested.</p> <p>5 And those test results had to be available for</p> <p>6 the -- for the agency. And they had to pass, obviously.</p> <p>7 JUDGE ALDRICH: And then, are you familiar -- or</p> <p>8 I guess, have personal knowledge of the AUS -- now</p> <p>9 CSI's -- accounting system?</p> <p>10 THE WITNESS: No. I'm too far removed from that.</p> <p>11 JUDGE ALDRICH: Okay. I guess -- and this</p> <p>12 question might be more for Appellant's Counsel. And he</p> <p>13 can direct it -- or she can direct it -- if they would</p> <p>14 like to reply to it.</p> <p>15 But I was looking through the exhibits. And page</p> <p>16 38 -- there's a reference to a Steven Freeman --</p> <p>17 MS. VERDUGO: Could you repeat that. Page 38 of</p> <p>18 which exhibit?</p> <p>19 JUDGE ALDRICH: I was referring to the exhibit</p> <p>20 binder in its entirety. So that's the Amended Exhibit</p> <p>21 Binder for Appellant. Let's see.</p> <p>22 There's just an address of Steven Freeman. I</p> <p>23 guess I was wondering if that was in connection to the</p> <p>24 Schedule that preceded it on pages 30 -- I think it's</p> <p>25 pages 35 through 38.</p>	<p style="text-align: right;">Page 57</p> <p>1 MS. VERDUGO: Okay. So we're at Exhibit 2,</p> <p>2 page -- what was --</p> <p>3 JUDGE BROWN: It's towards the end of Exhibit 2.</p> <p>4 JUDGE KWE: Oh. This -- is this an exhibit to</p> <p>5 the Decision and Recommendation by CDTFA?</p> <p>6 MR. VINATIERI: Yes.</p> <p>7 JUDGE KWE: Okay.</p> <p>8 MS. VERDUGO: Yeah.</p> <p>9 JUDGE ALDRICH: So in reference to that</p> <p>10 submission, was that prepared contemporaneously with</p> <p>11 the -- with Phase 1 and Phase 2?</p> <p>12 Or was this a schedule that was prepared in</p> <p>13 preparation for the appeals conference --</p> <p>14 MS. VERDUGO: So we were not in -- Counsel -- we</p> <p>15 were not in -- involved in this appeal.</p> <p>16 JUDGE ALDRICH: Okay.</p> <p>17 MS. VERDUGO: That was a different law firm. But</p> <p>18 I do believe they worked with an accountant to provide</p> <p>19 this document. So we had to read it much as you had to --</p> <p>20 to read it.</p> <p>21 Was there a specific question other than who was</p> <p>22 on the address?</p> <p>23 JUDGE ALDRICH: I was just wondering about the</p> <p>24 foundation of the schedule that it --</p> <p>25 MS. VERDUGO: Yeah. So it -- we were initially</p>

<p style="text-align: right;">Page 58</p> <p>1 using this because it had been provided previously. We</p> <p>2 didn't have access to the same people anymore.</p> <p>3 So when we started using -- when we had access to</p> <p>4 Mr. Gubser, we started using the invoices that were used</p> <p>5 by the auditor themselves since that was already sort of</p> <p>6 vetted.</p> <p>7 So we used those invoices instead of the schedule</p> <p>8 since, again, we couldn't -- we didn't have that</p> <p>9 accountant available anymore.</p> <p>10 So again, we used the invoices which were drafted</p> <p>11 by Mr. Gubser. And he can vouch for what it -- what they</p> <p>12 represented.</p> <p>13 So that's why we submitted the motion with the</p> <p>14 invoices and not with the schedule.</p> <p>15 JUDGE ALDRICH: Thank you for the clarification.</p> <p>16 MS. VERDUGO: Thank you.</p> <p>17 JUDGE KWEE: Okay. Judge Aldrich, are you -- do</p> <p>18 you have any further questions?</p> <p>19 JUDGE ALDRICH: No further questions at this</p> <p>20 time. Thank you.</p> <p>21 JUDGE KWEE: Okay. Then I'll turn it over to</p> <p>22 Judge Brown.</p> <p>23 Judge Brown, do you have any questions for the</p> <p>24 witness?</p> <p>25 JUDGE BROWN: I think I just have one quick</p>	<p style="text-align: right;">Page 60</p> <p>1 So I did have one additional question, and that</p> <p>2 relates to the resale certificate that was accepted.</p> <p>3 Are -- are you at all familiar with the process</p> <p>4 that involved accepting the resale certificate from the</p> <p>5 customer, Big West.</p> <p>6 THE WITNESS: Specifically that resale</p> <p>7 certificate or resale certificates in general?</p> <p>8 JUDGE KWEE: Oh. I'm referring to the one that</p> <p>9 was accepted for the -- for the Phase 1 or first</p> <p>10 transaction.</p> <p>11 THE WITNESS: Well, of course, as I mentioned</p> <p>12 before, the Master Service Agreement indicated there would</p> <p>13 be one. So that was information that it was coming. But</p> <p>14 I didn't see it until I returned to the company in</p> <p>15 October.</p> <p>16 JUDGE KWEE: Okay. And so would you have any</p> <p>17 knowledge about what they could -- because resale</p> <p>18 certificates, the sale for resale, and then the big --</p> <p>19 sir, from my understanding -- was the oil refinery you</p> <p>20 said -- would you have any knowledge about who the</p> <p>21 intended resale was for?</p> <p>22 THE WITNESS: I have not the slightest clue. I'm</p> <p>23 sorry. But I didn't even know -- I wasn't even aware that</p> <p>24 they -- what they become -- became later.</p> <p>25 I -- I -- I have no clue.</p>
<p style="text-align: right;">Page 59</p> <p>1 question for the witness.</p> <p>2 On the -- on the -- the chart -- diagram behind</p> <p>3 you, on the -- the timeline, for the second transaction,</p> <p>4 it uses the phrase -- phrase "cold commissioning."</p> <p>5 And I was just wondering if you could define what</p> <p>6 that means for -- for our -- for my understanding.</p> <p>7 THE WITNESS: After you assemble -- tie</p> <p>8 everything together, you -- you then have to do certain</p> <p>9 tests such as bumping motors; making sure -- running</p> <p>10 motors, making sure they're aligned properly; running</p> <p>11 instrument checks to verify that you've got clean signals</p> <p>12 going to and coming from the instruments.</p> <p>13 So that's kind of, like, cold commissioning --</p> <p>14 okay? -- where you're just -- you're not processing any</p> <p>15 gas or anything and you're not even connected. You're</p> <p>16 just running diagnostics on what you've installed.</p> <p>17 JUDGE BROWN: So it's like a -- it's like a</p> <p>18 testing.</p> <p>19 THE WITNESS: Preliminary -- preliminary testing,</p> <p>20 yeah. But cold -- it's described that way to indicate</p> <p>21 that there's -- there's no hot gases processed.</p> <p>22 JUDGE BROWN: Thank you. I --</p> <p>23 JUDGE KWEE: Oh. Go ahead.</p> <p>24 JUDGE BROWN: You -- you can go ahead.</p> <p>25 JUDGE KWEE: Okay. This is Judge Kwee.</p>	<p style="text-align: right;">Page 61</p> <p>1 JUDGE KWEE: Okay.</p> <p>2 THE WITNESS: So I'm sorry. I didn't know, at</p> <p>3 the time, what their plans were. They held their plans</p> <p>4 pretty close to the vest.</p> <p>5 JUDGE KWEE: Okay. So it was not something that</p> <p>6 was addressed or talked about at all at that time?</p> <p>7 THE WITNESS: No. No. Nothing was divulged to</p> <p>8 us. They didn't -- they didn't -- they didn't allow that</p> <p>9 kind of information out of their corporate offices.</p> <p>10 JUDGE KWEE: Okay. Thank you.</p> <p>11 THE WITNESS: All I can assume is that there was</p> <p>12 some plan in mind.</p> <p>13 MR. VINATIERI: Don't assume.</p> <p>14 JUDGE KWEE: Okay. At this point -- I believe</p> <p>15 that was the last question I had at this point. And I</p> <p>16 believe the panel -- the panel has concluded with their</p> <p>17 questions for the witness.</p> <p>18 So I will, at this point, turn it over to CDTFA.</p> <p>19 I believe we have allocated 20 -- let me just check</p> <p>20 the calendar -- calendar that I set up -- oh, that's</p> <p>21 right -- 25 minutes for CDTFA's presentation.</p> <p>22 So I'll just wait a moment for Appellant's</p> <p>23 Representative to change their seats before I turn it over</p> <p>24 to you.</p> <p>25 MR. VINATIERI: Thank you.</p>

<p style="text-align: right;">Page 62</p> <p>1 JUDGE KWEE: Okay. So it's now approximately 2 2:30. So that would bring you to 2:55. I'll turn it over 3 to you now, CDIFA.</p> <p>4</p> <p style="text-align: center;">PRESENTATION</p> <p>5</p> <p>6 MR. NOBEL: The determination -- the 7 determination at issue is based upon a November 5, 2010 8 Audit Report disclosing a disputed measure for claimed 9 nontaxable sales for resale of \$12,168,819.</p> <p>10 This measure all relates to Appellant's -- 11 Appellant's design, fabrication, sale, and installation of 12 four select -- Selective Catalytic Reduction Systems for 13 Big West of California.</p> <p>14 As we will explain in greater detail, the 15 Department has reduced the measure in dispute by 16 \$3.1 million approximately down to \$8.984 million dollars.</p> <p>17 The issues in this appeal are whether the SCR 18 Systems are fixtures or machinery and equipment; whether 19 Appellant timely accepted a resale certificate in good 20 faith from Big West; whether the Department is estopped 21 from questioning the good faith; whether a portion of 22 Regulation 1521 is invalid; and whether there are errors 23 in the audit calculations.</p> <p>24 Appellant initially entered into a contract for 25 just the design and fabrication of the SCR Systems but</p>	<p style="text-align: right;">Page 64</p> <p>1 contract means a contract to erect, construct, or alter 2 any building, structure, fixed work, or other improvement 3 to real property.</p> <p>4 A construction contract does not include a 5 contract for the sale and installation of tangible 6 personal property such as machinery and equipment.</p> <p>7 Subdivision (a)(5) defines fixtures as items that 8 are -- that are accessory to a build -- building or other 9 structure and do not lose their identity as accessories 10 when installed.</p> <p>11 Subdivision (a)(6) defines "machinery and 12 equipment" as "property intended to be used in the 13 production, manufacturing, or processing of tangible 14 personal property; the performance of services; or for 15 other purposes not essential to the fixed works of the 16 building structure itself but which property incidentally 17 may, on account of its nature, be attached to the realty 18 without losing its identity as a particular piece of 19 equipment and, if attached, is readily removable without 20 damage to unit or to the realty."</p> <p>21 In looking at the SCR Systems we first note that 22 the real property the SCR Systems are attached to are 23 petroleum facilities and thus are considered fixed works. 24 And there is no dispute that Big West was required to 25 install these types of systems at its refineries and that</p>
<p style="text-align: right;">Page 63</p> <p>1 later agreed to install the systems pursuant -- 2 (Reporter admonition)</p> <p>3 MR. NOBEL: Little fast? All right. No problem. 4 -- but later agreed to install the systems 5 pursuant to a contractual addendum.</p> <p>6 According to the contract, Appellant was the 7 prime contractor responsible for furnishing and installing 8 the systems.</p> <p>9 The systems were installed from January 2007 10 through May 2007. There was no dispute that Appellant 11 accepted a resale certificate from Big West for the sale 12 of the SCR Systems and that Appellant did not report and 13 pay tax on the sale of the systems at issue.</p> <p>14 It is also undisputed that Big West was required 15 to reduce emissions at the refinery pursuant to San 16 Joaquin Valley Unified Air Pollution Control District Rule 17 4306.</p> <p>18 And then -- still a little too fast? 19 (Reporter admonition)</p> <p>20 MR. NOBEL: It's complex area of law, agreed? 21 -- and that it decided to do so by purchasing the 22 SCR Systems.</p> <p>23 With respect to whether the SCR System is a 24 fixture or machinery and equipment is relevant here, 25 Regulation 1521 provides that the contract -- construction</p>	<p style="text-align: right;">Page 65</p> <p>1 it would incur fines if it failed to do so pursuant to 2 Rule 4306.</p> <p>3 To be clear, the refinery cannot legally operate 4 without these types of systems. In addition, there is no 5 evidence that the SCR Systems can be functionally used 6 when not attached to the oil refinery or evidence 7 establishing that the systems either produce, manufacture, 8 or process tangible personal property that is not part of 9 the operation of the oil refinery itself.</p> <p>10 In other words, the SCR Systems functions as part 11 of the processing of petroleum production, the very 12 purpose of the refinery. Therefore, the SCR Systems are 13 essential and not merely incidental to the purpose of the 14 fixed works and thus do not meet the definition of 15 machinery and equipment.</p> <p>16 We also note the installation and incorporation 17 of the SCR Systems into the refinery took around five 18 months and required significant time and labor both in 19 adapting the refinery and in attaching the SCR Systems to 20 the fixed works.</p> <p>21 For example, during the audit, the Department 22 found that concrete foundation work took 84 days, on-site 23 fabrication and mechanical installation took 90 days, and 24 electrical work took 81 days.</p> <p>25 In addition, the photos shown in Appellant's</p>

<p style="text-align: right;">Page 66</p> <p>1 Exhibits 23 through 25 shows that the SCR Systems were 2 attached to the property via bolts, piping, electrical 3 wiring, supporting structures, and duct work and appear to 4 be no different in appearance than any other component of 5 the refinery.</p> <p>6 These photographs are consistent with the 7 declaration provided by Mr. Gubser, Appellant's Exhibit 5, 8 wherein he states the scheduled duration for delivery, 9 placement of the supporting structures, and alignment of 10 the equipment was time consuming and complex.</p> <p>11 This further establishes that the SCR Systems 12 were not incidentally attached to the refinery and did not 13 maintain its identity as a particular piece of machinery 14 and equipment.</p> <p>15 Similarly, the evidence indicates that removal of 16 the SCR Systems would require extensive labor and cost 17 including removal -- removal of all exposed duct work and 18 piping, supporting structures, and bolts securing the 19 various components of the system.</p> <p>20 That declaration submitted in appeals state that 21 this would take anywhere from three to four weeks. An 22 approximate removal time of one month indicates that the 23 SCR Systems are not readily removable.</p> <p>24 In addition, while Appellant contends that there 25 would not be extensive damage to the real property because</p>	<p style="text-align: right;">Page 68</p> <p>1 onto real property.</p> <p>2 Therefore, Appellant is a construction contractor 3 and pursuant to Regulation 1521, the retailer of the 4 fixtures it furnished and installed during the performance 5 of the construction contract.</p> <p>6 As the retailer, Appellant owes sales tax 7 measured by its gross receipts from those sales pursuant 8 to Section 6012 and 6051.</p> <p>9 While Appellant asserts that it -- it accepted a 10 resale certificate in good faith from Big West and should 11 not be liable for tax on its sales of fixtures, with 12 certain exceptions not relevant to this appeal, Regulation 13 1521 is very specific in stating that a contractor, like 14 Appellant, cannot avoid their liability for sales or use 15 tax on materials or fixtures they furnish and install by 16 taking a resale certificate from someone such as Big West.</p> <p>17 It does not simply say a contractor cannot take a 18 resale certificate. It specifically states that a 19 contractor in this scenario cannot avoid their liability 20 by taking a resale certificate.</p> <p>21 Thus as a matter of law, the re- -- resale 22 certificate has no effect. And Appellant is liable for 23 sales tax on its sale of SCR Systems to Big West.</p> <p>24 While Appellant now asserts that it was not a 25 construction contractor at the time it accepted the resale</p>
<p style="text-align: right;">Page 67</p> <p>1 some components could be readily unbolted and removed with 2 the use of a crane, Appellant's assertion ignores all the 3 piping, concrete foundations, electrical, and duct work 4 that were incorporated into the real property for the 5 specific purpose of the SCR Systems.</p> <p>6 Removal of these items would cause damage to the 7 real property. For these additional reasons, the SCR 8 Systems do not meet the definition of machinery and 9 equipment in Regulation 1521.</p> <p>10 And then, lastly, while the plain language of 11 1521 establishes that the SCR Systems are fixtures, we 12 note that our briefing in this case notes several 13 different cases -- such as Seatrain Terminals of 14 California v. County of Alameda and Crocker National Bank 15 v. City and County of San Francisco -- that apply a 16 three-prong test derived from property law when 17 determining whether or not property becomes a fixture when 18 it's incorporated into real property.</p> <p>19 The elements of this test would also show that 20 this was a fixture. So even if we weren't following 21 Regulation 1521, the test applied by the courts would also 22 find this was a fixture as well.</p> <p>23 As for the application of tax to Appellant's sale 24 of the fixtures, it is undisputed that Appellant entered 25 into a contract to furnish and install the SCR Systems</p>	<p style="text-align: right;">Page 69</p> <p>1 certificate, the sale at issue and the amounts in dispute 2 were all paid and occurred during 2007. The sale at issue 3 is the construction contract wherein Appellant furnished 4 and installed the fixture.</p> <p>5 With respect to whether portions of Regulation 6 1521 could or should be invalidated because there is an 7 alleged conflict with Section 91 and Regulation 1668, we 8 first note that CDTFA is required by law to follow 9 Regulation 1521 and must be faithful to its own 10 regulations unless a court of appeal has found the 11 regulation to be invalid.</p> <p>12 And here, no court of appeal has found it to be 13 so. Indeed, the briefings in this case discuss a number 14 of cases wherein Regulation 1521 is routinely upheld.</p> <p>15 In addition, pursuant to OTA's precedential 16 opinion in the Appeal of Talavera, OTA, respectfully, as 17 an administrative agency, also does not have the authority 18 to declare Regulation 1521 as invalid.</p> <p>19 We further note there's no actual conflict 20 between the regulation and statutes. For proper 21 administration of the sales and use tax laws and to 22 prevent the evasion of tax, Section 6091 creates a 23 presumption that all of the retailer's gross receipts are 24 subject to tax until the contrary is established and 25 places the burden to prove that the sale was not a</p>

<p style="text-align: right;">Page 70</p> <p>1 retail -- retail upon a retailer unless the retailer 2 timely and in good faith takes a certificate to the effect 3 that the property is purchased for resale. 4 However, pursuant to Regulation 1521, a 5 construction contractor is defined as the retailer of 6 fixtures and cannot avoid their liability by taking a 7 resale certificate. 8 Accordingly, when a construction contractor 9 furnishes and installs a fixture in the performance of a 10 construction contract, that sale is at retail and the 11 provisions of 6090 -- 6091 are inapplicable. 12 We further note that Section 6092 and Regulation 13 1668 require that a retailer take a resale certificate in 14 good faith. 15 Since a construction contractor is the retailer 16 of fixtures they furnish and install and Regulation 1521 17 says you can't avoid your liability for this, we interpret 18 this to mean a construction contractor cannot take a 19 resale certificate in good faith for its retail sales of 20 fixtures. 21 As for the measure of tax, during the audit, the 22 Department requests that -- a copy of the Master Contract 23 to establish the retail selling price of the fixtures. 24 However, Appellant did not provide any copies of 25 the agreement, call sheets, or other records that contain</p>	<p style="text-align: right;">Page 72</p> <p>1 without any deduction for labor, service cost, or other 2 expense. 3 Charges for installing tangible personal property 4 onto real property are not subject to tax. 5 The burden is on the taxpayer to establish 6 entitlement to any exemptions or exclusions from tax. And 7 a taxpayer has the responsibility to maintain and make 8 available for examination all records necessary to 9 determine the correct tax liability. 10 When a taxpayer challenges an NOD, the -- the 11 Department has the burden to explain the basis of the 12 deficiency. Where the explanation appears reasonable, the 13 burden of proof shifts to the taxpayer to demonstrate by a 14 preponderance of the evidence that the deficiency is 15 invalid. 16 Specific to a construction contractor's sales of 17 fixtures, Regulation 1521 provides three ways to determine 18 the sales price of fixtures manufactured by the 19 contractor. 20 First, the sales price is considered to be the 21 price at which similar fixtures and similar quantities 22 ready for installation are sold by him or her to others. 23 If similar fixtures are not sold by the 24 contractor ready for installation, then the price of the 25 fixture is deemed to be the amount stated in the price</p>
<p style="text-align: right;">Page 71</p> <p>1 price data for the SCR Systems. 2 As such, the Department -- Department was only 3 able to examine Petitioner's sales journals and determined 4 that all sales to Big West during the liability period -- 5 totaling approximately \$12.1 million -- were included in 6 the price of the fixture. 7 Subsequently, during the appeal, Appellant 8 provided approximately two-thirds of the invoices it 9 issued to Big West, which have been provided as 10 Appellant's Exhibit 21. 11 The invoices contain some itemized charges for 12 parts of the SCR System as well as lump-sum charges for 13 labor performed by Appellant and two subcontractors. 14 To account for any nontaxable charges for 15 installation of the SCR Systems, the Department reviewed 16 the invoices and accepted that amounts on the invoices 17 identified as lump-sum charges for subcontractors was the 18 best available evidence of any nontaxable installation 19 labor. 20 Accordingly, during the reaudit, subcontractor 21 charges of approximately \$3.1 million were removed from 22 the measure. 23 Section 6011 and 6012 provide that the sales 24 price of tangible personal property includes charges for 25 fabrication and all services that are part of the sale</p>	<p style="text-align: right;">Page 73</p> <p>1 lists, bid sheets, or other records of the contractor. 2 If the sales price cannot be established in 3 either of these manners, then the price of the fixtures is 4 an aggregate of material costs; direct labor; factory 5 costs attributable to fixture; excise tax; the pro rata 6 share of all overhead related to the manufacture of the 7 fixture, which importantly includes job site fabrication; 8 and a reasonable profit, which in the absence of evidence 9 to the contrary, shall be deemed to be 5 percent of the 10 sum of all preceding factors. 11 Here, despite the fact that Appellant initially 12 entered into the contract only for the design and 13 fabrication of the systems, it did not provide the Master 14 Contract with unredacted prices or otherwise provide 15 documentation establishing the price of the fixture. Nor 16 did it provide information regarding sales of similar 17 systems it sold without installation. 18 Accordingly, the journal entries and sales 19 invoices showing actual amounts paid to Appellant by Big 20 West represent the best available evidence of the sales 21 price of the fixture. 22 Furthermore, even without verifiable documents 23 establishing the actual cost of the fixture or specific 24 amounts for nontaxable installation labor, the Department 25 accepted that the charges to the subcontractors represent</p>

<p style="text-align: right;">Page 74</p> <p>1 the best available evidence of any nontaxable amounts.</p> <p>2 Appellant has proposed various figures throughout</p> <p>3 the appeals process. But we note that the Department's</p> <p>4 estimate is specifically consistent with Appellant's</p> <p>5 estimated price of the fixtures based upon the aggregate</p> <p>6 of all cost.</p> <p>7 The Department's Exhibit C, beginning on page 23,</p> <p>8 is Appellant's previous calculation of its potential tax</p> <p>9 liability showing costs related to the fixture of</p> <p>10 \$6.4 million and a potential tax liability of \$6.8 million</p> <p>11 after accounting for a 5 percent markup as well as</p> <p>12 spreadsheets that, according to Appellant, were generated</p> <p>13 by its accounting software.</p> <p>14 As explained in detail in Exhibit G, the</p> <p>15 Department did not accept this calculation because no</p> <p>16 source documents were provided and because Appellant</p> <p>17 omitted various mandatory service charges that are part of</p> <p>18 the sale of the fixture such as scheduling services,</p> <p>19 procurement services, engineering and oversight services,</p> <p>20 engineering for design support, and external engineering</p> <p>21 costs.</p> <p>22 Additionally, whereas a 5 percent markup to the</p> <p>23 cost is appropriate only in the absence of evidence of a</p> <p>24 higher markup, here, the Department calculated a markup</p> <p>25 for 26.66 percent for 2008 and 16.73 percent for 2009 by</p>	<p style="text-align: right;">Page 76</p> <p>1 In addition to being far below its own previous</p> <p>2 cost estimate, these assertions are particularly</p> <p>3 unreasonable in light of Appellant's Exhibit 12, pages 161</p> <p>4 and 187, which contain -- contain descriptions of the</p> <p>5 scope of work of the subcontractors, stating that, to</p> <p>6 minimize refinery down time and loss of production,</p> <p>7 foundation work, mechanical -- mechanical erection, and</p> <p>8 electrical installation would be completed before the</p> <p>9 final tie-ins were executed.</p> <p>10 In other words, there's evidence that the</p> <p>11 contract stressed the need to maximize taxable fabrication</p> <p>12 labor and minimize nontaxable installation labor.</p> <p>13 Exhibit 12 further describes various types of</p> <p>14 assembling and wiring that needed to be performed prior to</p> <p>15 installation and is corroborated by Mr. Gubser's</p> <p>16 declaration that there was extensive fabrication and</p> <p>17 assembly on site.</p> <p>18 Therefore, the Department's determination is</p> <p>19 reasonable and best on -- and based on the best available</p> <p>20 evidence. And the burden shifts to Appellant to</p> <p>21 demonstrate additional adjustments are warranted.</p> <p>22 Before turning to the specific reductions</p> <p>23 asserted by Appellant in it's brief, it is important to</p> <p>24 reemphasize that the reason it was necessary for the</p> <p>25 Department to estimate the liability in this matter -- and</p>
<p style="text-align: right;">Page 75</p> <p>1 comparing Appellant's recorded gross receipts to its cost</p> <p>2 of goods sold.</p> <p>3 Since Appellant did not perform any construction</p> <p>4 contracts in these two years, these markups more</p> <p>5 accurately reflect the actual markup on the sales of TPP.</p> <p>6 Even if we were to use the lower markup of</p> <p>7 16.73 percent for 2009 and apply that to the \$6.4 million</p> <p>8 cost Appellant calculated, the total comes out to</p> <p>9 \$7.5 million, which, again, should also be increased by</p> <p>10 excluded service fees that were as part of the sale.</p> <p>11 So while the Department did not accept these</p> <p>12 calculations, the cost identified in Appellant's</p> <p>13 spreadsheets are probative as to the actual cost of the</p> <p>14 fixtures and an indication that the Department's</p> <p>15 assessment of \$8.9 million is reasonable.</p> <p>16 In contrast, in its brief, Appellant asserts that</p> <p>17 only \$1.7 million of the total project cost of</p> <p>18 \$12.1 million represents the sales price of the fixture.</p> <p>19 Again, by its own calculation, the price was approximately</p> <p>20 \$6.8 million.</p> <p>21 Appellant's method of calculation does not follow</p> <p>22 Regulation 1521's provisions on determining the sales</p> <p>23 price of the fixture. And it would mean, roughly, that</p> <p>24 85.5 percent of the project value was attributable solely</p> <p>25 to nontaxable installation labor.</p>	<p style="text-align: right;">Page 77</p> <p>1 even as we sit here today -- is because Appellant did not</p> <p>2 provide the price information from the contracts at issue.</p> <p>3 And, in fact, some such information was actually redacted</p> <p>4 from the documents provided by Appellant.</p> <p>5 Appellant has also not provided price information</p> <p>6 for the pre-addendum contract which was only for the sale</p> <p>7 of fixtures and would thus be particularly helpful -- or</p> <p>8 from other contracts from the sale of similar property.</p> <p>9 Considering the evidence that there was</p> <p>10 considerable fabrication performed, it is unreasonable to</p> <p>11 argue for further adjustments via selective invoices in</p> <p>12 lieu of just providing the actual documentation needed to</p> <p>13 determine -- needed to determine the price of the fixture.</p> <p>14 During the specific reductions, we will first</p> <p>15 address additional subcontractor charges totaling</p> <p>16 \$880,000. For these charges, Appellant references</p> <p>17 Invoices 27, 38, and 45.</p> <p>18 Invoices 27 and 38 are pages 461 and 465 in the</p> <p>19 hearing binder. Appellant has not provided Invoice 45 but</p> <p>20 references a draft e-mail in Exhibit 17 as evidence of</p> <p>21 this charge.</p> <p>22 With respect to these charges and considering the</p> <p>23 evidence in the contracts that onsite fabrication labor</p> <p>24 was performed by the subcontractors, it would be</p> <p>25 inappropriate to make any further reductions for</p>

<p style="text-align: right;">Page 78</p> <p>1 subcontractor billings.</p> <p>2 We further note that Invoice 27 contains itemized</p> <p>3 charges, and it is not possible to determine whether any</p> <p>4 labor contained in these charges were actually nontaxable</p> <p>5 installation labor as opposed to taxable fabrication</p> <p>6 labor.</p> <p>7 In addition, Invoice 45 has not been provided.</p> <p>8 And Appellant's Exhibit 17 does not provide any indication</p> <p>9 that this amount related solely to installation labor.</p> <p>10 Therefore, no adjustments for the additional subcontractor</p> <p>11 billings are warranted.</p> <p>12 Similarly, with respect to the construction</p> <p>13 management fees paid to Appellant of approximately</p> <p>14 \$3.5 million, we again note -- we again note that</p> <p>15 Appellant has not provided the documentation identifying</p> <p>16 its costs as required by Regulation 1521.</p> <p>17 And there is no way to determine, from the</p> <p>18 construction management fees, which amounts, if any,</p> <p>19 relate just to nontaxable installation and which amounts</p> <p>20 relate to taxable fabrication labor.</p> <p>21 Lastly, this \$3.5 million reduction, based upon</p> <p>22 construction management fees paid to Appellant, would</p> <p>23 alone reduce the taxable measure from \$8.9 million to</p> <p>24 \$5.5 million, which is far lower than the \$6.8 million</p> <p>25 liability previously calculated by Appellant.</p>	<p style="text-align: right;">Page 80</p> <p>1 is warranted for this assertion.</p> <p>2 Appellant also asserts that Invoice 14, totaling</p> <p>3 \$1.9 million, should be excluded from the audit because</p> <p>4 the invoice is from 2006.</p> <p>5 However, Appellant's Exhibit 21, page 453 is the</p> <p>6 invoice in question. And we note that this invoice is</p> <p>7 dated January 12, 2007. It appears that Appellant is</p> <p>8 referencing a prior version of the invoice.</p> <p>9 In addition, we note that there are no clauses in</p> <p>10 the contract passing title at an earlier time and no</p> <p>11 indication that the sale of the SCR System occurred in</p> <p>12 2006.</p> <p>13 Accordingly, even if the invoice had not been</p> <p>14 later revised and issued during the liability period, the</p> <p>15 evidence indicates that the sale occurred. And</p> <p>16 consequently, tax became due in 2007. And there is no</p> <p>17 basis to make this reduction.</p> <p>18 Lastly, there was a reference to \$65,000 in</p> <p>19 engineering and service fees that Appellant asserted were</p> <p>20 not subject to tax. However, Appellant has not provided</p> <p>21 any evidence establishing that this \$65,000 relates solely</p> <p>22 towards non -- nontaxable installation labor -- labor.</p> <p>23 Therefore, no basis to make this reduction.</p> <p>24 In summary, Appellant's predominant business is</p> <p>25 designing and fabricating SCR Systems without</p>
<p style="text-align: right;">Page 79</p> <p>1 Therefore, in the absence of documentation</p> <p>2 establishing the actual cost attributable to the fixtures,</p> <p>3 it would be, again, inappropriate to make further</p> <p>4 reductions based on partial documentation.</p> <p>5 There were some other specific reductions</p> <p>6 referred to Appellant -- referred to by Appellant in this</p> <p>7 motion.</p> <p>8 They alleged that amounts billed for structural</p> <p>9 steel and ducts in the amount of \$1.2 million were</p> <p>10 materials used during installation process and therefore</p> <p>11 must be excluded from the measure of tax.</p> <p>12 The scope of work in the declaration of</p> <p>13 Mr. Gubser established significant fabrication and</p> <p>14 assembly occurring prior to installation.</p> <p>15 Any of the property Appellant refers to as</p> <p>16 "materials" that was attached to fixture prior to the</p> <p>17 installation would be part of the fixture and part of the</p> <p>18 retail sale.</p> <p>19 In addition to the extent that these charges</p> <p>20 represent the consumption of any actual materials, we note</p> <p>21 that a construction contractor is the consumer of the</p> <p>22 materials they use in the performance of construction</p> <p>23 contracts and that there's no evidence that tax was paid</p> <p>24 at the time of purchase.</p> <p>25 Therefore, no reductions to the taxable measure</p>	<p style="text-align: right;">Page 81</p> <p>1 installation. And Appellant's initial contract with Big</p> <p>2 West for the sales at issue was also just for design and</p> <p>3 fabrication.</p> <p>4 As such, Appellant should have been able to</p> <p>5 provide the price of the systems and has not done so.</p> <p>6 Without means to differentiate between taxable</p> <p>7 and nontaxable labor -- labor charges, the Department</p> <p>8 reasonably determined that the subcontractor charges</p> <p>9 totaling approximately \$3.2 million was the best available</p> <p>10 evidence of any nontaxable amounts.</p> <p>11 In addition, we note that the Appellant's prior</p> <p>12 calculation of its potential tax liability of \$6.8 million</p> <p>13 is proximate to the measure in dispute, especially if the</p> <p>14 excluded taxable service charges and a more appropriate</p> <p>15 markup were applied.</p> <p>16 This further indicates that the reductions</p> <p>17 asserted by Appellant are not justified and that the</p> <p>18 Department's determination is reasonable.</p> <p>19 Without further documentation such as actual cost</p> <p>20 sheets identifying the cost of the fixture, Appellant has</p> <p>21 failed to meet its burden. And no further reductions,</p> <p>22 based on these partial records, is warranted.</p> <p>23 In light of all the foregoing, this appeal should</p> <p>24 be denied. Thank you.</p> <p>25 JUDGE KWEE: Thank you. This is Judge Kwee. I</p>

<p style="text-align: right;">Page 82</p> <p>1 did have a couple of questions.</p> <p>2 So during your presentation, you were saying that</p> <p>3 it's undisputed that the transaction at issue was the one</p> <p>4 that occurred in 2007, which I think was a reference to</p> <p>5 the Phase 2 aspect.</p> <p>6 I'm just curious why -- what documents -- or what</p> <p>7 led you to believe or conclude -- or CDTPA to conclude</p> <p>8 that it wasn't as Appellant is contending?</p> <p>9 And, you know, there was a Phase 1 transaction</p> <p>10 and a Phase 2 transaction. But why are you looking at it</p> <p>11 as, you know, one continuous transaction?</p> <p>12 MR. NOBEL: I mean, we are looking at a contract</p> <p>13 and then something else that is referred to as an</p> <p>14 "addendum to the contract."</p> <p>15 So, to us, it seemed like there was initial</p> <p>16 discussions to design and fabricate an SCR System. And</p> <p>17 then later, that agreement was modified to include</p> <p>18 installation.</p> <p>19 My inclusion of the word "undisputed" was</p> <p>20 probably inaccurate given the testimony and presentation</p> <p>21 today by opposing Counsel.</p> <p>22 JUDGE KWEE: Okay. So if -- and I just want to</p> <p>23 look at it from, you know, Appellant's perspective. If --</p> <p>24 if we were to look at it and, you know, we just look at</p> <p>25 that first Phase 1 aspect -- and, you know, forget for a</p>	<p style="text-align: right;">Page 84</p> <p>1 separate transaction for, you know -- with installation</p> <p>2 thereof?</p> <p>3 Like, if they make that separate, is it possible</p> <p>4 to do it that way?</p> <p>5 Or are you saying that, as soon as you add the</p> <p>6 second component -- whether it's the same transaction or a</p> <p>7 separate transaction -- throughout 1521, you can't -- I</p> <p>8 guess that would subsequently -- retroactively invalidate</p> <p>9 a -- a resale certificate that might have been accepted</p> <p>10 prior to them negotiating the second transaction?</p> <p>11 MR. NOBEL: I mean, there's -- there's a lot</p> <p>12 there.</p> <p>13 I -- I -- I'm aware of very particular</p> <p>14 circumstances where design aspects, not fabrication, but</p> <p>15 design aspects of TPP will sometimes be excluded under</p> <p>16 Regulation 1501.1.</p> <p>17 Research and development contracts -- there are</p> <p>18 very specific ways that needs to be done. And it needs to</p> <p>19 be a qualifying contract.</p> <p>20 When it comes to two separate contracts for</p> <p>21 design of what is a fixture and subsequent installation of</p> <p>22 the fixture, I think you're going to run into issues both</p> <p>23 with the Step Doctrine -- which would be, if you have a</p> <p>24 series of transactions that could be construed as a way to</p> <p>25 avoid tax or misappropriate the application of the law,</p>
<p style="text-align: right;">Page 83</p> <p>1 moment that they -- they also did the installation.</p> <p>2 If you look at Phase 1 aspect and treat it as one</p> <p>3 transaction and then you stop there, would -- would CDTPA</p> <p>4 agree that, in that case, they wouldn't be a construction</p> <p>5 contractor and this would be a sale of TPP and accept a</p> <p>6 resale certificate for that?</p> <p>7 MR. NOBEL: We don't have any evidence that the</p> <p>8 sale of the design -- like, the fabricated system --</p> <p>9 occurred prior to the installation in this case. So I</p> <p>10 don't know that those facts are in existence.</p> <p>11 And again, I think the problem we would run into</p> <p>12 is that we can't look at it in a vacuum.</p> <p>13 We know that the SCR System was furnished and</p> <p>14 installed by Appellant. And Regulation 1521 is very</p> <p>15 specific to say that you cannot avoid sales tax liability</p> <p>16 for this.</p> <p>17 JUDGE KWEE: Right. I -- I -- I guess what I was</p> <p>18 wondering is it -- is there a way that they can</p> <p>19 structure -- and, I mean, I'm not sure that was, you know,</p> <p>20 appropriate here -- that's -- I think that's what we're</p> <p>21 being asked to determine.</p> <p>22 MR. NOBEL: Sure.</p> <p>23 JUDGE KWEE: But is it possible for, you know,</p> <p>24 someone to schedule a transaction or a project as two</p> <p>25 separate transactions? One for the sale of TPP and a</p>	<p style="text-align: right;">Page 85</p> <p>1 they would disregard some of those transactions.</p> <p>2 And then I -- another issue that I'm going to run</p> <p>3 into is the sales and use tax law's definition of "sales</p> <p>4 price."</p> <p>5 Like, the price of tangible personal property,</p> <p>6 whether fabrication and design of it occurs prior to the</p> <p>7 contract for the sale of the actual thing, the sales price</p> <p>8 of tangible personal property includes all charges for</p> <p>9 design, fabrication, and things of that nature.</p> <p>10 So if OTA would like additional briefing</p> <p>11 post-hearing, we'd be willing to provide it. But I do not</p> <p>12 think that separating a contract of design and fabrication</p> <p>13 and subsequent installation of it onto real property would</p> <p>14 render Regulation 1521, like, inapplicable in these</p> <p>15 circumstances.</p> <p>16 JUDGE KWEE: So I guess what I was thinking is</p> <p>17 that, you know -- is that when they had the first phase</p> <p>18 transaction, they had the resale certificate.</p> <p>19 At the time they accepted the resale certificate,</p> <p>20 it seems like that was before they even did the addendum</p> <p>21 for the second phase. So then --</p> <p>22 MR. NOBEL: Sure.</p> <p>23 JUDGE KWEE: You were saying that, "Hey. Maybe</p> <p>24 when you have the time." Or maybe -- maybe I shouldn't</p> <p>25 say you were saying it.</p>

<p style="text-align: right;">Page 86</p> <p>1 But at the time they -- they accepted the resale 2 certificate, that could have been a valid resale 3 certificate. But then, based on the fact that they 4 addendum -- amended the contract, then they have to go 5 back and say the resale certificate is invalid, basically, 6 because you -- you and I are transforming it into a 7 construction contract. 8 It just seems like -- 9 MR. NOBEL: Once they perform the construction 10 contract, Regulation 1521 says they cannot avoid their 11 liability for sales or use tax by accepting a resale 12 certificate. 13 JUDGE KWEE: All right. 14 MR. NOBEL: So, I mean, I -- no. Like, 15 there's the money that is at issue -- the deficiency was 16 paid after the agreement for installation -- like, I don't 17 think we have the fact -- the facts in existence that 18 you're asking. 19 But I think Scott may have had a response. 20 MR. CLAREMON: I -- I was going to make that same 21 point -- that, again, the facts here are that, at the time 22 of the sales, they were a construction contractor. 23 So when we talk about whether they can accept a 24 resale certificate that's tied to when they were making 25 the sale, they're a construction contractor and they</p>	<p style="text-align: right;">Page 88</p> <p>1 over to Big West. 2 JUDGE KWEE: Okay. And so just moving over to 3 the subcontractor aspect -- so if they had hired 4 subcontractors to do the installation, my understanding is 5 that you -- CDTFA deleted a portion of the subcontractor 6 charges but then not all of them. 7 Is that a correct summary? 8 MR. NOBEL: Yeah. Excuse me. 9 There was an initial measure that was all of the 10 invoices for 2007 -- or sales journal for 2007 related to 11 this contract were totaled. And that was around 12 \$12.1 million. 13 In preparation, during the appeals conference 14 within CDTFA, two-thirds of the invoices were provided. 15 Some of those were talked about today as sample 16 invoices and some of those documents and invoices have 17 lump-sum charges for subcontractors on there. 18 The Department, without having the actual cost of 19 the fixture, determined that that was the best available 20 evidence of any nontaxable installation labor and accepted 21 that. 22 However, looking at the scope of work and other 23 statements, it appears there was onsite fabrication, 24 although I know Appellant says this was all installation. 25 So to make further adjustment for subcontractor</p>
<p style="text-align: right;">Page 87</p> <p>1 cannot avoid the liability. 2 I think you might have some hypotheticals about 3 if there was different facts with regard to making a sale 4 when they are not a construction contractor and then 5 contracting to install. But those aren't the facts here. 6 The facts here are that -- that they were a 7 construction contractor and cannot accept the resale 8 certificate when they made the sale. 9 JUDGE KWEE: So you're saying that the payment 10 occurred after they negotiated the Phase 2 aspect. So 11 you're saying that the sale occurred -- and, I guess, the 12 construction aspect occurred -- in this Phase 2. 13 So that's why you're considering it as one 14 continuous transaction? 15 MR. CLAREMON: The sale generally occurs upon 16 physical delivery of the TPP. 17 JUDGE KWEE: Right. And so -- 18 MR. CLAREMON: Or -- or if otherwise stated, the 19 title passes. 20 JUDGE KWEE: Okay. So -- so you're saying that 21 the sale occurred after they had negotiated the Phase 2 22 addendum? 23 Is -- is that what you're saying? 24 MR. NOBEL: It would appear that the sale 25 occurred when the fact -- when the SCR Systems were turned</p>	<p style="text-align: right;">Page 89</p> <p>1 labor -- labor just on the blanket assertion that any 2 labor performed by the subcontractors was nontaxable 3 installation labor doesn't seem appropriate. 4 So Appellant, in its motion, identified 5 additional subcontractor costs that it said should be 6 excluded from the measure of tax. And absent further 7 documentation actually establishing the costs of the 8 fixtures, we argue that no further reductions are 9 warranted. 10 JUDGE KWEE: Okay. 11 MR. NOBEL: Sorry. 12 JUDGE KWEE: No problem. Okay. So just to walk 13 me through that -- so, you know, the subcontractor did say 14 the reactor -- they furnished and installed it -- or -- or 15 if they did the foundations, you know, they're -- my 16 understanding -- the consumer of the materials -- the 17 reseller of the fixtures -- they would have either paid 18 tax at the time of their purchase of the materials that 19 they're using or -- or they would have charged tax to 20 Appellant before it's all good to go. 21 But then this -- yeah. I'm sorry -- but then the 22 fixture for Phase 1 -- I -- I think I see what you're 23 saying. 24 I should turn it over to Judge Aldrich. 25 Do you have any questions for CDTFA?</p>

<p style="text-align: right;">Page 90</p> <p>1 JUDGE ALDRICH: This is Judge Aldrich.</p> <p>2 I don't have any questions for CDTFA. Thank you.</p> <p>3 JUDGE KWEE: And Judge Brown, do you have any</p> <p>4 questions for CDTFA?</p> <p>5 JUDGE BROWN: I -- I will try to be quick.</p> <p>6 I wanted to ask about CDTFA's argument regarding</p> <p>7 good -- whether Appellant accepted the resale certificate</p> <p>8 in good faith.</p> <p>9 MR. NOBEL: Yes, Judge Brown.</p> <p>10 JUDGE BROWN: So I'm sure you know the wording of</p> <p>11 Regulation 1668 Subdivision (c), I think, regarding the</p> <p>12 presumption of good faith if the resale certificate is</p> <p>13 regular on its face.</p> <p>14 MR. NOBEL: Mm-hmm.</p> <p>15 JUDGE BROWN: And it starts by saying, like, "In</p> <p>16 the absence of evidence to the contrary, this presumption</p> <p>17 applies."</p> <p>18 MR. NOBEL: Yeah.</p> <p>19 JUDGE BROWN: So if I understand your -- CDTFA's</p> <p>20 argument is, essentially, that the evidence is the</p> <p>21 regulation itself -- that Appellant couldn't have accepted</p> <p>22 the resale certificate in good faith because your -- the</p> <p>23 legal interpretation wouldn't allow them to?</p> <p>24 MR. NOBEL: I think it's more that -- and this is</p> <p>25 pretty much only in a circumstance involving 1521 and 1668</p>	<p style="text-align: right;">Page 92</p> <p>1 Regulation 1521's statement that a construction contractor</p> <p>2 cannot avoid their tax liability by accepting a resale</p> <p>3 certificate would kind of trump whether or not this was</p> <p>4 accepted in good faith to begin with.</p> <p>5 JUDGE BROWN: I don't have anything further.</p> <p>6 Thank you.</p> <p>7 JUDGE KWEE: Okay. So I believe there are no</p> <p>8 further questions from the panel for CDTFA.</p> <p>9 So at this point we have ten minutes, I believe,</p> <p>10 for Appellant's final rebuttal before we conclude. So</p> <p>11 it's approximately 3:05. So, Mr. Vinatieri, you have</p> <p>12 until 3:15.</p> <p>13 Oh. I'm sorry. I thought somebody was asking a</p> <p>14 question. But -- yeah.</p> <p>15 MR. VINATIERI: So, Judge Kwee, there's been much</p> <p>16 thrown out just now. And ten minutes is not going to take</p> <p>17 care of all the different items that were just set forth</p> <p>18 by CDTFA Counsel. And I'm going to need a little bit more</p> <p>19 time than that ten minutes.</p> <p>20 JUDGE KWEE: Okay. So we don't have any hearings</p> <p>21 after us. And I think we have the room until -- well, I</p> <p>22 don't want to say -- I don't want to give you carte</p> <p>23 blanche time to stay.</p> <p>24 But can I just get an idea of how much time</p> <p>25 you're -- you're looking for?</p>
<p style="text-align: right;">Page 91</p> <p>1 or maybe some other statute that makes you a declared</p> <p>2 retailer.</p> <p>3 But it's that, when 1521 declares that a</p> <p>4 construction contractor is always the retailer of a</p> <p>5 fixture and that they cannot take a resale certificate to</p> <p>6 avoid their sales tax liability, it stands to follow that</p> <p>7 you cannot in good faith think that you, as a construction</p> <p>8 contractor, are making a sale for resale to the person who</p> <p>9 you're installing the fixture on -- for.</p> <p>10 JUDGE BROWN: But -- so if CDTFA's audit staff</p> <p>11 accept -- initially accepted that the -- that Appellant</p> <p>12 accepted a resale certificate in good faith -- I -- I</p> <p>13 understand that CDTFA's now switched its position -- but I</p> <p>14 guess my question is, if the audit staff thought that was</p> <p>15 a plausible argument, how do we know that Appellant didn't</p> <p>16 think it was a plausible argument that -- that -- that</p> <p>17 this was a sale for resale?</p> <p>18 MR. NOBEL: I think audit staff's interpretation</p> <p>19 of "good faith" was in error. But I certainly understand</p> <p>20 the circumstance you're pointing out.</p> <p>21 But I would just say their previous</p> <p>22 interpretation -- or their acceptance of the resale</p> <p>23 certificate was accepted in good faith was an error by</p> <p>24 them.</p> <p>25 And then I -- I want to stress that, like, it --</p>	<p style="text-align: right;">Page 93</p> <p>1 MR. VINATIERI: Probably 20 minutes. Maybe a</p> <p>2 little bit more.</p> <p>3 JUDGE KWEE: Okay. That's fine. Did you, you</p> <p>4 know -- because we talked about a lot here.</p> <p>5 Did you want us to call a recess to go over your</p> <p>6 notes and decide what you want to talk about? Or are you</p> <p>7 ready to proceed right now?</p> <p>8 MR. VINATIERI: I -- I think we can just go ahead</p> <p>9 and proceed.</p> <p>10 JUDGE KWEE: Okay. I'd say if you can do it</p> <p>11 by -- if you can finish by 3:30, that would be much</p> <p>12 appreciated.</p> <p>13 MR. VINATIERI: I'm going to work the best I can.</p> <p>14 JUDGE KWEE: Okay. Thank you.</p> <p>15</p> <p>16 CLOSING ARGUMENT</p> <p>17 MR. VINATIERI: So what's -- what's particularly</p> <p>18 bothersome about this is I've heard nothing, basically,</p> <p>19 but supposition. "If it's this, it must be this." "If</p> <p>20 it's 1668, then 1521 actually is -- in essence trumps."</p> <p>21 And when asked the question about good faith,</p> <p>22 "Well, it has to be good faith because 1521 says what it</p> <p>23 says. So ergo it could not have been good faith."</p> <p>24 The law doesn't say that. That's an</p> <p>25 interpretation that they just came up with. So let me --</p>

<p style="text-align: right;">Page 94</p> <p>1 let me just go through my notes here. And I want to go 2 back to the very beginning.</p> <p>3 And that is -- we have a timeline here. We have 4 two transactions. We have one for design and fab and one 5 for installation. One clearly happened before the other. 6 There was no contradiction of the fact that there were 7 two.</p> <p>8 And yet we just heard, "Well, there must be one 9 because of the way it went down." And there was 10 supposition again about title -- when did the sale take 11 place? There's been no facts in evidence. It was all 12 supposition.</p> <p>13 But what we do know is that there were two 14 transactions. And even I heard Counsel indicate that 15 there were two transactions.</p> <p>16 So let's -- let's make sure -- and let's go back 17 to what Mr. Gubser said about the two transactions and how 18 it went down and why it went the way it did.</p> <p>19 He is a percipient witness. There's no 20 questions -- there's no contradiction of his testimony. 21 He was there. He was both there on the design and fab as 22 well as the installation. So, I want to get us back in 23 that mindset and away from the -- the -- the supposition.</p> <p>24 And I think even Counsel indicated that -- that 25 they're normally -- as was indicated -- that there are --</p>	<p style="text-align: right;">Page 96</p> <p>1 install contract -- does that somehow -- in essence what 2 they're saying quietly -- well, does that trump the fact 3 that you had one contract for design and fab?</p> <p>4 The answer is no. Those are two separate 5 contracts. And there's no facts in evidence that somehow 6 conjoins both of those into one. There's no facts in 7 evidence.</p> <p>8 Once again, supposition. Supposition. Let's 9 deal with the facts.</p> <p>10 Much of what was just said was -- I heard the 11 words "it would appear." And the sale took place after 12 delivery. I don't want to repeat myself. But there's no 13 facts in evidence. There's two contracts. That's what 14 the evidence is.</p> <p>15 You heard Mr. Gubser sit right here and he talked 16 about the MSA. He talked about the -- the -- in June. 17 And then he talked about the resale certificate. And then 18 he talked about the bid on the install. And he talked 19 about the '07 contract.</p> <p>20 So once again, I want to stick with -- with the 21 facts. And I'll just hit very quickly this issue -- 22 there's a concession made -- you asked the very right 23 question. This audit staff is very sharp.</p> <p>24 Why would they say that, yes, you took it in good 25 faith? Why would they say, "You took it in good faith,"</p>
<p style="text-align: right;">Page 95</p> <p>1 they are in the business of doing design and fab.</p> <p>2 So let's go from there and just -- I'm going 3 to -- I'm going to go through a couple of items here with 4 regard to the -- this issue of the -- the fabrication -- 5 or the concession that was, in essence, good -- on the 6 good faith issue and that, apparently, we had audits 7 saying one thing and legal saying something else.</p> <p>8 And, Judge Brown, I think you pointed that out. 9 And -- and I think there was a very good question asked -- 10 "Well, if you have a Phase 1, wouldn't CDTFA agree that 11 you're selling TPP?" -- and the answer that came back -- 12 and then I didn't fully understand the answer.</p> <p>13 But then the question was asked again, "Is it 14 possible to do two different transactions?"</p> <p>15 And what I heard was, "Well -- well -- well, we 16 know 1501.1."</p> <p>17 Well, we all know what 1501.1 is about. Many of 18 us were there when it was written. It has nothing to do 19 with this situation here.</p> <p>20 "Well, this is possibly a step transaction." 21 Really? There's no such thing as a step transaction in 22 this situation. No.</p> <p>23 You asked the right question -- could you do one 24 contract and perform it and then later get asked to do a 25 bid -- and as the timeline says -- and then get that</p>	<p style="text-align: right;">Page 97</p> <p>1 if they didn't think what was going on here was a sale of 2 design and fab?</p> <p>3 I mean, otherwise, why would the staff at the 4 Sales Tax Department say, "Yeah. It was good faith?" 5 It's only after the fact -- now it gets up to this 6 level -- that the tune has changed a little.</p> <p>7 So I -- I, you know, the concession was made. I 8 think there's a -- the concession is a concession. I 9 think there was a basis for it because -- now, I'm engaged 10 in supposition -- because they knew this was a design and 11 fab contract.</p> <p>12 Let me just also quickly say that when there's an 13 inconsistency between the reg and the statute. The reg 14 has to be within the scope of the authority conferred. 15 And the reg can't trump the statute.</p> <p>16 Now, I understand that was argued at the lower 17 level. We're different Counsel. We're not putting a lot 18 of emphasis on that. Because there's facts now -- that 19 have now come out that I don't think came out at the lower 20 level at CDTFA.</p> <p>21 So but -- but there's also an issue that has come 22 up here. And he talked about fixtures. Now, Mr. Gubser 23 took some time to talk about the units, and he showed you 24 the pictures.</p> <p>25 And it's always easy to say, "Well, yeah. Look</p>

<p style="text-align: right;">Page 98</p> <p>1 at this. Look at the wiring. And look at this and that." 2 But Mr. Gubser said that they were done in a way 3 to stack one on top of the other -- one on top of the 4 other like the erector set. 5 And -- and that -- in that manner, they do not 6 lose their identity. And he showed you in the pictures -- 7 for example, the ammonia -- ammonia that was right there. 8 And he showed the control area right next to it. 9 So these are not fixtures per se. Fixtures are a 10 situation where TPP loses its identity. This did not lose 11 its identity. 12 The fact is, as he indicated -- Mr. Gubser 13 indicated if you were to take the tall stack and you 14 wanted to disassemble it, you disassemble it piece by 15 piece by piece by piece. 16 So it -- it -- it -- it didn't lose its identity. 17 And I'm just going to indicate -- and you can all look at 18 this -- but they talk about the Seatrain case, et cetera. 19 Those are all property tax cases. And some of you are 20 familiar with property tax. There's the Seatrain case and 21 then there's the U.S./Lyons case. And the U.S./Lyons case 22 was all about sales tax. 23 And there was a distinction -- a determination 24 that, for sales tax, a fixture could be looked at one way, 25 but for property tax it would be -- could be looked at</p>	<p style="text-align: right;">Page 100</p> <p>1 You heard Mr. Gubser say, "I was involved in 2 writing those up." And he went through them with 3 Ms. Verdugo to make sure that we knew exactly what each of 4 those line items were. 5 You heard no questions asked of Mr. Gubser, 6 "Well, did it really mean this as you said? Did it really 7 mean this?" 8 It's uncontradicted. Mr. Gubser helped write 9 those because he was in charge of the installation 10 project. We're well past the design and fab at this point 11 in time. 12 So that's percipient witness testimony. And 13 unless -- unless somehow, it's been contradicted and 14 unless he doesn't have credibility, I'm strongly 15 encouraging the panel to say, "Well, gee whiz, that must 16 be the way it is." 17 He and Ms. Verdugo went through those, and we 18 only gave you a couple of them today because we could 19 spend a lot of time doing it. 20 But I'm asking you, with respect to what 21 Mr. Gladfelter said in his DNR -- we now have done what he 22 requested. And yes, they partially follow through on Mr. 23 Gladfelter by giving you a \$3.1 million deduct. 24 But it wasn't enough because they did not go 25 through the source documents as we have now given it to</p>
<p style="text-align: right;">Page 99</p> <p>1 another way. 2 Now, many of us who were -- used to be at the 3 Board of Equalization will say, "The law should be the 4 law. It shouldn't make a difference." 5 I mean, a picture is a picture. But the law has 6 come out and said that property tax doesn't necessarily 7 provide the outlet that you're looking for -- at least, I 8 think, that staff's looking for relative to sales tax. 9 And you can look that up. And we've talked about that. 10 So let me go to something else that was said 11 here. And that is that -- if we go to what's our Exhibit 12 2 -- this is the DNR -- and if you go look at page 16 and 13 the -- Mr. Gladfelter who's tax Counsel who wrote it -- He 14 made the comment on page 16, line 16 through 20 -- or 15 excuse me -- line 15 through 20. 16 It says, "However, Petitioner did not provide any 17 additional documentation regarding the measure of tax and, 18 to date, has not provided any source documentation 19 regarding the measured tax, backup, or evidence to support 20 its spreadsheets. Thus Petitioner has not provided any 21 source documentation to support the spreadsheets or 22 claimed adjustments. And we reject its fourth argument." 23 Now, what we did today and what we tried to do in 24 that motion a year ago -- what we did today is Ms. Verdugo 25 went through source documentation.</p>	<p style="text-align: right;">Page 101</p> <p>1 you here. 2 So we're asking you that -- with respect to the 3 installation -- that installation, what we have given 4 needs to be pulled out because it's nontaxable. And 5 there's some other items, other than fab -- installation 6 labor, on that. 7 Let me go to -- a statement was made -- once 8 again, supposition -- no facts in evidence -- quote, 9 "There's evidence that the fabrication labor was minimized 10 and installation was maximized." 11 There's no facts in evidence -- supposition, once 12 again. 13 Quote, "There was considerable fabrication 14 performed, assumedly, on the ground." 15 That's what was stated. Mr. Gubser specifically 16 said, when asked by Ms. Verdugo, "Well, how was their 17 fabrication done?" And we all know that if you take that 18 long stack and you put it into -- to five pieces on the 19 ground and you bolt it together on the ground and then you 20 raise it up -- that's fabrication labor. We know that. 21 There's a number of cases that I had in front of 22 the old Board of Equalization where we had similar 23 situations. 24 But if they did the erector set -- if they did 25 it -- the foundation -- put it on the foundation -- the</p>

<p style="text-align: right;">Page 102</p> <p>1 first piece -- tied it down, put the second one on, put 2 the third one -- that's installation. 3 Now, it seems really silly that we have these 4 kinds of distinctions between installation and fabrication 5 in this kind of context. But it's the rule. And that's 6 what we follow. 7 And Mr. Gubser gave you uncontradicted testimony 8 that that's how it was done. So we can't engage in 9 supposition. 10 We talked about your question, Judge Kwee, about 11 two different transactions. It is entirely possible to do 12 two transactions. There's no question about it. 13 And underlying what's -- what's troublesome, to 14 be very candid with you, is that in these situations 15 someone always says, "Oh. We're going to take a -- a -- a 16 one -- make it one contract for design, fabrication, and 17 installation. You know, we're going to put it in two. 18 And that way we can show that part of it is taxable, 19 potentially, and part of it is nontaxable." 20 There's no evidence of that here whatsoever. I 21 understand that there are taxpayers that do that. That's 22 not what's going on here. That's not the testimony. 23 That's not the documentation. 24 So to -- to basically say that -- that -- that 25 there's no evidence along those lines, whatsoever. And --</p>	<p style="text-align: right;">Page 104</p> <p>1 find him to be credible, then you need to take his 2 testimony as evidence. 3 And what we have here is we have all the 4 documents. And we gave you source documentation that they 5 did not have previously. 6 And they tried to use it to kind of come up and 7 say, "Well, if you had done this, then -- then it should 8 have been this. But, you know, if you done this" -- 9 Which is what happens in these cases a lot when 10 you don't have direct knowledge and you're on the part of 11 the Department -- it's been my experience -- you engage in 12 supposition. 13 So I'm just going to indicate to you -- if you 14 find Mr. Gubser to be credible -- you find that what he 15 said makes sense -- that it meets, essentially, the 16 timeline, then his -- and his testimony corroborates the 17 documentation. 18 It's not as if he's just coming out here out of 19 the blue. No. His testimony corroborates the 20 documentation that we've given you and -- and some of 21 the -- some of the documentation the Department already 22 had. 23 I just wish we'd had him at the lower level. But 24 we weren't Counsel at that time. 25 So I just want to indicate that we are of the</p>
<p style="text-align: right;">Page 103</p> <p>1 and I'll -- I'll go ahead and finish up here. 2 We have two transactions right here on the 3 timeline. It's very clear. There's no discussion of 4 title paths or any of that stuff -- all right? -- that was 5 all supposition. 6 We, here, have given you facts. That's why we 7 brought Mr. Gubser in. And we're very thankful that 8 Mr. Gubser is able to be with us, because this is a long 9 time ago. 10 The Department has nobody. Much of it is just 11 basically audit work papers and what they thought was -- 12 was the best under the circumstances. 13 We brought Mr. Gubser in. We found him, to be 14 candid with you, in going through our due diligence a 15 couple years ago because we knew we were going to end up 16 here at some point in time. 17 And we spent a lot of time with Mr. Gubser just 18 to make sure his memory, his recollection -- he's gone 19 through the documents. You heard him. I'll say again -- 20 those are his invoices. He was -- he was hands-on. And 21 there -- there's been no contradictory testimony to what 22 Mr. Gubser said. 23 I'm just going to indicate to you that, unless 24 there has been something to contradict Mr. Gubser -- I'm 25 going to say it again -- that you need to take -- if you</p>	<p style="text-align: right;">Page 105</p> <p>1 belief that there are two contracts. The resale 2 certificate was properly given and relied upon -- and 3 that, with respect to the installation and the labor and 4 the service that went into it, as Ms. Verdugo has put 5 together, she ticked -- ticked and tied with Mr. Gubser -- 6 and you heard a little bit of that here. We didn't give 7 it all to you. 8 But we have met our burden of proof. We've met 9 our burden of proof. We've given you hard evidence in the 10 way of testimony and documentation. 11 And we strongly request that you find for the 12 Appellant, under these circumstances, with that 13 documentation and with that credible testimony brought to 14 you by Mr. Gubser. 15 And we thank you for your time today. 16 JUDGE KWEE: Thank you. 17 There are just a couple of items: One, I wanted 18 to see if the parties were in agreement -- so the resale 19 certificate was dated -- it looks like 10/31/06. 20 Is there any dispute that the resale certificate 21 was accepted on 10/31/06? Or -- 22 MR. VINATIERI: I can't -- I mean, I think it 23 speaks for itself -- the document does. 24 JUDGE KWEE: Okay. And, CDTFA, do you have any 25 -- do you have a position on whether the document was</p>

<p style="text-align: right;">Page 106</p> <p>1 accepted on 10/31/06?</p> <p>2 MR. NOBEL: We don't have an official position on</p> <p>3 that. We would assume it was on or about shortly</p> <p>4 thereafter that date of the resale certificate.</p> <p>5 JUDGE KWEE: Okay. As far as the addendum</p> <p>6 authorizing Phase 2 -- it looks like that was signed on</p> <p>7 2/28/07. I'll just double-check with -- starting with</p> <p>8 Appellant -- do you have any -- are you in agreement that</p> <p>9 that was the date the addendum was signed? Or do you have</p> <p>10 a position?</p> <p>11 MR. VINATIERI: Actually, there's one other item</p> <p>12 that goes with this. And Mr. Gubser didn't talk to you</p> <p>13 about it, but I'll point it out to you.</p> <p>14 If you'll look at -- it's our 12. It says,</p> <p>15 "Addendum and Master Service Agreement." Turn a couple of</p> <p>16 pages and you'll see back there "Owner, Big West." And</p> <p>17 you'll see "contractor" by "Aliso Systems" -- you'll see</p> <p>18 "Mr. Gubser" there.</p> <p>19 See his signature there?</p> <p>20 JUDGE KWEE: Okay.</p> <p>21 MR. VINATIERI: Yeah. And -- and, Judge Kwee,</p> <p>22 further, too -- and if you look at 12 -- and Ms. Verdugo</p> <p>23 and Mr. Gubser did not go over it -- but if you go to</p> <p>24 12 -- 12 is pretty lengthy. But if you go to just before</p> <p>25 what we have, in our book, Tab 13, about six or seven</p>	<p style="text-align: right;">Page 108</p> <p>1 was sometime between January and February that the second</p> <p>2 amendment was negotiated and -- and agreed upon.</p> <p>3 MR. VINATIERI: That's correct.</p> <p>4 JUDGE KWEE: And does CDTFa have a position on --</p> <p>5 on that amendment?</p> <p>6 MR. NOBEL: No. That sounds about right.</p> <p>7 JUDGE KWEE: Okay. And I guess the last question</p> <p>8 that I had at this point -- is there an agreement on</p> <p>9 the -- what portion of the remaining liability is</p> <p>10 applicable in the Phase 1 versus the Phase 2?</p> <p>11 MS. VERDUGO: Could you repeat the question.</p> <p>12 JUDGE KWEE: I was asking if there was an</p> <p>13 agreement between the parties between what portion of the</p> <p>14 liability is applicable to the Phase 1 versus the Phase 2?</p> <p>15 MS. VERDUGO: I think in our -- in our motion, we</p> <p>16 went through the invoices and we split out -- and that's</p> <p>17 one of the reasons we had Mr. Gubser explain the invoices.</p> <p>18 The first part is amounts related to the design</p> <p>19 and fabrication. The middle section is the duct and</p> <p>20 steel -- that's, you know, they were also contracted to</p> <p>21 fabricate.</p> <p>22 And the third -- bottom part is related to the</p> <p>23 installation contract, which includes the construction</p> <p>24 management and the subcontractor.</p> <p>25 So I believe we detailed that out and separated</p>
<p style="text-align: right;">Page 107</p> <p>1 pages back from that, you'll see a letter dated via</p> <p>2 e-mail, January 30, 2007.</p> <p>3 Are -- are you all there?</p> <p>4 JUDGE KWEE: Yeah. Exhibit 13, go a couple of</p> <p>5 pages back to 12?</p> <p>6 MR. VINATIERI: Just -- just before -- a</p> <p>7 couple -- couple of pages before 13 -- Exhibit 13.</p> <p>8 JUDGE KWEE: And was that the January 30, '07</p> <p>9 letter?</p> <p>10 MR. VINATIERI: Yes. To Mr. Mark Dennis.</p> <p>11 JUDGE KWEE: Okay. I see that. Yes.</p> <p>12 MR. VINATIERI: Okay. So that's part of 12,</p> <p>13 under the addendum that you asked -- just asked the</p> <p>14 question about -- when was -- when we said February 9th on</p> <p>15 this phase -- you'll note that this letter -- and I'll</p> <p>16 make a representation to you.</p> <p>17 If you go to the third page, it's signed by David</p> <p>18 A. Gubser, project manager. I'll make a representation</p> <p>19 this -- this is -- is Mr. Gubser's letter which basically</p> <p>20 lays out Exhibit 12 and the addendum that we're talking</p> <p>21 about right now.</p> <p>22 So once again, he's boots on the ground. He's</p> <p>23 there. And that's what this letter's all about.</p> <p>24 JUDGE KWEE: Okay. So in any event, it was</p> <p>25 sometime -- if you take these two documents together -- it</p>	<p style="text-align: right;">Page 109</p> <p>1 that out in our motion.</p> <p>2 JUDGE KWEE: Okay. And I would turn to CDTFa.</p> <p>3 Do you have a position or comment -- a response</p> <p>4 to, I guess, just a breakdown of the liability?</p> <p>5 MR. NOBEL: The liability is based upon 2007</p> <p>6 invoices and sales journal entries. The \$12.1 million</p> <p>7 total, which was reduced down to \$8.2.</p> <p>8 So I guess you could say we agree that the</p> <p>9 \$3.2 million the Department removed during the appeals</p> <p>10 process from the \$12 million total is not subject to tax.</p> <p>11 And that would be it.</p> <p>12 JUDGE KWEE: Okay. So --</p> <p>13 MR. NOBEL: I don't -- I don't -- I don't agree</p> <p>14 to any allocation of TPP fabricated in Phase 1 not being</p> <p>15 taxable now.</p> <p>16 JUDGE KWEE: Okay. Yeah. I understand your</p> <p>17 position. I was just organizing it for my understanding,</p> <p>18 you know -- understanding both party sides.</p> <p>19 And so with that said, I believe there are</p> <p>20 questions from Judge Brown for Appellant's</p> <p>21 representatives --</p> <p>22 MS. VERDUGO: Can I add one more thing on the \$12</p> <p>23 million?</p> <p>24 JUDGE KWEE: Oh, I'm sorry. Yes. Please</p> <p>25 proceed.</p>

<p style="text-align: right;">Page 110</p> <p>1 MS. VERDUGO: So in our motion -- again, going 2 back to that question Mr. Aldrich asked about the 3 accountant and that other schedule -- so in order to make 4 this easier, we started with their documentation of the 5 \$12 million with the invoices and the sales journal. 6 So we start in the same place with the \$12 7 million. We acknowledge the \$3-point-something that they 8 removed. But then we walk you through what other steps 9 they missed because they didn't know what it was or they 10 didn't maybe look at it closely enough. 11 And so we deduct from the \$12 million additional 12 amounts. And we explain what that is. And we point out 13 what was equipment and what was installation. 14 So I just wanted to say that we start in the same 15 place now. 16 JUDGE KWEE: Okay. Thank you. 17 At this point, I will turn it over to Judge 18 Brown. I think Judge Brown has a couple of questions for 19 the Appellant's representative. 20 JUDGE BROWN: Well, it's getting late. So I'll 21 try to be brief. For Appellant's representatives, if -- 22 I'm sure you're familiar with -- in Regulation 1521, 23 exhibit -- Appendix B lists examples of fixtures. 24 And so my question is -- and I -- if you want to 25 turn to that page first, that's fine. I'm not going to</p>	<p style="text-align: right;">Page 112</p> <p>1 referring to there. 2 JUDGE BROWN: So how -- how would you compare -- 3 or you're arguing that this T -- the TPP at issue here -- 4 the SCR Systems -- are readily removable and therefore 5 they're not fixtures. 6 MR. VINATIERI: They're -- 7 JUDGE BROWN: But aren't television antennas 8 readily -- more readily removable than the SCR Systems? 9 MR. VINATIERI: So I see television antennas -- 10 and are we talking -- part of the problem with this is are 11 we talking about the big television transmission? Or are 12 we talking about a television antenna on somebody's home? 13 There's a bit of a difference, obviously, there. 14 I -- I -- I would -- to be very candid with 15 you -- these items -- there -- there is some similarity to 16 our situation here. 17 But what I would say to you is the fact that -- 18 that, once again, it comes down to how is it affixed? And 19 what's the -- what's the ability to -- to disassemble it 20 and to take it down? 21 I -- I think Mr. Gubser said that, when they were 22 contracted by Big West to design and fabricate -- that 23 part of their agreement was, if Big West wanted to take 24 the -- those systems down -- that they could take the 25 systems down -- and they designed them to take the systems</p>
<p style="text-align: right;">Page 111</p> <p>1 get super specific about it -- but go ahead if you want 2 to. 3 MR. VINATIERI: I brought the book for a reason. 4 JUDGE BROWN: Okay. 5 MR. VINATIERI: So you're -- you're asking -- 6 we -- of course, we have this in here about the elevator 7 installations and all of that -- that business. 8 JUDGE BROWN: So I -- I just wanted to ask -- 9 your argument that the TPP at issue here is readily 10 removable and therefore it doesn't meet the definition of 11 "fixtures" -- how does that compare with examples in 12 Appendix B like removal of air-conditioning units, signs, 13 or television antennas? 14 MR. VINATIERI: I'm looking here -- 1521 -- it's, 15 as you say, Appendix B. And that -- this is the item 16 regarding -- regarding fixtures. 17 JUDGE BROWN: I think you need to speak into the 18 microphone. Sorry. 19 MR. VINATIERI: Sorry. I'm looking here at, for 20 example, furnaces, boilers, and heating units. 21 Is that what you're referring to? 22 JUDGE BROWN: Well, like I said, the examples I 23 picked up were air-conditioning units, signs, and 24 television antennas. But I can -- hold on. 25 MR. VINATIERI: Yes. I -- I -- I see what you're</p>	<p style="text-align: right;">Page 113</p> <p>1 down. 2 And I think I heard Mr. Gubser say that, in 3 taking it down, they also had to do it in such a way that 4 the refinery would not be shut down -- that the refinery 5 continued to deal with processing oil. 6 But -- but if they were going to take it down -- 7 that they could do it in such a way that it wouldn't stop 8 the refinery. 9 So I -- it was -- in my view, it was designed -- 10 why -- why they would ever want to do it? I don't know. 11 I'm not Big West. And I'm just a lawyer doing this. 12 But I think they designed them to be able to take 13 them down. Would it -- would -- could they be taken down 14 in one day? No. And Mr. Gubser said that. 15 MR. CLAREMON: Judge -- Judge Brown, may we 16 comment on this question? Or provide a response? 17 JUDGE BROWN: Yeah. Yes. That's fine. Go 18 ahead. You can respond. 19 MR. CLAREMON: We -- we just want to add that, in 20 addition to Appendix B, the definition of fixtures is 21 something that specifically does not lose its identity 22 when attached to realty. 23 And so when Appellant has argued these are not 24 fixtures because they don't lose their identity, he's more 25 accurately -- they are more accurately describing a</p>

<p style="text-align: right;">Page 114</p> <p>1 material. And whether or not it loses its identity is not 2 a distinction between fixture and machinery equipment. 3 Because neither lose their identity when attached 4 to realty. 5 JUDGE BROWN: I -- I don't have any further 6 questions. 7 THE WITNESS: Okay. This is Judge Kwee. 8 Oh. Actually, I'll turn to Judge Aldrich. 9 Did you have any questions before we conclude? 10 JUDGE ALDRICH: This is Judge Aldrich. No 11 questions. 12 JUDGE KWEЕ: Okay. We're ready to conclude this 13 hearing. This case is submitted on Tuesday, September 20, 14 2022. The time is approximately 3:40 p.m. 15 The record is now closed. I'd like to thank 16 everyone for coming in today. The Judges of this panel 17 will meet and decide your case later on. And we'll send a 18 written decision to the participants within a hundred days 19 of today's hearing. 20 Today's hearing in the Appeal of CSI Aliso, Inc., 21 is now adjourned. And this concludes the oral hearing 22 that was scheduled for this afternoon. We will resume 23 tomorrow at, I believe, 9:30 a.m. for Tuesday -- for 24 Wednesday the 21st. 25 Thank you, everyone.</p>	<p style="text-align: right;">Page 116</p> <p style="text-align: center;">REPORTER'S CERTIFICATION</p> <p>1 2 3 I, Sarah M. Tuman, RPR, CSR No. 14463, a 4 Certified Shorthand Reporter in and for the State of 5 California, do 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 10 proceedings was made by me using machine shorthand, which 11 was thereafter transcribed under my direction; that the 12 foregoing transcript is a true record of the testimony 13 given. 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 17 transcript [] was [x] was not requested. 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 22 my name. 23 Dated: November 6, 2022 <u>Sarah M. Tuman, CSR, RPR, CSR No. 14463</u> 24 Certified Shorthand Reporter 25 For The State of California</p>
<p style="text-align: right;">Page 115</p> <p>1 (Proceedings concluded at 3:38 p.m.) 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	

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