

BEFORE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
A-1 PORTABLES, INC.,)
) OTA NO. 19095258
)
APPELLANT.)
_____)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, November 8, 2022

Reported by:

SHELBY K. MAASKE

HEARING REPORTER

Job No. 39131 OTA B

1 APPEARANCES:

2
3 Panel Lead:

Hon. Andrew Kwee

4
5 Panel Members:

Hon. Joshua Aldrich
Hon. Keith Long

6
7 For the Appellant:

Richard Stack,
Joseph Wilson

8
9
10 For the Respondent:

Sunny Paley,
Tax Counsel

Stephen Smith,
Tax Counsel

Jason Parker,
Hearing Representative

I N D E X

WITNESSES

PAGE

Darlene Bishop

21

E X H I B I T S

(Appellant's Exhibits were received at pages 8 and 9.)

(CDTFA's Exhibits were received at page 7.)

CLOSING STATEMENTS

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By Mr. Stack

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1 Cerritos, California; Tuesday, November 8, 2022

2 11:53 a.m.

3
4
5 ADMINISTRATIVE LAW JUDGE KWEE: We are opening
6 the record in the appeal of A-1 Portables. This matter is
7 being heard before the Office of Tax Appeals, and OTA Case
8 No. 19095258. Today's date is Tuesday, November 8, 2022,
9 and the time is approximately 11:53 a.m. This hearing is
10 being conducted in Cerritos, California, and it is also
11 being live streamed on OTA's public YouTube channel.

12 Today's hearing is being heard by a panel of
13 three administrative law judges. To my right is Judge
14 Keith Long, and to my left is Judge Josh Aldrich. My name
15 is Andrew Kwee, and I will be the lead administrative law
16 judge for this appeal.

17 All three judges will meet after the hearing and
18 produce a written decision as equal participants.
19 Although I will be the lead judge conducting this appeal,
20 all of the members of this panel are equal participants,
21 and any judge on the panel may ask questions at any time
22 to ensure that we have all of the information we need to
23 conduct and decide this appeal.

24 For the record, I'd ask that the parties please
25 state your names and who you represent. And I'll start

1 with the Representatives with the tax agency, CDTFA.

2 MS. PALEY: Sunny Paley for CDTFA.

3 MR. SMITH: Stephen Smith for CDTFA.

4 MR. PARKER: Jason Parker for CDTFA.

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

6 And then I'll turn to the taxpayer.

7 MR. STACK: Yes. Good afternoon, your Honor.

8 Richard Stack for the taxpayer, A-1 Portables, and sitting
9 to my right is Darlene Bishop, who is a co-owner, and her
10 son is here.

11 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

12 And just as far as the witnesses, I understand
13 that you just have the one witness, Darlene Bishop?

14 MR. STACK: That is correct.

15 ADMINISTRATIVE LAW JUDGE KWEE: CDTFA, you don't
16 have any witnesses today?

17 MS. PALEY: Correct.

18 ADMINISTRATIVE LAW JUDGE KWEE: Great. And as
19 far as the exhibits, I just -- to first check, OTA did
20 distribute a copy of the exhibits, but there was one
21 revised exhibit package for Appellant's which was the
22 revised four declarations.

23 Both parties, do you have the exhibit binders
24 that were distributed? CDTFA, do you have the copy?

25 MS. PALEY: Yes.

1 ADMINISTRATIVE LAW JUDGE KWEE: Appellant, did
2 you also receive a copy of the exhibit binders?

3 MR. STACK: Yes, I have a copy of that, sir.

4 ADMINISTRATIVE LAW JUDGE KWEE: Perfect. Thank
5 you.

6 So for CDTFA, we had discussed Exhibits A through
7 F during the prehearing conference, and there were no
8 changes after the conference. CDTFA, do you have
9 additional exhibits today?

10 MS. PALEY: No, thank you.

11 ADMINISTRATIVE LAW JUDGE KWEE: And I understand
12 Appellant did not have any objections to CDTFA's exhibits?

13 MR. STACK: No.

14 ADMINISTRATIVE LAW JUDGE KWEE: Then Exhibits A
15 through F for CDTFA are admitted.

16 (CDTFA's Exhibits A through F were received.)

17 ADMINISTRATIVE LAW JUDGE KWEE: Then for
18 Appellant's, we have exhibits numbering 1 through 10.
19 Exhibits 1, 5, and 6 were previously submitted during the
20 briefing process. And Exhibits 2, 3, and 4, from my
21 understanding, they were provided by CDTFA, but then they
22 were referenced by Appellant. So I do have those
23 exhibits, but I note they are duplicative.

24 I'll get to the declarations in a moment, just
25 because there was some back and forth between the parties.

2 then the declarations, 7 through 10, do you have any
3 additional exhibits?

4 MR. STACK: No, that's it, your Honor.

5 ADMINISTRATIVE LAW JUDGE KWEE: CDTFA, did you
6 have any objections to Exhibits 1 through 6?

7 MS. PALEY: No.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So then
9 Exhibits 1 through 6 are admitted without objection.

10 (Appellant's Exhibits 1 through 6 were received.)

11 ADMINISTRATIVE LAW JUDGE KWEE: And then I'll
12 just briefly go over the exhibits. And my understanding
13 was the declarations -- there were four declarations which
14 are identified as Exhibits 7, 8, 9, and 10, that were
15 timely submitted, and then CDTFA objected to the form
16 because they were not signed under penalty of perjury, and
17 then they were resubmitted -- the declarations were
18 resubmitted on October 28, 2022, with the required
19 language.

20 CDTFA, do you have any remaining objection, or
21 did you withdraw your objections to those exhibits?

22 MS. PALEY: Correct, we have no objection.

23 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Then I
24 will admit -- and one quick follow-up. Because our rules
25 for tax appeals allow CDTFA 30 days to submit written

1 questions to those declarants, are you going to be
2 exercising that option?

3 MS. PALEY: No, thank you.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great. So
5 then Exhibits 7 through 10 are admitted without objection,
6 and with the waived 30-day period for questions so there
7 will be no follow-up questions to those declarants.

8 (Appellant's Exhibits 7 through 10 were received.)

9 ADMINISTRATIVE LAW JUDGE KWEE: And as far as the
10 issues, there were two issues. We discussed those
11 previously during the prehearing conference and they were
12 summarized in the minutes and orders, so I won't go over
13 them again. Just to confirm, CDTFA, were the issues
14 correctly summarized for the appeal?

15 MS. PALEY: Yes.

16 ADMINISTRATIVE LAW JUDGE KWEE: And, Appellant,
17 would you confirm that the issues were correctly
18 summarized for this appeal?

19 MR. STACK: Let me just look here, your Honor,
20 briefly.

21 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

22 MR. STACK: Yes, I believe those are the issues,
23 your Honor. There is a sub-issue as the Issue 1 that I was
24 going to argue today.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay. You are

1 certainly free to argue any items that you would like to
2 so just as long as we have the umbrella that these were
3 the issues that will be listed in decision. If you have
4 additional arguments, they will be addressed under the
5 umbrella of the respective Issue 1 or 2.

6 MR. STACK: Okay. Thank you.

7 ADMINISTRATIVE LAW JUDGE KWEE: Great. And then
8 I believe that there were two items that were discussed as
9 not been in dispute. The first is with respect to the
10 first issue, there's no dispute about CDTFA's calculation
11 of the disallowed deduction, the question was whether
12 these amounts are deductible or not deductible. Is that a
13 correct understanding for Appellant?

14 MR. STACK: Yes, it is.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And then
16 for CDTFA -- there was also one agreed item that CDTFA
17 does not dispute that Appellant is a legal or statutory
18 successor of the audited partnership and that is in
19 reference to 6596?

20 MS. PALEY: Correct.

21 ADMINISTRATIVE LAW JUDGE KWEE: Great. Before we
22 get started, I'll just go briefly over the order of
23 presentations to make sure that everyone is on the same
24 page. I have 20 minutes allocated for Appellant's opening
25 presentation, which are legal arguments, and 20 minutes

1 allocated for testimony from Ms. Bishop, and after, that
2 we have 20 minutes for CDTFA's opening presentation, and
3 then each party will be afforded 10 minutes for any final
4 closing remarks.

5 Are there any questions about that or just about
6 the process before we start and turn it over to the
7 taxpayer for their opening presentation?

8 MS. PALEY: No, thank you.

9 MR. STACK: No, your Honor.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.
11 Then it is approximately noon, and I'm turning it over to
12 Appellant's representative. You have 20 minutes for your
13 opening presentation.

14 MR. STACK: Thank you, your Honors.

15 The main issue in this case is whether the
16 charges for maintenance or cleaning services in the
17 invoices between A-1 Portables and its customers were
18 mandatory or optional within the meaning of California
19 Sales and Use Tax Regulation 1660 Subparagraph (d)(1), and
20 that is the key in the first issue that is referenced in
21 the minutes and orders of the prehearing conference.

22 At all relevant times in this matter, A-1
23 Portables and its predecessor entities offered two
24 separate and distinct services to the clients. First, the
25 rental of public portable toilets, and, secondly, the

1 maintenance and cleaning services regarding those portable
2 toilets.

3 A-1 Portables was in existence for over 33 years,
4 and its business practices, as Ms. Bishop is expected to
5 testify, never really changed during that period of time,
6 and the way they invoiced clients never really changed
7 either.

8 The company entered into oral contracts with
9 customers that were memorialized with written invoices and
10 sometimes purchase orders that the lessees provided. And
11 as far back as 2003, when the company was audited for tax
12 periods from 1999 to 2022, in response to refund claims
13 that it had filed in order to recover sales tax amounts
14 that it had paid to vendors on toilets it had purchased.

15 You know, the optional nature of the cleaning and
16 maintenance services has been approved, essentially, by
17 the State of California, in a July 2003 audit report,
18 which is part of the record. I believe it is Exhibit 6,
19 if I'm not mistaken. The predecessor to the CDTFA, the
20 BOE, found that, quote, "cleaning services are not
21 mandatory," end of quote. And that, quote, "the taxpayer
22 correctly taxes portable chemical toilet rental receipts
23 as stated on Regulation 1660," end of quote. And that can
24 be found in the CDTFA's decision, it's Exhibit 1, in the
25 documents, but the reference to the audit report here is

1 in Exhibit 15 to that decision, page 1 of 2 of that
2 decision.

3 And so as a result, the State Board, at that
4 time, issued sales tax refunds to A-1 based on its
5 overpayment of sales taxes paid on the portable toilets it
6 so purchased from vendors, but only after it first
7 verified that it properly reported sales taxes on the
8 leases of those toilets to its own customers.

9 And if you look at the invoices that A-1
10 Portables issued -- and some samples can be found in the
11 record, mainly in Exhibits 5 and 6 to the decision, which
12 is Exhibit 1. Basically, the invoices show that it
13 segregated the toilet rental charges which, typically,
14 were \$15.00 a month, against which it did impose a sales
15 tax and weekly cleaning and maintenance charges that were
16 not taxed. The CDTFA admitted to the segregation in its
17 briefing, and that's referenced in the decision at
18 page 11, lines 15 to 18.

19 Also, if you look at the invoices themselves,
20 which we will do here momentarily, there's no statement in
21 them which indicates that cleaning and maintenance
22 services are mandatory. And in all cases, when it entered
23 into portable toilet leases with customers, which usually
24 were verbal rather than written, A-1 gave its customer s
25 the option to utilize its cleaning and maintenance

1 services, and it never required or made it mandatory for
2 customers to utilize such services. That was never a
3 condition in the lease contract that the cleaning and
4 maintenance services must be utilized by the customer.

5 We submit that the optional nature of the
6 cleaning and maintenance services that A-1 offers is
7 supported by a lot of evidence in the record, including
8 the declaration of Darlene Bishop, that is Exhibit 7,
9 specifically paragraph 3 deals with that issue; the
10 declaration of Phillip Bishop, who, unfortunately because
11 of ill health, could not attend the hearing today, and
12 that is Exhibit 8 paragraph 3 of Mr. Bishop's declaration.

13 We also attained declarations from Earl Graham,
14 who is a customer of A-1 Portables called Whoa, Inc.,
15 that's W-H-O-A, and that's paragraph 3, Exhibit 9. The
16 declaration of Annette Worthy, who is co-owner of
17 Dan Worthy Plumbing, that is Exhibit 10, paragraph 3. Her
18 declaration references that.

19 In addition, during the administrative process,
20 the client, Ms. Bishop, obtained statements from 10
21 customers which, I believe -- I think the evidence will
22 show, it was submitted in about 2017, to the effect that
23 cleaning and maintenance services were optional. And as
24 the decision indicates at page 12, lines 2 to 3, the CDTFA
25 made no attempt to reach out to the identified 10

1 customers of A-1 Portables for whom it submitted
2 statements.

3 Also, more recently, with regard to the four
4 declarations that are in evidence now, it has offered no
5 evidence to rebut statements in those declarations that
6 the cleaning and maintenance services were optional. The
7 non-mandatory nature of the toilet cleaning and
8 maintenance services that A-1 offered was supported by the
9 fact that customers were permitted to rent portable
10 toilets from the company without using its cleaning
11 services. They could clean the toilets themselves if they
12 wanted to, for example.

13 As a matter of convenience, however, the large
14 percentage of customers who rented toilets from A-1 opted
15 to utilize the service they offered. Again, not a
16 mandatory thing. A-1 Portables was so good at the toilet
17 cleaning that it sometimes cleaned and maintained toilets
18 that customers had rented from a different company, and
19 that's set forth in Mr. Graham's declaration, Exhibit 9,
20 paragraph 4.

21 And, also, some customers just simply stuck with
22 A-1 Portables with regard to the toilets and rented and
23 never used another company, and that's referenced in
24 Annette Worthy declaration, Exhibit 10, paragraph 4.
25 There's also examples of service-only invoices, which is

1 Exhibit 6 attached to the decision, which is Exhibit 1.

2 Now, if you look at the elements of the Sales Tax
3 Regulation 1660(b), A-1 Portables clearly qualifies for
4 exemption from sales taxation for its maintenance and
5 cleaning services because, one, its charges were optional.
6 Maintenance and cleaning services were not part of the
7 rental price of the portable toilet. Two, maintenance and
8 cleaning services were optional since customers were not
9 required to purchase those services from A-1 Portables.
10 And, three, A-1 Portables has provided documentary
11 evidence establishing that charges for maintenance and
12 cleaning services were optional.

13 And, again, it's our position that invoices which
14 state the maintenance and cleaning charges separately from
15 the rental charge is sufficient to support a tax
16 exemption. And, again, we refer to you Exhibit 5, pages 1
17 to 4, and the decision, which is Exhibit 1.

18 It doesn't seem to make any sense why they would
19 have sent out the rental lease separately from the
20 maintenance and cleaning fees if the latter fees were
21 mandatory. At least that's our view of the situation.

22 There was some points made in the decision as to
23 whether the taxpayer charged too little for the portable
24 rental toilets. It's our position that the stated rent al
25 charge of about \$15.00 a month for the portable toilets

1 that A-1 rented to customers fairly reflects its actual
2 cost of the toilets.

3 The evidence will show that the average cost of a
4 regular portable toilet, nothing fancy, that A-1 purchased
5 during the audit period in 2013 to 2016 was about \$500.00
6 per toilet. That is supported by Exhibit 1, pages 1 to 2
7 to the decision. That's the audit work papers that show
8 the business assets and allocation of the purchases
9 prices. We anticipate that Ms. Bishop will testify
10 similarly to that.

11 You may recall that -- just to refresh your
12 memory of the record here, A-1 sold its assets to a third
13 party in 2016, and that is what triggered the sales tax
14 audit in this matter in order to provide clearance. And
15 the evidence will also show that the average cost of a
16 regular toilet from 2013 to 2015 did not vary or increase
17 significantly. Ms. Bishop will testify as to that.

18 Also, the useful life of a portable toilet is
19 about five to seven years, and that will be established by
20 Ms. Bishop's testimony. So if you look at the useful life
21 of these regular toilets and the purchase price, A-1
22 essentially was able to recover the cost of toilets it
23 purchased in about 33 months. And the math would be just
24 \$15.00 a month times 33 months comes out to \$495.00.

25 It's our contention that, if anything, the \$15.00
17

1 monthly toilet rental fee which A-1 charged the customers,
2 which is taxable, obviously, was actually much greater
3 than the industry standard rental fee that was charged for
4 portable toilets during that time, and Ms. Bishop will
5 testify to that effect.

6 Finally, the second issue here has to do with
7 whether Appellant has established a basis for relief of
8 taxes, interest, and penalties, per Revenue Tax Code
9 Section 6596. And this really comes in to whether it
10 reasonably relied on the State Board's audit of its
11 predecessor entity from the tax periods 1999 to 2002,
12 namely, the determination that the taxpayer's rental of
13 portable chemical toilets, that the cleaning services are
14 not mandatory, and that the taxpayer correctly taxes
15 chemical toilet rental receipts as stated in Regulation
16 1660.

17 The business practices of A-1 and its predecessor
18 entities and successor entities were exactly the same as
19 it relates to the leasing of toilets and the invoice of
20 customers in this case, and it hasn't changed. It has
21 always separately listed a monthly rental price on its
22 invoices and treated them as taxable, and treated the
23 cleaning and maintenance expenses as non-taxable.

24 I know that there is an argument by the
25 Department that we have to compare apples to apples and

1 not apples to oranges. And they're claiming that the
2 field billing order, essentially, the audit of the refund
3 claim, is different from the sales tax audit. We submit
4 that it's not different at all. As a necessary
5 determination, before the taxpayer was entitled to about a
6 \$6,000.00 refund back in that earlier period, the FBO
7 period, it was first necessary to determine that it was
8 not required to pay any sales taxes on the portable
9 toilets it purchased from its vendors.

10 But, secondly, the taxpayer also was required to
11 show that it was not required to pay sales taxes or that
12 it properly taxed the lease of those toilets to its own
13 customers. And that is why the State Board specifically
14 looked into the fact that, you know, are the cleaning
15 services mandatory or optional? And they found they were
16 not mandatory, in other words, optional, and that they
17 correctly taxed the chemical toilet receipts per
18 Regulation 1660.

19 So regardless of whether the prior determinations
20 were made by the State Board on a full-blown audit of the
21 FOB, the same issues were necessarily presented and
22 determined in both matters, and there's no reason why the
23 taxpayer shouldn't have been allowed to rely on that prior
24 audit determination.

25 I also would point out that the FBO review that
19

1 the SBE conducted from the periods of 1999 to 2002, took
2 77 hours to complete. And that is referenced in
3 Exhibit 6, the field billing order dated 8/1/2003, page 3.

4 In contrast, the audit in connection with the
5 closing of that, had to be obtained in the connection of
6 the sale of A-1, took 93 hours to complete. And that's
7 the report of the field audit dated 10/31/2016, page 3 of
8 Exhibit 2, and it's also CDTFA's Exhibit C.

9 So in our view, based on the amount of time it
10 took to complete each of those audit exercises, the
11 previous audit is functionally equivalent to the closing
12 audit that the CDTFA conducted from the periods of 2013 to
13 2016. And with that, that is the end of my opening.

14 Thank you.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.
16 And before we turn it over to the witness for testimony, I
17 just had a question on the legal argument. We are going
18 to go to Taxation Code Section 6010.7, that one is the one
19 that discusses the application of tax to leases of
20 portable chemical toilets. And it has a provision there
21 in (d)(1) that charges for maintenance and cleaning
22 services will be considered mandatory, and part of the
23 taxable rental price, unless the lessor provides
24 documentary evidence establishing such charges are
25 optional.

1 So my question was, the declarations that were
2 being provided, is that the documentary evidence to show
3 that they were optional that you have or were there
4 additional documents?

5 MR. STACK: That is the documentary evidence.
6 And the testimony will also show that they were separate
7 as well.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you
9 for the clarification. So before we have Ms. Bishop
10 testify, I just have to swear her in.

11 If you could raise your hand.

12
13 DARLENE BISHOP,
14 called as a witness, and having been first duly sworn by
15 the Administrative Law Judge, was examined and testified
16 as follows:

17
18 THE WITNESS: Yes, I do.

19 ADMINISTRATIVE LAW JUDGE KWEE: Great. Thank
20 you.

21 You may proceed with the witness testimony.

22 MR. STACK: Thank you.

23 ///

24 ///

25 ///

DIRECT EXAMINATION

BY MR. STACK:

Q Ms. Bishop, did you sign declarations in the case on 4/14/2020, and on 10/26/2022, that were filed with this court?

A I did.

Q And are all of the statements that you made in those declarations true and correct?

A Yes.

Q And what was A-1 Portables?

A It was a portable toilet rental company.

Q How long were you involved in that?

A I believe it was about 33 and a half years.

Q And what was the extent and nature of your involvement in the company?

A The office, basically. The billing and the receivables and -- everything. Whatever the office details were, I was involved in.

Q Okay. And what services did A-1 Portables offer its customers?

A The service of the portable toilets.

Q And did it prepare invoices to customers?

A Yes.

Q And who did that?

A I did it up until -- towards the end of the
22

1 business, and then I had two of the hired girls that did
2 it for me.

3 Q Did you separately list the rental toilets and
4 service related to such rentals on the invoices?

5 A Yes.

6 Q And how was that depicted on the invoices?

7 A Can I see that?

8 Q Yes.

9 MR. STACK: I'm going to hand the witness
10 Exhibit 5. I'll hand copies to the State as well so they
11 don't have to find it in the record. But it's part of
12 Exhibit 1, it's Exhibit 5 to Exhibit 1, pages 1 through 4.

13 MS. PALEY: Thank you.

14 THE WITNESS: On the invoice, the toilet would be
15 broken down --

16 BY MR. STACK:

17 Q Let me just ask you this. We'll go through this
18 quickly here, but -- so I'm at page 1 of Exhibit 4. It's
19 an invoice that was issued to Zeitger's in Houston, Texas.

20 A Yes.

21 Q And this one is dated 12/31 of 2015, and shows
22 the due date of 1/30/2016?

23 A Yes.

24 Q What's the first row there that is shown on the
25 column activity there?

1 A That is the portable toilet, and those would have
2 been the actual service dates for that unit, and then the
3 taxable realm would be below that.

4 Q Okay. So the service dates here were 12/18 of
5 '15 to 12/15 of '15.

6 A I believe that was an error on my secretary's
7 part. When you go from the ending of one year going into
8 the next, sometimes you mix those dates up. I believe
9 that's what happened here.

10 Q So that references the cleaning and maintenance
11 of the toilet, and this was for \$63.80?

12 A Yes. That would have been broke down into four
13 weeks. And we had -- we had a 26- or 28-day billing
14 period.

15 Q So the toilets were cleaned on more than just a
16 monthly basis then?

17 A Yes, weekly.

18 Q The second entry shows taxable rental, what does
19 that depict?

20 A That is the rental portion that I charge taxes
21 on.

22 Q Okay. And that was -- and there's a T to the
23 right of the amount?

24 A Yes.

25 Q And 15.00?

1 A Yes, referencing that is the taxable portion.

2 Q And this invoice shows a subtotal of \$78.80 and
3 has a tax, 8 percent of \$1.20 for a total of \$80.00.

4 A Yes.

5 Q And the tax of 8 percent, was that the sales tax
6 that you were charging?

7 A Yes. Actually, I think in San Bernardino it's
8 7.75 percent, and we were charging 8.

9 Q Okay. So Exhibit 2, page 2 or 4, this is an
10 invoice to Hawks Nest, Inc. It's dated 3/24 of 2016. And
11 Line 1, does that reference the maintenance and service?

12 A Yes, it would have been from March 24, 2016 to
13 4/2016.

14 Q Okay. So that would have been basically once a
15 week servicing of the toilets?

16 A Yes.

17 Q That's something, I take it, you did for sanitary
18 reasons?

19 A Yes.

20 Q Okay. Then there is a taxable rental of there
21 for \$15.00?

22 A Yes.

23 Q What does it relate it?

24 A That's the rental of the unit.

25 Q Okay. And there is a T to the right of amount

1 column, and the tax charged for that was \$1.20; is that
2 right?

3 A Yes.

4 Q Then the next invoice is page 3 of 4 of Exhibit 5
5 to Exhibit 1. And this is Decerata, Inc.

6 A Yes.

7 Q I have a date of 3/24/16 on this invoice. Again,
8 what does this reflect, the activity entries there, the
9 first one?

10 A Once again, that would be the servicing of the
11 unit.

12 Q And that was for \$58.80. So four services for
13 \$58.80, essentially?

14 A Yes.

15 Q And that was the taxable portion that was charged
16 for the toilet?

17 A Yes.

18 Q \$15.00 again?

19 A Yes.

20 Q And the tax was charged to the customer as
21 referenced under the tax portion; right?

22 A Yes.

23 Q And if you could go to the last page of this.
24 This one was to Silver Strand Construction dated 3/24/16.

25 A Uh-huh.

1 Q And if can you go through this one? It's a
2 little more complex.

3 A Yes, more complex. It has a -- this is a sink
4 unit -- this was a trailer unit that was -- it was a
5 portable unit on the trailer and then a sink unit on it.
6 So it had three, which would have been -- I believe it
7 would have been the trailer, the portable toilet, and the
8 sink, which would have been reflected there in the taxable
9 realm 3 of \$15.00 each and \$45.00 taxable.

10 Q Okay. And the reference on the first row there,
11 the dates of the service 3/24/15 to 4/24/15, does that
12 relate to all three of the toilet units?

13 A Yes.

14 Q Okay. Or it's just two toilets and a sink?

15 A It says two-station sink and toilet and then the
16 trailer unit.

17 Q Okay. And you charged tax on the \$45.00 on this
18 instance; right?

19 A Yes. Each unit was taxable.

20 Q So the tax that was charged was \$3.60?

21 A Yes.

22 Q 8 percent; right?

23 A Yes, 8 percent.

24 Q Okay. During the audit period of 2013 to '16,
25 what was the average monthly rental for a regular portable

1 toilet rental?

2 A It was \$15.00.

3 Q And were there more deluxe units that would cost
4 more?

5 A No, not really. Not really.

6 Q And how did you determine to charge \$15.00 a
7 month for the rental of a regular portable toilet?

8 A That goes back 33 years ago. When we started in
9 business, we had several friends that were in the business
10 at the time, and I asked them what they were charging for
11 the rental on their units, and each of them said \$5.00.
12 And I told my husband we needed to raise that. And it's
13 been \$15.00 for 33 and a half years as a rental.

14 Q Why did you raise that?

15 A I just felt it was fair.

16 Q Okay. And was the \$15.00 monthly rental a -- did
17 it bear some relationship to how much you actually had to
18 pay to purchase this toilet?

19 A Yes.

20 Q In general, based on your experience in the
21 business, do you have an opinion as to what the useful
22 life of the toilet was or is?

23 A I would definitely say probably between five to
24 seven years. Some placements of them, they would get used
25 pretty hard, so, you know, they might only last me two,

1 three, or four years, and some placements might even go a
2 little longer.

3 Q So it depends on the use then?

4 A Yes.

5 Q Are the construction sites, are they hard on the
6 portable toilets?

7 A Very hard.

8 Q Okay. So based on the useful life of the toilets
9 you have identified as five to seven years, about how long
10 would it take A-1 to recover its purchase price of the
11 toilets?

12 A I think we figured 33 months, give or take --

13 Q Okay.

14 A -- is what was thought.

15 Q And what was the nature of the cleaning and
16 maintenance services that A-1 offered to its customers?

17 A The unit would be pumped out, and, then, of
18 course, we refreshed with chemicals, paper, hand
19 sanitizer. Some units required seat covers for women. So
20 each unit was different. If it was just men on the job,
21 the customer did not require seat covers. But all of that
22 would have to be refreshed, and the unit would have to be
23 sanitized and ready for the next week, and that was done
24 weekly.

25 Q Okay. During the audit periods or at any time,

1 were customers required to use A-1 cleaning and
2 maintenance services?

3 A No.

4 Q Were those services considered optional?

5 A Yes.

6 Q And how was it made known that they were
7 optional, the services?

8 A Most of our contracts that we went into were
9 verbal, and it was up to them to decide if they wanted to
10 use our service at that time. There were some in the past
11 that did not use our service, which was okay. There were
12 some in the past that we actually would go out and service
13 for them. They owned the unit, and we would service for
14 them.

15 Q All right. I'm going to show you Exhibit 6.

16 MR. STACK: I will hand a copy of this to the
17 representatives of the Department as well. This is
18 attached to Exhibit No. 1 -- Exhibit 6 to No. 1, and I'll
19 hand the witness this as well as for the counsel for the
20 Department.

21 MS. PALEY: Thank you.

22 ADMINISTRATIVE LAW JUDGE KWEE: Mr. Stack, when
23 you are doing the questioning, pause a moment between
24 question and answer so we have a transition for the
25 stenographer to pick up the different people's responses.

1 MR. STACK: I'll slow down. Thank you.

2 BY MR. STACK:

3 Q So in Exhibit 6, can you tell us what the first
4 page of this reflects?

5 A This is actually United Services, and it is
6 another company here in Southern California, and they had
7 asked us to go in and service their units.

8 Q Okay.

9 A So we just pumped them, and this is what we would
10 bill for the service each week.

11 Q This is dated 11/5 of 2015?

12 A Uh-huh.

13 Q And the pumping services, the period that's
14 referenced is 11/5/15 to 12/2/15?

15 A Yes.

16 Q So that refers to, basically, like four different
17 services on a weekly basis?

18 A Yes.

19 Q And there was no tax charged on that, that was
20 for a flat \$100.00?

21 A Right.

22 Q \$25.00 per pumping, I take it?

23 A Yes. It may have been out of the area that we
24 normally are.

25 Q Okay. This was on Dunnell Road. I don't know

1 where that is. If you can go to the next page of this
2 exhibit please. This is an invoice that was billed to
3 Hartwick & Hand, Inc. of Victorville dated 10/18 of 2015.
4 Can you tell us what this represents?

5 A This customer, Hartwick & Hand, owned this unit,
6 and they hired us to come in and service it on a weekly
7 basis. It's a trucking company in Victorville.

8 Q Okay. And it reflects four different services
9 and ranges from October 9th to October 30th of 2015?

10 A Yes.

11 Q And it shows the tax for San Bernardino was 8
12 percent, but there was no tax charged on this; correct?

13 A Correct.

14 Q Why is that?

15 A Because there was not a rental on that.

16 Q Okay. And during the audit that was conducted by
17 the Department, did you have occasion to obtain statements
18 from A-1's customers as to whether or not the cleaning and
19 maintenance services were optional or mandatory? And I'll
20 show you -- that's referenced as Exhibit 3 to Exhibit 1.
21 It's a 10-page document.

22 MR. STACK: I will hand the witness Exhibit 3,
23 and I will also share it with the Department and their
24 representatives.

25 MS. PALEY: Thank you.

1 BY MR. STACK:

2 Q And these are various statements, and it looks
3 like, pretty much, fill-in-the-blank; is that right?

4 A Pretty much.

5 Q And, basically, it indicates that "I/we contract
6 with A-1 Portables, oral agreement, and as part of that
7 agreement, we were never required to use their cleaning or
8 maintenance services for portable units." Is that
9 correct?

10 A Correct.

11 Q And we got the signatures of various parties on
12 that ranging from Coolly Construction to Whoa, Inc. on the
13 third page, and various other individuals. And why did
14 you obtain those statements?

15 A To prove that we never required them to use our
16 service. If they chose to use someone else, they were
17 welcome to do that.

18 Q Okay. And about -- when did you obtain those
19 statements?

20 A That was earlier on, I believe. It was 2017, I
21 believe.

22 Q It was during the audit though; correct?

23 A Yes, the last audit. Yes.

24 Q Can you briefly tell me the circumstances
25 surrounding the audit of the tax period 2013 to 2016?

1 A Well, my husband and I were in Montana, and we
2 were notified about the audit when we came back. And I
3 believe it was the State Board of Equalization at that
4 time, they sent out an auditor, and he went through
5 whatever receipts that I had there at that time. And,
6 well, here we are.

7 Q That was in connection with your selling the
8 assets?

9 A Yes, that I sold in 2016.

10 Q Okay. Prior to the CDTFA's determination that
11 you owed additional sales taxes from the periods of 2013
12 through 2016, had you ever had an adverse determination
13 against A-1 Portables?

14 A No, never.

15 Q Prior to that time, had A-1 Portables ever fallen
16 behind in paying its sales taxes?

17 A No.

18 Q Was it ever late in filing its returns?

19 A No.

20 Q And who was in charge of doing those things?

21 A I was.

22 Q Did it surprise you that the CDTFA's
23 determination was that you owed, I think another -- if I
24 recall, \$221,000.00 of additional tax surprise you?

25 A Yes, it did.

1 Q And did you think that you had been doing things
2 correctly?

3 A Completely, yes.

4 Q Could we go back in time to the period around
5 2003? And that deals with the field billing order for the
6 essential audit of your refund claims?

7 A Uh-huh.

8 Q Why did you file a refund claim?

9 A Well, from the inception of our business, I knew
10 that I shouldn't have to pay taxes on the equipment that I
11 purchased to rent. I kept telling the leasing company
12 that they were charging me, because they broke down their
13 charges. And I'm, like, "You guys shouldn't be charging
14 me this. I'm paying taxes already on this." They said,
15 "Oh no, we have to charge you." And this went on for
16 years and years. And finally, I just said, "Well, I'm
17 going to have to prove it to them," and that's what I did.

18 Q Did you contact the -- back then, the State Board
19 of Equalization?

20 A I did. I contacted SBE, and I asked them if I
21 was doing it properly and they said yes. And I said,
22 "What do I do? Because he won't believe me. I have been
23 doing this for years and paying taxes at the purchases."
24 And she said, "Well, we can do an audit," and I said,
25 "Okay. Let's do an audit," and that's what I did.

1 Q So was an auditor assigned to your case?

2 A Yes.

3 Q What was the name of that auditor?

4 A I believe her name is Kattie Woods.

5 Q Did you meet with her?

6 A Yes.

7 Q How many times?

8 A Just the one time. She called ahead of time and
9 asked me for certain documents and sales receipts, and if
10 I could have those ready for her. And when she got there
11 to my office, I had everything laid out for her so that
12 she could go through it, all of the lease agreements,
13 sales receipts. Whatever she asked for, I made sure she
14 had it completely available to her.

15 Q Okay. And you came back from Montana to meet
16 with her?

17 A No, this was --

18 Q I'm sorry. Never mind.

19 A This was at a different time.

20 Q Okay. But did she visit your office and meet you
21 there?

22 A Yes, she did.

23 Q Okay. Was that a lengthy meeting that you had
24 with her?

25 A I don't remember exactly. I believe it was

1 between four to five hours. She was there quite some time
2 that day. And she did ask me for some other documents
3 that I had not laid out that she did not ask for prior. I
4 went and got those and gave those to her also.

5 Q Did you tell her the periods for which you were
6 seeking a refund?

7 A No, I just wanted her to look to see where I had
8 overpaid.

9 Q Okay. Did she tell you -- what did she tell you
10 after you provided these documents to her and she reviewed
11 them?

12 A She was really quite nice. She told me that my
13 records were impeccable, and I was very thankful that she
14 told me that. But I was able to -- everything that she
15 asked for, it was at my fingertips, and I was able to get
16 it to her to investigate.

17 Q Did she tell you that the State Board could
18 provide a refund to you?

19 A Yes, she did.

20 Q Did you file refund claims after you met with
21 her?

22 A Yes.

23 Q Okay. Did she ask about your leasing practices
24 when you met with her?

25 A She did. I can't remember verbatim, you know,
37

1 the actual questions, but she did, yes. She questioned me
2 on several things.

3 Q Okay. Did she seem to want to -- did she express
4 concern that you were correctly taxing the lessees of the
5 portable toilets?

6 A Yes. She said everything was good on that end,
7 and that we were taxing properly. There was no issues at
8 that time at all. And our practices had not changed from
9 the inception of the business until the sale of the
10 business. Everything remained the same. Even after
11 Kattie Woods was there, nothing had changed.

12 Q Did the invoices or the manner in which they were
13 written change at all?

14 A No, absolutely not.

15 Q And did she, in about July of 2003, when she
16 apparently wrapped up her audit, did she tell you anything
17 about her findings?

18 A She did. She told me that -- she said --
19 "Ms. Bishop, I can only go back two years," I believe is
20 what she said. But she said, "Because I can see that you
21 way overpaid these taxes." And she said, "There's nothing
22 I can do about the past, but I will see if I can put it
23 through a four-year refund," and that's what she told me
24 that day.

25 Q Okay. Did she tell you anything about whether

1 you were required to pay sales taxes on maintenance and
2 cleaning services?

3 A We did talk about that. I can't remember the
4 whole exact conversation. But according to her, the way
5 that we were doing it at the time was proper.

6 Q Okay. All right. And after the audit, did you
7 get a refund from the State Board?

8 A Yes.

9 Q About how much?

10 A I want to say it was around \$6,000.00.

11 Q Okay. After this audit was completed, did the
12 company rely on Ms. Woods' oral advice that you were
13 correctly taxing the leases of the toilets?

14 A Yes.

15 Q And during this case, we obtained the audit
16 file -- the previous, I guess, field billing order audit
17 filing from the State of California, and there were a
18 couple of determinations in there. And I'm referring
19 specifically to, I think -- I think it's Exhibit 6.

20 Anyway, there were a couple of statements in that
21 audit file. The first one was, "The taxpayer rents
22 portable chemical toilets. Cleaning services are not
23 mandatory." Did you see that in looking through the
24 materials here?

25 A Yes.

1 Q Okay. And is that something that she told you as
2 well, that she determined that cleaning services were not
3 mandatory?

4 A Yes.

5 Q And the second item is that quote, "The taxpayer
6 correctly taxes chemical toilets rental receipt as stated
7 in Regulation 1660," is that something you recall her
8 telling you?

9 A Yes.

10 Q And it was referred to in her determinations?

11 A Yes.

12 MR. STACK: All right. I don't have anything
13 further of Ms. Bishop.

14 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I'll
15 turn it over to CDTFA.

16 CDTFA, did you have any questions for the
17 witness?

18 MS. PALEY: No, thank you.

19 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I believe
20 I have a couple of questions, and I believe both of my
21 panelists also have questions. I will start with my first
22 question.

23 I understand the record doesn't include any lease
24 agreements between A-1 Portables and the customers. Am I
25 understanding correctly? It was oral agreements?

1 THE WITNESS: Yes, sir.

2 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And then
3 the four invoices that you went over at the beginning of
4 your testimony, talking mostly, there are three for just
5 toilets, and one for toilets and trailer and a sink?

6 THE WITNESS: Yes.

7 ADMINISTRATIVE LAW JUDGE KWEE: Are those
8 invoices representative of how you would -- how the
9 business would have billed their customers throughout the
10 audit period?

11 THE WITNESS: Yes, your Honor. They would break
12 it down for the customer so they would know what they were
13 paying for.

14 ADMINISTRATIVE LAW JUDGE KWEE: And those
15 invoices were the only written documentation --

16 THE WITNESS: Yes.

17 ADMINISTRATIVE LAW JUDGE KWEE: -- between the
18 parties? Okay.

19 And the invoice that you went over, which was
20 Exhibit 6 to Exhibit 1 -- so the CDTFA had their decision,
21 which was Exhibit 1, and then Exhibit 6 to that attachment
22 was an another invoice for -- you had talked about -- I
23 think it was Hartwick & Hand?

24 THE WITNESS: Yes.

25 ADMINISTRATIVE LAW JUDGE KWEE: And I'm curious,

1 was the \$15.00 weekly charge for just pumping the toilet
2 or also for all of the cleaning services that you normally
3 performed when you did your own toilets?

4 THE WITNESS: Your Honor, that would have
5 included paper, the chemicals or whatever we had to
6 refresh that unit with. Their service would have been no
7 different from a customer of ours. You know, if they
8 wanted to use our service, they would not have been any
9 different.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I was just
11 asking about that because it looked like those were
12 charged on a weekly basis, but your other invoices were
13 charged on another monthly basis it looks like.

14 THE WITNESS: Well, this Hartwick & Hand, each
15 week that our driver would go in there, they would have to
16 give them a receipt that they pumped the unit and readied
17 it for the following week, so my billing would have to
18 match the receipts that our driver gave them that they
19 were there to service with Hartwick & Hand.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And you
21 mentioned that -- so I saw -- this was one example that
22 there were some transactions where you provided services
23 only but no toilet; but on the other hand, there were
24 transactions where you did toilets only without services;
25 is that correct?

1 THE WITNESS: Yes.

2 ADMINISTRATIVE LAW JUDGE KWEE: When you
3 structured it that way, there was only a toilet but no
4 services, was that charged the same, the \$15.00 a month,
5 or was the charge different?

6 THE WITNESS: It depends. It would depend. I'm
7 trying to think of a customer that we did. It's been so
8 long since I have done that.

9 ADMINISTRATIVE LAW JUDGE KWEE: If you don't
10 remember, that's fine.

11 THE WITNESS: I apologize.

12 ADMINISTRATIVE LAW JUDGE KWEE: And my
13 understanding is -- I don't believe there are any
14 invoices -- I believe there are four invoices where it
15 says service and toilet, and one invoice where it is
16 service only, but I don't believe the evidence includes
17 any toilet only without service; is that a correct
18 understanding?

19 MR. STACK: I haven't seen any in the record,
20 your Honor. I know there are some additional invoices
21 attached to the decision. I would have to look through
22 that. But without looking through that, I can't recall
23 offhand.

24 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.
25 One other question that came up when I was looking at

1 this, I believe in the prior audit it talked about how
2 your business was renting the toilets from a third party
3 and subleasing them.

4 THE WITNESS: It was a leasing company, your
5 Honor. When we purchased them -- actually, it was lease
6 purchase. And how I noticed is each month I would get my
7 bill, and I would see there's tax on here and I shouldn't
8 be paying this tax, and that's how I noticed it. It went
9 on for years.

10 ADMINISTRATIVE LAW JUDGE KWEE: So at the end of
11 lease, you purchased and owned the toilets?

12 THE WITNESS: Yes.

13 ADMINISTRATIVE LAW JUDGE KWEE: I was asking
14 because I noticed in the sale of your business that it
15 talked about selling the toilets, so I wasn't sure, but
16 that makes sense.

17 THE WITNESS: Yes.

18 ADMINISTRATIVE LAW JUDGE KWEE: Thank you. I
19 will turn it over to Judge Aldrich.

20 Judge Aldrich, do you have any questions?

21 JUDGE ALDRICH: Hi, this is Judge Aldrich. Yes,
22 I do have some questions for Ms. Bishop if that's okay.

23 If I could direct your attention to your
24 declarations, so Exhibit 7, I believe. I'll give you a
25 second to get there.

1 THE WITNESS: Yes.

2 ADMINISTRATIVE LAW JUDGE ALDRICH: So I'm looking
3 at page 3, item 6.

4 THE WITNESS: Uh-huh.

5 ADMINISTRATIVE LAW JUDGE ALDRICH: And it reads
6 "To verify that A-1 had overpaid its sales taxes to
7 vendors, Ms. Woods reviewed not just the documents related
8 to the vendors, but also the leases that A-1 had with its
9 customers and sales invoices," et cetera. And in that
10 sentence, what do you mean by "leases"?

11 THE WITNESS: That would have been the purchase
12 of the units that we purchased to re-rent.

13 ADMINISTRATIVE LAW JUDGE ALDRICH: Okay. So is
14 that same meaning applicable to the next page where it
15 says, "I provided numerous documents to Ms. Woods
16 including lease agreements"?

17 THE WITNESS: Yes, sir.

18 ADMINISTRATIVE LAW JUDGE ALDRICH: So the only
19 leases that she would have reviewed were those kinds of
20 leases, or did you have leases documenting the
21 relationship between you and your customers?

22 THE WITNESS: I did have invoices that she
23 reviewed, and the actual lease agreements is what was in
24 contention there because of the overpayment of taxes, so
25 that it would have been on the leases -- so from the lease

1 companies that we purchased them through.

2 ADMINISTRATIVE LAW JUDGE ALDRICH: Got it. And
3 then amongst those documents -- let me back up a little
4 bit. So in a typical customer engagement, it was an oral
5 contract; right?

6 THE WITNESS: Yes.

7 ADMINISTRATIVE LAW JUDGE ALDRICH: And would the
8 customers follow up with an e-mail to confirm terms or --

9 THE WITNESS: On some occasions, yes.

10 ADMINISTRATIVE LAW JUDGE ALDRICH: Okay. And did
11 Ms. Woods review those kinds of things as well?

12 THE WITNESS: No. Those would have been mostly
13 verbal or -- the e-mails at that time -- I don't think we
14 were really doing a lot of e-mails at that time. It was
15 more later in the end of our business where we would go
16 back and forth with customers through e-mail, but at that
17 time, no.

18 ADMINISTRATIVE LAW JUDGE ALDRICH: Okay. So in
19 the situation where A-1 Portables would rent just the
20 toilets or related items, what would happen if the
21 customer didn't return the unit clean?

22 THE WITNESS: Well, that wasn't on them. That
23 was on us.

24 ADMINISTRATIVE LAW JUDGE ALDRICH: Perhaps I
25 should rephrase. In the event that you rented the toilets
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1 or the washing station, et cetera, to a customer and
2 didn't include the services, right, was there a fee?

3 THE WITNESS: No, no fee.

4 ADMINISTRATIVE LAW JUDGE ALDRICH: Okay.

5 THE WITNESS: You mean when they would bring it
6 back to us?

7 ADMINISTRATIVE LAW JUDGE ALDRICH: Right.

8 THE WITNESS: No fee.

9 ADMINISTRATIVE LAW JUDGE ALDRICH: Even if it
10 weren't in the same condition you provided it?

11 THE WITNESS: I can't remember a particular
12 situation where it didn't come back to us pretty much the
13 same.

14 ADMINISTRATIVE LAW JUDGE ALDRICH: And you said
15 that later on, perhaps even during the liability period at
16 issue here, sometimes you would have e-mail communication
17 after or no?

18 THE WITNESS: Yes, more towards the end of
19 business we would have some e-mail. But mostly it was
20 verbal. My husband is a man of his word, and when he
21 talked to a customer, whatever he said, that's the way it
22 went with those customers. And there was times where he
23 would put his foot in his mouth and I said, "Are you
24 sure?" And he's says, "Yes, I'm good with it."

25 ADMINISTRATIVE LAW JUDGE ALDRICH: Okay. And

1 Mr. Stack went over the cost of the toilet units, but
2 there were other things that A-1 also rented out; is that
3 correct?

4 THE WITNESS: Yes. We had sink units. We had
5 trailer units, you know, a portable setup on a small
6 trailer for, like, the gas company or Edison or something
7 like that where they would move from one position to the
8 next so that we didn't have to go out there all the time
9 and move it for them. They would keep it behind the truck
10 and move it along the job.

11 ADMINISTRATIVE LAW JUDGE ALDRICH: So an example
12 of that trailer would be on page 56 of Exhibit 1? It's an
13 invoice, Exhibit 5, page 4 of 4, if that helps.

14 THE WITNESS: Yes, sir.

15 ADMINISTRATIVE LAW JUDGE ALDRICH: I see with the
16 portable toilet, there's 3/24/2016 through 4/20/2016, and
17 the services untaxed rate is \$50.80, and then there is a
18 portable toilet trailer unit. Is that what you were
19 describing before?

20 THE WITNESS: Yes.

21 ADMINISTRATIVE LAW JUDGE ALDRICH: So did that
22 require more time to service, or why was the service fee
23 \$133.00?

24 THE WITNESS: San Bernardino County is one of the
25 biggest counties in California, and our company went all

1 the way to Nevada state line and all the way Arizona. So
2 depending on where we had to start or end, that could be
3 that price there. Because if we had to drive all the way
4 out to the Arizona border --

5 ADMINISTRATIVE LAW JUDGE ALDRICH: Lots of gas.

6 THE WITNESS: Exactly.

7 ADMINISTRATIVE LAW JUDGE ALDRICH: But going back
8 to those other items on the same invoice, the two-station
9 sink, what is the life span of a two-station sink? Is it
10 the same?

11 THE WITNESS: Pretty much as long as it doesn't
12 get blown up or run over, yes.

13 ADMINISTRATIVE LAW JUDGE ALDRICH: And cost wise?

14 THE WITNESS: Oh, my goodness.

15 ADMINISTRATIVE LAW JUDGE ALDRICH: If you can't
16 remember, that's fine.

17 THE WITNESS: I honestly don't remember.

18 ADMINISTRATIVE LAW JUDGE ALDRICH: And the
19 portable unit, cost wise, do you have an idea of that one?

20 THE WITNESS: Actually, the trailers were
21 separate. I mean, we paid for those ourselves. They were
22 not leased. And then we would just mount the unit on
23 there, you know, according to the standard for traveling
24 or whatever, but that was a totally separate purchase from
25 the unit.

1 ADMINISTRATIVE LAW JUDGE ALDRICH: Those are all
2 of the questions that I had for you. Thank you very much.
3 I'll refer back to Judge Kwee.

4 ADMINISTRATIVE LAW JUDGE KWEE: Before I turn it
5 to Judge Long, I did have two follow-up questions. One
6 is, in the prior audit, there was the issue of overpaid
7 tax to the vendor, but I don't think I saw any issues
8 about tax paid purchases resulting in the current audit.
9 Did you resolve that so they stopped charging you tax?

10 THE WITNESS: Yes.

11 ADMINISTRATIVE LAW JUDGE KWEE: So then my other
12 question is, when your company was servicing the portable
13 toilet, were things like toilet paper, seat covers, and
14 cleaning supplies, were those purchased for resale or were
15 those purchased with tax? How did that happen?

16 THE WITNESS: They were actually a portion of the
17 rental. It was a minimal cost. The toilet paper and the
18 chemicals were a minimal cost, and it was just basically
19 included in the rental.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I
21 meant, like, when you purchased it, did you pay your
22 vendor tax on those items?

23 THE WITNESS: No, we did not have to.

24 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So you had
25 a resale certificate for those?

1 THE WITNESS: Yes, we did.

2 ADMINISTRATIVE LAW JUDGE KWEE: Got it. I will
3 turn it over to Judge Long. I believe Judge Long has a
4 couple of questions.

5 THE WITNESS: Okay.

6 ADMINISTRATIVE LAW JUDGE LONG: Thank you.

7 Ms. Bishop, I just want to clarify. So with
8 respect to the 1999 to 2002 audit, in that case, you only
9 had verbal contracts with your customer as well?

10 THE WITNESS: Yes, pretty much throughout our 33
11 years.

12 ADMINISTRATIVE LAW JUDGE LONG: And with respect
13 to the \$15.00 rental fee, your contention is that the
14 cleaning and maintenance fees weren't mandatory, right, it
15 was optional. But if someone rented just a toilet and did
16 not purchase those things, you would just break even on
17 that toilet or even lose money if it had lasted less than
18 33 months.

19 THE WITNESS: It may have taken a little longer
20 possibly for that one to be paid off. You know what I'm
21 saying? Yes, I mean.

22 ADMINISTRATIVE LAW JUDGE LONG: Okay. Thank you.
23 I don't have any more questions.

24 THE WITNESS: Thank you.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Then I

1 believe that is all of the questions that this panel has
2 for the witness at this time.

3 I will turn it over to CDTFA for your opening
4 presentation. You have 20 minutes. It's approximately
5 1:00 o'clock, so you have until 1:22.

6 MS. PALEY: Thank you.

7 Appellant, A-1 Portables, Incorporated was a
8 California corporation that operated a business out of
9 Hesperia, California renting portable chemical toilets.
10 The seller's permit for the business began in April of
11 2006 and closed out effective May 27, 2016. Appellant
12 sold its business, including business assets, to Diamond
13 Environmental Service, LP. Appellant previously, from
14 1985 until 2006, operated a different entity as a
15 partnership that did business as A-1 Portables Drain and
16 Sewer.

17 There are two issues in this appeal. The first
18 issue is whether the maintenance and cleaning services
19 provided by Appellant with its rental of portable toilets
20 were taxable and, therefore, whether the deficiency
21 measure of approximately \$2.5 million was warranted. The
22 second issue is whether Appellant reasonably relied on the
23 written advice of the Board of Equalization in failing to
24 pay the correct amount of tax due.

25 With respect to receipts for bringing portable
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1 chemical toilets charges for mandatory maintenance and
2 cleaning services are subject to tax as part of the rental
3 price, but charges for optional cleaning services are not
4 subject to tax. Maintenance or cleaning services are
5 mandatory when the lessee, as a condition of the rental
6 agreement, is required to purchase the service from the
7 lessor.

8 Conversely, maintenance or cleaning services that
9 are optional when the lessee is not required to purchase
10 the service from the lessor. In determining whether a
11 charge is mandatory or optional, Regulation 1660 (b)(1)
12 provides a standard specific to the leasing of portable
13 toilets.

14 The regulation provides that charges for
15 maintenance or cleaning services will be considered
16 mandatory and, therefore, part of the taxable rental price
17 unless the lessor provides documentary evidence
18 establishing that such charges are optional. The terms of
19 the lease or rental agreement determines whether the
20 maintenance or service charges are mandatory or optional.

21 Where there are no lease or rental agreements,
22 Regulation 1660 (b)(1) directs us to look at Appellant's
23 invoices for the requisite language showing cleaning
24 services are optional. Finally, the regulation provides
25 that other documentary evidence may be provided to

1 establish that maintenance or cleaning is performed at the
2 option of the lessee.

3 In this audit, Appellant has not provided any
4 lease or rental agreements with any of its customers.
5 Accordingly, Appellant cannot establish that the services
6 were optional based on the terms of the lease.

7 Next, Appellant has provided many sales invoices,
8 but not one sales invoice states that the service charges
9 are optional. Therefore, Appellant cannot establish that
10 the services were optional based on sales invoices.

11 Appellant has asserted that it rented its
12 portable toilets for \$15.00 per month, and that any
13 additional charges were for optional maintenance or
14 cleaning service. If this were true, one would expect
15 that the customers who decline the optional service would
16 just be billed \$15.00 a month for renting portable
17 toilets.

18 Appellant has not identified a single customer
19 who was charged just \$15.00 per month for a portable
20 toilet rental. The evidence shows that every last
21 customer was charged for the additional services. Because
22 Appellant did not provide documentary evidence
23 establishing that its charges for maintenance and cleaning
24 services were optional, the Department concluded that the
25 service were mandatory pursuant to Regulation 1660,

1 subdivision (b)(1).

2 Appellant has recently submitted the sworn
3 statements of Earl Graham of Apple Valley, California, and
4 Annette Worthy of Helena, Montana, prior customers of
5 Appellant, which attest, albeit after the fact, that they
6 had the option of the cleaning services and they used A-1
7 cleaning service. During the audit and its appeal,
8 Appellant provided similar, undated, fill-in-the-blank,
9 insert-name-of-company statements attesting that cleaning
10 services were optional.

11 However, statements that services are optional
12 are not enough to overcome the presumption set forth in
13 Regulation 1660. The regulation required the lessor to
14 provide documentary evidence that establishes that the
15 services are optional.

16 Generally, the documentary evidence is in the
17 form of lease agreements or sales invoices, and Appellant,
18 however, has not provided lease agreements, and its sales
19 invoices do not state that the services are optional as
20 required by the regulation. The declarations submitted
21 are testimonial in nature, not documentary.

22 The Department would accept other documentary
23 evidence such as captured from a website, or
24 advertisements, or e-mails, or other business records that
25 indicated that services were, in fact, optional. Or sales

1 invoices that showed that there were actual customers who
2 were charged only \$15.00 a month for toilet rentals, but
3 no such documentary evidence has been provided.

4 Additionally, the circumstantial evidence
5 indicates that the services are mandatory because every
6 single customer was charged for additional services. For
7 these reasons, the Department finds that all of
8 Appellant's additional charges to its customers were for
9 mandatory services and were subject to tax as part of the
10 rental price for the 32 portable toilet.

11 We must also address whether Appellant reasonably
12 relied on written advice from the Department's
13 predecessor, the Board of Equalization, BOE, in failing to
14 pay the correct amount of tax due.

15 Appellant's predecessor entity, A-1 Drain and
16 Sewer was previously subject to a prior sales and use tax
17 field billing order, or FBO report, that was issued July
18 3, 2014. The BOE auditor reviewed lease agreements,
19 cancelled checks, sales invoices and related information
20 to determine whether they overpaid tax to its vendors and
21 were entitled to tax paid purchase resold credit as shown
22 in A-15.

23 The BOE auditor commented that cleaning services
24 were not mandatory for the period of July 1, 1998 through
25 December 31, 2002, and that the taxpayer correctly taxed

1 portable chemical toilet rentals as stated in Regulation
2 1660.

3 As shown in Exhibit A-16, in the August 1st, 2003
4 letter from BOE that enclosed a copy of the FBO, the BOE
5 stated that the FBO was not an audit report, and that the
6 auditor may not have examined all of your transactions and
7 that there still may be transactions that you are not
8 reporting correctly. And the field billing order
9 pertaining to a claim for refund was not a full audit of
10 practices.

11 Revenue and Taxation Code Section 6596(a)
12 provides that if a person's failure to pay the correct
13 amount of tax was due to that person's reasonable reliance
14 from the Department or its predecessor, that person may be
15 relieved of any sales or use tax imposed. If the prior
16 audit report of a taxpayer shows that the issue in
17 question was examined, either in sample or actual review,
18 such evidence will be considered written advice of the
19 Department.

20 Written evidence in the form of audit comments,
21 scheduled, or other writings which become a part of the
22 audit work papers that show an auditor examined the
23 activity of transaction in question, can inform a taxpayer
24 that the activity or transaction was properly reported,
25 and the determination that no additional tax are due is

1 sufficient from a finding of relief from liability.

2 The field billing order, Exhibit A-15, pertaining
3 to 1998 to 2002 addressed to claims for refund for
4 overpayment of tax and did not relate to the disallowed
5 claim of nontaxable labor sales at issue here. The focus
6 of the FBO was A-1's purchases and vendors, not the
7 failure to collect the full amount of tax due from
8 customers.

9 The FBO was requested by Ms. Bishop because she
10 believed A-1 had overpaid sales tax to its vendors and
11 associated leasing companies for many years, as shown on
12 Exhibit A-17. A full audit of the overall business
13 practices was not undertaken and, hence, the cautionary
14 language of the accompanying letterhead, Exhibit A-16.
15 Therefore, it's not reasonable to have relied on the field
16 billing order's finding of lack thereof as a defense to
17 the present audit.

18 Additionally, the issuance of the FBO to the
19 predecessor entity also does not demonstrate that the
20 facts and conditions relating to the activity or
21 transaction have remained unchanged from the period
22 covered by the prior period as required by Regulation
23 1705(c).

24 It appears that there have been a change in
25 Appellant's business model from subletting toilets to at

1 least some ownership of them. In the examination of the
2 present entity, the Appellant has cited the \$15.00 rental
3 fee as somehow representing the depreciation value of the
4 toilets, whereas the predecessor entity rented them from
5 another lessor which provided us with the lease agreements
6 for review in the prior field billing order. One wouldn't
7 be depreciating a toilet if they were just a lessee and
8 not an owner.

9 Based on the law and evidence, we submit that
10 Appellant has not established a basis for excluding from
11 tax all or any portion of the invoice charges that it
12 billed customers in connection with the lease of portable
13 chemical toilets, and that Appellant has not established a
14 basis for relief of taxes, interest, and penalties
15 pursuant to Revenue and Taxation Code 6596, based on the
16 written advice of the Board of Equalization for the
17 predecessor entity in failing to pay the correct amount of
18 tax due, and we ask that the panel deny the appeal.

19 ADMINISTRATIVE LAW JUDGE KWEE: Does that
20 conclude your opening presentation?

21 MS. PALEY: It does.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay. You had
23 mentioned a couple of times that taxpayer was arguing
24 that -- I guess their position was they rented the toilets
25 for \$15.00 a month from their owner? And I guess I just

1 wasn't sure -- I don't think that was the testimony today.

2 MS. PALEY: And that wasn't my contention. What
3 the documentation shows is that it rented to their
4 customers for \$15.00.

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Judge
6 Aldrich, do you have any questions for CDTFA?

7 ADMINISTRATIVE LAW JUDGE ALDRICH: I do not have
8 any questions.

9 ADMINISTRATIVE LAW JUDGE KWEE: Judge Long, do
10 you have any questions for CDTFA?

11 ADMINISTRATIVE LAW JUDGE LONG: No questions,
12 thank you.

13 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I do have
14 one other question that has to do with the 6596 aspect and
15 whether or not the transactions have changed. If I'm
16 understanding CDTFA's position, your position is that
17 there is a change in the nature of the transactions
18 because in the prior audit it only referenced subleases
19 and leases versus the current audit, there were leases,
20 and then there were also portable toilets which the
21 taxpayer owns.

22 Are there any other differences that CDTFA is
23 asserting that changed from the first and second audit, or
24 is that the only thing that's asserted?

25 MS. PALEY: We do not know what else had changed,
60

1 but that was an instance that we were able to point out
2 from the documentation.

3 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.
4 At this point, I will turn it over to Appellant for your
5 closing remarks. And you have 10 minutes. You may
6 proceed when you are ready.

7 MR. STACK: Thank you, your Honors.

8
9 CLOSING STATEMENTS

10 MR. STACK: I will treat this more as rebuttal
11 than a true closing rather than go through our entire
12 argument and opening statement. You know, we believe we
13 have shown that through a combination of the invoices that
14 we submitted and had Ms. Bishop explain that that is
15 sufficient documentary evidence that the cleaning and
16 maintenance services were optional rather than mandatory.

17 The State appears to elevate form over substance
18 here. In substance, it was clear that the company, you
19 know, offered optional toilet cleaning and maintenance
20 services. There was no requirement that customers utilize
21 those services. And we did introduce declarations of
22 three other individuals besides Ms. Bishop that support
23 that fact.

24 We also have introduced statements from other
25 third parties that were part of one of the documents in

1 the decision. And, you know, it's true there were no
2 formal invoices because this was done orally. You have
3 oral agreements. Oral contracts are just as good as a
4 written contract.

5 We believe that we were able to show through
6 documentary evidence that the maintenance of the rental
7 services were optional rather than mandatory. The State
8 has not offered any evidence at all to rebut the
9 documentary evidence and the declarations that we
10 submitted that the services were somehow mandatory. It's
11 just kind of ipse dixit determination by the State that
12 because we say so, this is what it is.

13 With regard to the reasonable reliance, while
14 there is a caveat in the letter transmitting the field
15 billing order that it doesn't constitute an audit, in
16 fact, Ms. Woods did conduct an audit of A-1, otherwise
17 there would have been no reason for her to orally tell
18 Ms. Bishop, number one, that the cleaning services are not
19 mandatory. Okay? She determined that the cleaning
20 services are not mandatory. Secondly, that the taxpayer
21 correctly taxes portable chemical toilet rental receipts
22 as stated on Regulation 1660.

23 It is not fair for the State, at this late date,
24 to try to wiggle out of those statements by its previous
25 auditor that the taxpayer continued to rely on and ran her

1 business consistently with how she had done it before the
2 field billing order was issued.

3 And there really is no substantive evidence that
4 the business model of A-1 Portables has changed in any
5 significant way between the time of the period that was of
6 the FBO and the later audit? This is just something
7 that -- you know, there is no evidence that A-1 was just
8 in the business of releasing toilets that it had leased
9 from another entity in the earlier period and somehow that
10 business model was different in the later years.

11 And, you know, it does seem that the taxpayer was
12 reasonably -- could justifiably and reasonably rely on the
13 advice that was given to her by the auditing agent, by
14 Ms. Woods, and was actually supported by the actual audit
15 report that she issued.

16 So for all of those reasons, we believe that the
17 taxpayer has established that, you know, both that the
18 charges for the cleaning and maintenance services were
19 optional, not mandatory, and, therefore, not taxable, and,
20 alternatively, that was entitled to rely on the previous
21 audit determination that the services related to cleaning
22 were not mandatory, and that it correctly taxed chemical
23 toilet rental receipts as provided in Regulation 1660.

24 So for those reasons, we submit that the court
25 should rule in favor of the taxpayers and deny the

1 proposed assessments determined by the State.

2 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.
3 And now I will turn it over the CDTFA. You have 10
4 minutes for any closing remarks that you would like to
5 make?

6 MS. PALEY: No, thank you.

7 ADMINISTRATIVE LAW JUDGE KWEE: And CDTFA has
8 waived closing remarks. I believe we are ready to
9 conclude. I'll just check with my panel.

10 Judge Aldrich, do you have anything to add before
11 we conclude?

12 ADMINISTRATIVE LAW JUDGE ALDRICH: This is Judge
13 Aldrich. Nothing further to add. Thank you.

14 ADMINISTRATIVE LAW JUDGE KWEE: And Judge Long,
15 do you have any final questions before we conclude today?

16 ADMINISTRATIVE LAW JUDGE LONG: Just one.

17 Ms. Bishop, with respect to the voluntary nature
18 of the cleaning services, if a customer didn't opt to get
19 cleaning services from you, they would need to own their
20 own pump or go to a different cleaning service?

21 THE WITNESS: Yes, they would.

22 ADMINISTRATIVE LAW JUDGE LONG: And just so I'm
23 clear, there's nothing in the evidence that's been
24 provided that shows that any of your customers actually
25 did that though?

1 THE WITNESS: There is stuff in the past but
2 where it would be. I don't know. I don't know. I
3 honestly don't know. I apologize.

4 ADMINISTRATIVE LAW JUDGE LONG: It's okay. I
5 just wanted to make sure that I understand the situation.
6 Thank you very much. I have no further questions.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Then I
8 believe we are ready to conclude. The record is now
9 closed and this case is submitted for an opinion on
10 Tuesday, November 8, 2022.

11 Thank you, everyone, for coming in today. The
12 judges, the members of this panel, will meet after today's
13 hearing and produce a written opinion as equal
14 participants. And that opinion should be mailed out
15 within 100 days of today's date. And that concludes our
16 oral hearing for today's date and for tomorrow's too. So
17 thank you.

18 (The hearing adjourned at 1:23 p.m.)
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1 HEARING REPORTER'S CERTIFICATE

2
3 I, Shelby K. Maaske, Hearing Reporter in and for
4 the State of California, do hereby certify:

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

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

14 I have hereunto subscribed my name this 1st day
15 of December, 2022.

16
17 
18 Shelby Maaske,
Hearing Reporter

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