

## BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF: )  
 )  
CITIES OF FILLMORE, ET AL., ) CASE NO. 18011887  
 )  
 APPELLANTS. )  
\_\_\_\_\_ )

**CERTIFIED COPY**

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Thursday, December 15, 2022

Reported by:

Maria Esquivel-Parkinson,  
CSR No. 10621, RPR

Job No. :  
39620 OTA(B)

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TRANSCRIPT OF PROCEEDINGS, taken at  
400 R Street, Sacramento, California,  
commencing at 1:05 p.m. and concluding  
at 4:00 p.m. on Thursday, December 15, 2022,  
reported by Maria Esquivel-Parkinson,  
CSR No. 10621, RPR, a Certified Shorthand  
Reporter in and for that State of California.

1 APPEARANCES:

2  
3 Panel Members: SHERIENE RIDENOUR, Lead ALJ  
4 ANDREW WONG  
5 SUZANNE BROWN

6 For the Petitioners: JANIS VARNEY, Representative

7  
8 For the Appellant: MICHAEL CATALDO, Attorney

9  
10 For the CDTFA: OFFICE OF TAX APPEALS  
11 CHAD BACCHUS, Tax Counsel  
12 SCOTT CLAREMON, Tax Counsel  
13 CATHY STOCKER, Hearing Representative  
14  
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I N D E X

E X H I B I T S

(Appellants' Exhibits 1 through 16 were admitted at page 8)

(Petitioner's Exhibits P-1 and P-2 were admitted at page 8)

(CDTFA's Exhibits A through D were admitted at page 8)

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1 Sacramento, California; Thursday, December 15, 2022

2 1:05 p.m.

3  
4 ALJ RIDENOUR: We are opening the record in the  
5 appeals of City of Fillmore, et. al., OTA Case No.  
6 18011887. Today's date is Thursday, December 15th,  
7 2022, and the time is approximately one o'clock. The  
8 hearing is being conveyed [sic] at Sacramento,  
9 California.

10 Today's hearing is being heard by a panel of  
11 three administrative law judges. My name is Sheriene  
12 Ridenour, and I'm the lead judge. Judges Andrew Wong  
13 and Suzanne Brown are the other members of this Tax  
14 Appeals panel. All three judges will meet after the  
15 hearing and produce a written decision on equal  
16 participance. Although the lead judge conducts the  
17 hearing, any judge on this panel may ask questions.

18 For the record, will the parties please state  
19 their names and who they represent starting with  
20 appellant.

21 MR. CATALDO: My name is Michael Cataldo, with  
22 Cataldo Tax Law, and I represent the Appellant City of  
23 Fillmore.

24 ALJ RIDENOUR: Thank you.

25 MS. VARNEY: Janis Varney, vice president of

1 Sales and Use Tax for MuniServices representing the  
2 Petitioners Cities of Los Angeles, Ontario, Palm  
3 Springs, San Jose, San Diego, and County of Sacramento.

4 ALJ RIDENOUR: Thank you.

5 And CDTFA?

6 MR. BACCHUS: Chad Bacchus with the  
7 Department's legal division. And seated behind me are  
8 Scott Claremon also with the legal division, and Cathy  
9 Stocker with the Department.

10 ALJ RIDENOUR: Great. Thank you.

11 As we discussed and agreed upon by the parties  
12 at the prehearing conference on November 14th, 2022, and  
13 as stated in my minutes and orders dated November 17th,  
14 2022, there are two issues in this appeal. They are  
15 whether the reallocation of tax is barred under the  
16 equitable doctrine of laches and whether the disputed  
17 amount of local tax allocated as sales tax directly to  
18 Appellant should be reallocated.

19 The following facts are agreed upon by the  
20 parties: That the Fillmore office is the only  
21 California location at issue as a possible place of  
22 business of retailer, that the storage tanks were not  
23 owned or operated by retailer, and the fuel located in  
24 the storage tanks were commingled with fuel owned by  
25 other persons.

1 (Reporter interrupted)

2 ALJ RIDENOUR: No, don't apologize.

3 The following facts -- I'll start there? Does  
4 that work for you?

5 THE COURT REPORTER: Yes.

6 ALJ RIDENOUR: Okay. The following facts  
7 agreed upon by the parties: That the Fillmore office is  
8 the only California location at issue as a possible  
9 place of business of retailer, that the storage tanks  
10 were not owned or operated by retailer, and that the  
11 fuel located in the storage tanks was commingled with  
12 fuel owned by other persons. When the jet fuel was  
13 delivered to customer, title passed and the sales  
14 occurred in California.

15 As for exhibits, each party's exhibits are  
16 listed in the exhibit log, which was attached to the  
17 minutes and orders as well as in the exhibit binder  
18 which was emailed to the parties if any party did not  
19 get that, would they please let -- raise their hand.

20 All right. Hearing none. Appellant submitted  
21 Exhibits 1 through 16; Petitioner submitted Exhibits P-1  
22 and P-2, and CDTFA submitted Exhibits A through D.  
23 During the prehearing conference, none of the parties  
24 raised objections to other parties' exhibits. As such,  
25 pursuant to my minutes and orders, Appellant's Exhibits

1 1 through 16 were admitted into evidence, Petitioner's  
2 Exhibit P-1 and P2 were admitted into evidence, and  
3 CDTFA Exhibits A through D were admitted into evidence.

4 (Appellant's Exhibits 1 through 16 admitted.)

5 (Petitioner's Exhibits P-1 and P-2 admitted.)

6 (CDTFA's Exhibits A through D admitted.)

7 ALJ RIDENOUR: There will be no witness  
8 testimony today. The presentations will consist solely  
9 of oral arguments.

10 Also indicated in my minutes and orders, at the  
11 close of the hearing, the record will be held open to  
12 allow the parties to brief on the issue of buying  
13 companies which was recently raised by Appellant.

14 While I originally indicated that Appellant  
15 would have 30 days from today to submit its brief, I  
16 have since realized that Appellant's 30-day deadline  
17 would fall on a Saturday of a holiday weekend. So in an  
18 effort to allow the parties an equal duration of further  
19 briefing on this new issue, I will instead give each  
20 party 40 days.

21 As a reminder to the parties, during our  
22 prehearing conference, we decided that Appellant will  
23 have 60 minutes to make its presentation, followed by  
24 Petitioners who will have 20 minutes, and then CDTFA who  
25 will have 30 minutes. Then Appellant will have minutes



1 to provide closing remarks if it chooses. Each party is  
2 encouraged to monitor their own time. And I also remind  
3 the parties that the taxpayer in this matter shall be  
4 referred to only as "Retailer."

5 Does anyone have any questions before we move  
6 on to presentations?

7 Mr. Cataldo?

8 MR. CATALDO: No questions.

9 ALJ RIDENOUR: Thank you.

10 Ms. Varney?

11 MS. VARNEY: No questions.

12 ALJ RIDENOUR: Thank you.

13 And Mr. Bacchus?

14 MR. BACCHUS: No questions.

15 ALJ RIDENOUR: All right. Thank you.

16 Again, Mr. Cataldo, you have 60 minutes, and  
17 when you're ready, please begin your presentation.

18 MR. CATALDO: Perfect. Thank you very much.

19  
20 PRESENTATION

21 BY MR. CATALDO, Attorney for Appellant:

22 So I just want to give you a little overview of  
23 the topics that I'm going to be covering in my  
24 presentation today starting with just a summary of the  
25 case, identifying the agreed facts of the case --

1           ALJ WONG: Mr. Cataldo, can you pull the mic  
2 closer, please. Thank you.

3           MR. CATALDO: How's this? Okay?

4           ALJ WONG: Great. Thank you.

5           MR. CATALDO: So I'm going to start with a  
6 summary of the case, then lay out the agreed facts, then  
7 discuss the evidence in this case, then the economic  
8 development agreement, followed by a discussion of  
9 buying companies and Regulation 1699 -- it was (h), it  
10 is currently (i). There's recently been an amendment to  
11 the regulation that just moved the ordering -- as well  
12 as legislation specifically dealing with jet fuel, local  
13 sales tax allocation where there's one place of  
14 business. Then I'm going to go through the Board of  
15 Equalization review of the reallocation petitions and  
16 the regulations, followed by the laches argument, then  
17 applying the local sales tax allocation laws to the  
18 undisputed facts in this case, and then concluding with  
19 several ways that this panel can decide the case in  
20 favor of Fillmore.

21           So for a summary of the case, the airline in  
22 this case -- and I'm just going to refer to it as  
23 "airline" -- established Retailer as a jet fuel-buying  
24 company. Retailer entered into an agency agreement with  
25 Inspired Development, LLC, where the retailer asks

1 Inspired to establish and conduct a jet fuel sales  
2 administration office in Fillmore.

3 The retailer purchased jet fuel from various  
4 third parties and resold the jet fuel to the airline  
5 through its Fillmore office pursuant to a master sales  
6 agreement between the airline and the retailer. So that  
7 is just the -- sort of summary of the case.

8 Appellant contends that the local sales tax  
9 applies because the jet fuel sales were made by Retailer  
10 from its Fillmore office, and Appellants's position is  
11 supported by both ample evidence in the record as well  
12 as the settled law on local sales tax allocation with  
13 respect to jet fuel sales sold by buying companies with  
14 a single place of business.

15 CDTFA and Petitioners, from what I understand,  
16 their arguments are really aligned, so I don't have to  
17 address separate arguments from Petitioner and CDTFA.  
18 We all seem to be -- they're all advancing the same  
19 arguments. So if I refer just to "CDTFA argues," I  
20 think you can fairly say that I'm also saying  
21 "Petitioner argues." There's no other separate  
22 arguments. For example, Petitioners were at one point  
23 arguing that there was more than one possible place of  
24 business because of the storage tanks, but as  
25 Judge Ridenour just mentioned, that is sort of off the

1 table now.

2 So what CDTFA is contending is that the jet  
3 fuel sales in question here were subject to a local use  
4 tax because it claims that those sales were made by a  
5 retailer from Houston. Now, CDTFA must show by a  
6 preponderance of the evidence that the sales were made  
7 from Houston in order to reallocate. And that's  
8 Regulation 1807(b)(2), now 35056(c)(3), where the  
9 preponderance of evidence standard is.

10 They're won't be able to do that. The CDTFA  
11 really ignores all of the evidence in the case showing  
12 that the sales were made by Retailer from Retailer's  
13 office in Fillmore.

14 The agreed facts in this case. The retailer  
15 was a buying company. This was acknowledged in -- at  
16 Exhibit A, page 1, in the Decision and Recommendation,  
17 second sentence. What is a buying company? A buying  
18 company is defined under Regulation 1699(h). I'll be  
19 referring to it as (h). A buying company -- and this is  
20 not the entire regulation. I'll be getting into it  
21 later. But the gist of it is that a buying company,  
22 quote, shall be issued a seller's permit and shall be  
23 regarded as the seller of tangible personal property it  
24 sells or leases.

25 Another agreed fact is that the Board of

1 Equalization issued Retailer a seller's permit in 2006  
2 for the Fillmore location.

3 Now, before I proceed any further, I just want  
4 to make clear when I'm referencing the Board of  
5 Equalization -- there's a lot of different parties and  
6 the Taxpayer Transparency and Fairness Act kind of added  
7 some complications to who I'm going to be referring to.  
8 But during the time at issue in this case, there was no  
9 CDTFA and there was no Office of Tax Appeals. Both of  
10 those roles were handled by the State Board of  
11 Equalization. So the State Board of Equalization was in  
12 charge of administering the sales tax, issuing  
13 regulations, which is now what the CDTFA does. The  
14 Board of Equalization also heard tax appeals, both sales  
15 tax as well as income tax appeals, which is now what the  
16 role of the Office of Tax Appeals is.

17 So the Board of -- the Board of Equalization  
18 issued a seller's permit to Retailer for the Fillmore  
19 location. It now seeks to retroactively revoke that  
20 sales permit and it -- so it needs that to happen in  
21 order for its entire theory to hold together.

22 And I will just note right now that I'm not  
23 aware of any authority that allows the State Board of  
24 Equalization to retroactively revoke a seller's permit.

25 Sellers' permits when they're issued, there's

1 rights and responsibilities to having a seller's permit,  
2 and the CDTFA's own publications will tell you that.

3 Then there's -- under the Code, there's  
4 revocation proceedings and hearings before a seller's  
5 permit can be revoked. It's actually a misdemeanor to  
6 sell without a permit. And accepting and issuing the  
7 sale for resale certificate, these are all things that  
8 show you can't just retroactively revoke a seller's  
9 permit.

10 The point -- because I am in the agreed facts  
11 here, the point is that the BOE issued the retailer  
12 seller's permit. Now, I know they'll probably disagree  
13 as to whether they can revoke it or not, but I just  
14 wanted to point that out here.

15 Again, the retailer had no other place of  
16 business in California. So we've agreed to that.

17 And finally, title to the jet fuel at issue  
18 passed in California.

19 The evidence in this case, the evidence that  
20 this panel will need to look at to decide this case  
21 is -- there's a handful of things. One is the agency  
22 agreement between the retailer and Inspired, and that's  
23 at Exhibit A-1.

24 The master sales agreement between the retailer  
25 and the airline, which governs the sales of the jet fuel

1 in this case. The purchase orders and authorizations  
2 received at the Fillmore office. Those are at  
3 Exhibit A-7. The master sales agreement, by the way, is  
4 at Exhibit A-5. And the invoices received at the  
5 Fillmore office, which is at Exhibit A-8, at page 13.

6 There's also an economic development agreement,  
7 which the CDTFA has pointed out in its D&R. So the  
8 economic development agreement really is not relevant  
9 evidence as far as how the law should be applied;  
10 however, you certainly need to know about it because  
11 it's relevant to looking at the buying company issue.

12 The economic development agreement was between  
13 Inspired and Fillmore. The economic development  
14 agreements of localities are legal, and there's been no  
15 suggestion that this is not something that can be  
16 legally done.

17 The economic development agreement split the  
18 local sales tax revenue that was -- would be generated  
19 as a result of placing a place of business in Fillmore,  
20 50 percent to the retailer, 15 percent to the City of  
21 Fillmore, and 35 percent to Inspired.

22 There's been some discussions and questions  
23 about Ryan's involvement, and they're were a tax  
24 consulting firm who assisted. And under the agreement,  
25 they're were referenced as having a separate agreement

1 with Inspired, which we didn't have. It was asked for.  
2 CDTFA wanted to see it. We don't have it. Suffice it  
3 to say, there's some economic development agreement.  
4 Ryan was involved. It's our position is how Ryan gets  
5 compensated under this economic development agreement  
6 has no bearing on this case.

7           Buying companies. So this is going to be a bit  
8 of a mouthful, but I think given the importance of this  
9 regulation, I'm going to go ahead and just read the  
10 buying company regulation currently at 1699(i). And  
11 here it goes. The definition, For the purposes of this  
12 regulation, a buying company is a legal entity that is  
13 separate from another legal entity that owns, controls,  
14 or is otherwise related to, the buying company and which  
15 has been created for the purpose of performing  
16 administrative functions, including acquiring goods and  
17 services, for the other entity. It is presumed that the  
18 buying company is formed for the operational reasons of  
19 the entity, which owns or controls it or to which it is  
20 otherwise related. A buying company formed, however,  
21 for the sole purpose of purchasing tangible personal  
22 property ex-tax for resale to the entity which owns or  
23 controls it or to which it is otherwise related in order  
24 to re-direct local sales tax from the location(s) of the  
25 vendor(s) to the location of the buying company shall



1 not be recognized as a separate legal entity from the  
2 related company on whose behalf it acts for purposes of  
3 issuing it a seller's permit.

4 "Such a buying company shall not be issued a  
5 seller's permit. Sales of tangible personal property to  
6 third parties will be regarded as having been made by  
7 the entity owning, controlling or otherwise related to  
8 the buying company. A buying company that is not formed  
9 for the sole purpose of so re-directing local sales tax  
10 shall be recognized as a separate legal entity from the  
11 related company on whose behalf it acts for purposes of  
12 issuing it a seller's permit. Such a buying company  
13 shall be issued a seller's permit and shall be regarded  
14 as the seller of tangible personal property it sells or  
15 leases."

16 There's more, but not that much.

17 The elements of a buying company. "Elements.  
18 A buying company is not formed for the sole purpose of  
19 re-directing local sales tax if it has one or more of  
20 the following elements: (A) adds a markup to its cost  
21 of goods sold in an amount sufficient to cover its  
22 operating and overhead expenses." And (B), issues an  
23 invoice or otherwise accounts for the transaction."

24 Now, we're not claiming that we meet A, adds a  
25 markup. That's not a fact in this case. But "B"

1 certainly does apply, "Issues an invoice or otherwise  
2 accounts for the transaction." The record and the  
3 evidence in the record, there's an ample amount of  
4 evidence to show that retailer otherwise accounted for  
5 the transaction.

6 So to understand why buying companies are so  
7 important to this case and really dispositive of this  
8 case, we need to look to the history of the buying  
9 company regulation.

10 So back in -- it was in 2001, the State Board  
11 of Equalization opened up a regulation project to deal  
12 with buying companies. There had been a lot of  
13 uncertainty, a lot of audit disagreements regarding the  
14 establishment of the buying companies and whether  
15 they're valid or not. And they were looked to sort of  
16 common law and income tax concepts of substance over  
17 form, sham transactions, and it was not really a  
18 workable solution.

19 And I will point you to -- it's Exhibit 1 on  
20 page 6. I'm just going to read from it. You don't have  
21 to go there if you don't want to.

22 But this is at page 6 of 13. It's at the last  
23 paragraph. "There are many factors" -- oh, this is a  
24 "Initial Discussion Paper of the SBE for this Regulation  
25 Project."

1           Quote, There are many factors that must be  
2 considered when questioning the validity and the  
3 existence of a buying company. These items include but  
4 are not limited to, the breadth of customer base;  
5 invoicing methods of the buying company; whether or not  
6 it achieved profit margins; whether those are  
7 reasonable; assumption of fiscal and legal liabilities;  
8 the existence of a distinct separate identity;  
9 employees, accounting, and banking; whether or not the  
10 buying company has a proprietary interest in its own  
11 facilities; carries its own insurance; and the nature of  
12 economic relationship between the buying company and the  
13 vendors and the buying company's parent entity.

14           The intent was to address the local sales tax  
15 allocation involving buying companies. So very similar  
16 to the case we have here, one of -- the concern that the  
17 CDTFA had with buying companies was their establishment,  
18 which could redirect the local sales tax to one location  
19 instead of it being allocated to many jurisdictions.

20           Staff even recognized -- at Exhibit 4,  
21 page 3 -- they even recognized the use of economic  
22 development agreements by cities and other localities to  
23 do this understanding that it was legal to do this.  
24 That's at Exhibit 4, page 3.

25           At Exhibit 4, page 5 -- excuse me. I knew I

1 brought these for a reason.

2 So Exhibit 4, page 5, again, this is -- this is  
3 a formal issue paper issued by the State Board of  
4 Equalization.

5 They wanted to ensure uniform application of  
6 the regulation. And the importance of that is that we  
7 need to treat all cities and localities equally. We  
8 can't have one be provided a certain result and another  
9 a different result even though the facts are  
10 substantially the same.

11 The reg project was initially proposed under  
12 Regulation 1802, but as the project went forward, staff  
13 agreed that 1802 was not the proper place to address the  
14 buying companies. It was at 1699 for issuing permits.

15 Staff proposed standards to a buying company  
16 which are much more stringent than what was  
17 ultimately -- ultimately adopted in the regulation. And  
18 at Exhibit 2, pages 10 and 11, and Exhibit 3, page 3,  
19 they list a variety of different additional requirements  
20 that the staff was proposing.

21 The project was well-publicized. There were 28  
22 submissions by interested parties, according to the SBE.  
23 And ultimately the Board adopted on -- in February of  
24 2002, the Board adopted the buying company regulation as  
25 it exists today.

1           One of the things that the staff wanted was not  
2 such a certain definition. In the buying company  
3 regulation, it talks about for the sole purpose of  
4 redirecting sales tax. That's where a buying company  
5 will not be recognized under the current regulation,  
6 what the sole purposes is.

7           Staff was looking for something not quite as  
8 easy, if you will. They wanted something with  
9 principle, but that didn't really meet the problems that  
10 they were dealing with, which is the uncertainty. If we  
11 have principle instead of sole, we're still going to  
12 have all of these fights. So they went with sole. And  
13 they also defined what the sole reason for reallocating  
14 would be. And if -- if you were involved in invoicing  
15 or involved in the transaction under 1699(b) that's  
16 going to be enough to be treated not as solely set up to  
17 reallocate.

18           So after this regulation was passed, this  
19 agreement between the City of Oakland and United came to  
20 light. And you'll see as I sort of describe what's  
21 going on and it's been described in the exhibits that  
22 I've provided, the agreement is strikingly similar to  
23 the -- the issue we have today. And it's not surprising  
24 because as a result of this Oakland-United agreement,  
25 the State Board of Equalization looked at that agreement

1 and was asked to reject the -- the -- the impact of it,  
2 the local allocation of it. And it didn't.

3 The Board of Equalization was asked to repeal  
4 the buying company regulations in order to do that. It  
5 refused to do so. The Board of Equalization was asked  
6 to amend the buying company regulation because of this  
7 agreement, and it also refused to do so. What it did do  
8 was it instructed staff to go ahead and set up another  
9 regulation project to reexamine what was going on with  
10 the buying companies.

11 So the Oakland-United agreement. Jet fuel  
12 sales from a buying company and United, were made  
13 pursuant to a master sales contract, much like here.  
14 The buying company was a subsidiary of United much like  
15 here. The buying company was issued a seller's permit  
16 at its Oakland location, which was its only location.  
17 That office had -- it was a 580-square-foot office in  
18 Oakland manned by a single person.

19 The airline issued monthly purchase orders to  
20 the buying company for estimated jet fuel needs pursuant  
21 to the master sales contract, and the monthly purchase  
22 orders were mandatory under the master sales agreement  
23 in order to have the title pass, much like the case  
24 here. Title to the jet fuel passed in California, as  
25 they have here.

1           Much was made of the economic development  
2 agreement between United and Oakland because, much like  
3 here, there was an economic development agreement in  
4 that case where Oakland retained some of the additional  
5 sales tax revenue. United also received some of that  
6 sales tax revenue.

7           There's a quote -- and this was from -- it's at  
8 Exhibit 8, page 3. I'll just read it to you.

9           And this is -- excuse me. Okay. So this is a  
10 quote from a spokesperson for United, and this, what I  
11 believe, is what sort of started this whole process of  
12 some of these other cities and localities saying this --  
13 we -- this can't stand. It's actually -- I'm sorry. I  
14 said page 3. It's the top of page 4, where the quote  
15 starts. And I will just read it.

16           "The beauty of the arrangement, United  
17 spokesman Jeff Green said, is that reallocation of the  
18 subsidiary is essentially paperwork. The company would  
19 open a one-person sales office at Oakland International  
20 Airport. The deal requires neither construction, nor  
21 the transfer of a single drop of jet fuel into or out of  
22 Oakland. The deal would just consolidate purchasing the  
23 company does for the West Coast work that can be handled  
24 by one additional employee. Although United has major  
25 operations in both San Francisco and Los Angeles, it is

1 unlikely either city would offer the same business  
2 incentives."

3           So there was some outrage about this from many  
4 of the parties, which is what led to this -- the  
5 petitions of the -- the Cities of -- City and County of  
6 San Francisco as well as the County of San Mateo.  
7 They -- in December of 2004, they filed a petition with  
8 the State Board of Equalization using this  
9 United-Oakland agreement as a basis -- basis for its  
10 petitions. And it asked the Board to repeal the  
11 regulation retroactively. The Board looked at it,  
12 considered it, and denied repealing it in March of 2005.  
13 That's when it ordered the staff, the business tax  
14 committee, to consider some possible amendments.

15           The staff did actually open a regulation  
16 project in April of 2005, and it held interested parties  
17 meetings in July and September of that year. They --  
18 the -- at Exhibit 11 -- Exhibit 11 is -- it's the  
19 business tax committee -- business tax committee  
20 discussion.

21           And there it -- the business tax committee sort  
22 of laid out the various proposals. There was -- SB  
23 staff had its proposal, and City, County of  
24 San Francisco and San Mateo had some alternatives.  
25 San Francisco and San Mateo wanted this repealed



1 retroactively and effectively undoing the United-Oakland  
2 agreement.

3 At the time the State Board of Equalization's  
4 staff's position was that applying this retroactively  
5 would be unfair, so their proposal was to apply it --  
6 apply it effective August 31, 2006, was at least the  
7 draft.

8 However, this draft never got anywhere because  
9 the business tax committee voted to abandon the  
10 regulation in November of 2005. And there was a reason  
11 for that, and that reason was that the legislator had --  
12 the legislature stepped in. They knew what this issue  
13 was. They were aware of the Oakland-United agreement  
14 and how it impacts allocation of local sales tax.

15 And they passed AB 451, which put an end to  
16 having jet fuel companies have a buying company in a  
17 single location. And the key to why this Oakland-United  
18 deal, like, works under the law is there's only one  
19 place of business so there's a retailer with one place  
20 of business with a sale's permit. There's no question  
21 that in that instance the sale -- it's a sales tax and  
22 all of the sales, local sales tax, is allocated to where  
23 that place exists.

24 Then on September 29th, 2005, the Legislature  
25 passed AB 451, and the key point of that for this case

1 is that they made it effective January 1, 2008. Our  
2 years at issue here are -- actually this is the periods  
3 and there's the second, third, and fourth quarters of  
4 2007. So this application of AB 451 doesn't apply until  
5 2008.

6 Now, we should think -- I want to talk about  
7 some prior legislation, which actually didn't pass,  
8 which is kind of telling. And this is AB 2466. I --  
9 it's essentially identical to AB 451 as far as changing  
10 where local sales tax is allocated for jet fuel sales  
11 where there is a single place of business.

12 This was proposed, but it was vetoed by the  
13 Governor. The -- part of the legislation said that we  
14 need a study by the State Auditor to see what the impact  
15 is of -- of changing this on the localities and their  
16 revenue and the agreements that they have entered into.  
17 The Governor said we need more time to study the impact  
18 on local incentives and development agreements. And you  
19 can see that at Exhibit 14, page 5. That was the reason  
20 it was vetoed.

21 Then 451 came along with an effective date of  
22 January 1, 2008, for that very reason, to allow the  
23 localities -- to give time for the legislature to  
24 discuss the impact. Because these localities rely a lot  
25 on the local sales tax, and the reason there was this

1 delayed effective date was to make sure we're not  
2 pulling the rug out from under these -- these localities  
3 who have entered into agreements.

4 So AB 451 resolves the buying company issue for  
5 jet fuel sales beginning in 2008. So the United and  
6 Oakland deal was allowed to go through, and until 2008  
7 AB 451 ended it.

8 Revenue and Taxation Code 7224 requires that  
9 each local jurisdiction has the right to have the law  
10 administered in a uniform manner. Oakland and United,  
11 theirs was -- their -- their agreements were respected  
12 up until 2008 when the law changed. There's no basis to  
13 treat Fillmore any differently than Oakland.

14 Now, I do want to -- I'm kind of switching  
15 gears here now and going to the reallocation petition  
16 regulations.

17 The panel has asked about -- specifically about  
18 whether any parties demanded that a -- a -- a decision  
19 be rendered under 35056(c)(4) within six months of the  
20 date the petition was received. So at this time -- at  
21 the time that a petition was issued, we were under the  
22 regulation 1807(b)(3), as the panel has noted. There's  
23 some slight differences in the language, but I'm just  
24 going to look to the 1807(b)(3).

25 And it just says if the allocation group does

1 not issue a decision within six months of the date it  
2 receives a valid petition, then whoever's making this  
3 argument can demand that a decision be issued within 90  
4 days, irrespective of the investigation.

5 Now, how does this impact the laches argument,  
6 was the question. And I'll say that neither -- these  
7 were not options for either Fillmore or the petitioners.  
8 And that's because the allocation group issued a  
9 decision within less than six months. And I'm just  
10 going to kind of go through now the process of what  
11 happened.

12 So first we have the incorrect distribution of  
13 local petitions which were filed by the petitioners, and  
14 that's at Exhibit P-1, on March 28th, 2008. On May 7th,  
15 2008, there was a visit of the Fillmore office,  
16 apparently. That's at Exhibit A-6. This is the  
17 "scribbled note" exhibit, which is -- I guess the  
18 auditor or whoever made the visit wrote down that they  
19 showed up May 7th, 2008, at the Fillmore location. The  
20 door was locked. That note also says they called the  
21 landlord, who'd never heard of Retailer.

22 Now, we can look at Exhibit D, which kind of  
23 lays out what happened. Exhibit D kind of has all of  
24 the -- all of the letters and correspondence. So  
25 March 28th, 2008, that's when the petition was filed.

1 August 4th, 2008, the allocation group sent a letter to  
2 Fillmore stating the Fillmore office was not a valid  
3 sales office. The sales were negotiated in Houston and  
4 that they're reallocating the local sales tax. It was a  
5 use tax. You can appeal if you disagree by requesting  
6 an appeal conference.

7 So tax or -- pardon me. Fillmore responded  
8 August 28th, 2008, asking for a 30-day extension, which  
9 was granted. Then on October 3rd they filed their  
10 response objecting to the allocation group's August 8th  
11 letter, also suggesting that an appeals conference may  
12 have been premature.

13 October 29th the allocation group sent a letter  
14 saying, "We're moving the matter to the appeals  
15 section," and then followed up again with a letter on  
16 the 10th saying that you're -- you -- you're going to  
17 appeals. The decision had already been made.

18 So this question of laches and the delay was  
19 not at the very beginning. At the very beginning they  
20 acted very promptly. In fact, too promptly because I  
21 don't know how you could even do an investigation acting  
22 so quickly, but they seem to rely only on the auditor  
23 who made this office visit in 2008 as a basis for saying  
24 that the -- it was a use tax and it was going to be  
25 reallocated.

1           So after November 10th, 2008, everything went  
2 silent. There was nothing going on, no response, no  
3 correspondence from appeals, was just told Appeals will  
4 contact you. Been waiting for appeals.

5           The next thing we have is a response to an  
6 information request on April 16th, 2012. And then by  
7 September 26th the decision was rendered. The decision  
8 recommendation, that's at Exhibit A, pages 9 and 10,  
9 kind of detail what happened.

10           And what happened was the regulations -- the  
11 1807 regulations. So Part (a) is just a bunch of  
12 definitions. Part (b) is reviewed by the allocation  
13 group. And the section -- it's (b)(3) this is where  
14 this if it -- no decision was made within six months,  
15 but a decision was made within six months, so there was  
16 no option for that.

17           What happened was the allocation group kind of  
18 just didn't do anything. They just kicked it over to  
19 appeals. And there it sat for over three years before  
20 anything got done. And what I mean by "anything got  
21 done," is that any questions were even asked.

22           So we have a period over three years where  
23 there's no explanation that's reasonable for it. And  
24 the delay is certainly prejudicial, especially in this  
25 case where there's so many facts being asked about.

1 CDTFA has noted that there's no evidence for X, Y or Z.  
2 Think of what's happened over the three years. The --  
3 so Inspired Development, LLC, that in that course in  
4 time has gone away. The single person who ran Inspired  
5 Development passed away in 2012, I believe it was. And  
6 the retailer was acquired in a pretty large transaction.

7 So documents get lost when time passes, when  
8 three years go by with nothing being done other than the  
9 auditor shows up at the door, it's locked. Okay. You  
10 know what? We can't allocate sales tax here. That's  
11 all the evidence there was. And 2008, that office was  
12 closed down. So there really was nothing to find out in  
13 2008. We're talking about periods of 2007.

14 So the laches defense -- and we've cited it.  
15 The Department has cited cases as well. I don't think  
16 there's much of a disagreement about what it applies to.  
17 It's a defense where there's unreasonable delay, and as  
18 a result of the delay, there's prejudice. And I think  
19 that we clearly met that here. The delay was  
20 unreasonable.

21 There was no reason for the allocation group to  
22 not do its job, which was to actually to investigate the  
23 petition, gather evidence. They didn't do it. They  
24 said this is just going to appeals. Why are we skipping  
25 over half of the regulation? I don't know.

1 But then some three-plus years later, I think  
2 somebody at CDTFA realized, hey, we didn't -- we messed  
3 this up. This has got to go back. And it did go back.  
4 And that cost a lot of time, which cost inability to  
5 have all of the evidence, to get all of the evidence.  
6 Evidence deteriorates over time, for the reasons I  
7 stated. People pass away, companies get acquired,  
8 document policies. They don't -- companies don't keep  
9 documents forever.

10 Okay. So just looking at the agreed facts in  
11 this case, since the retailer was a buying company and  
12 it had only one California place of business, CDTFA  
13 properly issued a retailer seller's permit, because it's  
14 its only location. You can't issue a seller's permit to  
15 no location. You have to have one location.

16 And why this whole arrangement works in a way  
17 that directs the local sales tax to where the retailer  
18 is located is because there's only one location, and  
19 that's where the seller's permit is is at that location.

20 And if you look at Regulation 1802(a)(1), it's  
21 pretty plain. "If a retailer has only one place of  
22 business in this state, all California retail sales of  
23 that retailer in which that place of business  
24 participates, occurs at that place of business."

25 So as a result, all the jet fuel sales made by



1 Retailer through its only California place of business  
2 are subject to sales tax and the local portion allocated  
3 to that place of business in Fillmore.

4           So now I'd like to get into Regulation  
5 1620(a)(2)(a). And this is -- so Fillmore's office was  
6 a place of business of the retailer that participated in  
7 the jet fuel transaction. Now, if we just look at the  
8 buying company regulation, one location, I think you can  
9 decide this case based on that alone. However, the  
10 CDTFA didn't look at the buying company regulation. It  
11 didn't really -- did not mention it at all throughout  
12 all of this time. And instead, it's focused on  
13 Regulation 1620 to argue that there was no place of  
14 business in Fillmore and that that office didn't  
15 participate in these sales.

16           And even if the -- the 1699 buying company  
17 regulation doesn't dissolve -- dispose of this case, we  
18 can look right to this regulation and the facts of this  
19 case and conclude that the Fillmore office was the place  
20 of business.

21           So just to address some of the contentions.  
22 One of the things that CDTFA is contending is that no  
23 place of business in Fillmore, and what they say is,  
24 "Hey, Inspired was in Fillmore because Inspired had the  
25 lease of the location," but that was Inspired.

1 That's -- that's -- that's not the retailer. So it's  
2 not the retailer's location.

3 And this just ignores agency principles that  
4 are pretty well-established in California. The Inspired  
5 and -- and the retailer had an agency agreement  
6 specifically to open an office and run an office out of  
7 Fillmore. So anything that Inspired did was as an agent  
8 of the retailer. And as a result of that, the retailer  
9 had a place of business where Inspired was.

10 Now, we can set that aside for the moment and  
11 say even if, even if the law in California weren't clear  
12 that agents can act for their principal, Inspired leased  
13 the facility. There was a lease that Retailer entered  
14 into. It was an actual lease. So we don't really even  
15 need to rely on the notion of "agency."

16 And I want to just read one part of the 1620  
17 regulation. It's specific about agents. Sales tax  
18 applies when the order for the property is sent by the  
19 purchaser, which is what has happened here, to any  
20 location, branch, office, outlet or other place of  
21 business of the retailer in this state or agent or  
22 representative operating out -- operating out of or  
23 having any connection with such local branch, office,  
24 outlet, or other place of business and the sale occurs  
25 in this state, which everyone agrees it did.

1           So to ignore the agent's agency is just  
2 incorrect. But again, it's sort of a who cares because  
3 retailer has its own lease.

4           Now, they've talked about, that is CDTFA has  
5 tried to discredit this lease and say it's invalid and  
6 it shouldn't be considered, and they've sort of gone to  
7 some great lengths to try and show that by submitting a  
8 sample lease of another with an -- with the landlord and  
9 a different tenant. And the purpose of it is to say,  
10 "Hey, look. This lease had a provision that prohibited  
11 subleasing without written authorization."

12           This is -- well, I don't think you can really  
13 even consider that as evidence. But it doesn't matter.  
14 You don't need to. Because even if there were a  
15 provision in the -- in the lease that prohibited  
16 subleasing without written consent, that doesn't make  
17 the lease void. It's voidable. It's voidable at the  
18 election of the landlord.

19           And there's a case on this that's been cited  
20 hundreds of times. It's People v. Klopstock,  
21 K-l-o-p-s-t-o-c-k, 24 Cal. 2d, 897 pin cite 9/01/1944.

22           The successive assignments, though made without  
23 the written consent of the lessor were merely voidable,  
24 not void. There was no ipso facto termination of the  
25 lease by reason of the lessee's failure to obtain

1 lessor's written consent to assignment. So this is kind  
2 of no reason to be chasing down this road because  
3 there's no evidence in the case that the landlord  
4 voided -- voided the lease. Because the landlord has to  
5 actually take action to void the lease. There's no  
6 evidence that -- of that.

7 Now, the last thing I'd like to address is the  
8 question of whether the retailer participated in the  
9 sales, and I think the evidence is overwhelmingly, yes,  
10 the retailer participated in the sales. They have the  
11 master sales agreement. Under that master sales  
12 agreement, you could not transfer title to the jet fuel  
13 without purchase -- purchase orders and authorizations.  
14 And you can look to the master sales agreement itself at  
15 Exhibit A-5, page 8. Negotiations and execution of the  
16 master service agreement was done in the Fillmore  
17 office.

18 Now, a lot has been made of this with the --  
19 the declarations signed under penalty of perjury that  
20 there was the execution and negotiations of the master  
21 service agreement in Fillmore. But that's cumulative  
22 evidence. That's -- yeah, it -- it helps to show that  
23 there was participation at the Fillmore office because  
24 that happened, but it's not essential. What's essential  
25 is the purchase orders, the authorizations all going to

1 the Fillmore office, the person working at the Fillmore  
2 office releasing the -- writing the purchase orders,  
3 receiving the purchase orders. That is where the  
4 participation -- participation -- participation is  
5 shown. So it really doesn't make much of a difference  
6 whether the MSA itself was negotiated or executed at the  
7 Fillmore location even though the undisputed evidence  
8 shows it was.

9           There's testimony under penalty of perjury  
10 signed that -- that says so. CDTFA wants to discount  
11 that because they believe the people who signed it who  
12 are employees of Ryan cannot be honest because they have  
13 some sort of financial stake. And there's no evidence  
14 that the employees of Ryan have a financial stake in the  
15 outcome.

16           And I don't know if it's very reasonable to say  
17 if someone has a financial stake in the outcome, we  
18 can't have their testimony. We would have a lot less  
19 declarations if that were the case in cases that are  
20 before you as well as in the court. In the courts  
21 declarations are often used and are valid evidence  
22 signed under penalty of perjury. And very often it's,  
23 you know, an employee of a company giving it to provide  
24 evidence when there's otherwise none to be found  
25 because, you know, so much time has gone by, we sort of

1 had to go to the -- go to the declaration. Because  
2 that -- declarations are used a lot when evidence is  
3 missing try and fill in the gaps.

4 So in closing, there's just -- I wanted to  
5 provide the panel with a few ways I believe they could  
6 conclude here to -- to find that no reallocation is  
7 proper. One is laches, unreasonable delay, and  
8 prejudicial. I don't think there's any dispute that  
9 this delay was unreasonable. It doesn't matter that the  
10 petitioners were not involved, did not -- were not at  
11 fault for the delay. It's unreasonable delay and  
12 prejudice.

13 A second -- and these are all independent ways  
14 the panel can go to decide this. You could just say,  
15 Laches, case over. I don't even need to get into any of  
16 the other stuff.

17 The second one is another simple one, which is  
18 to say there is insufficient evidence that sales  
19 occurred in Houston to apply a use tax. We have quite a  
20 bit of evidence about what's gone on at the Fillmore  
21 office, but the evidence is very light that anything  
22 happened in Houston to apply the sales tax.

23 A third independent way to conclude that there  
24 should be no reallocation is that you cannot  
25 retroactively revoke the retailer's seller's permit

1 because having the seller's permit and one location  
2 means that's where the sales are allocated. So the  
3 CDTFA needs to retroactively revoke the Retailer's  
4 seller's permit for any of this -- for any of their  
5 positions to work.

6 Fourth, the buying company regulations, the  
7 Oakland-United deal, and AB 451 show a clear intent by  
8 the legislature as well as the State Board of  
9 Equalization making the regulations that these  
10 arrangements are to be respected until January 1, 2008.

11 And fifth and finally, Fillmore office was a  
12 place of business of Retailer and that it did  
13 participate in the jet fuel sales. And this is kind of  
14 where all of the CDTFA's argument lies is in fifth -- in  
15 my fifth point. The fifth way you could find for  
16 reallocation is it was a place of business. The  
17 evidence shows it was a place of business. The evidence  
18 shows that the retailer participated in the jet fuel  
19 sales transactions, but there's no evidence that it did  
20 not. And that's all I have.

21 ALJ RIDENOUR: Thank you, Mr. Cataldo.

22 I do have some questions for you, and they are  
23 lengthy, so please be patient with me.

24 MR. CATALDO: Okay.

25 BY ALJ RIDENOUR:

1           Q     First, I don't believe there's any dispute  
2 among the parties that retailer is a buying company.  
3 And if, you know, Petitioners and CDTFA feel  
4 differently, please let me know during your  
5 presentation.

6                     So having said that, is it Appellants's  
7 contention that because it's a buying company it's  
8 automatically entitled to a seller's permit?

9           A     Because -- well, if you -- let's look at the  
10 regulation .

11          Q     Um-hum.

12          A     And I'm just going to pull it up right now.

13                     So here's the important thing is -- that's why  
14 I read this whole regulation. I did not want to, but I  
15 thought it was important. We have to look at -- what  
16 is -- what is the definition of a buying company. What  
17 is it doing? It's performing administrative functions,  
18 including acquiring goods and services. That's what was  
19 done here. That's what retailer did here.

20                     And then there's a lot of words about when it  
21 is and when it is not going to be respected. Those  
22 words are the sole purpose to redirect. Now, if you --  
23 if it's not -- if the sole purpose of the buying company  
24 is not to redirect the local sales tax, it shall be  
25 issued a seller's permit and shall be regarded as the



1 seller of tangible personal property it sells or leases.

2 Again, the retailer was acquiring goods at the  
3 location in Fillmore. The United-Oakland deal discussed  
4 this almost exact situation. So because there's only  
5 one place of business, yes, I believe under 1699 under  
6 the buying company right, if you -- in our case, if you  
7 meet this regulation because this was -- this was being  
8 done at Fillmore, that, yeah, the sales have to be  
9 allocated to Fillmore, the only place of business.

10 Q Okay. So, yes, you agree it first needs to be  
11 found a place of business?

12 A Well, yes. Like, for example, if there's a  
13 buying company in some far remote place that does all  
14 this stuff, it's not in California, there's no seller's  
15 permit that's going to be issued.

16 Q Okay. Just wanted to clarify. Thank you.  
17 Okay. As for your laches argument, is it -- just to  
18 clarify, is it Appellants's position that Petitioners  
19 caused any delay?

20 A Well, the Petitioners filed the petition and  
21 then did nothing else. They didn't actively prosecute  
22 their claims. They were coming to the Board to say,  
23 "Hey, we have a problem. We have a claim," and now we  
24 filed our petition and then did nothing.

25 They let the CDTFA kind of run with it, but

1 they ran a really strong burst for a little bit and then  
2 stopped. And I have to look and say, Well, you know,  
3 three years in -- three years go by. Did the  
4 Petitioners do anything to say, "Hey, what's going on  
5 with our claim that we have?" There was nothing.

6 So to the extent that they sat on their hands  
7 and did nothing, yes, they have some fault in this.

8 Q Okay. So --

9 A But it's not required. I'm sorry. I didn't  
10 mean to interrupt.

11 Q Right. I'm sorry. Go ahead.

12 A It's not -- I don't think laches requires that.  
13 It's unreasonable delay and prejudice. Those are the  
14 two things. It's not someone got a benefit or didn't  
15 get a benefit. Unreasonable delay, which I think the  
16 record shows clearly there was, and prejudice, which is,  
17 I mean, if you find that, "Hey, all of this evidence  
18 that's CDTFA is kind of picking at and complaining about  
19 not showing what it really shows and, therefore, it's a  
20 use tax. And it's a use tax to Houston."

21 There's prejudice there. We would have had the  
22 opportunity to look into and get the evidence if  
23 three -- more than three years didn't just evaporate.

24 Q To follow up on that, so on March 29th, 2008,  
25 CDTFA received Petitioner's petition. And then on

1 August 4th, 2008, CDTFA noticed Appellant that it  
2 intended to reallocate.

3 As to that, I don't understand your position as  
4 to how Petitioners caused any delay.

5 A How Petitioners caused any delay?

6 Q Correct.

7 A Okay. So there was a -- let me go to the -- I  
8 want to make sure I'm answering your question.

9 Q Thank you.

10 A So August 28th, 2008 they requested an  
11 extension. I'm sorry. Can you repeat again where what  
12 --

13 Q So if am correct in my timeline, in March of  
14 2008 CDTFA received Petitioner's petition.

15 A Right.

16 Q And they were, you know, taken by CDTFA -- I'm  
17 just going to refer to BOE as CDTFA.

18 A Okay. That's fine.

19 Q Yeah. And then on August 4th, 2008, CDTFA  
20 noticed Appellant that it intended to reallocate well  
21 within the timeline for it to issue its decision. And  
22 so at that point I am kind of unsure as to how  
23 Petitioners caused a delay if they gave their petition,  
24 CDTFA notified Appellant and then Appellant filed on  
25 October 3rd, 2008, its petition for that against that

1 notification.

2 A Right. So the Petitioner in these reallocation  
3 cases, I mean, other than file your petition, there's no  
4 obligation for them to do anything. So it is the  
5 CDTFA's responsibility to run it through the  
6 regulations. The allocation group is supposed to look  
7 at it. The only way I can point to the Petitioners and  
8 say, "It's your fault," is not through that period but  
9 from the period November 2008 all the way through 2012.  
10 I mean, the years that had gone by. And this is the  
11 Petitioner's claims and you didn't say anything, you  
12 didn't ask, "Hey, how's our claim going? Should we be  
13 worried about it?"

14 So to the extent we can point the finger at  
15 Petitioner, it's really limited to that doing nothing --

16 Q Okay.

17 A -- in that period of time.

18 Q Right. Thank you very much. Appellant asserts  
19 that the four-year delay caused unreasonable and  
20 prejudicial because business operations in Fillmore had  
21 since closed and many documents are no longer available  
22 and witness testing -- memories had waned; is that  
23 correct?

24 A Yes.

25 Q Okay. According to the records, CDTFA received

1     Petitioner's petitions on March 29th, 2008, and then  
2     just four -- over four months later, on August 4th, 2008  
3     CDTFA notified Appellant that it intended to reallocate  
4     the local tax at issue; correct?

5             A     Let's check Exhibit D because intended -- does  
6     it say "intended"?   Sorry.

7             Okay.   So I'm looking at the August 4th, 2008,  
8     letter.   "Based on information in our possession" -- and  
9     this is August 4th.   It's from the State Board of  
10    Equalization to Fillmore.   Based on the information in  
11    our possession, it is the Board's position that the  
12    registered location is not a valid sales office.

13            "It is our opinion that the taxpayer's sales  
14    are negotiated in Houston; therefore, no local tax  
15    should" -- "should is do" -- I'm reading it -- "the City  
16    of Fillmore.   Accordingly, based on our date of  
17    knowledge, March 27th, 2008, and we propose to  
18    reallocate the local tax.   If you do not agree with our  
19    position, you may appeal this decision by requesting an  
20    appeals conference."

21            So that's what was sent to --

22            Q     So I misspoke.   Not intended, but proposed.

23            A     Yes.   Yes.   Proposed.

24            Q     Okay.   To which then Appellant did file a  
25    petition against that for that -- of that notification

1 on October 3rd, 2008 in response.

2 A Yes. Yes. They were a little confused when  
3 they it. Like, "Why are you skipping through this whole  
4 process? Shouldn't we be looking at it at the  
5 allocation level? Why are you just suddenly going to  
6 appeals?" But they did. They responded to it and said  
7 they didn't agree in their letter, and then they got two  
8 letters -- got a letter back on the 29th saying, "No.  
9 Appeals --"

10 Oh, yeah.

11 Q Okay. Mr. Cataldo, I'm going to stop you. I  
12 do -- I have learned this case inside and out so I know  
13 all the letters, notifications, everything, but I'm  
14 going to keep continuing with my laches questions.

15 When Appellant received that August 4th, 2008,  
16 notification, what steps did Appellant take to obtain  
17 documentation, testimony, et cetera supporting its  
18 position at that time?

19 A At that time they looked at it and they said,  
20 "Okay. Well, this is the United-Oakland deal. This is  
21 what we have to do in order for this to work. We have  
22 all the documents that we need." And they did have all  
23 the documents that they needed, and it's their position  
24 to this day all of the documents that they needed they  
25 have. But the CDTFA's position is that these documents

1 are not good enough and that we need more information.  
2 And it is -- if that more information is what causes  
3 Fillmore to lose this, then that would be prejudicial.

4 Q I understood the argument to be that because  
5 there was a four-year delay, you were unable to get the  
6 documents and everything. But now you're saying you had  
7 it in -- Appellant had it in 2008. So can you please  
8 clarify?

9 A So we had the documents that are actually  
10 essential to deciding the case, like the -- the  
11 agreements, the agency agreement, the -- the purchase  
12 agreement. But information and details that we didn't  
13 have, if you look at a lot of the information requests  
14 after, like in 2013 and '14, once they actually started  
15 picking up the case and the details information -- which  
16 frankly, that information is sort of irrelevant to the  
17 case. It doesn't change it. But they are asking for  
18 it. And if they're concluding all this info that you  
19 don't have, we're going -- even though it's our view  
20 that this info is not relevant, if they say it is -- and  
21 you're going to decide or they're going to decide based  
22 on this lack of information you lose, well, then, we  
23 maybe would have been able to get that information three  
24 and a half years earlier.

25 Q To which I then ask you if you had the

1 documentation in 2008 and submitted it -- I'm saying  
2 "you." I know you were not the representative at the  
3 time. If you had given CDTFA that documentation in  
4 2008, CDTFA probably -- and you can address this -- had  
5 been able to in 2008/2009 looked at the documentation  
6 and then been able to provide those questions for  
7 additional documentation.

8           So, again, this lapse in time of Appellant  
9 giving CDTFA the documentation when it was notified in  
10 2008 of this potential reallocation, I'm having a hard  
11 time wrapping my head around. So if you could please  
12 clarify?

13           A     Let me -- yes. And I think it was just the  
14 tone of these letters. One paragraph, very little  
15 investigation and just the definitive, "We've decided  
16 that this" -- "It's going to get reallocated. And you  
17 can appeal. Go to the appeals conference."

18           So if you're the Appellant and you're looking  
19 at this and you're reading the correspondence, they  
20 said, "Hey, why are you jumping the gun?" They even  
21 brought it up. "You're jumping the gun." But there was  
22 no response to that. It was just, "You'll be contacted.  
23 You will be contacted by the appeals division," is what  
24 the letter said.

25           In the letter before that Fillmore sent, they



1 said, "Hey, we've got this stuff. We're gathering this  
2 stuff." And then their response was, "You'll be  
3 contacted."

4 Does that answer your question? Because I feel  
5 like maybe I didn't answer it.

6 Q Okay.

7 A Like, okay, the November 10th, 2008, letter.  
8 "They will notify you of the time and place of the  
9 conference." They didn't say, "Can you give us the  
10 information?"

11 Q Well, Appellant did -- sorry to  
12 interrupt Appellant did indicate in its October -- it's  
13 an October 3rd, 2000, petition that it was in,  
14 quote-unquote, in the process of obtaining copies of  
15 documentation and that it expected to provide that  
16 information within 30 days. And then there was a three  
17 and a half year lapse between that letter and when  
18 Appellant gave the documentation.

19 A Right. So let's -- because that's interesting.  
20 We expect within 30 days to give you this information.  
21 We're gathering it, whatnot. But then what happened was  
22 within less than 30 days we got the letter from the  
23 State Board of Equalization. That's the October 29th  
24 letter. "We feel this issue can be best addressed at  
25 the next level of the appeals process. Therefore, we're

1 forwarding your appeal to our appeals section. You'll  
2 be contacted regarding the scheduling of an appeals  
3 conference at a later date."

4 No "Can you provide us information?" No  
5 questions. None of that. And then on the 10th, they  
6 kind of say the same thing. "This is to acknowledge  
7 your appeal of our proposed reallocation. You didn't  
8 give us any new information. Your appeal didn't present  
9 any new information." I mean, this is on the 10th.  
10 Like they hadn't even asked for the info and they're  
11 already saying, "We decided and you can go to appeals."  
12 Like, honestly, it seemed like they just didn't want to  
13 do this.

14 Maybe they're -- I mean, they mentioned  
15 staffing in the D&R. I don't know what it is. What I  
16 do know is, at least from the documents I'm looking at,  
17 the allocation group didn't really do any work on this  
18 and it got sent to appeals. And then eventually someone  
19 in appeals looked at it and said, "Hey, wait a minute.  
20 We forgot to go through the whole process that the  
21 allocation group's supposed to do. Let's kick it back  
22 down to them." And that was three-plus years.

23 Q And during that time Appellant didn't find  
24 it -- Appellants's been in this position more than once.  
25 They've had such cases. And so I'm just kind of

1 curious, like, why they just wouldn't submit the  
2 documentation so that they could have it.

3 A So I'm speculating now because there's nothing  
4 in the record about this. But if it were me and I'm  
5 looking at it and they say, "We've already decided," at  
6 the allocation group." And we send a letter saying,  
7 "Wait. Wait. What about the rules? What about the  
8 regulations? What about the allocation group performing  
9 an investigation of any kind?"

10 But, no, they already decided. And, "You'll be  
11 notified. We're sending you to appeals." Who's  
12 notifying me? Where do I send it to? Normally in  
13 most -- now, this is a reallocation case. It's very  
14 unique. But typically when you're representing a  
15 taxpayer, you're at an audit. You get IDRs, and then  
16 you answer the IDRs. And if you don't in a timely  
17 fashion, the Department of Revenue, whoever you're  
18 dealing with -- CDTFA, FTB -- they don't just disappear  
19 for three years and not say, "Hey, where are your  
20 responses?" They say, "Where are your responses?" And  
21 that didn't happen here. So that's a long-winded way of  
22 trying to answer your question.

23 Q Okay. No. I appreciate it. Okay. It is  
24 indicated in the record that this matter was one of  
25 eight CDTFA appeals, to which Appellant was concurrently

1 a party. And Appellant, having participated with CDTFA  
2 and deciding the prioritization of the appeals gave  
3 several other appeals higher priority because CDTFA had  
4 not distributed some of -- that amount that were  
5 reported to Appellants's pending the outcome of appeals.

6 What is Appellants's position on this? And  
7 especially in the context of laches.

8 A So I'm not aware of anything in the record  
9 where Appellant said, "Hey, just ignore this case." I'm  
10 not aware of anything. And they say in the D&R, they  
11 say there was some scheduling. But I don't see  
12 anything. I'm not aware of any sort of document or  
13 letter saying, "We're going to back-burn this case."

14 Q Okay. Thank you. And then one more question  
15 with regards to laches. I understand the unreasonable  
16 delay, but it -- in general laches is defined as the  
17 neglect or failure of a plaintiff to assert a right for  
18 such a period of time that results in prejudice to  
19 defendant requiring that the plaintiff's cause of action  
20 would be barred in equity.

21 Would you agree with that?

22 A Well, not in this case because we don't have a  
23 plaintiff in this case. If that's what you're getting  
24 at, like, you have to be a plaintiff for laches to  
25 apply. I don't think that's the case. I think it can

1 be applied against a government agency.

2           You know, one of the things -- and I was  
3 looking at this case -- maybe just pull it up. Yeah.  
4 It's cited at Brown vs. State Personnel Board. So they  
5 were talking about laches in the context of a local  
6 administrative agency exercising quasi-judicial  
7 functions. And one of the things they said is  
8 unreasonable delays as a matter of law when there's no  
9 statute of limitations. And you think about the  
10 reallocation regulations. Other than what the panel had  
11 pointed out earlier about, "Hey, you know what? You  
12 have a right to say issue a decision now within" -- if  
13 it's within 90 days.

14           Well, once that's done and that opportunity is  
15 over, there's no statute of limitations. We could sit  
16 here forever. There's no -- nothing to compel the  
17 Board's acts. So in those cases -- and this was at --  
18 it's that Brown case at page 1160. That's kind of like  
19 where you would apply laches.

20           Like, normally you have the statute of  
21 limitations that's supposed to protect you from these  
22 long delays. Like, what's the policy behind the statute  
23 of limitations? Its, you know, evidence disappears over  
24 time. Where there's no statute of limitations is where  
25 laches is particularly applicable, and that does apply

1 here.

2 Q I've read the case, but if you could please  
3 remind me, was the government agent -- or the agency not  
4 asserting a right in that case?

5 A Were they not asserting a right?

6 Q Were they asserting a right? Because my  
7 question is, is that -- the reason why I'm trying to --  
8 CDTFA, in all intents and purposes, was not a party to  
9 this reallocation. They are pretty much a first-tier  
10 tryer of fact as to whether the reallocation. They  
11 aren't, you know, receiving the money. They aren't --  
12 it's not a NOD. It's just they have -- CDTFA is  
13 deciding who gets the money. It's -- so, therefore,  
14 it's not asserting a right to the money.

15 Can you expand on that, your position?

16 A Well, I thought I saw something that said that  
17 they were a party, in the reg -- in the reg. But, yeah,  
18 I mean, I think -- yeah. Okay. So this is -- I'm just  
19 going to refer to 35056 -- (a)(9), "Party" means the  
20 jurisdiction filing a petition for redistribution, any  
21 notified jurisdiction, and the assigned section." The  
22 assigned section of CDTFA. So I think under -- at least  
23 under this regulation, they're a party.

24 Q Okay. Thank you very much.

25 A You're welcome.

1 Q Now we're on to place of business.

2 A Oh, boy. All right.

3 Q Like I said, I went through this file inside  
4 and out.

5 A Excellent. I appreciate it.

6 Q Of course. Let's see. The meeting regarding  
7 the master sale agreement, which I'll refer to hence  
8 forth as MSA, took place in late September before the  
9 October 1st sublease between Retailer and Inspired. Is  
10 it Appellants's contention that the Fillmore office was  
11 Retailer's place of business when that meet took place?

12 A Yes.

13 Q And can you expand on how that is?

14 A Agency.

15 Q So your -- so is it Appellants's contention  
16 that an agency's place of business is transmuted into  
17 the principal's place of business?

18 A When the agency agreement is explicit and the  
19 whole purpose of the agreement is to set up a place and  
20 that is the place, then yes. And that's the case here.  
21 The entire purpose of the agency agreement was to set up  
22 the office. So Inspired did that, and while they were  
23 there, they were acting as the agent and that was their  
24 place of business.

25 And I will point out that I don't think that

1 is -- like I said, it's cumulative, that evidence, as  
2 far as participation in the sales, the invoicing, the  
3 purchase orders, the authorizations. That is enough for  
4 participation in the orders. Participation in any way,  
5 any way.

6 Q Well, we'll get to participation of sales.  
7 Believe me, I've got it all figured out.

8 So do you have legal authority as to the 2006  
9 agency agreement transmuting agency's place of business  
10 by principle by just merely having that agreement?

11 A Just general agency principles. I mean, I  
12 don't have it right now, but I don't think it would be  
13 hard to find. I mean, you could look at the Civil Code.  
14 I don't have it right now. I don't. So I couldn't  
15 point it to you. But, I mean, the Civil Code is full of  
16 definitions about what agency is. Contractual rights.  
17 If we look at the actual contract, the agency  
18 agreement's a contract. If you look at the contract,  
19 what does it say? The agent acts for the principal.  
20 Like they're doing it as if the principal is doing it  
21 itself.

22 Q Okay. Thank you.

23 A I mean, we could look at -- I mean, in a tax  
24 case, we have the Borders case. That's been mentioned.  
25 And, you know, Scripto, if we want to go all the way



1 back to the Supreme Court talking about the distinction  
2 between an independent contractor, employee, for tax  
3 purposes. It's irrelevant.

4 Q Okay. Thank you. Just again, a lot of these  
5 questions are just so I can wrap my head around it when  
6 I write -- when we write the opinion.

7 A Happy to have the questions.

8 Q Thank you. Does Appellant have any evidence  
9 demonstrating that retailer ever intended itself, not  
10 through its agency, or intended or that it ever did  
11 physically use the Fillmore office? Like, did it have  
12 employees that were an agent work out of it? Did it  
13 ever -- Retailer itself, not agency, make use of the  
14 office and have external indications tending to show the  
15 office is its place of business? Like external signage,  
16 advertising, websites, any of that?

17 A So my answer is, again, agency, and I'll  
18 explain. The people working for Inspired Development  
19 who were there at the office were acting as agents of  
20 Retailer. So the fact that there was no employee of  
21 Retailer there, if that is even a fact -- I don't know  
22 for sure. There's nothing in the record, but it doesn't  
23 matter that place was operated under an agency agreement  
24 and people who were fulfilling the obligations were in  
25 that office.

1           No signage. We have to think about this  
2 transaction. This is a captive jet fuel purchasing  
3 company. So it's not like we're looking for foot  
4 traffic to sell jet fuel. So the notion that, you know,  
5 the signage and business cards or whatever, that -- I  
6 don't think that is relevant to this case.

7           Q     Okay. Thank you very much. And now  
8 participations in the sales. We're almost -- I know. I  
9 know. I understand -- I understand that it's  
10 Appellants's contention that the MSA was negotiated at  
11 the Fillmore office. There's been a couple dates  
12 mentioned, September 27th, September 28th. Can you  
13 please clarify Appellants -- which date Appellant is  
14 contending?

15          A     Which date that?

16          Q     The meeting took place.

17          A     I'm just looking for the -- pardon me. I'm  
18 looking for the declaration because it says it in there.

19          Q     Okay. Take your time. No worries.

20          A     I believe it's the 28th.

21          Q     Twenty-eighth? Thank you. Can you please  
22 expand on what exactly was negotiated at the Fillmore  
23 office? And any evidence that a real negotiation took  
24 place during that meeting?

25          A     I don't know. I only have what you have as far

1 as the evidence. I will say that I don't think the -- I  
2 mean, let's look at the law again for a second, single  
3 place of business.

4 Q Get closer, please.

5 A Oh, okay. Single place of business. So if  
6 there's a single place of business, it goes there. It's  
7 allocated there. Like, we don't need to go to this  
8 question of, "Oh, well, there's two competing. Which  
9 one do we go to? Well, there was the principal sales  
10 negotiated?" That isn't a thing that we even need to  
11 deal with because there's not two, there's just one.  
12 Well, what happened at that office when they -- when  
13 they executed these agreements and what are these  
14 declarations really saying about what happened there? I  
15 mean, I don't know. I read the declarations. And just  
16 like -- like -- like you can read them, and that's kind  
17 of all I can see from it. But what I can say is that  
18 it's really, like again, cumulative evidence of  
19 participation in the sale.

20 Q Speaking of the declarations, I did read them.  
21 And the declarants each say that the meeting took place  
22 on September 28th. Yet according to the travel  
23 documentation provided, Mr. Kersey (phonetic) and  
24 Mr. Jones each checked out of their hotel on September  
25 27th, the day before, and Mr. Logo (phonetic) flew out

1 of LAX, which is approximately 60 miles from the City of  
2 Fillmore, the morning of September 28th at 10:55 a.m.

3 I was hoping you could please help me  
4 understand the discrepancy between the statements made  
5 in the declarations and the declarants' travel  
6 itineraries.

7 A I'm going to admit, I didn't look at that one.

8 Q Yeah. I told you I looked at everything.

9 A Let me -- I really don't have any comment on it  
10 just because there's -- I mean, I have to find it. Let  
11 me see. Where is the travel itinerary?

12 There it is. Sorry.

13 Q Okay.

14 A I'm looking at the travel itinerary now. Check  
15 in, check out. This is a hotel, I think Expedia. 28th,  
16 check -- I'm looking at -- okay. I'm blind. Where are  
17 my glasses? There we go. Zoom it. Check in, 26, check  
18 out, 27th. Okay. I see what you're saying. I don't  
19 know. I don't know.

20 Q Thank you. Let's see --

21 A I mean, I'm looking at one that says check out  
22 the 28th. I mean, there's one that says the 27th, but  
23 then now there's one that says the 28th.

24 Q Would that be Mr. Logo (phonetic).

25 A That's Mr. Logo, yes.

1           Q     Thank you. And I understand you --  
2 Appellants's position is that the negotiations isn't  
3 really relevant; however, I still have a couple more  
4 questions about it, please.

5           A     Okay.

6           Q     So I was looking at the MSA and it is all typed  
7 except for the gallon amounts, which Appellant's  
8 position is that, you know, it was negotiated at this  
9 meeting. So I'm just having a hard time wrapping my  
10 head around why all but just the gallon amounts would be  
11 typed up if it was negotiated at the meeting.

12          A     Well, I think it's because they don't know the  
13 exact amount they're going to have. It's just a  
14 requirement. And, I mean, if you look at the -- not  
15 agency agreement but the master sales agreement --

16          Q     That's Exhibit A-5; correct?

17          A     A-5. So, I mean, it talks about -- like we  
18 don't know exact -- the specific quantity. Like --  
19 okay. So let's start with -- it's A-5, page 3.

20                Let's look at number 2, quantity and limits.  
21 "Buyer and seller agree that although the specific  
22 quantity of aviation fuel, equipment, supplies, and  
23 other related items the buyer is under obligation to  
24 purchase --"

25                It's not fixed by this contract.

1           -- "buyer is obligated to make purchases of at  
2     least 2.5 million to 15 million gallons." So that's  
3     what they were obligated to do. But it recognized the  
4     specific quantity was not fixed by the contract. Yeah.  
5     And then 6, when known or capable of estimation --

6           So, I mean, I think there was just an  
7     understanding that they didn't know exactly the amount  
8     but that there was a procedure in place for -- for  
9     placing the orders.

10          Q     Okay. So to follow up on that, are you saying  
11     the only things that were negotiated or talked about at  
12     the meeting were the gallon amounts?

13          A     Well, I -- no, I'm not saying that. Maybe it  
14     is; maybe it's not. I don't think the evidence said  
15     limits it. It could have been. I mean, the -- the  
16     declarations are the only things in evidence about what  
17     happened there.

18          Q     Okay. Thank you. Before I continue with the  
19     rest of my questions, I want to acknowledge that the  
20     parties disagree whether the documentation Appellant  
21     provided were actual purchase orders authorization to  
22     release inventory.

23                 Having said that, OTA will use those terms when  
24     discussing the documentation for ease of reference.  
25     Okay?

1           Regarding the purchase orders, Appellant  
2 contends that the purchase orders from customer were  
3 regularly and systematically reviewed, processed, and  
4 approved at the Fillmore office and that the review of  
5 the purchase orders include checking them against the  
6 MSA, authorizing the release of fuel only if that -- the  
7 orders were consistent with the terms of the MSA.

8           Do I have that correctly?

9           A     I think so.

10          Q     Okay. So I've reviewed the purchase orders,  
11 and the range in each purchase order is inconsistent  
12 with the maximum -- the minimum gallon amount delineated  
13 in the MSA. And so -- and Ms. Cooperman (phonetic) said  
14 that, in her declaration, that she reviewed orders,  
15 ensured the orders were within the prescribed  
16 requirements set forth by the MSA. And if a purchase  
17 order was not correct, it was her duty to reject the  
18 order and notify customer as to the bases of the  
19 rejection.

20           Is there any evidence that Ms. Cooperman  
21 rejected an incorrect purchase order?

22          A     There is no evidence of that. And, you know, I  
23 don't mean to go back to laches now --

24          Q     Okay.

25          A     -- but it's the perfect, like, example of where

1 it would matter. Like, there's no evidence now of that.

2 Q Okay. Thank you.

3 The purchase orders indicate that Retailer will  
4 sell aviation fuel to the customer pursuant to its  
5 order, but there's a wide range. So could you please  
6 help me understand based on that, how Retailer would  
7 know how much fuel to sell to customer?

8 A How Retailer would know how much fuel to sell  
9 to customer?

10 Q Yeah. You know, like by looking at that  
11 purchase order, Retailer is going to have to provide  
12 customer fuel at different locations, different  
13 airports. And, you know, different amounts of gallons  
14 different days.

15 A Mm-hmm. Yeah.

16 Q So based on that purchase order, which  
17 Appellant is contending is a purchase order, how  
18 would -- can you please help me understand how Retailer  
19 would know the amounts and the locations based on that  
20 purchase order?

21 A I think the amounts, the specific amounts --  
22 you know, I don't know because there's no evidence in  
23 the record as to how the specific amounts were  
24 determined.

25 Q Okay. Thank you. Give me a minute, please.



1 All right. I'm going to just go into invoices and this  
2 will --

3 (Reporter interrupted)

4 Q I'm going to move on to invoices. Thank you.  
5 It appears from the evidence that the invoices were sent  
6 subsequent to the month the fuel was sold, for example,  
7 bring that invoice dated May 4th, 2007. It's denoted as  
8 the monthly billing for the sale of fuel in April 2007.

9 Is it Appellants's contention that billing  
10 activity done after the sale qualifies as participation  
11 in the sale?

12 A Yes.

13 Q Okay. And can you please expand on that.

14 A Participation in the transaction in any way.  
15 So that's one of the things that I think is part of  
16 participating in the transaction. It's just one. It's  
17 not the only one. It doesn't carry the whole day. I  
18 mean, there's other things as well. But that would be,  
19 I think, included.

20 Q Perfect. Thank you, and that concludes my  
21 questions. We'll do questions with the panel, and then  
22 we'll give the stenographer a break. Would that work?

23 THE COURT REPORTER: Yes.

24 A Yes. Okay. So, Judge Wong, do you have any  
25 questions?

1 EXAMINATION

2 BY ALJ WONG:

3 Q I do have a few questions for Appellant, mostly  
4 regarding -- sorry -- mostly regarding the buying  
5 company regulation in 1699 at the time (h), right? So  
6 part (h). But before that, could you give me some  
7 background on Fillmore? Where is it located, like  
8 just --

9 A It's in Ventura County.

10 Q Okay.

11 A I don't -- I -- I mean, I'm not sure, like,  
12 other than it's in Ventura County what -- I don't know.  
13 Like I could check Wikipedia and see what it says. I  
14 mean, that's kind of what I've done. So there's nothing  
15 about it that jumps out at me as particularly, like,  
16 different or relevant to -- for this case, but --

17 Q Yeah. I'm just -- I'm just wondering what its  
18 relation to selling -- buying and selling jet fuel is.

19 A Oh, it's -- well, I mean, we -- you kind of got  
20 to go back to the United-Oakland agreement and how that  
21 was borne out of the adoption of the regulation in the  
22 first place. And the back and forth, what should the  
23 regulation say, what should it not say, there were, you  
24 know, cities and counties saying, "This is too loose."  
25 There were others saying, "Hey, the localities should be

1 able to negotiate these economic development  
2 agreements." So it's like -- part of the economic  
3 development agreement was having an office in Fillmore.

4 The connection between Fillmore and the jet  
5 fuel? Like there's -- no jet fuel passed through  
6 Fillmore. The jet fuel went -- or went or it was in the  
7 storage tanks in the airport. But, I mean, if you look  
8 at the regulation and the United-Oakland deal, the  
9 Board's reaction to that, and then AB 451, you don't  
10 need to have a connection with the locality for the jet  
11 fuel.

12 Q Was one of the reasons why Retailer was formed,  
13 was it for the purpose of redirecting local taxes, like  
14 one of the purposes?

15 A So -- okay. So there's stated purpose of --  
16 okay. There was the sales tax refund claims and this  
17 was in the briefing. That was one of the purposes for  
18 the setup. There was an economic development agreement.  
19 So part of the reason was this economic development  
20 agreement. That's permissible.

21 I mean, the legislature recognized -- if you  
22 look in the exhibits about the AB 451 as well as the  
23 prior legislation that was vetoed, everyone there in the  
24 descriptions, these agreements are legal. The  
25 localities are allowed to enter into economic

1 development agreements, and they can do it how they want  
2 to do it. And they can compensate how they want to.  
3 They're independent in that way. And the CDTFA can't go  
4 in -- there's no state law prohibiting it. CDTFA can't  
5 prohibit it. And they can't do policies that would  
6 influence or mess with the contracts that these  
7 localities entered into.

8 Q Was Retailer's sole purpose redirecting local  
9 sales taxes?

10 A No. No.

11 Q Okay. What were the other purposes it was  
12 formed for?

13 A To facilitate the refund of sales taxes on jet  
14 fuel that were ultimately used in international travel.  
15 So before -- and I think they're still doing this  
16 actually, even though this whole reallocation single  
17 place of business has been changed because of AB 451,  
18 they're still doing this because certain jet fuel used  
19 in international travel is not taxable, but having a  
20 single entity file all the returns, they can get the  
21 refunds back versus going to the supplier, all the  
22 different suppliers, and having to do it that way.

23 Q Retailer -- did Retailer cease to exist or  
24 close down shortly after the law was changed that you're  
25 referring to? I'm specifically referring to Regulation

1 1802 -- at the time it's -- I think it's (b)(6)(B),  
2 which changed where the sale of jet fuel takes place.  
3 And it became effective like January 1st, 2008. My  
4 understanding is that Retailer stopped doing business in  
5 Fillmore shortly after that order.

6 A That is correct. And, you know, I kind of want  
7 to follow up on the last question.

8 Q Sure.

9 A Because you were asking about the sole --

10 Q Yeah.

11 A And it's in the regulation itself. The buying  
12 company is not formed for the sole purpose of  
13 redirecting local sales tax if it has one or more of the  
14 following elements and I'm going to skip that markup.  
15 That's one of them, that's not relevant in this case.  
16 The other is issues and invoice or otherwise accounts  
17 for the transaction.

18 So not a lot has to be done for it to not be  
19 the sole purpose. Now, we've done that, so it's not  
20 sole purpose, but there is other purposes besides  
21 redirecting that was here. Nevertheless, I understand  
22 where you would say, "Hey, you know what? You can't  
23 come here and say that" -- and I don't even think  
24 redirecting is the right word. It's just this is where  
25 it's allocated. And you located in Fillmore. If part

1 of the reason and part of the incentive of relocating --  
2 or locating in Fillmore was the sales tax allocation  
3 deal, that's permissible. And I think by the fact that  
4 they closed up shop in 2008, January 1, kind of tells  
5 you it's significant but not sole.

6 Q Pretty clever. But -- so my other question is,  
7 it goes to Judge Ridenour's question regarding  
8 negotiations. So my understanding is Retailer and its  
9 customer, its main customer, is it the only customer it  
10 had?

11 A Yes. Well, pretty much. I mean, there was  
12 affiliates as well. But for the most part, it was just  
13 the airline and its affiliates. Those were the only --

14 Q But they share common ownership; is that  
15 correct? Like --

16 A Yes. Yeah. They complete -- yeah. It's  
17 captive. Like, the airline owned the retailer  
18 100 percent.

19 Q Okay. I know CDTFA in their decision or  
20 supplemental or maybe both even, they mentioned this.  
21 But, like, in what sense was it a negotiation if both  
22 parties are related? Like -- yeah, in what sense is it  
23 a negotiation?

24 A Yeah. I mean, that's a good question. Like a  
25 negotiation as far as, like, hemming and hawing back and

1   forth, offer, counteroffer. I don't think the word  
2   "negotiation" requires that level of counteroffer.  
3   Like, and I thought about this scenario. Like, I always  
4   go to the hardware store and you're going to go buy a  
5   hammer, as like the simplest application of sales tax  
6   you could possibly come up with.

7           And I go in to buy a hammer, and the hammer  
8   costs, I don't know, \$12. I pull it off the shelf. I'm  
9   not hemming and hawing. I'm not saying, "How about  
10   nine?" I'm just paying it. That's kind of like the  
11   negotiation of what's happening and why sales tax is  
12   allocated to that place.

13       Q     That's all the questions I had for now. Thanks  
14   for your presentation.

15       A     You know, I would like to kind of follow up on  
16   one thing that you mentioned because you did mention  
17   that the setup was clever. And it was. Fillmore wasn't  
18   the one who set it up. I mean, Oakland-United kind of  
19   did this. And then it came to light, and then the  
20   legislature sort of stopped it. So it's like this has  
21   been done before, and Fillmore and I don't know how many  
22   other cities said, "Okay. Well, if Oakland's going to  
23   get this and X city is going to be able to do this, we  
24   should be able to do this too." And I think the law  
25   requires they are treated equally. So I just wanted to

1 put that in there.

2 ALJ WONG: Thank you.

3 MR. CATALDO: Thank you.

4 ALJ RIDENOUR: Thank you.

5 Judge Brown, did you have any questions?

6 ALJ BROWN: I do not have any questions. Thank  
7 you.

8 ALJ RIDENOUR: All right. It's 2:45. We're  
9 going to take a five-minute recess. We're off the  
10 record. And thank you. Oh, you know what? We'll have  
11 a ten. Give -- thank you. Ten-minute break.

12 (Break taken at 2:46 p.m.)

13 ALJ RIDENOUR: Welcome back. We're back on the  
14 record.

15 Petitioners, you have 20 minutes. When you're  
16 ready, Ms. Varney, please begin your presentation.

17 MS. VARNEY: Thank you very much.

18  
19 PRESENTATION

20 BY MS. VARNEY, Representative for the Petitioner:

21 In an effort to be sensitive to time and also  
22 not to be overly repetitive in terms of a lot of  
23 information that's already been exchanged and questions  
24 you asked and so forth and things that are already  
25 submitted in the record on our briefs, I'm going to kind



1 of touch on some of the points that were -- are, you  
2 know, important to me as brought forward by Mr. Cataldo.

3 First and foremost I wanted to bring up the  
4 fact that the CDTFA or SBE, they're contracted by the  
5 local jurisdictions here in California to collect and  
6 remit the local tax on their behalf and then distribute  
7 it and fund it back to them. So in that regard, they  
8 are constantly reviewing and monitoring and so forth on  
9 behalf of the jurisdictions because they are paid to do  
10 so by those.

11 Our role is to kind of backstop that process in  
12 that we also monitor and look to make sure that, based  
13 on our knowledge of laws and regulations, that the local  
14 tax is being allocated to the proper jurisdiction.

15 One of the important points, I think, also is  
16 to note that when a business applies for a seller's  
17 permit, the information that may be provided at that  
18 time may not, you know, be fully complete in the sense  
19 that it may not -- it may say that it's going to be  
20 sales, but in terms of the greater details in terms of  
21 that office's operations or so forth. So when a  
22 seller's permit is registered and issued by the State  
23 Board of Equalization and then is -- by virtue of the  
24 address that is registered, they issue the tax area code  
25 that then tells them where they're going to distribute

1 the local tax to once the taxpayer files the return. So  
2 the address becomes relevant there in terms of how the  
3 CDTFA knows where to fund that local tax based on the  
4 tax return.

5           So one of the things -- one of the comments  
6 that Mr. Cataldo made is referencing to revoking the  
7 seller's permit. This case was not about revoking a  
8 seller's permit. It was more about determining what the  
9 proper place of sale was. Is that the City of Fillmore?  
10 Was it registered properly? Is that where the local tax  
11 belongs? Or should the seller's permit be registered to  
12 another location, in this case, potentially their  
13 out-of-state headquarters? So MuniServices, on behalf  
14 of the Petitioners, we first became aware of the offices  
15 in the city of Fillmore back in -- starting in 2006 and  
16 filed one case back in 2006 on behalf of a retailer and  
17 then subsequently filed on seven other retailers in  
18 2008, of which this case is relevant to one of them.

19           As was discussed, many of these cases were  
20 going through the process simultaneously, so a lot of  
21 the investigation and work that was being done not only  
22 by ourselves on behalf of Petitioners but also CDTFA was  
23 a lot of overlapping of case investigations, et cetera.

24           We had visited Fillmore in February of 2008  
25 prior to our filing our petition and also done thorough

1 investigation of the facts that we could obtain in terms  
2 of where the point of sale would be related to the sales  
3 of jet fuel involved in this case.

4           One of the other points I wanted to touch on  
5 was the issue of the timing on the letters that were  
6 brought forward and that somewhat translated into the  
7 Appellants's discussions about laches is the fact that  
8 there was also a change, a regulatory change, on 1807  
9 that changed the different levels of appeal. And so I  
10 think what occurred at that time was when they initiated  
11 the original letter advising the City of their proposed  
12 reallocation in this action, they realized that they  
13 needed to step back and run it through the appeals  
14 process, and that subsequently ended up with a separate  
15 decision to us and the -- the -- ultimately the D&R.

16           I don't think that the Appellant can in any way  
17 make comment as to what we were doing or not doing on  
18 behalf of our petitioners during the time that this case  
19 was under investigation by the CDTFA. Again, there's no  
20 way he would know what actions we may or may not have  
21 taken in terms of trying to be involved in resolving the  
22 issue as we do every day on behalf of all of our -- all  
23 of our clients and all the petitions that we file. A  
24 Couple of the other things is that the arguments being  
25 made in this case are repetitive of arguments made in

1 the other cases of which the Appellant was denied. And  
2 the key dispute in this case was whether or not the  
3 office in the city of Fillmore was a place of business  
4 of the retailer and whether or not actual sales  
5 negotiation occurred at that. And without belaboring  
6 that, we disagree that either of those things apply in  
7 this case for all of the, you know, regulations in terms  
8 of place of sale -- and I apologize. I'm mumbling  
9 probably a little bit here -- but for a sales office to  
10 be considered a place of business.

11 (Reporter interrupted)

12 MS. VARNEY: 710.0013 states that for a field  
13 sales office to be considered as a place of business for  
14 the purposes of the Bradley Burns, the retailer must  
15 have proprietary interest in that office space.

16 In this case I think that we have discussed and  
17 determined that the retailer did not have proprietary  
18 interest in that office space at the time that they  
19 claim that the MSA was negotiated in September prior to  
20 these -- the lease to the retailer from Inspired  
21 occurred.

22 Also, using that office on occasion for the  
23 purposes that they claim still is somewhat  
24 unsubstantiated. The documentation as presented in this  
25 case does not actually -- is not an actual purchase

1 order, and it doesn't actually identify the specific  
2 number of gallons that are going to be purchased, nor do  
3 their claim of the invoices that are supposedly  
4 generated at that office do not identify specific  
5 amounts that were purchased and utilized at the  
6 different airport locations during the periods in  
7 question.

8           Also, at the appeals conference, the prior  
9 conference that had been held, statements were made by  
10 the retailer that the negotiations of that MSA was  
11 not -- was merely just to -- let me -- that the actual  
12 terms of the MSA were not being -- that the gentleman  
13 that he delegated the authority to was only to execute  
14 the document at that time. It did not authorize them to  
15 actually determine the terms of the MSA. And as we've  
16 already discussed, the supposed -- or the alleged  
17 purchase orders, again, all of them were the same. They  
18 noted the same minimum and maximum, which we've already  
19 established did not match the terms in the MSA as did  
20 the purported invoices do not specify how many gallons  
21 were actually utilized, and, therefore, how could that  
22 be an invoice when you don't -- you aren't invoicing for  
23 an actual amount?

24           Also, we -- I wanted to state that we don't  
25 have any disagreement with the issue of the buying

1 company, and so I won't be addressing anything further  
2 on that issue in this and that we are in agreement with  
3 the CDTFA's decision in the supplemental -- the D&R and  
4 the supplemental D&R, that it is a use tax and that for  
5 those contracts that were -- and purchases in excess of  
6 the \$500,000 limit, that those allocations would go  
7 directly to the petitioning jurisdictions balances being  
8 allocated through the county by pool. So I believe  
9 that's all I have right now.

10  
11 EXAMINATION

12 BY ALJ RIDENOUR:

13 Q Thank you very much. To expand on your  
14 argument regarding execution versus negotiations, can  
15 you please expand as to the authorization to execute an  
16 agreement. Would that be same as to allow them to  
17 negotiate an agreement?

18 A Again, I will speak to that only in the sense  
19 of reiterating the statements that were made by the  
20 retailer at the -- so Mr. Meissner who was an officer --  
21 or manager of the retailer said that he delegated his  
22 authority to sign the agreement. And in this  
23 authorization he delegated them to execute it, but gave  
24 them no authority to negotiate the terms. So that was  
25 the basis of that comment.

1 ALJ RIDENOUR: Thank you. That's all the  
2 questions I have for now.

3 Mr. Wong -- Judge Wong, do you have any  
4 questions?

5 ALJ WONG: I do not. Thank you.

6 ALJ RIDENOUR: Thank you.

7 Judge Brown?

8 ALJ BROWN: I do not have any questions right  
9 now. Thank you.

10 ALJ RIDENOUR: Thank you. And with that, we  
11 will move over to CDTFA, who I believe has 30 minutes.  
12 So please begin your presentation.

13 MR. BACCHUS: Thank you.

14  
15 PRESENTATION

16 BY MR. BACCHUS, Tax Counsel:

17 I'm going to give the bulk of the presentation  
18 and at the end Mr. Claremon is going to address a few  
19 points. But before we get to the substance of the  
20 appeal, we first want to clarify, the Department's role  
21 in these local tax matters.

22 The Department administers the allocation of  
23 local tax between the various jurisdictions that impose  
24 taxes pursuant to the Bradley-Burns uniform local sales  
25 and use tax law. When there is a dispute regarding the

1 allocation of local tax, it is appealed via petition to  
2 the Department's local revenue branch and then to the  
3 appeals bureau but the parties in a local tax appeal are  
4 the petitioning jurisdiction, and the substantially  
5 affected jurisdictions.

6 We also note that there are other jurisdictions  
7 that are not parties in this local tax appeal in that  
8 they are not present here but will otherwise be affected  
9 financially based on the outcome of this appeal, as  
10 described in our Exhibit A, the decision and  
11 recommendation.

12 There was mention of Regulation 30506 that  
13 lists the applicable section within the -- within the  
14 Department as a party, but that is just for purposes of  
15 naming who's involved in the appeal process, not that  
16 the Department is a party, meaning that the Department  
17 would not benefit one way or the other with any  
18 financial gain or loss based on the outcome of these  
19 local tax appeals.

20 With that in mind, Fillmore's contention that  
21 the Department's delay in gathering evidence should bar  
22 any reallocation under the equitable doctrine of laches  
23 misses the mark. Laches provides a defense or bar to  
24 claims by those who neglected to assert their rights in  
25 a timely manner when the delay has caused prejudice to



1 the party claiming the laches defense.

2 Here, the petition jurisdictions timely filed  
3 their petitions. There was no delay by a party to this  
4 action and any determination that the reallocation of  
5 local tax is barred by laches would punish petitioners  
6 for a delay they did not contribute to. Accordingly,  
7 there is no basis for applying the doctrine of laches to  
8 these facts.

9 As to what specifically occurred during the  
10 period of August 4th, 2008 and September 26, 2012 in its  
11 October 3rd, 2008 petition, Fillmore indicates that it  
12 was in the process of gathering documentation to submit  
13 to the Department. The Department acknowledged the  
14 petition in letters dated October 29, 2008 and  
15 November 10th, 2008 and indicated that it was referring  
16 the matter to the appeals bureau.

17 In December 2008 the Appeals Bureau returned  
18 the matter to the Department for the issuance of a  
19 decision. The appeals bureau recognized, as was pointed  
20 out in the October 3rd, 2008, petition that it was  
21 premature to refer these -- this appeal to the appeals  
22 bureau prior to the issuance of a -- of the Department's  
23 decision and/or supplemental decision.

24 In February 2012 the Department again requested  
25 documentation from Fillmore, which Fillmore responded to

1 by email dated April 6th, 2012 and letter dated  
2 April 16th, 2012. The Department issued its decision on  
3 September 26th -- 26th, 2012. There's no formal record  
4 of what transpired between January 2009 and February  
5 2012, however, as has already been mentioned, this  
6 matter was one of eight local tax cases involving the  
7 City of Fillmore that were all happening at the same  
8 time.

9           Some of the other matters involved local tax  
10 that the Department was holding in abeyance pending the  
11 outcome of the appeals. Also unlike here, the amount at  
12 issue in those cases continued to accrue each quarter.  
13 Therefore, the parties informally agreed that the  
14 Department would prioritize the other appeals ahead of  
15 this appeal at issue today. The -- and during 2009,  
16 '10, and '11, the Department worked to complete the  
17 other appeals before working on this appeal, and at that  
18 time Fillmore's representative was representing Fillmore  
19 in all the appeals. So it was beneficial to -- not only  
20 to Fillmore to handle the cases where the local tax was  
21 held in abeyance, but also to representatives and to  
22 basically everybody that was involved. There had to be  
23 some type of prioritization to the cases so that they  
24 could start working them through and getting them  
25 resolved.

1 Appellants here today have mentioned a few  
2 times in relation or in regard to this argument about  
3 laches, that a lot of the evidence that could have been  
4 gathered wasn't gathered, and that's the prejudice that  
5 the City of Fillmore experienced that they didn't know  
6 or couldn't foresee what evidence they needed to retain  
7 for when this case eventually came to an appeals -- to  
8 the appeals bureau and eventually to the Office of Tax  
9 Appeals, which we find a little surprising given that  
10 that the City of Fillmore was on notice in 2008, that  
11 this -- that the -- that the local tax was -- now I  
12 forget -- I forget the term from the -- from the -- from  
13 the original letter, but that they were proposed to  
14 reallocate the tax from Fillmore to these other  
15 petitioning jurisdictions. And -- and the questioning  
16 that has happened today kind of touched on -- on the  
17 fact of why wouldn't -- why didn't or why wouldn't  
18 Fillmore have -- in anticipation of -- of this matter  
19 going forward, why wouldn't they have kind of set aside  
20 the evidence as opposed to just kind of letting it go  
21 wherever it went? So the Department is a little bit  
22 surprised by that admission.

23 Turning now to the substance of this appeal, as  
24 I will explain in greater detail, the allocation of  
25 local tax to Fillmore was correct only if the applicable

1 tax was sales tax rather than use tax and the place of  
2 sale was a location of the retailer in Fillmore.

3 Pursuant to Section 6051 and Regulation 1620(a)  
4 and (b), a retail sale is subject to sales tax if two  
5 conditions are satisfied. First, the sale occurs in  
6 California, which there's no dispute about that; and  
7 two, there's participation in the sale by a California  
8 location of the retailer. Here, there's no dispute that  
9 the sales occurred in California when the jet fuel was  
10 delivered to customer at the respective storage tanks at  
11 airports in this state; therefore, the critical question  
12 is whether there was participation by any California  
13 location of Retailer.

14 It is undisputed that the storage tanks were  
15 not owned or operated by retailer and that the fuel  
16 located in the storage tanks was commingled with fuel  
17 owned by other persons. The storage tanks for the  
18 airport were not place of businesses of the retailer.

19 Accordingly, the only location that could  
20 qualify as a place of business of the retailer is  
21 Inspired's Fillmore office. A place of business must be  
22 a place where the retailer actually conducts business  
23 and generally must be a place the retailer has a  
24 proprietary interest in or otherwise hold out as its  
25 place of business.

1           You can see Annotations 701.0013 and 710.0024,  
2     "Where an agent working out of its own place of business  
3     performs activities on behalf of a principal, the  
4     agent's business location is generally not the business  
5     location of the principal."

6           Here, pursuant to agency -- to an agency  
7     agreement between retailer and Inspired Development,  
8     which is in Exhibit 1 to our Exhibit A, Inspired was  
9     required to lease or purchase -- or purchase commercial  
10    space necessary to create a regional sales  
11    administration center in Fillmore. The space was to be  
12    leased in Inspired's name and not as retailer's agent  
13    and did not require retailer to make any payments. On  
14    or about September 28th, 2006 representatives of  
15    retailer and its customer met at Inspired's Fillmore  
16    office at 751-F Ventura Street in Fillmore. Then on  
17    October 1st, 2006 retailer entered into a nine-year  
18    lease with Inspired for the nonexclusive use of office  
19    space at that location for a monthly rent of \$100.  
20    That's in Exhibit 2 to Exhibit A. However, Inspired,  
21    not Retailer, is listed as the occupant on the signage  
22    displayed on the building and door at the office  
23    location. They see pictures in Exhibit 3 to Exhibit A.

24           On May 7th, 2008, the Department visited the  
25    Fillmore office and found the doors locked and no one

1 present, which is in Exhibit 6 to Exhibit A. The  
2 Department also telephoned Inspired's landlord who  
3 stated that he had never heard of Retailer.

4 There's also no evidence or contention that  
5 retailer's employees ever worked at the Ventura Street  
6 location. Instead, activities at the office were  
7 conducted by Joyce Cooperman who, in her declaration,  
8 stated that she was the office manager at Inspired's  
9 Fillmore office. That's in Exhibit 12 to Exhibit A.

10 In summary, there is no evidence that retailer  
11 ever held this office out as retailer's place of  
12 business in any way. The only time a representative of  
13 Retailer was at that location was prior to the term of  
14 its lease as one of two parties invited by Inspired to  
15 meet at that location. At no time during the lease  
16 of -- during the term of the lease did the retailer  
17 occupy or use the location in any way. Accordingly, the  
18 Fillmore office did not constitute an actual place of  
19 business of retailer. As such, no place of business of  
20 retailer participated in the sales at issue and, we're,  
21 the applicable taxes, use tax, which is properly  
22 allocated through the Countywide thorough the  
23 jurisdiction's of use where the storage tanks were  
24 located.

25 While the -- while the foregoing is

1     dispositive, we also address whether Fillmore -- whether  
2     the Fillmore office participated in sales.  
3     Participation is a transaction necessary --  
4     participation in a transaction necessarily means that  
5     the local place of business of the retailer must have  
6     some meaningful effect on the sales process, that is,  
7     the participation must serve some real purpose in the  
8     actual sales process and involve some genuine physical  
9     interaction from the sale of that location. Activities  
10    that are not necessary for the sales process and/or that  
11    take place after the sale is complete, do not constitute  
12    participation in the sale.

13             In addition, general business activities that  
14    support a retailer's sales activities do not constitute  
15    participation in any particular sale.

16             Fillmore's first contention is that it  
17    negotiated the master sales agreement for all monthly  
18    sales at the Fillmore office on or about September 28th,  
19    2006. As explained in greater detail in Exhibit A, both  
20    parties at the meeting derived their authority to sign  
21    the agreement from the same person -- that's Exhibit 8  
22    to Exhibit A -- and the MSA was seemingly prepared prior  
23    to the meeting with the only information added to the  
24    MSA at the meeting were being handwritten notations  
25    specifying the minimum and maximum limits of gallons to

1 be purchased each month and the parties' signatures.  
2 And that comes from the declaration of Bill  
3 Kersey (phonetic) of Ryan, LLC, which is in Exhibit C --  
4 no. Sorry. That comes not from his declaration but  
5 from the appeals conference transcript, which is in  
6 Exhibit C.

7 Yet there's no evidence that the parties  
8 negotiated those limits, meaning the minimum/maximum  
9 gallons of fuel per month at the meeting or that they  
10 were authorized to negotiate at the meeting at all.  
11 Rather the declaration relied on by Fillmore, found in  
12 Exhibit 11 to Exhibit A which is Mr. Jones' declaration,  
13 makes the incredible and unsubstantiated statement that  
14 the entire agreement was negotiated there. As such  
15 while we have no reason to dispute that the MSA was  
16 signed at Inspired's Fillmore office, there is  
17 insufficient evidence to support that any negotiations  
18 took place there. And as previously stated, it was, in  
19 fact, Inspired's office, not retailers, especially not  
20 on September 28th, 2006, which was prior to the  
21 commencement of retailer's \$100 a month sublease for the  
22 office space. And regardless, the MSA was not  
23 negotiated at the Fillmore location.

24 Fillmore next contends that participation in  
25 these monthly statewide aviation fuel purchases occurred



1 at that location through the actions of Ms. Cooperman  
2 who we again note was an office manager at the Inspired  
3 office.

4 The MSA required customer to order goods by  
5 notification to Inspired, including the quantities to be  
6 -- quantities to be furnished. Specifically the MSA  
7 reads, quote, Customer shall notify retailer or Inspired  
8 when specific deliveries are required. Customer's  
9 delivery order shall indicate the delivery location,  
10 manufacturer, model number, quantity desired, and  
11 preferred delivery date, end quote. This shows that the  
12 orders required were received by retailer at its Houston  
13 headquarters when the amounts of fuel needed -- that  
14 actual amounts of fuel needed, were provided by  
15 customer. Mr. Corsi confirmed at the appeals conference  
16 that the fuel needs were communicated by customer to  
17 retailer at the Houston office. That's, again, in  
18 Exhibit C.

19 Customer would then issue a document to  
20 retailer indicating a range of how much fuel it needed  
21 for the subsequent month, Exhibit 7 to Exhibit A.

22 These documents were issued a few days prior to  
23 the start of the month and were signed by Ms. Cooperman  
24 some days later. In response to these documents on the  
25 same day she signed it, Ms. Cooperman would issue an

1 authorization to release inventory, which is the name of  
2 the form, which indicates the maximum amount of fuel  
3 Retailer was authorized to sell to customer for any  
4 given month.

5           According to her declaration found in  
6 Exhibit 12 to Exhibit A, Ms. Cooperman stated that,  
7 quote, If the document was not correct, it was my duty  
8 to reject the order and notify the customer as to the  
9 basis for the rejection. If the document was deemed  
10 acceptable, I would notify retailer via an authorization  
11 to release inventory that it was permitted to release  
12 inventory to customer, end quote. Whereas the  
13 communications to the Houston headquarters put retailer  
14 on notice of the fuel requirements, any document  
15 received and inventory release form completed by  
16 Ms. Cooperman at best serves only as unnecessary  
17 reminders. The documents she received stated an  
18 identical range each month, which actually incorrectly  
19 indicated the minimum and maximum monthly gallon amounts  
20 per the MSA. Yet Ms. Cooperman never rejected the  
21 orders indicating that the orders and Ms. Cooperman's  
22 actions bore no real purpose or had any real effect on  
23 the sale.

24           In addition, for several months -- for several  
25 of the months at issue, retailer released fuel prior to

1 receiving the release forms, and each month retailer  
2 released more gallons than was authorized on the  
3 authorization forms. Again, indicating that the  
4 authorization forms were not actually necessary to the  
5 sales process. Based on this information, which is  
6 explained in more detail in Exhibit A, these orders and  
7 releases served no real purpose in the sale process and,  
8 we're, do not constitute participation in the sales at  
9 issue.

10 As to the argument regarding buying companies,  
11 I just wanted to make one -- kind of make one statement  
12 about that, and then we'll reserve our further analysis  
13 of that argument in post hearing briefing. But there's  
14 no dispute that retailer is a buying company and that as  
15 a buying company Retailer is recognized as a separate  
16 legal entity entitled to hold a seller's permit for any  
17 location that meets the criteria of Section 6072 and  
18 Regulation 1699. However, there is no authority for the  
19 proposition that a different standard applies to buying  
20 companies with regard to what constitutes participation  
21 or a place of business of the Retailer.

22 We note in the Board of Equalization memorandum  
23 opinion Cities of Agoura Hills a similar argument was  
24 raised by the City of Fillmore that a retailer's  
25 location was entitled to a seller's permit even though

1 it did not meet the basic requirements of Section -- of  
2 Regulation 1699. As stated in that memorandum opinion  
3 subdivision (h) of Regulation 1699 does not and cannot  
4 abrogate other legal requirements to the issuance of a  
5 seller's permit, including particularly as to the  
6 location to which a permit can attach.

7 To summarize, the Fillmore office was never a  
8 place of business of retailer during the relevant  
9 periods at issue. Moreover, the September 2006 meeting  
10 and the actions of Ms. Cooperman did not constitute  
11 participation in the sales at issue within the meaning  
12 of Regulation 1802. For each of these reasons on their  
13 own, the applicable tax for the sales at issue was use  
14 tax, which was properly reallocated to Petitioners and  
15 the other jurisdictions through their respective  
16 countywide pools. Accordingly, Fillmore's appeal should  
17 be denied.

18 And I'll let Mr. Claremon make statements.

19 MR. CLAREMON: Thank you.  
20

21 PRESENTATION

22 BY MR. CLAREMON, Tax Counsel:

23 Good afternoon. To -- to briefly respond to  
24 some of the arguments that have been raised by the City  
25 of Fillmore here, as Mr. Bacchus has explained, the

1 issue here is based in the application of basic  
2 allocation rules, specifically was there a place of  
3 business of a retailer? And did it negotiate or  
4 otherwise participate in the sales? Appellant here  
5 today -- or excuse me -- the City of Fillmore here today  
6 has made a number of assertions as to why the  
7 application of those rules does not apply in this  
8 particular appeal or applies differently in this  
9 particular appeal, including the buying company rules  
10 under 16 -- under Regulation 1699(i) formerly (h), which  
11 Mr. Bacchus addressed? None of those arguments are  
12 valid. For example, Regulation 1620 allows for  
13 participation by an agent, but only when working out of,  
14 quote, such places of business such referring to a place  
15 of business of the retailer.

16 Regulation 1802(a)(1) states that if there is a  
17 sole and state place of business of the retailer, it is  
18 the place of sale for all sales in which it  
19 participates. That is stated in that subdivision. So  
20 in both cases, the basic rule still applies. It must be  
21 a place of business of the retailer and that place of  
22 business must participate in the sale.

23 Likewise, with regard to jet fuel, Regulation  
24 1802(b)(6) discusses when allocation is to the place of  
25 delivery prior to 2008. It does not dictate when

1 allocation is to another location. And in fact, the  
2 subdivision concludes in subparagraph (e) with the  
3 statement that "otherwise taxes allocated as provided  
4 elsewhere in this regulation."

5           With regard to Fillmore's discussion of another  
6 matter involving the sale of jet fuel, we note that the  
7 allocation of local tax is based on the facts and  
8 circumstances of each particular appeal or allocation.  
9 It is not the CDTFA's position that a buying company's  
10 office cannot be the place of sale. The question is  
11 whether in a particular circumstance the facts support  
12 that conclusion. For example, if a buying company  
13 actually placed an employee at its in-state office, held  
14 out -- held out that location as their place of  
15 business, and that employee genuinely took orders that  
16 had a necessary and meaningful impact on the  
17 transactions, then we would conclude that that buying  
18 company's office was the place of sale. As Mr. Bacchus  
19 has discussed, that is not the case here. It is the  
20 equal application of the allocation rules to  
21 different -- a different set of facts and circumstances.

22           With regards to negotiations, I note that the  
23 City of Fillmore has asserted here that they -- these  
24 were essentially the same company, that these were not  
25 arm's length transactions, but rather a captive

1 arrangement that's how he described it. And this  
2 position is not just at odds with the idea that the MSA  
3 was negotiated at the Fillmore office on September 28,  
4 2006, but that it was subject to deliberation at all at  
5 that point if we are talking about essentially two  
6 entities that are acting as one. The contention here is  
7 that after internally developing this purchase  
8 agreement, this master sales agreement for however long  
9 it took, this key element of the agreement, the actual  
10 range that's going to be purchased, was left to the  
11 weekend before it was to take effect.

12 And that, again, as Judge Wong has alluded to,  
13 it's hard to understand what form negotiation would take  
14 in this instance, but more than just negotiation, the  
15 fact that this wasn't already settled.

16 This was an internal deliberation essentially  
17 two parties acting as one. It's somewhat unreasonable  
18 given the way it's been described here today with regard  
19 to the buying company's arguments, that not only this  
20 would be left to be negotiated but that it wouldn't have  
21 already been decided in this internal deliberation. So,  
22 again, we do not believe that any negotiation of the  
23 master sales agreement took place in Fillmore.

24 And then finally I note that whether a location  
25 has been issued a seller's permit is not determinative

1 of local tax allocations. The allocation analysis is  
2 based on the actual facts of the transaction. In almost  
3 all local tax allocation cases such as this one, when a  
4 retailer is attempting to direct local tax to a specific  
5 location, it obtains a seller's permit for that  
6 location. It is a fact or a circumstance of pretty much  
7 all local tax allocation cases like this one, and it is  
8 simply not a relevant fact in determining the proper  
9 allocation of local tax. Local tax is based on the  
10 facts of the transactions themselves and the nature --  
11 and the actual nature of the office itself as whether  
12 it's an office of the retailer. Thank you.

13 ALJ RIDENOUR: Thank you. Thank you.

14 MR. BACCHUS: I did -- I did want to clarify.  
15 I made a misstatement in my conclusion when I said that  
16 the use tax was properly reallocated to Petitioners and  
17 the other jurisdictions to their countywide pools.  
18 That's not accurate. Some of them were directly  
19 allocated for those transactions that were over  
20 \$500,000. So I just wanted to clarify that we had some  
21 direct reallocation and some through the countywide  
22 pool.

23 ALJ RIDENOUR: Thank you very much for the  
24 clarification. I do have a couple of questions,  
25 Mr. Bacchus.



1 EXAMINATION

2 BY ALJ RIDENOUR:

3 Q I just want to have it for the record, does  
4 CDTFA dispute that retailer was a buying company?

5 A We do not dispute they were a buying company.

6 Q Thank you. And I know you touched on laches  
7 and you spoke about it, however, can you please respond  
8 to Appellants' assertion that because it went from like  
9 allocation group to appeals back to allocation group  
10 there was this misunderstanding and miscommunication to  
11 Appellant and, we're, they weren't able to -- or did not  
12 provide the documents? Department, please give us a  
13 response to that.

14 A Sure. We don't -- we don't dispute that there  
15 was -- that it was prematurely sent to the appeals  
16 bureau in -- at the end of 2008. And in discussing it  
17 with the appeals bureau, our understanding was it was  
18 returned within a few weeks, that that was -- that error  
19 was noted -- was noticed and -- and it was sent back.

20 I'll just reiterate what I said before. The --  
21 the -- the Department just finds it hard to believe that  
22 a jurisdiction knowing that local tax was proposed to be  
23 reallocated, that they would not retain documentation or  
24 evidence that could potentially stop that reallocation  
25 during the appeal process.

1           The amount of time that seemingly no work was  
2 being done or that we don't have any formal  
3 documentation that work was being done on this case, it  
4 was -- it was a long time, abnormally long. But, again,  
5 there were other Fillmore cases for other companies,  
6 other retailers that -- that were being worked through.  
7 So the fact that Fillmore is arguing that it was  
8 prejudiced by the -- by the fact that they did know to  
9 keep the documentation when they were going through  
10 these cases, these other cases, and knowing that there  
11 was a proposal to reallocate the tax for this particular  
12 case is hard to believe.

13         Q     Okay. Thank you. And I have one more  
14 question. I don't know if it would be best answered by  
15 you or Ms. Stocker, so I will let you guys decide after  
16 I answer the question -- ask the question.

17           So in my minutes and orders I asked the parties  
18 to address the 90 days of that. So my question is: The  
19 regulation says, "If the assigned section does not issue  
20 a written decision within six months of the date  
21 received it a valid petition, the Petitioner may request  
22 the signed section issue to issue its decision," etc.

23           So then I looked up what "Petitioner" means,  
24 and so Petitioner means jurisdiction that has filed a  
25 timely and valid petition. So then I went, "Okay.

1 Well, what's the definition of a 'petition'?" And  
2 petition, the definition includes as well as a  
3 jurisdiction's written objection to a notification that  
4 local or district tax previously distributed to the  
5 jurisdiction was incorrectly allocated and distributed  
6 to be redistributed. So my question is, is what CDTFA's  
7 position Appellant becoming a Petitioner once State  
8 Appellant filed that -- you know, filed the written  
9 objection, does that start a 90-day clock for which a  
10 notified jurisdiction can ask for written decision?

11 A I will confer.

12 So our understanding or how -- how it works is,  
13 the petitioners when this case the jurisdictions that  
14 were petitioned that that allocation to Fillmore, that's  
15 one way to petition, and then once there is a decision  
16 or determination that the local tax would be  
17 reallocated, the objection to that is also a petition.

18 So in this case we have petition -- the  
19 petition jurisdictions and then we have City of Fillmore  
20 who is also a Petitioner. I think we have -- there's  
21 two kind of petitions and we have both in this case. So  
22 we have the -- the petitions that were filed by certain  
23 jurisdictions, which are the first kind of petition to  
24 get -- get that money that was allocated somewhere else.  
25 Then for other jurisdictions, they did not file a

1 petition and -- but we -- but we, CDTFA, notified the  
2 City of Fillmore that we would reallocate that money.  
3 We gave them notification. And then they filed an  
4 objection to that, which also became a petition. So  
5 they are also a Petitioner. I think that is the  
6 petition. So I'm not a hundred percent sure what the  
7 question is, but -- so the six-month clock would start  
8 -- if that's the question -- would start at that point  
9 in terms of after six months, they can request an  
10 update --

11 (Reporter interrupted)

12 A Request that the decision be issued within 90  
13 days.

14 Q Okay. And I did miss -- my apologies. I  
15 misspoke. When I read the regulation, I jumped -- I  
16 jumped the six-month --

17 A Yeah.

18 Q -- first. So I guess to clarify my question,  
19 once CDTFA, the allocation group did not issue a formal  
20 decision in response to Fillmore's petition and they did  
21 not -- if -- and correct me if I'm wrong -- they did not  
22 issue that decision within that six-month period. I was  
23 wondering if at that point the six -- the 90-day clock  
24 starts for which Fillmore could then use that 90 days to  
25 ask for a decision to be issued.

1           A     I do not think so. I think that they would  
2 have had to -- so their objection constituted a petition  
3 under 30506(b)(11). They would have had to make a  
4 request for a decision under 30506(c).

5           Q     Four?

6           A     Four.

7           Q     So they --

8           A     Correct. And those are not the same thing.

9           Q     Okay. But Fillmore is -- I guess because I've,  
10 you know, I understand petitioners definitely asked for  
11 that decision to be made after six months, my question  
12 is, would Appellant also have that right?

13          A     Any -- any -- yeah, I'm not -- (c)4 says only  
14 the Petitioner would have that right.

15               ALJ RIDENOUR: Thank you. Just wanted to make  
16 sure.

17               MR. CLAREMON: Okay.

18               ALJ RIDENOUR: Thank you very much. Those are  
19 all my questions for the Department.

20               Judge Wong, do you have anything to add or  
21 questions, please?

22               ALJ WONG: Is Ms. Varney allowed respond? I'd  
23 like to hear --

24               MS. VARNEY: Well, I apologize because I missed  
25 addressing that previously, but I -- I do want to

1 clarify a little bit. I think that there was some  
2 overlapping in terms of our petitions and there was also  
3 appears there was a petition that was filed by the City  
4 and County of San Francisco. And so I think that  
5 precipitated the original letter that went to the City  
6 of Fillmore back in August -- that original letter where  
7 they were proposing the reallocation. And it's almost  
8 like the dates were identical of the petition. So I  
9 know from our perspective when there wasn't a  
10 decision -- and this is generally how we would view  
11 it -- just addressing why we wouldn't have asked for it,  
12 a decision to be issued, if it wasn't within that time  
13 period as called for in the regulation is because we've  
14 just found that all that does is push an issue forward  
15 into the appeals process before the Department has had  
16 the opportunity to really investigate the facts. And  
17 you aren't really gaining anything other than, you know,  
18 trying to accelerate it before it's ready, and we never,  
19 you know, have found that to be, you know, favorable to  
20 the jurisdictions or anyone in that case. It's more  
21 important that the investigation be able to be completed  
22 and so forth, which was the reason that we did not ask  
23 relative to our petitions to have a decision to push it  
24 forward during that process.

25 ALJ WONG: Thank you. Thank you. I don't have

1 any other questions.

2 ALJ RIDENOUR: Thank you.

3 Judge Brown, do you have any questions?

4 ALJ BROWN: No, I don't have any questions.

5 Thank you.

6 ALJ RIDENOUR: Okay. Thank you.

7 Mr. Cataldo, if you like you may make a brief  
8 closing statement in response to Petitioner CDTFA's  
9 arguments for -- further address any of the questions  
10 asked by the panel, but it is not required. Would you  
11 like to make closing remarks?

12  
13 CLOSING STATEMENT

14 BY MR. CATALDO, Counsel for Appellant:

15 Excuse me. Yes. Just a few comments. The  
16 first comment is it seems that CDTFA and Petitioner just  
17 want to disregard agency. Inspired by note says  
18 already. I'll say it again. It's pretty important.  
19 Inspired Development entered into a agency agreement  
20 with Retailer. The agency agreement was specifically to  
21 open an office. They just want to disregard that fact  
22 when they're trying to -- trying to apply the rule of  
23 place of business. Place of business was where Inspired  
24 Development was. It was there on behalf of Retailer.  
25 So that's one.

1           Secondly, with respect to buying companies,  
2 just because -- like, I said this before earlier in  
3 response to one of your questions. No. Just because  
4 you meet the definition of a buying company alone  
5 doesn't mean you have a place of business. You could  
6 have a buying company in Antarctica. It's not going to  
7 get a California seller's permit. But here, there's  
8 only one location. It's a buying company, and we have  
9 ample evidence of its location being in Fillmore, ample.  
10 As a result of that, the conclusion is that the sale --  
11 the local sales tax, because there's only one location,  
12 permitted location, one, it has to go there. And that's  
13 kind of the beginning and end of this.

14           Just commenting on the Agoura Hills case, that  
15 was a question of, "Okay. So you're a buying company,  
16 but you've got more than one location." You don't just  
17 get to just pick your location. That's kind of what I  
18 read that case as. We don't have that situation here.  
19 There's one location or CDTFA/Petitioner's position  
20 none. We say one. There's no, "Hey, where are you  
21 going to go between locations in California?"

22           The seller's permit, if there's one location,  
23 you have to -- a seller's permit is issued to a location  
24 in California. I don't think you're going to issue a  
25 seller's permit to an office in Houston.



1           This gets me to sort of stepping back and  
2 looking at the standard that you have to apply here to  
3 decide whether you're going to reallocate or not, a  
4 preponderance of the evidence. And we've talked a lot  
5 about all of the evidence that is pointing towards  
6 Fillmore. Now, I know they've picked apart little  
7 pieces, bits and pieces of this here, there's no  
8 sublease, that wasn't allowed, things of that nature.  
9 But what I'm not seeing is any evidence of the main  
10 contention, which is: It's use tax because it happened  
11 in Houston. I don't think you can reach -- can find by  
12 a preponderance of the evidence that with what's in the  
13 record.

14           Oh, I did want to at least respond to  
15 Petitioner's comment, which is true, I do not personally  
16 know what Petitioners did during this time. This is the  
17 laches argument. I don't know. All I know is what's in  
18 the record, and the record shows nothing.

19           As far as who's a party and who's not, there's  
20 a definition of party, and CDTFA is in it, if that  
21 matters for laches. I don't think it does.  
22 Unreasonable delay and prejudice are the two things you  
23 have to find. That is all that I have.

24           ALJ RIDENOUR: Thank you, Mr. Cataldo.

25           There was a couple of arguments made from CDTFA

1 that I was hoping you would be able to respond and give  
2 your response to. One was in regards to the -- that the  
3 released authorization forms weren't really a  
4 participation in the sale because they were sometimes  
5 issued after the 1st of the month and -- and I believe  
6 they said also that the maximum amounts authorized to be  
7 released were in -- the released fuel was actually in  
8 excess of the maximum amount authorized by the release.  
9 And so can you please provide Appellants' response to  
10 that?

11 MR. CATALDO: Yes. So, again, we've got to  
12 look to the master sales agreement. That kind of lays  
13 out of all the rules. And if you don't do -- if these  
14 things were not issued, then you don't have a sale. If  
15 you don't have the authorization and POs issued, they're  
16 not a sale. The agreement recognizes that it's -- a lot  
17 of these things are estimates and they're not going to  
18 be a hundred percent accurate at the time.

19 Another thing just -- I want to point out. I  
20 mean, we keep saying participation in the sale, or I  
21 hear -- I keep hearing that. And maybe that's just  
22 shorthand, but when you evaluate this, I would urge you  
23 to actually look closely and just read the letter of the  
24 law. The actual regulation talks about participation in  
25 the transaction in any way, any way by the local office,

1 branch, or outlet is sufficient to sustain the tax. I'm  
2 not sure if I answered your question. Maybe I have not.

3 ALJ RIDENOUR: Yeah, you did.

4 MR. CATALDO: Okay.

5 ALJ RIDENOUR: Thank you.

6 Judge Wong, do you have any questions?

7 ALJ WONG: I do not. Thank you.

8 ALJ RIDENOUR: Thank you.

9 Judge Brown, do you have any questions?

10 ALJ BROWN: I do not. Thank you.

11 ALJ RIDENOUR: Okay. I really -- I wanted to  
12 first ask since it seems the parties addressed buying  
13 companies, I wanted to see if any party still wanted to  
14 brief the issue?

15 Mr. Cataldo?

16 MR. CATALDO: We would be happy to brief the  
17 issues.

18 ALJ RIDENOUR: Okay. That's fine. I'm not --  
19 thank you. All right. I want to thank everyone for  
20 participating. Oh, I'm sorry. Mr. Bacchus.

21 MR. BACCHUS: I'm sorry. Mr. Claremon would  
22 like to clarify one of his answers just to make sure  
23 there's no confusion. Because we think there may be  
24 just little confusion with regard to the -- who can --  
25 who can pull the trigger on those.

1 MR. CLAREMON: Thank you. And not even sure  
2 I'm still actually responding to the question. But just  
3 to be clear, the City of Fillmore was a petitioner in  
4 this case, and particularly since one decision was  
5 issued for all Petitioners in this case, they could have  
6 requested a decision within 90 days pursuant to (c)(4).

7 ALJ RIDENOUR: So to clarify, Appellant could.

8 MR. CLAREMON: I mean they --

9 ALJ RIDENOUR: As a Petitioner.

10 MR. CLAREMON: They could because they were a  
11 Petitioner. And, again, even though they're a  
12 petitioner for part of the case, there was one decision.  
13 So any petitioner could have requested that decision.

14 ALJ RIDENOUR: Okay. Thank you for the  
15 clarification.

16 MR. CLAREMON: Thank you.

17 MR. CATALDO: Can I respond to that?

18 ALJ RIDENOUR: Yes, of course.

19 MR. CATALDO: And just quickly. But the  
20 decision happened before the -- the decision happened  
21 like in an instant. So they became a petitioner, but  
22 the decision happened. There was no occasion or ability  
23 to ever apply that because the decision was rendered.  
24 Like: We're done here. You're going to appeals. That  
25 happened well within the time frame. The thing we're

1 complaining about as far as the time and the laches  
2 argument is after that the three-plus years after that,  
3 what happened.

4 ALJ RIDENOUR: Okay. Thank you very much.

5 All right. I want to thank everyone for  
6 participating in the Office of Tax Appeals' first local  
7 tax hearing. If there is nothing further, I'm now  
8 concluding the hearing.

9 The record will remain open to allow additional  
10 briefing on the issue of the buying companies. Each  
11 party's additional briefing is limited to this issue  
12 buying companies and its applicability to this matter.  
13 Any portion of a party's brief that addresses additional  
14 issues will not be considered by the Office of Tax  
15 Appeals.

16 The deadline for Appellant to submit its  
17 additional briefing is Tuesday, January 24th, 2023,  
18 which is 40 days from today's hearing.

19 Petitioners and CDTFA shall both have 40 days  
20 to separately file a reply brief from the date that  
21 Appellants' additional briefing is acknowledged. That  
22 would conclude the briefing process. That would  
23 conclude the additional briefing process unless  
24 additional briefing is requested by OTA. At the  
25 conclusion of the additional briefing period the record

1 will be closed. The judges will then issue a written  
2 decision of our -- opinion of our decision within a  
3 hundred days from when the record is closed.

4 Today's hearing in the Appeals of City of  
5 Fillmore, et. al, is now adjourned. This concludes the  
6 hearings for today. Hearings will resume tomorrow at  
7 9:30 a.m. Thank you, everybody.

8 (Conclusion of the proceedings at 4:00 p.m.)

9 ---oOo---

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA )

COUNTY OF SACRAMENTO ) ss.

I, MARIA ESQUIVEL-PARKINSON, do hereby certify that I am a Certified Shorthand Reporter, and that at the times and places shown I recorded verbatim in shorthand writing all the proceedings in the following described action completely and correctly to the best of my ability:

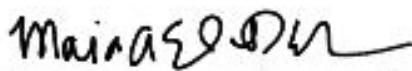
CASE: In the Appeal of Cities of Fillmore, et. al.

DATE: Thursday, December 15, 2022

I further certify that my said shorthand notes have been transcribed into typewriting, and that the foregoing pages 1 through 110 constitute an accurate and complete transcript of all my shorthand writing for the dates and matter specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California on this 9th day of January, 2023.

  
\_\_\_\_\_  
Maria Esquivel-Parkinson  
CSR No. 10621, RPR

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