BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,	
STARBUZZ INTERNATIONAL, INC. and, STARBUZZ TOBACCO, INC. (REHEARING),	OTA NO. 21098578
APPELLANT.	

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Thursday, January 19, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at 12900 Park Plaza Dr., Suite 300, Cerritos, California, 91401, commencing at 9:33 a.m. and concluding at 11:37 a.m. on Thursday, January 19, 2023, reported by Ernalyn M. Alonzo, Hearing Reporter, in and for the State of California.

APPEARANCES:

Panel Lead:	ALJ DANIEL CHO
Panel Members:	ALJ NATASHA RALSTON ALJ ANDREA LONG
For the Appellant:	MARDIROS DAKESSIAN MICHAEL PENZA
For the Respondent:	STATE OF CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION
	COURTNEY DANIELS STEPHEN SMITH DAMIAN ARMITAGE
Also Present:	PAMELA BERGIN
	KATHLEEN DILL

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-7 were received at page 6.)

(Department's Exhibits A-I were received at page 6.)

OPENING STATEMENT

CLOSING STATEMENT

Cerritos, California; Thursday, January 19, 2023

9:33 a.m.

JUDGE CHO: Let's go on the record.

This is the Appeal of Starbuzz International, Inc., and Starbuzz Tobacco, Inc., Rehearing, OTA Case Number 21098578. Today is February [sic] 19, 2023, and the time is approximately 9:33 a.m. We're holding this hearing in Cerritos, California.

My name is Daniel Cho, and I'm the lead Administrative Law Judge for this appeal. With me are Administrative Law Judges Andrea Long and Natasha Ralston.

Can the parties please identify yourselves by stating your name for the record, beginning with Appellant.

MR. DAKESSIAN: Good morning, Your Honorable Judges. My name is Mardi Dakessian of Dakessian Law, and I represent the Petitioner in this matter -- the Appellant I should say.

MR. PENZA: Good morning, Your Honors. Michael Penza of Dakessian Law, also for the Appellant, Starbuzz.

JUDGE CHO: Good morning. Thank you.

Department.

MS. DANIELS: Courtney Daniels for the Department.

MR. SMITH: Stephen Smith for the Department.

MR. ARMITAGE: Damian Armitage, for the Department.

JUDGE CHO: Good morning. Thank you.

With respect to the evidentiary record, CDTFA has provided Exhibits A through I, and Appellant has provided Exhibits 1 through 7. Neither party objected to these exhibits. Therefore, these exhibits are entered into the evidentiary record.

(Appellant's Exhibits 1-7 were received in evidence by the Administrative Law Judge.)

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

As we previously discussed, Appellant you will have 20 minutes for your opening presentation.

CDTFA, you'll be given up to 60 minutes for your presentation.

We'll probably take a break afterwards, and then, Appellant, you'll be given 40 minutes for your final rebuttal. And with that, I believe we are ready to begin.

Appellant, when you're ready.

PRESENTATION

MR. DAKESSIAN: Good morning, Honorable Judges.

Is my microphone picking up? Can you hear me

okay? Great. Great.

So there are two issues before you. The threshold issue is whether the rehearing was properly granted. Our view is that it was not because the CDTFA did not raise proper grounds for a rehearing. But if this Panel determines that the rehearing was, in fact, properly granted, then we get to the issue of the underlying merits of the case and how this 50 percent test in 30121(b) should be interpreted.

When you read the statute plainly, the shisha at issue was not taxable because it contains less than 50 percent tobacco. It's not even considered smoking tobacco in the plain common sense meaning of the term. And while we know that the CDTFA is going to pound the table on the deleterious health consequences of tobacco use, that's not at issue here. What's at issue before this Honorable Panel is the meaning of the words in 30121(b), interpretation of the statute. So with that, I would also add this is an ongoing issue.

The statute was changed effective April 1, 2017, to now include shisha and other products within the scope of tobacco tax. And the last thing to keep in mind as we'll go through just to sort of summarize where we're going with this, is that ambiguities in the statutory tax must be resolved in our favor.

So judges it's hard enough for taxpayers to win a case once in the California's tax system, the time, expense, the delay, the stress. I know I've been doing this for a long time. It can be overwhelming, but no taxpayer should have to win its case twice. That should not be expected of taxpayers in California. And when rehearings are improperly granted, as it was the case here, that's exactly the situation it places taxpayers in and the burden it places on taxpayers.

We all know that rehearings are a limited remedy only available upon specifically enumerated grounds in OTA's regulations, and only then in cases where there is some complete failure by the adjudicating body that would have compelled a different result. And we all know or should know what the contrary to law standard is because there's been decades and decades of precedent, whether through Board of Equalization decisions, the predecessor agency to OTA, whether the OTA decisions themselves or whether under Code of Civil Procedure 657 upon which the rehearing grounds are patterned in OTA's regulations.

There's an overabundance of jurisprudence stating what the contrary to law standard is. Simply disagreeing with the original opinion or finding fault with its legal reasoning is not sufficient grounds for the rehearing, nor is rehashing the arguments that the original panel

rejected. We should -- I think we all know that. I think they know that, but they filed a petition for rehearing in this case anyway doing exactly that, rehashing their arguments.

Here's what their petition for rehearing stated, page 1 of their petition. The Department's petition is based on the grounds that OTA's decision is contrary to law. The decision makes numerous legal errors. The decision incorrectly -- one, the decision incorrectly finds that the statute is ambiguous; two, the decision misleadingly cites to White versus County of Sacramento; three, the decision correctly determines the voters' intent but then fails to apply it; and then four, the decision seems to turn on purported issues with a backup letter to the Department's annotation. We will address each argument in turn, they write.

None of this constitutes valid grounds for rehearing under the contrary to law standard or otherwise, quite frankly. The petition for rehearing goes on to state that the original decision was clearly constructed to support a specific outcome, that the conclusions in the original opinion are flabbergasting, that the conclusions in the original opinion are absurd, that the decision winds down a twisted rabbit hole of logic. The decision concludes with the inaptly named section, "Reason

Practicality and Common Sense."

Now one thing is very clear -- leaving aside the propriety of making those statements and imputing the integrity of the original panel, leaving that aside entirely -- one thing is very clear, which is that none of this -- although, a clear articulation of CDTFA's displeasure with the original opinion -- none of this constitutes grounds for rehearing. None at all.

Three points we would like to make. As we said before, rearguing or rehashing arguments is not a valid basis for a rehearing. The contrary to law standard means something very specific. What does it mean? For decades we've been reading in case law that contrary to law means unsupported by any substantial evidence. It's an evidentiary standard. One that CDTFA didn't even attempt to apply here. They didn't even articulate the standard in their petition. They made some attempt in their reply brief to address but never really addressed what this test means, unsupported by any substantial evidence.

In other words, there is no evidence in the record whatsoever to support the opinion such that a contrary decision would be compelled as a matter of law. CDTFA has a different view of what contrary to law means, I think. And it's a view, unfortunately, that the second panel adopted, which the contrary to law means some sort

of legal error in the opinion.

That's not correct. Contrary to law has never meant that. The new panel said -- or the second panel, I should say, said, "That we believe granting a rehearing on the contrary to law ground requires a finding that at least some portion of the written opinion is contrary to law. And two, applying a correct interpretation of the law would likely result in whole or in part in a different holding." It then cites to a few cases. It cites to a case called Santillan. It cites to Appeal of NASSCO. And there was a third case cited to whose name escapes me at the moment, but I've read the cases.

None of those cases stand for the proposition that contrary to law means we take issue with the legal analysis of the prior opinion. It's simply not what it means. And so there's no real attempt to measure, sort of, whether the opinion was supported by substantial evidence and, of course, it was. There weren't even any fact disputes in the original opinion. And so there is no dispute in terms of the evidence, which is what contrary to law is all about.

The implications of this new formulation -- and we couldn't find any case based on our research, and they haven't cited to any case that we've seen that says contrary law is something other than that. And for good

reason because the implications of this would not be good.

First of all, we would create a de novo review effectively for the taxing agencies in every appeal. This is what this is. If you believe the contrary to law simply means I disagree with the legal reasoning of the original opinion, that amounts to de novo review. And that's not what this limited remedy is intended to provide.

The second thing is that it would establish grounds for rehearing in virtually every case. So not only would it be a de novo standard of review, but any losing party is going to take issue with some aspect of the decision of -- in terms of legal findings. Obviously, the losing party is going to feel that the original decision was incorrect. And that alone can't be a basis for a valid petition for rehearing. That simply can't be the case.

It's contrary to what the Taxpayer Transparency and Fairness Act was intended to do. There was a very sort of specific system that was set up that was intended to create finality at the Office of Tax Appeals if a taxpayer won. What this sort of standard would do, invariably more petitions for rehearing would be granted and more length would be added, as it has been here, an additional, you know, two years.

Obviously, we had some detours in our case. But, you know, going through another round of briefing and another hearing would probably add between 18 and 24 months to an appeal. That's not what was intended. One of the goals of the TTFA was to make sure that the appeals proceedings were tighter than they were with the previous agency, and that there was a role of finality, that if a taxpayer won, they really won, that they wouldn't have to win a case twice.

So I guess what I'll say is this. I mean, you can say what you want about the original opinion. Obviously, we happen to think it was correct, but it was very well-reasoned. It went through all the arguments that the CDTFA made. It, basically, analyzed every authority that was cited. We had full briefing. We had a very robust hearing. And you can say whatever you want about the original opinion, but it was very detailed, well-reasoned, and reflects all the consideration that was given to the parties.

It just happened to conclude that CDTFA was incorrect. And what that indicates to me is not that there was some miscarriage of justice with that opinion, you know, was defective in some way. It just means there was a difference of opinion with the CDTFA, and that's not a valid ground for a rehearing.

To the contrary, all legitimate and reasonable inferences must be made to uphold the opinion. That's what the case is saying. When you do that, the original opinion must be upheld. The petition for rehearing must be denied or upheld to have been invalidly granted, which precludes a relitigation of the underlying merits and ends the case.

So, I can pause there. If there are no questions from the Panel, I can continue to the underlying merits, which is the second issue that the Panel ask that we address.

JUDGE CHO: Feel free to continue. We'll ask questions at a later time. Thank you.

MR. DAKESSIAN: Thank you, Your Honor.

So an overview of the three points we're going to be covering. First, we'll address the plain text of Section 30121(b). Second, we'll talk about a very significant piece of extrinsic evidence as to what Section 30121(b) means, and that is the legislative change or the -- actually, the statutory change because this was a ballot initiative. The statutory in 2017 that -- that expanded the scope of the tobacco products tax. And then finally we will briefly go through the analysis on ambiguity and taxing statute. So that's where we're headed.

I think one thing we can all agree on -- everybody in this room, CDTFA included -- is that the plain language of the statute should control and that words should not be rendered superfluous. And in our view, the CDTFA's interpretation of the statute renders the word other in the statute superfluous.

If I could draw your attention to slide Number 8, just to read the statute. Just to read the statute.

JUDGE CHO: And real quick, Mr. Dakessian, just as a reminder to try to speak into the mic for the live stream purpose. I know we can hear you in here, but then sometimes the people online won't be able to hear what you're saying.

MR. DAKESSIAN: Certainly.

JUDGE CHO: Thank you very much.

MR. DAKESSIAN: My apologies.

JUDGE CHO: No worries.

MR. DAKESSIAN: Okay. So just to read the statute, tobacco products include but is not limited to all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of or containing at least 50 percent of tobacco but does not include cigarettes. The problem with the CDTFA's interpretation is that it doesn't give full meaning to the word "other".

The CDTFA's interpretation could stand, even with the deletion of the word other. In fact, makes a lot more sense if you delete the word other. Because the word other is what connects the 50 percent requirement to the previous terms that describe it.

For example, let's go back to Slide 7. Slide 7 we've deleted the word other. So let's go through the statute again. Tobacco products includes but is not limited to all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any articles or products made of or containing at least 50 percent tobacco but does not include cigarettes.

I think they'd have a much better case if the word other were not there, again, cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of or containing at least 50 percent tobacco. And the original opinion, I think, correctly referred to this as the ejusdem generis rule of statutory construction, which means that you have these articles that have these terms that have something in common. They all predominantly contain tobacco.

And what makes sense about that is if you consider the fact that there's no specific statutory definition of these listed items. Cigars, smoking tobacco, chewing tobacco, and snuff must, therefore, be

read with reference to their common-sense ordinary meaning, which we can find in a dictionary. Right? Cases have said the dictionary definitions in the absence of specific statutory definitions, dictionary definitions should provide us with insight into what is meant by these terms in their common sense, ordinary, everyday meaning.

And when you look to the dictionary definition of smoking tobacco, for instance, you will find -- this is Merriam-Webster's Dictionary. It says that the term smoking tobacco means tobacco suitable for the manufacture of cigarettes and pipe tobacco. What about the word cigar? The word cigar is a small roll of tobacco leaf for smoking. Chewing tobacco, chewing tobacco is defined as any type of tobacco that is chewed -- oh, sorry. A type of tobacco that is chewed rather than smoked. Snuff is defined as a preparation of pulverized tobacco to be inhaled through the nostrils, chewed, or placed against the gums.

In other words, what do these terms all have in common? In their everyday ordinary sense they're commonly understood to mean items that are, if not entirely, predominantly made of tobacco. And that gives further context and meaning to the application of the 50 percent test. So I wouldn't really even say that the 50 percent test modifies cigars, smoking tobacco, chewing tobacco,

and snuff as much as it refers to them as implicitly containing predominantly more than 50 percent tobacco, almost entirely that cigars is 100 percent tobacco. So it gives context and further corroboration to our interpretation of it.

The other key piece I think is the exclusion of the term cigarette from the definition of tobacco products, and the definition of cigarette in 3003 of the Revenue & Taxation Code. And cigarette is defined as in terms of its tobacco content made wholly or in part of tobacco. So if the voters wanted to delineate that sort of, you know, 1 percent, 2 percent, it does not matter what the percentage is. If they wanted to create that kind of a test in 30121(b), they would have done so explicitly. That didn't happen.

So with that in mind, our view is that the 50 percent test applies to describe all the listed products, not just the catchall provision. The other thing I would point out, we talked about the common ordinary meaning of smoking tobacco. When you look at it in those terms, shisha is not a smoking tobacco. So in order for CDTFA to prevail, they would have to convince this Panel that shisha is, in fact, smoking tobacco. And they would need to prevail on the issue of the application of the 50 percent test.

And, again, the common definition smoking tobacco, tobacco suitable for the manufacture of cigarettes or pipe tobacco, that's not shisha. If you look up pipe tobacco on the internet, it's, you know, leafy tobacco in pouches that is suitable for use in pipes, in common, you know, tobacco pipes. If they wanted to say shisha, they would have either said it explicitly or they would have had a more expansive definition of listing of terms in the -- or previous to the catchall provision. So shisha in our view falls in the catchall provision. So something else for the Panel to keep in mind.

What's also important and related to this point is the statutory change. It's our second major point, the statutory change in 2017. So if the Panel finds that the statute is ambiguous and wants to look to extrinsic aids, I think it's very, very important that at the top of the list should be the statutory change, effective April 1, 2017. And that statutory change did three things. First, it eliminated the 50 percent test. So now, just like with cigarettes, you have a tobacco tax that taxes products regardless of tobacco content in whole or in part of tobacco, point number one.

Point number two, it expanded the scope of the products to be taxed. It's much broader. It went from

like 37 words to like 125 words, and encompassing all variations and all forms of tobacco products regardless of their tobacco content.

And the third thing that's really, really important, is that the statutory change in 2017 was prospective, not retroactive. And whenever there's statutory language changes that are prospective in nature, there's a very strong presumption that a change in the law was intended. A presumption they have not rebutted and cannot rebut.

So that statutory change in 2017, which by the way renders their parade of horribles and all the bad, you know, sort of administrative consequences on the CDTFA, completely eliminates those concerns because now we're -- let's see. We're in 2023, year six, beginning year seven of this new regime. So -- but believing that aside, very, very pertinent to the construction of the previous former statute. We think that's very important.

Our final point, Honorable Judges, is that there's a longstanding rule that tax statutes -- statutes imposing taxes must do so clearly and explicitly and that any ambiguities must be revolved in favor of the taxpayer. That's not just a slogan. That's not just, you know, something that was said in a case 100 years ago. It's there for a very specific reason because the legislature

is the one -- in this case, the voters are the ones that have the onus power to impose these taxes, and the burden should not be placed on a taxpayer to try and figure out what the law means.

And that's why this has been a part of California's jurisprudence for decades. It's -- there are so many iterations of this rule about taxing statutes. It is a very, very well-settled part of our law here in California. And a corollary principle is that any ambiguities in the taxing statute must be resolved in favor of the taxpayer. That's also an often-repeated rule. And what's important here --

Yes, Your Honor?

JUDGE CHO: I'm sorry to interrupt you, Mr. Dakessian, but your 20 minutes has expired. But you can go on for a little bit more, if you don't mind just wrapping up.

MR. DAKESSIAN: Yes, I am wrapping up. Thanks, Your Honor. It won't be but a minute.

JUDGE CHO: Thank you.

MR. DAKESSIAN: So in this case what's important to know is that CDTFA, they've sort of walked this back, but they have effectively conceded that ambiguity exist. They're going to tell you otherwise in their presentation.

But if I can direct your attention briefly to

slide number -- I can't even read this. I can't even read my own type -- 21. This is their own internal memorandum, at least from the predecessor agency, from the Board of Equalization. And this is the center piece of their entire argument that they cite repeatedly in their briefing, but they don't emphasize this piece of it, which is the definition in Section 30121 can be interpreted in two ways, depending on whether the 50 percent test modifies everything in the statute or just the catchall provision.

This is in their -- oops, excuse me.

This is in their internal memorandum. So they effectively concede that an ambiguity exists because an ambiguity under the law means a statute that can be read reasonably in more than one way. And that to us really tips the scales in the Appellant's favor.

So we will reserve the rest of our time for rebuttal. Thanks for your patience, and we will answer any questions as well as the Panel may have. Thank you.

JUDGE CHO: Thank you very much.

Department, you'll have 60 minutes for your presentation, and then we'll probably either ask some questions afterwards or take a break and then move onto Appellant's final rebuttal.

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PRESENTATION

MS. DANIELS: Good morning.

As you are aware there are two issues to be decided in this matter here today: First, whether there are grounds for granting the petition for a rehearing. Hereinafter referred to as the PFR in this appeal under OTA Rule 30604. Second is whether Appellant's shisha distributions for the claim period are subject to the tobacco products excise tax under California Code of Regulation Section 30121 for the applicable periods. And we're just going to refer to that as the statute.

In order to determine whether the opinions interpretation of the statute was contrary to law, it's necessary to first discuss the statute and its application to Appellant's tobacco products. As such, we're going to first address why Appellant's shisha constitutes a tobacco product under the statute, and then we're going to turn to why the petition for rehearing should be granted -- or was correctly granted.

So shisha is also known as a hookah tobacco, and it's a type of tobacco mixed with molasses or honey and other -- and it comes in a lot of different flavors. A hookah is used to smoke the shisha. The hookah uses charcoal to heat this tobacco mixture, and then the user inhales the smoke through a heated tobacco mixture.

Appellants are California corporations based in Anaheim and are licensed as manufacturers and importers and distributors of shisha products and accessories. Appellants also import and distribute shisha from the tobacco distributors and import shisha products from overseas. This imported tobacco, which is already mixed with glycerin and honey is received in California. And then Appellants add flavoring, repackage the product, and sell it as a finished package.

The shisha and tobacco accessories are sold to retailers, wholesalers, and distributors within and outside of California.

JUDGE CHO: Ms. Daniels, sorry to interrupt you. Would you mind just talking a little slower.

MS. DANIELS: Oh, absolutely.

JUDGE CHO: It's just to make sure we have a clear record.

MS. DANIELS: Yes. Sorry.

JUDGE CHO: Thank you.

MS. DANIELS: So today's hearing pertains to Appellants' claims for refund for taxes paid for the liability periods of October 1st, 2012, through September 30th, 2013, and that was by Starbuzz International, Inc., and taxes paid for the liability period of August 1st, 2013, through September 30, 2015, by

Starbuzz Tobacco, Inc.

So the Appeals Bureau's first decision denied Starbuzz's claim for refund of about $1,814,429 in tax for the period of April 1st -- sorry -- August 1st, 2013, through September 30th, 2015. And then in a related matter, the Appeals Bureau issued a separate decision denying Starbuzz International's claim for refund for the amount of $1,400,309 in tax, and that was for that period of October 1st, 2012, through September 30th, 2013.

These matters were consolidated on appeal to the Office of Tax Appeals. And as you know, we had a hearing on January 27th, 2021. And on April 28th, 2021, OTA issued its initial opinion. So we're just going to refer to that throughout our presentation as the opinion. And in this opinion, it reverses the decisions of the Appeals Bureau, which it included that Appellant's shisha products qualified as tobacco products.

And on May 26th, we filed a timely petition for rehearing, and we got an opinion on September 9th, 2021. And we're going to refer to that as the PFR opinion for clarification. And it concluded that the Department had established a basis for granting a new hearing. So just as some background matter on this, on September 21st, 2021, in response to the PFR opinion, Appellants' filed a verified petition for writ of mandate or administrative

mandate against OTA in the Orange County Superior Court, naming the Department as real parties in interest.

And as part of that settlement, the Department and Appellants entered into a stipulation that's resulting in this hearing here today. And we believe that that's just important to mention because the stipulation required that we address, not just the threshold issue of whether the PFR opinion was correctly granted, but also whether Appellants' products should be taxed as tobacco products under the statute, and that the panel is charged with deciding both of those matters, just not the preliminary matter here today.

So the evidence before the panel at the original hearing on January 27th, 2021, clearly supported the Department's conclusion that Appellants' shisha products are smoking tobacco and thus, subject to tax. In order to demonstrate the evidence that was before the panel, we will first look at the plain unambiguous language of the statute. Then we're going to discuss why the canons of statutory interpretation do not support Appellant's interpretation.

Then we will discuss why canons -- or sorry -- why the historical application and the intention behind that language of the statute also did not support Appellants' interpretation. And finally, we're going to

discuss why if you were to adopt Appellant's interpretation, it would lead to an absurd result.

The Department's position is that hookah tobacco is a tobacco product as defined in the statute. As you have looked at with Appellants' counsel here, the definition was, quote, "All forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of or containing at least 50 percent tobacco, but does not include cigarettes."

The plain language of the statute enumerates smoking tobacco as a tobacco product, and then provides an additional category for other products containing at least 50 percent tobacco. This is clear from the words, quote, "And any other articles or products," end quote.

And because this language is not ambiguous, our analysis really should end here under People v. Valencia (2017) case, 3Cal.5th 347 at 357. And that case holds that if the language is unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the voters.

Appellants have ignored the clear unambiguous language of the statute. And instead, they urge that the 50 percent applies to all enumerated items instead of any other articles or products language that it follows. This interpretation does not follow the clear unambiguous

language of the statute. Instead, it renders enumerated tobacco products listed within the statute as superfluous.

If the definition of tobacco products is said to be all products made of at least 50 percent tobacco, there would be no reason to include any of these enumerated items. The Supreme Court has stressed that statutes should be read to avoid superfluidity. That's Marx v. General Revenue Corp., 568 U.S. 371 at 392. That's a 2013 case. Also TRW Inc. V. Andrews 534 U.S. 19 at 31 (2001) states, "It is a cardinal principle of statutory construction that a statute ought upon the whole to be construed that if it can be prevented, no clause, sentence, or word shall be superfluous void or insignificant."

Appellants' interpretation renders all of those words as superfluous. I know they've stressed today that the word "other" under our interpretation would be superfluous, but that's clearly not true. What is true is that based on their interpretation, all of the specifically enumerated products would be. Appellants' interpretation also contradicts longstanding rules of statutory construction. It's contradicted by the last antecedent rule and the statutory interpretation rule of expressio unius est exclusio alterius.

So the last antecedent rule of statutory

interpretation requires that prepositional phrases be read to modify the preceding term or phrase, and that's Shine v. Williams-Sonoma, Inc. (2018) 23 Cal.App.5th 1070 at 1081. Therefore, the last antecedent rule would apply here to require the phrase, quote, "Made of or containing at least 50 percent tobacco," end quote, to modify, quote, "Any other articles or products," end quote.

Likewise, the statutory rule of expressio unius est exclusio alterius -- sorry for that -- does not support Appellants' interpretation. It states that if exemptions or exclusions are specified in a statute, a court may not imply additional exemptions unless there is a clear legislative intent to the contrary. And that's Lopez v. Sony Electronics, Inc. (2018) 5Cal.5th 627 at pages 635 to 636. Here, the statute only explicitly excludes cigarettes as a tobacco product.

Appellants' interpretation would, however, exempt cigars, smoking tobacco, snuff, and any other articles or products that are not made of tobacco -- or sorry -- that are made of tobacco but don't contain the 50 percent supposed requirement. So based on Appellants' items that are clear -- sorry. Based on Appellants' arguments, items that are clearly enumerated such as moist snuff, which typically contains 30 to 35 percent tobacco by mass, would now be exempted.

MR. PENZA: Excuse me. Objection. Could CDTFA's Counsel clarify on the record any information as to what snuff and --

JUDGE CHO: I'm sorry, Mr. Penza, not to interrupt you, but would you mind not interrupting the other party when they are presenting. These are informal hearings, so we don't really take objections, or we don't really have the parties interact with each other. This is more their opportunity to present to us. Just like when Appellant presented to us, I believe CDTFA probably didn't agree with many things you said, but they didn't object to anything.

MR. PENZA: I understand that, Your Honor. I would just point out, though, that we haven't -- when my colleague, Mr. Dakessian, was speaking, he didn't insert new facts that are not in the record. So it's not -- I'm not disagreeing with their legal argument. What I'm saying is that factual matters being inserted into the hearing without it being admitted into the record, and I think that is objectionable, even at the OTA. But I appreciate your point, and I will rest.

JUDGE CHO: Thank you. And you can bring that up in your rebuttal statement, so that's totally fine. Thank you.

MS. DANIELS: And Judge Cho, just to clarify,

that is something that we did address at the initial hearing, and it is in the record, which we will talk about later when we talk about evidence that was ignored at the original hearing.

JUDGE CHO: Thank you very much for that clarification as well.

MS. DANIELS: Thank you.

JUDGE CHO: Please proceed.

MS. DANIELS: Where was I? Okay. Okay.

So the foregoing shows that Appellants' interpretation of the statute is clearly not supported by the statute's text nor the canon is a statutory interpretation. But it's also not supported by the voters' intent. In interpreting statutory language adopted by voter initiative, the Court's primary task is to determine the intent of the electorate, quote, "So that we may adopt the construction that best effectuates the purpose of the law," that's end quote. That's Committee For Green Foothills v. Santa Clara County Board of Supervisors (2010) 48 Cal.4th 32.

You can also see Robert L. v. Superior Court (2003) 30 Cal4th894, pages 900-901 stating, quote, "Statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent," end quote.

The Supreme Court has consistently stated, quote, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. That's People v. Hull (1991) 1 Cal4th 266 at page 2971.

In determining the legislative intent, courts consider the words that are used in a statute, keeping in mind the nature and purpose of the enactment. So to give the language such interpretation as will promote rather than defeat the objective of the law, Clinton v. County of Santa Cruz (1981) 119 Cal.App.3d 927 at 933.

In ascertaining legislative intent, the inquiry is not limited to the statutory language alone, we should also take into the account the object of the legislation, the evils to be remedied, the legislative history, public policy, and other matters helpful in discerning the intended meaning of the words used. And, again, that is Clinton at page 933.

So the version of the statute at issue here was adopted in 1998 as part of Initiative Measure Proposition 99. We'll call that Prop 99, and it's available as our Exhibit I. So Section 2 of Prop 99 provides a findings and purpose of the statute. In this summary section it states that tobacco use, quote, "Is the single most preventable cause of death and disease in America,

creating immense suffering and personal loss and a staggering economic cost, which all Californians have to pay. And that's Exhibit I, Section 2, subsections(a) through (b).

Now Section 2(e) states, quote, "To reduce the incidents of cancer, heart, and lung disease and to reduce the economic cost of tobacco used in California, it is the intent of the people of California to increase the state tax on cigarettes and tobacco products to do all of the following: One, reduce smoking and other tobacco use among children; two, support medical research into tobacco-related cancer, heart, and lung disease; and three, treat people suffering from tobacco-related disease, all in Exhibit I.

So this text clearly articulates the intent behind the adoption of the statute to decrease tobacco use by increasing the cost associated with its purchase and to use the revenues from the increased tax to mitigate health care cost associated with tobacco use. At the hearing, the Department provided numerous exhibits that demonstrated the negative health impacts associated with Appellant's shisha products. And you can see those at Exhibits A-4, A-5, and A-7.

The evidence shows that, quote, "Smoking a hookah for 45 to 60 minutes can be equivalent to smoking 100 or

more cigarettes a day," end quote. That's at Exhibit A-4. And this is indicative of the fact that negative effects of smoking shisha are not less than that of other forms of smoking tobacco containing higher percentages of tobacco. Thus, there does not appear to be any correlation between the percentage of tobacco, any smoked product, and the negative health impacts caused by that product.

Nor does it appear that it was the electorate's intent to apply Appellants' 50 percent requirement to smoke tobacco products. Notably, there's no discussion of the percentage of tobacco in the enumerated tobacco products or any sentiment that products contain less tobacco are somehow less culpable in contributing to tobacco related diseases within the findings and the purpose of Prop 99.

It was the legislators' and the voters' intent -- sorry.

If it was the legislators' and voters' intention to only tax products with 50 percent or more tobacco product, one would assume there would at least be some mention for a procedure for determining which enumerated products contain the requisite amount of tobacco for taxation to apply. However, there's no mention within the statute of such a procedure or any corresponding regulation or policy.

Certainly, if it was the intention of the legislator and the people to only tax products with 50 percent or more tobacco content, we would see a procedure that had been put in place for determining the composition of each tobacco product to determine whether it reached the threshold. Similarly, one would expect there to be some sort of manufacturer disclosure required. The absence of any mention of such a procedure within California's statutes, regulation, and Department policies strongly suggest that a 50 percent or more tobacco content requirement was never intended or even contemplated for products that were specifically enumerated as tobacco products, i.e., all forms of cigars, smoking tobacco, chewing tobacco, and snuff.

Thus, the legislature and voters' intentions weigh heavily against employing Appellants' interpretation of this statute. The opinion and Appellants' arguments are also not supported by the historical application of the statute. The Department's position has always been that the 50 percent tobacco content requirement modifies the part of the tobacco's product definition that pertains to quote, "Any other articles or products made of tobacco," end quote, and that the 50 percent test does not apply to the types of tobacco products that were specifically enumerated.

As discussed, if it were to apply to all the enumerated items, the mere mention of these items would be superfluous. As Appellants have mentioned, our position was explained in a memorandum dated on September 27th, 1996, which was annotated so the public would be aware of our interpretation. The annotation states that all forms of cigars, smoking tobacco, chewing tobacco, and snuff are regarded as tobacco products regardless of the amount of tobacco they contain. And other products are regarded as tobacco products if they have at least 50 percent tobacco.

This has always been the Department's position. In interpreting the statue, the analysis in the memo was guided by the manner in which similar language in federal law had been interpreted, as specifically 28 USC Section 50702. And in that, federal authorities regarded chewing tobacco to be a tobacco product even when a tobacco product contained only 2 percent tobacco.

The Department's interpretation has never been controversial, and it was followed industry wide for decades. Appellants themselves accepted this interpretation of the statute throughout the claim period. Now in an effort to garner a refund, they are creatively arguing that the statute is ambiguous. However, Appellant's interpretation is not supported. And if employed, it would also lead to an absurd result.

It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences, which the legislature did not intend. That is Stokes 35 Cal.App.5th at 957 quoting Younger v. Superior Court (1978) 21 Cal.3d 102 at page 113.

To be very clear, the Department does not agree with Appellant's assertion that their interpretation encompasses the plain meaning of the statute. However, even if one were to agree with Appellant's interpretation, it should be disregarded as it would be led to an absurd result. As touched upon earlier, a requirement that a product be made of at least 50 percent tobacco to be defined as a tobacco product would necessitate the testing and evaluation of all the products containing tobacco, either by manufacturers or by the Department themselves.

This would require developing acceptable means for calculation, as well as substantial means for the cost of Department oversight. The creation of such an onerous task without mention of it or how it will be implemented seems highly unlikely, if not absurd. Additionally, adopting Appellants' interpretation would encourage manufactures to modify products that are commonly considered as tobacco products, such as cigars, smoking tobacco, chewing tobacco, snuff to fall under the

50 percent threshold in order to escape paying taxes.

For example, a manufacturer of chewing tobacco could include liquids and flavorings to skate underneath that 50 percent requirement and avoid paying the tax normally assessed to such products. This outcome certainly undermines the intent of the statute and is quite frankly absurd.

In sum, Appellants failed to present a plausible argument for their interpretation of the statute at the original hearing. Adopting Appellants' interpretation of the statute undermines its plain ambiguous language while also ignoring the legislatures' and voters' intention. Furthermore, applying this interpretation would lead to an absurd result. Because first, it renders part of the statute's language superfluous. Second, it creates the need for a system to determine the composition of all tobacco products. And third, it modifies -- it provides an avenue for tobacco manufacturers to avoid paying tax on their products by modifying the composition.

As we have established that Appellants' interpretation of the statute is untenable, especially in light of the evidence, we will now address why the opinion granting Appellants' request for refund is contrary to law, and why the PFR opinion correctly granted a new hearing in this matter. As you are aware, OTA may grant a

rehearing where one of the following grounds is met and materially effects the substantial rights of the party seeking a rehearing:

One, an irregularity in the proceeding that prevented the fair consideration of the appeal.

Two, an accident or surprise that occurred which ordinary caution could not have prevented.

Three, newly discovered relevant evidence which the filing party could not have reasonably discovered and provided prior to the issuance of the opinion.

Fourth, insufficient evidence to justify the opinion.

Fifth, the opinion is contrary to law.

Or sixth, and error in the law in the appeals hearing or proceeding has occurred.

And that's California Code Regulation Title 18 Section 30604. It's also stated in Appeal of Do, 2018-OTA-002P, and Appeal of Wilson Development, Inc., 94-SBE-007, available at 1994 West Law 580654.

In this appeal, a rehearing should have been granted and was correctly granted because the opinion is contrary to law. As noted in the PFR opinion, the State Board of Equalization's precedential decision in Appeal of Wilson and of the rules of tax appeals consider it appropriate in cases of uncertainty to look at Civil Code

of Procedure Section 657 for guidance in determining whether a ground for rehearing exists.

The same standard used by the State Board of Equalization in granting a rehearing is applicable to OTA's decision in this matter. Therefore, it is sometimes appropriate to be guided by Code of Civil Procedure Section 657, applicable case law, and precedential decisions in determining whether to grant a new hearing when application of OTA's rules of tax appeals are not clear. And the PFR opinion acknowledges this on page 2.

So for clarification, on March 1st, 2021, revision to the rules of tax appeals added a new explanation to the contrary of law standard of review and says that it shall be reviewed -- you shall review the opinion for consistency with the law. So this revision severed the former ground for rehearing, insufficient evidence or contrary to law into two separate grounds effective with petitions filed on or after March 1st, 2021.

The revision does not create two new and different grounds for rehearing, but instead it's meant to clarify that it is appropriate to streamline the analysis while still looking to the existing precedent. The PFR opinion correctly acknowledges this at page 3. So the elements for rehearing are the same under the former and

current rules, but the revision makes clear that the analysis may now focus solely on the sufficiency of the evidence or application of the law or both as relevant.

The PFR opinion correctly concluded that the opinion's interpretation of the statute was first, contrary to the plain reading of the statute, second, contrary to the statement of intent for the statute, and third, inconsistent with existing authority. So the PFR opinion identified that applying correct interpretation of the law would also likely result in a different holding. And that's PFR opinion at 4, which cites to Santillan, available at 202 Cal.App4th 708. Hill v. San Jose Family Housing Partners, LLC, that is a 2011 198 Cal.App.4th 764, and also Appeal of NASSCO.

The PFR opinion also correctly identified that the pertinent facts are undisputed and for that matter, there are no factual disputes on this appeal. This appeal entirely is a question of law. So at the outset, the PFR opinion identified the opinion ignored the plain language of the statute, and you can see this at page 5. The opinion concluded that in-state distributions of Appellant's shisha products were nontaxable because they contained less than 50 percent tobacco and as such, do not meet the definition of tobacco products.

In doing so, the opinion ignored the everyday

meaning of the text and instead, rewrote the statute to say that tobacco products, quote, "Are only those items which are made of or contain at least 50 percent tobacco." That's the opinion at 14. That is a complete revision of the statute. As was discussed at the hearing and within the PFR opinion, this interpretation essentially removes any necessity for including the enumerated items within the statute.

We've wiped away. We've deleted all forms of cigars, smoking tobacco, chewing tobacco, and snuff since now it replaces these enumerated products with a new requirement that the products contain 50 percent tobacco. This interpretation is contrary to law as it renders the language of the statutes superfluous, void, and meaningless. That's in opposition to Marx 568 U.S. at 392, and also, T.R.W., Inc., 534 U.S. at 31 which all say it is a cardinal principle of statutory construction that a statute ought upon the whole to be so construed that it can be prevented. No clause, sentence, or word shall be superfluous, void, or insignificant.

The PFR opinion correctly recognizes the deficiency in the opinion's interpretation. It employed a common-sense approach based on the statute's language. The PFR opinion identifies that Appellant's shisha products are smoked in hookah pipes and contain tobacco.

Thus, Appellant's shisha products are a form of smoking tobacco. It's very simple.

PFR opinion at page 5. The PFR opinion clarified that quote, "Tobacco products include all forms of smoking tobacco." That's Revenue & Tax Code Section 30121(b). "Furthermore, the 50 percent requirement does not apply to certain specified tobacco products, including smoking tobacco. The tobacco products explicitly specified in the statute as taxable irrespective of the 50 percent threshold are cigars, smoking tobacco, chewing tobacco, and snuff. By its plain terms, the 50 percent requirement only applies to the other unspecified articles or products made of or containing at least 50 percent tobacco.

"Smoking tobacco is a specified tobacco product, and the 50 percent requirement does not apply to specified tobacco products. Thus, in the April 28th, 2021, opinion, the panel's application of the 50 percent requirement to a specified tobacco product is contrary to law," end quote. And that's a PFR opinion at 5.

Further, the PFR opinion correctly concluded that the opinion's erroneousness application of the law is material because a correct application of the statute would have resulted in denying Appellants' claim for refund.

Next, the PFR opinion correctly identified that

the opinion erred in ignoring the electoral intent of the statute. The opinion openly admits that the Panel's, quote, "Fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." That's the opinion at page 5 quoting to Day v. City of Fortuna (2001) 25 Cal.4th268, page 272.

And the opinion even concludes that the voters' intention was as follows, quote, "It is readily apparent from the above materials that Prop 99 was enacted to reduce tobacco use and its associated cost to the public through a substantial increase in the cigarette excise tax and broadening of the tax base to include other tobacco products which were previously not subject to any excise tax," opinion 9. That was the purpose behind the statute. The opinion clearly identifies it, and admits it.

In fact, the opinion spends an entire page quoting ballot pamphlet language in support of this finding. This shows that the Panel understood and acknowledged that California voters approved the statute in Section 30123 with the passage of Prop 99 in the intent stated therein, which is available for you again at Exhibit I.

This measure included the following statement of electoral intent. I've said this but it quote -- the

opinion quotes it. So once again quickly I'm going to say, "Tobacco use is the single most preventable cause of death and disease in America. Tobacco-related diseases create immense suffering, personal loss, and a staggering economic cost which all Californians have to pay. And that the purpose is to reduce the incidents of cancer, heart, and lung disease and to reduce the economic cost of tobacco use in California."

This measure also added a provision to the California Constitution guaranteeing that the funds generated from the tax supports those goals. And that's California Constitution Article 13(b) Section 12. Thus, the opinion correctly determined the voters' intent in adopting Prop 99. However, having established that the electorate intended to reduce tobacco consumption. The opinion nevertheless concludes that there's no indication from extrinsic aids whether the electorate intended for shisha to be a tobacco product within the meaning of the statute.

I mean, this conclusion is flabbergasting. The PFR opinion also acknowledges that the two -- excuse me.

The PFR opinion also acknowledges that the Department presented evidence that smoking shisha is at least as harmful to human health as smoking cigarettes, and that this evidence was ignored by the opinion. For

example, the California Department of Public Health issued the publication entitled "Hookah Tobacco is Unsafe," which we've provided now and provided then as Exhibit A-4 in which it states that smoking hookah for 45 to 60 minutes can be equivalent to smoking 100 or more cigarettes in a day," end quote.

Similarly in 2017, the California Department of Public Health issued a publication entitled, "Hookah in Multiunit Housing," Exhibit A-5, in which it states, "People who smoke hookahs or who are exposed to hookah smoke are at risk for the same diseases that are caused by smoking cigarettes, including lung cancer, heart disease, respiratory disease, and problems during pregnancy," end quote.

On January 2nd, 2013, the Department of Health issued a document entitled, "State Health Officers Report on Tobacco Use and Promotion in California," provided as Exhibit A-7. In this document, the Department specifically addresses the growing number of young adults smoking hookahs and the misconceptions regarding the risks associated with it.

Quote, "Hookah smoking is increasingly popular among young adults exposing them to both tobacco use and secondhand smoke. Many of these young people do not think that hookah smoke is as harmful and addictive as cigarette

smoke. Again, however, smoking a hookah for 45 to 60 minutes can be equivalent to smoking 100 or more cigarettes." That's Exhibit A-7 at pages 1 through 2.

These reputable, credible, and consistent sources support the Department's conclusion that hookahs are used for smoking a tobacco product, and that it exposes users and bystanders to the same risks associated with cigarette smoking. The evidence presented shows that shisha is a smoking tobacco, and that this smoking tobacco is at least as harmful to human health as cigarettes. The opinion fails to even acknowledge the evidence presented regarding the harms associated with shisha.

The electoral intent was to tax distributions of cigarettes and tobacco products to reduce tobacco-related diseases. Thus Prop 99 taxes in-state distributions of cigarettes and tobacco products. It would not fit with the electoral intent to exempt shisha products from the taxes imposed by the statute and tax a potentially less dangerous product such as cigarettes.

Smoking tobacco is a tobacco product. It is known to cause disease, and for this reason the people of California enacted this statute which clearly and unambiguously taxes distributions of all forms of smoking tobacco in the State. The basic principle of statutory and constitutional construction mandates that courts in

construing a measure not undertake to rewrite its unambiguous language. That's People v. Skinner (1985) 39Cal.3rd 765 at 775.

The stated intent in taxing smoking tobacco is to reduce the incidents of tobacco-related diseases. In other words, the plain language to tax smoking tobacco is consistent with the statement of intent to reduce tobacco-related diseases. By its terms, there is no stated exemption for smoking tobacco. If the opinion stands, millions of dollars will be pulled from the six accounts identified in Revenue & Tax Code Section 30122 that fund tobacco-related programs, research, and treatment.

These funds redirected as a refund to a distributor of a cancer causing smoking tobacco. For the opinion to conclude that the electorate had no intent regarding this outcome is absurd. The opinion's failure to enforce the voters' internet is a clear error of the law. The PFR opinion also correctly concluded that the opinion ignores the longstanding application of the statute. Although the plain language of the statute is controlling and the foregoing language and intent is thus dispositive, it bears mentioning that this interpretation is consistent with the Department's longstanding application of the law.

When a statute has been construed in a consistent manner by an administrative agency that is charged with its enforcement for an extended period of time, and that practice has been consistently acquiesced in by the legislature and recognized by the courts, its language comes, quote, "Clothed in a special meaning," end quote. And to strip them of that acquired connotation at this late date would be arbitrary and would deny the experience of all the preceding years. And if you want guidance on this, you can look to Sacramento County v. Hickman (1967) case 66 Cal.2d 841 at 851.

As I have mentioned and as Appellants' counsel has mentioned, on September 27th, 1996, the Department published its business law tax guide annotation interpreting the definition of tobacco products in the statute. Although annotations are not law and their legal interpretations are not binding, OTA may afford some consideration and give greater weight to annotations which reflect longstanding agency interpretations, especially, where the Department is interpreting a statute that it is charged with interpreting. And there's precedent for that under Appeal of Praxair, Inc., 2019-OTA-301P. And also Appeal of Martinez Steel Corporation 2020-OTA-074P.

The Department's annotation reproduced in its entirety provides only this. The cigarette and tobacco

products tax applies to all forms of cigars, smoking tobacco, chewing tobacco, and snuff regardless of the amount of tobacco they contain. In addition, the tax applies to any other articles or products which are made entirely of tobacco or contain at least 50 percent tobacco, excluding cigarettes. And that's Appellant's Exhibit 7.

This represents the Department's longstanding interpretation of a statute that it is charged with interpreting. And there's no argument or evidence that the Department has ever taken a contrary position. The Department's interpretation is also consistent with the statement of the electoral intent. The legislature delegated to the Department the authority to prescribe, adopt, and enforce retroactive rules and regulations pertaining to the administration enforcement of the cigarette and tobacco taxes imposed by Prop 99.

Based on these factors, the Department's longstanding interpretation is deserving of some consideration indifference under Yamaha Corp. of America v. State Board of Equalization (1998) 19 Cal4th 1 at page 7. Overturning a longstanding generally accepted interpretation that specify tobacco products are taxable regardless of tobacco percentage should not be examined in a vacuum, and the far-reaching consequences should be

considered.

Such a finding impacts not just Appellants' shisha products during the claim period, but also the application of tax to distributions of all other forms of cigars, smoking tobacco, chewing tobacco, and snuff, and further would undermine a constitutional amendment ratified by the electorate. The opinion did not consider the tobacco percentage of other types of specified products in the context of whether excluding Appellants' shisha products is consistent with the entire statutory framework of Prop 99.

For example, moist snuff, one of the enumerated types of tobacco products within the statute typically contains 30 to 35 percent tobacco by mass. This information was provided at the hearing and completely ignored. By adopting Appellants' interpretation of the statute, the opinion excludes this enumerated tobacco product from taxation.

Additionally, permitting a tobacco distributor to escape taxation under the statute by simply adding sweeteners to a tobacco product creates a loophole that encourages the use of this type of tobacco product over those that were equally harmful. This was also not the internet of Prop 99.

In their briefing and today, Appellants have

argued that the opinion is not contrary to law because it's supported by substantial evidence, namely the evidence that shisha is comprised of less than 50 percent tobacco. In support of this argument, Appellants cite cases with trials and jury verdicts and arguing that a new trial or a hearing can only be granted if there is no substantial evidence to support the verdict or decision.

So following this jury trial analogy, the opinion's incorrect statement of law that only items containing more than 50 percent tobacco are tobacco products, is analogous to a jury instruction that the Panel applied to evidence. Which is, you know, Appellants' evidence that their shisha contains 16.2 percent tobacco. Appellants' arguments, however, ignore the longstanding legal canon that applying an incorrect statement of law is an error and contrary to law, whether it is applied by the judge or the jury.

It is well-settled that giving an erroneous instruction is an error of law under Section 657. And that's Gonzalez v. Petalumu Building Materials Company (1960) case 181Cal.App2d 320 at pages 335 through 336. The California Supreme Court has consistently held for over a century that incorrect re-instructions are an error at law, which is a ground for a new trial. See Jansson v. National Company (1922) 189Cal.187 at 193, which is citing

Code of Civil Procedure Section 657.

And this rule of law has been consistently applied by California courts. You can see Caldwell v. Paramount Unified School District, a 1995 case, 41Cal.App.4th 189 at page 205 stating, quote, "The grant of a new trial is a proper remedy for the giving of an erroneous jury instruction when the improper instruction materially affected the substantial rights of the aggrieved party," end quote.

See also Gonzalez at 181 Cal.App.2d pages 335 to 336, quote, "It is well settled that erroneous instructions or refusal to give an instruction are errors of law occurring at the trial under the 7th subdivision of Section 657 of the Code of Civil Procedure," end quote. "Here the opinion incorrectly defined tobacco products as only those items which are made up or contained at least 50 percent tobacco," end quote. That's the opinion at page 14.

This definition is legally inaccurate. The actual definition is that tobacco products include but is not limited to all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of or containing at least 50 percent tobacco but does not include cigarettes. The opinion then applied this incorrect statement of the law to Appellant's products

which resulted in the absurd outcome of disregarding the items that the stature specifically enumerates as tobacco products. The opinion essentially creates an all-new definition. That's an error of law.

In conclusion, despite Appellant's contentions, the facts of this case are quite simple. Appellants bought and sold tobacco that was smoked by consumers. In other words, they bought and sold smoking tobacco. Based on the plain language of the statute, Appellants' shisha products are tobacco products. The opinion is contrary to law because it ignores the plain language of the statute, and it rewrites the law.

The opinion then takes this incorrect statement of law and applies it to Appellants' products resulting in an absurd result. Appellants' will try to overly complicate and twist the issues in this case to escape their tax liability. They will liken this matter to a jury trial where the jury is fighting with applying the law to the facts, but none of those instances are applicable here.

The determination in this matter has always been purely a legal question, and here the opinion got the law wrong. There's no situation where applying a wrong statement of law does not result in an outcome that is contrary to the law. I urge you to recognize Appellants'

arguments for what they are, a fruitless attempt at securing a refund that is not grounded in the law.

Lastly, as mentioned earlier, you are aware the stipulation signed by the parties requires that both issues be addressed by this panel today. So first, whether there were grounds for granting the PFR in this appeal under OTA Rule 30604; and second, whether Appellants' shisha distributions for the claim period are subject to the tobacco products excise tax. Thus, even in the unlikely event that you find that there were no grounds for granting our PFR, the Panel must still address whether Appellants' shisha products is a smoking tobacco under the statute.

For the many reasons that we have provided, we ask that you find that the PFR was correctly granted and that Appellants' request for refund should be denied. Thank you for your time.

JUDGE CHO: Thank you very much. It's about 10:50ish. We've been going for over an hour and 10 minutes. So let's take a 15-minute break, and we'll come back. So let's go off the record, and we will be back at around 11:05.

(There is a pause in the proceedings.)

JUDGE CHO: All right. It's 11:05. Why don't we go back on the record.

So thank you for your presentation Department. Let me see if my panel members have any questions.

Starting with Judge Ralston. Do you have any questions for either party at this point in time?

JUDGE RALSTON: Not at this time. Thank you.

JUDGE CHO: Thank you.

Judge Long, do you have any questions for either party at this time?

JUDGE LONG: Let me check my notes real quick.

JUDGE CHO: Sure.

JUDGE LONG: Not at this time. Thank you.

JUDGE CHO: Thank you.

I have a couple of questions for the parties at this time. The first question, and it's something that was stated by the Department in its presentation. It was the issue in this appeal -- of the issues in this appeal. At the prehearing conference we discussed that Issue One was a threshold issue, and that if OTA found that the opinion of the PFR was not granted properly, Issue Two would be moot. But it appears, based on the Department's presentation today, that that is no long the Department's position as well; is that correct?

MR. SMITH: The joint stipulation entered into by the parties and the litigation requires the OTA address both issues.

JUDGE CHO: And I have read the joint stipulation. I believe the first paragraph states that OTA has the jurisdiction to consider whether Issue One is a threshold issue. Do you want me to pull it up?

MS. BERGIN: If I may? Hi. Can I jump in, please? Pamela Bergin, Assistant Chief Counsel Tax and Fee Programs Bureau with the Department.

JUDGE CHO: Sure. Would you mind talking closer into the microphone so people can hear you on the internet.

MS. BERGIN: Yes. Of course. Thank you.

So the joint stipulation, there was a lot of back and forth. And there is a statement that we specifically wanted in the joint stipulation --

JUDGE CHO: And I'm sorry. Would you mind speaking a little closer so that --

MS. BERGIN: That reads -- sorry. Let me move this over. Can you hear?

JUDGE CHO: Yes.

MS. BERGIN: -- that says that the Office of Tax Appeals will issue a written decision discussing all of the issues that the parties bring up. And the purpose of -- and I'm paraphrasing. I don't have it in front of me, but I don't have my glasses.

And the purpose of that was to ensure that

whether or not the panel finds for Appellants on the first issue, that the second issue is still flushed out, analyzed, and discussed in the written opinion. And I believe on --

MR. DAKESSIAN: I was intimately involved in those negotiations, and we can relitigate this right now. But we agreed to the language of the stipulation. The language of the stipulation says as follows:

Following the assignment of the new Panel, petitioners and CDTFA shall submit a stipulation to the ALJ Panel setting forth the following procedures for further proceedings. Sorry about that. I'll start again.

Following the assignment of the new Panel, Petitioners and CDTFA shall submit a stipulation to the ALJ Panel setting forth the following procedures for further proceedings in the OTA Appeal: One, in briefs filed pursuant to OTA Rule 30607 and at any oral hearing requested under Rule 30401, CDTFA and Appellants will be able to argue to the new ALJ Panel as to whether the OTA's original opinion in favor of petitioners was correctly decided, whether the petition for rehearing was erroneously granted under the argued contrary to law standard, and whether that issue should be treated as a threshold issue.

That gives the OTA the authority to decide as it

did in the minute order that the resolution of the first issue in Appellants' favor renders the second issue moot. I was a party to those proceedings. This is the language my clients and I agreed to.

JUDGE CHO: Thank you, Mr. Dakessian.

And I would also like to point out, at the prehearing conference that's exactly how I had stated it in our prehearing minutes and orders. It said in the Footnote 1 that if -- well, let me pull it up so I can read it verbatim. "If OTA determines that the petition for rehearing was not properly granted, then Issue Two becomes moot."

That was sent to the parties. We talked about it this morning. I asked if anybody had any objections or if anything changed. Nothing had changed, based on what was stated to me earlier. But then during Department's presentation it seems like you've taken a contrary position. So I would just like to know how you want -- how you would like OTA to kind of proceed with what's going on at this point in time.

MS. BERGIN: So we are not taking a contrary position. I may have missed that portion of the prehearing conference statement or the order that was issued because I was mostly concerned with the exact language of the stipulation, which I also was intimately

involved with crafting and agreeing to. And the sentence, "The new ALJ Panel will address all issues raised by the parties in their written opinion," was specifically introduced by the Department for the purpose of ensuring that Issue A -- or Issue One and Two are both addressed.

And again, when I see, "The issues to be decided on appeal will be as follows," under Number Two of the stipulation, it says, "A and B." And that's been our position all along. We had that position with the Chief Counsel of the Office of Tax Appeals, and that's what we conveyed multiple times back and forth. And the only reason we agreed to the word "threshold" in the stipulation was because we were going to have that sentence, "The new ALJ Panel will address all issues raised by the parties in the written opinion."

So our request is that regardless of whether you find that the petition for rehearing was erroneously granted, that you also include Issue Two, which is merits of the case and addresses that and analyzes that in the decision as well. It may be a moot point if you find that the PFR was erroneously granted and that the outcome of Issue B doesn't really matter. But we would like to see that written in the opinion. And that was the purpose, again, of that specific sentence that we asked to include in the stipulation. There was a whole reason for it.

MR. DAKESSIAN: From our perspective, Judge Cho, that makes absolutely no sense. If the petition for rehearing was improperly granted, that ends the case and the original opinion is reinstated. So we included the language "threshold issue" so that the OTA could decide whether that's what it wanted to do. That's what the OTA decided at the prehearing conference. I'm sorry that there was no objection made, but that's well within the bounds of the stipulation, and that's -- that's the beginning and the end of it.

I'm not here to guess what's in the mind of the CDTFA's Counsel when they're agreeing to language. I'm here to enforce the language of the stipulation that we agreed to conclude the litigation. So that's our position that the, you know, the OTA can choose whether to address as a threshold issuer or not.

JUDGE CHO: Okay. Thank you very much for that input.

Let me take a quick look at my notes to see if I have any further questions. Oh, yes. So I do have another question for the Department.

During the Department's presentation, the Department was stating that the original -- sorry -- that the opinion on PFR was properly granted because of -- and you used the analogy of giving incorrect jury

instructions. Is it the Department's position that the error in law standard is the same as the contrary to law standard? Well, let me take a step back. I'm sorry.

Is the jury instructions contrary to the law standard or the error in law standard? Because they are two separate standards.

MS. DANIELS: Well, they are. However, it appears that if one is met, they are both met. If wrong law -- if the law is wrong, it's an error of law. And then when you apply the wrong law to the facts, Appellants' products, then you also end up with the result that's contrary to law. So in that specific analogy to jury instructions, you could find for under either of those.

JUDGE CHO: One second, Mr. Dakessian. I'll let you respond in just a second.

So the Department's position is that those two standards are both met here in this situation; is that correct then?

MS. DANIELS: You could find, yes. You could find that it's both erroneous and contrary under that. It's under that specific argument, yes.

JUDGE CHO: Okay. Thank you.

Mr. Dakessian, you seemed like you wanted to respond?

MR. DAKESSIAN: Yes. Yes, I do. I have two issues with that statement. First of all, the error in the law standard was not the stated basis in the petition for rehearing. The stated basis in the petition for rehearing was the contrary to law standard. So allowing the Department to proceed now under a different basis for rehearing is tantamount to filing or allowing a late petition for rehearing to be filed, point number one.

Point number two, they are distinct standards. Contrary to law as we've said means unsupported by any substantial evidence, whereas, error in the law -- and I quote Regulation 30604(a)(6), "Is an error in law in the appeals hearing or proceeding."

So their statement is totally incorrect for many reasons.

MR. PENZA: I would just add one point to that to -- and I appreciate that OTA proceedings are somewhat informal, but that argument was raised for the first time in a reply brief. We didn't have a chance to respond. And so just based on that alone, it seems like it wasn't timely raised, and that's just in addition to the points my colleague just made.

JUDGE CHO: Thank you very much.

And thank you Department.

Did you want to say anything, Ms. Daniels?

MS. DANIELS: Not at this time. Thank you.

JUDGE CHO: All right. Thank you.

Those are the only questions that I had.

Appellant you will be provided 35 minutes for your final rebuttal. As a reminder, you do not need to use it all if you don't think you need to, and feel free to address anything that was discussed earlier.

MR. DAKESSIAN: Thank you, Your Honor.

CLOSING STATEMENT

MR. DAKESSIAN: So I guess the first thing I wanted to say is that the CDTFA's presentation has proven our point. The arguments that they've raised are all the same arguments they raised in the original hearing that the original opinion decided against, that the original opinion rejected. There's nothing new here. It's a rehash of the original arguments. That's not valid grounds for a rehearing under any of the enumerated grounds in Regulation 30604, let alone the contrary law standard.

So it just -- if you got the gist of their argument, it was that they disagreed with the quality and nature of the reasoning in the original opinion. This was a complete do over of all the arguments that were previously raised. They didn't start with why the opinion

was contrary to law. They never addressed the contrary to law standard as it's commonly understood as it's been on the books for decades.

They went into the erroneous jury instruction analysis, and there's absolutely no precedent for that. None of that makes any sense. This is a -- you know, there's no analog for that -- for that ground for relief. But what they didn't do was address why they thought the opinion was unsupported by unsubstantial evidence. They didn't do any of that.

The other thing I would like to say is there is -- really, the statement regarding the overall legislative intent or the intent of the legislature to curb tobacco use isn't helpful to us in this discussion, and for the following reasons. It's a general statement of what the electorate was trying to accomplish, to reduce the use of tobacco products. Okay. I think we can all agree on that. How does that relate to the specific text at issue here? What would be helpful, if there were any materials or wording in the ballot materials.

What would actually be helpful are things that are directly related to the scope of the products to be taxed, and there isn't anything like that. And the absence of that should not be placed on the back of the taxpayer. The absence of that, if the Panel is so

inclined, would create an ambiguity that would be resolved in favor of the taxpayer.

So Judge Dang addressed this in the original opinion where he said look, you know, even if we were to agree, you know, that the, you know, the general intent of the electorate was to curb tobacco use. Who is to say that this doesn't accomplish that by establishing a 50 percent test and applying it to all the listed products. That -- that's a reduction of the tobacco in the use of tobacco. So it's not helpful just to say that tobacco use is bad, therefore, all the interpretations must be in favor of the Department. That's not helpful, and that's kind of what their argument amounts to.

There's a point that they make about lack of procedure for the 50 percent test. And surely, there would be some procedure delineated in the statutory text. We don't think that makes any sense. First of all, they still agree that there's a 50 percent test, that it just applies to the catchall provision. So why wouldn't their concerns apply with equal force to the 50 percent test as applied to the catchall provisions, first of all?

Second of all, it's the job of the Department to implement whatever the statutory text is. And that's why they have the ability to prescribe rules and regulations and so on and so forth, so just to dispose on that. The

federal law -- the federal law point, the federal law is totally un-applicable. And I'm sorry if I'm, you know, going over ground that, you know, we've already covered in the briefing. But it's probably worth mentioning that the federal statute, unlike, the Rev and Tax Code, it doesn't contain a 50 percent test. It doesn't contain any reference to other articles or products. It's based on weight, not based on cost.

I mean, the entire analysis -- and this relates to the Yamaha deference point. The entire analysis of the 1996 opinion is undergirded by reference to the federal law. And oh, by the way, no expressed reference to the federal statute, which the income tax law does when it wants to incorporate federal law. The sales tax law does when it wants to incorporate federal law. And even the excise tax. There are provisions of the excise tax that refers specifically to the United States Code.

None of that is here, and so it goes to the poor quality of the 1996 opinion. And I get that that's -- they call it their longstanding opinion. That's fine. What part of that didn't they mention? What part of that didn't the CDTFA address? The part about the ambiguity in the statute. Even their own ruling recognizes there can be two reasonable interpretations of Section 30121(b).

One that would include reference to the 50

percent test would refer to all the listed products, and one would be that the 50 percent test only applies to the catchall provision. Their words, not ours. So, of course, at the very least there's an ambiguity in the statute. And that, you know, when you read the original opinion -- and this goes just sort of back to the merits of the original opinion.

We think the original opinion was very correctly decided for the simple reason that the Panel looked at all the arguments, said that the interpretations were in a relative equipoise, right, but that our position was the better read overall, and then went to the rule of ambiguity regarding tax and statute. So all those arguments were raised before, and they were rejected.

Far reaching consequences, that was another sort of point that CDTFA made. I don't think so. The statute was changed in 2017 to include shisha products, and it was on a prospective basis. What evidence is there of far-reaching consequences at this point and time? The law has been on the books for six years. So I don't think that make a whole lot of sense. And they didn't respond to the statutory change. There was no discussion of statutory change.

This is how the law is supposed to function, right. The tax law should be clear and explicit, and

we -- you know, if there's some ambiguity in the law, then it's up to the legislature or in this case the electorate to change the law to put taxpayers on notice. I totally take issue with this fact that this was everybody -- nobody challenged this for decades.

You know, what evidence is there of that, first of all, that people agreed with their interpretation? Even if they acquiesced, what evidence is there that everybody was -- you know, the taxpayer community was somehow on board with the Department's interpretation. That doesn't make any sense. Even if that were the case, that doesn't change our task today, which is to interpret and construe the words of the statute.

You know, going back to the petition for rehearing piece, the Santyon -- the Santillan -- I'm not quite sure how to pronounce it. Hill v. San Jose, NASSCO that the CDTF cited, I urge you to read those cases closely. None of those cases support the new formulation of the contrary to law standard that we've seen for the first time in the opinion granting the rehearing. That's the first time. In fact, they didn't cite to any cases. If you notice, the only legal text they cited to was the opinion granting the rehearing.

There's nothing. There's nothing in the case law. And it's just not 657, it's OTA cases. It's Board

of Equalization decisions, Wilson Development, Los Angeles Korea. For decades -- for decades, contrary to law has been unsupported by substantial evidence. So at some point we're either going to follow the rules here, or we're not. We're either going to apply the contrary to law standard that's been on the books for decades.

Or we're going give the CDTFA a pass, and we're going to say you know what, we're just going to -- you disagree with the opinion. That's good enough for us. That's not how this is supposed to work. We're not supposed to have to win this case twice. And the first opinion was correctly decided. I think it was -- the reasoning of the opinion was extremely thorough. It was impeccable. They addressed all the issues that CDTFA raised here today.

And so -- absurd result. That's another thing that I've just seen pop up over and over again, the issue of absurd result. Absurd result doesn't mean that you just disagree with the review of the analysis of the statute. And it doesn't even mean that it could have consequences that you don't like. Right. Absurd result. I think there's a good statement of it here.

The absurdity exception requires much more than showing that troubling consequences may potentially result if the statute's plain meaning were followed, or that a

different approach would have been wiser or better. To justify departing from a literal reading of a clearly worded statute, the results produced must be so unreasonable, the legislature could not have intended them.

And what are they complaining about here? They are complaining about the fact that the 50 percent test would be referred to all the listed products. Okay. That their own opinion says is a reasonable read of the statute. Why is that so absurd? Why is it so absurd that a 50 percent test would be placed in the statute? How is that an absurd or troubling consequence? Right.

There's a 50 -- we all agree that the 50 percent test applies to the catchall provisions. Is that absurd? No. That's what was chosen, and they got rid of it. They decided it wasn't working for whatever reason, and so on a go forward basis in 2017, they got rid of the 50 percent test. And then they broadened the scope of the statute.

And then the other thing I wanted to address is this point about rendering the words of the statute, cigars, smoking tobacco, chewing tobacco, and snuff rendering that superfluous. I -- obviously, I disagree with that. This really is an iteration or an example of the reverse ejusdem generis statutory canon that was cited in the original opinion. And this is what it says just to

refresh your memory the phrase, "Iguanas, tortoises, rattle snakes, and other land reptiles would likely exclude marine iguanas like those found in the Galapágos Islands." And the phrase, "Kansas City, Topeca, Lawrence, Witchita, and other cities in Kansas would probably not extend to Kansas City, Missouri."

So it's not superfluous. It's just the way that the electorate stated or give examples of the types of products that would be subject to tax. That was just the way they worded it. It's not a singular example of the use of this sort of statutory text. So I think that's important and something we would like the Panel to consider.

Do you have anything to add, Mr. Penza?

MR. PENZA: Sure. Sure. Thank you. Just a few points. Largely technical, but I want to make sure that everything that was in the briefing is just addressed, even if just briefly an oral argument. I know Judge Cho assured us that everyone here has read the briefing, and I -- we've been here at it a long time. So I will be brief, but I do want to point some things out.

In CDTFA's brief, the reply brief, it was said again in oral argument. Essentially, they say that Section 657 in case law interpreting the same may be instructive. No. They're trying to distance themselves

from the case law interpreting 657. It's not may be instructive. It's identical. When the OTA promulgated the regulation governing rehearings, they said explicitly this is patterned after 657. In Swat Fame which is the precedential decision issued by the OTA on the issue of rehearings, it cited to Sanchez Correa and other appellate decisions that were interpreted in 657.

So as far as we're concerned, there's no wiggle room there. 657 and the regulation applying to rehearings is one and the same, and that the case law that applies to 657 also applies in interpreting the OTA's regulation. So that's point one.

Point two, I don't think this came up in oral argument today, but I did want to point out that in their briefing on page 3, they talk about Swat Fame. And they say, well, if you read the decision, they also did address the legal issue in Swat Fame before saying that there was evidence in the record -- I'm sorry -- that there was evidence in the record to support the opinion.

And what we would say to that is that with the OTA issuing the decision on rehearing, they're obviously free to support the legal analysis of the first Panel. And so if they want to do that and go out of their way to say, by the way, we weren't wrong on the legal issue, they can. But if you continue to read Swat Fame, they go on to

say, and by the way, the opinion is supported by substantial evidence, and that's the standard, and they applied it correctly. And that was the end of the matter, and the petition for rehearing was denied. So I wanted to point that out.

Point three, as we said, you know, this issue with error in law, again, we don't think it's been properly raised. But I also just want to point out that it's clear. It's clear under the plain language of the Regulation that an error of law is procedural error. And CDTFA just presented for about an hour, and it's clear they are arguing with the interpretation of a statute. That's a substantive issue, not a procedural issue. Error in law is not proper grounds for their -- their grievance in this matter.

MR. DAKESSIAN: I would also add that error in law was not listed in the stipulation as a basis for a rehearing that they could raise in these proceedings.

MR. PENZA: Point four, yeah, I want to cut to the core of the opinion granting a rehearing initially and their argument, which frankly is hard to find. Because, again, for an hour you can't really tell where the petition for rehearing arguments and the substantive issue begins. And that's problematic because it shows that the two are merging together such that it's really -- they are

rearguing the interpretation that the statute was wrong.

But essentially, what they're arguing is that if there was no factual dispute, that somehow the contrary to law standard morphs into a new standard. So that if there was a factual dispute, the contrary to law standard means is their -- is the opinion supported by the substantial evidence. But they're suggesting that if there's no factual dispute, then somehow it's a, quote, "pure legal issue," and that the panel that takes the petition for rehearing can just overrule the first panel in a pure question of law. That's not correct.

First of all, there's no case law in over 100 years of jurisprudence saying that. That is cut from an entirely whole cloth. The only precedential decision on this point is Swat Fame and, I believe, Martinez Steel, both of which just cite the standard that was stated in Sanchez Correa. Okay. So this notion that just because there is no dispute or controversy over the facts somehow changes the contrary to law standard, that's cut from entirely whole cloth.

There is an evidentiary record in this case. It's in this binder. And if there's anything in this binder to support the opinion, then it's not contrary to law. It's a very, very simple standard, which is why we pointed out in our briefing that it's very rarely applied.

It only had -- in order for opinion to be contrary to law there has to be a catastrophe, a total breakdown in adjudication by which the second Panel looks at the opinion, and they look at the record, and they say something went terribly wrong here. That should happen once in a blue moon.

And by the way, I would also point out. All the other grounds for rehearing, those only happen once in a blue moon. I'm just looking at it now; an irregularity in the appeals proceeding, an accident or surprise, newly discovered evidence that comes up. These things don't happen very often, and all the grounds should be rarely, rarely applied because it's an extreme remedy to make the parties do it over again. The time, the expense, all of that, that has to be considered when you're hearing a petition for rehearing.

Has this -- is the opinion so egregious that we have to do it again? And that's why the standard is so heightened. They're arguing for a very low standard. They're just saying if you disagree with the first Panel and the interpretation of the statute, you should grant a rehearing. That's the tantamount to de novo review as we said in our briefing.

And so I just wanted to cover those points. So thank you. I appreciate it.

Mardy, do you have anything else?

MR. DAKESSIAN: No. No. I guess the last thing I'll say just to include is that, you know, we've talked about the contrary to law standard and why the grant of the rehearing was proper. We've talked about the textual arguments regarding 30 -- regarding 3 -- regarding the text. I forgot the name of the statute but -- 30121 -- thank you. 30121(b).

We've talked about the extrinsic aid such as the statutory change in 2017. We talked about the ambiguity in the statute. And for all those reasons -- for all those reasons, we respectfully request that the instant appeal be granted.

And we are happy to take any further questions the Panel may have. Thank you for your time today.

JUDGE CHO: Thank you very much.

Let me check with my Panel members to see if they have any final questions.

Judge Ralston, do you have any final questions?

JUDGE RALSTON: No, I don't. Thank you.

JUDGE CHO: Thank you.

Judge Long, do you have any final questions for either party?

JUDGE LONG: I have no questions. Thank you.

JUDGE CHO: I don't have any questions either.

So this concludes the hearing. The Panel will meet and decide the case based on the documents and arguments presented today. We will issue our written opinion in the previously agreed upon time frame. This case is submitted, and the record is now closed.

Thank you very much for everyone's participation in this hearing. I believe we'll take a recess before the next hearing, which should start at 1:00 p.m.

Thank you again.

(Proceedings adjourned at 11:37 a.m.)

HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 21st day of February, 2022.

_____

ERNALYN M. ALONZO
HEARING REPORTER