

BEFORE THE STATE OF CALIFORNIA
OFFICE OF TAX APPEALS
COUNTY OF SACRAMENTO

IN THE MATTER OF THE APPEAL OF:)
ADVENTURES BY THE SEA,) CASE NO. 18083673
APPELLANT.)
_____)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS
Sacramento, California
Wednesday, February 22, 2023

Reported by:

Maria Esquivel-Parkinson,
CSR No. 10621

Job No.:
40409 OTA(A)

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ADVENTURES BY THE SEA,) CASE NO. 18083673
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TRANSCRIPT OF PROCEEDINGS, taken at
Office of Tax Appeals, 400 R Street, Sacramento,
California, commencing at 9:33 a.m. and
concluding at 11:25 a.m. on Wednesday,
February 22, 2023, reported by
Maria Esquivel-Parkinson, CSR No. 10621, RPR,
a Certified Shorthand Reporter in and for
the State of California.

1 APPEARANCES:

2
3 PANEL MEMBERS:

4 Andrew Kwee, Lead ALJ

5 Keith Long

6 Sara Hosey

7
8
9 FOR THE APPELLANT:

10 Gary Kimsey, Representative

11
12
13 FOR THE CDTFA:

14 OFFICE OF TAX APPEALS

15 400 R Street

16 Sacramento, California

17 By: Kevin Smith, Tax Counsel

18 Cary Huxsoll, Tax Counsel

19 Jason Parker, Hearing Representative

I N D E X

E X H I B I T S

(Appellant's Exhibits 1 through 11 were received at
page 7)

(Appellant's Exhibit 12 was received at page 8)

(CDTFA's Exhibits A through H were received at
page 7)

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Frank Knight	25			
Michelle Knight	28			

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By Mr. Smith 74

1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, FEBRUARY 22, 2023

3 9:33 a.m.

4
5 ALJ KWEE: Okay. It looks like we are ready to go
6 the record, so we are opening the record in the appeal
7 of Adventures by the Sea. This matter is being held
8 before the Office of Tax Appeals. The OTA case number
9 is 18083673. Today's date is Wednesday, February 22nd,
10 2023. The time is approximately 9:33 a.m. This
11 hearing is being conducted in Sacramento, California.
12 And we're also streaming live on OTA's public YouTube
13 channel.

14 Today's hearing is going to be heard by a panel of
15 three administrative law judges. My name is Andrew
16 Kwee, and I will be the lead administrative law judge.
17 Judge Keith Long to my right and Judge Sara Hosey to my
18 left are the other members of the panel. And we will
19 all be meeting after today's hearing to discuss this
20 case, and we will produce a written decision as equal
21 participants. Although I will be conducting this
22 hearing, any judge on this panel may ask questions and
23 otherwise participate to ensure that we have all the
24 information that we need to decide this appeal.

25 For the record, I'd ask the parties to please state

1 their names and who they represent, and I'll start with
2 the representatives for the CDTFA.

3 MR. SMITH: My name is Kevin Smith. I'm from CDTFA
4 legal department.

5 MR. HUXSOLL: Cary Huxsoll from CDTFA's legal
6 department.

7 MR. PARKER: Jason Parker, chief of headquarters
8 operations bureau with CDTFA.

9 ALJ KWEE: Okay. Thank you.

10 And for -- representatives for Appellant?

11 MR. KIMSEY: My name's Gary Kimsey. I'm
12 representing Adventures by the Sea.

13 MS. KNIGHT: I'm Michelle Knight, and I'm one of
14 the taxpayers. I'm --

15 MR. KNIGHT: And Frank Knight.

16 ALJ KWEE: Okay. And I believe that I had noted
17 there would be a third -- a witness, Bill Jespersen, a
18 CPA for Appellant. Is he going to be here, or is he no
19 longer going to testify here?

20 MR. KIMSEY: Mr. Jespersen will not be here today.

21 ALJ KWEE: Okay. Okay. So I'm just going to do a
22 quick recap before I move on to the presentations to
23 ensure that we're all on the same page. So after the
24 prehearing conference -- we met last month -- I
25 provided a copy of the exhibits to the parties. We had

1 discussed Exhibits A through H for CDTFA and 1 through
2 11 for Appellants. My understanding was that there
3 were no objections to those exhibits that were
4 discussed during the prehearing conference. And I'll
5 get to Exhibit 12 which was recently submitted, next,
6 but is that a correct understanding, there's no
7 objections to the exhibits that were discussed at the
8 conference?

9 MR. KIMSEY: That's correct.

10 ALJ KWEE: Okay.

11 MR. SMITH: We have no objection.

12 ALJ KWEE: Okay. So CDTFA's Exhibits A through H
13 and Appellant's Exhibits 1 through 11 are admitted into
14 evidence.

15 (CDTFA's Exhibits A through H received into
16 evidence.)

17 (Appellant's Exhibits 1 through 11 received into
18 evidence.)

19 ALJ KWEE: As for Exhibit 12, that was submitted
20 following a prehearing conference, and it's a time
21 line. And also there was a supplement to Exhibit 12,
22 which was submitted last week with additional
23 information on the time line.

24 CDTFA, do you have any objections to their --

25 MR. SMITH: No, we don't.

1 ALJ KWEE: -- Exhibit 12? Okay. Great. Thank
2 you. So Exhibit 12 is also admitted into evidence.
3 All the exhibits were admitted without objection.

4 (Appellant's Exhibit 12 received into evidence.)

5 ALJ KWEE: So the other item is the post-hearing,
6 post-conference submissions. During the prehearing
7 conference, Appellant had indicated that they believed
8 they had made payments towards the liability, and they
9 requested a summary of how many payments were made
10 today -- to date.

11 And CDTFA had provided a summary of approximately
12 \$67,000 in payments. They also provided the remaining
13 tax liability plus interest and penalties. For
14 Appellant's representative, did you have any additional
15 questions or concerns about the remaining tax liability
16 being asserted?

17 MR. KIMSEY: No, we do not.

18 ALJ KWEE: Okay. Great. So the issues, we
19 discussed the issues during the minutes and orders.
20 Those were summarized at the prehearing conference.
21 Those were summarized in the minutes and orders.
22 They're also listed on our agenda.

23 We had also discussed some items which were no
24 longer disputed, some agreed items, following the four
25 re-audits. So I won't re-summarize those again, but

1 those were listed in the minutes and orders. And I'd
2 ask CDTFA, do you agree with the issue summary and
3 agreed items listed in the minutes and orders?

4 MR. SMITH: Yes, we do.

5 ALJ KWEE: Okay. And for Appellant's
6 representative, was that also an accurate summary of
7 what we discussed for you?

8 MR. KIMSEY: Yes. That's accurate.

9 ALJ KWEE: Okay. Great.

10 So the one other item is during the prehearing
11 conference I had asked the parties to be prepared to
12 address two time periods. That was December 27th,
13 2018, to October 28th, 2020, and January 26, 2018, to
14 August 30th, 2018. And I'd asked the parties to be
15 prepared to address that during the hearing today.

16 It looks like Appellant's Exhibit 12 partially
17 addressed some of those items. I just want to make
18 sure there's -- CDTFA, are you also prepared to address
19 that period during the hearing today?

20 MR. SMITH: Yes. As part of our presentation, we
21 have -- we have statements about both those time
22 periods.

23 ALJ KWEE: Okay. Great. Thank you. So then I'll
24 just do a quick recap of how the hearing is going to --
25 order is going to go today. So we had discussed 15

1 minutes for Appellant's opening presentation, followed
2 by 30 minutes for testimony from Appellant's two
3 witnesses. Then we would turn to CDTFA for their
4 presentation, which would be allocated to 20 minutes.
5 Afterwards each party would be allocated ten minutes
6 for any final closing remarks.

7 Are there any questions or concerns about the time
8 allotment and the order of presentation that we had
9 arranged?

10 MR. KIMSEY: Since our preconference hearing, we
11 will probably need a little more time for our
12 presentation. It's listed as 30 minutes. We're
13 probably going to need more like 45 minutes.

14 ALJ KWEE: Okay.

15 And, CDTFA, was the time estimate that we had gone
16 over still accurate for you?

17 MR. SMITH: Yeah. We'll probably actually be less.
18 Probably closer to ten minutes, so -- for the opening
19 presentation.

20 ALJ KWEE: Okay. So that's an increase of five
21 minutes, so we have this -- this is the only hearing of
22 the morning, so I don't think that will be a problem to
23 accommodate the additional time. So that should be
24 fine.

25 So before we get started, one last item. Since we

1 have two witnesses, I'd just -- I'll start by swearing
2 them in so that you could turn directly to witness
3 testimony when it's time for that. So if -- I think
4 Mr. and Mrs. Knight, if you would please raise your
5 right hand.

6 Do you swear and affirm to tell the truth, the
7 whole truth and nothing but the truth today?

8 MS. KNIGHT: We do.

9 MR. KNIGHT: I do.

10 MS. KNIGHT: I do.

11 ALJ KWEE: Okay. I have an affirmative from both
12 witnesses, so we are ready to turn it over to
13 Appellant's representative, Mr. Kimsey, for your
14 opening presentation.

15
16 PRESENTATION

17 BY MR. KIMSEY, Attorney on behalf of Appellant:

18 First of all, we'd like to thank you for giving us
19 this opportunity to plead our case and describe the
20 issues involved and why we believe after 14 years from
21 when this audit was first started by BOE auditors back
22 in 2009 that there's -- that there's still nontaxable
23 revenue that's included in the audited measure of tax.
24 And during these 14 years, the audit staff has spent
25 time on the original audit, plus four re-audits that

1 have been prepared. It's taken them a lot of time, a
2 lot of effort.

3 Let me describe briefly what Adventures by the Sea
4 does or --

5 THE COURT: Oh, Mr. Kimsey. Just could I
6 double-check that your microphone, the green light, is
7 on. Because they're having a hard time hearing you on
8 the stream. If you could just bring it a little
9 closer, then that would be much appreciated.

10 MR. KIMSEY: Is that better now?

11 ALJ KWEE: That is, yeah, much better.

12 MR. KIMSEY: Okay.

13 ALJ KWEE: Thank you.

14 MR. KIMSEY: All right. All right.

15 Adventures by the Sea is mainly in the business of
16 offering rentals of kayaks and surries, bicycles,
17 surfboards, boogie boards to the public in the
18 Monterrey Bay area. They also provide various bicycle
19 and kayak tour packages, which included a guide,
20 equipment that goes along with the kayaks, wetsuits,
21 paddles, life vests. Those are all provided to the
22 customers.

23 So, now, in general terms, the remaining contested
24 issues involve three areas of concern. These areas
25 are, number one, whether adjustments are warranted to

1 the measure of unreported taxable rental receipts;
2 number two, whether adjustments are warranted to the
3 measure of unreported taxable sales; and number three,
4 whether interest relief is warranted.

5 The specific areas of contention in the first
6 issue, which would be unreported taxable rental
7 receipts, include whether on the purchases of kayaks
8 did the vendor, which was Outdoor -- Johnson Outdoors,
9 have a responsibility to collect sales tax on the sale
10 of the kayaks to Adventures by the Sea. If so, then
11 subsequent rental income for the kayaks would be exempt
12 from tax.

13 In the alternative, we believe that a portion of
14 the rental receipts from kayak rentals are not subject
15 to tax because purchases of life vests and wet suits,
16 which are always included with the rental, were
17 purchased tax paid from California vendors. So that
18 portion, whatever that portion of the rental receipts
19 that represents would be exempt from the tax because
20 that equipment had been tax paid.

21 Also regarding the kayaks and bicycle tour income,
22 we believe that the income from these tours is not
23 subject to tax because this type of activity in our
24 mind and our belief does not fall within the definition
25 of a rental or a lease.

1 Then in the area of unreported taxable sales, that
2 includes the over-reported taxable sales in the third
3 and fourth quarter of 2005 that CDTFA did not allow as
4 a credit in the audit.

5 And then for our contention regarding the relief of
6 interest, that should be granted. We believe relief of
7 interest should be granted for more than -- more than
8 the time period of January 1st, 2014, through May 31st,
9 2015, that CDTFA has already conceded to.

10 And during today's hearing, we intend to provide
11 testimony and evidence to prove our contentions. And
12 that's the end of my opening statement. Thank you.

13 ALJ KWEE: Okay. And I just realized that you have
14 an easel in front of you there, so I wasn't sure --
15 because I don't think we had discussed a presentation.
16 Did you have any additional documentation to give?

17 MR. KIMSEY: The easel's for an exhibit. It's
18 Exhibit 12. It's the second part of Exhibit 12 that we
19 just wanted to put up here for -- so that Michelle
20 Knight will be able to reference that.

21 ALJ KWEE: Okay. Perfect. So then that's a copy
22 of the interest time line.

23 MR. KIMSEY: Yes.

24 ALJ KWEE: Okay. That's -- that's fine. And I
25 will let you proceed with the witness testimony. Thank

1 you.

2 MR. KIMSEY: Okay.

3 For the adjustments to unreported taxable rental
4 receipts, which is issue one, the first sub-issue in
5 that category involves purchases of kayaks. All of the
6 kayaks owned by Adventures by the Sea were purchased
7 from Johnson Outdoors Company headquartered in
8 Wisconsin. A tax was not charged to Adventure [sic] by
9 the Sea when purchases were made.

10 We believe and contend that Johnson Outdoors had an
11 obligation and a duty to collect sales tax on these
12 transactions because they are considered to be doing
13 business in California. And that was because of the
14 following facts: They had sales representatives,
15 agents, operate in California who regularly visited
16 Adventures by the Sea shops to show new equipment, to
17 solicit sales, and to take orders for products that
18 were sold by Johnson Outdoors.

19 Adventures by the Sea did not issue a resale
20 certificate for the purchases, and the vendor is
21 engaged in business under the -- under the sales tax
22 law in California by having nexus in the state. The
23 vendor would have had a legal obligation to collect tax
24 on the sale of the kayaks to Adventures by the Sea.

25 Johnson Outdoors' legal obligation to collect tax

1 on the sales would have occurred prior to the time
2 Adventure by the Sea had to act on their option either
3 to report tax on the cost of the kayaks or to collect
4 tax on the subsequent rentals of the kayaks. Johnson
5 Outdoors' legal obligation to collect tax on the sale
6 to Adventure by the Sea would not be extinguished or
7 relieved just because Adventures by the Sea put these
8 kayaks into rental service.

9 So we believe Johnson Outdoors Company had an
10 obligation to collect the tax on the cost of the kayaks
11 or to report -- let me back up, sorry. We believe
12 Johnson Outdoors Company obligation to collect the tax
13 on the sale to Adventures by the Sea would trump
14 Adventure by the Sea's option to either report tax on
15 the cost of the kayaks or to report tax on the
16 subsequent rentals.

17 The section of law, which is 6203, indicates that
18 if an out-of-state retailer is engaged in business in
19 California by having sales agents or representatives or
20 inventory, they clear -- they have an obligation to
21 collect tax on their sales to California residences.

22 They didn't live up to their responsibility under
23 6203, and if they had, then we wouldn't -- we wouldn't
24 be here today on this issue because tax would have been
25 collected by the seller. And actually, Section 6203

1 indicates that if a retailer is engaged in business in
2 California, they shall collect the tax. It doesn't
3 give them an option. They shall collect the tax unless
4 the sale is exempt under some other exemption, like
5 sale for resale by accepting a resale certificate.
6 They did not do that. They had a clear -- they had a
7 clear responsibility to collect the tax on this sale.
8 They did not.

9 And it's our belief that that obligation because
10 the section of law in the case that they shall collect
11 the tax. It doesn't say may collect the tax or should
12 have collected the tax. It says they shall collect the
13 tax. So it's our belief that that obligation trumps
14 Adventures by the Sea's obligation to either pay tax on
15 the cost or pay tax on the rental receipts for rentals
16 that take place after that initial sale in California.

17 Then the second issue involves tax paid rental
18 equipment that is included in the rentals of the kayaks
19 and whether enough credit has also been -- has been
20 allowed already for the tax paid portion of the
21 equipment included in the rentals of the kayak.

22 CDTFA staff has conceded to a 2 percent allowance.
23 In other words, 2 percent of the rental receipts would
24 represent the tax paid cost of the life vests, the wet
25 suits in this case. In the hourly and daily rentals of

1 the kayaks and in the uses of the kayaks and kayak
2 tours, every customer is provided a kayak, a paddle, a
3 wet suit, and a life vest. The wet suits and the life
4 vests are all purchased tax paid from California
5 vendors.

6 The wet suits are purchased from Kolatat [sic] --

7 (Court Reporter interruption)

8 MR. KIMSEY: I'll spell it. K-o-l-a --

9 MS. KNIGHT: It's K-O-K --

10 MR. KIMSEY: -- t-a-t. Okay. They're -- that
11 company is located in Arcata, California, A-r-c-a-t-a.
12 And the life vests were purchased from Seda Kayaks,
13 S-e-d-a, in Chula Vista, California.

14 During the appeals and the audit process, we had
15 provided Appellant's Exhibit No. 1, four invoices from
16 Kokatat showing a total of 287 wet suits that were
17 purchased during the audit period. These were all
18 purchased tax paid, as is all the other purchases of
19 wet suits from the same company.

20 We also provided Appellant's Exhibit No. 2, a copy
21 of an invoice from Seda Kayaks showing life vests were
22 purchased tax paid. Also in the Board of Equalization
23 audit staff August 28th, 2013, memo to at that time the
24 appeals hearing officer Dana Brown, tax counsel, which
25 related to the appeals conference that was held on

1 May 22nd, 2013. This memo is Appellant's Exhibit
2 No. 3. At that time the BOE audit staff conceded that
3 the Appellant/Petitioner Adventures by the Sea had
4 provided sufficient evidence establishing that
5 purchases of life vests and surries were tax paid and
6 adjustments should be made. I might add that the surry
7 rental income has already been deleted from the audit
8 liability. And thus at that time the Department
9 recommend that adjustments to the rental receipts
10 derived from leases of those items, which was the life
11 vests and surries, be adjusted from the audit.

12 And then in the Board of Equalization decision and
13 recommendation for that hearing that we had in -- was
14 that -- let's see, that was the -- that was -- let me
15 get the date here of that hearing again. That was the
16 May -- the May 22nd, 2013, appeals hearing.

17 In the D&R that was issued in that case, the second
18 appeals hearing officer was Leslie Kinnamon (phonetic).
19 She issued the D&R. She stated that after the
20 conference, by memorandum August 28th, 2013, which is
21 our exhibit -- our Exhibit No. 2, there was a specific
22 recommendation to, number one, determine the nontaxable
23 portion of the taxpayers' rental receipts derived from
24 its leases of tax paid surries and life vests, as
25 conceded in the Department's August 28th, 2013, memo,

1 as well as kayak clothing that we found -- we being the
2 hearing officer -- found that tax paid -- tax was paid
3 on those items as well.

4 So the D&R recommended that the surries be exempt
5 from tax, surry rental be exempt from tax. The life
6 vests had been tax paid so they should be exempt from
7 tax. And they also indicated that the wet suits were
8 tax paid and those should be exempt from tax as well.

9 And just as a note, the rental income from the
10 surries has been eliminated, but the measure of tax had
11 not been eliminated for the portion that would
12 represent the wet suits and the life vest income in a
13 kayak rental. And it was our belief that the appeals
14 conference Decision and Recommendation report issued on
15 May 16th, 2016, the tax paid status of the wet suits
16 and life vests was conceded by BOE and only the method
17 of calculating the tax paid portion was still at issue.

18 So at that time we suggested to the audit staff how
19 to make this calculation of the tax paid portion of the
20 rental income from kayak rentals. This calculation was
21 submitted to OTA in our opening brief as well as in the
22 BOE appeals conference.

23 We proposed calculating the percentage on the
24 rental charge of kayaks based on, number one, the cost
25 of tax paid items, which was the life vests and the wet

1 suits, divided by the total cost of the -- of all the
2 equipment used in the -- in the rental, which would
3 have been the kayak cost plus the cost of the
4 equipment. And the tax paid cost would have been
5 divided by the total cost of the equipment used in the
6 rental. And that percentage came out to be
7 23.37 percent of the rental receipts. That calculation
8 is in our opening brief.

9 And this -- this compares to the 2 percent that the
10 staff, CDTFA staff, is now conceding to. Our
11 calculation based on cost was 23.32 percent of the
12 rental receipts. The CDTFA has given us 2 percent.

13 Then the third sub-issue in this category involves
14 kayak and bicycle tour income. As another alternative
15 contention, we believe that bicycle and kayak rental
16 activities possibly should be taxed on the cost of the
17 equipment involved instead of on the rental receipts.
18 And that's because Regulation 1660(c)(6) states that if
19 a lessor makes any use of the rental equipment in the
20 state other than incidental use, he or she is liable
21 for use tax measured by the purchase price of the
22 property.

23 In this case Adventures by the Sea makes hourly or
24 daily rentals of bicycles and kayaks that the
25 Department states are rentals; however, Adventures by

1 the Sea also uses the bicycles and kayaks in guided
2 tours, which we believe may not be a continuing sale
3 under the law or rental under the law.

4 These are docent-guided tours on a specific route
5 ushered by Adventure by the Sea employees where the
6 customer has no ability, input, or suggestions
7 regarding the route the tour will take, the stops the
8 tour will make, the amount of time the tour will take,
9 or the speed of the peddling for a bicycle or the
10 paddling of a kayak. And the speed of every tour, how
11 long it takes, is basically determined by the slowest
12 customer in the group.

13 We believe in these cases it isn't a rental of
14 equipment because of the route restrictions and the
15 other restrictions relating to the use of the equipment
16 like the number of stops, the timing of the stops along
17 the route, and the -- and the time and speed of the
18 equipment.

19 These tours are much like a horse pack trip where
20 the horse is provided for transportation to get to a
21 specific destination or to travel a specific route to
22 allow customers to do the sightseeing along the way.
23 BOE legal staff had previously ruled in the form of
24 annotations that similar types of activity are not
25 rentals or equipment -- rentals of equipment or

1 continuous sales.

2 For example, Annotation 330.2283, which is
3 Appellant's Exhibit No. 8, indicates in the case of
4 horse pack trips the receipts from pack trip rentals
5 are not taxable. Are not taxable. Under those
6 circumstances, there's actually no lease because the
7 horses remained under the control of the lessor, not
8 the lessee.

9 The bicycle and kayak tours are very similar to
10 horse pack trips in that the tour guide maintains
11 control of where the bicycles or kayaks can go, in
12 other words the route taken. The guide has control of
13 the -- of the route. They also have control of the
14 speed that's traveled. They also have control of the
15 number and location of any rest stops. These are
16 predetermined routes that the tours maintain and do not
17 deviate from them. On the bicycle and kayak tours, the
18 only control that the customer has is in steering with
19 the handlebars or with the paddle. However, they must
20 stay on the course that the guide has determined they
21 would go on.

22 In the Department's reply to our opening brief, the
23 only argument that the Department presented to refute
24 our contention was that the operation of the bicycles
25 and kayaks were under the direction and control of the

1 customers and were, therefore, leases under Regulation
2 1660. Please note that they did not explain or define
3 what they meant by "direction" and "control." And it's
4 not defined in the regulation or the law. So we could
5 only go on previous rulings in this case, which there's
6 not many. To be perfectly honest, there's not many.

7 In our testimony today, we have explained why we
8 don't believe the customer had direction and control
9 that would have made it a rental. If they don't have
10 direction and control, and I'm assuming that means of
11 everything that's done that the customer could do,
12 direction and control of everything, where they go,
13 when they stop, how fast they're going, they don't have
14 that control. They don't have direction because they
15 have to follow a specific route.

16 So if these bicycles tours are not defined as
17 rentals or continuous sales because of the arguments
18 we've put forth today, then the activity would be
19 considered, under the regulation, it would be
20 considered any other use of the property. If -- and
21 tax would be measured by the purchase price of that
22 property.

23 We have calculated this amount of cost to be
24 \$18,750 being the cost of the -- total cost of the
25 bicycles and kayaks in rental service. That's a --

1 that's a general cost amount because the inventory does
2 vary slightly at any one time. But that's the average
3 cost in inventory.

4 And also we don't believe bicycle and kayak tours
5 would be considered incidental use under the regulation
6 because, based on the income statement revenue totals,
7 bicycle and kayak tours is roughly about 41 to 45
8 percent of the total income from rentals of bicycles
9 and kayaks. It's just varied slightly from year to
10 year. So as you can see that it's not incidental use
11 because it's almost half of the total revenue from
12 kayak and bicycle rentals.

13 Under this reasoning, bicycles and kayaks should be
14 taxed at cost rather than rental income. And since
15 Adventures by the Sea did not charge tax on any of the
16 rental income, there wouldn't be the concern about
17 excess tax reimbursement either that's mentioned in the
18 regulation. That would be for subsequent rentals of
19 the bikes and kayaks. So we wouldn't have that problem
20 at all. So that's our arguments for the first issue.

21 MR. KNIGHT: Hi. Frank Knight.

22 And just to talk about the tours, and maybe you've
23 been in Monterrey before and maybe been on one of our
24 kayak tours, but, you know, the whole -- the whole
25 safety net about the tours is if it's -- if everyone in

1 this room was on a tour and I was the tour guide or
2 Michelle was -- sometimes we have one, two, three,
3 depending on the size -- if for some reason Gary goes
4 out to left field, you know, we have to stop the tour.
5 And everyone holds onto the kelp, and one of us has to
6 go out and go get Gary and bring Gary back because the
7 safety net of the kayak tour is the kelp forest that
8 grows along the Monterey Bay Aquarium. It's where all
9 the otters are and the Harbour seals and all that kind
10 of thing.

11 And I don't know if you've heard, you know, we've
12 had three white shark attacks this year -- or last year
13 in Monterey right in front of our locations, and
14 they're always outside. They're not in the kelp. So
15 the tour situation is completely -- is a safety net of
16 the tour guide, you know.

17 We even have a boat that the guides have radios
18 that if all of a sudden the wind picks up and we need
19 to get control of the tour -- because wind is not our
20 friend when you're out on a kayak -- you know, the boat
21 goes out, rounds every -- we call it a sheep herder.
22 You know, we round everyone back up. We get them back
23 into the kelp forest.

24 So tour-wise, it's so -- we don't just go on a tour
25 and all of a sudden if you want to go out to left

1 field, it doesn't work like that. You don't have that
2 choice. We go get you. We stop the tour. We go back.
3 We start over again. That's sort of thing.

4 When it comes for the biking as well, you know, we
5 are only as good or as fast as the slowest peddler.
6 You don't just take off on a bike tour and leave
7 someone behind and then stop somewhere and say, you
8 know, not to pick on Gary, but, "Where's Gary?" you
9 know. And so again, there's a person in the front.
10 There's a person in the back. There's always in
11 communication.

12 And it's really about safety for the tour. And
13 then when people come into the stores these days or to
14 this day is, "Hey, I've never been before and I want to
15 go," we really want you to be in our safety net.
16 We don't -- our saying is let's stay out of the
17 newspaper. Because people that, you know -- well, the
18 worst thing is when they say they know what they're
19 doing. A lot of times they don't know what they're
20 doing. But, you know, we really push everyone into our
21 guided tours. All about safety, whether it's for
22 biking or kayaking. Thanks.

23 MR. KIMSEY: Okay. Now we're going to go into our
24 testimony on the interest calculations, interest
25 charges. Michelle Knight is going to --

1 Michelle, do you want to sit here?

2 MS. KNIGHT: No, I'm good. I'm good.

3 Can you guys see me through the crack? I guess
4 it's just more important that you hear me.

5 Hello. I'm Michelle Knight. Our case has been
6 fraught with unnecessary delay; lack of action;
7 re-audits where entirely new methodologies were
8 applied, so essentially starting over; and unforeseen
9 events that were beyond anyone's control or
10 anticipation. All of this has led us to finally having
11 a hearing 14 years after the start of this audit.

12 This long delay has put us in the position of owing
13 more interest than even in taxes under dispute. That
14 perspective alone should speak to the unique and unjust
15 position that the Department has put us the taxpayer
16 in. I'd like to lay out exactly how we got here,
17 demonstrating why a dramatic reduction in the amount of
18 interest we're being charged needs to be made.

19 We are respectfully asking for your consideration
20 of a minimum of eight years or 96 months being deleted
21 from the interest charges. We believe this number
22 could be as high as ten years because of the many
23 delays and mistakes in our case. If they had never
24 occurred, this case may have been settled long before
25 we even got to this point in the process.

1 There are two main areas where we believe a
2 reduction in interest is warranted. As you know,
3 Section 6593.5 of the R&T Code allows for relief of
4 interest in situations where a failure to pay tax is
5 due to an unreasonable error or delay by an employee of
6 the board acting in his or her capacity. Therefore, we
7 are asking for relief of interest in this situation for
8 the periods of time that occurred that was not normal
9 auditing processing time and normal appeals processing
10 time.

11 We will review the abnormal periods of time when
12 nothing was being done by the audit staff to help bring
13 the audit fieldwork to a conclusion and periods of time
14 that had to be taken by the audit staff when a new
15 auditor was assigned to the audit and the new auditor
16 had to completely review all of the new work -- of the
17 work that had been done by the previous auditor. In
18 addition, all of the time that each new auditor decided
19 to abandon the previous auditor's work and basically
20 replace the previous audit methods for a new one.

21 We also would include any abnormal processing time
22 during the appeals process. I'll go over the time
23 frame for our audit and believe it will clearly
24 demonstrate that there were a multitude of unreasonable
25 delays and errors by the staff working on our audit.

1 The second area where we believe we are warranted a
2 reduction in interest charges is due to several
3 circumstances that can be considered extraordinary and
4 outside the control of either the Department or us. We
5 assert that even though these are not called out in
6 statute as allowable for interest reduction, the nature
7 of the events themselves preclude them from being
8 codified as they were unusual and unprecedented in
9 nature. For that very fact, we should not be penalized
10 with interest charged during these events.

11 I believe you've been given a chart entitled
12 "Adventures by the Sea Audit Chronology," H-12 -- I
13 mean, No. 12. And it's helpful, you could follow
14 along. And that's what I've put up here. And it just
15 sort of goes one, two, three, four, but there's five
16 pages.

17 As you know, our audit was initiated in 2009. Hold
18 on, everybody. Here's the ride. Even at the start, we
19 had two initial auditors. The first auditor started
20 work and then quit and the case was turned over to a
21 new auditor who had to start the process again. After
22 the initial audit was complete, we evaluated the
23 results and saw there were many errors and mistakes
24 that led us to file for an administrative protest in
25 March of 2010. This was really the beginning of the

1 journey.

2 From March 2010 until October 2010, we waited seven
3 months to try to address discrepancies in the audit.

4 In August our expert requested that the audit be moved
5 to Sacramento so we could send additional documents and
6 work there. It was finally moved, and in November of
7 2010 we got a scheduled meeting with a new auditor.

8 From November until June of 2011, this new auditor
9 did not complete the work. We checked and even
10 complained and in May was told that she was, quote,
11 working on other assignments. Then in June we were
12 told she was being promoted and would not be able to
13 complete our audit. And up to this time, we'd received
14 no documents or information regarding the work being
15 done. This auditor had it for seven months with no
16 results.

17 MR. KIMSEY: So let me just -- let me just add
18 something in that space, if you -- if you don't mind.
19 At this point this audit was under -- was under
20 petition. And so the auditor in the Sacramento office
21 that we had the audit transferred to so that I could
22 work a little closer with the auditor, in that
23 seven-month period, she didn't do anything on the audit
24 apparently. And this should have been a priority
25 assignment for her. But she didn't treat it as a

1 priority assignment.

2 So go ahead.

3 MS. KNIGHT: All right.

4 So in June 2011, we were assigned a new auditor.
5 We met with him, and he actually presented us with some
6 documents from the previous auditor that we had never
7 seen. We reviewed these documents and found that no
8 adjustments that we had been told would be made had
9 actually been made. These were items that had been
10 agreed upon during the discussions in 2010.

11 When asked about why, the new auditor informed us
12 he would be starting with a new methodology and that
13 they, very arbitrarily, had decided not to make any
14 recommended adjustments. Again, when we asked why, we
15 received no answer.

16 So this went on from July 2011 until October 2011
17 when repeated emails and phone calls to the auditor
18 were made. We sent additional documentation to the
19 Department per their request in October 2011, followed
20 up with emails to see if anyone was reviewing it, and
21 received no answers.

22 Finally, in March 2012 a call was made, and we were
23 told that the audit schedules would be sent the next
24 week. At the end of March until mid-April we made
25 repeated attempts to get information. And finally, on

1 April 19th, 2012, the AWP was sent and we discovered
2 that after all this time there were still no
3 adjustments made.

4 When we inquired once again about it, we were told
5 we did not send them additional documents so they made
6 no changes. We argued that we had sent all the
7 information previously to the previous auditors and
8 they had accepted it, so now all of a sudden why was it
9 not appropriate.

10 We received no replies. And despite repeated
11 requests for an exit interview with a manager, we were
12 told in May 2012 the second audit was considered
13 complete. This auditor had had it for ten months.
14 That means it took 18 months total for the second audit
15 to be completed, going through two auditors with little
16 adjustments despite previous agreements they were
17 warranted.

18 We assert that this process should have taken three
19 to four months total, perhaps two months for each of
20 them. Since no adjustments were made, especially on
21 items that were clearly uncontested such as surry
22 rentals at the time, it was still not cleared, the
23 amount of tax owed was so much higher than we believed
24 warranted so we considered the appeals process and a
25 hearing was scheduled with the appeals division on

1 May 28th, 2013. It took another 12 months to get this
2 hearing scheduled after the second audit was complete.
3 12 months to get a hearing.

4 And after the hearing in May 2013, all of a sudden
5 we were informed the Department was suspending all DMC
6 related cases because they were reviewing regulations.
7 We have stated from the very beginning we are not a
8 DMC, but regardless, the work was suspended. Our
9 expert did request the other items in our audit could
10 be continued since they did not have to do with the DMC
11 issues, but we received no response.

12 On June 15th, 2015, we were notified the DMC work
13 was finished and the audit was released. This was 23
14 months, from May of 2013 until June of 2015. The
15 Department has conceded a 17-month delay here and
16 recommended suspension of interest for this period, but
17 we believe that the entire 23 months should be
18 deducted.

19 After the release, work did not begin again on our
20 case until December, another six-month delay. We were
21 told at this time that our hearing officer had moved on
22 and we could either have a new hearing or go to a new
23 officer and have her consider the evidence from the
24 previous hearing and rule on it.

25 We agreed to the new officer, and she finally

1 requested additional information in December. And
2 correspondence went on between her and our expert for
3 two months through February 2016. And finally, on
4 May 16th, 2016, the D&R was issued. This means that
5 five more months of delay had elapsed, from December to
6 May, when the case was supposed to be considered a
7 priority assignment.

8 The D&R requested yet another re-audit. So the
9 re-audit was initiated and finally completed on
10 May 1st, 2017, another 12 months and two auditors
11 later. This is the third re-audit and shouldn't have
12 taken more than four months. Since we disagreed with
13 the re-audit because we felt that still many of the
14 recommended changes from the D&R were still not
15 incorporated, we requested a Board hearing, and one was
16 scheduled for May 24th, 2017.

17 Due to some issues on our side, we requested to
18 reschedule, and it was extended until October. But
19 regardless, in August it was cancelled by BOE saying it
20 was scheduled prematurely as work was still being done.

21 After this additional work was done, the third
22 audit was considered complete in October 2017. Another
23 five months of work were added to the 12 months already
24 elapsed. We reviewed it and still disagreed. So in
25 January 2018, mind you eight years after the audit had

1 begun, we still felt significant issues had not been
2 addressed. So we were told the audit would be
3 transferred to OTA when we disagreed.

4 We waited for notification that it had been sent.
5 In June 2018 we were still waiting, so we reached out
6 to Dana Brown, who responded that it had not been sent
7 to OTA yet because, quote, petitions tells me that OTA
8 may not have received these appeals yet because there's
9 been some internal issues since we have a new system.

10 In July we were still waiting for it to get to OTA.
11 So in December 2018, we had it sent in for settlement
12 review. This means that from January until December,
13 12 months, had elapsed as we waited for the audit to be
14 transferred to OTA.

15 In July 2019, seven months later, we're sent a
16 settlement offer that was very still significantly
17 different from what we believed was the tax due. So in
18 April 2020, they closed the settlement case, another
19 nine months after the offer was made, and still the
20 appeals never gets sent to OTA.

21 In October settlement says they still have it, it's
22 under review. And in November 2020, CDTFA informs OTA
23 that settlement discussions are concluded and the
24 appeal can continue. So we request a hearing.
25 Settlement discussions took from December 2018 until

1 November 2020, 23 months to be completed.

2 In December 2020, we submitted our opening brief.
3 Throughout this period, as the taxpayer we've been
4 relying on the advice of our expert as to where the
5 appeal was headed in terms of what amounts of tax
6 should be due and what he felt the ultimate conclusion
7 would be.

8 Initially, way back in 2009, we were working on the
9 assumption that tax due would be around \$30,000. As
10 time went on and various rulings were made, this number
11 went up. However, some issues were clearly not being
12 addressed, and the new auditors coming on the case kept
13 refusing to make adjustments recommended by the hearing
14 officers and previous auditors.

15 By December 2020, our expert recalculated what he
16 believed our tax liability would be and we made a
17 \$60,000 payment to show our good faith intention that
18 we really wanted to resolve this.

19 On October 28th, 2021, OTA assigned our audit to a
20 subject matter expert for review. That was ten months
21 after our opening brief. This process was supposed to
22 occur within 120 days, according to the correspondence
23 sent to us.

24 Finally, our hearing date today was set. Today is
25 14 months since the opening brief was submitted. In

1 total, our audit has spanned 14 years, five-plus
2 auditors, two hearing officers, has been in BOE
3 petitions section, BOE appeals division, CDTFA
4 settlement section, and in OTA. We assert that
5 throughout this entire audit process there was
6 excessive delay and restarts that made our audit
7 prolonged.

8 According to our expert, he believes the most time
9 it should have taken to get to this point would be
10 about six years. And this is without considering that
11 if changes that we were told were going to be made had
12 been made, we may have settled this way before a
13 hearing was necessary.

14 In addition to delays in the actual processing of
15 the audit itself, during these years several things
16 beyond our control happened that were extraordinary in
17 nature and we believe must be considered. First, the
18 Department went through a structural change from BOE to
19 CDTFA and set up a new system for hearing appeals.
20 This process arguably added delay to our audit moving
21 forward.

22 In addition, it is our understanding that during
23 this switchover the new board, yourselves, did not even
24 hear any sales tax hearings during the first year,
25 which was 2018. This switch was most likely the cause

1 of some of the delays during that period. And, of
2 course, there were two years of COVID shutdowns and
3 business interruptions that have been unprecedented in
4 our lifetime. This undoubtedly added to the length of
5 time it took for the audit to get out of settlement to
6 OTA and the time when our opening brief was submitted
7 to when the matter was assigned to a subject matter
8 expert. All of these have added to the extensive
9 delays and should be part of consideration for interest
10 relief.

11 Lastly, we would argue that interest rates during
12 this period were essentially at zero percent for much
13 of this time, yet the interest being charged to us is
14 at 6 percent throughout.

15 In closing, we ask that you consider all of these
16 facts and know that we feel we were severely prejudiced
17 in our ability to actually resolve this audit and pay
18 the tax owed. Every time what we considered to be a
19 fair adjustment that was supposed to be made, it never
20 was and, thus, we were never given the opportunity to
21 see a fair audit on our business and pay the
22 appropriate tax.

23 Please ask yourselves: Is this process meant to be
24 punitive or is it meant to remedy and error on our
25 part? We did make a mistake by not paying the right

1 tax up front, but we did not do it on purpose or with
2 the intent to defraud. Throughout this entire
3 process -- sorry -- we have tried to get a fair
4 assessment of the taxes owed. Sorry.

5 We are asking that you judge our case on the basis
6 of fairness. We believe that due to all the factors
7 detailed, about a minimum of 96 months of interest
8 should be deducted from our bill. And what I put on
9 the area in the black are what I thought was excessive
10 time or what we thought was excessive time, it actually
11 adds up to 106 months. So, I mean, we're asking for a
12 minimum of 96. And I -- and I certainly hope you will
13 consider.

14 MR. KIMSEY: I'd like to point out in Michelle's
15 presentation there are -- there were some estimates on
16 our part as to how long we think this process should
17 have taken. Those estimates of time are from my
18 experience, 29 years as an auditor, 29 years. Included
19 in that 29 years was a lot of time spent as a -- on a
20 supervisor. So I have a lot of experience -- and over
21 20 years in private practice.

22 So I know how long these processes should take or
23 would reasonably take. So our estimates of the amount
24 of time are based on over 50 years of experience in
25 this process. So they weren't just picked out of the

1 air.

2 All right. Now, the last -- and I'll try to make
3 this brief. The last adjustments, the last category of
4 adjustments was whether the measure -- if there should
5 be any adjustments warranted to the measure of
6 unreported taxable sales.

7 CDTFA auditors concluded on Schedule R4-12A, this
8 being the last re-audit group of working papers, that
9 there was a credit -- there were credit differences
10 between total taxable sales derived from the income
11 statements and they differed from the reported taxable
12 sales for third quarter 2005 and fourth quarter 2005.

13 That would indicate that there was an
14 over-reporting in those two quarters. However, these
15 credits, these apparent credits were not allowed as
16 credits in the audit calculations. The amount of those
17 credits measured in tax -- measured in measure of tax
18 was 90,221 in the third quarter and 24,223 in the
19 fourth quarter. Our contention is that these credits
20 should certainly have been allowed in the audit. The
21 total amount of tax is roughly \$8,297 for this
22 category.

23 The reasoning given by CDTFA staff for not allowing
24 the overpayments is, quote, Appellant did not provide
25 documentation substantiating the overstated taxable

1 measure, end quote. On schedule R4-12A, the source of
2 the data for Column E, which was the total revenue, was
3 the income statements. It was from the income
4 statements for the entire audit period.

5 And so for the remaining part of the audit period
6 excluding these two quarters, the income statement data
7 was used as the only source for the remaining ten
8 quarters in the audit period and was considered
9 accurate, complete, considered accurate. Why wasn't
10 the same data, the same source of data, considered
11 accurate for the third and fourth quarter 2005?

12 It seems very clear to us that CDTFA staff has by
13 way of their own audit procedures already supplied all
14 the documentation that would be needed to document the
15 over-reporting of taxable measure. CDTFA staff in
16 calculating the audited taxable measure for all
17 quarters in the audit has already accounted for all of
18 the total revenue of the corporation. And they said
19 that it was accurate except for those -- somehow except
20 for those two quarters.

21 They've accounted in those -- in the audit period,
22 they've accounted for all of the taxable revenue.
23 They've accounted for all of the nontaxable revenue.
24 This same source of data for all income categories was
25 used by the auditor and accepted as accurate. So if

1 all income is accounted for and accepted as accurate,
2 why then shouldn't Adventures by the Sea be given
3 credit for all the taxable measure that they reported
4 in those two quarters?

5 But -- and by the way, we've tried to find the
6 sales tax worksheets for those two quarters in
7 question. But since it's been over 17 years ago, by
8 now we couldn't -- we couldn't locate the worksheets.
9 We couldn't even find copies of the sales tax returns.
10 We had to get those from CDTFA.

11 We don't know -- but now CDTFA wants to put all of
12 the burden on us to prove what was reported 17 years
13 ago. We do know that data on the income statements was
14 accurate and CDTFA auditors after reviewing the
15 business records since 2009 could find no instances
16 where the income statement data was inaccurate. They
17 could find no instances of that. They accepted the
18 income tax statements as being accurate. But now they
19 say those two quarters in 2005 were not accurate. And
20 that -- this just popped up. It wasn't as if we knew
21 about this ten years ago. This just popped up. It
22 just -- it makes no sense to us.

23 I would like to have Michelle just briefly tell us.
24 Where did the income tax numbers -- no, excuse me --
25 where did the income statement numbers come from?

1 MS. KNIGHT: So in the business we had daily sales
2 reports. And they were compiled into a P&L through
3 QuickBooks, or at the time I think part of it was
4 Quicken. So we had daily sales that were then entered.
5 And then the accountant took the information that I
6 provided and then they ran the reports. So that was
7 the only source though they had. They used my data.
8 And it was done by daily input sheets.

9 MR. KIMSEY: Okay. Thank you, Michelle.

10 That concludes our presentation on this.

11 ALJ KWEE: Okay. Thank you. So I am going to ask
12 CDTFA, did you have any questions for the persons who
13 provided testimony today?

14 MR. SMITH: No, we do not.

15 THE COURT: Okay. I have a couple questions and
16 I've got to check with my panelists if they have
17 questions too. I guess I'll start.

18 So just as a matter of clarification for
19 Appellant's representative, my understanding was that
20 an allowance was made for the tour guide and the issue
21 that we're looking at is the rental, the amount
22 allocable to the rentals of the equipment, like the
23 kayaks, the wet suits, the bicycles and -- the wet
24 suits, bicycles, kayaks, and -- yeah. Is that correct?

25 MR. KIMSEY: The tour -- the portion for the tour

1 guide has been eliminated out of the tour guide rental
2 income. That's correct. For both bicycles and kayaks.

3 ALJ KWEE: Okay. Great. And as far as the -- I'm
4 sorry, are you ready to proceed?

5 MS. KNIGHT: But I think the contention is, is the
6 tour income as a whole, not just the tour guide portion
7 should be not considered a taxable sale.

8 THE COURT: Oh, yes. I understand.

9 MS. KNIGHT: Okay.

10 ALJ KWEE: I just wanted to make sure I understood
11 what was already conceded by CDTFA. And I understand
12 that, that there's a dispute as to the remaining
13 portions on multiple bases. But, yeah, I did have a
14 couple other questions about that.

15 So I do see some invoices for, like, the wet suits
16 and the life vests and I see that you had estimated an
17 average of \$350 for the cost of kayaks. But I'm not
18 sure if I saw an invoice for kayaks or where that
19 dollar amount came from. Did I -- was there
20 documentation to support the estimated kayak cost in
21 the file?

22 MR. KIMSEY: I'm -- I don't think we -- we -- I
23 don't think we put in an invoice in our exhibit for the
24 cost of the kayaks, but maybe Michelle or Frank can
25 emphasize that for us.

1 MR. KNIGHT: So going back 15 years? Okay. The
2 kayak -- the -- we've always used the same brand kayak.
3 It's called Ocean Kayak, and it was bought by Johnson
4 Sports -- Outdoor Sports many, many years ago. Back in
5 the day those days, you know, kayaks were about \$300.
6 Today if you went into an REI to see the same kayak,
7 they're about seven, \$800. And so -- and the cost of
8 oil -- I mean the cost of the kayaks have gone way up.

9 So did that answer --

10 MS. KNIGHT: I think that's working from --

11 MR. KNIGHT: You know, yeah. Just -- that's about
12 the rounding, you know.

13 ALJ KWEE: Okay. And for the invoices that are
14 attached as exhibits, are those partial invoices just
15 to give a sample of the prices paid, or were those a
16 complete invoices for the period? I guess I just
17 wasn't clear whether that was being offered as a sample
18 or a complete set of documents.

19 MR. KIMSEY: They were not the total invoices for
20 those categories for that period. They couldn't be
21 located by that time for that period. But they were
22 buying all of the kayaks, all of the life vests, and
23 all of the wet suits from the same companies during
24 that time. And all of the costs that I had in my
25 calculation were from invoices during that period of

1 time. Even the kayaks. So I just -- for some reason
2 we didn't have a copy of that invoice in here.

3 ALJ KWEE: Okay. I guess my -- yeah, my question
4 was just geared towards understanding if they were all
5 purchased in the same manner so these, you know,
6 invoices reflect of tax paid and if they were from
7 different, you know, suppliers or if they were charged
8 differently during the data period or if they were all
9 treated similar to how this happened with these
10 invoices during the audit period.

11 MR. KIMSEY: One of the problems we were having
12 with gathering all of these invoices were that they
13 were handled differently for depreciation purposes.
14 They were only depreciated, capitalized, if it was
15 above a certain amount. If it was below a certain
16 amount, IRS required that they were expensed or
17 recommended that they were expensed.

18 So we didn't have -- we didn't have depreciation
19 statements that would give us a full picture. We
20 didn't have all of the expense journals either for that
21 period of time. But we pulled out all of the invoices
22 that we could get our hands on for that period of time.
23 And unfortunately, it wasn't a lot. But we thought,
24 well, because of the fact that you're buying them all
25 from the same vendor, I mean, by category the same

1 vendor, then we wanted to give them, the auditors, a
2 sample of those invoices to show that tax was paid on
3 those.

4 We did give them copies of some purchase -- well,
5 some reports that were showing all of the expenses and
6 the vendors for a certain period of time. And they
7 could see that we were buying the stuff from the same
8 vendors continuously. So it wasn't as if they would
9 see, you know, like a purchase from REI for instance or
10 any other sporting goods company for these items.

11 Does that answer your question?

12 ALJ KWEE: Yes, I think that's good. Thank you.
13 And as far as the wet suits and the life vests, were
14 they both always offered with the kayak, or was it a
15 case where you could have a life vest but no wet suit?

16 MR. KNIGHT: Yeah, that's a good question. You
17 know, with our business, obviously we have to have a
18 strong liability insurance. So absolutely. You have
19 to -- you have to wear the proper gear in case you fall
20 out of the boat. These boats are, you know, they're
21 open top. You can fall out. You've got to get back
22 in. It's another reason why we want you on a tour so
23 the tour guide can help you back in. But it -- it's
24 always mandatory to wear those things.

25 As well as keep in mind, we're not a -- we're not

1 like an REI, you know. We're, you know -- our business
2 is rentals and tours and mainly being on the tour side.
3 So we're not buying equipment every month, six months.
4 Even, like, you know, years can go by and we won't buy
5 new equipment in the sense of we might buy a few dry
6 bags or, you know, just little things, you know,
7 bottled water, things like that. But we don't buy
8 kayaks and bikes every year. Because they last.
9 They're -- we have some boats that have lasted a long,
10 long time.

11 MS. KNIGHT: And I want to clarify. Life vests
12 absolutely all the time. The kayak clothes, I can't
13 tell you every single person takes them. But the
14 majority of people do because the -- because of the
15 fact we're just there in Cannery Row and people are
16 usually there for the day. They are wearing their
17 street clothes and they come in and they want to go
18 kayaking, and this -- that's why we have this type of
19 equipment, so they can go on right over their clothes.
20 They're splash clothes.

21 So in order to stay dry, because the sit-on-top
22 kayaks have self-draining so the water comes up. So
23 although I can't say 100 percent of the people wear the
24 dry clothes, they certainly do mostly -- most I'd say
25 most of them wear the pants, if not all, but they

1 have -- the life vest is absolutely non-negotiable.

2 MR. KNIGHT: The water -- it's not a secret, the
3 water is 55 degrees in the Monterrey Bay. So it could
4 ruin your day, your child's day, whoever you take --
5 you take, you know, moms, dads, grandmas, grandpas,
6 kids. Our goal is to keep them dry and warm so when
7 they come back, they drop the clothes and they go, "Oh,
8 this was great. I thought I was wet, but I'm not.
9 I'm -- this is awesome," you know, and they're off to
10 go to the aquarium or something like that. So the
11 clothes are, you know, just as important, if not more,
12 for the experience of the tour for the kayak.

13 ALJ KWEE: Okay. And that's helpful. I thought
14 that they were talking about the wet suits that you
15 strap on, not something that keeps you dry. That does
16 help clarify now.

17 MR. KNIGHT: It's actually -- yeah.

18 MS. KNIGHT: They're dry clothes. Well, they're
19 not really dry clothes if you're a diver. It's
20 different. They're called splash gear.

21 MR. KNIGHT: Yeah.

22 MS KNIGHT: So they go on over you to to keep you
23 dry when the water splashes on you.

24 MR. KNIGHT: Yeah.

25 MS. KNIGHT: So then when you come out and you take

1 it off, you're dry.

2 MR. KNIGHT: We actually have -- we do a lot of
3 corporate tours and things. And they're getting out of
4 their meetings and they come across the street from the
5 Plaza or, you know, the other hotels. You know,
6 they'll take their tie off, their jacket off, and
7 they'll put -- they'll put the pants and the jacket
8 right over their shirt and pants and, you know, an hour
9 and a half later they're coming back. They drop it,
10 they put their clothes back on, and it's -- makes it a
11 lot -- you know, it's good.

12 ALJ KWEE: Well, great.

13 MR. KNIGHT: And one more thing. When it comes
14 for -- you know, we do a lot of group kayak tour
15 business. It's mandatory for the corporate groups to
16 take the tour. And that's not just from us. That's
17 from the company. If you work for Hewlitt Packard,
18 they want you on a tour because they don't want you out
19 on your own. They want to make sure they have a safety
20 person with that, you know -- again, because we've got
21 to keep everyone together.

22 Somebody goes off side, you know, outside the --
23 you know, someone goes out to left field, we've got to
24 go get them and bring them back and get them back into
25 the tour.

1 ALJ KWEE: Okay. Great. Thank you for the
2 clarification. So I just had one other question and
3 that was related to the initial issue raised on whether
4 or not it was a sales or use tax transaction. And I
5 just wasn't sure. How did you acquire the kayaks then?
6 Were they shipped? Were they delivered in person or
7 shipped from out of state or were they delivered in
8 California?

9 MR. KNIGHT: No. They're all shipped like in a
10 big, old Freightliner yellow --

11 MS. KNIGHT: Yeah. They call us and they show up
12 with -- you know, we call it Tupperware, with a
13 truckload of Tupperware.

14 ALJ KWEE: Oh, so there was just like I guess a
15 common carrier that delivered it for you?

16 MR. KNIGHT: Yeah.

17 MS. KNIGHT: Yeah.

18 ALJ KWEE: Okay.

19 MR. KIMSEY: Can you just briefly describe what the
20 salesmen from the company did in California that you're
21 aware of.

22 MR. KNIGHT: Well, they would -- I mean, they
23 always -- they drive by with their -- you know, maybe
24 biannually or annually or whatever. You know, they
25 would come by and show us their new models of kayaks,

1 you know.

2 Our vision was always -- we always kept it with an
3 open top. You've seen some of the kayaks where people
4 are in and they've got the skirt and they do the roll
5 and all that stuff. That's not us. We've never had
6 those. The liability is too high. And people have
7 gotten a lot of -- you know, when they fall out they
8 can't get back in, and you're in 55 degree water, you
9 know.

10 But they -- the salesmen would come by. We always
11 bought the same boat, you know. It was the Scupper
12 Pro. And, you know --

13 MS. KNIGHT: The tandem.

14 MR. KNIGHT: And we had tandem boats called the
15 Malibu Twos. It was the right fit for our company.

16 MS. KNIGHT: And like we said, kayaks last forever.
17 So the only -- usually we might sell some at the end of
18 a year, but not many. And then so we very rarely
19 replaced the boats. And instead, when you see new
20 purchases, they would only be maybe when we opened
21 another store so we needed more equipment.

22 MR. KNIGHT: Yeah. And what's happened too over
23 the years, you know, other people have opened other
24 kayak stores so we didn't need the boats that we needed
25 in the beginning of our business, you know. Our

1 business has been going on for 35 years. So we
2 actually have kayaks that are over 30 years old.

3 MS. KNIGHT: Yeah.

4 MR. KNIGHT: And the joke is we don't want to sell
5 them because we think they're good luck so we just keep
6 them. We don't use them -- you know, the tour guides
7 will use them, but -- because they're made out of the
8 polyethylene, they're -- I've had a kayak blow off the
9 trailer on the highway, do a quadruple flip --

10 MS. KNIGHT: Not hurt anyone.

11 MR. KNIGHT: Not hurt anyone. And circle back and
12 go get it, put it back on. And it's good to go and,
13 you know, they're very indestructible.

14 THE COURT: Okay. Thank you. That was all the
15 questions I had for the Appellant and the Appellant's
16 witnesses. I will turn it over to Judge Long.

17 Judge Long, did you have any questions for the -- I
18 guess the Appellant?

19 ALJ LONG: I do have a -- I'm sorry, can you hear
20 me? I do have a few questions. First, I wanted to
21 discuss the 23.28 percent calculation for the life
22 jackets and et cetera.

23 How did you come upon that calculation and how can
24 I, from everything that's been submitted here, verify
25 its accuracy and, you know, see if I agree?

1 MR. KIMSEY: The calculation, we came up with at
2 the time of the appeals hearing. And it's explained
3 and shown in our opening brief, but I'll briefly go
4 over it just quickly with you. We took the cost of wet
5 suits, an average cost of a wet suit. We took the
6 average cost of life vests. Totaled that together.
7 That would be the numerator in our calculation.

8 And then for the denominator, we would take that
9 number, cost of -- average cost of wet suits and life
10 vests, add the cost of the kayak to that number. That
11 would be the denominator in the calculation. It comes
12 out to be 23.32 percent.

13 So what that represents is the cost of the
14 taxable -- the cost portion of the life vests and the
15 wet suits that were tax paid divided by the total cost
16 of the equipment -- all the equipment in that rental.
17 So that's -- and we -- those costs for the life vests
18 and the wet suit are in our exhibits as well, the
19 calculation of that cost. It's handwritten on the
20 invoices for those items.

21 ALJ LONG: Thank you. And I just wanted to
22 confirm. Your position is that the kayaks were
23 purchased from Johnson and that Johnson was required to
24 collect sales tax but they did not. As I'm sure you're
25 aware, with rentals and leases, they're subject to tax

1 unless sales tax reimbursement was paid or a timely
2 election to pay use tax was made.

3 I just want to be clear that there's no contention
4 that Appellant made an election to pay the use tax;
5 correct?

6 MR. KIMSEY: I'm aware of that. Our contention is
7 that under the regulation for engaged in business it
8 specifies clearly that they "shall" collect the tax.
9 That event took place long before the event of the --
10 of Adventures by the Sea.

11 So we believe that that, the language "shall
12 collect the tax," that trumps the activity that
13 Adventures by the Sea did subsequently with that
14 merchandise. I mean, there's no -- there's no ifs,
15 ands, or buts in that section of law. It says they
16 shall collect the tax. They did not. That was their
17 obligation. They did not.

18 If they would have taken a resale certificate, then
19 that would have been their out, but they did not take a
20 resale certificate from Adventures by the Sea. So it's
21 their obligation. That's our position. It's their
22 obligation. The law says they shall collect the tax.
23 They did not collect the tax. They should have. Even
24 if they're not aware of it. Even if they're not aware
25 of that section of law, it's still their obligation.

1 ALJ LONG: Okay. Thank you. I don't have any
2 questions.

3 ALJ KWEE: Okay. I will turn it over to Judge
4 Hosey.

5 Judge Hosey, did you have any questions for
6 Appellant?

7 ALJ HOSEY: No. You guys have been really
8 thorough. Thank you for answering all our questions
9 and your time today. Thank you.

10 ALJ KWEE: Okay. I believe we are ready to turn it
11 over to CDTFA for their opening presentation, which we
12 had allocated for 20 minutes, but I believe the CDTFA
13 indicated that they only need ten.

14 And in your response for CDTFA or in your
15 presentation, would you please address also the
16 contention raised by the taxpayer about the use tax
17 collection obligation in 6203 and what impact that has
18 on the liability or CDTFA's position on that contention
19 too. Thank you.

20 MR. SMITH: Thank you.

21
22 PRESENTATION

23 BY MR. SMITH, Attorney for the Respondent:

24 Good morning. At issue today is whether
25 adjustments are warranted to the measure of unreported

1 taxable rental receipts and whether adjustments are
2 warranted to the measure of unreported taxable sales.

3 Appellant operates as a destination management
4 company in Monterrey, California. Appellant offered
5 rentals of kayaks, surries, bicycles, and surfboards,
6 as well as various tours and surf lessons. Appellant
7 also offered tour packages for bicycles and kayaks,
8 which included the price of equipment as well as the
9 tour guide for one lump-sum price.

10 California imposes sales tax on a retailer's retail
11 sales in this state of tangible personal property
12 measured by the retailer's gross receipts unless the
13 sale is specifically exempt or excluded from taxation
14 by statute. When sales tax does not apply, use tax
15 applies to the storage used for other consumption of
16 tangible personal property in California unless that
17 use is exempt or excluded.

18 The terms sale, use, and purchase includes the
19 lease of tangible personal property in this state.
20 Leases of tangible personal property in California are
21 a continuing sale in this state by the lessor. The
22 granting of possession of the property by a lessor to
23 the lessee or to another person at the direction of the
24 lessee is a continuing purchase for use in this state
25 by the lessee.

1 In the case of a lease that is a sale and purchase,
2 the tax is measured by the rentals payable. Generally
3 the applicable tax is a use tax upon the use in this
4 state of the property by the lessee, and a lessor must
5 collect the tax from the lessee at the time rentals are
6 paid.

7 Turning first to Appellant's assertion that its
8 vendor had a tax collection obligation because it was
9 operating in this state. California Code of
10 Regulations Title 18, Section 1660(c)(2), states that
11 if sales tax reimbursement or use tax has not been
12 paid, a lessor is relieved from an obligation to
13 collect use tax from a lessee only if the lessor
14 reports and timely pays tax at the time the rental
15 property is placed in service.

16 Appellant's contention that its vendor may have had
17 a use tax collection obligation does not change the
18 fact that it did not pay use tax on its purchases of
19 the kayaks. It is undisputed that Appellant did not
20 pay its vendor's use tax on its purchases of the kayaks
21 at issue. Consequently, Appellant is required to
22 collect the use tax and is liable for the tax on rental
23 receipts derived from its lease of the kayaks.

24 As for the rental receipts derived from taxpayer's
25 lease of clothing related to kayaking, taxpayer

1 provided purchase invoice which show it paid some tax
2 on at least some of its purchases of these items and a
3 2 percent allowance was given by the Department. This
4 reduced the measure of taxable kayak rentals by
5 \$18,946. Without further documentation, an additional
6 reduction is not warranted.

7 Next, Appellant contends that the kayak and bicycle
8 tour income is not subject to tax. Specifically
9 Appellant contends that because there was a tour guide
10 the bicycles and kayaks were not under the control of
11 its customers and it is not a lease. This is not
12 correct. While Appellant may have had tour guides
13 leading it customers, the operation of the bicycle and
14 kayaks were under the direction and control of the
15 customers. The customers operated the kayaks and
16 bicycles, propelling and steering them. These
17 transactions were leases under Regulation 1660.

18 Annotation 330.2889, which has been in effect since
19 1970, predating the Annotation Appellant referred to,
20 which was 330.2283, states that in order to provide a
21 service rather than lease equipment, the owner must not
22 only furnish and supervise use of the equipment, they
23 must actually operate the equipment. Here Appellant's
24 customers were operating the bikes -- bicycles and
25 kayaks.

1 Further, Annotation 330.2283 which Appellant
2 referenced has been deleted because the back-up letter
3 did not contain sufficient information to support the
4 conclusion of the annotation.

5 Turning to his next contention, Appellant contends
6 that a credit should be allowed for the third and
7 fourth quarters of 2005. The audit disclosed that the
8 reported taxable measure exceeded total taxable sales
9 from income statements for the third and fourth
10 quarters of 2005. However, Appellant has failed to
11 provide any documentation establishing the source of
12 the difference. Therefore, an adjustment should not be
13 allowed.

14 Finally, turning to interest relief in the periods
15 that you specifically asked about. You asked for
16 further explanation regarding the time that the appeal
17 spent in settlement. Appellant requested settlement
18 review in December 2018 and a deferral or request was
19 submitted to OTA. We have contacted the settlement
20 section, and I have been informed that this case was
21 within a range of a reasonable and standard turnaround
22 time frame for settlement review of this case.

23 We were also asked in the minutes and orders to
24 address the period from January 26, 2018, when CDTFA
25 indicated the appeal was going to be transferred to OTA

1 to the start of the case activity by OTA around
2 August 30th, 2018. Appellant was not informed on
3 January 26, 2018, that its appeal would be transferred
4 to OTA. Instead, Appellant was sent a letter informing
5 him of the results of the second re-audit and giving
6 him 30 days to file a request for reconsideration.
7 Appellant did not file a request for reconsideration
8 and the audit went final. The appeal would have then
9 been transferred to OTA.

10 OTA acknowledged receipt on August 30th, 2018. The
11 next step for Appellant would have been filing its
12 opening brief with OTA. Appellant requested multiple
13 extensions to file its opening brief before eventually
14 deferring the case to settlement. Appellant did not
15 file its opening brief until December of 2020. No
16 interest relief should be grant granted for the period
17 of January 2018 through August of 2018.

18 And then just turning briefly to his argument
19 regarding 6203. That applies for retailers. The
20 person that was selling them the kayaks is not a
21 retailer in California, so that would not apply to
22 them. And regardless, you -- I know they think that
23 they should be registered as a retailer in California,
24 but they were not so the tax obligation remains on
25 Appellant.

1 And that concludes my presentation. Thank you.

2 ALJ KWEE: Okay. Thank you. Just one second while
3 I look at my notes. Actually, I'm going to start with
4 Judge Long.

5 Judge Long, did you have any questions for CDTFA?

6 ALJ LONG: No questions. Thank you.

7 THE COURT: Okay.

8 Judge Hosey, did you have any questions for CDTFA?

9 ALJ HOSEY: No questions. Thank you for your
10 presentation.

11 ALJ KWEE: Okay. I did have one question about the
12 DMC delay period from I think '13 to '15, the two years
13 while it was held in abeyance pending potential
14 guidance which didn't -- my understanding didn't
15 ultimately materialize for DMCs. So I'm just wondering
16 about whether or not CDTFA has guidance on why that
17 doesn't qualify as a delay or if there's guidance that
18 you could cite to and how that is dealt with in other
19 cases by CDTFA.

20 MR. SMITH: Well, that was the time period from
21 January 2014 to May 2015, which is -- we did recommend
22 that period for interest relief.

23 ALJ KWEE: Oh, '14 -- I thought that they had a
24 two-year period from June '13 to, like, June '15. So
25 I'm not sure that was a complete overlap there I guess.

1 So if you look at their -- I guess looking at their
2 materials, they had highlighted the DMC period as
3 5/18/11 -- oh, I'm sorry that's too soon. That's
4 before the DMCs -- 5/28/13, when they were suspended
5 working on the case until 6/16/15 for DMCs. And then
6 you -- my understanding is CDTFA conceded 17 months
7 there. I guess that's not the entire period. It looks
8 like it would have been 24 months.

9 MR. PARKER: Judge Kwee, to answer that, the case
10 was with the appeals section during that time. And it
11 looks like eventually it was referred back to petitions
12 to put in delayed status. So they were -- they were
13 still going through the process in the appeals
14 section --

15 ALJ KWEE: Oh, okay.

16 MR. PARKER: -- is what it appears. From
17 June 13th, 2013. And then it was referred back to
18 petitions in December of 2013.

19 ALJ KWEE: Okay. I see. Thank you. Oh, and I'm
20 sorry. There was one other question about the
21 calculation of the 2 percent allowance for the tax paid
22 life vests and wet suits. You know, there's the
23 difference of what the CDTFA has, the 2 percent, versus
24 the calculation the taxpayer has, the 23 percent. And
25 it looks like they were using the -- a ratio based on

1 the cost of the tax paid property.

2 And I'm wondering, is the reason CDTFA didn't go
3 with the taxpayer's calculation, was that -- was there
4 a dispute as to estimated costs or was there -- or what
5 was the reason that CDTFA chose 2 percent versus a
6 greater percentage considering the invoices did seem to
7 suggest that the -- like there was a cost for the, you
8 know, life vests and -- or life vests and the dry
9 suits. I was saying wet suits. But that seems a
10 little higher than 2 percent of the overall costs.

11 MR. PARKER: So because the Appellant only provided
12 limited invoices and they couldn't be traced back to
13 see if they actually paid tax on all of those items, we
14 looked to see what would be a reasonable estimation,
15 and the 2 percent seemed to be a reasonable amount.
16 And when we had calculated based off the kayak rentals
17 of 947,000, 2 percent gives them a credit of almost
18 19,000.

19 The invoices they provided, which some of them were
20 outside of the audit period, but those invoices
21 amounted to a little over 12,000. So we gave them a
22 credit higher than the limited invoices that they did
23 provide.

24 ALJ KWEE: I see. So the concern was the invoices
25 were partial and that the allowance granted was in

1 relation to the invoices that were available as to what
2 they were I guess contending that maybe they were a lot
3 more substantial than what was provided?

4 MR. PARKER: Yes. I believe I agree with your
5 statement.

6 ALJ KWEE: Okay. Then I don't believe my panelists
7 had questions so I think we're ready to move on to any
8 closing remarks. I'll turn first to Appellant's
9 representative for Appellant. Did you want to proceed
10 with your closing remarks? You have ten minutes.

11 MR. KIMSEY: Could you say that one more time? I
12 didn't catch all that.

13 ALJ KWEE: Oh, I was turning it to you for any
14 closing remarks that you might have before we conclude
15 today.

16 MR. KIMSEY: Okay.

17 First of all, I'd like to thank the administrative
18 law judges for hearing our case and CDTFA staff for
19 listening to our presentation today. And we hope that
20 it's -- that it's made our contentions a little clearer
21 and that our documentation has supported our
22 contentions.

23 The entire process from when the audit was
24 initiated in 2009 up to today has taken approximately
25 14 years. And I honestly can say that it's not been a

1 very enjoyable experience for this side of the -- of
2 the room. I've been involved in sales tax auditing for
3 over 50 years, including 29 years as a sales tax
4 auditor and sales tax audit supervisor and assistant to
5 one of the Board of Equalization board members, and now
6 22 years in private practice after my retirement from
7 the State as a sales tax consultant. And during that
8 entire time, I can honestly say, I've never, ever seen
9 an audit take this long to get to a resolution.

10 It's been an unbelievable situation that has been,
11 in my mind, totally unfair to the corporation, to the
12 corporate officers. And when the audit and appeal
13 process takes this long to complete, there's obviously
14 some unreasonable delay somewhere along the line.
15 Michelle Knight has pointed out those areas that we
16 think were unreasonable and has calculated amount of
17 time that we think this delay took place or these
18 delays took place.

19 In this whole process of auditing and appeals, the
20 State has almost all of the control over how fast this
21 whole process takes. The taxpayer has very little
22 effect on the processing timetable except maybe for
23 asking for some periodic short delays or extensions in
24 some situations beyond their control. Because this
25 overall process has taken approximately 14 years to

1 complete, interest has been accruing all the way back
2 to the beginning of the audit period, which was July of
3 2005, which is, what, 17 and a half years ago for
4 interest to be accruing at roughly a 6 percent annual
5 rate.

6 I think I've covered all of our contention issues
7 with the audit results adequately, and I hope that you
8 consider our presentation and documentation with an
9 open and fair mind. And we very much appreciate the
10 time you all have to -- the time all of you have taken
11 to commit -- committed to our appeal.

12 On CDTFA's response, I didn't catch what your
13 explanation was for why Johnson Outdoors would not be
14 liable but Adventures by the Sea would. I didn't catch
15 all that. Maybe it's because of the mask, I'm not
16 sure. But could you go over that?

17 ALJ KWEE: Oh, so I guess the parties aren't
18 supposed to be discussing amongst themselves the case.

19 MR. KIMSEY: Okay.

20 ALJ KWEE: So when CDTFA has their closing
21 presentation, if the panel has questions, I could ask
22 them to clarify -- CDTFA to clarify for the panel. But
23 for your presentation, if you could please focus on
24 your presentation, that would be much appreciated.
25 Thanks.

1 MR. KIMSEY: The other thing I would like to
2 respond to, as far as the tax paid status of the wet
3 suits and -- the wet suits and the life vests, yeah,
4 all of the equipment in the rental. During the appeals
5 process in our appeals hearing that we had, the appeals
6 hearing even mentioned -- the D&R even mentioned this,
7 that it was conceded by the audit staff that these were
8 tax paid equipment based on the evidence that we had
9 presented to them. This was conceded. It's even
10 talked about in the D&R that this was a concession that
11 the audit staff had made.

12 It only became a problem when, after the D&R was
13 issued, that the auditor that got the assignment
14 decided that, well, she didn't agree with that. She
15 didn't agree that this was a -- an issue that had been
16 established. So she said, based on her own, she wasn't
17 going to go along with the D&R report but she was going
18 to make up her own mind whether these were tax paid or
19 not. That's how this all came about, because when we
20 got the re-audit, that adjustment wasn't made.

21 We contacted the hearing officer. And, as I
22 recall, the hearing officer had the auditor explain
23 why. But it shouldn't be left up to the auditor to
24 decide if she's going to accept the recommendation from
25 the hearing officer or not. As far as I know, there

1 were no memos back and forth between the two to come up
2 with a different conclusion or not. That's my response
3 to that particular area. The auditor did not make the
4 adjustments that were required under the D&R.

5 That concludes our closing.

6 MR. KNIGHT: Gary, can I say something?

7 MR. KIMSEY: Oh.

8 MR. KNIGHT: So I just wanted to add to when they
9 were talking about the tours, how the individual has
10 their own paddle or their own handlebars to hold onto
11 the bike. When it comes to the tours, one thing I left
12 out and it made me think about it when the man over
13 there brought it up was that a lot of times on the
14 tours, the tour guide, there's a bow line on the
15 tour -- on the front of the boat. So we'll actually
16 attach that bow line to the back of the tour guide so
17 the tour guide or so the -- you know, so the guest has
18 no control of their direction because they need to stay
19 in our safety zone.

20 So it isn't just -- again, you know, with these --
21 with the kayak tours, they're very controlled and even
22 controlled to the point where we have said, "Okay, you
23 need a time out. We're hooking you up." And sometimes
24 we'll hook two, three, four boats up together just so
25 everyone stays together.

1 If you get blown out in the Monterrey Bay, it's not
2 a good thing and we've got to keep you in the kelp
3 forest. So to sit there and say everyone has their own
4 direction, that's really not true. Thanks.

5 ALJ KWEE: I'm sorry, I'm not sure I fully caught
6 that. Did you -- when you were talking about bow line,
7 is that a -- are you saying that the kayaks are
8 connected by a rope or just that --

9 MR. KNIGHT: Yes.

10 THE COURT: -- some of them are?

11 MS. KNIGHT: They can be.

12 MR. KNIGHT: They can be. Yeah. So what
13 happens -- especially with kids, you know, mom and like
14 say you've got your five-year-old and your mom. We'll
15 actually attach the bow line on that boat to the back
16 of the tour guide's boat so they can't do anything
17 wrong. They have to stay with the tour guide.

18 ALJ KWEE: Okay.

19 MR. KNIGHT: They're connected.

20 MR. KIMSEY: That would eliminate the control
21 aspect that was brought up by --

22 MR. KNIGHT: Yeah.

23 MR. KIMSEY: -- CDTFA. And there is --

24 MR. KNIGHT: It keeps you in your lane, you know.

25 MR. KIMSEY: I don't know what other elements of

1 control and direction that they were thinking about.

2 There is no other aspects of control and direction.

3 MR. KNIGHT: So -- and the other thing to remember
4 is being in the sanctuary, you know, we have to stay
5 100 feet away -- well, I think it's 50 feet -- 50 feet
6 away from all the sea otters. And the idea is you want
7 to go out and see the sea otters and the Harbour seals.
8 Mainly the sea otters. They're all wrapped up.
9 They're looking good.

10 And, you know, especially having the Monterey Bay
11 Aquarium there, you know, the reason -- the reason for
12 the tour guides is to keep them from disrupting the sea
13 otters that are in the kelp. So there's total control
14 there. Because there's people on shore with little
15 blue jackets and they're called Bay Net. If we get too
16 close to the otters, they call and they can call the --

17 MS. KNIGHT: CALTIP, it's called.

18 MR. KNIGHT: -- CALTIP. And we get a call or
19 they'll come over, an officer will come over and say,
20 "Hey, there's a violation. You're too close to the
21 otters," or they think you were or, you know, that sort
22 of a thing. Sometimes there are boats, sometimes there
23 are not. But sometimes from land you think you're
24 closer than you really are. But that's a whole other
25 question.

1 But again, it's very controlled in the sense of --
2 even to the point where we tie up the people so they
3 don't get too close to the otters. And to the rocks,
4 and to the waves, and to -- a lot of danger out there.

5 ALJ KWEE: Okay. Thank you. So for Appellant, are
6 you -- have you concluded your final remarks?

7 MR. KIMSEY: We have. We've concluded.

8 MS. KNIGHT: Wait. No. I have one last statement.
9 And I'm -- hope I'm not out of line. I just wanted to
10 respond that the presentation I gave was the
11 information as it -- as it happened to us, as it
12 happened to the taxpayer. If our audit sat in
13 petitions or in -- and then didn't get to whatever,
14 from our perspective, we were told at that date that it
15 was being held.

16 So if technically they held it from the -- instead
17 of from December -- instead of from May until December
18 and then December is when this whole DMC thing stopped,
19 the fact of the matter is, is from our perspective it
20 was being held. We didn't know which division it was
21 being held in or why, but we knew nothing happened in
22 that period. We knew that much. And then we knew that
23 we were told everything had been stopped.

24 So I think that the important point was that --
25 that the delays were real, that they stopped, that work

1 was not getting done, which is why it took 14 years to
2 get here. Thank you.

3 ALJ KWEE: Okay. Thank you. So I'm going to turn
4 it on to -- turn it over to CDTFA for their closing
5 remarks.

6 And, CDTFA, when you do your closing remarks, could
7 you just briefly re-summarize the CDTFA's position on
8 the 6203 argument that was raised by Appellant in their
9 presentation.

10 MR. SMITH: I'll just quickly address that. Here
11 we have leases, therefore, the applicable statute is
12 1660 -- I mean applicable regulation is 1660. The 6023
13 is not the applicable statute in this situation. So
14 hopefully that clarifies.

15 And that's all we have. Thank you.

16 MR. HUXSOLL: Just to add on to that statement.
17 The use tax collection obligation or the potential use
18 tax collection obligation to the vendor does not change
19 the fact that Appellant did not pay use tax on its
20 purchase or sales tax reimbursement on its purchase of
21 the kayaks at issue; therefore, the subsequent lease,
22 absent a timely election being made by Appellant, are
23 taxable measured by the rentals payable. So the fact
24 that there may be a use tax collection obligation does
25 not change the analysis for purposes of the taxability

1 of the leases.

2 ALJ KWEE: Okay. Thank you.

3 So I believe we are ready to conclude. I'll just
4 check with my panelists.

5 Judge Long, did you have anything further before we
6 conclude today?

7 ALJ LONG: I have nothing further. Thank you.

8 ALJ KWEE: Okay.

9 And, Judge Hosey, did you have anything further
10 before we conclude today?

11 ALJ HOSEY: Nothing further. Thank you.

12 ALJ KWEE: Okay. So this case is submitted on
13 Wednesday, February 22nd, 2023. Thank you, everyone,
14 for coming in today. The record is now closed. The
15 judges are going to meet and decide your case later on,
16 and we will send a written opinion with our decision
17 within 100 days of today's date.

18 That concludes the morning calendar. The next
19 calendar will start I believe at one o'clock, but I do
20 not believe that's going to be livestreamed. Thank
21 you.

22 (Conclusion of the proceedings at 11:25 a.m.)

23 ---o0o---

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)

COUNTY OF SACRAMENTO) ss.

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

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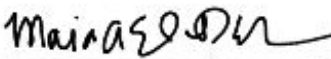
CASE: In the Matter of the Appeal of
Adventures by the Sea

DATE: Wednesday, February 22, 2023

I further certify that my said shorthand notes have been transcribed into typewriting, and that the foregoing pages 1 through 75 constitute an accurate and complete transcript of all my shorthand writing for the dates and matter specified.

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

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 15th day of March, 2023.



Maria Esquivel-Parkinson
CSR No. 10621, RPR

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