

STATE OF CALIFORNIA

CERTIFIED COPY

Wednesday, February 15, 2023

Job No. :
40541 OTA(C)

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
ADDISON POOLS, INC.,) OTA NO.: 20096720
)
 Appellant.)
)

TRANSCRIPT OF PROCEEDINGS, taken at
12900 Park Plaza Drive, Suite 300, Cerritos,
California, commencing at 3:10 p.m. and
concluding at 4:58 p.m. on Wednesday,
February 15, 2023, reported by MARIE SANCHEZ,
CSR No. 13809, a Certified Shorthand Reporter
in and for the State of California.

1 APPEARANCES:

2
3 Panel Lead: ALJ SUZANNE BROWN

4 Panel Members: ALJ MICHAEL GEARY
5 ALJ ANDREW WONG

6
7 For the Appellant: BARRY MOSER

8 For the Respondent: STATE OF CALIFORNIA
9 DEPARTMENT OF TAX AND
FEE ADMINISTRATION

10 NALAN SAMARAWICKREMA
11 JASON PARKER
CHRISTOPHER BROOKS

I N D E X

E X H I B I T S

(Appellants' Exhibit 1 was received at page 14)

(Department's Exhibits A through K were received at page 21)

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By Mr. Samarawickrema

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1 CERRITOS, CALIFORNIA, WEDNESDAY, FEBRUARY 15, 2023

2 3:10 p.m.

3
4
5 JUDGE BROWN: Good afternoon. This is the appeal of
6 Addison Pools Inc, and we are on the record. This is
7 OTA Case Number 20096720. I am Suzanne Brown, and I am the
8 Lead Administrative Law Judge in -- conducting the hearing
9 for this case.

10 This case -- this hearing is before the Office of
11 Tax Appeals or OTA. I will remind everyone that OTA is not a
12 court but is an independent appeals body. OTA is staffed by
13 tax experts and is independent from the state's tax agencies.
14 Because OTA is a separate agency from the California
15 Department of Tax and Fee Administration, arguments and
16 evidence that were previously presented to CDTFA are not
17 necessarily part of the record before OTA.

18 OTA's written opinion for this appeal will be
19 based upon the briefs the parties have submitted to OTA, the
20 exhibits that will be admitted into evidence, and the
21 arguments presented at hearing today.

22 As a reminder, this Panel does not engage in
23 ex-parte communications with either party. My co-panelists
24 today are Judge Andrew Wong and Judge Michael Geary.
25 Although I am the Lead ALJ for purposes of conducting the

1 hearing, all three ALJ's are coequal decision makers in this
2 process and are free to ask questions at any time.

3 Also present is our Stenographer Mrs. Sanchez who
4 is reporting this hearing verbatim. To ensure we have an
5 accurate record, we ask that everyone speaks one at a time
6 and does not speak over each other. Also, speak clearly and
7 loudly into the microphones. When needed, the Stenographer
8 may stop the hearing process and ask for clarification.

9 After the hearing, the Stenographer will produce
10 an official hearing transcript which will be available on the
11 Offices of Tax Appeals website. And, I believe, I said we
12 are on the record with the appeal of Addison Pools Inc,
13 OTA Case Number 20096720. Today is Wednesday, February 15th,
14 2023, and it is approximately 3:13 p.m.

15 We are holding this hearing in Cerritos,
16 California. As I said, I am Suzanne Brown. I'm the Lead
17 ALJ for this case. My co-panelists today are
18 Judge Andrew Wong and Judge Michael Geary. I will start by
19 asking each of the participants to please state their names
20 for the record. And I will start with the representatives
21 for CDTFA.

22 MR. SAMARAWICKREMA: Nalan Samarawickrema for the
23 Department.

24 THE REPORTER: I'm sorry. I didn't get that.

25 MR. SAMARAWICKREMA: Nalan Samarawickrema for the

1 Department.

2 MR. PARKER: Jason Parker, Chief of Headquarters
3 Operations Bureau with CDTFA.

4 MR. BROOKS: Christopher Brooks, Tax Counsel for
5 CDTFA.

6 JUDGE BROWN: Thank you. And the representative for
7 Appellant.

8 MR. MOSER: Barry Moser.

9 JUDGE BROWN: Okay. Thank you. Next, what I'm going to
10 do is first I'm going to confirm what the issues are for
11 hearing today and then I'm going to talk about admitting the
12 exhibits for hearing today.

13 We had a prehearing conference in this matter on
14 January 17th of 2023 and I issued a prehearing conference
15 minutes and orders afterwards that summarized everything that
16 we talked about during the prehearing conference. As we
17 discussed at the prehearing conference and I confirmed in the
18 minutes and orders there are two issues for hearing. The
19 first issue is whether additional adjustments are warranted
20 to the unreported taxable measure based on the cost of
21 accountability test. And the second issue is whether relief
22 of interest is warranted.

23 First I want to talk about the second issue, the
24 relief of interest, because the question I had at the
25 prehearing conference, as I recall, is whether Appellant is

1 seeking relief of interest for any time periods beyond what
2 CDTFA has already conceded as relief of interest. Mr. Moser,
3 do you recall we discussed this during the prehearing
4 conference?

5 MR. MOSER: Yes.

6 JUDGE BROWN: Okay. And you saw the periods -- I think
7 totaled 15 months that CDTFA is conceding relief of interest.
8 So the question is: Is Appellant seeking any additional
9 relief beyond the periods that are conceded?

10 MR. MOSER: Yes. Yes.

11 JUDGE BROWN: I think that I'm hearing that you need to
12 be closer to the microphone. Is your green light on?

13 MR. MOSER: Yes.

14 JUDGE BROWN: Okay. Then if you can just move the mic
15 closer to you. Move you closer to the mic.

16 MR. MOSER: Okay. Is that better? Is that better?

17 JUDGE BROWN: I think so, yes. Yes.

18 MR. MOSER: Okay.

19 JUDGE BROWN: All right. What periods are you seeking
20 relief of interest for beyond what CDTFA has already
21 conceded?

22 MR. MOSER: I think the periods from March 2019 to
23 February 2023.

24 JUDGE BROWN: All right. Hold on just a second. Now,
25 CDTFA has conceded -- CDTFA has conceded for the periods

1 December -- December 2013, May, and June -- I'm not going to
2 list them all -- they've conceded for some periods that
3 include June to August -- through August 2019 and
4 October 2019 to January 31st, 2020, that are covered by what
5 the period you just identified.

6 They also conceded periods prior to what you just
7 identified, so I won't get into those. But, I guess, the
8 question is if you are con -- the CDTFA issued its decision
9 and then you filed this appeal with OTA in September of 2020,
10 so any relief of interest beyond after CDTFA issued the --
11 their appeal is -- is, I believe, not something that my
12 office can address.

13 MR. MOSER: Yeah. I had a hard time understanding
14 exactly which periods they were conceding. And -- so my
15 understanding on -- I mean, the -- the reason that I'm asking
16 for this is that this audit has gone on for ten years and
17 there are long stretches of time where we had no
18 communications from auditors or appeals or wherever, and so
19 during those times, that's what I was trying to figure as to
20 the interest should stop during those times. So -- because I
21 think -- when did we --

22 JUDGE BROWN: All right. Well, my first -- my first
23 question was what time periods you're conceding? I'm just --
24 I will note that part of the time period -- sorry -- what
25 time periods you are alleging relief of interest is warranted

1 beyond what is conceded? I will note that part of the period
2 that you just identified is already conceded, June through
3 August 2019 and October 2019 through January 2020 is already
4 conceded.

5 So you are saying in addition, March 2019 through
6 May 2019 and then all periods after January 31st, 2020. And
7 then my next question is related to this: Why don't we have
8 your request for relief of interest that we discussed at the
9 prehearing conference? If you recall, you agreed and I put
10 in the order that you were going to submit it by
11 January 31st.

12 MR. MOSER: Oh, I misunderstood then. I didn't realize
13 I had to put in a request.

14 JUDGE BROWN: Did you receive the minutes and orders,
15 the document that we sent on January 23rd, I believe, that
16 confirmed what we talked about?

17 MR. MOSER: Yeah, I did get it. Yes.

18 JUDGE BROWN: Okay.

19 MR. MOSER: I just misunderstood. I thought it was all
20 coming up in -- during this hearing. That's why.

21 JUDGE BROWN: Okay. Well, we can't grant any relief of
22 interest if we don't have the signed request for relief of
23 interest. Now, when we talked about it at the prehearing
24 conference, I thought I had -- I'm sure -- certain that I
25 asked you to submit it by January 31st. How much time do you

1 think you would need to submit the request for relief of
2 interest? Like, a week? Two weeks?

3 MR. MOSER: You mean from now?

4 JUDGE BROWN: From now.

5 MR. MOSER: Oh, yeah. What is -- yeah. If we can do a
6 week, until next Wednesday.

7 JUDGE BROWN: Okay.

8 MR. MOSER: And I just send that to that evidence.

9 JUDGE BROWN: The same -- the same E-mail address that
10 you were submitting everything else with a copy to CDTFA.

11 All right. CDTFA, do you have any response to
12 what we were just discussing about the issue two, about
13 relief of interest?

14 MR. SAMARAWICKREMA: I did not understand your question,
15 your Honor.

16 JUDGE BROWN: I was talking too fast. I said, do you
17 have any response or question or objection to anything that
18 we just discussed about submitting the request for relief of
19 interest?

20 MR. SAMARAWICKREMA: I have no objections.

21 JUDGE BROWN: Okay. I don't know if you're going to
22 want to respond to the written request for relief, but I
23 wanted -- I need to at least get it in writing because I
24 can't grant anything even the conceded portions.

25 MR. SAMARAWICKREMA: Right. Yeah.

1 JUDGE BROWN: Okay. All right.

2 MR. MOSER: Do I have to say anything about the conceded
3 portions or just -- just on the new -- the new portions?

4 JUDGE BROWN: CDTFA, do you have any thoughts on that?

5 MR. SAMARAWICKREMA: Based on our review, we -- we
6 recommend a 15 months, but we don't have the request signed
7 by the Appellant, so in order to -- to become effective then
8 we need a request.

9 JUDGE BROWN: No, I understand. You need it in
10 writing --

11 MR. SAMARAWICKREMA: Yeah. Right.

12 JUDGE BROWN: -- under -- in writing under penalty of
13 perjury.

14 MR. SAMARAWICKREMA: Yeah. Under penalty of perjury.

15 JUDGE BROWN: I understand that.

16 MR. PARKER: Also, Judge Brown, I'd just like to add
17 we've already conceded those months, so I don't see the
18 purpose in addressing those in his presentation since we've
19 already given those away.

20 JUDGE BROWN: Right.

21 MR. PARKER: Assuming he files the form.

22 JUDGE BROWN: That is what I was asking. I just wanted
23 to let you respond. So I'll say Appellant does not need to
24 address the conceded portions, but I also want to clarify
25 that I'm not aware of any authority that allows relief of

1 interest for periods after the CDT -- CDTFA has issued its
2 decision and Appellant filed the appeal with the
3 Office of Tax Appeals, so you would want to focus your
4 argument regarding any non-conceded portions on the period of
5 time when CDTFA actually still was -- when the case was with
6 CDTFA as opposed to when it left CDTFA's possession and you
7 changed -- and you filed your appeal with OTA.

8 All right. Next, I believe, as I said we already
9 clarified what issue one is. And then we clarified issue
10 two. If anyone has any -- if no one has anything further on
11 clarifying the issues, CDTFA?

12 MR. SAMARAWICKREMA: No, we don't have.

13 JUDGE BROWN: Okay. Then I will just confirm that
14 Appellant will submit the request for relief of interest in
15 writing under penalty of perjury.

16 Mr. Moser, if you would refer back to the
17 prehearing conference minutes and orders that I issued a
18 couple of weeks ago, I believe, it was January 23rd, and it
19 contains a website address for where you can find a form
20 that's on CDTFA's website. It's Form 735-A. You don't have
21 to use that form for your request for relief of interest, but
22 it's convenient to use it because it already contains the
23 language that you need regarding penalty of perjury. So it's
24 available as a resource to you.

25 All right. Then if we've confirmed the two issues

1 of hearing, the next I want to move on to admitting the
2 exhibits. All right. As I reminded the parties during the
3 prehearing conference and as I indicated -- confirmed during
4 the prehearing conference minutes and orders, OTA's
5 regulations require submission of exhibits at least 15 days
6 prior to the hearing which, in this case, was January 31st.

7 I'm going to talk about Appellant's exhibits
8 first -- exhibits first and then next I will address CDTFA's
9 exhibits. Appellant timely submitted Exhibit 1 which is
10 pages of Excel Spreadsheets. And, first, I'm going to say at
11 the time of the hearing -- of the prehearing conference I
12 asked CDTFA if they had any objection to admission of
13 Exhibit 1. CDTFA indicated that it hadn't had time to review
14 that document yet because we had just received it right
15 before the prehearing conference on January 17th.

16 I asked if CDTFA would identify any objection if
17 it had one by February 8th. We didn't -- I didn't receive
18 any notification of an objection, so from that I infer CDTFA
19 doesn't object to Exhibit 1, all those Excel Spreadsheets
20 being admitted; is that correct?

21 MR. SAMARAWICKREMA: That's correct.

22 JUDGE BROWN: Okay. Then I will say Appellant's
23 Exhibit 1 is admitted.

24 (Appellants' Exhibits 1 was received
25 in evidence by the Administrative Law Judge.)

1 JUDGE BROWN: Next I want to move onto the documents we
2 received more recently. After the close of business on
3 February 13th, Appellant submitted an additional spreadsheet
4 and 13 pages of invoices that OTA received. Because of the
5 way our system works we didn't receive them until the morning
6 of February 14th which was yesterday. And I will say --
7 first I'll call these proposed Exhibit 2. I'm just going to
8 label all of them together as proposed Exhibit 2.

9 I have two questions for Appellant. The first --
10 and then I will ask CDTFA to respond -- the first question is
11 why weren't these timely submitted, given that we discussed
12 at the prehearing conference January 31st is the deadline?
13 That's not the first time that my office notified Appellant
14 of our -- of the -- that evidence needs to be submitted well
15 in advance of the hearing.

16 This case was first filed in September of 2020
17 when my office acknowledged the receipt of the appeal. Our
18 form letter says that the parties need to submit their
19 evidence in advance when we notified the parties of the
20 hearing in -- that notice went out in December of 2022. It
21 states, "Evidence needs to be submitted well in advance."

22 So, Mr. Moser, why did we just get these
23 yesterday?

24 MR. MOSER: This new exhibit is really just a
25 rearranging of the prior exhibit, and they tried to put --

1 the client tried to put it in a little easier format to -- to
2 read and then they attached also copies of the invoices that
3 related to the -- to the exhibit.

4 They were having problems going back and finding
5 these invoices and because of the long delay on this, and so
6 that's what I tried to -- I tried to have them go back and
7 get the invoices because that's really my whole contention on
8 this whole audit was no one looked at the invoices.

9 They did look at them, but there was a problem
10 with it. So that's what I was trying to do was just trying
11 to make it easier. It's really -- there's no new information
12 on this exhibit than was on the other one. It's just a
13 reformatting of it in trying to put it better so that someone
14 can look at the -- the invoice and you can also see that
15 either the tax was paid on the invoice or it wasn't paid.
16 That's --

17 JUDGE BROWN: So are you saying that the spreadsheet
18 portion is the same as all that information is contained in
19 the spreadsheets you submitted in Exhibit 1?

20 MR. MOSER: Yes.

21 JUDGE BROWN: Is it the part that is labeled
22 "miscategorized" on Exhibit 1?

23 MR. MOSER: No. It should be the -- the main
24 spreadsheet.

25 JUDGE BROWN: On sheet one?

1 MR. MOSER: It's -- well, the original spreadsheet was
2 many pages, and this is just -- it's really what this is
3 doing is reformatting that -- that into an easier way of
4 reading it.

5 JUDGE BROWN: All right. But then the invoices
6 themselves --

7 MR. MOSER: Relate to the -- to -- relate to the listing
8 that's there.

9 JUDGE BROWN: All right. But --

10 MR. MOSER: And those invoices would relate to the
11 original spreadsheet also because they're the same items.

12 JUDGE BROWN: But does that -- has Appellant previously
13 submitted those invoices as evidence? Did CDTFA ever get
14 them?

15 MR. MOSER: Well, I sent them to everybody.

16 JUDGE BROWN: But you sent them two days before the
17 hearing, really one day practically -- effectively.

18 MR. MOSER: Okay.

19 JUDGE BROWN: So my question is why weren't they
20 submitted sooner with the -- before the deadline?

21 MR. MOSER: Because they were trying to find these
22 invoices. That was the thing. They were trying to match up
23 the invoices to -- to the listings.

24 JUDGE BROWN: Right. But this hearing was filed in
25 September of 2020, so why didn't -- why weren't they

1 submitted earlier?

2 MR. MOSER: I'm not following that.

3 JUDGE BROWN: I'm just saying your client had two and a
4 half years to put this evidence together, and we indicate --
5 I indicated when we had the prehearing conference that we
6 needed them in time by this deadline because this is -- our
7 regulation say 15 days before the hearing.

8 MR. MOSER: No, I understand what you're saying.
9 And what -- I mean, the problem is, is this -- the long delay
10 on this whole thing is that, you know, you can't just keep
11 these files readily available all the time when it's so --
12 when they're so old. I mean, people have businesses. They
13 have limited space, so they put things in boxes and,
14 you know, they label them. And so they had to go back and
15 find these invoices again and match them up to -- to -- to
16 the invoices. We had shown this during the audits and stuff
17 and that -- this whole thing is very frustrating on my part
18 for the way the audit was -- was conducted.

19 And, I mean, this may not be the right time to go
20 through it, but I'll go through that --

21 JUDGE BROWN: Well, I -- let's just focus on the
22 exhibits right now.

23 MR. MOSER: -- but that was the reason that it was late.
24 It was just the client was trying to find all these invoices
25 again.

1 JUDGE BROWN: All right. And, CDTFA, I am going to get
2 to you next, so I appreciate your patience. The second
3 question -- before I do that though -- the second question I
4 was going to ask Appellant is I was going to ask for an offer
5 of proof. In a brief summary can you say what is it that you
6 contend these new documents that you just submitted will --
7 what will they establish if they are admitted into evidence?

8 MR. MOSER: Well, they show that either the tax was paid
9 on these invoices or if the tax wasn't paid, that it wasn't
10 required to be paid. I will say there are a few errors in
11 here, but -- but that's really what it's supposed to show.

12 It's a listing of invoices where there was tax due
13 and invoices that there was no tax due and was showing the
14 actual invoice so, you know, someone can see that there was
15 no tax due on it because it was late or whatever and there --
16 or there was tax due because it was equipment or something
17 they don't require tax.

18 JUDGE BROWN: All right. Now, I'm going to turn to
19 CDTFA. And first I will ask, does CDTFA have any objection
20 to the admission of what I've labeled as Appellant's
21 Exhibit 2, the documents that were submitted at the end of
22 day on Monday, February 13th, that we all received the
23 morning of February 14th, yesterday?

24 MR. BROOKS: Yes, we do, based on timeliness.

25 JUDGE BROWN: And then we also received one additional

1 invoice just this morning from Appellant, and I think that
2 that's probably all of my questions about the earlier
3 documents are probably -- I think that everything is pretty
4 much the same in terms of the -- the invoice we received
5 today. I was going to ask the same questions, but I'm
6 anticipating that it's -- I'm going to -- I would get the
7 same response as to why they were late and why it was late
8 and what the invoice would prove.

9 MR. MOSER: Yeah. It's -- it's just related to the --
10 to their - to their documents. They had a listing of X-tax
11 invoices and this shows why it's wrong on their schedule.

12 JUDGE BROWN: All right. I'm going to uphold the
13 objection based on timeliness. I think the documents came in
14 too late for CDTFA to be able to have a meaningful response.

15 I will say, Appellant, you can refer to the
16 documents if you -- they are part of your argument, but I'm
17 not going to admit them as exhibits because it is contrary to
18 our rules of our regulations with the 15-day deadline. I did
19 admit Appellant's Exhibit 1 and now I'm going to move onto
20 CDTFA Exhibits A through K.

21 At the prehearing conference Appellant said it had
22 no objections to admission of those exhibits, and CDTFA you
23 have no additional documents other than Exhibits A through K;
24 correct?

25 MR. SAMARAWICKREMA: Yes, that's correct.

1 JUDGE BROWN: Okay. Appellant, assuming that you have
2 no objection to admission of those documents --

3 MR. MOSER: No.

4 JUDGE BROWN: -- right, that we discussed at the
5 prehearing conference, I will say CDTFA Exhibits A through K
6 are admitted.

7 (Department's Exhibits A through K were received
8 in evidence by the Administrative Law Judge.)

9 JUDGE BROWN: Next, I will just confirm neither party is
10 calling any witnesses. And I will just go over again as it
11 indicates in my prehearing conference, minutes, and orders
12 what the order of events will be. We'll have Appellant's
13 presentation first, and Appellant will have up to 30 minutes.
14 Mr. Moser, you do not have to use all of that time. That's a
15 maximum.

16 I am cognizant that it is late in the afternoon,
17 so I'm going to try to streamline things. Next, we will have
18 CDTFA's presentation. And in the interest of time, I may
19 just condense the Judges' questions all into one -- one block
20 after both parties have made their initial presentations.
21 We'll see.

22 After we have questions from the judges, then we
23 have time for Appellant's rebuttal, and Appellant has up to
24 15 minutes. And then, CDTFA, we discussed at the prehearing
25 conference if you wish to make a brief rebuttal you can, but

1 we'll see if the time -- if you don't, that's fine as well.

2 I've admitted the exhibits. We've gone over the
3 schedule for this afternoon. Does anyone have anything else
4 to raise before we begin with the presentations? Does anyone
5 have any questions about any logistical things at the hearing
6 today?

7 MR. MOSER: No.

8 MR. SAMARAWICKREMA: No.

9 JUDGE BROWN: Okay. Then we can proceed with the
10 Appellant's presentation. Mr. Moser, whenever you're ready.
11 You have 30 minutes.

12
13 PRESENTATION

14 MR. MOSER: The first thing I just wanted to -- to talk
15 about was the removal of the interest, so that I'm just going
16 to do with the -- by -- by written request and then that will
17 take care of that; right? We don't need to discuss any more
18 on that.

19 So the -- the main issue that I have with this
20 audit and the -- the reason that I've taken it this far is
21 this audit was conducted in -- in my office. And when the
22 audit happened we brought in every invoice, every purchase
23 invoice that -- that the client had. We had six or eight
24 boxes of these invoices, and the auditor sat there in my
25 office for two to three weeks going through these invoices.

1 During that time, never once did the auditor ever
2 ask a question. At the end of the time that she was there,
3 did whatever she had to do, she said she's not coming back
4 anymore, she's done, and as far as she was concerned the
5 audit was, from her point, was complete. So that was -- the
6 audit, I guess, started sometime in March. That was probably
7 sometime in May, June that it happened.

8 And -- and she said she would issue a report.
9 Never asked a question. Never commented that she had any
10 questions about anything that she found any errors or
11 whatever. Sometime in August I contacted her because we
12 don't have a big office and we had all these boxes. And I
13 contacted her and said, "Do I need to hold onto these
14 invoices anymore? Do you have any questions about them? Or
15 can I give them back to the client?" And she said, "No. You
16 can give them back. We don't need them anymore."

17 Maybe about a month or two later, sometime
18 September, October I received the -- her findings. And it --
19 it astonished me that she had all these findings and all
20 these invoices that she was looking at, never once asked a
21 question. All of this could have been resolved had she just
22 said to us, hey, I have an invoice here. I don't see tax
23 paid. Why wasn't it paid? We could have gone over it and we
24 could have resolved every one of them. We never would have
25 gotten this far. We could have resolved it right there

1 because we had the invoice there, but never did that.

2 And -- and this is -- this is what -- what
3 frustrated me in that never once has the auditor or her
4 supervisor or any appeals person ever came back and said,
5 hey, look at these invoices that we looked at. These didn't
6 have tax and they should have had tax. Never once did that
7 happen, and that's what we tried to do with this exhibit was
8 go back and figure out should these invoices have tax or not.

9 The client was running -- unfortunately was
10 running three businesses at the same time through the same
11 corporation. He was doing construction. He was doing -- he
12 was servicing pools doing, like, going out and servicing the
13 pools, and he was -- and he had a little store in his -- in
14 his office -- in his -- where his office was. He had a
15 building and he had a little retail store that he would sell
16 some, you know, some products to -- for -- for pools.

17 And so the way the client had everything set up on
18 his purchases was with his vendors. He would have different
19 accounts. One account was -- was retail account. One
20 account was wholesale account. So he would, you know,
21 purchase and tell the vendor what he was purchasing for and
22 then they would invoice. They would charge him tax or didn't
23 charge him tax, whatever, whichever way it was supposed to
24 go.

25 And -- and I'm not saying that everything was

1 perfect, but we could have resolved all this. We had every
2 invoice there. And then -- and then later on they came back
3 with this -- what is that called that -- that test that they
4 do -- okay -- to me it's so abstract because if you have a
5 big -- anywhere you have, you know, a controller who's really
6 an accountant who really understands bookkeeping and you can
7 come up with a pretty good set of books where your cost of
8 goods sold is pretty good and everything, you, know is in
9 let's say in proper place.

10 For our purposes, this is a client that, you know,
11 barely had a bookkeeper. I mean, did have a bookkeeper who
12 kept books through Quick Books but, you know, she's not
13 really trained other than she knows how to use Quick Books.
14 And so for our purposes all these years, you know, we're just
15 doing a tax return for them. We're not auditing any books.
16 We're not doing any financial things. We're doing a tax
17 return.

18 The IRS doesn't care if you put something into
19 cost of goods sold or you put into operating expense. If
20 it's a deduction, it's a deduction. They're never going to
21 make a -- a different determination to say that, you know,
22 you put your operating expenses in cost of goods sold, or you
23 put your cost of goods sold in operating expense, and that's
24 what this test is -- is kind of doing is that it's getting --
25 it's misleading by the fact that -- that, you know, maybe the

1 books aren't perfect.

2 I mean, we had some other differences with the
3 different auditors that, you know, through appeal we got
4 reversed, but one of the main things that -- that they came
5 up with this is when I was -- was looking at this is that
6 on -- on this test it never took -- it never took out the
7 service route invoices, so the test is -- is showing them as
8 if they're -- they all should have been taxable and -- and
9 it's not true.

10 So, I mean, that is why I gave this last invoice
11 because that's what this -- this invoice relates to. It
12 relates to -- to the service route and that -- that it was --
13 it was a non-taxable event. So, you know, I'm going through
14 and I'm looking at this test and I'm just -- think, you know,
15 this -- this is somebody's abstract way of -- of trying to
16 figure out what the taxable purchases should be, but we went
17 back and looked at the actual stuff and came up with a vastly
18 different number.

19 I can't believe that -- that anybody can say that we
20 can -- we can do a test that's not based on facts or purely
21 facts. You know, it's -- it's based on something that we
22 perceive as being factual as opposed to looking at the actual
23 invoices. Because that's really the determination of whether
24 something is taxable or not. You look at the invoice and you
25 say they purchased materials or something that they're not

1 going to resell, that they're using for themselves and they
2 should have paid tax on it, or -- or it's something that, you
3 know, some of this stuff was for services, so there's no tax
4 on it.

5 So I -- that, you know, that was the way they did
6 the audit originally. But then they -- then they -- they
7 kind of switched when we asked them about this listing of --
8 of invoices and how they came up with it.

9 So -- I don't know. I look at this test and -- and
10 I -- I found so many errors in it that I can't -- I
11 just can't trust it. And -- and that's what -- and that's
12 what they're basing their whole -- their whole argument on
13 whether the taxes is due or not due. And so that's why we
14 went back and we looked at every invoice.

15 You know, some of -- I asked the client to go back
16 and I gave them the listing of the invoices that the -- that
17 the auditor came up with. I asked them to try and find them.
18 Some of them they couldn't even find. I don't know where
19 they came up with -- with these things from. So, you know, I
20 just -- I look at this and -- and -- and -- and said -- and
21 I've argued this thing from -- from day one that this test
22 just doesn't make sense. It just doesn't make sense, so --
23 so that's -- so that's kind of where my position is on this.

24 JUDGE BROWN: All right. Thank you very much. Let me
25 start with a quick question, Mr. Moser.

1 MR. MOSER: Uh-huh.

2 JUDGE BROWN: Looking at your Exhibit 1, I wanted to ask
3 about the part that you had labeled "miscategorized."

4 MR. MOSER: Yeah. That was their way of saying it was
5 miscategorized in cost of goods sold and it shouldn't have
6 been in cost of goods sold. That -- that's what they went
7 back.

8 JUDGE BROWN: So --

9 MR. MOSER: It's not -- doesn't have anything to do with
10 whether it's taxable or non-taxable.

11 JUDGE BROWN: That's what I was trying to figure out.

12 MR. MOSER: Yeah. Yeah. Yeah. No. She -- yeah.
13 Well, this is part of the problem of dealing with people who
14 really aren't accountants but they're trying to do accounting
15 work. But, yeah. But that was with her -- that's what she
16 was -- because -- because what I asked her to do was I asked
17 her -- because this test is based on cost of goods sold, I
18 asked her to go back into her general ledger and -- and
19 adjust the items that were not -- that were in the cost of
20 goods sold in the general ledger but should not have been in
21 cost of goods sold.

22 And so that's what she put -- that's what her
23 miscategorization is. It's for the items that should not be
24 part of cost of goods sold. And the other -- and her -- the
25 first page of that listing is all the items that should be in

1 cost of goods sold.

2 JUDGE BROWN: Okay. So what is your argument as to
3 how -- if -- if we agreed that these items were
4 miscategorized, how would that affect the tax -- the taxable
5 measure?

6 MR. MOSER: Well, no, the -- that has nothing to do --
7 that's just -- that -- that has nothing to do with whether
8 the tax is right or wrong. I mean, what it will do is this
9 cost accountability test will get adjusted for it because the
10 cost of goods sold is -- is -- is wrong. But that's --
11 but that -- but that miscategorization that was really for my
12 purpose and not for -- I just -- I -- I shouldn't -- I
13 probably shouldn't -- I probably should have just taken it
14 out when I sent over the thing. It has nothing to do with
15 whether something is taxable or not taxable.

16 JUDGE BROWN: Okay. Thank you. Then I will turn to my
17 co-panelists and ask if they have any questions for
18 Appellant. Judge Geary?

19 JUDGE GEARY: I'd like to reserve my questions until
20 after the Department gives its presentation please.

21 JUDGE BROWN: Okay. Thank you. And, Judge Wong, do you
22 have any questions at this time?

23 JUDGE WONG: I just had one question. Excuse me.
24 You had mentioned that you had kept invoices in your office
25 but then you asked the auditor whether you could return them

1 to the client; is that correct?

2 MR. MOSER: Yes. When the -- when the original audit
3 happened, the client had brought over all -- because we were
4 doing the audit in our office so the client had brought over
5 the boxes of all his purchase invoices. And so, yeah, we had
6 like six or eight boxes in the office, and that's what the
7 auditor went through those invoices to, I assume, to come up
8 with her listing, but I -- she was there for weeks.

9 JUDGE WONG: And then you returned the boxes to the
10 client?

11 MR. MOSER: Yeah. I -- I asked her before I returned
12 them -- because we had them in our office and we didn't
13 really have a big office. We didn't have a lot of room for
14 them -- but I asked her before I returned them, do you have
15 any questions? Is it okay for me to return them? She never,
16 you know -- I never got any feedback from her. I never got
17 any questions from her on anything that she did. And -- and
18 I found that really unusual.

19 I'm an auditor. Okay. We do a lot of auditing.
20 And if I find -- if I find a problem, I go to the client
21 right away and ask them because -- because how does an
22 outside person really know anything that, you know, unless
23 they, you know, ask the people who deal with this all the
24 time?

25 JUDGE WONG: Do you know what the client did with the

1 boxes of invoices after you returned them to your client, if
2 you know?

3 MR. MOSER: Well, I mean, I just assumed he keeps them
4 filed somewhere.

5 JUDGE WONG: Okay.

6 MR. MOSER: I mean, they were -- they were in such a way
7 that -- I doubt it, like, he would have taken the stuff out
8 and re-did -- you know, because they were -- they
9 were labeled. It was all labeled --

10 JUDGE WONG: All right.

11 MR. MOSER: -- on the outside.

12 JUDGE WONG: Thank you. No further questions.

13 JUDGE BROWN: Okay. Thank you. Now we will switch to
14 allow CDTFA's presentation. CDTFA, you have up to 30
15 minutes.

16 MR. SAMARAWICKREMA: Thank you, Judge.

17
18 PRESENTATION

19 MR. SAMARAWICKREMA: Appellant is a California
20 Corporation that operates a construction business since
21 May 1st, 2009, in Sherman Oaks, California. As a
22 construction contractor, Appellant furnish and installs
23 swimming pools and spas and related fixtures and equipment.

24 Appellant also provides maintenance and repair
25 services. In late 2010 Appellant opened a retail store --

1 THE REPORTER: I didn't understand you.

2 MR. SAMARAWICKREMA: Okay. In late 2010, Appellant
3 opened a retail store at the business location to sell pool
4 and spa related supplies and merchandise. During the audit
5 period, Appellant purchased merchandise in three ways. Some
6 purchases were week sales tax paid to the vendors. Some
7 purchases from out of state vendors were made without sales
8 or used tax paid, and some purchases from California vendors
9 were sales for resale using a resale certificate.

10 The construction contracts for furnishing and
11 installing swimming pools and spas and related fixtures and
12 equipment --

13 THE REPORTER: I'm sorry. I apologize.

14 MR. SAMARAWICKREMA: -- were either on a lump sum basis,
15 all on time and material, plus sales tax basis. As a retail
16 store, Appellant recorded sales on its point of sale system.
17 The Department audited Appellant's business for the period of
18 April 1st, 2010, through March 31st, 2013.

19 During the audit period, Appellant reported around
20 2.1 million as total sales and claimed around 18,000 as
21 non-taxable labor and around 1.9 million as other deductions
22 resulting in reported taxable sale of around --

23 THE REPORTER: Border taxable --

24 MR. SAMARAWICKREMA: -- resulting in reported taxable
25 sale of around 257,000.

1 THE REPORTER: My apologies.

2 MR. SAMARAWICKREMA: It's all right. And that will be
3 on your Exhibit A, pages 18 and 19. Appellant did not report
4 any purchases that was subject to used tax for the audit
5 period. During the audit, Appellant failed to
6 provide complete purchase and sales records such as job
7 contracts, cost files for individual job performed, sales
8 invoices, POSA's download with all related folders from his
9 POS system, sales receipts, and credit card sales receipt to
10 support its reported sale for the audit period.

11 As a result, Appellant could not provide
12 a declared support to demonstrate how it reported its sales
13 on its sales and used tax returns, specifically what sources
14 it relied upon. The Department completed three --

15 THE REPORTER: I apologize. I didn't get that sentence.

16 MR. SAMARAWICKREMA: The Department completed three
17 verification methods to evaluate the reasonableness of
18 Appellant's reported total sales, taxable sales, and
19 purchases subject to used tax.

20 The Department was unable to verify Appellant's
21 taxable sales and purchases subject to used tax using a
22 direct audit approach. Ultimately, the Department used the
23 cost accountability test to determine the unreported taxable
24 measure that was subject to used tax for the audit period.

25 First, the Department compared the reported

1 taxable sales for years 2010 and 2011 with a gross receipts
2 reflected on Appellant's corresponding Federal Income Tax
3 Returns and calculated the taxable sales percentage less than
4 one percent, and that will be on Exhibit A, page 50.

5 However, based on the analysis of audited taxable
6 sales and purchases, the Appellant's overall audited taxable
7 sales and purchase percentage are a little over three
8 percent, and that will be on your Exhibit A, page 50.

9 Second, Appellant did not report any purchases
10 subject to used tax for the audit period, and that will be on
11 your Exhibit A, page 18. However, based on Appellant's
12 purchase records, Appellant's X-tax materials, fixtures, and
13 equipment purchases for more than \$900,000 for the audit
14 period, and that will be on your Exhibit D, pages 207 through
15 228.

16 Third, the Department reviewed Appellant's Federal
17 Income Tax Return for years 2010 and 2011 and audit net loss
18 of around \$4,000 in year 2010 and low net income of around
19 \$4,100 in year 2011. And that will be on your
20 Exhibit A, page 50.

21 The Department compared the gross receipt
22 Appellant reported on his Federal Income Tax Returns in years
23 2010 and 2011 with Appellant's reported total sale of around
24 \$75,000 for the same period and calculated an overall
25 difference of around 7.7 million, and that will be on your

1 Exhibit A, page 50.

2 The Department also compared the reported total
3 sale of around \$75,000 to the purchases of around
4 3.4 million reflected on Appellant's available Federal Income
5 Tax Returns and calculated an overall negative reported book
6 markup of around 98 percent, and that will be on your
7 Exhibit D, page 52.

8 The total purchases of 3.4 million is also more
9 than 45 times larger than the reported total sale of around
10 \$75,000. Appellant explained that for the first ten quarters
11 its reported total sales are net of contract sales but did
12 not provide the source of the reported amount. For the last
13 two quarters, Appellant reported total sales that included
14 contracts sale of around 1.9 million that were claimed as
15 deductions for non-taxable labor and contract sales, and that
16 will be on your Exhibit A, pages 18 and 19.

17 In general, Appellant is liable for taxes on
18 materials used in lump sum construction contracts. If
19 Appellant did not pay sales tax on the purchase of the
20 material, then Appellant would owe used tax on those items
21 when it consumed them and used them to fulfill the
22 construction contracts.

23 Seemingly, Appellant is generally liable for tax
24 on fixtures and equipment it used in lump sum contracts. If
25 Appellant did not pay sales tax on the purchases of those

1 items, then Appellant would owe used taxes on those items
2 when it used them in fulfilling the construction contracts;
3 therefore, in regard to construction contracts, the
4 Department considered Appellant to be the consumer of
5 material in store in lump sum contracts, the retail of
6 fixtures installed in lump sum contracts, and the retail of
7 equipment in store in lump sum contracts.

8 The Department ordered the Appellant did not
9 maintain cost files for each individual job performed.
10 During the audit period, Appellant purchases include some
11 purchases with tax reimbursement paid to the vendor and
12 others purchase without tax, and that will be on your
13 Exhibit D, pages 157 through 228.

14 As such, materials and supplies that were
15 purchased without payment of sales tax reimbursement to the
16 vendors and consumed in fulfilling contracts on lump sum
17 basis are subject to used tax.

18 As stated earlier, Appellant has not reported any
19 material purchases subject to used tax on its sales and used
20 tax return for the audit period, and that will be on your
21 Exhibit A, page 18.

22 The Department therefore performed a cost
23 accountability test to identify any unreported used tax
24 liability, and that will be on your Exhibit A, pages 47
25 through 49.

1 Cost accountability test is an audit procedure
2 performed on a taxable measure basis in which all material
3 costs are accounted for. The Department performed this test
4 to determine whether the Appellant has reported the correct
5 measure of tax on materials, fixtures, and equipment in store
6 in construction contracts.

7 The Department examined Appellant's purchase
8 journals and available purchase invoices for the period
9 April 1st, 2010, through December 31st, 2012, and that will
10 be on your Exhibit D, pages 157 through 228.

11 Based on the available purchase information, the
12 Department calculated purchases of materials, fixtures, and
13 equipment of around two million that was comprised
14 of 1.1 million in purchases with tax paid to the vendors and
15 around 909,000 in purchases without payment of tax, and that
16 will be on your Exhibit D, pages 157 through 228.

17 Based on the available beginning and
18 ending inventory amounts, the Department calculated an
19 adjusted total purchase cost of around 1.8 million, and that
20 will be on your Exhibit A, pages 47 through 49.

21 The Department reduced this amount by 1.1 million
22 for tax paid purchases to calculate around \$658,000 for
23 purchases without tax paid to the vendors and consumed in
24 fulfilling lump sum contract for the period April 1st, 2010,
25 through December 31st, 2012, and that will be on your

1 Exhibit A, pages 47 through 49.

2 The Department determined that all retail sales
3 relating to time and material contracts and all in-store
4 retail sales were from tax paid inventory of materials,
5 fixtures, and equipment and therefore sales tax was due only
6 on the gross profit on retail sales, and that will be on your
7 Exhibit C, pages 106 through 120.

8 From the sales journals, the Department calculated
9 the retail sale of materials, fixtures, and equipment under
10 time and material, plus tax contracts of around \$124,000, and
11 retail store sale of around \$189,000 with a total of around
12 \$313,000 in retail sales for the period April 1st, 2010,
13 through -- through December 31th, 2012, and that will be on
14 your Exhibit C, page 106.

15 The Department performed a shelf test of
16 over-the-counter sales by comparing the selling prices on the
17 sales report for the period June 15th, 2013 through
18 June 30th, 2013. The shelf test resulted in an overall
19 markup of around 30 percent, and that will be on your
20 Exhibit C, pages 121 to 126.

21 The Department then used the total retail sale of
22 materials, fixtures, and equipment from Appellant's time and
23 material, plus sales tax contracts and from Appellant's
24 retail store sales to determine the cost of purchases of
25 around \$240,000 and gross profit of around \$73,000 for the

1 period April 1st, 2010, through December 31, 2012, and that
2 will be on your Exhibit A, page 48.

3 The Department used a calculated X-tax purchases
4 of around \$658,000 and gross profit of around \$73,000 to
5 calculate Appellant's audited taxable measure of around
6 \$731,000 for the same period, and that will be on your
7 Exhibit A, page 48.

8 Audited taxable measure was compared with the
9 reported taxable sale of around \$216,000 to calculate the
10 unreported taxable items of around \$515,000 for the period of
11 April 1st, 2010, through December 31st, 2012, and that will
12 be on your Exhibit A, page 48.

13 Unreported taxable items were compared with the
14 reporter taxable sales to calculate the percentage of error
15 of around 239 percent for the same period, and that will be
16 on your Exhibit A, page 48.

17 The Department then applied the percentage of
18 error of around 239 percent to the reported taxable sale of
19 around \$257,000 to determine the unreported taxable item of
20 around \$614,000 for the audit period, and that will be on
21 your Exhibit A, page 46.

22 Had the Department used the audited X-tax
23 purchases of materials, fixtures, equipment of around
24 \$909,000 without considering the total purchases of
25 materials, fixtures, and equipment of around two million to

1 determine unreported purchases subject to used tax, this
2 would increase the unreported taxable purchases subject to
3 used tax by around \$164,000 from around \$614,000 to \$778,000,
4 and that will be on your Exhibit A, page 46 and Exhibit D,
5 page 157.

6 The audit calculation of X-tax purchases of
7 materials, fixtures, and equipment based on the cost
8 accountability test was reasonable and was in Appellant's
9 favor, since it was the lowest of the differences determined.
10 Ultimately, the Department used an audit method which yield
11 the lowest deficiency measure to give a benefit to the
12 Appellant.

13 As mentioned earlier, Appellant did not provide
14 documents that were requested so the Department could
15 directly calculate the unreported X-tax purchases subject to
16 used tax. Appellant did not provide cost files for each
17 individual job performed. Appellant did not report any
18 purchases subject to used tax, and the Department was unable
19 to determine the unreported purchases subject to used tax
20 using a direct audit method; therefore, cost accountability
21 test was used to determine unreported used tax.

22 Accordingly, the Department determined the
23 unreported tax based upon the best available information.
24 The evidence shows that the audit produced fair and
25 reasonable sales. Appellant contends that the audit results

1 are not accurate and it should be adjusted. Appellant also
2 contends that it completed hundred percent review of his
3 purchase information and request the Department to accept
4 Appellant's finding.

5 As supposed, Appellant provided the same general
6 ledger information that was previously provided during the
7 audit field work, and that will be on your Exhibit 1 and
8 Exhibit D, pages 157 through 206.

9 Yesterday Appellant provided 13 purchase invoices
10 and a transaction detail for some of his vendors, and that
11 will be on your Exhibit 2. This information was available
12 for the audit staff during the field work. This purchase
13 information also excluded from total purchases of materials,
14 fixtures, and equipment of two million and audited X-tax
15 purchases of materials, fixtures, and equipment of around
16 \$909,000, and that will be on your Exhibit D, pages 158
17 through 228.

18 As stated earlier, had the Department used the
19 audited X-tax purchases of materials, fixtures, and equipment
20 of around \$909,000 without considering the total purchases of
21 materials, fixtures, and equipment of around two million to
22 determine unreported purchases subject to used tax, this
23 would increase the unreported purchases subject to used tax
24 by around \$164,000, and that will be -- that will be on your
25 Exhibit D, page 46 and Exhibit D, page 157.

1 Therefore, the Department rejects Appellant's
2 argument and the Department find that the amount assessed in
3 this audit is not only reasonable but benefits the Appellant.
4 Before the prehearing conference, Appellant also contended
5 that there are some calculation errors in the cost
6 accountability test that the adjusted error rate should be
7 212 percent and that Appellant is entitled to relief of
8 interest due to unreasonable delay in processing of these
9 audit, and that will be on your Exhibit K.

10 Since Appellant has not stated any specific errors
11 in the cost accountability test, the Department rejected this
12 contention. The Department was not able to verify the
13 Appellant's proposed error rate of 212 percent, and that will
14 be on your Exhibit I, page 321. Therefore, the Department
15 rejected the second contention.

16 Appellant request relief of interest due to
17 unreasonable delays in processing of these audit. The
18 Department performed an analysis of the case and this
19 specific time spent during the audit appeals and settlement
20 process, and that will be on your Exhibit J.

21 Reimbursement review, the Department recommends
22 relief of interest for the periods of December 1st, 2013,
23 through December 31st, 2013; May 1st, 2014, through
24 June 30th, 2014; August 1st, 2015, through October 31st,
25 2015; August 1st, 2017, to September 31st, 2017; June 1st,

1 2019 through August 31st, 2019; and October 1st, 2019 through
2 January 31st, 2020, for a total of 15 months.

3 The Department request a request for relief of
4 interest form signed under penalty of perjury for this
5 recommendation to take effect. Appellant has not provided
6 any reasonable documentation or if he chose to support any
7 additional adjustment to the audit finding; therefore, for
8 all of these reasons the Department request the appeal be
9 denied. This concludes our presentation. We are available
10 to answer any questions the Panel may have. Thank you.

11 JUDGE BROWN: Thank you. Now, we may have questions
12 from the panel. Judge Geary, would you like to begin with
13 any questions?

14 JUDGE GEARY: Sure. For -- for the Department first.
15 Did the Department assume that all retail sales either in
16 conjunction with time and material contracts or retail store
17 sales were from tax paid inventory?

18 MR. SAMARAWICKREMA: Yes.

19 JUDGE GEARY: Why?

20 MR. SAMARAWICKREMA: The -- even -- the -- based on
21 the -- based on the information we recovered -- I mean, we --
22 based on the information we had, the Appellant did not
23 maintain any cost files, and the only information that the
24 Department had is retail sales, and we -- the -- the
25 Department was unable to -- to identify whether -- whether

1 the retail sales were -- came from tax paid purchases or
2 X-tax purchases.

3 And we used the actual retail sales and actual
4 material and material -- for materials, fixtures, and
5 equipment using lump sum contracts and identify the -- the
6 total -- total sales and the -- the most effective way to --
7 to identify the unreported taxable purchases by using the
8 audit that we use.

9 And, like, also during the audit period we
10 identify the actual X-tax purchases, \$909,000. So if --
11 if -- if you -- if he used the actual -- actual X-tax
12 purchases the -- the number should be 164,000 --

13 THE REPORTER: The number -- what?

14 MR. SAMARAWICKREMA: If he use that actual X-tax
15 purchases of hundred -- 909,000 and adjusted for opening and
16 ending inventory and compare that to the reported sales, then
17 the number is more than what we have for these audit even if
18 he -- if he didn't take 73,000 gross profit into
19 consideration.

20 So the -- the -- the way -- the way we did the
21 cost accountability, you know, our objective to identify the
22 X-tax purchases but actually we have -- we have actual X-tax
23 purchases on actual basis on Exhibit -- Exhibit D, page 207
24 through 228. The -- the -- by using the cost accountability
25 test actually we gave a huge benefit for the taxpayer by not

1 paying \$664,000, so the -- it is our position the way we
2 approach the audit by assuming all the -- all the retail
3 sales that came from tax paid purchases is reasonable.

4 JUDGE GEARY: So --

5 MR. SAMARAWICKREMA: Sorry.

6 JUDGE GEARY: -- let me just -- so by assuming that all
7 retail sales were sales of tax paid purchases, it actually
8 benefited the taxpayer.

9 MR. SAMARAWICKREMA: Yes.

10 JUDGE GEARY: Okay. Same regarding any -- a similar
11 assumption made with respect to the ending inventory;
12 correct?

13 MR. SAMARAWICKREMA: Yes. Because we can identify
14 the -- because based on the accountability test, we already
15 have the -- the opening inventory and we have the two million
16 purchases and we have ending inventory 200 something. So if
17 it -- if the computer percentage, like, opening inventory and
18 divided by the purchases to compute the opening inventory
19 percentage and if he do the same thing to compute the ending
20 inventory percentage and apply those two percentages to
21 909,000, then we have opening tax -- X-tax inventory and also
22 ending X-tax inventory.

23 If he -- if he applied those adjusted numbers,
24 then the unreported taxable should be more than 164,000.

25 JUDGE GEARY: Is it your understanding, Department, that

1 the items included in purchases did not include charges for
2 services?

3 MR. SAMARAWICKREMA: That's right. And it -- the
4 easiest way to verify it, we already had the Federal Income
5 Tax purchases. If you -- if you go to our -- our page 50 of
6 Exhibit A, in 2010, the purchases for the whole 12 months
7 purchases is 1.9 million. And for -- for 2011 is
8 1.4 million.

9 And if you -- and if you compare that to the
10 Schedule 12-C, that is Exhibit D, page 157, the total
11 purchases we used for the material accountability test is
12 585,000 versus 1.4 million. And in the audit paper
13 specifically says we make adjustment for sub-contracts,
14 services and also the -- the Appellant provided the detail
15 listing yesterday. And -- and before the hearing we reviewed
16 that information there about a little over ten -- ten
17 vendors. Those vendors were not listed in our total
18 purchases listed in Schedule C of -- that is Exhibit D,
19 page -- pages 158 through 206.

20 JUDGE GEARY: You're referring to the exhibits that were
21 not admitted today?

22 MR. SAMARAWICKREMA: Yeah. Like, I was referring to as
23 Exhibit 2 and the -- like, I can give you exactly --

24 JUDGE GEARY: That won't be necessary.

25 MR. SAMARAWICKREMA: Okay.

1 JUDGE GEARY: Some questions for the Appellant.
2 Mr. Moser, does your -- does your client contend that the
3 items identified as purchases of tangible personal property
4 made without the payment of tax to the vendor are not
5 accurate?

6 MR. MOSER: Yes. That listing -- that listing of the
7 X-tax purchases?

8 JUDGE GEARY: Yes. Which I think is the original
9 Schedule C, 12-C.

10 MR. MOSER: Yeah. We don't think that that was -- that
11 that's accurate.

12 JUDGE GEARY: And have -- have you or has your client
13 submitted to the Department, either during the audit or in
14 the course of this appeal, an invoice that shows that the --
15 that any given entry on that schedule does not accurately
16 state an amount paid by your client for tangible personal
17 property?

18 MR. MOSER: Yes. And originally they had every invoice,
19 so if they had a question -- if they came to an invoice and
20 they said no tax was paid but we think tax should have been
21 paid, they had the opportunity -- I was 50 feet away from
22 this auditor. She could have came to me and said, hey, I
23 have this invoice. I think tax should have been paid, and it
24 shows that it's not paid. So why wasn't it paid?

25 We could have then got gone back to the client and

1 tried and figured out why no tax was paid, and we could have
2 then determined whether she's right, we're right. But that
3 was never done. And -- and I -- and I -- that's why I -- I
4 had the client, you know, I -- this one invoice that I
5 submitted today shows that. It shows that this should not
6 have been tax on here. It wasn't taxed on here. It's on
7 their X-tax listing.

8 So they had -- I mean, we've talked about this for
9 years, this whole thing. And why they didn't do this, I
10 cannot figure out. And, you know, this goes a little bit to
11 the rebuttal, but they're sitting there saying that we didn't
12 provide all the documentation. We provided everything that
13 they asked for.

14 Now, I will say that in a perfect world, there's
15 some things that they probably asked for that just weren't
16 available. But everything that we could have provided, we
17 provided, and we provided every invoice. I mean, what's more
18 direct than looking at the invoices of the purchases and
19 determining whether there should be tax or no tax?

20 JUDGE GEARY: Let me interrupt you for a second.

21 MR. MOSER: Sure.

22 JUDGE BROWN: And try to focus this discussion. You
23 have said in your argument and you've said in response to my
24 question that -- that you or your client or both think it was
25 inappropriate for the auditor to look at an invoice, observe

1 that it involved the purchase of tangible personal property,
2 and to observe that it showed no payment of tax by your
3 client.

4 Why -- why do you think the auditor would have to
5 ask you about it if the information is right there in front
6 of the auditor?

7 MR. MOSER: Because it's -- it's not that simple.
8 They -- they were purchasing items properly without tax and
9 they were purchasing items with tax. They had a retail
10 store. The items that they purchased with the retail store
11 did not have to have tax on it because they're charging tax
12 to the ultimate person they're selling to.

13 JUDGE GEARY: I understand that. I -- but -- but why do
14 you think -- I don't think that the Department disputes that
15 it was entirely within your client's rights to pay tax on
16 some items and not pay tax on other items, but are you
17 suggesting that the payment of tax by your client determines
18 whether or not your client owes tax on those items?

19 Let me ask you this. If your client buys a pool
20 filter and pays tax on it and then sells that pool filter at
21 a profit to a customer, does your client -- do you believe
22 your client owes tax on any of the amount your client
23 receives in payment for that pool filter?

24 MR. MOSER: Well, I think the profit portion may have --

25 JUDGE GEARY: And don't you think that's what the

1 Department did with respect to retail sales of items that
2 were purchased by your client tax paid?

3 MR. MOSER: No.

4 JUDGE GEARY: All right.

5 MR. MOSER: I -- no, I don't -- not -- not from the
6 listing that's there.

7 JUDGE GEARY: Does the evidence that you've submitted,
8 does it -- referring to that evidence, and I'm not talking
9 about spreadsheets. I'm talking about -- because we don't
10 know the source of information on some spreadsheets, but can
11 you -- can you point to any specific entry on the
12 Department's schedule of purchases that is wrong because the
13 Department included in the -- in the taxable measure either
14 because it's used tax owed on the purchase price -- you do
15 agree, by the way, that your client would owe used tax on
16 tangible personal property purchased and consumed by your
17 client; correct?

18 MR. MOSER: Yes.

19 JUDGE GEARY: Okay. And you also agree that your client
20 owed -- owed sales tax on the profit it made from TPP
21 purchase, tangible personal property purchase tax paid
22 because you just said you agreed with that.

23 MR. MOSER: Correct.

24 JUDGE GEARY: Can you point to any entry on the
25 Department's schedule of purchases, either tax paid purchases

1 or X-tax purchases, where the Department incorrectly included
2 the -- either the purchased price or the profit and the
3 taxable measure and then point us to an invoice that shows
4 the Department was wrong?

5 MR. MOSER: Yeah. Let me -- I forget the page numbers
6 for the X-tax listing. Do you guys know the X-tax listing
7 page number?

8 MR. PARKER: The X-tax purchases is in Schedule 12-D
9 which is part of Exhibit D. And it's pages 207 through 228.

10 JUDGE GEARY: I have that schedule in front of me, and
11 if you can -- if there is an entry on that schedule that you
12 think your evidence establishes an error.

13 MR. MOSER: Yeah. If you look at this invoice dated
14 8/09.

15 JUDGE GEARY: A line number would probably help me
16 better.

17 MR. MOSER: Okay. What was -- let me find the listing.
18 207.

19 JUDGE GEARY: I'm sorry. I didn't hear that.

20 MR. MOSER: It's page 207.

21 JUDGE GEARY: Okay. And give me a line number.

22 JUDGE BROWN: I believe -- did you say 207 or 227?

23 MR. PARKER: It's page 207 through page 228. I should
24 clarify. That's the BATES stamp page number.

25 MR. MOSER: Yeah, at the bottom. I got this from --

1 this page 112, this retail and service invoices which --

2 JUDGE GEARY: Let me just interrupt you. Mr. Moser,
3 when you say page 112, is it --

4 MR. MOSER: The stamp number.

5 JUDGE GEARY: Okay. Give me a minute to get there.
6 Okay.

7 JUDGE BROWN: And you mean 112 in CDTFA's exhibits?

8 MR. MOSER: Yes.

9 JUDGE BROWN: Okay.

10 MR. MOSER: It says "Retail and Service Invoices."

11 JUDGE GEARY: Okay. I'm on 112. The first line number
12 on that page is 109. Is that the right one?

13 MR. MOSER: Yes. So if you look at 115.

14 JUDGE GEARY: 115, \$37,330.

15 MR. MOSER: Which shows that it's put into the X-tax
16 listing, but it's not an X-tax.

17 JUDGE GEARY: And you know this because what?

18 MR. MOSER: I have the invoice.

19 JUDGE GEARY: Is that the invoice?

20 MR. MOSER: It should -- it should be X-tax, but it was
21 added back in as taxable.

22 JUDGE GEARY: It sounds -- are you -- when you -- when
23 you say "but it's taxable," you mean --

24 MR. MOSER: It's not taxable, but it was added back in
25 on their calculations that it should have been taxable.

1 JUDGE GEARY: I'm confused. And let me ask you for some
2 clarification. Is it your contention that line item 115 an
3 invoice for \$37,330.00 is -- appears on the schedule for
4 retail and service invoices 2012, and is it your contention
5 that that \$37,330.00 is included in the schedule of TPP
6 purchases that are subject to tax either on costs or profit?

7 MR. MOSER: Yes.

8 JUDGE GEARY: All right. Let me interrupt my questions
9 to you and go to Mr. Samarawickrema, and ask you, sir, is
10 that -- is that amount included in the Department's measure
11 of tax?

12 MR. SAMARAWICKREMA: No, because that's a sale invoice
13 and not the purchases. That listed the sale invoices for
14 that particular year. And the purpose of that schedule is to
15 identify what the retail sales and the material, equipment,
16 and -- material, equipment, and fixtures using lump sum
17 contracts. So the Department did similar test for all three
18 years to identify retail sales of material, fixtures, and
19 equipment and this is not -- this is sale invoices.

20 MR. PARKER: Judge Geary, I'd just like to add something
21 real quick is that I think where the Appellant's
22 representative is getting confused is our audit is
23 conducted -- basically the measure is solely derived from
24 purchase invoices, and he has always provided sales invoices
25 saying they're not subject to tax. The invoice that he

1 provided that he points out, we agreed that it's not subject
2 to tax but it has no bearing on the adjustment to the
3 purchases of -- or the X-tax purchases on Schedule 12-D.

4 JUDGE GEARY: Because it's not included in those
5 purchases.

6 MR. PARKER: Well, it's a sale and not a purchase.

7 JUDGE GEARY: Right.

8 MR. PARKER: Correct.

9 JUDGE GEARY: Do you understand that, Mr. Moser?

10 MR. MOSER: Well, I understand what you're saying, but I
11 don't necessarily agree. But you can go on.

12 JUDGE GEARY: Okay. Is there any other -- is there any
13 other particular amount included on the Department's
14 schedules of X-tax purchases or tax -- or tax included
15 purchases that you think should not have been included in the
16 taxable measure?

17 MR. MOSER: I don't have any detail on it. No.

18 JUDGE GEARY: Thank you. Those are all the questions I
19 have.

20 JUDGE BROWN: Thank you very much. And, Judge Wong, do
21 you have any questions?

22 JUDGE WONG: I have no questions, thank you.

23 JUDGE BROWN: Okay. Give me just a moment. All right.
24 I think that I will say that we can move onto Appellant's
25 rebuttal, if you are ready, Mr. Moser. If you need a minute,

1 that's fine.

2 MR. MOSER: No, I'm fine. That's fine. I can go.

3 JUDGE BROWN: You can go ahead with your rebuttal and --
4 yeah, thank you.

5
6 CLOSING STATEMENT

7 MR. MOSER: Okay. So part of what the Department said
8 was we refused to show some records which -- which was not
9 true. We provided all the records that they asked for that
10 were available.

11 Now, I will admit that there were some records
12 that they asked for that were not available partly due to, to
13 timing, partly due to my client not fully understanding his
14 record retention, and so there was some records that we --
15 that we couldn't provide. But -- but everything they -- they
16 asked for -- there was nothing that they asked for that we
17 couldn't provide a sampling of.

18 They asked for point of sales invoice -- not
19 invoices but records that -- to show the sales for whole
20 three-year period that it -- the client had changed their
21 point of sales equipment and so all the records were not
22 available, but we were able to provide a test for -- for the
23 period which they did.

24 So their whole contention is that they had to use
25 this cost accountability test because they couldn't get

1 records. I -- I find it hard to understand if you have every
2 single invoice in your possession how you can't use a direct
3 auditing method and why you have to then go to some other
4 record, some other way of testing. I just -- I don't -- I
5 don't understand that, and it's something I've never
6 understood for the last ten years.

7 They talked about time and material contracts.
8 I'm not really sure there were any time and material
9 contracts. I think they're really talking about the route
10 sales. They talk about -- they talked about that we couldn't
11 show them how the -- the sales tax reports were -- were
12 calculated. We did go through the way it was calculated, and
13 we gave the auditors at -- at some time the backup that the
14 client used.

15 Now, I will admit that the client did not prepare
16 the returns properly because they didn't understand, and I
17 find this with a lot of clients, they don't understand that
18 they're supposed to report hundred percent of their sales and
19 then take a deduction for their non-taxable sales. So, yes,
20 they only reported the taxable sales on their sales tax
21 return probably up to the time of the audit, maybe after that
22 then we straightened them out on that. But we did give them
23 the detail. The client did have records of how they made the
24 calculation, and we did send them that -- that information.

25 And let me see -- well, I mean, some of the stuff

1 that he was talking about I couldn't really follow because I
2 couldn't get to the pages fast enough. But -- but my main
3 contention is that this cost accountability test I don't
4 think is accurate because I don't know that the books and
5 records are as accurate as they need to be for that test in
6 terms of what's in cost of goods sold, what's in what
7 purchases where they are on the -- on the general ledger and
8 stuff or -- so -- but if you have every invoice I just -- I
9 just don't understand how you don't use that and say, okay, I
10 looked at every invoice. Let's determine if tax should have
11 been paid on it or not. I don't know.

12 I mean, I don't know. I do a lot of auditing and
13 that's the way I do my auditing. If I have -- if I come up
14 to a question I go to the client and ask them, hey, what
15 happened? I don't -- I can't make a determination and put it
16 in a financial statement and say, hey, this client did all
17 these things wrong because that's my determination. I have
18 to ask them. And that's really what should have happened
19 here. They had the records.

20 You know, to say they didn't have the records
21 is -- is completely false because they had all the purchase
22 invoices. I mean, you're telling me that someone sat in my
23 office for three weeks and wasn't looking at anything?
24 So that's -- that's what I don't understand. But -- and I'm
25 not trying to say that -- that their number should be zero.

1 Okay. I just want -- I'll -- I'll admit that there were
2 errors in here.

3 You know, the client did try and keep a
4 distinction between what they were purchasing with tax for
5 the store and what they were purchasing for their
6 construction business. But, you know, you call up a vendor
7 and you say, hey, send me whatever, you know, sometimes the
8 vendor makes mistake. Sometimes you make the mistake.
9 Whatever happen.

10 I'm not trying to say that everything is perfect
11 here, but I just don't think that this -- this number is
12 accurate.

13 JUDGE BROWN: Okay. Thank you very much. And I did
14 allow an extra few minutes if CDTFA had any final response,
15 in addition to what we've already heard from you. You do not
16 need to repeat anything.

17 MR. SAMARAWICKREMA: We have nothing to add.

18 JUDGE BROWN: Okay. Thank you. Just a minute. All
19 right then. I can say that that concludes the hearing. The
20 record is closed and the case is submitted except for the
21 Appellant's submission of the written request for relief of
22 interest.

23 Mr. Moser, it can be signed by you or it can be
24 signed by your client. But as I said, it does have to be
25 under penalty of perjury and you indicated you would submit

1 it to OTA with a copy to CDTFA one week from today, and I
2 don't know if we need any time for response from CDTFA.

3 MR. PARKER: We've already gone over the months that
4 we're willing to concede.

5 JUDGE BROWN: Right.

6 MR. PARKER: I don't see -- I don't see a need for a
7 period to respond.

8 JUDGE BROWN: Okay. Thank you. All right. Then I will
9 say once we -- I guess the problem -- question is for the
10 periods that aren't conceded whether CDTFA would want to
11 respond on those.

12 MR. PARKER: The Appellant's representative made no
13 argument today about any of the other periods. I would
14 consider this to be the forum to provide that argument. I'm
15 not sure the need for it after the fact. We've already
16 provided all of our analysis and the periods in which we felt
17 there was unreasonable delay, and otherwise the items were
18 being worked so --

19 JUDGE BROWN: Mr. Moser, you understand that -- the
20 question is for this -- the time period where you're arguing
21 relief of interest and CDTFA has conceded it, if you didn't
22 raise it during your argument today -- and so the question is
23 how, you know, whether CDTFA would have -- whether that
24 period is still at issue, those periods are still at issue
25 and whether CDTFA, you know, if you're not going to raise it

1 now how would they have an opportunity to respond?

2 MR. MOSER: Well, I did raise it. I did raise it, and
3 you said that I needed to put it in writing.

4 JUDGE BROWN: I think we --

5 MR. MOSER: You asked me what periods and I told you,
6 and then you said, well some of that is outside of your
7 purview.

8 JUDGE BROWN: Right. But the period after it's left
9 CDTFA --

10 MR. MOSER: Yes.

11 JUDGE BROWN: -- the question is -- let me -- hold on.
12 Let me look at the time period. All right. So the time
13 period that is in question that we're talking about here is
14 March, April and -- March through May of 2019 and then
15 September 2019 and then February 2020 through whenever
16 CDTFA's final options letter was issued and --

17 MR. MOSER: Is that the September period?
18 September 2020?

19 JUDGE BROWN: Well, I think CDTFA's options letter was
20 issued -- hold on -- the option letter was issued
21 August 4th, 2020, so that would be the end date essentially.

22 MR. MOSER: Okay. August.

23 JUDGE BROWN: Now CDTFA conceded, as I said, periods
24 within that.

25 MR. MOSER: Right. June through August, and October

1 through January 2020.

2 JUDGE BROWN: Yeah. Is your microphone on, Mr. Moser?

3 MR. MOSER: Yeah. I'm sorry.

4 JUDGE BROWN: Okay.

5 MR. MOSER: Yeah. I think it's the June 2019 to
6 August 2019 and October 2019 to January 2020.

7 JUDGE BROWN: Right. So those are the periods conceded.
8 CDTFA is saying they don't need to response to that. They've
9 already conceded it. The question is those other periods
10 that we're talking about. Do you have any argument or
11 evidence that you're pointing to that -- beyond what you're
12 going to put in -- not beyond, but what they're saying is, is
13 their -- you didn't argue anything about those periods during
14 your presentation.

15 MR. MOSER: Well, I didn't say anything because you said
16 that I needed to put it in writing.

17 JUDGE BROWN: We do need it in writing.

18 MR. MOSER: So I didn't really say much. I mean, this
19 thing was -- this thing was delayed from -- from 2013 to
20 2018. So, you know -- so I'm not really clear as to what
21 periods I'm allowed to get the relief of interest and what my
22 client is allowed to get the relief, you know. But, I
23 mean --

24 JUDGE BROWN: I will --

25 MR. MOSER: -- everything was delayed. I mean, there

1 was no -- from 2013 to -- to 2018 this whole thing was -- was
2 just delayed.

3 JUDGE BROWN: Right. And I will point -- I will say --
4 I will point you to CDTFA's Exhibit F where they have a
5 little chart that their position.

6 MR. MOSER: No. I have that. I wasn't --

7 JUDGE BROWN: Okay. All right. What I'm going to say
8 is --

9 MR. MOSER: Yeah.

10 JUDGE BROWN: -- you're going to submit your request for
11 relief of interest by a week from today.

12 MR. MOSER: The 22nd.

13 JUDGE BROWN: Right. CDTFA, I will leave the record
14 open for if you have any response. We'll set a deadline for
15 which you can respond. And if you think that there's no need
16 to respond, then please let us know and then we will close
17 the record.

18 MR. SAMARAWICKREMA: Okay.

19 JUDGE BROWN: Okay. Do you want two weeks from the
20 submission of the request?

21 MR. SAMARAWICKREMA: Yeah. Two weeks. Is fine. Thank
22 you.

23 JUDGE BROWN: Okay. All right. So the record -- I'm
24 going to leave the record open, as I said, one week from
25 today for Appellant's submission. CDTFA will have two weeks

1 to respond, and then the record will be closed. And as I
2 believe I indicated previously, after that once the record is
3 closed the judges will meet and decide the case based on the
4 evidence, arguments, and applicable law, and we will mail
5 both parties our written decision no later than 100 days from
6 today. So --

7 MR. MOSER: From the date.

8 JUDGE BROWN: From the date of close. Right. Sorry.

9 MR. MOSER: So that's three weeks.

10 JUDGE BROWN: 100 days from the date the record closes.

11 MR. MOSER: That's about three weeks from today.

12 JUDGE BROWN: Yeah, three weeks from today.

13 MR. MOSER: All right.

14 JUDGE BROWN: Sorry. That's my -- my default language.
15 So I believe that wraps everything up, and so the hearing is
16 now adjourned. Thank you very much everyone for your
17 participation, and we are off the record.

18 (The Hearing concluded at 4:58 p.m.)
19
20
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25

1 REPORTER'S CERTIFICATION

2
3 I, the undersigned, a Certified Shorthand
4 Reporter of the State of California, do hereby certify:

5 That the foregoing proceedings were taken before
6 me at the time and place herein set forth; that any
7 witnesses in the foregoing proceedings, prior to
8 testifying, were duly sworn; that a record of the
9 proceedings was made by me using machine shorthand, which
10 was thereafter transcribed under my direction; that the
11 foregoing transcript is a true record of the testimony
12 given.

13 Further, that if the foregoing pertains to the
14 original transcript of a deposition in a federal case --
15 before completion of the proceedings, review of the
16 transcript [] was [] was not requested.

17 I further certify I am neither financially
18 interested in the action nor a relative or employee of any
19 attorney or party to this action.

20 IN WITNESS WHEREOF, I have this date subscribed my
21 name.

22 Dated: MARCH 6, 2023

23 Marie C. Sanchez
24 Marie C. Sanchez, CSR No. 13809
25 Certified Shorthand Reporter
For The State Of California

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