

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
KOENIG & BAUER,) OTA NO. 21037464
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Friday, February 24, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 1:00 p.m. and concluding at 1:40 p.m. on
Friday, February 24, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSHUA ALDRICH

Panel Members: ALJ SUZANNE BROWN
ALJ KEITH LONG

For the Appellant: RICK NAJJAR
COLETTE SUTTON

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

JARRETT NOBLE
CHAD BACCHUS
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibit 1 was previously received into evidence.)

(Parties' Joint Exhibits A-K were previously received into evidence at the prehearing conference.)

P R E S E N T A T I O N

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1 California; Friday, February 24, 2023

2 1:00 p.m.

3
4 JUDGE ALDRICH: This is Josh Aldrich. We're
5 opening the record in the Appeal of Koenig and Bauer US
6 Incorporated doing business as Planeta North America
7 Incorporated before the Office of Tax Appeals or OTA; OTA
8 Case Number 21037464. Today's date is Friday,
9 February 24th, 2023, and it's approximately 1:00 p.m.

10 This hearing was noticed for a virtual hearing
11 and is being heard by a panel of three Administrative Law
12 Judges. My name is Judge Aldrich. I am the lead judge
13 for purposes of conducting the hearing. I'm joined by
14 Judges Suzanne Brown and Keith Long. During the hearing
15 the Panel members may ask questions or otherwise
16 participate to ensure that we have all the information
17 needed to decide this appeal. After the conclusion of the
18 hearing, we three will deliberate and decide the issues
19 presented.

20 As a reminder, the Office of Tax Appeals is not a
21 court. It's an independent appeals body. We do not
22 engage in ex parte communications with either party, and
23 our opinion will be based on the parties' arguments,
24 admitted evidence, and the relevant law. And we have read
25 the parties' submissions, and we're looking forward to

1 hearing your arguments today.

2 Who is present for Appellant?

3 MR. NAJJAR: Rick Najjar and Colette Sutton.

4 JUDGE ALDRICH: Okay. And for the purposes of
5 presentation, are you going to be presenting, Mr. Najjar
6 or is Ms. Sutton, or are you dividing it?

7 MR. NAJJAR: I will be presenting. Thank you.

8 JUDGE ALDRICH: Okay. Thank you.

9 And who is present for the Department or CDTFA?

10 MR. NOBLE: Jarrett Noble with CDTFA.

11 MR. BACCHUS: Chad Bacchus also with CDTFA.

12 MR. PARKER: Jason Parker with CDTFA.

13 JUDGE ALDRICH: Great. Welcome everyone.

14 So the issue to be decided is whether any further
15 adjustments are warranted to the determined measure of
16 unreported taxable sales. And there are two sub-issues,
17 whether Appellant's transportation charges are subject to
18 tax, and whether the disputed measure include any other
19 nontaxable charges.

20 I'll start with Appellant's representative. Is
21 that your understanding of the issue?

22 MR. NAJJAR: Yes, it is.

23 JUDGE ALDRICH: And Department, is that your
24 understanding of the issue?

25 MR. NOBLE: Yes, it is.

1 JUDGE ALDRICH: Great. Moving on we'll address
2 the exhibits. So both parties have identified the same
3 exhibits, Exhibits A through K, as their exhibits in their
4 respective exhibit indexes, which were submitted prior to
5 the prehearing conference. Exhibits A through K were
6 submitted with CDTFA's September 15th, 2021, opening
7 brief. And pursuant to the agreement of the parties and
8 to reduce duplicative exhibits, A through K will be
9 referred to as a "Parties Joint Exhibits."

10 And in anticipation of the hearing, we admitted
11 the exhibits into the record without objection from either
12 party. And Appellant also timely submitted an Exhibit 1,
13 which was identified as a document defining the term
14 "contemporaneous."

15 So for the Department, Mr. Noble, does this
16 statement accurately reflect your understanding regarding
17 the exhibits?

18 MR. NOBLE: Yes, sir. It does.

19 JUDGE ALDRICH: And Mr. Noble, do you have -- now
20 have any objections to either Appellant's Exhibit 1 or the
21 Joint Exhibits?

22 MR. NOBLE: We do not.

23 JUDGE ALDRICH: Great.

24 And so similar questions for Mr. Najjar. Does
25 that previous statement accurately reflect your

1 understanding of these exhibit?

2 MR. NAJJAR: Yes, and we have no objections.

3 JUDGE ALDRICH: Thank you.

4 All right. So transitioning to the hearing
5 format, we plan for the hearing to proceed as follows.
6 Appellant's opening presentation will be approximately
7 20 minutes followed by CDTFA's combined opening and
8 closing statement of 20 minutes. Then the Panel may ask
9 questions for 5 to 10, and we'll afford Appellant the
10 opportunity to rebut or close, and we allotted 5 to 10
11 minutes there. So these are made for calendaring
12 purposes. If you need additional time, please ask me and
13 I will see if we can accommodate you.

14 And if there's nothing further, we'll switch over
15 to presentations.

16 Mr. Najjar, are you ready to proceed?

17 MR. NAJJAR: Yes, I am. Thank you.

18 JUDGE ALDRICH: Go ahead when ready.

19 MR. NAJJAR: Sure.

20

21 PRESENTATION

22 MR. NAJJAR: This is Rick Najjar speaking. Thank
23 you, Judge Aldrich. And thank you to the OTA for hearing
24 our case today.

25 Overall there are three main issues in this case

1 related to petitioner or taxpayer or Koenig & Bauer,
2 Bauer's contracts with three of its customers, Advance
3 Paper Company, Garvey, and Royal Paper Box. In
4 particular, the petitioner contends one, the charges for
5 transportation were separately stated in accordance with
6 Regulation 1628(a); two, the assembly charges are actually
7 nontaxable installation charges under Section 6011; and
8 three, the training charges are immediately incidental to
9 the nontaxable installation charges and therefore, they
10 themselves are nontaxable.

11 Just to provide some background, petitioner's
12 company is located in Dallas, Texas and is a member of the
13 overall Koenig & Bauer Group, which is located in Germany.
14 Petitioner sells high-tech printing presses to customers
15 located all over the world, including in the U.S. and
16 including in California. Petitioner's primary business is
17 making these large custom high-tech printing presses that
18 they sell via common carrier most of the time.

19 The sales contracts in question today all contain
20 a lump sum purchase price for the printing presses,
21 training, transportation, and installation. However,
22 after the contracts are completed, including any modifying
23 addendums thereto, the shipment of the actual printing
24 press has occurred, invoices are issued to their customers
25 that separately state charges for training, installation,

1 and transportation.

2 So getting to our first issue regarding
3 transportation charges, Respondent contends -- the CDTFA
4 contends the invoices were not issued contemporaneously
5 because they were not issued at the exact same time the
6 contracts and the addendums were signed. Looking to
7 California Law Regulation 1628(a) states the following:
8 Transportation charges will be regarded as separately
9 stated, only if they are separately set forth in the
10 contract for sale or a document reflecting that contract
11 issued contemporaneously with the sale, such as a
12 retailer's invoice.

13 So what does contemporaneously actually mean in
14 the context of Regulation 1628(a)? There's no California
15 law or guidance on this issue. Therefore, we're left with
16 trying to find the ordinary or popular meaning of the
17 term. Respondent cites Webster's -- Merriam-Webster
18 Dictionary and Black's Law Dictionary which gives a simple
19 definition of contemporaneous as meaning at the same time.
20 In other words, contemporaneous is synonymous with
21 simultaneous. But looking to a bigger dictionary, the
22 Oxford English Dictionary unabridged, states there's
23 actually a difference in the usage of simultaneous and
24 contemporaneous.

25 Simultaneous is meant to mean at the exact moment

1 in time, while contemporaneous means in the same period of
2 time. Petitioner contends that this definition better
3 fits the context of Regulation 1628(a). Also, it should
4 be noted dictionaries are a useful indication of what the
5 ordinary and popular meaning would be of a term, but they
6 are not a be-all end-all. As courts have stated before,
7 dictionaries are not a talisman. So it's important to
8 look at other indications.

9 Looking further at California sales tax
10 regulations, we see that the term "simultaneous" is used
11 in Regulation 1502 instead of contemporaneous. So why
12 doesn't 1628(a) use the term simultaneous if that's what
13 the drafters of that regulation in 1962 actually intended?
14 Thinking more abstractly about the matter, there is a
15 notion of contemporaneous documentation that is ubiquitous
16 in the tax law. For example, Section 178 -- 170(f)(8)(a)
17 of the Internal Revenue Code provides the following: No
18 deduction shall be allowed under subsection (a) for any
19 contribution of \$250 or more, unless the taxpayer
20 substantiates the contribution by a contemporaneous
21 written acknowledgement of the contribution by the donee
22 organization.

23 That meets the requirements of subparagraph (b).
24 The statute goes on to provide that there's a one-year
25 time frame, the same time as when the actual expense is

1 paid for the charitable contributions made. So it's a
2 one-year time frame to submit the written acknowledgment.

3 Furthermore, we would also like to point out that
4 deference to CDTFA, Respondent, is inappropriate here,
5 even though Respondent is entitled to deference usually
6 when interpreting its own regulation, which is what
7 1628(a) is. Deference is not appropriate when there's no
8 published guidance or even a longstanding policy
9 interpreting Regulation 1628(a), particularly with this
10 matter with contemporaneous.

11 Next question would be, what is the relevant time
12 frame and when does it begin? To assess what the time
13 period would be, we define contemporaneous the way the
14 petitioner contends. It's the petitioner's position that
15 the relevant time frame would begin with shipment -- begin
16 on the shipment date of the printing presses, which is
17 actually considered the sale pursuant to Section 6006.

18 It's typical for a business, like petitioner's,
19 to first have a contract then later have addendums to
20 modifying the contract, then to ship the product and then
21 to finally issue customer invoice. Given the large
22 amounts of these sales, these are printing presses that
23 run into the hundreds of thousands of dollars. This
24 allows time for all the relevant pricing information to
25 accrue to accurately issue a separately stated invoice

1 down the road.

2 So let's just go over some relevant dates here
3 with the contracts at issue.

4 Advance Paper, we have a shipment date of
5 January 22nd, 2016, an invoice date of February 2nd, 2016.
6 You can see Exhibit H and Exhibit E respectively for that.

7 The Garvey Group, a shipment date of
8 January 12th, 2016, Exhibit H, and an invoice date of
9 January 22nd, 2016, Exhibit F.

10 Royal Paper Box Company, a shipment date of
11 December 22nd, 2015, Exhibit H, and invoice dates of 26
12 of -- February 16th, 2016, and February 19th, 2016,
13 Exhibit G.

14 As you can see the time between the shipment date
15 and the actual issuance of the customer invoice is
16 nominal. Finally, the purpose of Regulation 1628 has been
17 served here. The separate statement -- a separate
18 statement rule Regulation 1628(a) is meant to ease the
19 administrative burden for the taxing agency. Taxpayers
20 often bear the evidentiary burden of demonstrating that a
21 receipt is not taxable and requiring a separately stated
22 charge provides a clear-cut way of meeting this burden.

23 Second and closely related to the first rationale
24 I just stated, the separate statement rule minimizes
25 disputes over the allocation of receipts to the taxable

1 and nontaxable components of the transaction. That's been
2 met here. Circling back to 170 of the Internal Revenue
3 Code, which I had mentioned about charitable
4 contributions, the U.S. Tax Court has stated, the
5 essential statutory purpose of the contemporaneous written
6 acknowledgment required by Section 170(f)(8)(a) is to
7 assist taxpayers in determining the deductible amounts of
8 their charitable contributions and to assist the IRS in
9 processing tax returns on which the charitable
10 contributions deductions are claimed. Petitioner's timing
11 of these invoices are contemporaneous, and they have not
12 caused any administrative burden for the Respondent to
13 separately figure out what should be taxable and what
14 shouldn't be.

15 Getting to the second issue related to
16 installation, Respondent misclassifies this charge as a
17 charge for taxable assembly instead of for a nontaxable
18 installation. The value of the actual assembly is
19 incorporated into the sales price, and the sales price
20 alone for the printing press. Stated in another way, the
21 printing press's retail sales price is unchanged from when
22 it is shipped from Germany to the U.S. The installation
23 charges do not increase the actual sales price of the
24 printing press itself, nor does the installation change
25 any substantive character of the printing press.

1 Exhibit 14 and Exhibit 16 in our original
2 submission clearly outlined by affidavit and video
3 evidence, the role of the erection engineers and the
4 assembly that occurs in Germany, not in the United States.
5 And the simple installation of just basically, in
6 colloquial terms, hooking up the machine and getting it
7 activated. The engineers just merely reassemble on-site.

8 The last issue is related to training charges.
9 The training charges are merely incidental to petitioner's
10 nontaxable installation charges as discussed previously.
11 KBA does not provide extensive training services regarding
12 the operation of the machines. KBA's customers can obtain
13 such training if they so opt. In other words, this isn't
14 like a training course that they buy. It's more just to
15 show users how to use the specific customized machine that
16 was assembled in Germany. The training services are not,
17 per say, required.

18 Overall, thank you for your consideration of this
19 matter for the taxpayer.

20 JUDGE ALDRICH: Does that conclude your opening
21 presentation?

22 MR. NAJJAR: That concludes it. Yes, Your Honor.

23 JUDGE ALDRICH: Great. So we're going to reserve
24 questions for after CDTFA presents. I do have some
25 questions for you and -- but --

So Mr. Noble, are you ready to begin with CDTFA's
or Respondent's opening and closing?

MR. NOBLE: Yes, sir.

JUDGE ALDRICH: Okay. Go ahead.

PRESENTATION

MR. NOBLE: On July 31st, 2018, Appellant was issued a Notice of Determination for the period January 1st, 2014, through December 31st, 2016. The determination is based on a June 15th, 2018, audit report disclosing a taxable measure of around \$2.7 million. Measure of tax for unreported sales determined by the audit is approximately \$2,050,000. And Appellant confirmed via email dated November 4th, 2020, that the measure in dispute is approximately \$1.6 million.

In addition, the Department subsequently performed a reaudit to remove installation charges of approximately \$41,000 from the taxable measure. The issues in this appeal are whether Appellant's charges for transportation of the printing presses are subject to tax and whether the measure includes any nontaxable charges such as installation or other services that were not part of its sales of the presses.

With respect to Appellant's transportation charges, Regulation 1628 subdivision (b)(2) provides that

1 when tangible personal property is sold for a delivered
2 price, tax applies to the transportation charges unless
3 three conditions are met. First, the transportation
4 charges must be separately stated. Second, the charges
5 must be for transportation from the retailer's place of
6 business or other point from which shipment is made
7 directly to the purchaser. And third, the transportation
8 must occur after the sale of the property is made.

9 The Department does not dispute that the charges
10 were for transportation from the retailer's place of
11 business. Subdivision (b) (1) states that property is sold
12 for a delivered price when the price agreed upon in the
13 contract for sale includes whatever cost or charge that
14 may be -- that is made for transportation of the property
15 directly to the purchaser.

16 There are three sales at issue to Advance,
17 Garvey, and Royal. The purchase agreements and other
18 sales documents for Advance and Garvey, which have been
19 provided as Exhibits D and E, show that the agreed upon
20 price of the printing presses includes the cost of
21 transportation. Appellant did not provide the purchase
22 agreement for its sale to Royal; however, Addendum A,
23 which has been provided as Exhibit F, shows that the
24 agreed price includes the cost of transportation.

25 Therefore, Appellant's sales of printing presses

1 were for a delivered price. As such, in order for its
2 transportation charges to be excluded from tax, the
3 charges must be separately stated and the transportation
4 must have occurred after the sale of the property was made
5 to the purchasers.

6 As for separately stated charges, Regulation 1628
7 subdivision (a) states that the transportation charges
8 will be regarded as separately stated only if they are
9 separately set forth in the contract for sale or in a
10 document reflecting that contract issued contemporaneously
11 with the sale, such as the retailer invoice. The
12 available sales documents, Exhibits D through F, though
13 initial lump sum charges for the printing presses, which
14 include delivery and installation. As such, Appellant's
15 transportation charges were not separately stated in these
16 documents.

17 Appellant also provided contract addendums for
18 Advance and Royal. However, the addendums contained lump
19 sum charges for transportation and assembly. Accordingly,
20 the charges are not separately stated in the addendums.
21 There are some invoices which appear to be requests for
22 down payments for all three sales which have been provided
23 as Exhibit G. These invoices do contain separately stated
24 charges for transportation. However, based on the
25 available shipping documents, which have been provided as

1 Exhibit H, it is unclear when possession of the printing
2 presses was transferred to the purchasers.

3 Specifically for Advance, the invoices dated
4 February 2nd, 2016, that's Exhibit G, page 1, but the
5 shipping documents list various dates of shipment in
6 January of 2016. Appellant also provided an internal
7 document, Exhibit I, indicating the delivery to Advance
8 was completed on February 4th, 2016, but this is not the
9 shipping receipt. And considering the other conflicting
10 dates, this document alone does not establish that the
11 invoice was issued contemporaneously with the sale.

12 Furthermore, Addendum B to the contract,
13 Exhibit D, page 21, indicates that the payment identified
14 in the invoice is due 30 days after the first salable
15 commercial run of the printing press, whereas the invoice
16 indicates that the payment is due immediately. Based on
17 the 30-day terms of payment state in Addendum B and the
18 invoice stating that the payment is due immediately, the
19 only logical conclusion is that the invoice was issued
20 sometime after the first commercial run of the printing
21 press. Accordingly, the invoice was issued after the sale
22 rather than contemporaneously with the sale.

23 For Royal, Exhibit G, page 2, is dated
24 February 16th, 2016, and Appellant has not provided any
25 documents establishing when transfer of possession

1 occurred. For Garvey the invoice, which is Exhibit G,
2 page 3, is dated January 22nd, 2016, but the available
3 shipping documents list various dates in December of 2015.
4 Accordingly, there's insufficient evidence to establish
5 that these invoices were issued contemporaneously with the
6 sale. And thus, Appellant has failed to establish that
7 its transportation charges were separately stated.

8 In addition to the charges being separately
9 stated, the transportation must have occurred after the
10 sale. The purchase agreements for Advance, provided as
11 Exhibit D, page 6, and Garvey, provided as Exhibit E,
12 page 6, are standard forms and state that the sales were
13 made pursuant to a security agreement. The agreements
14 grant Appellant a security interest in the property and
15 give Appellant the right to repossess the property in the
16 event of default.

17 Appellant did not provide the purchase agreements
18 for Royal. However, given the standard nature of the
19 available purchase agreements and statements in
20 Appellant's briefs stating that they make these sales
21 pursuant to perfected security agreements, it is more
22 likely than not that the sale was also made pursuant to a
23 security agreement.

24 Regulation 1628 subdivision (b)(3)(a) provides
25 that when a sale is made pursuant to a security agreement

1 in which the retailer retains title as security for the
2 payment of the price, the sale occurs when possession of
3 the property is transferred by the retailer to the
4 purchaser or other person at the purchaser's direction.

5 Accordingly, the sales at issue occurred after
6 transportation when possession of the printing presses was
7 transferred to the purchasers. And thus, for this
8 additional reason, Appellant has failed to establish that
9 its transportation charges are not subject to tax.

10 As to whether the taxable measure includes
11 nontaxable charges, such as installation labor or other
12 services that were not part of its sales of the printing
13 press, Section 6011 subdivisions (a), (a)(2), and (b)(1)
14 provide that the sales price of tangible personal property
15 means the total amount for which property is sold and
16 specifically includes the cost of materials, labor, or
17 service cost, and any services that a part of the sale.

18 Generally, whether service charges are subject to
19 tax is a question of whether or not the charges are
20 mandatory. In addition, Regulation 1546 subdivisions (a)
21 and (b) provide that fabrication labor is subject to tax
22 and include any operation which results in the creation or
23 production of tangible personal property, or which is a
24 step in a process or series of operations resulting in the
25 creation or production of tangible personal property.

1 Lastly, annotations 435.0020 and 435.0120 provide
2 the charges for assembling or engineering property prior
3 to attachment to real property are subject to tax.
4 Appellant has not provided any documentation establishing
5 that any of its service charges, such as training,
6 erection, and assembly were optional to the purchaser. In
7 fact, the available documentation indicates the charges
8 were mandatory. For example, Exhibit A, page 20, under
9 installation notes that the prices include the services of
10 erection engineers with no indication that the purchaser
11 had the option to refuse the service.

12 In addition, considering the sales were made
13 pursuant to a security agreement and that the presses came
14 with a warranty and were, by Appellant's admission, large
15 custom-made printing presses. The terms are consistent
16 with Appellant's service charges being mandatory to ensure
17 proper operation of the printing press. In the absence of
18 evidence establishing that these service charges were
19 optional, no adjustments are warranted.

20 With respect to the nontaxable installation
21 charges, the Department has already removed \$41,000 from
22 the taxable measure to account for installation based on
23 invoices Appellant provided for Advance and for Garvey,
24 which have been provided as Exhibit C. Appellant has not
25 provided further documentation establishing that there

1 were other installation charges in excess of this amount
2 and thus, no further adjustments are warranted.

3 To the extent that Appellant argues that the
4 printing presses were fully assembled at the factory,
5 disassembled for shipment and then reassembled at the
6 customer's location, annotation 435.0143 provides the
7 charges for reassembling are not subject to tax if the
8 charges are separately stated and the customer is not
9 required to hire the seller for the reassembly. There's
10 no evidence that the printing presses were assembled at
11 its factory. But more importantly, there are no sales
12 documents separately stating any reassembly charges and no
13 evidence that the charges were optional.

14 To the extent that Appellant asserts that the
15 training charges were incidental to its installation
16 charges, there are no provisions in the sales and use tax
17 law stating the training charges are not subject to tax.
18 Regulation 1501 does provide a true object of the contract
19 test for persons primarily engaged in the business of
20 rendering services. The test is used to determine whether
21 any tangible personal property transferred by a service
22 provider is incidental to the service by examining whether
23 the true object sought by the buyer is the service, per
24 se, or the property produced by the service.

25 The test does not provide a distinction for

1 services for being incidental to other service charges and
2 thus, Regulation 1501 is not applicable to this appeal.
3 Annotation 315.0335 provides that installation charges are
4 subject to tax when the training is contractually or
5 practically mandatory. There's no indication in the
6 contracts that the charges for training were optional to
7 the purchasers.

8 Rather, the contract states that Appellant will
9 furnish personnel to demonstrate the use of the presses,
10 that the training occurs over the course of several weeks,
11 and that there's optional auxiliary training available
12 four weeks after the first commercial run, that the
13 contracts note an optional auxiliary training but do not
14 note that the initial training is optional is an
15 indication that the charges were mandatory.

16 Furthermore, considering that the sales were made
17 pursuant to security -- to security agreements and
18 included warranties, it follows training the purchasers
19 how to operate the presses is practically mandatory to
20 ensure proper operation. Based on the foregoing, no
21 further adjustments are warranted, and this appeal should
22 be denied.

23 That concludes my presentation. Thank you.

24 JUDGE ALDRICH: Thank you, Mr. Noble.

25 At this time, we're going to switch to questions

1 from the Panel. So my first question is for Appellant's
2 representative, Mr. Najjar.

3 So at times I've seen in the exhibits the KBA.
4 Is KBA synonymous with Koenig & Bauer U.S?

5 MR. NAJJAR: Yes.

6 JUDGE ALDRICH: Okay. All right. And then I
7 guess what's the relationship with Planeta? Is that just
8 the doing business?

9 MR. NAJJAR: That's just a DBA registered in
10 Texas.

11 JUDGE ALDRICH: Okay. Great. And the next -- I
12 was curious. So in your presentation you had referenced
13 Exhibits 14, 15, and 16 as part of your original
14 submission. Are you talking about your submission to
15 CDTFA or to the Office of Tax Appeals?

16 MR. NAJJAR: Our exhibits were submitted labeled
17 as numbers to the Office of Tax Appeals.

18 JUDGE ALDRICH: So I guess you had referenced
19 some declarations and a video, but we had requested that
20 those be provided in our prehearing conference statement
21 request and then also noted in our minutes and orders that
22 we hadn't received a copy of those. So I'm just, like,
23 wondering whether or not you're expecting that to be a
24 part of the evidence or you're just incorporating that
25 into the argument.

1 MR. NAJJAR: If we can still admit it into
2 evidence, we would like to. But if not at this juncture,
3 we understand.

4 JUDGE ALDRICH: Okay. I guess part of the
5 confusion is that in the opening brief -- briefs -- excuse
6 me -- it was labeled as forthcoming. So meaning we were
7 expecting to receive it in the future, and we never
8 received a copy. And that's why I was putting you on
9 notice with the prehearing conference statement request.
10 But so your request would be to submit those three
11 exhibits if possible?

12 MR. NAJJAR: Yes. So we request for admission,
13 but we understand at this juncture if we can't get these
14 admitted into the record.

15 JUDGE ALDRICH: Okay. And so let me turn to
16 CDTFA to see what their position is regarding them.

17 MR. NOBLE: It was noted as forthcoming in their
18 opening brief, and I believe in response briefs we noted
19 it had not been provided yet. And again, in the
20 prehearing conference statement, at the prehearing
21 conference, and in your minutes and orders, you requested
22 the exhibits. We would object to allowing more time for
23 those exhibits at this point. However, in the event that
24 you do accept them, we would request more time to respond
25 post hearing.

1 JUDGE ALDRICH: Okay. So given the amount of
2 notice that Appellant's representatives received, I'm not
3 inclined to allow their late admission. So I guess we'll
4 move on from there.

5 But so at this time, I wanted to see if
6 Judge Long, did you have any questions?

7 Judge Long I do not. I believe you addressed my
8 questions. Thank you, Judge Aldrich.

9 JUDGE ALDRICH: Okay. And Judge Brown, turning
10 to you?

11 JUDGE BROWN: I may have a question. I wanted to
12 ask Appellant more about their position regarding the
13 installation charges and assembly charges. I suppose I'll
14 say I don't see where Appellant has addressed CDTFA's
15 references to the annotations such as 435 -- one second.
16 I have them in -- 43510143, for example, for regarding the
17 reassembly charges. And I don't know perhaps that might
18 be something that Appellant is going to address on
19 rebuttal, but I wanted to say what is Appellant's position
20 regarding those annotations? Do you agree? Are you
21 arguing they're not applicable here, or are you arguing
22 that -- that CDTFA, that they are wrong with -- yeah. So
23 I will say I'll let Appellant respond.

24 MR. NAJJAR: This is Rick Najjar speaking. Our
25 position is they're not applicable and that the record

1 speaks for itself, that there's a difference in those
2 particular annotations versus what we have here just given
3 the amount of assembly that's taken place in Germany. But
4 our position is that the record speaks for itself.

5 JUDGE BROWN: So you're saying that they -- the
6 question about reassembly is not -- that the facts are
7 different here?

8 MR. NAJJAR: Yes. I mean, I think that the
9 reassembly that took place in those annotations was more
10 extensive than what would take place in our case.

11 JUDGE BROWN: I think that's all I have right
12 now. Thank you.

13 JUDGE ALDRICH: Okay. And we can circle back
14 after Appellant's closing slash rebuttal to see if the
15 Panel members have additional questions.

16 But so at this time I was going to see if the
17 Appellant's representatives have -- would like to submit a
18 rebuttal, a closing, if you need a second to gather your
19 thoughts, let me know. That's fine.

20

21 CLOSING STATEMENT

22 MR. NAJJAR: This is Rick Najjar speaking.

23 Before closing, we just want to say we think that
24 there's substantial enough evidence that the preponderance
25 of the evidence standards has been met when the shipment

1 in general took place. And these separately stated
2 invoices were issued within a reasonable time frame to
3 separately state these particular charges.

4 Furthermore, circling back to what Judge Brown
5 brought up, we believe that the reassembly that took place
6 on-site for U.S. customers is not anywhere near as
7 substantial as it was, as what took place in Germany. And
8 finally, we believe that the training is still merely
9 incidental pursuant to Section 1501 to the installation
10 charges.

11 Thank you.

12 JUDGE ALDRICH: So just circling back with my
13 panel members, I wanted to see if they had any additional
14 questions. I saw a head shake no from Judge Long.

15 Did you have any questions Judge Long?

16 JUDGE LONG: No questions. Thank you.

17 JUDGE ALDRICH: Okay. And Judge Brown?

18 JUDGE BROWN: I don't think I have anything
19 further. Thank you.

20 JUDGE ALDRICH: Thank you.

21 So at this time I think we're ready to conclude
22 the hearing. The record is now closed.

23 The Panel will meet and decide the case based off
24 of the evidence and the arguments presented. We will send
25 both parties our written decision no later than 100 days

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from today.

As I mentioned earlier, this is one of two
hearings on the afternoon calendar, and the subsequent
hearing should begin at approximately 2:10.

Please go ahead and cut the live stream, and
thank you everyone for your time.

(Proceedings adjourned at 1:40 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 10th day
of March, 2023.

ERNALYN M. ALONZO
HEARING REPORTER