

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
SNOWMAGIC, INC.,) OTA NO. 21088332
)
 APPELLANT.)
_____)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

SACRAMENTO, CALIFORNIA

TUESDAY, MARCH 21, 2023

REPORTED BY:

ANGEL LOVE
CSR NO. 13845

JOB NO. :
40812 OTA

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TRANSCRIPT OF PROCEEDINGS, taken at
400 R Street, Sacramento, California,
commencing at 9:45 a.m. and concluding
at 11:25 a.m. on Tuesday, March 21, 2023,
reported by ANGEL LOVE, CSR No. 13845, a
Certified Shorthand Reporter in and for
the State of California.

1 APPEARANCES:

2
3 Panel Lead: HON. SUZANNE BROWN

4
5 Panel Members: HON. NATASHA RALSTON
6 HON. KEITH LONG

7
8 For the Appellant: BRAD MARSH

9
10 For the Respondent: AMANDA JACOBS
Tax Counsel
11 CHAD BACCHUS
Hearing Representative
12
13 JASON PARKER
Hearing Representative
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I N D E X

EXHIBITS

(Appellant's Exhibits 1-9 were admitted at page 8)

(CDTFA's Exhibits A-L were admitted at page 9)

(CDTFA's Exhibit M was admitted at page 13)

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1 SACRAMENTO, CALIFORNIA; TUESDAY, MARCH 21, 2023

2 9:45 a.m.

3
4 JUDGE S. BROWN: And we are on the record for
5 the appeal of Snowmagic, Inc. OTA Case Number
6 21088332. Today is Tuesday, March 21, 2023. And it
7 is approximately 9:45 a.m. We are holding this
8 hearing in Sacramento, California.

9 I'm Suzanne Brown, and I am the lead ALJ for
10 this case. My copanelists today are Judge Natasha
11 Ralston and Judge Keith Long. Although I am the lead
12 ALJ for purposes of conducting the hearing, all three
13 ALJs are coequal decision-makers in this process and
14 are free to ask questions at any time.

15 I will start by asking each of the
16 participants to state their names for the record.

17 We'll start with CDTFA.

18 MS. JACOBS: Amanda Jacobs, Tax Counsel for
19 CDTFA.

20 MR. BACCHUS: Chad Bacchus, with CDTFA's
21 Legal Division.

22 MR. PARKER: Jason Parker, Chief of
23 Headquarters Operations Bureau.

24 JUDGE S. BROWN: Appellant.

25 MR. MARSH: My name is Brad Marsh. I'm the

1 attorney with Greenberg Traurig, representing
2 Snowmagic, Inc., today.

3 MR. BRONANDER: Albert Bronander. I'm the
4 President of Snowmagic, Inc.

5 JUDGE S. BROWN: Thank you, everyone.

6 We held a prehearing conference in this
7 matter, and I issued a prehearing conference minutes
8 and orders document that summarize how everything is
9 going to happen today, confirmed what the issues are
10 and what our schedule is going to be today. I'm just
11 going to briefly revisit that to make sure we are set
12 and nothing has changed, and then we will begin with
13 the hearing and hearing the parties' presentations.

14 As we discussed at the prehearing conference
15 and confirmed in the minutes and orders, there are
16 three issues for the hearing today.

17 The first issue is whether adjustments are
18 warranted to the audit liability to unreported sales
19 subject to use tax -- tax collection for the liability
20 period. And the liability period we're talking about
21 is January 1, 2012, through December 31, 2015.

22 The second issue is whether the failure to
23 file penalty should be relieved.

24 And the third issue is whether relief of
25 interest is warranted.

1 And I'll just confirm. I think everyone
2 understands that the -- the Issues 2 and 3, the
3 penalty and the interest, are dependent upon the
4 imposition of tax. So if the tax liability under
5 Issue 1 is deleted, the penalty and interest will be
6 deleted also. But I did want to just revisit that.

7 For Issue 3, we discussed at the prehearing
8 conference whether Appellant was going to be more
9 specific about what periods they were alleging there
10 was unreasonable delay. And it says, as we discussed
11 at the prehearing conference, and I put in my
12 prehearing conference minutes and orders, Appellant
13 was going to submit anything by March 9.

14 I did not -- we did not receive anything, and
15 I just kind of wanted to touch base on that to make
16 sure that Appellant hadn't submitted anything. And I
17 didn't know if there was any more specificity that we
18 were going to be getting or if that was going to be
19 part of your argument today.

20 MR. MARSH: We did not submit anything
21 further, and we intend to submit that argument on
22 existing record.

23 JUDGE S. BROWN: Okay.

24 And I don't know if -- CDTFA -- if you had
25 anything to respond to that. I will give you that

1 opportunity, or otherwise I will just move on.

2 MS. JACOBS: We'll address that in our
3 presentation.

4 JUDGE S. BROWN: Okay. Thank you.

5 All right. Then I just wanted to address
6 admitting the exhibits into evidence. Both parties
7 are aware that OTA's regulations require submission of
8 exhibits at least 15 days prior to the hearing. We
9 received exhibits from both parties. And at the
10 prehearing conference, the parties did not have any
11 objection to the other parties' exhibits. The parties
12 did submit additional documents in advance after we
13 had the prehearing conference, but they were similar,
14 and they addressed the same topic.

15 So I'll just start with we have Appellant's
16 Exhibits 1 through 9. And is there any objection from
17 CDTFA to admitting those exhibits into evidence?

18 MS. JACOBS: No objection. Thank you.

19 JUDGE S. BROWN: Thank you.

20 Appellant's Exhibits 1 through 9 are
21 admitted.

22 (Appellant's Exhibits 1-9 admitted.)

23 JUDGE S. BROWN: And then we have CDTFA's
24 Exhibits A through L. Is there any objection from
25 Appellant admitting these exhibits into evidence?

1 MR. MARSH: No objection.

2 JUDGE S. BROWN: Thank you.

3 (CDTFA's Exhibits A-L admitted.)

4 JUDGE S. BROWN: I have one question about an
5 exhibit. The -- CDTFA's Appeal Bureau Decision has a
6 footnote that says that the backup letter to
7 Annotation 5151307 is attached as an exhibit to
8 that -- to that decision. And it is an annotation
9 that both parties have argued about. But in reviewing
10 the file, we determined that, in fact, our copy of the
11 decision does not have that annotation backup letter
12 as an exhibit, and it's not on the OT -- CDTFA
13 website.

14 Does everybody else have this -- the backup
15 letter, and should we have it given that it seems to
16 be an issue and that the decision seems to indicate
17 that it was attached?

18 MR. MARSH: We do not have it. And it is not
19 available on the website as you indicated.

20 MS. JACOBS: We do have it today. We're not
21 planning to reference it, but if you would like a copy
22 of it, we can provide it.

23 JUDGE S. BROWN: Is there any objection from
24 Appellant?

25 MR. MARSH: I don't think so as long as

1 they're not arguing about it because it wasn't
2 submitted earlier.

3 JUDGE S. BROWN: Well, I understand that the
4 parties may be arguing about this annotation because
5 it was in the briefing. And my thought was --

6 MR. MARSH: If you're willing to give me a
7 few minutes to read it, I'd be happy --

8 JUDGE S. BROWN: Of course. Of course.

9 MS. JACOBS: Just to confirm, it's
10 Annotation 515.1207?

11 JUDGE S. BROWN: That's correct.

12 And part of why I was asking was that the
13 Decision indicated it was attached, and so I wasn't
14 sure if it was omitted from our copy or something like
15 that. It just seemed like a good idea to -- to
16 inquire.

17 MS. JACOBS: Apologies.

18 JUDGE S. BROWN: No problem. I was not
19 asking for any -- but we have other things to cover in
20 the meanwhile.

21 I will just briefly go over we're having one
22 witness today, and that is Mr. Bronander. And before
23 we begin with Appellant's presentation, I will swear
24 in the witness so that -- I understand that Appellant
25 is going to make an opening argument, and then we'll

1 have the witness testimony, but I'll just swear in the
2 witness so I don't get caught up and forget.

3 MR. MARSH: Is there any objection to me sort
4 of making an opening statement and small argument and
5 then having the witness proceed and then completing my
6 argument in the time frame -- in the order?

7 JUDGE S. BROWN: I think that should be fine.
8 CDTFA.

9 MS. JACOBS: No objection.

10 JUDGE S. BROWN: Okay.

11 Originally we scheduled this time frame with
12 the understanding we aren't going to have an afternoon
13 hearing. We don't have an afternoon hearing.

14 On the other hand, if the hearing runs long,
15 I will need to call a break. So I just want to say
16 that I'm -- in terms of scheduling the time, if we run
17 a few minutes late, that's not a problem. But I'm
18 still going to keep us on track in a general sense
19 because our stenographer will probably get a little
20 tired if we went all day.

21 In terms of the time estimates, we had a
22 total of an hour for Appellant's opening presentation,
23 and we had that estimate as 30 minutes for Appellant's
24 presentation and 30 minutes for the witness testimony,
25 and then I think I estimated about five minutes for

1 questioning. That may run longer or shorter. We
2 don't know. And then CDTFA's presentation, we
3 estimated for 20 minutes. And then, again, I
4 guesstimated five minutes for questioning, and then we
5 had allocated ten minutes for Appellant's rebuttal.
6 And I think that covers everything we need to do.

7 We now have copies of the exhibit coming in,
8 so I'm going to go off the record for five minutes.
9 Thank you. Everyone can review the document. And
10 then once we're ready, we'll go back on the record and
11 get started with the presentations.

12 (Off the record)

13 JUDGE S. BROWN: We're back on the record.

14 I wanted to ask if either party has any
15 objection to the backup annotation being admitted as
16 an exhibit.

17 Appellant, do you have any objection?

18 MR. MARSH: No objection.

19 JUDGE S. BROWN: CDTFA.

20 MS. JACOBS: No objection. We didn't plan on
21 referencing the backup letter, but we have no
22 objection.

23 JUDGE S. BROWN: I think I should still mark
24 it as CDTFA because it comes from CDTFA, and I think
25 this would be Exhibit M.

1 So CDTFA's Exhibit M is admitted.

2 (CDTFA'S Exhibit M admitted.)

3 JUDGE S. BROWN: Again, thank you, everyone,
4 for your patience. I think I've covered everything I
5 need to cover before we begin presentations.

6 Can anyone think of anything else that we
7 should address? Does anyone have any questions about
8 anything before we begin?

9 Then I will swear in Mr. Bronander as a
10 witness, and then Appellant can begin its opening
11 presentation.

12 Mr. Bronander, you can stand if you want.
13 You can raise your right hand.

14
15 ALBERT BRONANDER

16 (The witness in this matter, having
17 been duly sworn to tell the truth,
18 testified as follows:)

19 THE WITNESS: So help me God. Yes.

20 JUDGE S. BROWN: Thank you.

21 Mr. Marsh, whenever you're ready, you can
22 begin.

23 MR. MARSH: Great.

24 Good morning. Thank you very much.

25 Again, my name is Brad Marsh. I'm the

1 attorney for Snowmagic, Inc.

2 My client, Snowmagic, is in the
3 wintertainment business. This is a business that
4 Albert started 20-plus years ago and has remained in
5 control of. He'll be testifying today, so you'll get
6 to meet him a little bit more in a moment.

7 I'd like to thank you ALJ members, Brown,
8 Long and Ralston, for the opportunity to appear before
9 you today. And if there are no questions now, I'll go
10 ahead and move into the main presentation.

11 Okay. So this is a case -- you know, just
12 sort of setting the stage -- about sales and use tax.
13 This is not a case about any other tax. Albert pays
14 income tax and other taxes. And the basic outline
15 here of the way that sales tax works, which we'll get
16 into more detail about, is that services are not
17 taxable in California. Only sales of tangible
18 personal property are taxable.

19 As I said before, Snowmagic is in the
20 business of wintertainment. I heard it for the first
21 time working with Albert. And the reason for that is
22 because Albert actually coined that term years ago and
23 has a trademark on it.

24 Albert has been doing this type of work,
25 putting up these winter-themed events, for -- again,

1 for 20-plus years. And he's an expert of putting
2 those events together. It's an event service. No
3 tangible personal property is provided.

4 We'll discuss all this in a little more
5 detail with his testimony, but he helps places --
6 largely amusement parks, sporting venues, retail
7 locations and other areas -- to put on these
8 winter-themed events.

9 They hire him because they want to drive
10 traffic into their venues and entertain the clients
11 that they have of those areas, and he advises them on
12 the types of events and activities that they should
13 put on at these various entertainment venues based
14 upon their market, meaning his customer's market, and
15 their facilities, the available area, the available
16 facility that they have.

17 He consults with them, often making multiple
18 trips to the location, on setting it up, on what it's
19 like to work with the employees.

20 He has, by the way, ten permanent employees
21 and ten seasonal employees, including working with
22 engineers and other outside consultants, to make sure
23 that the whole thing comes together.

24 He knows how to make slides. We'll show you
25 some pictures in a little bit of what those slides

1 look like, but slides and snowball targeted areas.

2 He knows how to make the targets not break.
3 He knows how to set it up so that people don't throw
4 snowballs at each other and the areas are contained
5 and people don't get injured.

6 He takes water, he adds nothing to it, and
7 makes snow or ice crystals temporarily for the
8 enjoyment of the public.

9 In setting it all up, he advises on and puts
10 together drainage strategies. Drainage is very
11 important. Water melts many times faster -- Albert
12 will tell you in a minute -- when it's in water than
13 it does when it's in the ambient air. So the drainage
14 consulting is a very important part of this.

15 He also advises his clients on staffing. How
16 many people from the amusement park, for example, must
17 there be there in order to control the crowds and make
18 sure that the event runs correctly.

19 He trains those same staff folks at the
20 customer site on things like how to operate a snow
21 slide, how to work with the Snowmagic folks to make
22 sure that the snow is still providing the same
23 movement and ability for fun for the customers that
24 are there.

25 He and his employees also staff the event to

1 make sure that the event goes well. They're there the
2 entire time. They're there 24 hours a day quite
3 literally.

4 He also consults with them on providing rules
5 and strategies around problem issues.

6 For example. How should improper use of the
7 equipment be managed? How should you handle an adult
8 who is not following direction on using a tube on a
9 slide? Or how do you deal with an adult throwing
10 snowballs in an area that they're not supposed to? He
11 provides those rules to the company, and the company
12 uses them to develop their final set of rules.

13 He also consults regarding decorations and
14 walls and other aspects of the event.

15 And all these things are services. Services.
16 No tangible property is sold. None of the snow that's
17 provided on-site to make the entertainment go is -- is
18 made by using chemicals. There is no additives, just
19 water.

20 And by law, as we'll get into, none of this
21 is subject to sales tax. But if you look at the
22 record below, if you look at the Decision and the
23 Supplemental Decision and the audit, a lot of this is
24 really sidestepped and ignored in the Department's
25 review until when we've gotten here. It reads more

1 like Albert is and Snowmagic is just providing snow.
2 Almost like dropping a dump truck of snow off. Or
3 certainly, I guess, they recognize he's manufacturing
4 it, but as if the only work that's done is the snow
5 being just put somewhere and as if that will work.

6 And I don't know if anyone here has had the
7 experience of going to one of those places. They have
8 a mall near my house where they take a dump truck and
9 dump snow. And it --

10 First of all, it's gone in a really fast
11 period of time. And it's fun for a little bit. But
12 it also becomes ice really quickly. His services add
13 a lot to how the product is treated on the
14 entertainment zone.

15 We're also going to go in and talk a little
16 bit about the annotations or maybe just annotation
17 that the Department is relying on here. We think it's
18 inapplicable.

19 And Albert will testify that really no other
20 state ever has asserted sales tax against him or his
21 company for his service, which I think is telling of
22 what it is. Obviously, different states have
23 different laws, but most states have sales tax. And
24 this was a surprise for Albert when this all happened.

25 So at this point, I'm going to call Albert

1 and go through some of these questions. And then, as
2 I said, I'll wrap it up with a little more argument at
3 the end.

4
5 DIRECT EXAMINATION

6 BY MR. MARSH:

7 Q. So, Albert, can you tell us what your
8 relationship is to Snowmagic?

9 A. I am the president and owner of the company.
10 We started just about 23 years ago.

11 Q. Okay. And what's the focus of your company's
12 efforts?

13 A. We provide wintertainment-type services. So
14 we're hired to come in to usually an all-season venue
15 so they can create a new winter season, if you will.

16 A lot of places, they drop off come October,
17 and we're able to come in and show them how to build a
18 winter park so they can keep people coming through
19 their gate and create a safe and family fun
20 wintertainment environment.

21 Q. Okay. And can you tell us how the equipment
22 works that creates the snow effect?

23 A. Sure. Basically our guys come in, set up the
24 equipment, then the client will give us the power and
25 the water. And then, you know, within 24 hours of

1 getting everything hooked up, we'll turn the machine
2 on, and it will start pumping out ice crystals, which
3 in that instance, for the most part, look like
4 snowflakes, but it's a temperature independent type of
5 system. So they're a little bit bigger and whiter.

6 Q. Okay. And when that water is frozen and
7 turned into snow or ice crystals, is that a chemical
8 change or a physical change?

9 A. No. A physical change.

10 Q. Okay. And you're not adding anything.
11 You're not adding salt?

12 A. No, sir.

13 Q. No additives? Not nitrogen?

14 A. No.

15 Q. No.

16 No other chemicals?

17 A. No chemical additives at all.

18 Q. Okay. And do you use anything other than
19 water and power to complete the manufacturing process?

20 A. Well, the system is a refrigeration system,
21 so it is self-contained, if you will.

22 So the refrigeration compressors allow the
23 refrigerant to become cold, heat exchange, if you
24 will, and that creates the ice. And then the ice
25 falls off, and we blow it out.

1 Q. Okay. You probably read this annotation with
2 me just a moment ago. And it talks about snowmaking
3 in terms of the use of -- it looks like they use -- at
4 least some items are getting mixed in there?

5 A. Nitrogen.

6 Q. Liquid nitrogen.

7 What's the difference between the way you
8 make it and that way?

9 A. Completely different. So normal snowmaking
10 you're in an area where the ambient temperature is
11 below freezing. So they'll take air, compress air and
12 water and mix the two, and you get the snow coming
13 out.

14 In warmer climates, what they did years ago
15 is they would come up with nitrogen to create the same
16 effect. So the nitrogen is mixed in with the water,
17 and the -- it creates the snow. But it's very short-
18 lived. They'll bring in one truck. They blow it out.
19 And it's only going to last X amount of time.

20 What you're talking about before with guys
21 backing up the truck, they'll come in. They'll dump.
22 it. They'll spread it out. You can get maybe one or
23 two days, then it's all gone. That's just one part of
24 what we do.

25 Our job is to create a venue that is one

1 that's going to maintain the snow and not lose it all.
2 There's a lot of aspects that go into it. And the
3 snow is just one part.

4 Q. Okay. And so you hook up your equipment to
5 the power source, into the pipes that are on-site, the
6 customer's on-site pipes?

7 A. Yes.

8 Q. That are presumably pipes from the utility --
9 local utility?

10 A. Yeah. They give us the power, then they'll
11 give us a couple of waterlines, usually a couple of
12 garden hoses from them, and that's enough water.

13 Q. What do your clients tell you when they want
14 to hire you? What are they looking for?

15 A. Primarily they're looking for the ability to
16 open up a gate and give their clientele a winter
17 experience.

18 You know, we're mostly in warmer climate
19 areas. We bring the mountain to the masses, so to
20 say. We give them the ability to have a winter park
21 in an area that obviously cannot normally.

22 Q. I want to talk through some of the elements
23 of that experience with you.

24 A. Okay.

25 MR. MARSH: And for those that want to look

1 at some exhibits that relate to this, these are
2 Exhibits 5 and, I would say, 6 in particular. They're
3 photos of -- that sort of help to put a picture on
4 some of the things that we're doing.

5 BY MR. MARSH:

6 Q. It looks like you do slides and tubing.

7 A. Yes. That's our primary.

8 Q. Can you tell me about what that looks like?
9 What does a typical slide or tubing area look like?

10 A. A typical slide is -- it all depends.

11 For example, we did Petco Park. That was we
12 hired a local scaffolding company to come in and build
13 the ramp. It had a walk-up ramp so the clients could
14 work their way up. And then there's several lanes set
15 up. And we'll train the staff on how to work at the
16 top of the hill and the staff at the bottom of the
17 hill so you release the tubes down on the snow, and
18 then they come in. They transition out of the way,
19 and the next group of people go down.

20 So in essence, it's a snow ride. We fill
21 each lane up with snow, and then it kind of
22 compresses. We put drainage bars in so you don't get
23 washed out at the bottom because it can happen.

24 And again, it's a slide where -- like you
25 would normally have to go to a ski area to go on their

1 hill, we can bring it right to them, and they can have
2 their clients have some fun.

3 And it's -- what's nice about it is it's
4 truly something for everyone, whether it's a
5 grandmother or a little guy, you know. They sit in
6 the tube, and they can get a ride down the hill.

7 Q. So let's talk about sort of setting up that
8 slide and tube ride.

9 A. Sure.

10 Q. How many of your clients know how to do this?

11 A. None.

12 Q. So can you give us, like, just some of what
13 you would say to a client, for example, when they
14 thought about wanting to have a tubing situation in
15 terms of how that would need to be set up?

16 A. Sure. What we'll do a lot of times is, when
17 a customer reaches out to us and say they want to
18 build a winter park, first thing we'll do is do a site
19 survey. They might say, hey, we want to do a tubing
20 hill here, and it just doesn't work; it's not the
21 right space to be in. We may then look at another
22 location.

23 Ultimately our goal is to come in and put
24 together a ramp that is going to work for them and
25 their clientele. Sometimes have different age groups,

1 if you will. But it's important that it's built, if
2 you will, to the weights and DIMs -- the dimensions
3 that it can be safe and fun for everyone.

4 Q. Is there, like, a rule of thumb, though, in
5 terms -- it looks like, from some of these pictures in
6 here, that you're building them on bleachers.

7 A. So we will sometimes build up right on the
8 stands. Like at a baseball stadium, they'll have
9 stands. So we'll have scaffolding that builds off of
10 that and in the field. So customers are able to walk
11 around, go up the stairs and get an area, sit in the
12 lane and down the tube and down the hill they go in
13 the tube. But, yes, most places are scaffolding. And
14 some places there will be smaller.

15 For example. SeaWorld, which is one of the
16 parks that we did, it was more of a snow play area and
17 snowball throwing area, and then we had three little
18 slides that we actually -- a supervisor would make
19 every day. Come in and have a little turn in it.
20 Pretty fun, but geared for kids. No adults on that.
21 The kids would line up, and, gosh, it was about a
22 90-minute wait, I think. And they take one little
23 ride down and a little turn in it, then you end it
24 right off the side.

25 Q. Okay. Do you assist in consulting on renting

1 the bleachers, making sure they can bear the weight of
2 the snow?

3 A. Absolutely. We basically assist in
4 everything they need to open.

5 Q. You mentioned earlier something about ADA?

6 A. Sure. ADA compliance. Very important here
7 in California. So it needs to have a walk-up ramp or
8 an elevator. The walk-up ramp needs to be one on 12.
9 It's a one on 12 type of ramp. So for every foot you
10 go up an inch. And then after X amount of feet, you
11 have to have a five by five area -- and then it goes
12 up the next stage and/or some places to eliminate that
13 because it can get a little expensive to build a whole
14 ramp. That's one on 12 on a 20-foot high ramp. And
15 then it will just come with an elevator. They have
16 these elevator shafts, and you can take care of things
17 that way, as well.

18 Q. So you're helping them meet the ADA
19 requirements?

20 A. Correct.

21 Q. Are you also working with them on selecting
22 tubes for the slide?

23 A. Exactly. From tubes, to signage, we're
24 assisting everything.

25 And the important thing on the tubes. We

1 have some water park customers, and they think, oh,
2 we're just going to use our tubes, and you can't. You
3 know, the way you need to be inside the tube. So when
4 you're going down that hill, the weight is going to be
5 in the tube and not on the outside because it's a
6 tubing hill.

7 So it gets a little bumpy, which is kind of
8 fun. We'll actually kind of put in some pits here and
9 there depending on what the client wants, but it's
10 important that they're inside that tube. Because if
11 their weight is on the outside, they can fall out and
12 have an accident.

13 Q. We've talked about snowball fights or maybe
14 snowball target areas, probably a better word. I know
15 you set up a few of those by the contracts in the
16 record --

17 A. Uh-huh.

18 Q. In the -- in California here. It seems to me
19 that doing -- setting something up like that probably
20 requires some thought. What type of advice do you
21 give to clients when you're laying this out with them?

22 A. I apologize. I missed the beginning of that.

23 Q. The snowball fighting slash --

24 A. Thank you. Sorry about that.

25 So, yes, with the snowball targets, it's

1 extremely important. The reason being is the winter
2 experience brings the kid out of you. You know, I
3 don't know how many times I've seen the parents first
4 kind of go in and the kids will run around. They go,
5 okay. Have some fun. And then the next thing you
6 know, 30 minutes later, the parents in there, making a
7 castle, trying to make a snowman, maybe a snow angel,
8 what have you, but it's --

9 The other thing that happens -- and it's just
10 one of these things that it just doesn't matter who
11 you are, someone wants to pick up the snow, make a
12 snowball and throw it at the father or the brother or
13 the sister, and it's not good. It becomes an unsafe
14 environment. So what we -- almost at every location
15 we're at, we have the clients make a snowball throwing
16 area so it alleviates all that pressure on the snow
17 play area so they can go over there and give them
18 something to do with the snowballs.

19 It works really well actually, and it's fun.
20 Clients build it the correct way, it can hold up
21 because our snow is -- again, it can be harder. And
22 when you're below freezing, it will get -- they can
23 make almost like an ice ball. So you need to build
24 something that's going to take that hit, and you can
25 have some fun with it.

1 Q. And does the on-site supervisor from your
2 company ever get involved in situations related to
3 that?

4 A. All the time.

5 Q. So, you know, we've got a couple of examples
6 here. It sounds like slides and tubing, snowball
7 fights, making snowmen?

8 A. Uh-huh.

9 Q. Do you make --

10 Does your team make snowmen?

11 A. Sometimes what we'll do, we'll make one big
12 snowman or a couple of them, and then the clients come
13 in and they -- they'll set up, like, a little -- some
14 get pretty creative. It's actually nice. They'll
15 give them, like, a little fake corn nose -- excuse me.
16 Carrot. Put them inside, and then they'll give them
17 some little, like, wood pieces, whatever, so you can
18 kind of carve it and make a little snowman. And then
19 when they're done, take everything, put it back in a
20 pile and the next group comes through.

21 Q. Okay. All right. And how do you keep the
22 snow in good condition throughout the day so that it
23 doesn't just either all melt or turn into ice or get
24 hard to handle?

25 A. That is about 90 percent of our job. Snow

1 quality. You know, making snow is -- everybody can do
2 it. It's about managing it and keeping it as fresh as
3 possible. That's really what we do. We're experts
4 when it comes to that. That's why we're in business.
5 Anybody can just kind of make a pile, but can you make
6 it last, and can you keep it safe?

7 You know, hundreds and hundreds of feet on
8 the snow kind of can really make it hard packed. With
9 our staff and our training that we do with our
10 client's staff, it's all about keeping it as dry as
11 possible, tilling it with -- as much as needed and
12 working it as -- so it's always nice and soft, you
13 know. Whether it's the first person that comes in the
14 park at 10:00 a.m. or it's the person at 5:00 p.m.,
15 they should all be able to experience the same
16 experience. And that's what we do.

17 Q. I see in the contract there's words used like
18 "tilling." Let me start with that one. What is
19 "tilling"?

20 A. So sometimes it can really get hard packed,
21 especially on a cloudy day. So we'll break sessions,
22 and we'll come in with an actual tiller, and you till
23 up the snow, and it will make it all very soft. But
24 there's a process to it. If you're not careful,
25 you'll sink the tiller into the snow. But that's what

1 we do. Our guys will come in. We don't allow the
2 clients to do that. It's important that we properly
3 till and create the fluffiness.

4 Q. Is it like a big lawn mower?

5 A. It is. There's probably some you've seen.
6 If you went to Home Depot, they have these little ones
7 that you plug in. They just kind of bounce. In some
8 areas that can work in an indoor facility. But mostly
9 we use one -- it's a little bit easier. It will have
10 big metal wheels on it that spin, and we can use a
11 lever that allows us to go up and down and create the
12 depth that we want. So as we're doing it, we're
13 creating a nice even area.

14 Q. And raking. Is raking part of this?

15 A. Raking -- sometimes you don't need a till and
16 you just need to rake. So that's when they'll just do
17 rake.

18 Sometimes you need a little shovel action
19 too. If someone loses a diaper or gets a bloody nose
20 or creates yellow snow, we obviously don't want that
21 out there. So we scoop it up, rake up and you're good
22 to go.

23 Q. One of the other things in your contract is
24 that you train event staff. Can you tell us what that
25 looks like? In this context, it's not your staff. I

1 know you train your own staff.

2 A. Right.

3 Q. But what do you do to train the staff at the
4 customer location of Petco or Legoland or whatever?

5 A. Before we open, we'll have staff training
6 days. Just about any park will do that before an
7 opening. And we come in and we work together with
8 their staff, all their new employees and such, and
9 then we go through each location.

10 You know, if this location, for example, has
11 a snow merry-go-round and a tubing hill and a snowball
12 area, we're going to go to each station and talk about
13 the responsibility of each location, how to load a
14 person into a tube because you can do it wrong. You
15 know, making sure that their legs are crossed, you got
16 hands holding onto the handles. Safety is the most
17 important.

18 In the snow play area, how to keep an eye on,
19 you know, the snow quality. And if there is something
20 that needs to be taken care of, to notify our
21 supervisor so it can be done.

22 And also to, again, block the kids from
23 trying to throw a snowball. We'll go through the
24 practical side. We'll have them working on
25 everything.

1 And then we'll also go -- we'll have a
2 sit-down in a classroom. We'll go through everything,
3 the rules of the park and sign off on it together with
4 them. That's actually provided to the state.

5 Q. I also see that some of the contracts
6 reference walls. What do you use walls for?

7 A. Sure. Walls help you maintain the snow.
8 We'll put the drainage underneath it. The last thing
9 you want is snow sitting in standing water. It will
10 melt 10, 20, 30 times faster than when it's probably
11 drained.

12 So the walls also help us maintain the snow
13 from -- keeping it in one place. We'll usually go
14 with four-foot high walls, which are what OSHA
15 requires, and then we kind of build up from the walls
16 to the middle so you have a nice snow area in the
17 middle and then you can still have it on the side but
18 not where it would be a hazard going over the wall.

19 Q. How many times a day do you typically have
20 the snowmaking machine on actually creating the snow?

21 A. It's usually at nighttime. Once we get open,
22 the guys are coming in, you know, around 10:00 p.m.,
23 the on-site supervisor will give them their
24 instructions for the evening. Okay. We need to cover
25 this, cover that; some areas we want to rotate X

1 amount of snow in the quadrant. So in the course of a
2 week, there's only seven day's worth of snow, if you
3 will. Old snow.

4 And sometimes in larger facilities, they will
5 want the snow to fly. So they'll turn it on, put it
6 on maybe half capacity so it's kind of shooting up
7 into the air so kids can stand underneath it, if they
8 like and all that. But it's not like snow -- hit
9 them -- again -- sorry.

10 It's the first time people at these places
11 see snow, so they're very excited about it. Smaller
12 areas we don't usually do that. There's not enough
13 room for it.

14 Q. So you're turning --

15 It sounds like you're turning on machines at
16 night?

17 A. Yep.

18 Q. And then what does the on-site staff do for
19 the rest of the day because they're there 24 hours a
20 day?

21 A. They are. In the evening, they're trying to
22 get everything back the way it's supposed to go for
23 the following morning when they open up. And during
24 the course of the day, they're maintaining the snow
25 and making sure that the slide is running properly.

1 You know, sometimes on a hill, if an
2 attendant is not letting this tuber go down in the
3 middle, it will create some turns, you know, in one
4 lane, and it can become a little dangerous. They
5 could potentially go over a wall into another lane.

6 So if they notice that, stop one lane.
7 They're going to go up and take that rake that we
8 talked about before, and they're going to rake it out
9 so it can continue running in a nice straight path.

10 Q. Do you charge the customer for the amount of
11 snow delivered or produced under the term of the
12 contract?

13 A. No.

14 Q. How much time do most of these events last
15 for?

16 A. Usually the norm is 30 to 45 days. We have
17 some clients who will go a little longer, couple of
18 months. We have some people go a little shorter. A
19 week or something.

20 Q. Have you or Snowmagic ever been asked to
21 consult? In other words, help folks understand how to
22 make snow at an event but not actually provide it --
23 separate from providing the actual snow?

24 A. Sure. Sure. A few different times. We did
25 one for a company that owned several parks, and they

1 wanted to figure out what to do. So they hired us
2 because we're kind of considered to be snow experts
3 above freezing and how to put together a winter event,
4 and we're hired to basically help them figure that out
5 and how many people they can get through with X amount
6 of lanes, what type of moving carpet will they need or
7 walk-up ramp or does it need to be scaffolding and all
8 that.

9 It is our goal to sometimes maybe get some
10 equipment in there too, if we can, but we don't always
11 win. Our goal is -- when we're hired for that type of
12 consulting service, it's our responsibility to give --
13 get them as many bids as we can from other vendors, so
14 for scaffolding or equipment or what have you.

15 JUDGE S. BROWN: We'll take a short break,
16 and we'll go off the record.

17 (Off the record)

18 (A break was taken)

19 JUDGE S. BROWN: We can go back on the
20 record.

21 And, Appellant, you were still giving your
22 presentation. You may proceed.

23 And I will remind everyone to speak slowly,
24 loudly, clearly into the microphone. And slowly,
25 please. Thank you.

1 You can begin when you're ready.

2 MR. MARSH: Thank you. And just a few more
3 questions for the witness.

4 BY MR. MARSH:

5 Q. So this is a wintertainment event, as we've
6 discussed. We've talked a lot about the activities
7 that occur on or with or around snow. Do some folks
8 come just to watch?

9 A. Sure. You know, it is a family type of
10 setting that we create. So you'll have grandparents
11 who will come and want to be able to watch. Some
12 parents who physically can't due to maybe one of the
13 attractions and/or babies, if you will, but, of
14 course, they come in to watch. They don't partake.
15 They're just coming in to kind of experience what's
16 going on with their kids or their grandkids.

17 Q. And I sort of mentioned at the opening, but
18 is it true that no other state has ever attempted to
19 charge sales tax for this service?

20 A. Yeah. We've never been charged sales tax on
21 what we do.

22 MR. MARSH: I think that's my last question
23 of the witness.

24 JUDGE S. BROWN: Thank you.

25 First, I will ask -- I guess I'll say --

1 You said you had additional argument that you
2 wanted to present.

3 MR. MARSH: I'm happy to do that before or
4 after they -- if they have questions that they want to
5 ask now since he's just completed, or I'm happy to do
6 it right now.

7 JUDGE S. BROWN: I'll say CDTFA, do you want
8 to ask any questions of the witness at this point?

9 MS. JACOBS: No, thank you.

10 JUDGE S. BROWN: Then, Appellant, you can
11 complete your opening presentation, and then we'll
12 have questions -- you may have questions from the
13 ALJs.

14 MR. MARSH: Okay. Good.

15 So in reviewing the briefing for the hearing
16 today, I think that the primary argument, as I
17 understand it, that the Department is making that --
18 is that -- that this is subject to tax under
19 Annotation 453.0160. And that annotation, for your
20 reference, if you feel like looking it up, is
21 Exhibit C in our package today. And that annotation
22 is entitled, "Mixing."

23 And more or less in the briefing, it seems to
24 me that the argument is that the clients are provided
25 water and power, which I think is accurate. Snowmagic

1 is provided that by the venue or the customer, and
2 then we either produce or fabricate or process or
3 print or imprint it into snow, which is Revenue
4 Tax 6006.

5 I think that's the gist of the primary
6 argument that I understand. I know that the decisions
7 below discuss some other aspects, but I'm going to
8 first address what the Department has put in their
9 briefing.

10 So first off, it's an annotation. I think we
11 all know what an "annotation" is. It's not law, and
12 it doesn't have the force of law. But let's look at
13 the annotation itself and see what it actually really
14 says.

15 First off, if you look at the annotated
16 guide, the title of the annotation itself is "Mixing."
17 "Mixing." And it's about factually mixing bentonite
18 with water to make a fire retardant. That's the
19 question that's being asked.

20 And it says that the change in the physical
21 properties, turning it into -- mixing a liquid and a
22 solid like that and making a gelatinous mass to spread
23 on fire is a -- is taxable. It calls it a change in
24 the physical properties. Comparable to making cement.
25 Okay. I think I understand that part, but there's the

1 part -- the part that doesn't make sense when you read
2 the annotation is -- where it says that it's also like
3 freezing water to make ice.

4 Again, the name of the annotation is
5 "Mixing." And the holding of this annotation says
6 that the end product is something physically different
7 brought by mixing a solid and a liquid. That's the
8 annotation.

9 It's confusing because, I mean, this is from
10 1965. This is quite an ancient annotation. And I'm
11 not aware of any modern way of making ice by mixing.
12 I took a minute and I Googled it, and you can make ice
13 by mixing aluminum nitrate and water. That's some
14 sort of back country homestead way of making ice.
15 Maybe that's what's being referenced. It's hard to
16 tell.

17 Other than that neat trick, which was
18 apparently before there was industrial sort of modern
19 freezers -- another little sort of history back end.
20 Freezers were invented in the early 1920. They really
21 didn't become commercial until the late '50s and in
22 everyone's home.

23 So I don't know. I can't really draw much
24 more from that annotation in terms of what they mean
25 when they're talking about mixing things together and

1 then they're talking about freezing water to make ice.
2 I suppose you can stick with the idea that it's a -- a
3 change in the physical makeup of the water, but it's
4 always water. It's water whether it's frozen. It's
5 water whether it's steamed, water vapor, whatever
6 else. Water is always water, and it's just in a
7 different physical form.

8 The other annotation I think I should
9 address, even though it appears that the Department
10 said earlier that they're not going to address it, is
11 the one that was -- for which the backup letter was
12 distributed today. This is 515.0317. The annotation
13 itself is from '92.

14 Again, it's not law, but it says that the
15 manufacturer of snow at the customer's site is a sale
16 of tangible personal property. And it says the true
17 object is snow rather than the service of making snow.
18 And then it says that the items incorporated into the
19 snow and sold in the form of snow may be purchased for
20 retail.

21 Seeing the letter, it's helpful to sort of
22 give a little context. I mean, this is sort of the
23 old way of -- or the antiquated way of making snow
24 here where you're doing mixing, where you're mixing
25 nitrogen, which maybe would bring it into the context

1 of Annotation 453.0160.

2 Again, the mixing, maybe that's the key
3 behind both of these is, that you're mixing things.

4 Again, here, we're only using power and water
5 in the equipment involved.

6 You know, I'm also not sure. It's unclear
7 from the backup letter what else is in there. I don't
8 know what it means to be artificial snow in the way
9 that it's referenced in the main annotation as opposed
10 to the snow that we're making here. Maybe that's a
11 reference to the nitrogen. Maybe there's other
12 additives. I don't know. I'm clearly just
13 speculating, but I did know that you can add plastics
14 or salt or other chemicals in order to manufacture
15 artificial snow. And so potentially that's the case.
16 It's hard to know for sure. Again, just sort of
17 looking at what is going on here.

18 And then, of course, I guess maybe the key
19 component of this annotation is that it talks about
20 the true object test, which is a big part of what we
21 discussed in our briefing, and I think is relevant
22 here. The true object is the wintertainment. The
23 entertainment value, the activities, the service of
24 taking care of -- of the themed area.

25 Let's talk for a minute about water. Water,

1 as we said, can take many forms; right? It can take a
2 form of ice, snow. It can be cold water, hot water.
3 It could be mist. It can be steam. It can vapor;
4 right?

5 I wanted to just take a moment to remind us
6 all sort of the interesting ways that we come in
7 contact with water that's physically changed in the
8 world and sales tax is not applied.

9 So let's talk about steam or vapor. If it's
10 really true that providing someone with water that has
11 changed its physical shape is taxable, then if I go to
12 the gym or a health club, that might cause some
13 issues, particularly if it's sort of an a la carte
14 menu.

15 In the Jacuzzi there may be some steam or
16 mist that's being provided to me.

17 What if I actually went into a steam room,
18 well, now I have physically changed water there.

19 Or dare I say an ice bath. What if I decided
20 to use that for health purposes? Would those services
21 be subject to sales tax?

22 I was in Sacramento last summer. I met with
23 my assemblyman. He was nice enough to take me out for
24 a beer at a local brewery. I wish I could tell you
25 the name. You probably all know which one it is, but

1 it was a very hot day that day. It was 90-plus
2 degrees, and they had misters out there. And if those
3 misters had been set up by a contractor, I wonder if
4 that physical change would be deemed subject to sales
5 tax.

6 How about a warm, steamed microwaved towel to
7 wash your hands and face with? Or the simple act of
8 drying your clothes at the laundromat in the dryer
9 turning water into steam. Radiators in buildings.
10 These are all examples of a physical change.

11 Same thing with ice, though. We went hot
12 first; right? We can go cold. How about cold water?
13 Ice. If you go to an ice rink -- and Albert testified
14 that he's involved with ice rinks from time to time.
15 Is using the ice on the ice rink subject to sales tax?
16 I don't think I've ever heard anyone say that.

17 Or what about if my hotel that I stayed at
18 last night contracted their ice maker out and I took
19 ice from the ice machine? Is that now -- the ice
20 maker rental person, are they now subject to sales
21 tax?

22 And I can go on, but I'll spare us all from
23 more of these types of examples because I think what
24 they do is, they get us to the point of why
25 Snowmagic's service is not taxable.

1 The real reason is because there's not really
2 a sale of tangible personal property here. This is a
3 service, and the true object here is wintertainment,
4 is the experience of being on the snow or on the ice
5 or sliding down the slide.

6 And to the extent that there's some small
7 transfer of water involved in this, just like with my
8 other examples, someone uses a hot towel. There's
9 some water that got on your hand to help you wash
10 yourself. You go into a steam room. You're going to
11 get hot. You're going to get sweaty maybe. There's
12 definitely going to be water on you from the water
13 vapor. You go into the snow and you touch the snow,
14 you're going to get wet. That's just incidental and
15 not really the true object of what people are going
16 there for. They're going there to have fun. They're
17 going there to be in a family friendly winter-themed
18 environment.

19 As Albert testified, some people don't even
20 play in the snow.

21 And nobody is there to keep the snow; right?
22 You can't take the snow home. It's artificial -- it's
23 not artificial, I mean, and it melts. You can't take
24 it home. It's there, again, to ride on, to slide on
25 and to play with and to provide a satisfying winter

1 setting for folks that aren't in the mountains. And
2 it's --

3 Again, it's no coincidence that these events
4 are provided generally at entertainment venues.
5 They're provided at places where entertainment is
6 typically provided. Amusement parks. Baseball
7 fields. Because this is all part of an entertainment
8 experience.

9 Let's contrast that with summertime events,
10 too, because I think it helps to show what we mean
11 when we talk about using water for experience. I'm
12 going to say a few words that hopefully some of you
13 know, have heard of. Some of them are Southern
14 California references because I grew up there, but
15 Raging Waters, a log ride or Splash Mountain, tube
16 ride or a lazy river.

17 Here, rather than snow, folks are sliding or
18 floating or experiencing just water. People play in
19 it. They squirt it through squirt guns or whatever,
20 but -- instead of throwing a snowball, but it's the
21 same general activity. Both of these, in different
22 physical forms, are providing a lubricant to the
23 entertainment. They're giving an experience that you
24 can't get without them.

25 Another example that I think is of interest

1 is a surf machine. I don't know if you ever seen one
2 of those live. I recently just saw them on TV. I saw
3 one live. There's one at a place called, "Belmont
4 Park" in Southern California. I wonder if that's -- I
5 mean, that's just molding water into a surfable
6 format. Would that be subject to sales tax because
7 you're mastering its physical form?

8 But again, none of these should be or are
9 actually subject to sales tax because they're all
10 services. They're entertainment or health services or
11 what have you, depending on the specific example that
12 I made.

13 People don't go to pools to consume water any
14 more than they consume snow when they ball it up and
15 throw it at a target. Ice skaters don't consume ice.
16 So the true object here of people that are doing these
17 types of things is the feeling, the experience of
18 sliding, falling, the nostalgic look.

19 You know, water is water in my mind. I think
20 these annotations, if anything, that we talked about
21 earlier show that mixing things might make them
22 something that you produce and subject to sales tax,
23 but water is -- and Albert testified. Albert
24 testified that when he goes and hooks up his
25 equipment, it comes from the pipes, the pipes of the

1 establishment. There's a specific exemption for that.
2 It's in 6353 of the code for water, and ...

3 So we think that either, A, that -- we think
4 that the annotations don't apply. They're just simply
5 not applicable. They don't make sense. We think that
6 the decisions below didn't give enough credit to the
7 true object of what's happening here, and we shouldn't
8 be subject to tax.

9 The last part of my presentation is simply
10 with respect to the penalties I've already noted, that
11 we are submitting on the interest on based -- what's
12 already in the documents. I won't be making a
13 presentation on that today.

14 But on the penalties, we would certainly like
15 the failure to file penalty to be evaded. In the
16 briefing, you'll see we cited numerous events,
17 annotations, things like floats and fireworks. Those
18 are very similar to the experiences that we're putting
19 on, albeit not identical. I think some of the
20 examples that I gave you today are much more similar.

21 And as I said before, the taxpayers never
22 paid tax anywhere ever. This isn't a situation where,
23 you know, someone's out trying to sell -- I don't
24 know. This is an old example, but video cassettes and
25 isn't collecting sales tax. I mean, this is a very

1 sort of, I think, interesting issue here with snow and
2 water. To penalize someone for doing what only seems
3 normal, providing a service like Raging Waters, what
4 have you, seems improper. There aren't really any
5 strong authorities on this.

6 Again, I think the annotations are not on
7 point and, again, are not binding and not law. And as
8 noted in the other briefing, no client of Snowmagic
9 ever viewed this as taxable either. They didn't pay
10 use tax on this in their own reporting. And you can
11 even look at some of the exhibits here. The folks at
12 these venues in California are arguing with the Honor
13 saying this is a service; we don't even understand why
14 you're asking about this. So we would like to ask
15 also that the penalties be evaded.

16 So with that, I will close the opening
17 presentation.

18 JUDGE S. BROWN: Thank you very much.

19 Now I'm going to turn to -- I will turn to my
20 copanelists first and see if they would like to ask
21 questions.

22 Judge Long, do you have any questions at this
23 point?

24 JUDGE LONG: Yes. Just a couple of
25 questions.

1 Mr. Bronander testified that occasionally
2 consulting services were provided without rental of --
3 or provision of the snow. Do you know approximately
4 how many -- what percentage of your contracts are that
5 type of service?

6 MR. BRONANDER: We've only had a few.

7 JUDGE LONG: Okay. Are any of them the
8 California contracts that are included in the
9 exhibits?

10 MR. BRONANDER: No, sir.

11 JUDGE LONG: Okay. Thank you. I have no
12 more questions at this time.

13 MR. BRONANDER: Thank you.

14 JUDGE S. BROWN: Judge Ralston, do you have
15 any questions at this point?

16 JUDGE N. RALSTON: No questions at this time.
17 Thank you.

18 JUDGE S. BROWN: I think I might have just
19 one or two questions. Let me pull up a document
20 first.

21 I wanted to inquire a little bit more about
22 Appellant's arguments in one of its briefs about where
23 Appellant argued that, to the extent it's determined
24 that the snow used in events is taxable, then tax may
25 only apply to the consideration received through the

1 snow. And Appellant was arguing that other portions,
2 such as installation, would not be taxable. I wanted
3 to know if you could expand on that a little more.
4 What would we consider to be the non-taxable portion,
5 if that were applicable?

6 MR. MARSH: Well, certainly we -- obviously
7 our position is that we think none of it is taxable.

8 JUDGE S. BROWN: I understand.

9 MR. MARSH: Just to repeat that.

10 JUDGE S. BROWN: I understand that. I'm just
11 trying to cover all the bases and make sure I
12 understand all of your arguments.

13 MR. MARSH: So, you know, this is -- you
14 know, in a worst-case scenario, this -- it sounds like
15 the question is, what portion of the contract is for
16 services versus the snow itself. And as Mr. Bronander
17 testified, it depends. And there aren't really
18 records kept on that. They don't sell the snow sort
19 of by the cubic foot or what have you, by how long the
20 machines are running. What they're doing is they're
21 creating an experience using whatever needs to be
22 produced to make that experience.

23 And so, you know, for better or worse, we
24 don't have a calculation that can draw out the cost of
25 production of snow versus all of the other services

1 that are provided.

2 Unless do you have a thought on that?

3 MR. BRONANDER: On installation?

4 MR. MARSH: On everything, except production
5 of snow.

6 MR. BRONANDER: No. I think you covered it.

7 JUDGE S. BROWN: I think that's my only
8 question right now.

9 So I'm going to say that we can move on to
10 CDTFA's presentation, if you're ready.

11 MS. JACOBS: Good morning. Appellant is an
12 out-of-state corporation that manufactured snow
13 on-site at customers' locations in California using
14 its specialized equipment and the customer's water.

15 During the liability period of January 1,
16 2012, through December 31, 2015, Appellant did not
17 have any business locations in California, hold a
18 California seller's permit or certificate of
19 registration use tax or file any California sales and
20 use tax returns.

21 Information received from Appellant's
22 customers show that Appellant was renting snow
23 machines in California during the audit period.
24 Exhibit E, page 7.

25 The Department opened an audit on

1 December 20, 2017. And after repeated attempts to
2 contact Appellant requesting documentation without
3 response, on May 24, 2018, the Department registered
4 Appellant with a California seller's permit effective
5 January 1, 2012.

6 During the audit, the Department reviewed
7 four contracts between Appellant and its California
8 customers, including contracts with Legoland, Petco
9 Park, SeaWorld San Diego and Universal Studios
10 Hollywood. Exhibit D, along with related sales
11 invoices.

12 After the audit, the Department conducted two
13 reaudits, the first of which increased the taxable
14 measure and the second of which decreased the taxable
15 measure to \$1,925,700.

16 As stated in the prehearing conference
17 minutes and orders, there are three issues on appeal.

18 One, whether adjustments are warranted to the
19 audit liability for unreported sales subject to use
20 tax collection.

21 Two, whether the Appellant is entitled to
22 relief of the failure to file penalty.

23 And three, whether Appellant is entitled to
24 interest relief.

25 Regarding the first issue, Appellant made

1 taxable sales of TPP during the liability period.

2 As you know, California imposes tax on a
3 retailer's retail sales of tangible personal property,
4 or TPP, measured by the retailer's gross receipts
5 unless the sales are specifically exempt or excluded.
6 Section 6051.

7 "TPP" means personal property, which can be
8 seen, weighed, measured, felt or touched or which is
9 in any other manner perceptible to the senses.
10 Section 6016.

11 All of the retailer's gross receipts are
12 presumed subject to tax, and the retailer bears the
13 burden of proving otherwise. Section 6091.

14 Every retailer engaged in business in
15 California and making sales of TPP for storage, use or
16 other consumption in this state is required to
17 register with the Department and at the time of making
18 a sale to collect use tax from the purchaser and offer
19 a receipt unless the sale is exempt or excluded from
20 tax. Section 6203(a) and Regulation 1684(a).

21 The use tax required to be collected by the
22 retailer constitutes a debt owed by the retailer to
23 the state. Section 6204 and Regulation 1684(g).

24 The term "sale" includes any transfer of
25 title or possession in any manner or by any means

1 whatsoever of TPP for a consideration.

2 Section 6006(a).

3 Pursuant to Section 6006(b), sale also
4 includes, quote, the producing, fabricating,
5 processing, printing or imprinting of TPP for a
6 consideration for customers who either furnish -- who
7 furnish, either directly or indirectly, the materials
8 used, end quote.

9 As relevant here, tax applies to charges for
10 processing TPP for a consideration for customers who
11 furnish either directly or indirectly the materials
12 used in the processing. See Regulation 1526(a).

13 Examples of taxable processing appear in the
14 backup letter of Annotation 435.1060. Exhibit C.
15 While the direct subject of that annotation involved
16 mixing clay and water, the Department explained that
17 processing involves a change in physical properties
18 and gave the example of freezing water to make ice.

19 Also relevant is Annotation 515.1307, in
20 which the Department found that the manufacturer of
21 snow at a customer's site was the sale of TPP subject
22 to tax.

23 Appellant argues that these annotations are
24 irrelevant, because in this case, the water maintains
25 its molecular composition without the addition of any

1 substance. However, there are many other instances of
2 taxable processing in which a customer's raw materials
3 were physically changed without changing their basic
4 composition and without the addition of another
5 substance. See annotations -- I'm about to string a
6 lot of numbers for you here. 435.0620, 435.0144.750,
7 435.0740 and 435.1263.

8 Here, Appellant utilizes specialized
9 equipment to convert water supplied by the customer
10 into snow. When using its specialized equipment to
11 physically change its customer's water for
12 consideration, Appellant was engaged in processing TPP
13 as contemplated by Section 6006(b) and
14 Regulation 1526. As such, Appellant made taxable
15 sales.

16 Furthermore, the total amount of the sales
17 price of Appellant's contracts properly included
18 Appellant's services as part of its taxable sales.
19 Generally, the total amount of a sale includes any
20 services that are part of the sale.
21 Section 6012(b)(1).

22 However, the provision of a service that is
23 not part of a sale or purchase of TPP is not subject
24 to tax. Regulation 1501.

25 Some transactions may involve the provision

1 of services and the transfer of TPP. In such cases,
2 the person rendering the service is the consumer, not
3 the retailer of any TPP the person uses incidentally
4 in rendering the service.

5 The basic distinction in determining whether
6 a particular transaction involves a sale of TPP or the
7 transfer of TPP incidental to the performance of
8 service is one of the true object of the contract.
9 That is whether the real object sought by the buyer is
10 the service or the property produced by the service.

11 If the true object is the service, the
12 transaction is not subject to tax, even though some
13 TPP is transferred incidentally. But if the true
14 object is the TPP, tax applies to the gross receipts
15 from its furnishing without any deduction on account
16 of the work, labor, skill, thought, time spent or any
17 other expense of producing the property.
18 Regulation 1501 and Culligan Water Conditioning versus
19 the State Board of Equalization. 17Cal3d 86,
20 pincite 96.

21 Essentially, Regulation 1501 provides a test
22 to determine whether a transaction is a sale of TPP or
23 merely a service. If the transfer of TPP is
24 incidental to the service, then the transaction is
25 merely a service and not a sale of TPP. If the

1 transfer of the TPP is more than incidental, it is the
2 sale of TPP. See Simplicity Pattern versus the State
3 Board of Equalization. 27Cal3d 900.

4 Here, the documentary evidence makes clear
5 that the true object of Appellant's contracts was the
6 production of snow. The Legoland contract begins,
7 quote:

8 "Based on the understanding of
9 what you would like to accomplish
10 with the next season's project at
11 Legoland, Snowmagic can continue to
12 supply the snow."

13 End quote. Exhibit D, page 2.

14 Appellant's contracts with Petco Park and
15 SeaWorld San Diego begin almost identically.

16 "Based on the understanding of
17 what you would like to accomplish,
18 Snowmagic can supply the snow."

19 Exhibit D, pages 8 and 14.

20 Appellant's snowmaking, which we have
21 established, is a taxable processing of the customer's
22 water. Constituting a sale was the true object of the
23 contract.

24 Appellant has demonstrated that its contracts
25 also included services, but the contracts do not

1 require Appellant to perform any services unrelated to
2 its snowmaking operations. Appellant has stated on
3 the record that it did not offer the services included
4 in these contracts with California customers without
5 producing snow. Most of the contracts provided
6 describe Appellant as only responsible for setup, take
7 down and operation of snowmaking equipment and
8 ancillary snow tasks, such as grooming and tilling and
9 in some cases additional activity, such as snow
10 tubing, snow sliding or snowballs. Exhibit D,
11 pages 8 and 18.

12 The contracts show that all services
13 performed by Appellant for its customers were related
14 to Appellant's snowmaking and were necessary for the
15 customer to use the snow in the form it desired. As
16 such, any services performed under Appellant's
17 contracts with its California customers were part of
18 Appellant's sales of TPP pursuant to
19 Section 6012(b)(1) and were subject to tax absent an
20 applicable exemption or exclusion.

21 The evidence does not support Appellant's
22 position that the true object of its contracts was
23 something other than its snowmaking and related
24 services.

25 To the contrary, the evidence establishes

1 that the processing of snow was what Appellant's
2 customers wanted and, in fact, was the true object for
3 contracts.

4 Regarding the second issue, Appellant has
5 presented no evidence demonstrating that it should be
6 relieved of the failure to file penalty. Any person
7 who fails to timely file a return is subject to a
8 penalty of 10 percent of the amount of taxes due for
9 that period. Section 6591(b).

10 They may be relieved of the penalty if their
11 failure to make a timely return is due to reasonable
12 cause and circumstances beyond the person's control
13 and occurred notwithstanding the exercise of ordinary
14 care and the absence of willful neglect.
15 Section 6592(a)(1).

16 Appellant argues that it should be relieved
17 of the failure to file penalty because it relied on
18 professional advice in failing to file its sales and
19 use tax returns. There is no statutory basis for
20 granting relief of the penalty based on reliance on
21 professional advice, and there is no evidence that
22 Appellant's failure to file was due to reasonable
23 cause and circumstances beyond its control or occurred
24 notwithstanding the exercise of ordinary care in the
25 absence of willful neglect. As such, Appellant should

1 not be relieved of the failure to file penalty.

2 Regarding the third issue, Appellant has
3 presented no evidence demonstrating that it is
4 entitled to interest relief. Interest relief may be
5 granted when a failure to pay the tax is due in whole
6 or in part on an unreasonable error or delay by an
7 employee of the Department acting in their official
8 capacity. Section 6593.5(a)(1).

9 Appellant argues that it is entitled to
10 interest relief because interest accrued because of
11 delays by the Department. However, Appellant has not
12 cited any specific errors or delays and, in fact,
13 failed to provide any clarification to specifically
14 identify which dates or periods it alleges
15 unreasonable delays occurred within the liability
16 period -- or within the September 2017 through July
17 2021 time frame. As no unreasonable errors or delays
18 by the Department have been demonstrated, Appellant
19 should not be relieved of the failure to file penalty.

20 For the reasons I have stated, Appellant made
21 taxable sales of TPP when it processed its customers'
22 water for consideration into snow. And Appellant's
23 ancillary service charges are includable in its gross
24 receipts as part of the sale of TPP because the
25 services were performed in connection with the sales

1 of TPP.

2 Furthermore, Appellant has not presented any
3 evidence demonstrating that it is entitled to relief
4 of interest or the failure to file penalty. On this
5 basis, no further adjustments to the audit items are
6 warranted, and we request this appeal be denied.

7 Thank you.

8 JUDGE S. BROWN: Thank you. I will start
9 with one question, which is to pick up where I left
10 off with Appellant, asking about whether -- the
11 provision that the sales price does not include the
12 price received for labor or services used in
13 installing or applying the property sold. I'm looking
14 at Regulation and Taxation Code Section 6011(c)(3).
15 And then there's a similar provision in 6012(c)(3),
16 the charge for labor or services used in installing or
17 applying the property sold are excluded from the
18 measure of tax.

19 MS. JACOBS: Well --

20 JUDGE S. BROWN: I'll just say I just wanted
21 to frame that my question is sort of under this realm
22 and picking up where Appellant had argued -- my
23 question is sort of -- is this -- I understand
24 services that are part of the sale are taxable. How
25 does that interplay with this question about

1 installation or application -- would there be any
2 portion of the services that would be -- might be
3 excluded even if services that are part of the sale
4 are taxable under this provision?

5 MS. JACOBS: I think we would start with the
6 fact that the gross receipts are presumed subject to
7 tax. And so the appellant would need to demonstrate
8 which parts would then be excludable, and they have
9 not done so.

10 JUDGE S. BROWN: I'll say thank you, and we
11 might come back to this -- unless you have a further
12 response.

13 Okay. I will turn to my copanelists and
14 allow them an opportunity to ask questions.

15 Judge Long, do you have any questions?

16 JUDGE LONG: I have a couple of questions.

17 First, I just want to make sure that I
18 understand we're discussing the incidents of the
19 taxable event. We're talking about essentially the
20 moment the water goes through the machine because
21 that's when it's processed into snow; is that correct?

22 MS. JACOBS: Correct.

23 JUDGE LONG: The end result of snow is water;
24 right? It returns to the state that the customer
25 provided. Does the temporary nature of the snow -- it

1 does not change anything; correct?

2 MS. JACOBS: Correct.

3 JUDGE LONG: Okay. Thank you.

4 JUDGE S. BROWN: Judge Ralston, do you have
5 any questions at this time?

6 JUDGE N. RALSTON: No questions. Thank you.

7 JUDGE S. BROWN: I think that's all I have at
8 this time.

9 I think that's all I have at this time if
10 there's nothing from CDTFA at this point.

11 Then I will say I think we can turn back to
12 Appellant, and Appellant had indicated he wanted to
13 potentially give a brief rebuttal.

14 MR. MARSH: Very brief.

15 JUDGE S. BROWN: Go ahead. Thank you.

16 MR. MARSH: The processing theory here
17 underlining the Department's position is one that has
18 really only ever related to actual manufacturing.
19 Where, for example, a -- somebody provides leather to
20 someone who makes gloves and returns them. If you
21 look through the whole series that underlines these
22 four through 5.0620 annotations, they're all permanent
23 physical transformations of processing of something
24 through a way that cannot be reverted back.

25 As discussed, what we're talking about here

1 today is water. And water in nature and in life
2 changes form, and it does so here, as well. I
3 mentioned earlier that water is exempt under 6353 of
4 the Revenue Tax Code. Certainly I think that that
5 starts us off.

6 Secondarily, we have a situation where I
7 don't believe -- and I think none of the evidence,
8 none of the legal authorities, indicate that there is
9 a taxable processing occurring when water is frozen.
10 I went through all those examples, and I can do a
11 reverse example.

12 A reverse example would be something that ski
13 resorts often do in years like this where the snow
14 packed is likely to last well past the ski season.
15 They will actually melt snow. They will do the
16 reverse in order to create a tiki bar-themed summer
17 event. Is melting that snow going to be taxable?

18 I think it would be pretty outside the box
19 for the services provided here to be thought of as
20 anything other than the putting together a winter
21 experience. And I've heard no compelling argument
22 that this is not entertainment, that there is not
23 entertainment value. We went through all the examples
24 of water slides. We went through all the other
25 examples of how water is used in different ways and

1 its physical properties are transformed, and none of
2 those are taxable, again, for obvious reasons because
3 people are using water as a tool to help with an
4 overlying service.

5 The Department mentioned that the contractors
6 say that we're providing snow. There's no dispute
7 that snow is provided as a part of this. So when
8 you -- so when something is quoted like, can continue
9 to provide the snow, what does that mean? I guess it
10 just means that that's part of the contract and
11 continue to do that along with the other things.

12 The contracts definitely show that there are
13 people there 24 hours a day throughout the entirety of
14 the event. The contracts definitely show that those
15 people are tilling. Mr. Bronander's testimony shows
16 that those people are working to make sure that that
17 experience on the snow is everything that it can be.

18 I have no further points.

19 JUDGE S. BROWN: Thank you very much. One
20 second.

21 And I believe I can say that we can conclude
22 the hearing. I think I heard the testimony, heard the
23 arguments. We've admitted all the evidence, and
24 there's nothing further that anyone has to submit.

25 So I will say thank you all very much for

1 your participation today. This concludes the hearing.
2 The record is closed, and the case is submitted today.
3 The judges will meet and decide the case based on the
4 evidence, arguments and applicable law. We will mail
5 both parties our written decision no later than 100
6 days from the date the record closes, which is today.

7 The hearing is now adjourned. Thank you all
8 very much, and this concludes the OTA hearings for
9 today. And we're off the record.

10 (Off the record)

11 (Proceedings concluded.)

12 ---oOo---

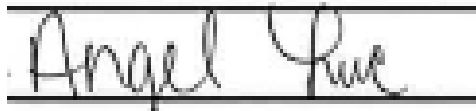
1 REPORTER'S CERTIFICATE

2
3 STATE OF CALIFORNIA)
4) ss.
5 COUNTY OF ALAMEDA)
6

7 I, Angel Love, a Certified Shorthand Reporter
8 of The State of California, do hereby certify that I
9 am a disinterested person herein; that I reported the
10 foregoing hearing to the best of my ability in
11 shorthand writing; that I thereafter caused my
12 shorthand writing to be transcribed into typewriting.
13

14 I further certify that I am not of counsel or
15 attorney for any of the parties to said hearing, or in
16 any way interested in the outcome of the said hearing.
17

18 IN WITNESS WHEREOF, I have subscribed this
19 certificate at Oakland, California, on this 21st day
20 of April 2023.

21 
22

23 Angel Love, RPR, CSR NO. 13845
24
25

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