

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
SWISSPORT LOUNGE, LLC,) OTA NO. 22019463
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, March 23, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:33 a.m. and concluding at 10:54 a.m. on
Thursday, March 23, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ JOSHUA ALDRICH
ALJ KEITH LONG

For the Appellant: PAUL RAYMOND

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

AMANDA JACOBS
JARRETT NOBLE
RAVINDER SHARMA

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-4 were received at page 8.)

(Department's Exhibits A-J were received at page 8.)

APPELLANT'S
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By Mr. Raymond 49

1 California; Thursday, March 23, 2023

2 9:33 a.m.

3
4 JUDGE KWEE: So we're opening the record in the
5 Appeal of Swissport Lounge, LLC.

6 This matter is being held before the Office of
7 Tax Appeals, and the OTA Case Number 22019463. Today's
8 date is Thursday, March 23rd, 2023, and the time is
9 approximately 9:33 a.m. This hearing is being conducted
10 electronically via Webex, and it is also being live
11 streamed on OTA's public YouTube channel.

12 Today's hearing is being heard by a panel of
13 three Administrative Law Judges. My name is Andrew Kwee,
14 and I will be the lead Administrative Law Judge. Judges
15 Josh Aldrich and Keith Long are the other members of this
16 tax appeals panel. All three of us will meet as equal
17 participants after this hearing, and we will produce a
18 written decision as equal participants. Although I will
19 be conducting this hearing, any judge on this panel may
20 ask questions or otherwise participate at any time to
21 ensure that we have all the information that we need to
22 decide this appeal.

23 With that said, for the record, I'd ask the
24 parties to please state their names and who they
25 represent, starting with the representatives for CDTFA.

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MS. JACOBS: Amanda Jacobs for CDTFA.

MR. NOBLE: Jarrett Noble, also for CDTFA.

MR. SHARMA: Ravinder Sharma for CDTFA.

JUDGE KWEE: Okay. Thank you.

And I'll turn over to Appellant. Would you and your two witnesses please identify yourselves for the record.

MR. RAYMOND: Yes, Your Honor. Paul Raymond for Appellant Swissport.

MR. BROMBERG: And I'm Mark Bromberg, and I'm here on behalf of Swissport Lounge, LLC.

MS. FRENCH: I'm Linda French, and I'm here on behalf of Swissport Lounge, LLC.

JUDGE KWEE: Okay. And one question. I understand Mark Bromberg was the president or is the president of Apex. And I did not have a title for Ms. Linda French. Could I get your title, please.

MS. FRENCH: Yes. This is Linda French and I am a staff accountant.

JUDGE KWEE: Okay. Thank you.

Okay. So I'm going to move on to the exhibits then. What I have is -- so basically after the prehearing conference OTA provided the exhibit binders to the parties. And during the conference, my understanding was that the parties had no procedural objections to admitting

1 the -- those documents identified and discussed into the
2 evidentiary record. Just for a recap, CDTFA had submitted
3 Exhibits A through I. After the prehearing conference,
4 CDTFA submitted one additional exhibit, Exhibit J. And
5 that was an exhibit detailing a post-hearing concession by
6 CDTFA.

7 CDTFA, do you have any additional exhibits that I
8 did not mention?

9 MS. JACOBS: No.

10 JUDGE KWEE: Okay. And Mr. Raymond, did
11 Appellant have any objections to any of these exhibits
12 that I just listed?

13 MR. RAYMOND: This is Paul Raymond. No
14 objections, Your Honor.

15 JUDGE KWEE: Okay. Then for Appellants I have
16 Exhibits 1 through 46, and I did not receive any
17 additional exhibits following the post-hearing --
18 prehearing conference. Is that correct for Appellant, or
19 did you have any additional exhibits that I did not
20 mention?

21 MR. RAYMOND: This is Paul Raymond, Your Honor.
22 No additional exhibits.

23 JUDGE KWEE: Okay. And CDTFA, I understand that
24 there's no objections to admitting those exhibits into
25 evidence; is that correct?

1 MS. JACOBS: Amanda Jacobs. No objections.

2 JUDGE KWEE: Okay. With that said, I will admit
3 Exhibits A through J for CDTFA and 1 through 46 for
4 Appellants into evidence without objection from either
5 party.

6 (Appellant's Exhibits 1-4 were received
7 in evidence by the Administrative Law Judge.)

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

10 And during the prehearing conference, we did ask
11 CDTFA to clarify one item. That item was Exhibit J, and I
12 understand that a concession was made. So my
13 understanding is that CDTFA from the exhibit, that you
14 conceded that item; is that correct?

15 MS. JACOBS: Yes. During the prehearing
16 conference you -- [NO AUDIO]

17 THE STENOGRAPHER: I'm sorry, Ms. Jacobs, I did
18 not get your answer. Can you please repeat that?

19 MS. JACOBS: Yes. During the prehearing
20 conference, we were asked a question regarding a certain
21 portion of the audit, and then after the prehearing
22 conference we conducted a reaudit and made a reduction
23 proportionate to the item that was -- that you are
24 questioning us about.

25 JUDGE KWEE: Okay. Great. And as far as the

1 issues that were heard, we discussed those two issues
2 during the prehearing conference. I'm not going to go
3 over them again because they are listed on our agenda, and
4 they were listed in the minutes and orders summarizing the
5 prehearing conference. But I would ask the parties to
6 confirm that there's -- those issues are correctly stated
7 and that there's no additional issues that I did not
8 include in the minutes and orders.

9 So CDTFA, were the two issues that were listed
10 correct?

11 MS. JACOBS: Amanda Jacobs. Yes.

12 JUDGE KWEE: Okay. And for Appellant, were the
13 issues that I had summarized in the minutes and orders,
14 does that accurately reflect the issues for this appeal?

15 MR. RAYMOND: This is Paul Raymond. Yes, Your
16 Honor.

17 JUDGE KWEE: Okay. Great.

18 So then the other item is just -- I'll give you a
19 quick recap of the time estimates for today's hearing. I
20 currently have 30 minutes estimated for Appellant's
21 opening presentation. I also have 30 minutes reserved in
22 the event that additional time is needed for witness
23 testimony. For CDTFA, I have 30 minutes for their opening
24 presentation. And then following, each party would be
25 given five minutes for any closing remarks. So the time

1 estimate is approximately one to one-and-a-half hours for
2 this hearing.

3 Are there any concerns about that time estimate
4 for CDTFA?

5 MS. JACOBS: Amanda Jacobs. No concerns. Thank
6 you.

7 JUDGE KWEE: Okay. And Mr. Raymond, is that also
8 an accurate summary for you?

9 MR. RAYMOND: Yes, Your Honor. With just the
10 additional revise of I think we're going to finish a
11 little early. We're going to waive our opening statement
12 and be prepared to go right into testimony then go back
13 into the argument. I think it's more efficient to do
14 that, and I can reference certain things when I begin.

15 JUDGE KWEE: Okay. Great. So then before I get
16 started, I would like to swear in the witnesses, starting
17 with Mr. Bromberg.

18 Mr. Bromberg, would you raise your right hand.

19

20 M. BROMBERG,

21 produced as a witness, and having been first duly sworn by
22 the Administrative Law Judge, was examined and testified
23 as follows:

24

25 JUDGE KWEE: All right. Thank you. You may put

1 your hand down.

2 Ms. French, would you raise your hand and tell me
3 when you're ready.

4 You might be muted.

5 MRS. FRENCH: Linda French, and I'm ready.

6 JUDGE KWEE: Okay.

7

8 L. FRENCH,

9 produced as a witness, and having been first duly sworn by
10 the Administrative Law Judge, was examined and testified
11 as follows:

12

13 JUDGE KWEE: Okay. Thank you. You may put your
14 hand done.

15 Okay. With that said, I believe we're ready to
16 get started. Does anyone have any questions before we
17 turn it over to Appellant's representative for their
18 witness testimony and questions?

19 Okay. Mr. Raymond, I'll turn it over to you.

20 MR. RAYMOND: Thank you, Your Honor, and thank
21 you to the Department, as well as the other participating
22 judges.

23

24 DIRECT EXAMINATION

25 BY MR. RAYMOND: Mark Bromberg, good morning, sir. How

1 are you?

2 A I'm fine.

3 Q Good. We're going to walk you through what you
4 did at Swissport, take you through the audit, take you
5 through the adjustments, and hopefully it won't be a
6 lengthy process. So let's start first with Apex. Please
7 describe for the Court what is Apex? What did you do, you
8 know, have a conversation about that with us, please?

9 A Sure. So I head up Apex Restaurant Group, LP.
10 We are contract managers for groups of restaurants or in
11 this case, a group of airport lounges that are owned by
12 others. And we step into the shoes and actually become
13 operating and functioning management for all of our
14 clients. In this case, Apex was contracted to run all of
15 the Swissport Lounge locations, which operated under the
16 name of Airspace in California, Ohio, Maryland, and
17 California in the 10-year contract that actually commenced
18 back in 2011.

19 We actually run the lounges. We provide the
20 accounting and human resource services for the lounge. We
21 make all the filings and provide all the calculations.
22 And we're performing functions exactly the same as a
23 management team would, were they employed by Swissport.
24 So that's who we are, and what we do. We're headquartered
25 in the suburb in Dallas, but we operate all over the

1 country for various clients of different types.

2 Q When was the first lounge that you operated?

3 A 2011. It opened at Baltimore International
4 Airport, and that was followed by lounge openings in
5 New York City at JFK, in Cleveland, and then ultimately in
6 San Diego.

7 Q And what, if anything, is the model that's in the
8 Swissport Lounge in San Diego? Please describe the way it
9 works, the operations, et cetera?

10 A Yeah. So if you'll indulge maybe 30 seconds of
11 background. Those of you that have traveled on airlines
12 over the course of your careers are probably familiar with
13 a typical type of airline lounge that you see. They might
14 be branded as American Airlines, Admirals Clubs, or United
15 Red Carpet Clubs, or Delta Sky Clubs, and often they were
16 built, staffed, managed, and run as an extension of the
17 airline itself.

18 Swissport had a different idea, and their idea
19 was to build on a unique business model that would develop
20 shared lounges that not only could be utilized by our
21 airline clients who either didn't have the will or didn't
22 have the resources to build out lounges of their own, but
23 also to credit card companies and other types of affinity
24 groups who wanted to provide a level of exclusive refuge
25 or separation within the airports itself.

1 And so that made, at the time, the Airspace
2 lounges. And I'm going to use for the purposes of this
3 hearing Airspace and Swissport simultaneously because it's
4 Swissport doing business as Airspace. But it made the
5 airport lounges unique in that instead of just having
6 airline passengers of a particular brand, the lounge was
7 used by the clients and customers of a wide range of
8 constituents.

9 And in the San Diego lounge, which is the one
10 that we're talking about today, was initially opened in
11 2014 after a long period of development under discussions
12 with the San Diego Airport Authority. This lounge served
13 the customers of American Airlines and Citibank, their
14 credit card partner, as well as initially American Express
15 and then eventually the passengers of Japan Airlines,
16 British Airways, Condor, and Iceland Air over the course
17 of its life.

18 The lounge itself is still in operation in San
19 Diego. Apex no longer manages it. It's managed now by an
20 in-house management team from Swissport itself. But
21 during the reference period that we're talking about, Apex
22 was providing all the administrative and management
23 functions of the lounge.

24 Q Okay. So let's go through a typical hypothetical
25 situation, Mr. Bromberg. You know, how does it work with

1 an American Express holder or an American Airlines person?
2 Please walk us through how that process works?

3 A Sure. So Swissport had contracts to provide a
4 level of service and a level of use for the companies'
5 various clients, and we'll start with American Airlines
6 first. American had a longstanding lounge in the San
7 Diego airport. It was called an Admirals Club. They run
8 Admirals Clubs all over the country, primarily for their
9 passengers. And when the Airport Authority decided to
10 renovate and build on to the airport, American declined to
11 replace its existing lounge with a new lounge.

12 And so they entered into an agreement with
13 Swissport to essentially provide access to Admirals Club
14 members who pay an annual fee to American Airlines that
15 provides them with unlimited use and access to Admirals
16 Clubs throughout the world. It's possible that a customer
17 could start their day in San Diego, walk into the lounge,
18 sit down, relax for 45 minutes, go catch their flight,
19 arrive in Chicago for a connecting flight, use the airline
20 lounge, the Admirals Club lounge in Chicago much the same
21 way, and then eventually arrive in Miami and use the
22 bathrooms, use the facilities, sit down, relax, make a
23 phone call in Miami before they go off and do their
24 business.

25 The transactions that an airline passenger would

1 interact will differ among the various types of lounges
2 out there. And I'm going to confine my remarks to what a
3 passenger would experience, do, and interact with an
4 Airspace lounge. So a customer of American Airlines will
5 come in. He'll show his membership card, you know. A
6 member of the lounge staff will verify that he's a member,
7 and then he or she will sit down and relax.

8 For that access, Swissport had a negotiated fee
9 of \$14.92 per customer. No cash and no credit cards
10 changed hands between the lounge and the passenger. It
11 was all handled with a monthly billing back to American
12 based on the number of people that came in and the number
13 of passengers that were served. For that, the American
14 Airlines passenger received access to the lounge, the
15 ability to sit down, read a newspaper, make a phone call,
16 use the restrooms, you know, go up to a very small
17 eight-foot counter, grab a four-ounce cup of coffee on a
18 self-serve basis, you know, in the morning pick up a
19 one-ounce muffin that might be there, you know, or grab a
20 four-ounce cup of Pepsi, you know, and could, you know,
21 basically have a refuge from the hustle and bustle of the
22 airport.

23 And every time somebody came in that wasn't an
24 American Airlines customer, that created a liability of
25 \$14.92 from the airline itself back to Swissport Lounge.

1 We had similar arrangements with respect to Japan Airlines
2 and respect to British Airways. They received a few extra
3 benefits that we'll talk about later. But the basic
4 American Airlines customer who made up the vast majority
5 of customers of Airspace lounge came in, sat down, were
6 separated from the airport, left after 20, 25, or 30
7 minutes or worse and longer when the airline wasn't doing
8 its job, but eventually grew to utilize the airport as,
9 you know, more or less quiet space.

10 Inside the lounge is a bar, and that bar was
11 equipped to sell pre-prepared snacks and beverages to
12 customers of the lounge or guests of the lounge for
13 consideration. The lounge never took cash. It only took
14 credit cards. And if a customer that was in the lounge,
15 free of charge to them, went up to the bar and asked for a
16 gin and tonic, for instance, or a glass of wine, the staff
17 of the lounge would serve that glass of wine or that gin
18 and tonic and record the transaction on the point of sale,
19 collect credit card from the customer, and ultimately the
20 credit card customer wound up being billed for it at the
21 end of the month much like any normal retail transaction.

22 The tax associated with that type of ancillary
23 sale is really not in dispute. It operated pretty well
24 the same way almost any other transaction would operate in
25 any bar or restaurant that you could think of. American

1 customers basically were cash customers. And I'm using
2 cash and credit card interchangeably once they were in the
3 lounge. They got nothing. If they were desiring a beer
4 or a glass of wine, they went and bought it.

5 But that was really the extent of any kind of
6 alcohol or food service that they were provided while they
7 were in the lounge, other than small tiny quantities
8 ancillary peanuts, muffin bites, as we talked about,
9 complementary coffee in small containers and complementary
10 soft drinks in small containers and the ability to grab a
11 plastic cup and fill up that plastic cup with water, which
12 happened to be out there as well.

13 Customers of Japan Airlines and British Airways
14 were handled a little bit differently. And I'm also going
15 to put American Express in this category as well. In
16 addition to our airline customers, we -- Swissport also
17 had a contract with American Express to provide the same
18 types of lounge services to their card holders as well.
19 And many of you are probably familiar with these kinds of
20 benefits that are no much more commonplace than they were
21 back in 2014.

22 In addition to providing lounge access and all
23 the things that we talked about earlier, each customer was
24 issued a smart card or a little gift card that had
25 validity that expired at the end of the day, could be used

1 in the lounge at the bar or at the -- well, at the bar,
2 you know, really, if they desired an alcoholic drink. And
3 that was included in the \$14.92 that we received back from
4 American or the \$16.50 that we received back from American
5 Express.

6 In truth, although the lounge issued these cards,
7 less than half of them were ever redeemed. They just
8 expired at the end of the day. They had no volume --
9 value, and they were never actually used. When a guest
10 went to the bar and used his \$7 card for partial
11 consideration of a drink, in fact, he was dispensed with
12 the drink. The drink was recorded, and at the end of the
13 day the value of that drink was reduced to its cost basis
14 and sales tax was remitted to California based on the cost
15 of goods sold.

16 Essentially, the determination to provide any
17 benefit whatsoever was made with the individual airline or
18 with the credit card company, and their idea was to
19 provide, you know, something for free to get people to use
20 the lounge if they wish. But ultimately, as I've said,
21 less than 50 percent of these cards were ever redeemed.
22 So the transaction that occurred was if you were an
23 American Airlines customer, you didn't get one of these
24 cards.

25 If you were a British Airways customer or an

1 American Express customer, you got a card. If you elected
2 to use it, then the sale was initially recorded then
3 backed out. The cost component of what we gave the
4 customer was then recorded and sales tax was remitted to
5 the State quarterly as required, based on the cost
6 components.

7 There is a third category of customer called a
8 walk-in customer. A walk-in customer would be a customer
9 like you and me who passed the lounge, saw the lounge and
10 said, wow, that would be a nice place to spend some time.
11 And they walked in and said, can I use the lounge? They,
12 depending upon capacity and business volumes, were allowed
13 to buy a membership. And those memberships varied but
14 started at \$35 per customer. Those transactions were
15 taxed, and the tax was remitted.

16 And my understanding is that the sales tax
17 treatment of walk-in customers or cash customers that had
18 nothing to do with either the airline clients or American
19 Express were treated like any other customer, and that's
20 not in dispute with the Board of Taxation. So basically
21 that's how it operated, you know, while the main purpose
22 and the main business model of the lounge was to provide
23 separation and to provide a way of keeping people away
24 from the hordes of passengers that would spew down the
25 concourses.

1 And, in fact, during Covid where the county did
2 not allow anything to be served to customers, whether they
3 be soft drinks or coffee or anything self-served, the vast
4 majority of customers came in, sat down, separated
5 themselves from the concourse and get up to leave when
6 they left. The lounge does not and did not provide to-go
7 services because none of the packaging was retail
8 oriented. The quantities that a customer could self-serve
9 were so small and infinitesimal that they weren't
10 available for sale within the airport. And they really
11 were, you know, an ancillary benefit that was there that
12 was, you know, absolutely tangential to the main reason of
13 separating themselves from customers.

14 So that's how it worked. At the end of the
15 month, Apex on behalf of Swissport accumulated the number
16 of entries, which were recorded electronically. And we
17 billed American Airlines for not only their customers but
18 Japan Airlines and British Airways. We billed American
19 Express, and about a month later reimbursement was
20 received and deposited in Swissport's operating accounts.

21 Q Mark, thank you. Mr. Bromberg, thank you. I'm
22 sorry. We're familiar with each other for the years that
23 we've known each other. Let's shift gears a little bit
24 and talk about what's in dispute. In other words, what
25 happened in the audit? What's in dispute? What's our

1 position? Can you summarize that for us?

2 A Yeah. So I mean, it's our position that the --
3 that essentially we stepped into the shoes of the
4 airlines. The airlines provide these lounges themselves
5 all around the country and including California, you know,
6 I'm sure. Customers come in. They sit down. They are
7 provided the same types of services and benefits that we
8 have. And our understanding is that since billing is done
9 centrally and can never really be attributed to a lounge,
10 those kinds of transactions are not taxable.

11 Our position is that what we're selling is
12 separation, and what we're selling is a refuge and a way
13 to relax. Any time a food or beverage item is sold within
14 the lounge, it's taxed. Any time a complementary food
15 item is provided or beverage item is provided, it's
16 reduced to its cost components by us, and we remit the tax
17 internally.

18 The main dispute here tends to center around
19 whether or not we're a retailer. And I'm not going to get
20 into the specifics of whether or not we're a retailer
21 under the California Code, other than my rudimentary
22 knowledge, you know, in terms of having gone through the
23 audit. But the way that the Department has determined
24 that we are a retailer is to take the sum total of all of
25 these complementary items that we provide for staff -- and

1 when we say all of them, I mean, the minimum numbers that
2 we provide for staff -- mark them up with a theoretical
3 retail margin, determine that is above a certain threshold
4 of revenue. And therefore, determine that we are a
5 retailer and should have remitted tax, and we dispute
6 that.

7 The items that are provided within the confines
8 of the lounge are not available for sale within the
9 restaurant -- I'm sorry -- within the airport. It's not
10 like we had bags of Lays potato chips out there that a
11 customer could take, which would replace a bag of potato
12 chips sold within a store elsewhere in the airport. You
13 know, the better analogy would be to have a little
14 dispenser that drops six or eight potato chips into a
15 little cup. Obviously, we don't dispense potato chips,
16 but the same analogy would hold with peanuts.

17 It's a small dispenser. It looks like a cereal
18 dispenser that many of you have seen at hotels, a very
19 small portion cup that's plastic. And people would grab a
20 few, you know, peanuts go to their seat if they wish and
21 eat it or not eat. And so our position is that we're not
22 a retailer because none of the items that were given away
23 on a complementary basis and made available to customers,
24 50 percent of whom likely didn't even touch them, are not
25 available for retail sale within the airport, can't be

1 taken to go, can't be consumed outside the lounge, and
2 wouldn't be a reason why people would want to visit the
3 lounge in the first place.

4 There's a second -- there's a second actual
5 theory that we use -- we being Apex -- to advise our
6 clients, which has actually been a theory that we've used
7 in other lounges we've operated across the country, and
8 that's this. Since we're not a retailer -- my definition,
9 not necessarily --

10 THE STENOGRAPHER: Mr. Bromberg?

11 MR. BROMBERG: Yes.

12 THE STENOGRAPHER: I'm sorry. Can you repeat
13 your last sentence? You cut out for that last sentence.

14 MR. BROMBERG: Yeah. I'm sorry.

15 There's another concept that I'd like to
16 introduce, you know, which we have used successfully in
17 terms of presenting our business model to other taxation
18 authorities where we've operated these lounges around the
19 country. And first, you know, let me acknowledge that
20 what New York does and what Ohio does probably has little
21 relevance to what happens in California. I acknowledge
22 that. Everybody has different tax laws.

23 But the other three states in which we operated
24 these Airspace lounges had concerns. And the basic
25 concern is, is the State getting, you know, the requisite

1 amount of tax revenue based on what we as an operator were
2 providing. And our position is that if we were to pay tax
3 on the purchases of all of our alcohol and all of our food
4 items, peanuts, popcorn, Coca-cola, coffee grounds, tea
5 bags, we can do whatever we want with it as long as we
6 don't charge for it.

7 We can give it away. We can, you know, put it
8 out in a big tub in front of the room and say, you know,
9 guys, grab a handful of popcorn. As long as the tax is
10 paid on the input item, and we're not collecting money and
11 not marking it up, then we should be able to do what we
12 want to do. And, in fact, that's what we have done. Now,
13 our suppliers, with the exception of Pepsi, you know, who
14 at our request charge a sales tax on everything, are not
15 equipped to charge a business like Swissport sales tax on
16 goods and goods purchased from them because typically
17 they're a wholesaler. And typically they provide these
18 foods to restaurants and hotels and people who resell
19 them.

20 And, you know, with the exception of cash
21 transactions, which we've already talked about, we don't
22 resell them. But if you were to -- and we've demonstrated
23 this to the audit team. If you were to add up the total
24 amount of purchases of food and beverages that were
25 provided on a complementary basis during the scope of the

1 audit period, apply the 8 percent sales tax to that, you
2 would come out with a larger number -- I'm sorry --
3 smaller number than the amount of the tax that was
4 remitted using the calculation basis that we use.

5 So once again, entries from customers coming into
6 the lounge that were not part of the airline, not part of
7 the credit card companies, just wanted to come in and pay
8 for a, you know, visit to the lounge, fully taxed, fully
9 remitted, not in dispute. To the extent that those
10 passengers that paid for their entry came in and had a
11 4-ounce cup of coffee or, you know, 4 or 5-ounce glass of
12 soda before they left the lounge, were we to have marked
13 those items up and remitted tax as the Department would
14 like us to do, then we would have double taxed our
15 customers once by charging for an entry and once by
16 self-remitting on the other side.

17 Anything for which we collected traceable
18 transactions we charge and remitted tax. Cash sales
19 across the bar, which were actually made by credit card.
20 Whether they were, you know, small snacks and sandwiches
21 or otherwise, all of that was recorded and remitted.
22 Items that were given away, you know, through the smart
23 card, which we call complementary ancillary items, we
24 reduce them to cost as if we had paid sales tax on the
25 inputs and remitted that to the State.

1 It's the same methodology that we've used
2 throughout the country. Not that it's relevant, but it's
3 what we've done. You know, our intent here was, you know,
4 to not to, you know, recognize an artificially inflated
5 value and collect tax on that. Our intent was to adhere
6 to and comply, you know, with what we understand to be the
7 intent and the written rule. And so that's what we did.

8 Q Wonderful. Thank you for the summary. You
9 mentioned other states that Swissport operated in. Can
10 you briefly tell us where they operated as well?

11 A Yeah. So we operated at the Baltimore Airport
12 and JFK Airport in New York City and at Cleveland Hopkins
13 airport. Very similar style of operation as our lounge in
14 San Diego. And actually just to sort of demonstrate that,
15 you know, we really are not in the business of selling
16 food, none of these operations actually had working
17 kitchens. And it was never, you know, a situation where
18 we were going to go out and purchase prepackaged food
19 items and give them to people. We basically had working
20 bars in them but function as the same.

21 In the case of Maryland, they went through a
22 long-protracted audit and investigation. You know, their
23 tax laws a little bit different, you know, but we were
24 given a full clean bill of health. You know, no change in
25 assessment. We explained the situation much like I'm

1 explaining to you, and that lounge actually went through,
2 you know, a full six years of operation until its lease
3 expired, and we never had a problem.

4 Same as New York. In New York, you know, as you
5 know, you know, has more than one taxation authority.
6 They have the state. They have the counties. They have
7 the city, you know. In this case, New York State did it
8 for the county and the city. They came in, you know,
9 looked at everything. The operation exactly the same had
10 no issues.

11 In Ohio we had a one-day audit. The auditors
12 came in looked at the operation because they had
13 questions. They came back out and, you know, again no
14 change to the assessment.

15 So the only time we've really had an issue was as
16 it relates to this particular audit. I will tell you
17 that, you know, the audit team was very easy to work with,
18 very communicative, very respectful. We have no issue
19 whatsoever with the people who did the audit, you know, or
20 the way in which it was conducted.

21 It's taken a long period of time but, you know,
22 we certainly have an issue with the respect to the
23 conclusion because we don't think the conclusion is either
24 practical, objective, or reasonable based on the business
25 that's being conducted.

1 Q All right. Mr. Bromberg, let me ask you perhaps
2 one final question, although I will ask you if there's
3 anything else you would like to add, and that is that you
4 did participate along with Ms. French with the audit team;
5 is that right?

6 A A lot less on my part than on Ms. French's
7 part -- Mrs. French's part. Yes.

8 Q And I assume it came to your attention during the
9 audit that the Department said that this was a case of
10 first impression for them; is that correct?

11 A That's correct.

12 Q All right. Is there anything else, Mr. Bromberg,
13 you would like to add? We have an opportunity -- excuse
14 me. I'm sorry. Before I -- well, I cut you off so let me
15 just continue. The Panel can ask questions of course.
16 The Department can ask you some questions of course, and
17 they have the right to present their witnesses and
18 testimony and things of that nature, if that's their
19 choice.

20 A Sure. I mean, you know, nothing that really, you
21 know, is, you know, a significant departure to what I've
22 said other than to amplify two things. Number one, it is
23 a case of first impression. And that first impression
24 might have been I think cleared a bit had the audit team
25 taken us up on our invitation to actually come in and

1 visit the lounge and spend some time in the lounge.

2 Now, unfortunately, because we're Texas-based and
3 the lounge is in California and the audit team was
4 Texas-based, it really wasn't practical I suppose for them
5 to actually come in and visit the lounge since the records
6 and the people preparing the records were in the Texas and
7 so was the team that actually did the audit.

8 But I'm confident that anybody on this panel and
9 anybody, you know, with a sense of how businesses operate,
10 would walk in, sit down, take a look around to see what's
11 actually going on, see what they're getting on a
12 complementary basis, and then shake their heads and say
13 these guys aren't retailers. And to the extent that they
14 are actually conducting retail sales, they are remitting,
15 collecting, and reporting tax accurately.

16 MR. RAYMOND: All right. At this point,
17 Mr. Kwee -- Judge Kwee -- I'm sorry -- I have nothing
18 further.

19 JUDGE KWEE: Okay. I am going to turn it over to
20 CDTFA.

21 CDTFA, did you have any questions for this
22 witness?

23 MS. JACOBS: No questions. Thank you. Amanda
24 Jacobs. No question.

25 JUDGE KWEE: Okay. Thank you, Ms. Jacobs.

1 So this is Judge Kwee. I did have a couple of
2 questions for the witness. I'd like to go back to the
3 smart card or gift card that you were referring to earlier
4 in your presentation and testimony. And I believe you
5 mentioned that the cost of the gift card, the value of the
6 card gift card was \$7. With that --

7 MR. BROMBERG: Yeah. So sure. I'll let you ask
8 your question and that way I won't ramble on, and I'll be
9 able to be responsive to what you're asking. So go ahead.

10 JUDGE KWEE: Okay. Yeah. So my first question
11 was I just wanted to confirm was that -- was that an
12 accurate understanding?

13 MR. BROMBERG: The value of the smart cards, you
14 know, was \$7 for some of the airline customers -- not
15 American -- and \$10 for others. And so what would happen
16 was the customer would come in. They would show their
17 credentials or their boarding pass. That was read into
18 the system and that triggered reimbursement from the
19 airline to us. And a lounge attendant would validate that
20 they were an entitled passenger, and they would grab a
21 magnetic card, a smart card much like an ATM card, and
22 they would place, for the purposes of you and I having
23 this discussion, a \$7 value on it.

24 The guest was told here's \$7 worth of
25 complementary value that you can use to purchase beverages

1 at the bar if you so choose. It has no value after your
2 visit is concluded. You can't come back with it and use
3 it another day. For the most part, that \$7 would not
4 cover the price of items that we had on the bar menu
5 itself. And they would use that as tender for the -- for
6 the purchase of the beverage item at the bar.

7 So if somebody went to the bar and ordered two
8 glasses of wine for \$9 each, the bartender would ring it
9 up on the point of sale, record an \$18 sale, read the
10 card. The card would show a \$7 complementary tender. And
11 then they would collect another \$11 plus tax from the
12 customer. At the end of the day or the end of the period,
13 those \$7 items which were attributable to the sale of wine
14 were reduced in value to a cost of wine. In our case,
15 let's say 30 percent.

16 So that \$7 value for the smart card would then
17 have a value of \$2.10 for taxation purpose. We would
18 calculate the 8 percent tax on the \$2.10, and we would
19 remit that to the State every quarter.

20 JUDGE KWEE: Okay. So --

21 MR. BROMBERG: Why you might ask, you know, is
22 \$2.10 the cost of the item that we gave across the counter
23 not the value that we would collect for sales and tax?
24 And the answer for that is, is that these items that were
25 given to customers were a benefit that we never collected

1 separately for from the airplane or the credit card
2 company. They were included in their entry fee. Most of
3 them -- a slight majority of them were not used.

4 And so as I said earlier, if we're giving
5 something away and we're not collecting for it, our policy
6 is as long as we pay tax on the input, whether it's from
7 the supplier or reducing it to the cost of goods, telling
8 the State and remitting it that way, we can give it away.
9 As long as we don't get reimbursed for it, as long as we
10 don't collect for it, then as long as we pay tax on the
11 input, our position has been, you know, we can throw it in
12 the garbage.

13 We can give it to the customers. We can drink it
14 ourselves. Obviously, it would not happen. And I'm
15 really not trying to be facetious here. I'm just trying
16 to drive the point, and I'm sure you get the point.

17 JUDGE KWEE: Okay. Yeah. And just to make sure
18 I'm understanding then. So I understand there's two
19 issues, and I'm looking -- I'm only asking about the issue
20 about the taxable alcohol sales right now. So was the
21 concern that CDTFA is asserting tax on the full \$7 or was
22 the concern they are asserting tax on amount more than \$7?
23 And you're saying that it should be \$2.10?

24 MR. BROMBERG: Well, I'll let the CDTFA, you
25 know, talk to that themselves because there are two issues

1 here. You know, their biggest concern was -- I believe
2 and they could speak for themselves. But I believe their
3 biggest concern was not the \$2.10 that these items were
4 deflated, but the value of complementary coffee, soft
5 drinks, peanuts, and muffin bites that were given to
6 customers when they came in the door. That seemed to be a
7 bigger concern because it's a bigger number than the value
8 of complementary beverage items used and paid for by smart
9 cards.

10 JUDGE KWEE: Okay. Yeah. And I did see that the
11 larger issue was the second issue, the unreported taxable
12 sales, and you talk mostly about the drinks. And I guess
13 that the other understanding -- the other -- the second
14 issue is the other items like the food that is being
15 transferred. So I was, I guess, just trying to wrap my
16 head around the item of the alcohol sales that you were
17 talking about first and making sure I understood the
18 amount being asserted. But maybe that's a better question
19 to ask CDTFA during their presentation to clarify what was
20 being asserted on, tax on. Thank you.

21 Okay. So I don't have further questions. I'll
22 turn it over to Judge Long.

23 Judge Long, did you have any further questions
24 for the witness?

25 I'm sorry. You're muted, Judge Long.

1 JUDGE LONG: No. Thank you.

2 JUDGE KWEE: Okay. Judge Aldrich, did you have
3 questions for the witnesses?

4 JUDGE ALDRICH: No questions for the witness at
5 this time. Thanks.

6 JUDGE KWEE: Okay. I would like to call a
7 5-minute recess before we move over to CDTFA's
8 presentation. So it is currently 10:20, if we could come
9 back at 10:25.

10 Just to clarify don't sign off. You could just
11 turn off your microphone and mute your cameras. And at
12 10:25 I will come back and call everyone to the cameras.
13 Thank you.

14 (There is a pause in the proceedings.)

15 JUDGE KWEE: We'll go back on the record.

16 And at this point, I am turning it over to
17 Mr. Raymond for any final questions for the witness.

18 MR. RAYMOND: No final questions, Your Honor.

19 JUDGE KWEE: Oh, okay.

20 In that case, then we will turn it over to CDTFA.
21 CDTFA, you have 30 minutes for your opening
22 presentation.

23 MS. JACOBS: Good morning. Can you hear me?

24 JUDGE KWEE: Yes. We can hear you, Ms. Jacobs.
25 You may proceed. Thank you.

1 MS. JACOBS: Thank you.

2

3 PRESENTATION

4 MS. JACOBS: Appellant operated an airport lounge
5 in the San Diego International Airport in San Diego,
6 California, during the liability period of July 1st, 2014,
7 through December 30th, 2017. There are essentially two
8 types of customers. One received access to the lounge
9 based upon agreements with third parties, including
10 airlines and credit card companies. The audit referred to
11 these as reimbursement customers. The other were walk-in
12 customers who paid an entry fee to Appellant prior to
13 gaining access.

14 Appellant provided its customers food and
15 beverages, including alcohol prior to gaining access. Oh,
16 sorry. Appellant provided its customers food and
17 beverages, including alcohol at no additional cost,
18 coupons for premium food and alcohol and amenities,
19 including restrictive lounge space, private washrooms, and
20 Wi-Fi. Appellant also sold premium food and beverages to
21 its customers.

22 Appellant made the following types of sales:
23 Reimbursement entry sales, which were payments from third
24 parties who contracted with Appellant to allow specified
25 reimbursement customers access; walk-in entry sales, which

1 were payments from walk-in customers for access; and
2 premium sales, which were payments from reimbursement
3 customers and walk-in customers for the purchase of
4 premium sales of food and alcohol. Appellant charged and
5 collected sales tax reimbursement on its walk-in customers
6 and premium sales but not on its reimbursed entry sales.

7 The issues in this appeal are whether adjustments
8 are warranted to Audit Item 1, unreported taxable alcohol
9 sales of approximately \$99,000, and Audit Item 4,
10 unreported taxable sales included in reimbursed entry
11 sales of approximately \$2.5 million.

12 With regard to the first issue, Appellant owes tax
13 on its unreported taxable alcohol sales. As you know
14 California imposes tax on a retailer's retail sales of
15 tangible personal property or TPP, measured by the
16 retailer's gross receipts unless the sales are
17 specifically exempt or excluded, Section 6051. All of a
18 retailer's gross receipts are presumed subject to tax, and
19 the retailer bears the burden of proving otherwise,
20 Section 6091.

21 According to Section 6006 subdivisions (a) and
22 (d), the term "sale" means any transfer of title or
23 possession, exchange or barter, conditional or otherwise
24 in any manner or by any means whatsoever of TPP for a
25 consideration, and includes the furnishing, preparing, or

1 serving food, meals, or drinks for a consideration.

2 A retail sale is a sale other than a resale of
3 TPP in the regular course of business, and retailer
4 includes every seller who makes any retail sale of TPP,
5 Sections 6007 and 6015 subdivision (a)(10). Anyone making
6 more than two retail sales of TPP during a 12-month period
7 is considered a retailer, Section 6019. In the case of an
8 appeal, the Department has a minimal initial burden of
9 showing that its determination was reasonable and
10 rational. See appeal of TFCG Incorporated 2019 OTA 389P.
11 See also Todd versus McColgen 89 cal.app.2d 509, pincite
12 514.

13 Once the Department has met its initial burden,
14 the burden shifts to the taxpayer to establish that a
15 result differing from the Department's decision is
16 warranted. See again Appeal of TFCG and also Riley B's
17 Incorporated versus State Board of Equalization 61
18 cal.app.3d 610, pincite 616. Except as otherwise
19 specifically provided by law, the burden is on the
20 taxpayer to prove all issues by a preponderance of the
21 evidence, Regulation 35003(a).

22 That is that a taxpayer must establish by
23 documentation or other evidence that the circumstances it
24 asserts are more likely than not to be correct.
25 Unsupported assertions not sufficient to satisfy a

1 taxpayer's burden of proof. In this case, we know
2 Appellant was selling alcoholic beverages in exchange for
3 consideration and according to their own books and
4 records, made at least \$213,593 in alcohol sales during
5 the liability period.

6 During the audit the Department used Appellant's
7 profit and loss statements to compare Appellant's cost of
8 goods sold for its premium alcohol sales and found an
9 overall book markup on its alcohol sales of
10 334.05 percent. Based on the Department's experience with
11 similar businesses in airport locations, the Department
12 expected a book markup rate of at least 400 percent for
13 food and even higher for alcohol sales. While Appellant
14 claims it sold the alcohol at below reasonable markup
15 rates, Appellant has not provided any evidence showing a
16 more accurate markup rate or that the markup calculated by
17 the Department was overstated.

18 When it is determined that a taxpayer's records
19 are such that sales cannot be verified by direct audit
20 approach, or reliance cannot be placed on a taxpayer's
21 records, the Department must calculate the sales from
22 whatever information is available using an indirect audit
23 method. See Audit Manual Sections 0404.05 and 0407.05.
24 Because Appellant's premium alcohol sales could not be
25 verified due to insufficient records, the Department used

1 the markup method, an approved indirect audit method, see
2 Audit Manual Section 0407.10, to verify Appellant's sales.

3 The Department used Appellant's purchase invoices
4 and POS data for June 2017 to conduct a shelf test and
5 found a weighted taxable markup of 606.34 percent. Using
6 the weighted taxable markup, Appellant's cost of goods
7 sold, and reported taxable sales of \$213,593, the
8 Department established the unreported taxable sales amount
9 of \$116,926, which as you know was reduced in the second
10 reaudit to \$99,229.

11 Appellant has not presented any arguments
12 disputing the Department's audit methodology or any
13 documentation to verify its actual markup rates.
14 Accordingly, the Department's determination of unreported
15 taxable alcohol sales of \$99,229 is reasonable and
16 rational, and Appellant has not met its burden of proving
17 otherwise. Therefore, no adjustments to that item are
18 warranted.

19 With regard to the second issue, Appellant made
20 taxable sales of food and beverages as part of its
21 reimbursed entry sales. Here it's undisputed that
22 Appellant provided food and beverages to its customers
23 upon entry. It is also undisputed that Appellant received
24 payments from third parties, such as American Express,
25 Condor and American Airlines for entry fees for these

1 customers where entry included premium food and beverages.

2 As previously stated, the term "sale" includes
3 the furnishing, preparing, or serving of food, meals, or
4 drinks for a consideration, Section 6006(d). In addition,
5 Regulation 1603(f) states the tax applies to sales of food
6 sold in a form for consumption at tables, chairs, or
7 counters, or from trays, glasses, dishes, or other
8 tableware provided by the retailer. Accordingly,
9 Appellant's furnishing of food and beverages to its
10 customers in exchange for consideration from the third
11 parties are sales as contemplated by Section 6006(d) and
12 Regulation 1603(f).

13 As for the proper measure of tax for those sales,
14 there are several annotations that are specific to
15 situations where food and beverages are provided in
16 addition to other services that are not part of the sale
17 of food and beverages. For example, annotation 550.0343
18 states that when a business provides food and beverages,
19 along with a theater show, as a one lump-sum price, a
20 reasonable segregation must be made and should result in a
21 taxable amount sufficient to cover the retailer's cost of
22 food, operating expenses, and a reasonable markup.

23 And annotation 550.0828 provides that when food
24 and drinks are served about -- aboard boat charters, for
25 example, only the retailer's charges attributable to the

1 food and drinks are subject to tax regardless as to
2 whether the charges are separately stated. Similar to
3 these annotations, Appellant provided food and beverages
4 to both its walk-in customers and its reimbursement
5 customers for a lump-sum price that included other
6 nontaxable amenities.

7 To calculate the portion of Appellant's entry
8 fees representing its sale of food and beverages, the
9 Department took the total value of the third-party
10 payments and apportioned the reimbursed entry sales of
11 non-premium food and alcohol accordingly allowing downward
12 adjustments from the third-party payments for nontaxable
13 amenities and additional adjustments to avoid double
14 counting food and alcohol Appellant had already included
15 in its reported taxable sales.

16 The Department used the best available evidence,
17 Appellant's own contracts with the third parties and
18 Appellant's books and records, to calculate the measure of
19 tax, and its determination was reasonable and rational.
20 Accordingly, the burden shifts to Appellant to establish
21 by a preponderance of the evidence that adjustments are
22 warranted.

23 Appellants has argued that the payments it
24 received from third parties are -- they have essentially
25 argued that the payments received from third parties are

1 not consideration for the food and beverages that it
2 provided. However, there are no provisions in the sales
3 and use tax law stating that a retailer must receive
4 payment directly from the customer -- from the consumer
5 for the payment to qualify as consideration.

6 In addition, Regulation 1671.1 subdivisions
7 (b) (5) and (c) (3) (a), while not applicable here, are
8 illustrative and that they describe situations in which
9 reimbursements paid by a manufacturer on the back end of a
10 transaction are still includable in gross receipts.
11 Similarly, when the third parties in this case reimbursed
12 Appellant for providing food and beverages to their
13 preferred customers, those payments are part of
14 Appellant's gross receipts.

15 To the extent that Appellant asserts that it is
16 not a retailer, we note that according to Appellant's own
17 profit and loss statements Appellant made at least
18 \$213,593 in premium alcohol sales during the liability
19 period indicating that it made more than two sales of TPP
20 for a purpose other than resale in the regular course of
21 business and thus, meeting the definition of a retailer
22 pursuant to Section 6019.

23 In addition, there's no dispute that Appellant
24 treated its entry sales to walk-in customers as retail
25 sales and collected tax reimbursement on that charge.

1 Lastly, there's no dispute that Appellant was operating
2 its business under a seller's permit filing sales and use
3 tax returns and reporting premium alcohol sales as taxable
4 sales. Appellant has claimed that it was entirely a
5 service enterprise consumer and as such, was the consumer,
6 not the retailer of the food and beverages furnished.

7 However, the non-premium food and alcohol
8 beverages were not incidental to the other amenities
9 included in the lounge access. Rather, Appellant was
10 required to furnish food and alcohol to its reimbursed
11 entry customers as evidenced by specific recitals within
12 each contract, Exhibit G, pages 10 and 30, Exhibit H,
13 page 3, and Exhibit I, page 1. Furthermore, it is clear
14 from the annotations that I previously noted that when
15 food and beverages are provided as part of another
16 service, the food and beverage are not incidental.

17 For the reasons I've just discussed, Appellant is
18 the retailer of the food and beverages it provided to its
19 customers, and Appellant has not provided any authority
20 establishing that it should be considered the consumer of
21 the food and beverages or that the measure of tax should
22 be based on its cost. In addition, Appellant has not
23 provided documentation establishing that the taxable
24 measure determined by the audit is overstated. Therefore,
25 Appellant has failed to meet its burden and no adjustments

1 are warranted.

2 Based on the foregoing, Appellant owes tax on its
3 unreported taxable alcohol sales and the taxable sales of
4 food and beverage included in its reimbursed entry sales.
5 On this basis, no further adjustments to the audit items
6 are warranted, and this appeal should be denied.

7 Thank you.

8 JUDGE KWEE: Thank you.

9 For CDTFA I just had a quick clarification about
10 the audit or I guess the Issue Number 1, the alcohol
11 sales, and I realize that there was an adjustment made
12 there. I just want to clarify for the alcohol sales, are
13 these sales based -- these are non-reimbursed
14 complementary alcohol sales. So it's a separate issue
15 from Issue 2 that these don't have anything to do with the
16 \$7, I guess, gift card -- complementary gift card would be
17 included in Issue 2 and not in Issue 1. This is just an
18 unreported alcohol sale; is that correct?

19 MS. JACOBS: Correct. Correct. This is for the
20 premium alcohol sales for customers that would walk up to
21 the bar and purchase the alcohol without any coupons or
22 smart cards.

23 JUDGE KWEE: Okay. Perfect. Thank you. And
24 then for Issue 2, my understanding, just from what you
25 said, is that, you know, like the taxpayer is getting a,

1 you know, reimbursed fixed amount. I think he said \$14.92
2 per customer who entered. And my understanding is that
3 CDTFA did not assert in any instance, you know, like more
4 than \$14.92. Like they made downward adjustments. So the
5 amount asserted for each customer was less than \$14.92,
6 and the difference between the taxpayer and CDTFA's
7 position is whether more downward adjustments are being
8 asserted. To my understanding, CDTFA is not asserting,
9 for example, \$20 per customer if they're doing less than
10 \$14.92 per customer. Is that a correct understanding?

11 MS. JACOBS: That's correct. Although different
12 customers received different -- or different -- Appellant
13 received different reimbursement amounts from different
14 customers. So I think Condor Airlines is like \$27 per
15 customer. But, again, we're not asserting that the entire
16 portion of that reimbursement amount was subject to tax,
17 just a portion for the food and beverages.

18 JUDGE KWEE: Okay. Great. Thank you for that
19 clarification. And yeah, that's a good point that they
20 were -- I was using the \$14.92 example because that's what
21 was discussed. But I understand what you're saying that
22 there were different reimbursements for just different
23 customers. Thank you.

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

25 JUDGE LONG: [NO AUDIO]

1 JUDGE KWEE: Okay. I believe Judge Long said
2 that he has no questions.

3 And, Judge Aldrich, did you have any questions
4 for CDTFA?

5 JUDGE ALDRICH: Hi. This is Judge Aldrich. I
6 had a couple of brief questions for CDTFA. So in your
7 presentation you indicated that the expected markup was
8 going to be 400 percent based off of experience with
9 similar?

10 MS. JACOBS: So the expected markup --
11 Appellant's markup when calculated was, like, 334 percent.
12 The Department expected a markup in similar situations for
13 at least 400 percent for food, and this was alcohol --
14 alcohol that we're talking about. So you would expect
15 more -- even more than 400 percent for alcohol. So then
16 when they did their calculations, they arrived at a markup
17 of around 600 percent.

18 JUDGE ALDRICH: Okay. And was that comparison
19 based off of other lounges or more airports, like,
20 retailers?

21 MS. JACOBS: So there wasn't a direct comparison.
22 We didn't get that 600 percent based on a comparison with
23 other lounges. We're just saying that the markup of
24 334 percent seemed low in comparison to airport locations,
25 if that makes sense.

1 JUDGE ALDRICH: Okay. Thank you. Because --

2 MS. JACOBS: But we didn't get the 600 percent
3 from another -- from another taxpayer or anything like
4 that. That was calculated using Appellant's own books and
5 records.

6 JUDGE ALDRICH: Okay. I guess I was just
7 wondering because we heard testimony that, according to
8 Mr. Bromberg, this was an audit of the first impression.
9 And so I was trying to figure out, like, what the
10 comparison was for the expected markup. But I understand
11 CDTFA's position now. Thank you. No further questions at
12 the moment turn.

13 I'll it back over to Judge Kwee.

14 JUDGE KWEE: Thank you, Judge Aldrich.

15 If there are no further questions from the Panel,
16 then I will turn it over for closing remarks. So I'll
17 turn it over to Appellant's representative.

18 Mr. Raymond, you have 5 minutes for any closing
19 remarks.

20 MR. RAYMOND: Actually, I think I can do it in
21 less than 5, Judge Kwee, because I know we're running a
22 little on the late side. I appreciate that, even though
23 we started a little late and had some breaks, et cetera.

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1 SBE, State Board of Equalization. I've seen concepts
2 called true object. I've seen, you know, incidental
3 sales. I've seen occasional sales. This, you know,
4 covers the gambit of different industries. And to the
5 point that Ms. Jacobs made sort of a moment ago about a
6 service industry type of argument that I think is
7 prevalent in our case.

8 I -- I just don't know how you can really compare
9 an airport lounge to any -- I'm going to use the retail
10 establishment, which I think you all will appreciate where
11 I'm going with that. It's a totally unique situation.
12 It's not offered for the purpose of sale of food and
13 beverages regardless of what contracts say. Trinkets may
14 be what they may be in the agreement, but people go there
15 to escape.

16 And if any of you have been to a lounge and have
17 been privileged enough to sit there and avoid the -- I
18 have to be careful about what I say because we're in a
19 public forum -- but avoid the crowd is really the polite
20 way of putting it and escape and conduct business and do
21 things, you will see that the purpose is not to -- how do
22 I say this? -- make money gouging sales, for whether it's
23 alcohol or whether it's peanut food, if you will.

24 So with that said, I am basically and
25 fundamentally done, other than to ask the Panel to please

1 consider all these points that we've raised. And once
2 again, thank the Panel and thanking the Department and
3 thanking the Office of Tax Appeals for the opportunity to
4 present our case today. Thank you.

5 JUDGE KWEE: Thank you, Mr. Raymond.

6 I'll turn it over to CDTFA.

7 CDTFA, did you have any final remarks before we
8 conclude today?

9 MS. JACOBS: No. Thank you.

10 JUDGE KWEE: Okay. Great. Judge Aldrich, are
11 you ready to conclude?

12 JUDGE ALDRICH: This is Judge Aldrich. Yes.

13 JUDGE KWEE: Okay. And Judge Long, are you ready
14 to conclude? You can nod your head yes if your microphone
15 is not working.

16 JUDGE LONG: This is Judge Long. I'm ready to
17 conclude.

18 JUDGE KWEE: Okay. I heard you that time.

19 So great. Thank you everyone for coming in. So
20 this case is submitted on Thursday, March 23, 2023. The
21 record is now closed.

22 The judges in this panel will meet after this
23 case, and we'll send a written opinion within 100 days
24 from today's date. This concludes hearings for the
25 morning calendar.

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I believe that the hearings for the afternoon
calendar will resume at 1:00 o'clock p.m.

Thank you everyone. Take care.

(Proceedings adjourned at 10:54 a.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 4th day
of April, 2023.

ERNALYN M. ALONZO
HEARING REPORTER