

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
ELECTRONIC DATA SYSTEMS ) OTA NO. 19125643  
CORPORATION & SUBSIDIARIES, )  
 )  
 )  
APPELLANT. )  
 )  
 )

## TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Wednesday, June 14, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
400 R Street, Sacramento, California, 95811,  
commencing at 9:05 a.m. and concluding  
at 9:52 a.m. on Wednesday, June 14, 2023,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOHN JOHNSON

Panel Members: ALJ SARA HOSEY  
ALJ AMANDA VASSIGH

For the Appellant: MICHAEL JACOBS  
YONI FIX  
LEE ZOELLER  
TIMOTHY LEE

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
  
JASON RILEY  
ELLEN SWAIN

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-21 were received at page 7.)

(Department's Exhibits A-O were received at page 7.)

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1 Sacramento, California; Wednesday, June 14, 2023

2 9:05 a.m.

3  
4 JUDGE JOHNSON: We are now on the record for the  
5 Appeal of Electronic Data Systems Corporation and  
6 Subsidiaries. It's OTA Case Number 19125643. It is 9:05  
7 on June 14, 2023. This hearing is being led by myself  
8 Judge Johnson and conducted in Sacramento, California.  
9 While I'm the lead ALJ for purpose of conducting this  
10 hearing, it will be the panel that decides this matter.  
11 At this point let me say good morning to my panel.

12 Good morning, Judge Vassigh.

13 JUDGE VASSIGH: Good morning.

14 JUDGE JOHNSON: And good morning, Judge Hosey.

15 JUDGE HOSEY: Good morning.

16 JUDGE JOHNSON: Before we introduce the parties,  
17 I'd like to remind everyone that the Office of Tax Appeals  
18 is not a court but is an independent appeals body. We do  
19 not engage with any ex parte communications with either  
20 party. We are staffed by tax experts and independent of  
21 the State tax agencies. Our decision will be based on the  
22 arguments and evidence produced by the parties on appeal,  
23 as well as the presentations you provide today in  
24 conjunction with appropriate application of the law. We  
25 fully respect the importance of the decision to be made on

1       appeal. We've read the briefs and the exhibits and are  
2       looking forward to your arguments today.

3               Let's have the parties introduce themselves,  
4       starting with Appellants.

5               MR. JACOBS: This is Michael Jacobs representing  
6       Electronic Data Systems Corporation.

7               MR. ZOELLER: Lee Zoeller representing Electronic  
8       Data Systems Corporation.

9               MR. FIX: Yoni Fix representing Appellant.

10              JUDGE JOHNSON: Thank you.

11              And Respondent Franchise Tax Board.

12              MR. RILEY: Jason Riley representing California  
13       Franchise Tax Board.

14              MS. SWAIN: Good morning, Panel. Ellen swain for  
15       the Franchise Tax Board.

16              JUDGE JOHNSON: Good morning.

17              The issue on appeal for this matter is whether  
18       Respondent's Notice of Proposed Assessment for the 1998  
19       tax year is barred by the statute of limitations.

20              We are admitting into the record Appellant's  
21       Exhibits 1 through 21 and Respondent's Exhibits A through  
22       O. Parties have stated they have no objection to these  
23       exhibits, and the exhibits are hereby admitted as evidence  
24       into the record.

25              (Appellant's Exhibits 1-21 were received

in evidence by the Administrative Law Judge.)

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

JUDGE JOHNSON: Let me check one last time before we go to the parties' presentations.

Appellants, any final questions or comments?

MR. JACOBS: No.

JUDGE JOHNSON: And, Respondent, any questions?

MR. RILEY: No.

JUDGE JOHNSON: All right. Thank you.

Appellants, you have 45 minutes. You can begin when you are ready.

## PRESENTATION

MR. JACOBS: Thank you, Your Honors.

In this case, the parties agree that there was a federal audit adjustment that effected Electronic Data Systems Corporation's federal R&D credit for the 1998 tax year. The parties also agree that the final determination regarding that final R&D credit adjustment occurred June 14th, 2006. The parties also agree that the notice of the federal R&D credit adjustments were not provided to the FTB within six months June 14, 2006.

So the only issue for resolution by the OTA for the 1998 assessment appeal is whether the July 16th, 2013,

1 Notice of Proposed Assessment was issued within four years  
2 of when EDS -- which is how I'll refer to Electronic Data  
3 Systems Corporation -- notified the FTB of the federal  
4 audit change as required by Section 19060. We believe the  
5 FTB did not meet this four-year deadline. We have  
6 provided evidence that demonstrates that the FTB -- we  
7 provided the FTB with all the information it needed to  
8 compute the adjustment included in the NPA by August 6th,  
9 2008. Consequently, the NPA was not issued within four  
10 years of the notification by EDS and thus, it was not  
11 timely.

12 In this case, the taxpayer repeatedly notified  
13 the FTB of the amount of the federal audit adjustment in  
14 response of requests from a succession of FTB auditors.  
15 At least two of these notifications occurred more than  
16 four years before July 16th, 2013. The FTB can't be  
17 allowed to extend that four-year statute of limitations  
18 period simply by indefinitely -- indefinitely simply by  
19 making repetitive requests to the taxpayer for information  
20 they already provided.

21 Now, a little background here. This is, you  
22 know, a case about the 1998 tax year, and EDS filed a  
23 California Franchise Tax return, claimed an R&D credit on  
24 that return. And, you know, fast forward almost 15 years,  
25 the FTB issues a Notice of Proposed Assessment for the



1 1988 tax year. And the additional tax on that NPA was  
2 attributable to a reduction in the California R&D credit  
3 that EDA claimed. And this reduction was made to reflect  
4 changes to EDS' federal R&D credit calculation. And it  
5 was made to reflect changes that occurred in a federal  
6 audit that was completed in June 2006.

7 EDS appealed the notice because it was not  
8 timely. They did not challenge the substance of the  
9 adjustment, merely the timing of the Notice of Proposed  
10 Assessment. And I'm going through the sort of the  
11 timeline of the audit, and to follow along on the timeline  
12 up on the board to make it clear that EDS notified the FTB  
13 of the credit adjustment more than four years before  
14 July 16th, 2013, which is the date they issued the NPA.

15 Now, the FTB began auditing EDS' 1998 R&D credit  
16 before 2003. And the key point to understand here is that  
17 the California R&D credit -- at least if you're claiming  
18 the regular credit -- is calculated in a matter similar to  
19 the federal. And the credit is based in part on the  
20 amount of qualified research expenses incurred in  
21 California. And for these purposes, qualified research  
22 expenses are defined by reference to the definitions in  
23 the Internal Revenue Code.

24 So consequently in 2003 when the FTB auditor that  
25 was reviewing EDS' 1998 Franchise Tax return was alerted

1       that the IRS was auditing EDS' qualified research expenses  
2       that were used to calculate the federal R&D credit, the  
3       auditor took the position that the FTB was going to follow  
4       the IRS' determination regarding the percentage of  
5       expenses treated as qualified expenses or expenses from  
6       qualified research activities.

7               So if you look in the FTB audit work papers dated  
8       June 16th, 2003, the auditor actually says, "They're going  
9       to reply on the IRS determination regarding EDS'  
10      California R&D expenses." And we've introduced a copy of  
11      those work papers as Exhibit 16. And this position was  
12      consistent with FTB policy that was to follow an on-point  
13      federal audit determination regarding R&D credits when it  
14      came to auditing California R&D credit issues. And this  
15      position was stated in the two FTB news publications that  
16      we've introduced as Exhibits 12 and 13.

17              So fast forward now to August 6th, 2008. Now at  
18      this point the federal audit of the R&D credit is  
19      completed, and EDS at that time provided the FTB  
20      auditor -- which was, I think, a different auditor than  
21      they were dealing with back in 2003 -- with the copy of  
22      the IRS form, which is called Form 4549-A. And this form  
23      was dated June 14th, 2006. And they provide some  
24      supporting schedules with it. And those documents show  
25      the final federal income tax examination changes relating

1 to that federal R&D credit claimed on the 1998 federal  
2 return.

3 This submission shows that the IRS reduced EDS'  
4 federal R&D credit by a total of \$15,241,156. And that  
5 worked out to a 20 percent reduction. At this point, the  
6 FTB had all the information that it needed to compute the  
7 adjustment to the California R&D credit that was reflected  
8 in the NPA that was ultimately issued several years later  
9 in July 16th, 2013.

10 Fast forward another year. Now, there's a new  
11 FTB auditor that's assigned to the 1988 audit. And the  
12 new auditor requests that EDS submit the information  
13 regarding the federal audit adjustment a second time. EDS  
14 provided this information and for a second time on  
15 June 4th, 2009. This submission was substantially  
16 identical to the August 6th, 2008 submission. And,  
17 finally, after yet another auditor was assigned to the  
18 audit, the FTB issued an IDR requesting the information  
19 about the final R&D credit adjustment again, which EDS  
20 responded to on December 31st, 2009.

21 And in this case, the FTB is claiming that it was  
22 notified of the federal audit adjustment to EDS' R&D  
23 credit calculation only when it received this  
24 December 31st, 2009, response, even though it had received  
25 substantially the same information at least two times

1 before. But -- and I'm going to go through what was in  
2 that December 31st, 2009, suspension. That was really  
3 showing that it's really nothing different than what the  
4 FTB already had more than four years before the July 16th,  
5 2013, NPA date.

6 This submission basically included four items  
7 relevant to the 1998 tax year, and I'm going to describe  
8 them one by one. First, there was a schedule showing,  
9 among other federal adjustments, the \$15,241,156  
10 adjustment to EDS' federal R&D credit. The same schedule  
11 prepared by EDS had already been provided to the FTB as  
12 part of its August 6th, 2008, and June 4th, 2009,  
13 submissions. A copy of this schedule was introduced in  
14 Exhibit 9 as part of the June 4th, 2009, submission.

15 Second, there was a calculation prepared by EDS  
16 computing the impact of the federal adjustments on EDS'  
17 California research credit for the 1996 through 1998 tax  
18 years. And this calculation was merely provided as a  
19 courtesy trying to bring the audit to a conclusion, but it  
20 was not required. The EDS was not required to provide  
21 this calculation to notify the FTB of the audit  
22 adjustments. I'm going to describe in a moment every item  
23 that was included in that 1998 calculation and show that  
24 was already provided to the FTB before or by August 6th,  
25 2008.

1           The third item that was in the December 31st  
2       submission was an IRS report of income tax examination  
3       changes. This is the 40 -- no, 44, 45, and 49-A dated  
4       June 14th, 2006. This same report have been provided to  
5       the FTB again, at least two times on August 6th, 2008, and  
6       June 4th, 2009. And a copy of this report was introduced  
7       as Exhibit 11, and we recently introduced a new copy of  
8       that that we believe is more legible. That's Exhibit 21.  
9       The original exhibit was one that we obtained from the  
10      FTB. The Exhibit 21 was one that we were able to obtain  
11      from the taxpayer.

12           So fourth, a revised version of the IRS  
13      explanation of items, so called Form 886-A, which was a  
14      narrative describing IRS' legal basis for adjusting the  
15      claim for federal research credit. EDS had provided an  
16      earlier version of this explanation of item to the FTB as  
17      part of an IDR response submitted on March 30th, 2005.  
18      Now, this revised explanation was almost identical to the  
19      one provided on March 30th, 2005. The differences between  
20      these two explanations can be seen in the red line that  
21      we've introduced as Exhibit 17.

22           If you look at this exhibit which shows the  
23      differences, the only substantive revision was that the  
24      IRS deleted its original primary position to disallow all  
25      the federal R&D credit and substitute it with the primary

1 position of only disallowing that \$15,241,156 amount of  
2 credits. That's the only revision that was of substance  
3 was to include the same R&D credit disallowance number  
4 that EDS had already provided the FTB as early as August  
5 6th, 2008.

6 The narrative portion of the form was unchanged  
7 from the prior March 30th, 2005, version. Thus, there's  
8 only two new items that were in that relating to the 1998  
9 tax year that were included in that submission. There's  
10 the California R&D credit calculation produced by EDS and  
11 that revised IRS explanation of item. Now, neither of  
12 these items provide the FTB with any additional  
13 information that it would have needed to calculate the  
14 1998 California R&D credit adjustment that it didn't  
15 already possess on August 6th, 2008.

16 Now, I'm going to go through that calculation  
17 now. We're just going to flip the exhibit so that you can  
18 see the numbers that went into that calculation. And  
19 again, this calculation was really just provided as a  
20 courtesy. It was not required under California law. But,  
21 you know, EDS at that point was, you know, trying to get  
22 the audit resolved. So they did this calculation using  
23 the numbers that they had already provided to the FTB.

24 So the first number that was in the calculation  
25 was the amount of the federal R&D credit as originally

1 claimed on the federal return. And that number, that  
2 \$76,376,448 number was something that the FTB had no later  
3 than October 28, 2001. And if you take a look at  
4 Exhibit 3 as introduced by the taxpayer, that's an FTB  
5 audit issue presentation sheet dated October 28, 2001,  
6 which includes again, this \$76,376,448 number. So that  
7 number was already in the FTB's possession on October 28,  
8 2001.

9 The second number that was needed for the  
10 calculation was the reduction in the federal R&D credit as  
11 a result of the federal audit. And this amount, as I  
12 mentioned previously, was something the FTB already had  
13 on -- no later than August 6th, 2008. You know, this was  
14 included in the August 6th, 2008 submission, the June 4th,  
15 2009, submission. You can see that -- I think that the  
16 later of the two submissions was -- excuse me. They were  
17 introduced as Exhibit 10. And you also see it in  
18 the -- oops -- cleaner copy that we got from the  
19 taxpayer's records as Exhibit 21.

20 Then the last -- then taking those two numbers,  
21 you can figure out the percentage reduction in the federal  
22 research credit of 20 percent. That was just a  
23 mathematical calculation that the FTB could have done  
24 itself using those two numbers.

25 The third number that the FTB needed to calculate

1 the adjustment that was included in the NPA was the amount  
2 of the California R&D credit before the reduction to  
3 reflect the federal audit. This was an amount that was  
4 already adjusted by the FTB because the FTB already had  
5 examined the California R&D credit earlier and slightly  
6 reduced it to reflect the fact that some of the qualified  
7 research expenses that were sourced to California the FTB  
8 disagreed with.

9 So that reduced number was a number that had been  
10 produced by the FTB itself, \$4,554,984. Again, the FTB  
11 had this number certainly, no later than May 7th, 2003.  
12 And we introduced a revised audit issue presentation  
13 sheet, Number 17, that shows this reduction to the  
14 California R&D credit as originally claimed to \$4,554,986.  
15 This is Exhibit 5. Thus, with those three numbers, the  
16 FTB had everything it needed to calculate the reduction in  
17 the California R&D credit that was ultimately included in  
18 the NPA. And it had the latest of those numbers, that  
19 \$15,241,156 reduction to the federal R&D credit. That was  
20 the last number they had, and they had that by August 6,  
21 2008.

22 Similarly, the FTB can't argue that the revised  
23 IRS explanation items that was in the December 31st, 2009,  
24 submission was the notification that started the four-year  
25 statute of limitations running either. Because there was



1 nothing magic about that explanation that would make it  
2 essential for the FTB to have that -- to have the  
3 information needed to make the California adjustment.

4 As I mentioned the text of this was almost  
5 identical to the prior version of the explanation of items  
6 that was provided in March 2005. The only difference was  
7 the inclusion of that \$15,241,156 number which again, the  
8 FTB had as of August 6th, 2008. And, in fact, there's  
9 not, you know, there's nothing magic about an explanation  
10 of items produced by the IRS because they don't produce a  
11 document like that in every audit. You know, typically  
12 it's only produced in certain audits when there are  
13 un-agreed items.

14 So it's sort of disingenuous for the FTB to argue  
15 that this explanation was essential for them to be able to  
16 compute -- complete the audit of the federal R&D credit  
17 adjustment when in many audits they would never even  
18 receive such a document. Thus, there was nothing in the  
19 December 31st, 2009, submission that the FTB did not  
20 already have as of August 6th, 2008. The only difference  
21 was the auditor finally reviewed this information and  
22 completed the calculation needed to make the adjustment.

23 As a matter of fairness, the taxpayer cannot be  
24 denied the benefit of the statute of limitations for  
25 assessment simply by having the FTB changing auditors and

1 bringing matters back to square one by constantly  
2 requesting the same information multiple times. This  
3 would defeat the purposes of statute of limitations for  
4 assessment and -- which was to give a cooperative taxpayer  
5 that provides the FTB with the information it needs some  
6 degree of certainty as to when its tax-free year is beyond  
7 adjustment.

8 In this case, the taxpayer was more than  
9 cooperative providing the same information multiple times.  
10 And frankly, it was more information than the FTB would  
11 have gotten if the taxpayer had even filed an amended  
12 return. In the one case that the FTB mentions in its  
13 brief involving sufficiency of notification, the Market  
14 Lessors case is really nothing like the situation we have  
15 with EDS.

16 In the Market Lessors case, the taxpayer made an  
17 annotation on a line on their return notifying the FTB  
18 that there had been an audit adjustment -- federal audit  
19 adjustment for two prior tax years. It didn't indicate  
20 what the amount of the adjustment was. It didn't indicate  
21 what item was adjusted. Obviously, that's not sufficient  
22 notification.

23 But in this case, the taxpayer provided the FTB  
24 with everything it needed to calculate the change to the  
25 federal R&D credit, so as of August 6th, 2008. So that

1 was the date that the four years should have started  
2 running from. So any notice of proposed assessment issued  
3 after August 6th, 2012, would not have been timely.

4 And I reserve the rest of my time for rebuttal.

5 JUDGE JOHNSON: All right. Thank you.

6 And with that, we will head over to Respondent.

7 You have 45 minutes as well. You may begin  
8 whenever you're ready.

9  
10 PRESENTATION

11 MR. RILEY: Thank you. Again, good morning. I'm  
12 Jason Riley for Franchise Tax Board, and here with me is  
13 Ellen Swain.

14 The issue here, whether Respondent's Notice of  
15 Proposed Assessment for the 1998 taxable year was barred  
16 by statute of limitations. Respondent's Notice of  
17 Proposed Assessment dated July 16, 2016, was timely under  
18 Revenue & Taxation Code Sections 18662 and 19060.  
19 Appellant provided substantive notice of the IRS  
20 determination on December 31st, 2009. Four years from  
21 that date is December 31st, 2013. The date Respondent  
22 issued the NPA, July 16th, 2013, is before December 31st,  
23 2013, and well within the statute of limitations.

24 Appellant claimed federal -- excuse me.

25 Appellant claimed federal regular incremental research

1 credit and California regular incremental research credit  
2 for the 1998 taxable year. Appellant claimed regular  
3 incremental research credit based on qualified research  
4 expenses of almost \$86 million and California 23609(h) (3)  
5 average annual gross receipts of \$475,736,400 using  
6 start-up method, which resulted in a credit of \$4,718,556.

7 JUDGE JOHNSON: This is Judge Johnson. Sorry to  
8 but in real quick. But I know you're reading law numbers  
9 and all that, if you could just take it slower, I think  
10 that might be helpful for us.

11 MR. RILEY: Okay. Hopefully, I don't have any  
12 more numbers.

13 JUDGE JOHNSON: Okay.

14 MR. RILEY: As a bit of background, Appellant was  
15 subject to the federal audit. And in a preliminary  
16 version of that audit, Form 886A, the commissioner of  
17 Internal Revenue Service reported both a primary position  
18 and an alternate position where the primary position  
19 relied upon a report by IRS consultant Mitre Group. Mitre  
20 Group examined five sample projects selected from 1998  
21 that were non-internal use software development type  
22 projects, including computer-aided manufacturing software  
23 and drafting and geometric dimensioning and tolerancing  
24 software.

25 The IRS' primary position proposed disallowing

1 Appellant's federal research credit in full. Respondent  
2 audited this credit in 2003, and Appellant informed  
3 Respondent that it was subject to an audit of its federal  
4 regular incremental research credit. California's credit  
5 for increasing research activity statute, Section 23609,  
6 is based on Internal Revenue Code Section 41 with some  
7 modification. So generally, as Appellant mentioned,  
8 Respondent will follow an on-point final federal  
9 determination for the same taxable years, unless the  
10 federal determination relates to a subsection of 41 -- of  
11 IRC Section 41 that California does not conform to.

12 Appellant provided Respondent with an IRS  
13 preliminary determination on March 30th, 2005.  
14 Respondent's Exhibit B, which put forth -- and that's  
15 included as Respondent's Exhibit B -- which put forward a  
16 primary position and an alternate position. And as noted,  
17 the primary position was supported by specialty consultant  
18 report prepared by Mitre Group. The IRS concluded its  
19 primary position by stating, quote, "There was no credit  
20 allowed under Section 41 in 1996, 1997, or 1988," end  
21 quote.

22 That is, the IRS' primary position was to deny  
23 Appellant's federal credit in full based on the software  
24 engineer's report. On August 6th, 2008, Appellant  
25 provided pages from at least three preliminary federal

1 determinations relating to Appellant's general business  
2 credit. Many of the pages of Appellant's Exhibit 10 --  
3 it's included as Exhibit 10. Many of those pages are  
4 illegible and unidentifiable, as Judge Johnson observed at  
5 the prehearing conference when he requested legible copies  
6 of these documents, and as Appellant observed when it  
7 submitted a more legible or a cleaner copy as Exhibit 21  
8 two weeks ago.

9 But during the audit, Appellant did not provide a  
10 copy of the revised revenue agent report, the RAR, to  
11 explain any substantive changes. On February 19th, 2009,  
12 Respondent requested work papers and/or schedules showing  
13 how the regular incremental research credit was calculated  
14 for the 1996 through 2002 taxable years. On June 4th,  
15 Appellant sent an email that included the same illegible  
16 and unidentifiable pages provided on August 6th, 2008, but  
17 again, did not provide a copy of the revenue agent report  
18 to explain any substantive changes.

19 On September 17, 2009, Respondent requested a  
20 thorough explanation of the adjustments or a complete copy  
21 of the federal revenue agent's report, which includes the  
22 explanation of the adjustments. Appellant responded on  
23 December 31st, 2009, with federal work papers and 17 pages  
24 of the federal revenue agent's report, revised 886A,  
25 explanation of items.

1 Appellant notified Respondent of the substance of  
2 the final federal determination that the IRS had not  
3 implemented the Mitre Group consultant report or the  
4 primary position or the alternate position and instead,  
5 had decided to apply an error rate of 20 percent from the  
6 2002 year -- tax year examination results that were  
7 applied to the QREs in years 1996 through 1998.

8 This is nothing magical, except that it was now  
9 based on a settlement from the 2002 taxable year and  
10 rolled back to the 1998 taxable year. After the learning  
11 of the substance of the final determination on  
12 December 31st, 2009, Respondent proposed adjusting  
13 Appellant's California regular incremental credit by 20  
14 percent. The parties attempted to resolve the 1998  
15 taxable year but did not.

16 In April 2013, Respondent informed Appellant that  
17 it was not until its December 31st, 2009, submission that  
18 it had provided the federal work papers sufficient for  
19 Respondent to make a determination. July 16th, 2013 --  
20 and on July 13th, Respondent issued the Notice of Proposed  
21 Assessment. Under Revenue & Taxation Code Sections 18662  
22 and 19060, Respondent had four years to issue a proposed  
23 assessment from the date it received notice. And 18662(c)  
24 mandates the level of detail of that notification. It  
25 must be sufficiently detailed to allow computation of the

1 resulting California tax change and shall be reported in  
2 the form and manner as prescribed by Franchise Tax Board.

3 Respondent requested a quote, "Thorough  
4 explanation of the adjustments or a complete copy of the  
5 revenue agent's report," which includes the explanation of  
6 the adjustments. And those did not arrive until  
7 December 31st, 2009. The substance was missing until that  
8 date. Appellant hadn't fully explained the adjustments or  
9 provided the federal documents. Respondent needed to  
10 request the information from Appellant in December 2009 to  
11 determine what the IRS analysis was and how to apply it to  
12 Appellant's claim of California regular incremental  
13 research credit.

14 Once Respondent had that information, it was able  
15 to determine the IRS primary position was substantially  
16 altered. It wasn't used. The IRS was no longer following  
17 the software engineer report recommendation. The IRS was  
18 no longer denying the regular incremental credit in full.  
19 The IRS was no longer -- they had no longer proposed both  
20 primary and alternate positions. None of this was clear  
21 until Appellant provided the substantive documentation on  
22 December 31st, 2009, so that Respondent could review what  
23 the federal changes actually entailed.

24 And there was neither the -- and as noted, that  
25 was -- the IRS applied the following, quote, "The



1 2002-year examination results were applied to the QREs in  
2 years 1996 through 1998," end quote.

3 Again, none of this was substantively disclosed  
4 in final federal documentation or made clear until  
5 December 31st, 2009. Appellant bears the burden of proof,  
6 and the notice must be made -- must be more than just  
7 notification that a federal change was made. It must  
8 report the substance of that change. Four years from the  
9 date on which Respondent received 17 pages of the revised  
10 886A was December 31st, 2013.

11 Respondent issued a timely Notice of Proposed  
12 Assessment on July 16th, 2013. Respondent's determination  
13 is presumed correct, and Appellant has the burden of proof  
14 in a tax credit case. They had material evidence in their  
15 control, and they didn't provide it until December 31st,  
16 2009. That's the date Appellant effectively provided  
17 notification of just what the IRS did. You know, it's now  
18 possible to make out with Exhibit 21, you know, details on  
19 the 4549-A, make out the numbers, make out information,  
20 like as far as who was that information conveyed to. But  
21 let's be clear that this is not a copy that Appellant  
22 provided during the audit, and so that doesn't meet the  
23 statutory requirements. FTB's notice was timely, and  
24 Respondent's determination should be upheld.

25 Thank you.

1 JUDGE JOHNSON: Thank you very much.

2 And with that, we are ready for Appellant's  
3 rebuttal. You have 15 minutes. You can begin when you  
4 are ready.

5 MR. JACOBS: Thank you.

6

7 CLOSING STATEMENT

8 MR. JACOBS: I'm going back to Section 18622,  
9 which describes what a taxpayer has to provide to notify  
10 the FTB of a federal audit change. And all it says is it  
11 must be sufficiently detailed to allow computation of the  
12 California tax change and reported in the form and manner  
13 as prescribed by the FTB. In this case, the FTB hasn't  
14 done what other states have done, which is to provide a  
15 specific documentary form in which the changes are  
16 supposed to be presented or computed by the taxpayer.

17 So what was new in that December 31st, 2009,  
18 submission that the FTB argues was what allowed them to  
19 compute the federal change. As I went through the  
20 calculation above, on the board up there, the FTB had  
21 everything it needed to calculate the credit adjustment as  
22 of August 6th, 2008. There was nothing new in that 886A  
23 that was necessary. They knew the substance of the  
24 adjustment as of August 6th, 2008. The taxpayer had  
25 indicated and provided a federal form and supporting

1 schedules that showed there was that \$15,241,156  
2 adjustment to the federal research credit.

3 That was all the FTB needed substantially -- in  
4 substance to make the adjustment. They knew the amount of  
5 the adjustment. They knew what was being adjusted. What  
6 was submitted was the 4549-A that the taxpayer had in its  
7 possession. Now, exhibit -- I believe it's Exhibit 10,  
8 which was the one that's being described as illegible is  
9 one the taxpayer obtained from the FTB's own records. In  
10 this case, a lot of the people who worked on that  
11 California audit are no longer around. And at the time  
12 that was the easiest way for us to try to get a handle on  
13 what -- everything that was provided to the FTB.

14 And we agree. Maybe that one doesn't look that  
15 great, but that's not a document the taxpayer had under  
16 their own control. So we -- as far as we know what was  
17 provided was the 4549-A that the taxpayer had in its own  
18 records. And as you can see, when you look at Exhibit 21,  
19 that was actually quite legible. We were able to obtain  
20 that directly from the taxpayer.

21 Kelly, who will be talking to you later in  
22 another case, still had a copy of it. So as far as we  
23 know, that's what the FTB was provided, and it was amply  
24 legible. And certainly, the supporting schedules that  
25 were provided with it were legible and showed the

1       \$15,241,156 amount.

2               And that's all we have for rebuttal right now.

3               JUDGE JOHNSON: Thank you very much.

4               Let me turn to my co-Panelists to see if they  
5 have any questions. Judge Hosey?

6               JUDGE HOSEY: Thank you for your presentations.  
7 I don't have any questions.

8               JUDGE JOHNSON: Okay. And Judge Vassigh?

9               JUDGE VASSIGH: Thank you. So I just want to  
10 check with FTB. Exhibit 10 is it what FTB received  
11 originally?

12              MR. RILEY: Yeah. That's the document that was  
13 in -- that we had as far as the -- what that -- what was  
14 it? The 4549-A, that's -- that is what is in the file.  
15 Presumably, I don't know exactly where it -- where that  
16 document came from, but I guess I would -- I would say  
17 that it's the taxpayer's burden to provide these documents  
18 to the Franchise Tax Board.

19              JUDGE VASSIGH: Okay. And do you have any  
20 knowledge of whether someone at FTB asked for a more clear  
21 copy?

22              MR. RILEY: So the -- those in the IDRs in  
23 February of 2009 and December of 2009, Respondent asked  
24 for a clear -- well, we requested in February the  
25 documents. I believe some of them they eventually arrived

1 in June, and when those were again illegible -- and  
2 although, you know, the June documents really related to  
3 1999 through 2002.

4 Although, I think there was another illegible  
5 copy of the 4549 in -- within those documents. But in  
6 December we requested -- FTB requested again a document  
7 showing hey, could you provide us something that shows the  
8 substance of this.

9 JUDGE VASSIGH: Thank you for clarifying that.

10 MR. FIX: Can we please respond to that?

11 There's nothing in IDR 19 that request for the  
12 additional information that mentions that it was  
13 illegible. To me that's speculation on part of the  
14 Respondent to imply that when, in fact, the copy that we  
15 have provided that is the one in the exhibit is illegible.  
16 I personally requested from the FTB as part of a Public  
17 Record Act request. So it was part of the FTB's own audit  
18 files that they keep on record, which I'm sure has been  
19 scanned and kept, you know, in the records.

20 And so there's nothing that implies in the IDRs.  
21 And I would think that if it was illegible, the original  
22 Form 4549, that the FTB would say something about that.  
23 They did not. They simply asked for additional  
24 information for a third time.

25 Thank you.

1 JUDGE VASSIGH: Thank you. I have no further  
2 questions.

3 JUDGE JOHNSON: All right. Thank you.

4 A couple of clarification questions perhaps.  
5 Appellant you referenced Exhibit 17. That was the red  
6 line showing the difference between the Form 886A's, I  
7 believe. I believe that's Exhibit 17 on your index, but  
8 it might be actually Exhibit 16. I just want to confirm  
9 that we're looking at the right exhibit. When you go to  
10 the exhibit, I believe it's Exhibit 16.

11 MR. FIX: That's correct. Exhibit 16 is the red  
12 line. Correct.

13 JUDGE JOHNSON: Okay. Thank you.

14 Also, it was mentioned that the final federal  
15 determination date -- let's see here -- was 6/14 --  
16 sorry -- June 14th, 2006. I believe that's the date of  
17 the 4 -- sorry the 4549-A. I was looking at your  
18 Exhibit 9, which is the RAR. It also references a  
19 finality date of August 7th, 2006. I don't think it makes  
20 a difference, but I don't know if Appellant or Respondent  
21 were looking at one of those two dates specifically as the  
22 finality date for the federal determination?

23 MR. JACOBS: I'm not sure of where the August 7th  
24 date is coming from. I see the June 14th, 2006 date is  
25 the date of the 4549-A. August 6th, 2008, was the date

1       that a copy of that was submitted to the FTB, along with  
2       the supporting schedules which shows the \$15,242,156  
3       amount.

4               JUDGE JOHNSON:   Okay.   Yeah.   I'm looking at  
5       page 5 of Exhibit 9.   There are like two charts on there.  
6       The bottom chart has tax year 1998, final federal  
7       determination date August 7th, 2006, the bottom row of  
8       that chart.   I don't think it's going to make a  
9       difference.   I just want to make sure I have the facts  
10      correct as I report them.

11             MR. FIX:   Yeah.   I'm not sure what that is  
12      because I know they are -- in the same exhibit there are  
13      references to multiple 4549-A forms that were provided  
14      that would start the clock for providing that.   I'm not  
15      sure what that date refers to.   But kind of taking a step  
16      back, the importance of the numbers on the 4549 were the  
17      final adjustment to the R&D credit.   And then for your  
18      purposes the determination of when the four-year clock  
19      starts is when it was provided to the FTB to apprise them  
20      of the change.   So --

21             MR. JACOBS:   I don't -- I don't think it changes  
22      anything.   Because again, the four years doesn't start  
23      running until August 6, 2008, when that document was  
24      provided to the FTB.   We're not arguing it was provided  
25      before that.

1 JUDGE JOHNSON: Right. But moving onto that date  
2 as well, the August 6, 2008, I notice that on the visual  
3 aid that you provided today, it looks like you're counting  
4 the four-year statute of limitations starting on  
5 August 6th, 2008. On Exhibit 2, you also had June 4th,  
6 2009. That was another date that documents were provided  
7 and started the four-year statute of limitations at that  
8 point. I know that the difference between those two won't  
9 matter. We're still looking at four years beyond that  
10 date. But as far as when I record, your sort of  
11 assertions on appeal, are you kind of sticking to the 2008  
12 or 2009 date?

13 MR. JACOBS: We're sticking to 2008. I think we  
14 used that in the exhibit just to show sort of in the  
15 worst-case scenario when we provided it the second time.  
16 It was still more than four years before the NPA date.

17 JUDGE JOHNSON: Okay. Thank you. And then one  
18 final question. Let's see here. You had mentioned that  
19 California, unlike other states, doesn't provide a  
20 specific form to use when reporting federal adjustments,  
21 under 18622 just sufficiently enough information detailed  
22 to perform the calculations. I wanted to ask if you have  
23 comments about California Code Regulations Title 18  
24 Section 19059(a). On there it references Section 18622  
25 noting that it requires taxpayers to report certain



1 specified federal changes. And then it goes on to say  
2 that such notifications shall be made in writing to FTB  
3 and just quote from there. "Made by mailing FTB the  
4 original or a copy of the final federal" -- sorry --  
5 "final determination or renegotiation agreement as well as  
6 any other data upon which such final determination or  
7 renegotiation agreement is claimed."

8 Now, it says that it must send FTB the original  
9 or a copy of the final determination or renegotiation  
10 agreement. Do you believe that what you provided in 2008  
11 and 2009 still matches the regulations requirements?

12 MR. JACOBS: Yes. In the case of an ongoing  
13 audit, it's long been the practice I think of the FTB and  
14 most other states to accept that information if it's  
15 provided directly to the auditor. And in this case, the  
16 taxpayer provided the auditor with everything they needed  
17 to calculate the adjustment to the California R&D credit,  
18 and it was provided in writing.

19 JUDGE JOHNSON: Okay. Thank you.

20 That's going to be my final questions. I will  
21 ask the parties if they have any final comments they would  
22 like to make. Seeing none.

23 We have the evidence that's been admitted in the  
24 record. We have the arguments and your briefs and oral  
25 arguments presented today. Thank you. We now have a

1 complete record from which to base our decision, and the  
2 parties should expect our written opinion no later than  
3 100 days from today.

4 Any final questions before we conclude today from  
5 Appellants?

6 MR. JACOBS: No.

7 JUDGE JOHNSON: Thank you.

8 And from Franchise Tax Board?

9 MR. RILEY: No. Thank you.

10 JUDGE JOHNSON: All right. I wish again to thank  
11 both parties with their efforts on their appeal. With  
12 that, we are now off the record.

13 This concludes the hearing in Appeal of  
14 Electronic Data Systems Corporations and Subsidiaries for  
15 the 1998 tax year.

16 (Proceedings adjourned at 9:52 a.m.)  
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