

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
O&B EQUIPMENT, INC.,) OTA NO. 21027271
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Thursday, August 10, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
12900 Park Plaza Dr., Suite 300, Cerritos,
California, 91401, commencing at 9:37 a.m.
and concluding at 10:33 a.m. on Thursday,
August 10, 2023, reported by Ernalyn M. Alonzo,
Hearing Reporter, in and for the State of
California.

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APPEARANCES:

Panel Lead: ALJ LAUREN KATAGIHARA

Panel Members: ALJ SUZANNE BROWN
ALJ KEITH LONG

For the Appellant: DAVID J. GLAUBIGER

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

COURTNEY DANIELS
JARRETT NOBLE
NALAN SAMARAWICKREMA

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received at page 7.)
(Department's Exhibits A-O were received at page 7.)

OPENING STATEMENT

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1 Cerritos, California; Thursday, August 10, 2023

2 9:37 a.m.

3
4 JUDGE KATAGIHARA: Let's go on the record.

5 We're opening the record for the Appeal of O&B
6 Equipment, Incorporated, before the Office of Tax Appeals.
7 This is OTA Case Number 21027271. Today's Thursday,
8 August 10, 2023, and the time is 9:37 a.m. We're holding
9 this hearing in person in Cerritos, California.

10 I'd like to begin by asking the parties to please
11 identify themselves by saying their name for the record.
12 Let's begin with Appellant.

13 MR. GLAUBIGER: Good morning. My name is David
14 Glaubiger. I'm an attorney representing taxpayer.

15 JUDGE KATAGIHARA: And who is here for the
16 Respondent?

17 MS. DANIELS: Courtney Daniels for CDTFA.

18 MR. NOBLE: Jarrett Noble, also for CDTFA.

19 MR. SAMARAWICKREMA: Nalan Samarawickrema for
20 CDTFA.

21 JUDGE KATAGIHARA: Thank you.

22 Mr. Glaubiger, can you please confirm that your
23 light on the microphone is on? You may need to bring the
24 microphone a little closer to you.

25 MR. GLAUBIGER: The light seems like it's on. Is

1 this working better.

2 JUDGE KATAGIHARA: Ms. Alonzo, are you able to
3 hear?

4 THE STENOGRAPHER: Yes. Thank you.

5 JUDGE KATAGIHARA: Okay. Thank you.

6 I am Judge Lauren Katagihara, the lead
7 Administrative Law Judge for this case. And with me today
8 are Administrative Law Judges Suzanne Brown and Keith
9 Long. We are the Panel that will be hearing and deciding
10 the case.

11 As we confirmed at the prehearing conference,
12 Appellant concedes the measure of tax. So the sole issue
13 we are considering today is whether interest relief is
14 warranted.

15 Will Appellant please confirm that this is
16 correct.

17 MR. GLAUBIGER: That's my understanding, Your
18 Honor.

19 JUDGE KATAGIHARA: Is Respondent in agreement?

20 MS. DANIELS: Yes.

21 JUDGE KATAGIHARA: Okay. Thank you.

22 Pursuant to the minutes and orders, after the
23 prehearing conference, the parties had until July 26,
24 2023, to submit exhibits. Respondent proposed Exhibits A
25 through O at the prehearing conference, and Appellant

1 confirmed that it had no objections to the exhibits.

2 Is that still the case?

3 MR. GLAUBIGER: That is still the case.

4 JUDGE KATAGIHARA: Thank you.

5 Appellant proposed Exhibits A through C, but
6 Appellant's exhibits should have been marked with numbers
7 rather letters. So to the extent that the proposed
8 exhibits are admitted into evidence, we will admit them as
9 Exhibits 1 through 3 instead.

10 Respondent, do you have any objections to
11 Appellant's exhibits?

12 MS. DANIELS: No.

13 JUDGE KATAGIHARA: Since there are no objections,
14 all the exhibits will be admitted into the record as
15 evidence.

16 (Appellant's Exhibits 1-3 were received
17 in evidence by the Administrative Law Judge.)***
18 (Department's Exhibits A-O were received in
19 evidence by the Administrative Law Judge.) ***

20 JUDGE KATAGIHARA: Will Respondent please confirm
21 they do not intend to call any witnesses.

22 MS. DANIELS: We do not. Thank you.

23 JUDGE KATAGIHARA: Appellant's representative,
24 Mr. Glaubiger, may testify as a witness. And so I will
25 swear him in now.

1 Mr. Glaubiger, please raise your right hand.

2

3 D. GLAUBIGER,

4 produced as a witness, and having been first duly sworn by
5 the Administrative Law Judge, was examined and testified
6 as follows:

7

8 JUDGE KATAGIHARA: Thank you.

9 Okay. Appellant, you may now proceed with your
10 presentation and testimony. You have 15 minutes.

11

12 PRESENTATION***

13 MR. GLAUBIGER: Okay. The battle -- the dispute
14 is about separately stated charges for the transportation
15 of sand, gravel, fill material. This dispute has been on
16 the table since the -- since, really, June of 2010.

17 JUDGE KATAGIHARA: I'm sorry. Appellant, sorry
18 to interrupt, but can you bring the mic just a little bit
19 closer to you?

20 MR. GLAUBIGER: There we go.

21 This dispute has been on the table since June of
22 2010. In fact, I draw the Court's attention to our
23 Exhibit 1. If you look at the -- it's entitled "Report of
24 Discussion of Audit Findings." If you go down to the
25 section "Taxpayer's Contentions," taxpayer believes tax

1 does not apply to separately stated charges for
2 transportation of landfill material per Regulation 1628.

3 1628 is important because that's an internal
4 regulation. That's not a law that passed through the
5 legislature and was adopted and put on the books. In
6 fact, this section is slightly more constrictive than the
7 law -- than the corresponding law that is on the books,
8 and it's not enforceable because of that, that one point.

9 Let's move onto my Exhibit 3. And if you go to
10 page 2, 2, 3, 4, 5 of my Exhibit 3, you'll see
11 reconciliation and explanation of reaudit adjustments.
12 And by the way in this case, there was a series of
13 reaudits. This -- it's mind boggling how many numbers
14 were crunched to come to this incredible conclusion. But
15 in the reconciliation section I'd like to read this into
16 the record.

17 Regulation 1628(c) does not apply because the
18 taxpayer has landfill material sales. It's questionable
19 that the materials are coming from an excavation site.
20 Questionable the materials are coming from an excavation
21 site, and doubtful the materials are being delivered to a
22 landfill site.

23 Your Honor, we're talking about transportation of
24 materials on an industrial scale; tractor trailer trucks,
25 20 tons of material per truck. And the Department is

1 confused about whether or not these materials came from an
2 excavation site. These are not -- on this volume, this
3 scale, you cannot go to Home Depot or Lowe's or anywhere
4 in your home city and buy 20 tons of fill material.
5 Materials at this scale, they are available from
6 excavation sites only. And there are a number of them
7 scattered throughout the State of California.

8 I do not know why in this discussion, which is
9 dated July of 2011, years ago, why this auditor is
10 confused as where these materials could have originated
11 from. But even if this auditor didn't have -- couldn't
12 pick up a telephone, didn't have the inclination to call
13 Lowe's or Home Depot and find out where these materials
14 could have come from, they could have posed the question
15 back to the taxpayer and say, Mr. Taxpayer, provide this
16 information that where -- as to where these materials
17 originated from. Which we gladly would have done.

18 We have been kicking and screaming for a reaudit,
19 really, since 2010 because the audit determined roughly
20 \$80,000 in tax liability. When they finally, finally
21 agreed with us, they reduced the tax liability to about
22 25 percent. That means a 400 percent mistake on this
23 issue. And the question is how long did it take the State
24 of California to make a determination as to where these
25 materials of this large scale, this volume, could possibly

1 originated from?

2 The fact is, Your Honor, they're -- the State
3 revisited this issue in 2014 when they came up with their
4 decisions and recommendations. And in the decisions and
5 recommendations they acknowledge that the taxpayer is
6 claiming that one, the materials originated from an
7 excavation site. But two, that they don't need to be
8 delivered to a landfill site, which is a dump by the way.
9 For the record a landfill site is a dump.

10 The law which is Tax and Regulation 6011 and Tax
11 and Regulation 6012 exempts delivery separately stated
12 charges for landfill materials that originate from an
13 excavation site but are delivered to anywhere that
14 customer wants it. Anywhere. In 2014, the Department
15 took the position, we are not aware and the petitioner has
16 not provided any authority finding Regulation 1628
17 subdivision (c) is improper. And in the absence of such
18 authority, we are bound to follow the regulation.

19 First of all, that's not true. The regulations
20 cannot be more restrictive than the laws that these
21 regulations purport to reflect. It's unconstitutional,
22 and I'll even cite the section. It's Government
23 Code 11342.2, whenever by the exercise or whatever --
24 pardon me. Whenever by the expressed or implied terms of
25 any statute, a state agency has the authority to adopt

1 regulations -- just like the one we're talking about -- to
2 implement, interpret and make specific or otherwise carry
3 out the provisions of the statute. No regulation is
4 adopted is valid or effective unless consistent and not in
5 conflict with the statute and reasonably necessary to
6 affect the purpose of the statute.

7 Obviously, if the regulation here is restricting
8 the delivery point to landfills, then it is more
9 restrictive and inconsistent with the corresponding
10 statute. The person who created the decision and
11 recommendations in 2014, he's an attorney. He can read
12 the law. He can read the statute. He knows that he's not
13 bound to stick to these regulations, and he can deviate
14 from them. What's interesting is that in 2017 the
15 Department reversed and said oh, you know what, we're
16 going to agree with the taxpayer here.

17 Okay fine. That only took seven years. Thank
18 you for coming to your senses on this one issue -- one
19 issue of where did these materials originate from, and how
20 are we going to interpret these statutory schemes? Can we
21 make them jive together somehow? Seven years. In 2021, I
22 get another brief from the State of California. And, what
23 they do in that brief, I find extremely interesting.

24 They essentially say that both the statutory
25 scheme that was passed by our state legislature, adopted,

1 reconciles and is consistent with the regulatory scheme.
2 That was the internal regulation that was adopted by the
3 Department. And I'm going to read this because I find
4 this very fascinating. And this is page 2 of the
5 Department's brief that's dated June 28, 2021, also
6 created by counsel. They're all attorneys. They can all
7 read the statutes same as I, same as this court.

8 When commenting on the statutory scheme in the
9 internal regulation -- this is the statement. The
10 Department determined that Appellant's new information
11 demonstrated that the audit liability included separately
12 stated reasonable transportation charges for transporting
13 landfill from an excavation site to a site specified by
14 the customer, which is excluded from gross receipts
15 subject to tax pursuant to Revenue & Taxation Code 6012 --
16 which is the state regulation -- and Regulation 1628,
17 which is the more restrictive internal regulation.

18 When I read this sentence, I thought wow, maybe
19 the Department amended 1628 to actually reflect the
20 statutory scheme that's bound in the Revenue & Tax Code.
21 So I pulled the code -- I pulled the regulation. The
22 regulation is not changed. It is exactly the same, which
23 means whoever drafted this brief either was being
24 disingenuous with the court, the taxpayer, their boss,
25 whoever. But they certainly -- this is certainly not a

1 true statement that both of these sections are exactly the
2 same. They're not.

3 In order for this taxpayer to -- to unwind untie
4 this knot -- well, we've been tied up in litigation for
5 13 years. There's nothing complicated about this point.
6 What there is here is, I think, a whoops situation by the
7 State of California at best. And at worse, it is you know
8 what, we're going to sweep this under the rug. We're
9 going -- we're going to leave this fly trap in place and
10 maybe, maybe the next taxpayer that we try and nail for
11 separately stated charges for fill materials that
12 originate from at excavation site and oh, what do you
13 know, don't end up in a landfill site, we'll be able to
14 capture. So great, so we can still capture the flies.

15 I would state to this tribunal, what's happened
16 here is wrong. This is an issue that could have been
17 resolved on day one in 2010, even if there was still
18 confusion in 2011, which apparently there was, there are
19 telephones. There are letters. There are emails. We
20 have -- we had -- the internet was up by then, and they
21 could Google. They could determine where did these --
22 where did this landfill originate from.

23 And on top of that, worse of all, when this --
24 when this product -- when this whole production, this
25 whole party got started, the State of California sent an

1 auditor in the field to the taxpayer's office and spent
2 weeks there -- weeks there looking over weight receipts,
3 looking over invoices. At any point they could have done
4 some investigation. They could have asked the question.
5 Where are these materials originating from? How do we get
6 a hold of 20 tons of sand? Are you going to go to Home
7 Depot and buy it? No, probably not.

8 They could have answered all these questions, but
9 instead they decided not to. I'm thankful in 2017, seven
10 years later, finally decided oh, gee-whiz, maybe you can't
11 get this at Home Depot and maybe they really did get this
12 from an excavation site. And oh, gee-whiz, if we push
13 this issue in front of this Court, we could end up in a --
14 and we win, we could end up in an appeal situation, and we
15 could end up striking down our -- that one section of
16 1628, which they avoided.

17 And they avoided it again, in 2021 by basically
18 misleading the taxpayer and attempting to mislead this
19 tribunal by saying that these two statutory schemes mirror
20 each other, which they do not. I -- I don't feel that --
21 this taxpayer had a right to an accurate accounting on day
22 one. This taxpayer had a right to a fair and unbiased
23 audit by the State. And they didn't get the tax liability
24 correct. They were only 400 percent off.

25 And simple questions could have been asked.

1 Simple questions could have been answered in 2010. Here
2 we are 13 years later, and it's mind boggling. It's -- I
3 am absolutely blown away. And I would ask this tribunal,
4 based on my presentation, there should have been no
5 interest that was developed during this tax. These
6 questions could have been answered in 2010, and this could
7 have been resolved. And whoever is the higher up, the man
8 behind this green curtain in this Department that finally
9 made the determination that you know what, for purposes of
10 this case, we should interpret the State's statute Tax &
11 Revenue Code to mirror the internal regulation 1628. But
12 that decision didn't come for seven years.

13 Now, I'm -- I'm -- they -- I've read the
14 correspondence. They tell me that seven years is fine. I
15 can't believe it takes seven years for someone to pick up
16 a phone, seven years to ask a simply question. But they
17 say that's reasonable, and that's what happened. I say
18 it's absolutely unreasonable. It's incredible, actually.
19 I mean at best you're -- at best I would say we have a
20 lack of common sense. We have a lack of initiative. At
21 worse we have an intentional lack of common sense and
22 intentional lack of initiative. Either way, this taxpayer
23 should not be caught in this trap.

24 And with that, I would ask the tribunal to
25 relieve the taxpayer of the interest obligation and I --

1 and that's my preparation.

2 JUDGE KATAGIHARA: Okay. Thank you.

3 The Panel is going to reserve its questions for
4 Appellant until after the Respondent's presentation.

5 Respondent, you can proceed with your
6 presentation.

7 MS. DANIELS: Thank you.

8

9 PRESENTATION***

10 MS. DANIELS: Good morning.

11 So the only issue remaining in this case is
12 whether Appellant has provided a basis for relief from
13 interest on the paid liability here. Appellant has
14 alleged that delays in obtaining a reaudit caused by the
15 Department impacted the amount of interest due and thus is
16 seeking relief from interest. The imposition of interest
17 is mandatory under Revenue & Tax Code Section 6482. It
18 accrues at the modified adjusted rate per month or a
19 fraction thereof from the last day of the month following
20 the quarterly period for which the amount or any portion
21 thereof should have been returned until the date of
22 payment.

23 There is no statutory right to interest relief.
24 However, Revenue & Tax Code Section 6593.5 subdivision (a)
25 allows for relief of all or any part of the interest

1 imposed where the failure to pay taxes due in whole or in
2 part to an unreasonable error or delay by an employee of
3 the Department acting in his or her official capacity.
4 Nevertheless, the statute requires that no significant
5 aspect of the error or delay may be attributable to the
6 taxpayer for relief to be granted. And that's Tax Code
7 Section 6593.5 subdivision (b).

8 In this matter, the audit was originally assigned
9 on December 22nd, 2009. And the supervisor's meeting
10 regarding the results were discussed on May 28th, 2010.
11 The Notice of Determination was issued on July 25th, 2010,
12 which assessed a liability amount of \$95,547.52. And that
13 was based an aggregate deficiency measure of \$936,556,
14 which consisted of unreportable taxable sales and a little
15 over \$350,000 in disallowed claims nontaxable labor, which
16 exceeded \$586,000. And that's all available at Exhibit I.

17 So the timeline that I'm going to discuss is
18 explained in more detail in the executive summary, which
19 is part of the Department's Exhibit L. Appellant appealed
20 the determination on August 10th, 2010. And after
21 Appellant filed its petition for redetermination, the
22 Glendale office reviewed the audit and prepared a report
23 of audit findings on December 8th. Thereafter, the
24 Department and Appellant corresponded consistently from
25 January 2011 until the reaudit completed on July 6th,

1 2011.

2 During these seven months the auditor examined
3 numerous submissions from Appellant and continually
4 requested additional information. The auditor also
5 contacted California's Employment Development Department
6 and numerous vendors to try to corroborate Appellant's
7 claims. On July 6th, 2011, the auditor completed the
8 reaudit work papers and sent copies to both Appellant and
9 its attorney. A deadline for response was set on
10 July 20th. On July 21st, the auditor reached out to
11 Appellant's attorney to review the audit, the reaudit work
12 papers, because there had been no response.

13 The auditor then extended the deadline to respond
14 to July 28th. On August 1st, the Department received a
15 response with additional documentation, and the reaudit
16 completed on August 9th, 2011. So afterwards this matter
17 was referred to the Appeals Bureau for scheduling, and on
18 January 4th, 2012, Appellant submitted its verification
19 for an appeals conference. Thereafter, it took
20 approximately 16 months to schedule the initial appeals
21 conference with the district office.

22 During that time the average time frame for an
23 appeal to move from inventory to scheduling a conference
24 was between 12 and 18 months. Thus, the time it took to
25 schedule the appeals conference was not an unreasonable

1 delay. The appeals conference was initially scheduled for
2 July 9th, 2013. Thereafter, Appellant caused numerous
3 delays in conducting the appeals conference. For example,
4 the Appeals Case Management section timely scheduled and
5 rescheduled appeals conferences that were subsequently
6 postponed by Appellant on three different dates; July 9th,
7 2013, July 17th, 2013, and April 30th, 2014.

8 The appeals conference was finally held on
9 November 4th, 2014, and that was at 10:30 a.m. The notice
10 was mailed to Appellant's address of record and was not
11 returned undeliverable. However, Appellant did not
12 respond to the notice and also did not appear at this
13 conference. By letter dated November 12th, 2014, the
14 Appeals Bureau notified Appellant that the conference had
15 been conducted in its absence and offered Appellant until
16 December 1st to submit additional evidence or arguments.

17 Almost three months after the deadline, by letter
18 dated February 23rd, 2015, Appellant's representative
19 inquired whether the decision had been issued and
20 requested a Board hearing. The Appeals Bureau responded
21 two days later and offered Appellant until March 12th to
22 provide supporting documentation for its contentions.
23 Again, the letter to Appellant's was not returned as
24 undeliverable, but the Department did not receive a reply.
25 Ant that's Exhibit A, footnote 2, also at our Executive

1 Summary in Exhibit L, page 5.

2 So the decision was then issued on July 22nd,
3 2015, Exhibit A, and on September 23rd Appellant's request
4 for a Board hearing was acknowledged, Exhibit B. On
5 December 4th, 2015, the Notice of Board Hearing was mailed
6 to Appellant indicating that the hearing was scheduled for
7 February 23rd, 2016. At this time, Appellant requested a
8 postponement of the hearing to a date in mid-March. That
9 was granted. The hearing was then rescheduled for
10 April 27th. On April 15th Appellant again requested a
11 postponement of the hearing until September 2016. Again,
12 Appellant's request was granted, and the hearing
13 rescheduled for September 28th, 2016.

14 On September 7th, Appellant requested another
15 postponement of the Board hearing until the November 2016
16 calendar, which was again granted. On October 5th, 2016,
17 Appellant filed its opening brief, and this was
18 accompanied by new evidence, and that's Exhibit C. Based
19 on the new submissions, the Department requested the case
20 be deferred for evaluation and verification of the new
21 evidence, which occurred on October 19th, 2016. So as a
22 result of this new evidence a second reaudit was
23 conducted, which was completed on June 15th, 2017, and
24 that reduced Appellant's liability to roughly \$23,000 in
25 tax and a little over \$15,000 in accrued interest;

1 Exhibit F.

2 So the dates and occurrences that I've
3 highlighted here today clearly show that Appellant was
4 instrumental, if not the sole cause of any alleged delays
5 that occurred in the audit and appeals process. Appellant
6 had the burden of providing the necessary documentation
7 for the audit and failed to do so from the outset.
8 Specifically, the auditor had requested additional
9 information from Appellant on numerous occasions, and
10 Appellant either failed to respond or again, provide
11 delayed responses with incomplete data.

12 Moreover, Appellant consistently requested
13 postponements of the proceedings, which continued to delay
14 resolving this matter. Specifically, Appellant failed to
15 appear at the appeals conference, and then asked for
16 multiple postponement of its Board hearings. Then right
17 before the hearing was to take place, Appellant finally
18 provided the Department with new evidence to support its
19 arguments. Had this information been provided during the
20 initial audit or the subsequent reaudit, this matter could
21 have been concluded at a much earlier date.

22 Thus, Appellant's request for relief cannot be
23 granted under Section 6593.5 subdivision (b) because its
24 actions or inactions were a significant aspect of any
25 alleged delay in this matter. For this reason Appellant

1 has failed to provide a valid basis for relief from
2 interest, and we would ask you deny this appeal.

3 Thank you.

4 MR. GLAUBIGER: It's my turn again?

5 JUDGE KATAGIHARA: Actually, we will be -- let me
6 check with the Panel to see if there are any questions.

7 MR. GLAUBIGER: Because I do have a couple of
8 comments and rebuttal.

9 JUDGE KATAGIHARA: Sure. Give me one second.
10 I'd actually like to ask Respondent a few questions before
11 your rebuttal.

12 Respondent, will you confirm the new information
13 that was provided by Appellant in its opening brief, prior
14 to the Board hearing, was that information used or was
15 that the sole basis for the reaudit that reduced the
16 measure?

17 MS. DANIELS: Yes, that's my understanding.

18 MR. NOBLE: Just to add a little bit of
19 clarification because I was looking at the most recent
20 reaudit this morning. What they provided was the
21 Department determined that made it more likely than not
22 that the invoices, the origin of the materials at issue
23 did come from excavation sites. However, the reaudit --
24 during the reaudit, the Department also had to contact all
25 of the customers to get statements from them as to whether

1 or not it was used as landfill material. The -- sorry.

2 Exhibit D, the memorandum from the Department
3 talks about it. And what they were looking for was
4 confirmation that these materials were delivered to a site
5 specified by the purchaser that were used at the site to
6 fill drains, ditches. Essentially, these materials
7 weren't used for further processing. So the Department
8 had to go through and contact all of the purchasers to
9 ensure that the materials at issue were used to fill land.

10 And when they couldn't get a response or the
11 purchaser's response indicated that it was used for
12 further processing, those weren't allowed. So there was a
13 lot of verification that went on after this -- after their
14 opening brief for the Board hearing was provided.

15 JUDGE KATAGIHARA: Okay. And Respondent, can you
16 confirm whether interest accrued in the month of
17 June 2017? Appellant's request for interest relief is for
18 the period January 1st, 2010, through June 2017, but I
19 believe payment was made in June. So I just want
20 confirmation whether interest was accruing at that time or
21 for that month.

22 MR. NOBLE: We can provide actual confirmation
23 after the hearing, but I would say interest would have
24 accrued through until the date of payment but only on the
25 unpaid amounts.

1 JUDGE KATAGIHARA: And Respondent, the initial
2 audit report was issued on April 6th, 2010, but the NOD
3 was issued about three months later on July 15th, 2010.
4 Can you explain the three-month gap between the
5 finalization of the audit report and the issuance of the
6 NOD?

7 MR. NOBLE: We'd have to contact the originating
8 office to find out what the timeline is from the
9 finalization of an audit report to the issuance of an NOD.

10 JUDGE KATAGIHARA: Okay. In the same vein I have
11 another question about the timeline. It looks like the
12 first reaudit report -- the reaudit report was complete on
13 August 9th, and the appeal was not forwarded to the
14 Appeals Bureau until September 23rd. I'd also like an
15 explanation about what occurred during that month.

16 MR. NOBLE: Again, we can provide an explanation
17 when we talk to the originating office, but I don't know
18 that we would consider six weeks between finalizing the
19 audit and discussing with taxpayer and then forwarding to
20 HQ for processing of an appeal would be considered an
21 unreasonable delay.

22 JUDGE KATAGIHARA: Okay. But there is an
23 indication now that there was communication with Appellant
24 during that time?

25 MR. NOBLE: Yes.

1 JUDGE KATAGIHARA: And Appellant, you can respond
2 to that in a minute.

3 Appellant, one of the questions that I have for
4 you is that it looks like in the timeline you were
5 provided until March 12th, 2015, to provide additional
6 documentation to CDTFA's Appeals Bureau prior to the
7 issuance of their decision and recommendation. Did you
8 provide documents to them around that time?

9 MR. GLAUBIGER: Well, the short answer is there
10 have been documents provided throughout the course of this
11 entire audit and even the process that -- whatever
12 occurred between the time of the initial audit and the
13 final reaudit where the taxpayer folded and paid the tax
14 liability. The issue that I have here -- and I'm just
15 going to break in -- is that we're talking very generally
16 here. Very generally. Did you provide documents? Did
17 you not provide documents?

18 Well, to me it really sidesteps the key issue
19 which is what's in those documents? What documents were
20 requested? Were the documents requested the ones that
21 were going to blow the lid off the case and blow it wide
22 open? Or the documents were just a request, hey, do you
23 have any additional documents you would like to provide?
24 I got a lot of those requests. Hey, do you have any
25 additional documents that you would like to provide? I

1 never got specific questions on -- I can't recall.

2 One specific question I got regarding, hey, where
3 did all this -- where did all this fill material originate
4 from? I mean -- and that really cuts to the chase, and
5 there are a lot of procedurals with -- am I -- I'm going
6 to far afield?

7 JUDGE KATAGIHARA: Yes. Yes.

8 MR. GLAUBIGER: Oh, pardon me.

9 JUDGE KATAGIHARA: Thank you. So I just want to
10 confirm. So during the appeals -- while your case was
11 with the Appeals Bureau with CDTFA, you did not provide
12 additional documents to them?

13 MR. GLAUBIGER: I'm sure we did, Your Honor. I
14 have books of exhibits that I provided.

15 JUDGE KATAGIHARA: Okay. CDTFA, I'm going to ask
16 that you confirm whether documents were provided. And the
17 reason that I'm asking is because it looks like at the
18 close of the evidentiary period for the decision and
19 recommendation was that March 12th date, but the decision
20 and recommendation wasn't issued until July 22nd, 2015.
21 So to the extent that you can explain, if there was a
22 delay, why there was a delay, then I would like to have
23 you include that in your briefing.

24 MR. NOBLE: Sure.

25 JUDGE KATAGIHARA: Thank you.

1 Judge Long, do you have any questions for the
2 parties?

3 JUDGE LONG: I do just for Mr. Glaubiger. With
4 respect to your discussion about the regulations versus
5 the statute, is your position that the delay is
6 attributable to inconsistencies between the statute and
7 the regulation, or is that the delays were attributable to
8 CDTFA's inconsistent -- allegedly inconsistent
9 interpretation of that regulation?

10 MR. GLAUBIGER: I think it's the latter. I think
11 they took a position on day -- in 2010 that 1628 was the
12 guiding statute and not the state statute, which preempts
13 the internal regulation. And they carried that really,
14 until 2021 when they decided oh, the state statutory
15 scheme and our internal regulatory scheme mirror each
16 other. It's not true, but that's the representation they
17 made in their briefing.

18 So I think what we have here is a wobble back and
19 forth between what is going to be the guiding statute in
20 this case. And I don't know why, with the army of lawyers
21 that they have, even in this courtroom right now, they
22 can't decide which statute is the guiding statute even
23 though the legislature clearly states you cannot have an
24 internal regulation that is more restrictive than the
25 State law. And I think it's that wobble back and forth.

1 It's really that simple for this entire case.
2 And I think this whole -- the procedural issues, whether
3 or not -- whether or not hearings were continued or not
4 continued is a red herring because that's not what this --
5 what stumble -- what the big stumbling block was. The
6 stumbling block was they just couldn't decide which rule
7 they were going to follow.

8 And you now, for instance, day one this taxpayer
9 said that this tax liability is exempt, and finally they
10 agreed with them. But what stopped them from agreeing
11 with them on day one versus what stopped them from
12 agreeing with -- and what allowed the State to agree with
13 the taxpayer seven years later? And even in the proposing
14 argument, they say there's new evidence. Oh, wow, well
15 that sounds terrific. I love the idea of new evidence,
16 but nobody said what it is.

17 They also said, oh, we needed necessary
18 documents, and we didn't get these necessary documents.
19 But nobody identified the necessary documents that were
20 requested. It's all very conclusory. And I think it's
21 written -- and I did not hear one statement explaining the
22 statutory scheme or which one was guiding -- which statute
23 was guiding the Department? Was it the internal
24 regulation? Or was it the State law, the Tax & Revenue
25 Code?

1 I think that's the case. The rest of it is
2 really -- it's really neither here nor there. And had the
3 State made the determination on day one in 2010, the
4 taxpayer would have paid the tax liability because the tax
5 liability was only about \$20,000 or so, versus the \$95,000
6 that they chased this company down with for years, which
7 is staggering. It's a staggering difference, and it's
8 disappointing. I live in California. We all live in
9 California. We love this state, but this is a staggering,
10 staggering difference in a tax bill. \$20,000 versus
11 \$95,000, it's a lot.

12 JUDGE LONG: Thank you. I just want to see. Did
13 CDTFA want to respond with respect to the regulation slash
14 statute issue?

15 MR. NOBLE: Maybe briefly. If you look at the
16 Department's memorandum, I think that is exhibit -- pardon
17 me -- Exhibit D, the second page. We stuck to the
18 provisions of Regulation 1628 subdivision (c). The
19 specification was that they believed that the landfill
20 referred to in 1628 means land in its raw form. Like, any
21 time you're delivering these materials and apply it to
22 land in its raw form, that land can qualify as a landfill
23 site. Like, we didn't wobble. We think that regulation
24 1628 subdivision (c) is proper and authorized, and we're
25 bound to follow it.

1 Thank you.

2 JUDGE LONG: Thank you. I don't have any further
3 questions.

4 JUDGE KATAGIHARA: Judge Brown, do you have any
5 questions for the parties?

6 JUDGE BROWN: I think I have a couple. Thank
7 you.

8 Let me start with Appellant's attorney. I want
9 to understand the argument regarding the evidence that you
10 provided in 2016 in anticipation of the Board hearing,
11 which then lead to the reaudit. Is it your position that
12 that evidence was not significant enough to warrant the
13 reaudit, that essentially that the Department had that
14 information previously?

15 MR. GLAUBIGER: I want to say that I don't know
16 what spurred the final reaudit. Maybe -- I don't know
17 exactly. But it certainly was not information that was
18 hidden. I believe that Exhibit C is just photographs of
19 excavation sites, which there -- that's public record.
20 It's public information. There was certainly nothing
21 stopping the State of California from determining where
22 these fill materials originated from in 2010.

23 In fact, the auditor in the field came to the
24 taxpayer's office and stayed there for weeks asking every
25 question under the sun. I can't imagine that one of those

1 question was not hey, where did you get these thousands of
2 tons of fill material? I mean, it certainly didn't --
3 they didn't come from their backyard. It didn't come from
4 Home Depot. It obviously had to come from someplace on an
5 industrial scale. I think that evidence was available.

6 JUDGE BROWN: I'm talking about that as well.
7 This evidence I'll just say for reference is in Exhibit C,
8 I believe. Is it your argument then that the auditor had
9 access to this information going back to 2010?

10 MR. GLAUBIGER: Yes.

11 JUDGE BROWN: That the taxpayer provided it, or
12 just that the auditor didn't ask the right questions?

13 MR. GLAUBIGER: Well, okay. The auditor,
14 Ms. Shumway, is not here. And so we have a hand tied
15 behind our back as to whether or not she asked the right
16 questions. But what concerns me is that in 2011, when
17 they submitted their supplemental discussions, they had
18 questions regarding the origination of these materials,
19 allegedly. Well, if they had the question in 2011, what
20 was to stop them from picking up the phone and answering
21 the question in 2011, or writing a letter or requesting
22 supplemental information specifically on that issue?

23 And I will say I never -- I have no recollection
24 of ever receiving a request for supplemental materials on
25 any particular issue. The requests that I remember are,

1 oh, by the way, if you have anything more you would like
2 to submit, you know, your deadline is this day. So to
3 answer your question, I don't see why the auditor couldn't
4 grab a telephone, couldn't make a quick call if she knew
5 that issue was on -- or even if she felt that that issue
6 was on the table in 2011, why not resolve it in 2011? Why
7 let it drift to 2017?

8 And that's -- that's really my chief concern with
9 this case is what they -- obviously, I mean, they got a
10 number of people here. I mean, the State of California
11 has a number of people here addressing this one appeal.
12 They certainly have the manpower. They certainly have the
13 resources. So I don't know why they didn't just devote
14 some of those resources to picking up a phone and
15 answering some of these simple questions.

16 And I think that's where the case zigs, is that
17 they should have done it, and this taxpayer should not --
18 should not eat the cost of their failure. And that's
19 ultimately what they're saying. And they want to say that
20 oh, the taxpayer he delayed this, he delayed that. He
21 caused his own damages blah, blah, blah. But the fact of
22 the matter is I think it's a red herring because it
23 subverts the key issue, which is why didn't they just pick
24 up a phone in 2011.

25 JUDGE BROWN: Thank you.

1 I want to turn to the Department now and ask --
2 well, first of all, I'll say if the Department has
3 anything that they want to offer in response. I want
4 to -- I'm going to stay on the same topic about the new
5 documents. And I want to ask whether the documents that
6 taxpayer submitted in 2016 were things that were within
7 the Department's record previously? Essentially, were
8 these new documents really the basis for the change in the
9 Department's position? Or was this something the
10 Department had all along or had access to all along?

11 MS. DANIELS: The records that we have indicate
12 that they did not have access. If you look at the
13 executive summary at Exhibit L, you can see numerous times
14 where the auditor is reaching out to Appellant and
15 Appellant's attorney asking and trying to verify
16 information. If they had that information there would be
17 no reason.

18 To Appellant's comment about they could have
19 picked up a phone, you can see that they did. They sent
20 letters. They sent emails. There is a recording that she
21 tried to speak with Appellant's attorney and that he was
22 argumentative. So I think it's disingenuous to say the
23 Department didn't reach out, because there's clearly a lot
24 of facts indicating that it did.

25 JUDGE BROWN: Okay. Thank you. I think that's

1 all of my questions for right now.

2 JUDGE KATAGIHARA: Thank you.

3 Appellant, you can proceed with your rebuttal.

4 You have five minutes.

5

6 CLOSING STATEMENT***

7 MR. GLAUBIGER: Well, I don't want to repeat
8 myself, but I think I'm going to in certain -- in certain
9 areas. And that is I expected more from the State. I
10 expected a really nice smoking gun piece of evidence to
11 show that ah-ha, the eureka moment. But what we don't see
12 is the nice smoking gun, eureka moment from the State.
13 What was that smoking gun piece of evidence that triggered
14 this final reaudit? We don't know what it is. We don't
15 know what it is, so we dance around it.

16 We use nice conclusory terms. So we asked and
17 asked, and we never got it. And then we finally got it,
18 blah, blah, blah. The key here is what is it? What was
19 that smoking gun piece of evidence that -- that was
20 absolutely unobtainable prior to that date? And like I
21 said, excavation sites. Really? You couldn't pick up a
22 phone or Google where these materials could possibly
23 originate from? You couldn't send a pointed letter to the
24 taxpayer saying, please explain where these materials
25 originated from. Please provide your evidence.

1 I never saw that letter. And if they sent that
2 letter and I ignored it, then I would say fine. You're
3 right. You guys asked for this evidence. The taxpayer
4 didn't respond. It's on -- it's on us. But they didn't
5 do that. And now what we have is a lot of conclusory
6 terms and a nice explanation what landfill is defined in
7 the regulation. The issue is that -- where's that
8 definition? It's not in their briefing. It's not in any
9 letter I ever saw.

10 It's certainly not in any of the audits or audit
11 comments in the audit, which I read into the record
12 earlier, which basically said, well, they haven't shown
13 that this came from an excavation site. And they can't
14 show that it was delivered to a landfill site. And by the
15 way, the common definition of landfill is a landfill. It
16 is a dump. It's where you dump your materials.

17 So the nice new definition today, and this is how
18 they're going to sell this, and how they're going to find
19 that the -- this state statutory scheme actually mirrors
20 the internal regulation, which obviously it doesn't.
21 That's their position. And you know with that, I would
22 say with the amount of time, effort, and energy that went
23 into this, it's mind boggling that the simple question,
24 the simple one that gets the answer. Where did it come
25 from? Where did you put it?

1 We skipped right over that, and I'm -- I'm
2 actually a little bit disappointed that so much of the
3 rebuttal oral argument was devoted to deadlines with
4 regard to the procedures to follow with this appeal and
5 not with why didn't someone pick up a phone? Why didn't
6 someone send a letter asking the specific question? I
7 think we're still kind of in the weeds as to what
8 triggered the ultimate audit. My client though, is
9 grateful that the State finally decided to accept our
10 argument and create the audit because it reduced the tax
11 liability to pretty much 25 percent of what it was.

12 But I do ask that -- I think this auditor could
13 have done a better job. I think the State could have done
14 a better job following up on this. They've spent so much
15 time hanging on to their arguments that they -- I think
16 they missed the key issues. And with that, I'll rest
17 and -- and I would once again just say that I request that
18 the Appeals Board relieve the taxpayer of the interest
19 liability here.

20 JUDGE KATAGIHARA: Thank you.

21 Respondent, if you have any closing remarks.

22 MS. DANIELS: Just really quick.

23

24 CLOSING STATEMENT***

25 MS. DANIELS: First, I think it's important to

1 recognize that the burden is on the taxpayer to provide
2 this information, and we can get into a lot of he said or
3 she said about whether it was requested or not. There's
4 clearly evidence that it was.

5 MR. GLAUBIGER: No, there isn't.

6 JUDGE KATAGIHARA: Appellant, please keep your
7 remarks to yourself while they're presenting. Thank you.

8 MS. DANIELS: Thank you, Judge.

9 So with that being said, for interest to be
10 relieved in this situation, none of the fault can be
11 attributable to the taxpayer. And here there is fault
12 that is attributable to the taxpayer with not providing
13 information needed, not corresponding, not showing up at
14 conferences, asking for delays in the hearing process. So
15 frankly Appellant just hasn't met their burden for relief
16 of interest, and we would ask that this appeal be denied.

17 Thank you for your time.

18 JUDGE KATAGIHARA: Appellant. I'm going to give
19 you just two minutes to make any final closing remarks, if
20 you would like it.

21

22 FURTHER CLOSING STATEMENT***

23 MR. GLAUBIGER: My only closing remark is that
24 what we've heard from the State is a lot of conclusions
25 and nothing specific. The Appellant here has provided

1 specifics, has cited to the record, cited to the exhibits,
2 and brought out the key issues in this case which, really,
3 were not addressed by the State. They really are hanging
4 out there just -- and really just met with conclusion,
5 which is oh, we already asked for it. There's no evidence
6 for that.

7 Oh, what was the smoking gun piece of evidence
8 that triggered the -- there's a final reaudit that the
9 taxpayer sat on for years and years and years. Oh, well,
10 we're not going to tell you exactly what that is either.
11 We're just going to conclude that it exists, and that's
12 smoke and mirrors. And I would say this tribunal really
13 doesn't need to look any further than the original
14 documents from 2010 and the discussions from 2011 to see
15 these issues were on the table from day one.

16 How the State determines that even its -- an
17 alleged excavation site when well, common sense says
18 there's nowhere else to get this volume of material.
19 Obviously, it came from an excavation site, but they
20 didn't do that. They didn't use the common sense, and
21 they didn't pick up the phone. They didn't write the
22 letter. They didn't ask hey, where did you get the stuff
23 from? The -- and that's really the key.

24 Had they -- you know, it's great to have these
25 wonderful numbers and have these great computer programs

1 that spit out these beautiful audits, but the really --
2 the numbers are only good as the information behind them.
3 And the information behind the numbers was severely
4 lacking, and the lacking had to do with -- really, it's
5 not that there was no investigation because there's a lot
6 of investigation. But I think it was burying your head in
7 the sand on key issues in this case that were not ferreted
8 out. They were just left there.

9 And they can say well, the taxpayer has the
10 obligation to provide this information. Well, you know,
11 the taxpayer is going to take the position that they did
12 provide this information, and they obviously did later on
13 because they're using some of that information as the
14 trigger for this final reaudit, but they won't tell us
15 exactly what the information was that was undiscoverable
16 before that date. You know, it's -- it's just
17 disappointing from the taxpayer's point of view and
18 certainly from my point of view as an attorney who has
19 been with this case for 13 years.

20 So -- and I had no gray hair when this started by
21 the way, if that gives you some idea. And with that said,
22 you know, I would again say the State just didn't do a
23 great job on this audit, and the taxpayer should not bear
24 the burden of their lack of diligence on basic issues.

25 JUDGE KATAGIHARA: Okay. Thank you, Appellant.

1 Judge Long, do you have any final questions?

2 JUDGE LONG: No questions. Thank you.

3 JUDGE KATAGIHARA: Judge Brown, do you have any
4 final questions?

5 JUDGE BROWN: No, I do not. Thank you.

6 JUDGE KATAGIHARA: Thank you.

7 This concludes the hearing. I want to thank the
8 parties for their presentation.

9 Respondent is ordered to submit the requested
10 information through additional briefing no later than
11 September 10th, 2023. We'll give Appellant chance to
12 respond to that information and evidence. And OTA will
13 issue with the applicable deadline shortly.

14 MR. NOBLE: I was going to ask if you were going
15 to issue the order. Would the deadline be from the date
16 of the order, since there's some specific date ranges,
17 you're asking. We would kind of like to have that
18 information in front of us before preparing our response.

19 JUDGE KATAGIHARA: No. It will be from today.
20 So it will be 30 days from today.

21 MR. NOBLE: Thank you.

22 JUDGE KATAGIHARA: All right. This concludes the
23 hearing, and we're now adjourned.

24 (Proceedings adjourned at 10:33 a.m.)
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I, Ernalyne M. Alonzo, Hearing Reporter in and for
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I have hereunto subscribed my name this 22nd day
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