

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
S. BACHOR, ) OTA NO. 21037482  
 )  
APPELLANT. )  
 )  
 )

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, August 9, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
12900 Park Plaza Dr., Cerritos, California,  
91401, commencing at 9:30 a.m. and concluding  
at 11:02 a.m. on Wednesday, August 9, 2023,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSHUA ALDRICH

Panel Members: ALJ KEITH LONG  
ALJ SHERIENE RIDENOUR

For the Appellant: JESSE MCCLELLAN

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

CHAD BACCHUS  
JASON PARKER  
PAMELA BERGIN

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-12 were received at page 8.)

(Department's Exhibits A-H were received at page 9.)

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By Mr. McClellan 50

1 Cerritos, California; Wednesday, August 9, 2023

2 9:30 a.m.

3  
4 JUDGE ALDRICH: This is Judge Aldrich. We're  
5 opening the record in the Appeal of S. Bachor doing  
6 business as Carmel Mountain Cabinetry before the Office of  
7 Tax Appeals, OTA Case Number 21037482. Today's date is  
8 Wednesday, August 9th, 2023, and it's approximately  
9 9:30 a.m. This hearing is being conduct in Cerritos,  
10 California, and is also being live streamed on OTA's  
11 YouTube channel.

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

21 As a reminder the Office of Tax Appeals is not a  
22 court. It is an independent appeals body. The Panel does  
23 not engage in ex parte communications. Our opinion will  
24 be based off the admitted evidence, the arguments, and the  
25 relevant law. We have read the parties' submissions, and

1 we are looking forward to today's oral hearing.

2 Who is present for Appellant?

3 MR. MCCLELLAN: Jesse McClellan of McClellan  
4 Davis on behalf of Sean Bachor, and Sean Bachor is also  
5 with me.

6 JUDGE ALDRICH: Thank you.

7 And for CDTFA?

8 MR. BACCHUS: Chad Bacchus, Attorney IV, for the  
9 Department.

10 MS. BERGIN: Pamela Bergin, Department's Legal  
11 Division.

12 MR. PARKER: Jason Parker, Chief of Headquarters  
13 Operations Bureau with CDTFA.

14 JUDGE ALDRICH: Great. Welcome everyone.

15 Next, we'll talk about the issues. So the  
16 July 12th, 2023, minutes and orders as distributed to the  
17 parties summarized two issues. In the interest of time,  
18 I'm not going to be restating the issues and related  
19 sub-issues. However, I'm going to ask if those issues  
20 were correctly summarized on the minutes and orders and to  
21 confirm whether there are objections to those summaries.

22 Mr. McClellan, would you like to start?

23 MR. MCCLELLAN: Yes. I would -- I don't have  
24 that in front of me, but I don't believe we have any  
25 objections to the way that the issues are stated.

1 JUDGE ALDRICH: Okay. Thank you.

2 And for the Department or CDTFA?

3 MR. BACCHUS: No objections.

4 JUDGE ALDRICH: Thank you. Regarding exhibits  
5 for the Department, CDTFA's exhibits are identified  
6 alphabetically. And before we can get into that, could --

7 Mr. McClellan, did you receive a copy of the  
8 exhibit binder that was distributed to the parties?

9 MR. MCCLELLAN: I do. I have that in front of  
10 me.

11 JUDGE ALDRICH: Wonderful.

12 And Mr. Bacchus?

13 MR. BACCHUS: Yes, I do.

14 JUDGE ALDRICH: Great.

15 So moving back to the exhibits for CDTFA, they're  
16 identified alphabetically as Exhibits A through H. A  
17 through F were submitted during the briefing, and I  
18 received a copy of Exhibit G on July 25th, 2023.

19 Mr. Bacchus, was that a resubmission, or could  
20 you tell me when --

21 MR. BACCHUS: I -- I'm not sure. I think that  
22 was the first time it was submitted. It was included in  
23 our exhibit index that we submitted with the prehearing  
24 conference statement, but I don't believe the actual  
25 second reaudit working papers were produced prior to the

1 PDF version that I submitted in July.

2 JUDGE ALDRICH: Okay. Thank you. And then  
3 similar question for Exhibit H. Was Exhibit H previously  
4 provided to OTA?

5 MR. BACCHUS: It was not.

6 JUDGE ALDRICH: Okay. And is it elsewhere in the  
7 file or --

8 MR. BACCHUS: It is not.

9 JUDGE ALDRICH: Okay. And -- okay. So  
10 Mr. McClellan, do you have any objections to admitting  
11 CDTFA's Exhibits A through H into evidence?

12 MR. MCCLELLAN: No.

13 JUDGE ALDRICH: Okay. And then Appellant's  
14 exhibits are identified numerically as Exhibits 1  
15 through 12. 1 through 10 were submitted during briefing.  
16 Exhibits 11 and 12 were submitted timely on July 14th,  
17 2023.

18 Mr. Bacchus, any objection to admitting  
19 Appellant's exhibits into evidence?

20 MR. BACCHUS: No objections.

21 JUDGE ALDRICH: Okay. Since neither party had  
22 objections to the exhibits, they're admitted into the  
23 record.

24 (Appellant's Exhibits 1-12 were received  
25 in evidence by the Administrative Law Judge.)



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

3 So to give everyone an idea of how this hearing  
4 will flow after these preliminary matters have been  
5 addressed, we plan for Appellant to present and provide  
6 testimony for about 60 minutes. Next, CDTFA will present  
7 an opening and closing statement for approximately  
8 25 minutes. Then the Panel will ask questions for 5 to  
9 10, and then Appellant will have the opportunity to give a  
10 rebuttal or closing for about 5 to 10 minutes as well.

11 With that said, we do have time. So if you need  
12 to make adjustments, if you need to ask for extra time,  
13 please just make the request, and we'll see if we can  
14 accommodate you. Okay.

15 MR. MCCLELLAN: Thank you.

16 JUDGE ALDRICH: So my understanding is that,  
17 Mr. Bachor, you were going to be providing testimony today  
18 or --

19 MR. MCCLELLAN: If I may answer that?

20 JUDGE ALDRICH: Yeah.

21 MR. MCCLELLAN: It depends on whether or not we  
22 need it.

23 JUDGE ALDRICH: Okay.

24 MR. MCCLELLAN: I think we've established the  
25 facts that we need to establish. But as you'll hear in a

1 moment, one of the things we're going to ask the  
2 Department to do is to provide an explanation of their  
3 reasoning behind the primary issue that we're presenting.

4 JUDGE ALDRICH: Okay. And so before you were to  
5 switch to witness testimony, if you could let me know.  
6 That way I can make sure to swear in the witness if he  
7 becomes one. Okay?

8 MR. MCCLELLAN: Absolutely.

9 JUDGE ALDRICH: Thank you.

10 MR. MCCLELLAN: Sure.

11 JUDGE ALDRICH: So any questions before we move  
12 on to presentations, Mr. McClellan?

13 MR. MCCLELLAN: None.

14 JUDGE ALDRICH: Okay. And Mr. Bacchus?

15 MR. BACCHUS: No questions.

16 JUDGE ALDRICH: Okay. So we are ready to proceed  
17 with presentations.

18 Mr. McClellan, please begin when you're ready.

19

20 PRESENTATION

21 MR. MCCLELLAN: Thank you, Judge Aldrich and  
22 Panel. My name is Jesse McClellan on behalf of Sean  
23 Bachor.

24 And this case involves a company called Carmel  
25 Mountain Cabinets, which I will refer to today as

1 CMC-California. There's a related company that's called  
2 Carmel Mountain Cabinetry, S-D-E-R-L-D-E-C-V, a related  
3 Mexico maquiladora, which we're going to refer to as Cmex.  
4 Okay.

5 CMC-California is a lump sum construction  
6 contractor that installs cabinets and other woodworks  
7 primarily in residential homes. CDTFA has confirmed that  
8 the cabinets are materials. The disputed liability  
9 includes two areas of asserted noncompliance purchases  
10 from Cmex in relation to fabrication labor and related  
11 materials sold to CMC-California and purchases from other  
12 vendors of materials from inside California.

13 So the primary issue that we want to address  
14 today is whether sales tax applies to sales of fabrication  
15 labor and materials from Cmex. As explained in our brief,  
16 we believe sales tax applies to those transactions  
17 pursuant to Regulation 1620 and related authority.

18 The second issue we'd like to address is whether  
19 sales tax applies to other material purchases from  
20 California vendors. We've resolved the majority of those  
21 with the Department. They have conceded that either sales  
22 tax applies to those transactions, or the tax has been  
23 paid on them. But there are some transactions that remain  
24 that we would like to address briefly.

25 The alternative, and I guess, third issue is

1       whether or not the employees of Cmex should be treated as  
2       employees, in fact, of CMC-California. And the basis of  
3       that argument, as I'm sure the Panel is aware, is Mapo v  
4       State Board of Equalization. And in the event that those  
5       employees are treated as employees, in fact, of  
6       CMC-California, then the fabrication labor at issue  
7       becomes nontaxable. It's considered the in-house  
8       fabrication.

9               What I'd like to do is provide some procedural  
10       history and some brief remarks, and then turn it over to  
11       CDTFA so they can explain their basis for the primary  
12       issue in this case, which they haven't done yet. And I'll  
13       explain that here in a moment. Our firm was retained by  
14       Mr. Bachor in February of 2022, well after the proceedings  
15       in the prior audit and following CDTFA's administrative  
16       appeals proceedings in this audit.

17              The primary issue we have raised in this case,  
18       whether sales tax applies to sales by Cmex is an issue we  
19       first broached with the auditor, Heidi Beltran, in a call  
20       held on May 10th, 2022. She explained at that time that  
21       the issue had not previously been addressed. In our brief  
22       dated May 23rd, 2022, we laid out in detail the facts,  
23       laws, and evidence that supports sales tax applies to  
24       sales by Cmex with tax due by the seller.

25              In a letter dated June 2nd, 2022, CDTFA requested

1 the opportunity to address our brief, quote, end quote,  
2 "Because Appellant has submitted new contentions."

3 In a June 10th, 2022 letter, OTA acknowledged  
4 CDTFA's request stating that new arguments included in  
5 Appellant's reply brief filed on May 23rd, 2022, is going  
6 to provide an opportunity for CDTFA to provide another  
7 brief. But then CDTFA filed a brief on July 11, 2022, in  
8 which it claimed Appellant is making the same arguments  
9 that it had made in the past which, of course, contradicts  
10 the letters and the fact that we were making a new  
11 argument.

12 The audit was then routed back to CDTFA's local  
13 office where I worked directly with the auditor to resolve  
14 purchases from California and, ultimately, taking the  
15 measure in that regard down from around \$700,000 to  
16 approximately \$70,000. What remains -- and we'll get into  
17 that in some more detail -- more or less are a large  
18 number of material purchases from a lot of different  
19 vendors. And it didn't make sense for us to spend a lot  
20 of time on each of those vendors. So it just became  
21 economically unfeasible to continue that process.

22 But we think that the evidence that was presented  
23 supports that the remaining purchases are from California  
24 vendors subject to sales tax. And some of them, actually,  
25 are not material vendors at all. In any event, on

1 August 11th, 2022, we filed Appellant's third brief  
2 explaining that CDTFA still has not addressed our new  
3 arguments.

4 In that brief we state that if CDTFA does have a  
5 rebuttal to Appellant's new arguments, we asked that it  
6 provide a detailed basis for any such rebuttal prior to  
7 the prehearing conference to avoid surprise at this  
8 hearing. On February 27th, 2023, in response to OTA's  
9 communication regarding an in-person or virtual hearing,  
10 we informed OTA that it hinges on whether or not there's  
11 disputed facts with our argument as it pertains to sales  
12 tax applying to sales by Cmex.

13 In that communication, we set forth six questions  
14 related to that issue, including what facts are under  
15 dispute and what evidence, if any, does CDTFA have to  
16 support its position that use tax applies. The same day  
17 OTA confirmed CDTFA was aware of our questions. On  
18 March 7th, 2023, Ms. Bergin of CDTFA sent an email  
19 claiming that the issues have been addressed in their  
20 briefing and that CDTFA has nothing further to add. And,  
21 of course, the briefing does not address the issue of  
22 whether sales tax applies to Cmex in any meaningful way.

23 In our June 30th, 2023, prehearing conference  
24 statement, we again explained that CDTFA has not addressed  
25 its basis for disputing our primary contention in any

1 meaningful way. On July 6th, 2023, a prehearing  
2 conference was held, and CDTFA during that conference  
3 stated that their position is that we haven't supported  
4 our position, but it didn't explain why. It didn't say  
5 what defect there is, what facts, evidence, law, it  
6 disputes.

7 On July 7, 2023, following the prehearing  
8 conference, Mr. Bacchus here today, sent an email to me  
9 requesting evidence showing title transfer in California  
10 in relation to sales from Cmax. After clarifying his  
11 questions, I provided a response which details why we  
12 believe sales by Cmax are subject to sales tax. There was  
13 no response. On July 26th, 2023, CDTFA submitted a new  
14 Exhibit H consisting of DMV registration documents. I  
15 asked CDTFA to explain the basis of their exhibit, and  
16 they responded by stating it was provided as support for  
17 our position that use tax was properly imposed. No  
18 further explanation was provided.

19 So that brings us here today where we still have  
20 not been provided with any meaningful basis regarding why  
21 CDTFA believes use tax applies to the transaction with  
22 Cmax, and what disagreements it has, if any, with our  
23 position. OTA has rightfully held in the appeal of  
24 Telavera that CDTFA must make some minimal showing before  
25 the burden shifts to Appellant. Here, we don't believe

1       that there's been a minimal showing of why CDTFA believes  
2       use tax applies, and why it disputes the facts, evidence,  
3       and law that we set forth for why sales tax applies.

4               So at this point, what we'd like to do is turn  
5       the presentation over to CDTFA, and then reserve time to  
6       respond once we better understand their position.

7               JUDGE ALDRICH:   Okay.   It looks like you've used  
8       10 minutes of your opening presentation.

9               MR. MCCLELLAN:   Okay.

10              JUDGE ALDRICH:   And so that's fine.   You can  
11       reserve time, and then we'll restructure it, I guess, to  
12       accommodate your request.   CDTFA do you have -- are you  
13       ready to proceed with your opening and closing?

14              MR. BACCHUS:    I am.

15              JUDGE ALDRICH:   Okay.   Go ahead.

16

17                                   PRESENTATION

18              MR. BACCHUS:    Appellant, a sole proprietor  
19       located in Murrieta, California is a construction  
20       contractor who builds and installs custom cabinets  
21       pursuant to lump sum construction contracts for customers  
22       in California.

23              During the liability period, Appellant purchased  
24       wood and other materials in the United States, some of  
25       which he shipped to Mexico for fabrication work performed



1 by a Mexico limited liability company named Caramel  
2 Mountain Cabinetry. And we'll also refer to that company  
3 as Cmex.

4 Appellant held a 99 percent ownership interest in  
5 that company. Upon completion of the fabrications, Cmex  
6 returned the fabricated materials to Appellant at his  
7 location or various job sites throughout California. And  
8 Appellant used his purchased materials, including the  
9 fabricated materials received from Cmex, to build and  
10 install custom cabinets. And those facts can be found  
11 generally in Appellant's Exhibits 1 and 5.

12 Appellant did not hold a seller's permit or  
13 certificate of registration for use tax during the  
14 liability period and did not file sales and use tax  
15 returns for the liability period. According to  
16 Appellant's Exhibits 5 and 10, during the liability period  
17 an employee of Cmex would pick up materials purchased by  
18 Appellant, transport those materials to Cmex's location in  
19 Mexico, and complete the agreed upon fabrication of those  
20 materials pursuant to the agreement between Appellant and  
21 Cmex, which is Appellant's Exhibit 7.

22 The Cmex employee would deliver the fabricated  
23 materials to Appellant's business location or to various  
24 job sites in California. According to DMV records found  
25 in the Department's Exhibit H, the truck used by the Cmex

1 employee was registered to Appellant.

2 According to the minutes and orders issued by the  
3 Office of Tax Appeals, the first issue in dispute is  
4 whether sales or use tax applies to Appellant's  
5 transactions with Cmex pursuant to Section 6051 and  
6 Regulation 1620 subdivision (a), a retail sale is subject  
7 to sales tax if two conditions are satisfied. First, the  
8 sale occurs in California and second, there is  
9 participation in the sale by a California place of  
10 business of the retailer.

11 Because the transactions at issue involve  
12 fabrication labor performed by Cmex, the first question is  
13 whether Cmex had a place of business in California that  
14 participated in the sale, and then whether the sale or the  
15 fabrication labor occurred in California. There's no  
16 dispute that Cmex has a place of business in California  
17 that participated in the transactions at issue.

18 Therefore, we must determine whether the sale  
19 occurred in California or in Mexico. If the sale occurred  
20 in California, then the appropriate tax is sales tax owed  
21 by Cmex. If the sale occurred in Mexico, then the  
22 appropriate tax is use tax owed by the Appellant.

23 Section 6006 subdivision (a) defines a sale as  
24 the transfer of title or possession of tangible personal  
25 property for a consideration. Subdivision (b) defines a

1 sale as the fabricating of tangible personal property  
2 towards a consideration for consumers who furnish either  
3 directly or indirectly the materials used in the  
4 fabricating. Based on the fact of this case, the  
5 transactions at issue fall under subdivision (b). Cmax  
6 fabricated tangible personal property for Appellant, and  
7 Appellant furnished the materials used in fabricating.

8 In the case of Dennis L. Duffy v State Board of  
9 Equalization, the Court held that Section 6006 subdivision  
10 (b) does not expressly require that there be a transfer of  
11 title from seller to another in order for the tax to  
12 apply, but that it is a tax on the value of labor and  
13 services required to fabricate tangible personal property  
14 from materials furnished by the consumer. In citing to  
15 the earlier case of Banken v. State Board of Equalization,  
16 the Court in Duffy held that sales tax applies to all  
17 transactions which fall within Section 6006 subdivision  
18 (b)'s terms.

19 So based on the statutory language of Section  
20 6006 subdivision (b) and the holdings in these court  
21 cases, the Department looks to the actual act of  
22 fabricating as the transaction which constitutes the  
23 taxing event. Because the fabrication occurred in Mexico  
24 at Cmax's location, that's where the sale occurred.  
25 Accordingly, the sale occurred outside of California, and

1 the appropriate tax is use tax imposed on Appellant as the  
2 consumer.

3 While the foregoing is dispositive, even if it is  
4 determined that some transfers of the fabricated tangible  
5 personal property is required for a sale to occur under  
6 Section 6006 subdivision (b), use tax would still be the  
7 appropriate tax. Because Appellant holds title to the  
8 materials throughout the fabricating process, which is  
9 supported by Appellant's Exhibit 1, the only transfer that  
10 could be required is the transfer of possession. Here,  
11 Appellant owns the truck on which the materials in the  
12 fabricated tangible personal property is transported. And  
13 that is found in our Exhibit H.

14 Therefore, possession of the materials transfers  
15 to Cmex when the materials are unloaded at Cmex's business  
16 in Mexico and possession of the fabricated tangible  
17 personal property transfers back to Appellant in Mexico  
18 when the items are placed on Appellant's truck at Cmex's  
19 business location. Appellant has not provided sufficient  
20 evidence to show that the truck was owned by Cmex, such  
21 that transfer of possession of the fabricated items  
22 occurred in California when those items were delivered to  
23 Appellant or to the various job sites in California. In  
24 fact, again, the Department's Exhibit H provides DMV  
25 documentation showing that the truck was registered to

1 Appellant listing his California company on the  
2 registration.

3 The second issue is whether sales or use tax  
4 applies to Appellant's purchases of materials from vendors  
5 in California, vendors other than Cmex. We note that  
6 during the reaudit and second reaudit Appellant provided  
7 documentation showing that he paid tax on some of his  
8 purchases actually, a majority of them as Mr. McClellan  
9 has already stated. The Department reduced the measure  
10 for this audit item, and Appellant has indicated he has no  
11 further documentation to provide. Without additional  
12 documentation, the Department is unable to further reduce  
13 the measure for this audit item.

14 While Appellant argues that the preponderance of  
15 the evidence shows that all of its purchases and materials  
16 in California were purchased tax paid, Appellant has not  
17 provided evidence to suspect such a claim. And  
18 unsupported assertions are not sufficient to satisfy a  
19 taxpayer's burden of proof. Therefore, without additional  
20 documentation, the measure of audit Item 2 cannot be  
21 reduced any further.

22 The final issue is whether employees of Cmex  
23 should be treated as employees, in fact, of Appellant. To  
24 support his assertion that Cmex's employees are  
25 Appellant's employees, Appellant relies on the court case

1 of Mapo, Inc. v. State Board of Equalization. However,  
2 Appellant's reliance on this case is misplaced. I will  
3 refer the Panel to the Office of Tax Appeals' April 6th,  
4 2020, precedential opinion in Appellant's earlier appeal  
5 before this agency for how the specific facts in Mapo are  
6 distinguishable from the facts of this appeal.

7 In that precedential opinion, the Office of Tax  
8 Appeals held that Mapo does not apply to Appellant's case  
9 because Mapo involved a corporation and its wholly owned  
10 subsidiary, while Appellant's appeal involves a foreign  
11 limited liability business entity owned in small part by  
12 someone other than Appellant. The fact that Appellant did  
13 not wholly own Cmex was sufficient to distinguish the two  
14 matters, particularly given that Mapo carves out an  
15 exception to the general rule.

16 Moving on, in Appellant's Exhibit 11 he request  
17 interest relief. So we will address the periods that were  
18 brought up in that exhibit. We note that the Department  
19 has reviewed the entire case history and is granting  
20 relief from the interest for the period May 1st, 2018,  
21 through June 30th, 2018, due to delay during the  
22 implementation of the Department's new Legacy System or  
23 CROS. That period is not part of either of the periods  
24 that Appellant is requesting relief, but our review of the  
25 case shows that that two-month period warrants interest

1 relief.

2 In Appellant's Exhibit 11, Appellant request  
3 relief of the interest for 17 months of the period from  
4 the date of issuance of the Notice of Determination on  
5 November 13th, 2018, through the date of the appeals  
6 conference on September 23rd, 2020. Appellant does not  
7 provide specific details as to what errors or delays were  
8 caused by Department employees, other than to state that  
9 the amount of time it took the Department to schedule the  
10 appeals conference was too long, and that the appeals  
11 conference should have been scheduled within six months of  
12 the issuance of the Notice of Determination.

13 Upon our review of the period in question, the  
14 Department has found no unreasonable errors or delays by a  
15 Department employee for that period. After the issuance  
16 of the Notice of Determination, the Department received  
17 Appellant's petition for redetermination on December 12th,  
18 2018, which was forwarded to Department's petition section  
19 at the end of December 2018 for them to complete a summary  
20 analysis. The summary analysis was completed on  
21 September 26th, 2019, at which time, an inconsideration of  
22 the workload was a reasonable amount of time to complete a  
23 summary analysis.

24 The appeal was then forwarded to the Appeals  
25 Bureau Case Management section for the scheduling of an

1 appeals conference. On October 31st, 2019, just a month  
2 later, Appellant requested that any further work on the  
3 appeal be deferred until the related case that was with  
4 the Office of Tax Appeals was resolved. The Office of Tax  
5 Appeals issued its opinion for the related case on  
6 April 6th, 2020, at which time an appeals conference for  
7 this appeal was scheduled for June 15th, 2020.

8 Appellant requested that this conference be  
9 postponed. The conference was then rescheduled for  
10 September 23rd, 2020, based on the fact that Appellant was  
11 the cause of delaying the scheduling of the appeals  
12 conference in October 2019 and again in June 2020. We  
13 find no error or delay by an employee of the Department  
14 for the period November 2018 through September 2020.  
15 Appellant further request relief of the interest for  
16 24 months during the period September 23rd, 2020, through  
17 the date of this hearing, August 9th, 2023.

18 While Appellant acknowledges that some of this  
19 time period was used to conduct reaudits that reduced his  
20 liability, Appellant states that all work performed during  
21 this period should have been completed within 12 months.  
22 After the appeals conference on September 23, 2020, the  
23 parties provided an opportunity to submit additional  
24 information or evidence. And that process was complete on  
25 November 24th, 2020, at which time, the Appeals Bureau had



1       90 days to issue the decision.

2               On February 12th, 2021, the decision was timely  
3       issued. Appellant submitted his timely appeal to the  
4       Office of Tax Appeals signed March 8th, 2021, in which he  
5       requested additional time to perfect his brief. The  
6       Office of Tax Appeals granted that request and a  
7       subsequent request for additional time. Ultimately, the  
8       Office of Tax Appeals received Appellant's brief on  
9       July 6th, 2021. By letter dated August 2nd, 2021, the  
10      Office of Tax Appeals informed the Department that  
11      Appellant had submitted additional documentation.

12              The Department requested additional time to  
13      consider the new documentation and to complete a reaudit.  
14      Upon completion of the reaudit, the Department filed its  
15      opening brief on November 24th, 2021. The Office of Tax  
16      Appeals granted Appellant three extension requests for  
17      additional time to file a reply brief, which was filed on  
18      May 23rd, 2022. The Department requested an opportunity  
19      to submit additional briefing, which it did on July 11th,  
20      2022. By letter dated August 11th, 2022, Appellant filed  
21      another brief and provided additional documentation.

22              From September 2022 through December 2022, the  
23      Department completed a second reaudit and made further  
24      reductions. From the date of the appeals conference on  
25      September 23rd, 2020, through the date of the matter --

1 through the date the matter became an appeal at the Office  
2 of Tax Appeals on March 8, 2021, there's no evidence of  
3 any unreasonable error or delay by the Department.  
4 Moreover, while the Department cannot grant relief from  
5 interest for periods of time the appeal is under the  
6 jurisdiction of the Office of Tax Appeals, the timeline we  
7 just referenced shows no unreasonable errors or delays  
8 caused by the Department.

9 Based on the foregoing, the appeal should be  
10 denied. Thank you.

11 JUDGE ALDRICH: Thank you.

12 At this time, we're going to take a recess of  
13 approximately 10 minutes, and then so we'll see each other  
14 at 10:14. Let's just make it 10:15. It'll be an  
15 11-minute recess, so quarter past the hour. All right.

16 Thank you.

17 (There is a pause in the proceedings.)

18 JUDGE ALDRICH: We're going to go back on the  
19 record in the Appeal of S. Bachor.

20 CDTFA gave its opening and closing presentation.

21 Mr. McClellan, would you like to proceed with the  
22 remainder of your time?

23 MR. MCCLELLAN: Yes, I would. Thank you.

24 JUDGE ALDRICH: Okay.

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I was actually trying to lookup the case that the Department cited in Duffy, hence, my urgings to tell me what their case was before the hearing so we can have an opportunity to prepare and look at things like that. I wasn't able to pull it up because we can't seem to get service in this room. My client, Sean, was able to pull up a summary of it. We don't see that it stands for the proposition that the Department suggests that it does. I've got some other authority that I think will help clarify that.

But for the sake of making certain I'm doing my job the best I can in the right way I think I should, I believe that as we discussed at the prehearing conference that if we need to leave the record open in order for us to address something, I think we ought to in this case, so I can look at that, read it, analyze it, and weigh in because I can't right now. Only to say that I know that I've read the case. We cite it in our brief, and I don't think it stands for that. But it's never been suggested that it does, so I'd like to have an opportunity to do that.

With that, the Department stipulates that there was in-state participation. Well just to back up to frame

1     it, so Regulation 1620 and related authority in summary  
2     essentially establishes two elements that have to be  
3     satisfied in order for sales tax to apply. One, being  
4     in-state participation and then two, the sale occurring  
5     inside the state. The Department has stipulated that  
6     there is in-state participation that is well established  
7     in our brief and in the related exhibits.

8             In summary, Mr. Bachor as 99 percent owner of  
9     Cmex is a full-time resident of California, and he  
10    operates the business from his office in California. So  
11    the question then turns to whether or not the sale  
12    occurred in California, or if the sale occurred in Mexico.  
13    And, of course, the Department stated that Code  
14    Section 6006, which defines sale, includes under  
15    subdivision (b) fabricating property for the consumers who  
16    furnishes the materials used and produced in the property.

17            The law effectively treats the sale of  
18    fabrication labor in the same manner as the sale of  
19    tangible personal property. Of note in this, there were  
20    materials applied to the materials provided by  
21    CMC-California by Cmex. So wood would essentially be --  
22    wood and lumber would essentially be sent down to Cmex  
23    where it would cut the wood, and then it would apply glue,  
24    nails, screws, stain and paint, and whatever else was  
25    needed to get it to the point where it was ready for

1 installation by CMC-California inside California.

2 And I guess on that point I should clarify that  
3 it wouldn't necessarily put all the cabinets together, so  
4 as they can take them into the home and screw them in, and  
5 there are photos to that effect. But it would get the  
6 materials in a condition that were ready for whatever job  
7 it was; stain, paint, things of that nature. So  
8 ultimately, as I'll speak to in a moment, a 1940 case, a  
9 very old case that we looked at in this regard says  
10 there's a newer different fabricated product that requires  
11 transportation back to Cmcx.

12 And it sounds like the Department's case  
13 essentially is that well, the fabrication was performed in  
14 Mexico, so the sale has to occur in Mexico. We haven't  
15 heard that before, but I will try to speak to that from  
16 what I have here today as best I can. And it's well  
17 established that of course sales tax applies to  
18 fabrication labor if the sale occurs in California.  
19 Banken is a 1947 California Supreme -- or I'm sorry --  
20 California Appellate case. Banken v. State Board of  
21 Equalization is a California Appellate case that  
22 establishes that dying fabrics provided by the customer is  
23 subject to sales tax.

24 In the Banken Court opinion, they noted a 1940  
25 California Supreme Court case Bigsby v. Johnson 99 Cal 2nd

1 268, which involved printing on paper stock furnished by  
2 the customer. And it states in relevant part at pages 270  
3 and 271 that there's a transfer of title and possession of  
4 the new or fabricated article within the meaning of the  
5 sales tax act and the State, therefore, properly asserts  
6 tax to be due on those transactions.

7 So in other words, when really, when this code  
8 section was first formed the courts addressed these sorts  
9 of questions because people were arguing, well, wait a  
10 second, tax applies to sales of TPP, not to labor  
11 functions. And it looked at these sorts of things and  
12 established that when there's fabrication labor performed  
13 since you have a new product, right? And that's the  
14 nature of fabrication as distinguished from repair labor,  
15 and it's something that comes up in these sorts of cases.

16 So when you fabricate something, it creates a new  
17 product. There is, of course, value there. And the  
18 person that's providing that fabrication labor certainly  
19 has an ownership interest. And as stated in the Bigsby  
20 case, there was ink applied to paper. And essentially,  
21 the person that applied that ink has a title interest in  
22 the ink itself, albeit a small amount.

23 So to address the Department's position somewhat  
24 on the fly here, I don't believe it's valid and to the  
25 extent that there is, in this case, fabricated wood and

1 other materials, which are being cut, which are being  
2 assembled, which are being stained, glued, painted. It's  
3 a new product, and the person that does that absolutely  
4 has an interest in that. And in order to satisfy the  
5 transaction we would need to transfer it.

6 There's the annotation -- there's also an  
7 annotation 435.1240, a 1952 annotation. It has a very  
8 long standing that establishes that textile painting of  
9 textiles provided by the customer is subject to sales tax.  
10 So, ultimately, we think it is well established that  
11 fabrication labor is -- is treated the same as sales of  
12 tangible personal property under the law and that  
13 ultimately, the provisions of Regulation 1620 apply in  
14 this case as they would normally with the standard sale of  
15 tangible personal property.

16 And that Code Section 6401 exempts transactions  
17 from use tax where sales tax applies. So sales tax  
18 applies here, the tax is due by the seller and the amount  
19 asserted against Appellant in that regard must be  
20 canceled. So again, I understand that the Department  
21 stipulated to local participation. I won't address that  
22 in my presentation.

23 And what we need do need to address is whether  
24 the sale is made inside California. So the rules in this  
25 regard we look to Regulation 1628 and California Uniform

1 Commercial Code Section 2401 that provide that if the  
2 contract expressly requires delivery at destination, the  
3 retailer completes his performance with reference to the  
4 physical delivery of the property on tender to the  
5 purchaser there.

6 Here, the driver is employed by the seller and --  
7 I'm sorry. Here, the driver is employed by the seller,  
8 and the contract between Cmex and CMC-California at  
9 paragraph 4-F provides that the delivery -- will require  
10 Cmex to deliver the finished product to the address of  
11 Appellant or any other address that he states on the dates  
12 and terms that are agreed upon in each order manufacturing  
13 request. That's provided under Exhibit 7, Appellant's  
14 Exhibit 7, and it can be found at page 590 of OTA's  
15 exhibit binder.

16 Section 4-I of the same contract states that Cmex  
17 will return with the finished product any material left  
18 over or had not been approved by the quality standards  
19 imposed by Appellant. So we think this further shows that  
20 Cmex was required to deliver the product to California,  
21 and that it was subject to acceptance at the time of  
22 delivery, that the sale was not complete until Cmex  
23 delivered it to California. CMC-California inspected and  
24 approved it. And at that point in time upon approval,  
25 Cmex has completed its obligations under the sale.



1           A quick point. The Department had stated that  
2       some of the materials were sent to Cmex for fabrication.  
3       I did speak with my client at the break about that. All  
4       the materials were sent to Cmex for fabrication. There  
5       wasn't another fabricator involved. But ultimately, if  
6       the materials weren't fabricated, then there's not going  
7       to be a fabricated charge that goes along with that. So  
8       it's -- I guess it's really kind of a moot point. It  
9       wouldn't be in the liability if, in fact, there were items  
10      that were not fabricated.

11           But in any event, the performance -- again, the  
12      performance under the sale was not completed until the  
13      products were delivered to Appellant in California  
14      pursuant to the contract provision that required them to  
15      do that. An employee of Cmex did transport the goods to  
16      California where they were subject to inspection, and upon  
17      approval, ultimately, the conditions under the agreement  
18      were satisfied.

19           Exhibit 10 includes documents showing the  
20      employee, Mr. Flores transported the goods through customs  
21      to Appellant's place of business. Again, Exhibit 10 was  
22      provided for that purpose to demonstrate that's what  
23      occurred. So the Department has said that the truck that  
24      was used was owned by Mr. Bachor and that it was  
25      registered in his sole proprietorship business name.

1 I looked at Exhibit H. I've talked with  
2 Mr. Bachor about that and, frankly, we don't dispute that.  
3 We don't think that it matters for a couple of reasons.  
4 First and foremost for the reasons that we've already  
5 discussed. The contract requires Cmex to deliver the  
6 goods to California. Okay. To the address of the  
7 purchaser inside California.

8 Now, logistically speaking, if Cmex takes the  
9 goods that they produce and they set them on a truck in  
10 Mexico, does that satisfy that obligation? Of course not.  
11 The goods are sitting in Mexico on a truck. And we don't  
12 see any basis in the law to suggest that doing that  
13 satisfies the obligations of the seller where it expressly  
14 requires the seller to deliver the goods to the address of  
15 the customer. So we don't think it matters.

16 The other factor that we think is -- is relevant  
17 is the driver is an employee of Cmex. And this issue came  
18 up in circumstances that I think that are relevant here  
19 under annotation 5570616. And in that case, the question  
20 was whether or not a delivery was made by facilities of  
21 the seller where the seller's trailer was used to deliver  
22 rock and gravel that it was selling. And in other words,  
23 did the seller maintain possession because its trailer was  
24 used to transport the goods?

25 Now, the trailer was towed, and the driver was

1       employed by someone else. And the opinion underlined in  
2       the annotation included that delivery was not by  
3       facilities of the retailer because the driver that pulled  
4       the trailer was not employed by the retailer. So by  
5       analogy in this case, the driver is a Cmex employee. The  
6       fact that he's using a truck that's owned by Mr. Bachor,  
7       who is by the way, of course, also a 99 percent owner of  
8       Cmex, doesn't change it.

9               You know, it doesn't create a scenario where the  
10       sale is complete. And at least under the authority that  
11       we found, if the vehicle was driven by an employee of the  
12       customer, you know, potentially that would change things.  
13       In other words, if the customer in this case,  
14       CMC-California, sends an employee in its truck down to  
15       Mexico, it picks up the goods. But what else at that  
16       point does the seller have to do? Maybe nothing.

17              But in this case, of course, the truck that CDTFA  
18       has pointed out is registered to Mr. Bachor is driven by a  
19       Cmex employee. We documented that, and that's well  
20       established under Exhibit 10. Annotation 5570640 stands  
21       for the same proposition. Essentially, addresses a  
22       similar issue to the annotation I just referred to as.

23              It's a 1964 annotation, and it says  
24       transportation by truckers in the retailers employment is  
25       transportation by the facilities of the retailer, rather

1       than by an independent carrier.

2               So the key is who is driving that truck? Who is  
3       paying that employee? Who is responsible for that  
4       employee? And, ultimately, in this particular case, which  
5       were not clear in these annotations where you have a clear  
6       contractual obligation to transport the goods to the  
7       destination. We don't really have to speculate on this  
8       because the facts aren't present to -- to necessitate it.  
9       But ultimately, even if the driver was a CMC driver and  
10      the truck was a CMC truck, does that satisfy the  
11      obligation in Mexico? It may not. Again we don't have to  
12      answer that question.

13              The facts as we have them here is we have a Cmex  
14      driver that is obligated under contract to deliver the  
15      goods to California where they're subject to inspection.  
16      And after that inspection, it's completed its obligations  
17      under the agreement. We don't think there's any question  
18      that the sale was completed in California. We think the  
19      facts are very clear on that point, and we think the law  
20      is very supportive in that regard.

21              We nonetheless would like to reserve the  
22      opportunity to take a look at Duffy because Mr. Bacchus  
23      has suggested that it says -- I believe if I understand  
24      him correctly, that essentially wherever the fabrication  
25      is performed, the sale occurs there as well. We don't

1 believe that that's supported but would like to have an  
2 opportunity to look at that.

3           Ultimately, as it pertains to transactions with  
4 Cmex, we think it's very clear that there is in-state  
5 participation. I'd like to go and just cite the authority  
6 so that's in the record as it pertains to -- to that  
7 factor, which is -- bear with me -- Regulation 1620  
8 subdivision (a)(1) subdivision (a)(2(a) and subdivision  
9 (a)(2(c). And that all goes to there being local  
10 participation. And I think when you look at what the law  
11 says in that regard and you look at the facts here, it's  
12 very clear that there was. And, again, I believe we have  
13 a stipulation on that point.

14           And as it pertains to the sales occurring inside  
15 the state, we think that the facts are very clear in that  
16 regard what's required under the contract, which is  
17 delivery to California. We've provided exhibits, which  
18 demonstrate that actually did occur, including  
19 documentation through customs where Alejandro is -- I'm.  
20 Sorry I forget his last name at the moment, but where the  
21 Cmex employee is passing through customs and identifies  
22 where it's going, which is Appellant's address. And then  
23 ultimately, under the agreement, that's where its  
24 obligations were satisfied.

25           With those two conditions having been met, we

1 think that the authority is clear that sales tax applies  
2 to these transactions and that the sales tax, of course,  
3 is imposed upon the seller. It has the obligation to pay  
4 it. And under 6401, the transaction is exempt from use  
5 tax. We're happy to address questions that you may have  
6 on that issue.

7 Turning to Issue Number 2. Ultimately, I work  
8 directly with the auditor on this, really, during the sort  
9 of the OTA scheduling and proceedings process. We were  
10 able to demonstrate to the auditor that -- that the  
11 documents that were provided previously to them by  
12 Mr. Bachor's prior representative, which is part of the  
13 record before you in the exhibit binder, support that  
14 these transactions are subject to sales tax or that tax  
15 was paid. And of course, you know, in part goes to the  
16 same exact issue that we just discussed in that we're  
17 detailing with California vendors.

18 For example, you know, one of the items still  
19 included is CMC doors and windows. And I looked it up on  
20 the internet, and it's located in Santa Ana, California,  
21 just right up the road. And I think, you know, those  
22 circumstances are presented throughout the remaining  
23 questioned transactions. There's a payment to a gentleman  
24 whose first name is Jose. I can't -- actually, it's  
25 Jesus. I can't recall his last name, but I did speak with

1 Mr. Bachor about it. And he's an independent contractor.  
2 He didn't sell any sort of materials at all, and it's a  
3 \$3,000 purchase.

4 The sum of it is we believe that there's enough  
5 documents, enough evidence for the Department to look at  
6 it and determine whether it's more likely or not that  
7 sales tax applies based on the documents that they've  
8 already reviewed, understanding how the business operates,  
9 and having an identification of the customer's name. Some  
10 of the customer's names have already been cleared up, for  
11 example, are Home Depot, Ace Hardware, things like that  
12 that are very well-known.

13 Some of these are a little less well-known, but  
14 when you look at them it becomes clear that they're  
15 California vendors. Ask more likely than not, under the  
16 preponderance of evidence standard, that they're subject  
17 to sales tax. And in all likelihood, we believe tax was  
18 actually paid on the transactions. We don't have invoices  
19 for all of them, but we think in all likelihood that's  
20 what occurred. But at a minimum, I think we can find that  
21 it's more likely than not that sales tax applies to those  
22 transactions also, tax due by the seller.

23 The final issue is whether or not, the employees  
24 of Cmcx should be treated as employees, in fact, of  
25 CMC-California. And the OTA decision in the prior matter

1 in this, of course, overturned a decision that the Board  
2 of Equalization heard. They ruled unanimously in favor of  
3 Mr. Bachor after an extensive hearing, and we think that  
4 that was proper. Understand we can't necessarily  
5 resurrect that at this point. But when I read the  
6 decision issued by OTA, it includes things that really  
7 aren't accurate like that in the Mapo case. They only  
8 provided fabrication services for their parent company,  
9 and in this case that's not true.

10 Well, that statement is not accurate. Cmex only  
11 provides fabrication and material purchases and sales for  
12 CMC-California. So Mapo in that case is aligned. Really,  
13 if you look at Mapo and the facts there and you look at  
14 this case and the facts here, the facts are -- I mean,  
15 they are basically 100 percent aligned. We don't think  
16 that it matters that the parent company, which I think was  
17 Disney in the Mapo case was a corporation, and in this  
18 scenario it's a sole proprietorship. We don't see any  
19 legal significance in that regard.

20 Ultimately, one difference that can't be disputed  
21 is that the ownership of Cmex is 99 percent of the sole  
22 proprietor, Mr. Bachor, and then 1 percent of a Mexico  
23 resident, which is a factor that is required under Mexico  
24 law. But certainly, for all intents and purposes, it  
25 doesn't matter. I mean, they're simply satisfying a



1 technicality under Mexican law.

2 The Mapo court found that the Board Equalization  
3 in that case was looking at form over substance. And we  
4 think that CDTFA is looking at form over substance when it  
5 seeks to seize on a 1 percent ownership that's purely the  
6 result of a technicality under Mexico law. And then  
7 ultimately under the circumstances this should be treated  
8 as in-house fabrication labor. And as we all know, when  
9 you're dealing with a construction contractor that's  
10 installing materials, that in-house fabrication labor is  
11 not subject to tax. Which is why Mr. Bachor in good faith  
12 has operated his business without a permit paying tax on  
13 what he understands to be all of his materials and not  
14 needing to register with CDTFA as a lump sum materials  
15 contractor often paying tax to his vendors.

16 And we don't think the fabrication should be  
17 treated as taxable at all. But ultimately, if it is --  
18 and we are not naive to the reality that there's a  
19 precedential decision that suggest that there's a  
20 separation there -- that those transactions are subject to  
21 sales tax. And with that, we will conclude our opening  
22 presentation.

23 I'm not at the moment seeing a need to call  
24 Mr. Bachor as a witness, and we'll address any questions  
25 that the Panel may have.

1 JUDGE ALDRICH: Thank you.

2 MR. MCCLELLAN: Thank you.

3 JUDGE ALDRICH: Just so I understand the request,  
4 you're asking to hold the record open based off of the  
5 Duffy case, so Duffy versus State Board of Equalization  
6 152 Cal.App.3d 165?

7 MR. MCCLELLAN: Yes, sir. And if I understood  
8 the Department correctly, they have stated that case, and  
9 I believe they said the Banken case also, stands for the  
10 proposition that we're performing fabrication labor that  
11 the tax applies, essentially, immediately as to  
12 fabrication is performed. And in this case, because the  
13 fabrication labor is performed in Mexico, that the  
14 transaction would necessarily be subject to use tax when  
15 it comes back into California.

16 JUDGE ALDRICH: So my question is that I believe  
17 or I note that in the May 23rd, 2022, Appellant's second  
18 brief --

19 MR. MCCLELLAN: Yes.

20 JUDGE ALDRICH: -- you cite to Duffy. And it  
21 seems like there's a difference in legal opinion between  
22 CDTFA and yourself and -- but let me take a moment and ask  
23 CDTFA.

24 Could you clarify your interpretation of Duffy?

25 MR. BACCHUS: Yes. It's not quite as far as

1 Mr. McClellan might have -- might have heard. So based on  
2 our reading of Duffy, Duffy says that there's no expressed  
3 requirement for -- I'll back up.

4 For Section 6006 subdivision (b), there's no  
5 expressed requirement that there be a transfer of title  
6 for a sale to occur, and that Duffy does cite to Banken,  
7 which states that sales tax applies to all transactions  
8 which fall within Section 6006 subdivision (b)'s terms.  
9 And so the Department uses that as kind of a basis or  
10 ground work with the language of subdivision (b).

11 And our interpretation is that the taxable event  
12 or the taxing event occurs when the fabrication or  
13 printing or processing, whatever the term is in 6006(b),  
14 when that happens. We're not saying Duffy expressly  
15 states that, but we are using the holdings from Duffy and  
16 Banken to make that interpretation.

17 JUDGE ALDRICH: Thank you. I do have some  
18 additional other questions. So Mr. McClellan indicated  
19 that the Department stipulated that there was local  
20 participation.

21 Mr. McClellan that's local participation of Cmax  
22 to be clear, the Mexico corp?

23 MR. MCCLELLAN: Yes, sir.

24 JUDGE ALDRICH: Okay. And is that accurate CDTFA  
25 that you do make that stipulation?

1 MR. BACCHUS: Yes, it is.

2 JUDGE ALDRICH: Okay. And for the definition of  
3 local participation, I'm going to ask this of both the  
4 party's representatives.

5 But the legal authority for that definition,  
6 where are you drawing that definition from, Mr. McClellan?

7 MR. MCCLELLAN: We would look to Regulation 1620  
8 and Revenue & Taxation Code Section 6203.

9 JUDGE ALDRICH: Okay. And for CDTFA, is that the  
10 same legal authority for your definition of local  
11 participation?

12 MR. BACCHUS: Essentially, the Department has had  
13 the same basic definition or interpretation of local  
14 participation for as long as I can remember that we have  
15 put forth in other cases dealing with local participation,  
16 which is some type of meaningful interaction with the sale  
17 at a local business location of the retailer.

18 JUDGE ALDRICH: Okay. At this juncture I'm going  
19 to see if my co-Panelists have questions for the parties.

20 Judge Long, would you like to --

21 JUDGE LONG: Yes, I do have a couple of questions  
22 for Appellant. First, I just wanted to make sure that I'm  
23 clear with respect to the briefing. Appellant's initial  
24 briefing states that Cmex is -- Cmex cannot legally sell  
25 materials as part of its registration as a maquiladora,

1 and I want to make sure that I understand the position has  
2 changed to Cmex is the retailer and their sales are  
3 subject to sales tax?

4 MR. MCCLELLAN: Well, I can't speak to that  
5 because I didn't prepare that briefing. And I can't  
6 recall having ever read that. But what I can say is this,  
7 that I know for a fact that Cmex does purchase materials,  
8 and we've documented that in the exhibits. Let me just  
9 give you the exact exhibit number. So Exhibit 9 are  
10 examples of materials that are purchased directly by Cmex.  
11 So it's buying a, you know, what I would call a material  
12 amount in value of materials, which would include stain,  
13 paint, screws, nails, thinner, basically everything that  
14 it needs to create the new product.

15 Now, we're not arguing that the wood that is  
16 fabricated, that the title to that transfers. But  
17 ultimately, we do believe that there is title within the  
18 meaning of 6006. We think that the Bigsby Cal Supreme  
19 Court case says it the best way that I've read it, which  
20 in summary is that within the meaning of Code  
21 Section 6006, there is essentially a transfer of title and  
22 possession of the new or fabricated parts. In this case,  
23 and really in any case where there's technically  
24 fabrication, it's a new product, right.

25 So our position is that upon transfer -- that

1       upon transfer of those products there's a sale under 6006.  
2       The sale is completed in California. Mr. Bachor informs  
3       me that Cmex can't sell materials in Mexico. It can sell  
4       materials in California outside of Mexico. But I don't  
5       want to disregard what Mexico law says, but the facts are  
6       what the facts are irrespective of the Mexico law says.

7               JUDGE LONG: Okay. And then with respect to the  
8       application of Mapo, given OTA's previous position, which  
9       I understand you disagree with, are there any  
10      distinguishing factors between the business operation in  
11      this appeal and the business operation in the previous  
12      appeal, which would allow for a finding that Mapo applies?

13             MR. MCCLELLAN: None that I'm aware of. No.

14             JUDGE LONG: Okay. Thank you. I don't have  
15      anymore questions.

16             JUDGE ALDRICH: Thank you.

17             Mr. McClellan, is it disputed that Cmex did not  
18      have a seller's permit in California?

19             MR. MCCLELLAN: That's not disputed.

20             JUDGE ALDRICH: Okay. And -- or registration for  
21      use tax?

22             MR. MCCLELLAN: It did not. I mean, at the end  
23      of the day, Judge, as we know, the position of Appellant  
24      was that there's no obligation because it's essentially  
25      treated as in-house. And that's why we have the

1 alternative argument because ultimately, I think there is  
2 truth in that. And at least there was a good-faith belief  
3 by Mr. Bachor and by Cmex that, essentially, it was  
4 performing a nontaxable function. That, you know, the  
5 fact that it was -- that it was buying and applying  
6 materials and so forth I guess sort of complicates that.

7 But, ultimately, that, you know, that's not  
8 disputed that there was no permit. But the reality is  
9 that when I became involved with this case -- and truth be  
10 told, before I became involved with this case, I was  
11 looking at it as a practitioner and thinking, I wonder why  
12 no one is asking the question that I'm asking now or the  
13 aspect that I'm asserting now; which is to say, is it  
14 sales or use tax that applies? And, obviously, we think  
15 sales tax applies.

16 JUDGE ALDRICH: Thank you.

17 MR. MCCLELLAN: Sure.

18 JUDGE ALDRICH: Judge Ridenour, would you like to  
19 ask questions of the parties?

20 JUDGE RIDENOUR: No, thank you.

21 JUDGE ALDRICH: Okay. And so if I may, with  
22 respect to the request to leave the record open, do you  
23 have a proposed scope of that request?

24 MR. MCCLELLAN: You know, I would defer to you,  
25 Mr. Aldrich, as far as what you're comfortable with. My

1 schedule I would say is such over the next week or so that  
2 I can jump on this right away. Obviously, I'm pretty  
3 eager to read the case. You know, I also see that we  
4 cited it. I know that I've read it. And I just want to  
5 make sure that, you know, I'm doing everything I feel like  
6 I should do. And that's, you know, in all fairness this  
7 is what we're asking for. You know, this is what we  
8 wanted to know so we could come here today fully prepared  
9 and ready to address these things.

10 JUDGE ALDRICH: Okay. Thank you. I do believe  
11 Judge Ridenour has a question.

12 JUDGE RIDENOUR: Thank you. I had a change of  
13 mind.

14 CDTFA, what is your position regarding which  
15 company delivered the TPP into California, and what facts  
16 support that, please?

17 MR. BACCHUS: We -- so our position is that the  
18 fabricating materials were delivered on a truck owned by  
19 Appellant. We do not dispute that it was an employee of  
20 Cmex that was driving the truck. But our -- basically,  
21 our determination is that who was driving the truck isn't  
22 the determining factor. It is who owns the vehicle.

23 If Cmex owned the vehicle, then I think our  
24 position would be that the materials were delivered by  
25 facilities of the retailer, such that the -- any transfer



1       that's required, again, we don't believe a transfer is  
2       required but if there is, would have happened in  
3       California. But because the materials were placed on  
4       Appellant's truck -- excuse me -- in Mexico, that is where  
5       the transfer from Cmax to Appellant occurred because it  
6       was Appellant's truck.

7               JUDGE RIDENOUR: Thank you.

8               MR. MCCLELLAN: Judge, may I respond to that?

9               JUDGE RIDENOUR: Yes.

10              MR. MCCLELLAN: It just occurred to me as  
11       Mr. Bacchus was speaking, that the law is fairly clear  
12       that if, for example, a seller hires a common or  
13       independent contractor to transport the goods, the  
14       obligations under the sale aren't satisfied by merely  
15       transferring the goods to the carrier if there's a  
16       provision in the agreement that requires delivery to the  
17       customer, which exist here.

18              So aside from the factors and the authority that  
19       I address regarding who is actually driving the truck, I  
20       think, you know, the reality is that because we have a  
21       clear term under the agreement that requires the seller to  
22       deliver the goods to California and that it's subject to  
23       inspection once they are delivered, that it doesn't leave  
24       room to suggest that the obligations for delivery purposes  
25       were somehow satisfied just because Mr. Bachor owned the

1 truck.

2 JUDGE RIDENOUR: Thank you.

3 MR. MCCLELLAN: You're welcome.

4 JUDGE ALDRICH: Okay. Mr. McClellan, would you  
5 like to make a final closing statement or a rebuttal?

6

7 CLOSING STATEMENT

8 MR. MCCLELLAN: Just to say I guess we appreciate  
9 the opportunity to, you know, present before OTA today.  
10 And, you know, Mr. Bachor has really had a long run here  
11 with this scenario. I can say that he's a gentleman and a  
12 good person. There was never sort of idea or intent or  
13 effort to create a situation where there would be a  
14 in-run-around, any sort of tax obligation.

15 If, you know, these fabrication functions are  
16 performed in-house at best we have a use tax obligation on  
17 those materials that are being applied by Cmex, right.  
18 And there's no fabrication labor at all. So ultimately,  
19 aside from that, I think that we've made our positions  
20 clear as to why we believe sales tax applies to the  
21 transactions. We think the facts, we think the law, and  
22 we think the evidence all support that conclusion.

23 And we thank you for your time.

24 JUDGE ALDRICH: Thank you. With respect to your  
25 request for leaving the record open. On the one hand,

1     there's been extensive briefing in this appeal, which  
2     would weigh against it. But, you know, prior to the  
3     prehearing conference and during the prehearing  
4     conference, you indicated that you were concerned of legal  
5     surprise. Also against granting additional briefing is  
6     that this is -- it would be a legal interpretation, which  
7     I believe it's the rule of the Panel to decide which  
8     parties has that interpretation correct, if it's correct.

9             However, to cure any potential concerns of  
10    surprise, I'm inclined to allow you the opportunity to  
11    submit additional briefing. However, I'd like it to be  
12    brief. So if you could limit it to something like ten  
13    pages, and to the scope of Duffy and the respective  
14    analysis concerning Duffy. And, you know, so the hearing  
15    binder as both parties are aware is little over  
16    1,700 pages.

17            That's enough material for us to consider, so  
18    brief would be the emphasis there. CDTFA would have  
19    30 days upon receipt. Mr. McClellan, you have 30 days to  
20    produce your brief and it would close thereafter. We'd  
21    send the parties a letter confirming closure of the  
22    record.

23            MR. MCCLELLAN: Thank you.

24            JUDGE ALDRICH: Okay. With that said, thank you  
25    everyone for your time. We're ready to conclude the oral

1       hearing. And the record is not closed. I'll produce a  
2       minutes and orders subsequent to this hearing to give  
3       direction, but you have the instructions.

4               (Proceedings adjourned at 11:02 a.m.)

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I, Ernalyne M. Alonzo, Hearing Reporter in and for  
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That the foregoing transcript of proceedings was  
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I further certify that I am in no way interested  
in the outcome of said action.

I have hereunto subscribed my name this 17th day  
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