

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
S. MATHER and N. MATHER,) OTA NO. 18093787
)
 APPELLANT.)
)
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Wednesday, September 20, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 1:34 p.m. and concluding at 4:07 p.m. on
Wednesday, September 20, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ KENNY GAST

Panel Members: ALJ OVSEP AKOPCHIKYAN
ALJ CHERYL AKIN

For the Appellant: JON SPERRING
DERRICK BRANNAN
MICHAEL ZARGARI
GLENN NEWMAN

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

DESIREE MACEDO
NATHAN HALL

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-42 were received at page 6.)

(Department's Exhibits A-I were received at page 6.)

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California; Wednesday, September 20, 2023
1:34 p.m.

JUDGE GAST: We are on the record.

This is Appeal of Mather, OTA Case No. 18093787.
Today is Wednesday, September 20th, 2023, and the time is
approximately 1:34 p.m. We're holding this hearing
electronically with the agreement of all the parties.

My name is Kenny Gast, and I am the lead
Administrative Law Judge for this appeal. With me today
are Administrative Law Judges Ovsep Akopchikyan and Cheryl
Akin.

At this time, I'd like to please ask the parties
to identify yourselves by stating your full name, first
and last, for the record, beginning with Appellants.

MR. SPERRING: Jon Sperring.

MR. BRANNAN: Derrick Brannan.

MR. ZARGARI: Michael Zargari.

MR. NEWMAN: Glenn Newman.

JUDGE GAST: And Franchise Tax Board.

MR. HALL: I'm Nathan Hall on half of Respondent.

MS. MACEDO: Desiree Macedo on behalf of
Respondent.

JUDGE GAST: Thank you.

So the issue in this case is whether Appellants

1 are entitled to other state tax credit for amounts paid
2 for the New York City Unincorporated Business Tax and the
3 Metropolitan Commuter Transportation Mobility Tax.

4 Both parties submitted exhibits for the record --
5 evidentiary record. Appellants have provided Exhibits 1
6 through 42, and FTB did not object to the admissibility of
7 these exhibits. Therefore, these exhibits are entered
8 into the record.

9 (Appellant's Exhibits 1-42 were received
10 in evidence by the Administrative Law Judge.)

11 JUDGE GAST: FTB provided has provided Exhibits A
12 through I, A as and apple, I as in I am. Appellants have
13 not objected to the admissibility of these exhibits.
14 Therefore, these exhibits are entered into the record as
15 well.

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

18 JUDGE GAST: One point of clarification, though,
19 is that some of the exhibits contain copies of tax
20 statutes, the state tax opinion, tax forms, publications,
21 and instructions to tax forms. Those will be considered
22 as legal arguments and not evidence.

23 Okay. Moving along here. Appellants will have
24 90 minutes to present. That will include questions or
25 testimony from their expert witness. That will also

1 include questions from FTB, if FTB has any questions of
2 the witness. Appellants will be redirect the witness, and
3 the ALJ panel will then have an opportunity to ask
4 questions of Appellants and their witness. And then we'll
5 move to -- we'll probably take a 10-minute break then,
6 maybe earlier, depending on how things go. And then FTB
7 will 90 minutes as well for their presentation. We'll
8 probably take a 10-minute break after that, and then I'll
9 turn it over to the panel for questions. And then
10 Appellants will have the final say. They will have
11 30 minutes.

12 So with that, unless there are any questions from
13 the parties, Appellants can begin. They will have
14 90 minutes.

15

16 PRESENTATION

17 MR. SPERRING: Good afternoon, Judge Gast,
18 Judge Akin, and Judge Akopchikyan. Thank you for your
19 time today.

20 For the record, my name is Jon Sperring, and I'm
21 with PricewaterhouseCoopers. I'll be discussing the net
22 income portion of today's presentation.

23 My colleague, Derrick Brannan, will review the
24 framework for consideration for both the New York City
25 Unincorporated Business Tax and the Metropolitan Commuter

1 Transportation Mobility Tax for the purposes of the other
2 state credit and address issues raised by Respondent.

3 We also have Michael Zargari from
4 PricewaterhouseCoopers' New York office who has extensive
5 knowledge of the New York City Unincorporated Business Tax
6 and the Metropolitan Commuter Transportation Mobility Tax.

7 Our expert witness is today Glenn Newman, a
8 former president of the New York City Tax Commission and
9 Tax Appeals Tribunal. Mr. Newman is an expert with regard
10 to the background operation and implementation of New York
11 tax laws.

12 Before I turn the presentation over to
13 Mr. Brannan, I'd like to confirm that you have in each of
14 your position Appellant's slide deck, which we will
15 reference throughout the presentation.

16 Thank you.

17 JUDGE GAST: This is Judge Gast. We have the
18 presentation. Thank you.

19 This is Judge Gast. Mr. Brannan, we cannot hear
20 you. You might be muted.

21 MR. BRANNAN: I'm mute.

22 JUDGE GAST: There you go.

23 MR. BRANNAN: That's crazy. Thank you very much.
24 My apologies. Technology has never been my strong point,
25 but I think this is far more convenient given the number

1 of people that are presenting here today.

2

3 PRESENTATION

4 MR. BRANNAN: Again, thank you all for your time.

5 You know what we'll do is walk through the
6 slides, and what I'd like to do is give a short overview
7 of the California law. And then what I'll do is ask
8 Mr. Newman to kind of give some of his background and
9 also, kind of walk through the overview of the two
10 New York taxes that we're discussing here today. And then
11 I think we'll get to, you know, some of the points that
12 are raised in the briefs. And that will complete kind of
13 the initial portion of our presentation.

14 Walking through the slides, you know, we'll just
15 jump in. Slide 2 is really just a restatement of the
16 issue that you read, Judge Gast.

17 I embellished a bit. There are a couple of
18 abbreviations that I've placed in there. And just, for
19 the record, you know, I have habitually called it the
20 MCTMT. New York smart people will call it the Mobility
21 Tax. So my apologies at the beginning as we move back and
22 forth between those two -- those two references to the
23 Mobility Tax.

24 What I'd like to do is, I think the kind of
25 underlying facts are very straightforward. And on Slide 3

1 you'll see them lifted out -- or listed out. Appellants
2 in this case were California residents during the years at
3 issue. Appellant Scott Mather -- Mr. Mather was a partner
4 in both Pacific Investment Management Company, LLC, PIMCO,
5 LLC, and PIMCO Partners, LLC. PIMCO Partners, but
6 collectively just refer to them as PIMCO. Both PIMCO
7 entities are partnerships for California tax purposes.

8 PIMCO is headquartered in Newport Beach,
9 California and has offices throughout the world, including
10 New York. PIMCO and Mr. Mather, as a PIMCO partner, were
11 subject to and paid New York State taxes, the UBT or
12 Unincorporated Business Tax and the MCTMT, based on
13 Mr. Mather's distributive share of PIMCO earnings. That's
14 it from a factual standpoint. The rest of this is about
15 the law and what those laws mean and how they are applied
16 for purposes of the Mathers and the other state tax credit
17 here of California.

18 One last point that is listed on the slide,
19 there's, you know, a certain number of, you know,
20 documentary questions that have arisen before the hearing.
21 And the amount, calculation, and payment of these taxes
22 are subject to proof, which will be provided in accordance
23 for the prehearing order after the hearing. So we're not
24 going to spend a lot of time today going through the
25 numbers.

1 If there are questions, we can certainly do our
2 best to respond. Hopefully that's consistent. Probably
3 should have brought that up before the hearing, but I
4 wanted to bring that up early with regard to the facts,
5 Judge Gast.

6 JUDGE GAST: This is Judge Gast. Yes, that is
7 consistent. And as I mentioned prior to this hearing, we
8 will keep the record open for submissions, and I will
9 mention that briefly at the end.

10 MR. BRANNAN: Perfect. Thank you very much. I
11 didn't mean to stall out there, but I did want to make
12 that -- you know, put that on the record for everybody's
13 benefit.

14 So at the end of the day the case is about the
15 California other state tax credit. In California --
16 basically Slide 5 has a couple of legal highlights.
17 California taxes its residence on their world-wide income
18 from all sources. Other states may tax income earned in
19 resource to that state regardless of residence. Unless
20 absent some relief mechanism, the California residents may
21 owe tax in California and in another jurisdiction based on
22 the same income. And we don't like that.

23 California mitigates that, the impact of this
24 potential for double tax by providing this other state tax
25 credit. And it's that guiding principle that really

1 should, you know, kind of help us construe and interpret
2 every one of the provisions that we talk about here as
3 this presentation goes on.

4 So simply put, you know, Slide 6, the OSTC, you
5 know the basic framework for it is set forth in Revenue &
6 Taxation Code Section 18001. In accordance with that
7 section, residents shall be allowed a credit for net
8 income taxes imposed by and paid to another state. It's a
9 very simple statement of the rule. For our reference
10 purposes, in 18006 it makes clear that a member of a
11 partnership is allowed to treat the pro rata share of net
12 income taxes paid to another state by the partnership as
13 if those taxes had been paid directly by the partner.
14 Unless there's a question with respect to who gets benefit
15 for the payment, we're probably not going to bring that up
16 again. I think it's pretty straightforward.

17 So when we talk about the other state tax credit,
18 it's, you know, as with many things under the law, the
19 statement itself is simple. But the limits and exclusions
20 end up taking more time to talk about than the actual rule
21 or the benefit provision of the credit itself. So first
22 of all, we have to hit some of those limitations and talk
23 about how they could apply.

24 Under Rev & Tax Code Section 18001(a)(1), the
25 credit shall be allowed only from taxes paid to the other

1 state on income derived from sources within that state,
2 which is taxable under its laws irrespective of the
3 residence or domicile of the receipt. In other words,
4 income based on source, rather than residency in the other
5 state, and the source of income shall be determined using
6 California nonresident sourcing rules.

7 Slide 8 further limitations in connection with
8 USTC under 1800183, the maximum credit is limited to the
9 amount of tax that would have been paid on the same income
10 in California. There's a couple of case cites there that
11 ended up kind of clarifying what that -- that mechanism
12 and how it works. Additional limitations, the tax is paid
13 under 18001 do not include any preference, alternative, or
14 minimum tax comparable to the tax imposed by Section
15 17062. And also, the credit shall be not be allowed. If
16 the other state allows residents of the state of credit
17 against the taxes imposed by the other state. In other
18 words, there's no double credit. And all these things
19 make sense from a very practical standpoint. But,
20 nonetheless, they do kind of factor into the consideration
21 and eligibility for the credit.

22 So what happens is we put all these things
23 together, and we move to Slide 9. And what we -- the way
24 we view this whole issue is kind of there's a framework
25 for how we have to look at. And it's, you know, just kind

1 of walking through the statutory authorities again. But
2 they are all on one page here. It's the only advantage of
3 Slide 9. And it's income from sources within the other
4 state. It's determined based on California law. Tax must
5 be imposed by the other state. The big issue here is it
6 imposed by the state or by a locality of some sort. Tax
7 must be paid to the other state, and tax must be imposed
8 on that income. Kind of the big three, there. Those are
9 the ones that are specifically mentioned in 18001. And
10 then it's not limited by some other mechanism.

11 So what we're going to do is try and address
12 those points as we walk through, you know, both with
13 regard to, you know, what happens in California, but most
14 notably for what happens in New York. And that's why
15 we're very happy to have Mr. Glenn Newman with us here
16 today.

17 And on Slide 10 you see kind of just identifying
18 Mr. Newman. What I'd like to do is to introduce him as an
19 expert witness, you know.

20 With that, Mr. Newman, if you would give us a
21 little bit of background about yourself, your education.
22 And I think everybody is comfortable with your
23 qualifications. So we can probably move through that
24 quickly.

25 JUDGE GAST: This is Judge Gast. Before you do

1 that, I'd like to swear him in.

2 MR. BRANNAN: Sure. Perfect. Thank you very
3 much.

4 JUDGE GAST: Okay. Mr. Newman, will you please
5 raise your right hand.

6
7 G. NEWMAN,

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

11
12 JUDGE GAST: I'm sorry. Mr. Newman, it's kind of
13 hard to hear you.

14 MR. NEWMAN: Is that better?

15 JUDGE GAST: Yes. Thank you.

16 MR. NEWMAN: I'll speak up.

17 I received my Bachelor of Arts Degree from the
18 State University of New York in Albany and then attended
19 Borden University School of Law where I received the JD
20 Degree. I was part of the honors program and was hired by
21 the New York City Office of the Corporation Council under
22 the honors program where I was a staff attorney, initially
23 handling matters of the New York City taxation, drafting
24 legislation, drafting regulations, litigating tax cases in
25 the courts of New York up to the US Supreme Court and

1 advising the Taxing Authorities, Property Finance in New
2 York City.

3 From there, I -- I was appointed Mayor Koch as a
4 Deputy Commissioner for the Department of Finance. I was
5 Deputy Commissioner for Audit and Enforcement, which
6 involved handling, supervising, and managing the audit
7 program for the City of the New York. After six years
8 there, I moved to law firm Roberts and Holland, a boutique
9 tax law firm where I was a partner there for eight years.
10 And then after the election of Michael Bloomberg, I was
11 appointed to be the president of the New York City Tax
12 Commission and Tax Appeals Tribunal.

13 The Tax Commission hears property tax appeals,
14 not a concern here. The Tax Appeals Tribunal heard
15 litigation arising from the various tax laws. And those
16 issues range from apportionment and the imposition of
17 taxes, constitutionality of the taxes. And I was in those
18 positions for just over 12 years. After that, in 2015
19 when I left the City of New York, I started working at
20 Greenberg Traurig as an attorney advising people on state
21 and local tax issues primarily in New York and Northeast.
22 And here I am now.

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Q Perfect. Thank you very much, Mr. Newman. I kind of maybe stating the obvious, but I'll ask nonetheless. During those many years in the various positions you've had, assuming, you know, rather constant exposure to New York State taxes, New York City taxes, and the Mobility Tax as well?

MR. BRANNAN: With that background, you know, I don't want to get too caught up in the formalities recognizing this is, you know, an administrative forum, but I would offer Mr. Newman as an expert on New York state tax, the New York City Unincorporated Business Tax and the MCTMT as well. We'll continue absent any questions. At that point with regard to Mr. Newman's qualifications, we'll move on then.

Q Mr. Newman, what I'm going to do is kind of walk through -- and we've chatted a couple of times before here. That's not a secret. What I'm going to do is kind of walk-through kind of the big picture structure, New York state taxes, and then walk through some the, you

1 know, kind of the framework questions, if you will, in
2 connection with the MCTMT or the Mobility Tax and also the
3 UBT.

4 So let's start. We move into -- it's Slide 11 or
5 Slide 12, excuse me.

6 And, Mr. Newman, you do have those slides in
7 front of you, I'm hoping.

8 A I do not --

9 Q Okay.

10 A -- have the slides in front of me.

11 Q Well, I don't know if you have them there. If
12 not, I think we'll be fine anyway. Let's -- I don't
13 think -- I don't think it's critical from your
14 perspective. You know all this stuff anyway. So Slide 11
15 has two provisions of the New York State Constitution, and
16 I'm just going to read excerpts from it. But the first
17 provision is that the legislature shall enact and may
18 amend statute of local governments granting to local
19 government power, local legislation, and administration.

20 And essentially what that constitutional
21 provision does is it gives -- and you can stop me if I'm
22 wrong. But I mean, it basically gives authority -- it
23 places authority in the State to govern the actions of the
24 subdivisions within the State. Is that --

25 A That is correct. And the State is sovereign and

1 it sets the rules. It's the State of New York that sets
2 the rules and particular on taxation.

3 Q Perfect. The second provision that's up on the
4 slide is, you know, it goes specifically to taxation.
5 It's Article 16, Section 1, the power of taxation shall
6 never be surrendered, suspended, or contracted away except
7 as to securities issues for public purposes pursuant to
8 the law. Short question, hopefully, clear from the, you
9 know, the tenor of the language of the constitution. I
10 mean, that reserves the power to tax in the State;
11 correct?

12 A Well, the State is sovereign and sovereign is the
13 one that has the authority and the power to impose tax.

14 Q Thank you.

15 MR. HALL: Sorry to interpret, Judge. Respondent
16 is noting -- I don't know if this matters to the tribunal,
17 but these questions are all leading questions. So, you
18 know, to the extent that opposing Counsel cannot lead the
19 witness, you know, we would note that in the record.

20 JUDGE GAST: Thank you, Mr. Hall. I'm going to
21 allow Mr. Brannan to continue to ask questions. The panel
22 will ultimately decide, you know, what weight to give to
23 the witness testimony. So I will let Mr. Brannan continue
24 with the questions. But thank you for that clarification.

25 You may proceed, Mr. Brannan.

1 MR. BRANNAN: Thank you, Judge Gast.

2 And point taken, Mr. Hall. I'm really just
3 trying to move things through, especially, with my witness
4 who can't see the slides at the moment.

5 BY MR. BRANNAN:

6 Q So, anyway, well, you know, just a couple of
7 questions with respect to the New York Authority based on
8 those provisions we just referenced, Mr. Newman. And keep
9 in mind that the years we're talking about here -- I don't
10 the it matters much -- are the 2012, '13, and '14 years.
11 But is there -- you know, when it comes to the power to
12 tax, either the UBT or MCTMT, does the State make those
13 decisions, or do the localities? Does the City or the,
14 you know, the MTA, the Transit Authority make those
15 decisions?

16 A The state legislature, along with the governor
17 approving the legislation or vetoing it and having that
18 veto overridden. It's the state legislature that sets all
19 of the details of the taxes that are enabled throughout
20 the State of New York. It's the State that determines
21 the -- how the taxes are to be imposed, how they are to
22 work in terms of apportionment and imposition in what is
23 taxed. And, by the way, it's -- you need the general law
24 of the State of New York to have any exemptions. So any
25 exemptions that are provided in the statute are -- must be

1 done through state law.

2 Q And this -- this is kind of my word, plenary
3 authority over these functions. It applies to both the
4 UBT and the MCTMT?

5 A That's correct.

6 Q So there's no scenario under which, you know,
7 either the Transit Authority or New York City could raise
8 or alter the rates, for example, in connection with either
9 of those taxes?

10 A That's correct. The state legislation sets the
11 tax rate, sets the exemptions, and the procedures for
12 appeal, and all of the details of the tax law.

13 Q Okay. Thank you. We're going to move on to the,
14 you know, kind of an individual tax and I'm going to
15 apply. You heard us setup the framework for California,
16 and we're going to kind of walk through some of those
17 questions, specifically, with regard to first, the
18 Mobility Tax, and then in connection with the
19 Unincorporated Business Tax.

20 So if we get into Slide 14 at this point, you
21 know, Mr. Newman, we're going to focus now on the Mobility
22 Tax. And would you describe kind of the general
23 parameters of the Mobility Tax as they would be applied to
24 Mr. Mather, a partner at PEMCO during these years?

25 A All right. The Mobility Tax applies, is imposed

1 upon self-employment, and that includes partnerships and
2 limited liability companies as well as sole
3 proprietorships. So the tax is imposed on the net income
4 from the operation -- the business operations of the
5 entity within the designated area, New York City and the
6 12 counties surrounding it to fund transportation.

7 Q Two, kind of, one-off questions. I mean, out
8 here in California we don't have anything that looks like
9 the Transit Authority or the Transit District. Can you
10 just talk -- I mean, how big is it? It's not just the
11 City; right?

12 A That's correct. The Metropolitan Transit
13 Authority covers New York City, Nassau County, Suffolk
14 County, and several counties north of the New York,
15 including Westchester, Rockland, Dutchess that are
16 serviced by Metro-North, which is one division of the
17 Metropolitan Transit Authority. There's the Long Island
18 Railroad that services Suffolk and Nassau, and this
19 Mobility Tax raises revenue for those operations.

20 Q So thank you very much. The background is
21 helpful because I remember the first time I heard it. It
22 was just like, wow, that's big. You know, that is kind of
23 is an understatement for sure. The other point of
24 confusion that has come up during the briefing of this,
25 there are two Mobility Taxes. And the one that you've

1 already described, the net earnings applies to us. What's
2 the other one, and why doesn't that apply to what we're
3 talking about here today?

4 A The corporate taxpayers. Corporations pay on a
5 tax based on the wages paid to employees, and that's
6 entirely different, separate from the Mobility Tax and
7 position on self-employment, which is based on net income.

8 Q So, again, I think this is a repeat, but the --
9 like the mobile -- the Metropolitan Transportation
10 Authority, the MTA, they don't have an authority over this
11 because it's all implemented by the State?

12 A That's correct. And the MTA a is feature of the
13 State created for the State to provide transportation in
14 the district that it covers.

15 Q Great. So when folks pay this tax, who do they
16 send the check to?

17 A The State of New York Department of Taxation and
18 Finance.

19 Q And it could be paid either, in this case, from
20 Mr. Mather or PIMCO. Either one of them could be paying
21 this tax, even on behalf of Mr. Mather as an individual
22 through, you know, say a composite return situation?

23 A Well, that is correct. You can pay individually.
24 Each particular partner can pay on their own. Or more
25 frequently, there's a composite return where the

1 partnership will report and pay the tax on behalf of the
2 department.

3 Q Okay. Let's -- and moving on to Slide 15. Let's
4 talk -- focus a little bit more on the tax base. Would
5 you describe the tax base for the tax and net earnings on
6 self-employment for us, please?

7 A Yes. It starts with federal taxable income.
8 There are certain modifications, but it's net income that
9 is then apportioned based on the activities within the
10 district.

11 Q And how is the net income, you know, how do you
12 determine what net income is sourced to the district?

13 A If you look at -- well, there's a three-factor
14 formula for certain years. The -- with rating -- with
15 property payroll and receipts. Subsequently, it's a
16 three-factor payroll with different ratings.

17 Q So for these years, for '12 through '14, they
18 were still using the evenly weighted three-factor?

19 A That's correct, the evenly weighted three-factor
20 formula. And then later years moved to more and more of
21 the receipts factor as California did.

22 Q Correct. Correct. So does the Mobility Tax
23 allow a credit for California taxes paid?

24 A No. The Mobility Tax does not allow a credit
25 because the income is apportioned and only that portion of

1 the income that represents activity within the district is
2 subject to tax. So there's no need for a credit.

3 Q Different question but maybe a little obscure as
4 well. But does the Mobility Tax include any preference,
5 alternative, or minimum tax item?

6 A No. There is no preference or an alternative tax
7 or minimum tax in the Mobility Tax.

8 Q Okay. Thank you very much. I think that's all I
9 have on the Mobility Tax. So, you know, very -- drawing a
10 line here. I'm trying to move on to the same series of
11 questions, really, in connection with the Unincorporated
12 Business Tax, New York City Unincorporated Business Tax.
13 So when this -- this tax was first adopted in 1966; is
14 that correct?

15 A That's correct. Chapter 772 in the laws in 1966.

16 Q Okay. Thank you. 1966. So can you describe,
17 you know, like you did with the Mobility Tax, the general
18 parameters of UBT as they would be applied to PIMCO and
19 Mr. Mather as a partner with PIMCO during the years that
20 are under consideration?

21 A So the Unincorporated Business Tax is a tax that
22 supplements the General Corporation Tax at time and now.
23 The -- there is a corporate tax on those who are engaged
24 in business in New York City in corporate form. And the
25 Unincorporated Business Tax is also a tax on that income

1 based -- that is imposed on sole proprietorships,
2 unincorporated businesses, including partnerships and
3 limited liability company.

4 Q And as with the Mobility Tax, does the City have
5 any authority to change, you know, aspects of the UBT
6 without legislative approval?

7 A No. The State of New York set a model local law
8 as well as the Enabling Act and the City has no authority
9 to deviate from those. In fact, the rate is set by the
10 State of New York and the state legislation, and any
11 exemptions are provided under the state law. The City has
12 no authority to grant additional exemption or to change
13 the rate.

14 Q And a little different from the Mobility Tax we
15 talk about, it is applied to the partnership, PIMCO, not
16 to the individual partner; is that correct?

17 A That's correct.

18 Q But when PIMCO pays the tax, those amounts are
19 attributable to Mr. Mather, you know, probably based on
20 his partnership interest?

21 A That's in the K-1 that Mr. Mather would have
22 received from the partnership which show that payment, and
23 it would be related to his partnership interest on the
24 percentage of his interest in the entity.

25 Q And who is the UBT paid to in New York?

1 A So the Unincorporated Business Tax is paid to the
2 Commissioner of Finance of the City of New York. And the
3 City of New York collects taxes on behalf of the State and
4 transfer tax in other areas.

5 Q And that process is, again, that's subject to
6 discretion, if you will, with the State of New York, just
7 like every other component of this tax; correct?

8 A Well, the state legislature, the legislation of
9 law imposing the unincorporated business tax provides that
10 it's to be paid to the Commissioner of Finance. As an
11 officer of the Municipal Corporation of the City of
12 New York, that is a feature of the State of New York,
13 subdivision of the State of New York that's provided in
14 the unincorporated business tax law.

15 Q Perfect. So let me end with Slide 18. Would you
16 describe kind of a tax base for the unincorporated
17 business tax?

18 A So once again it starts with the federal
19 Form 1065. The net income is reported on a federal
20 return. There are particular modifications that are made
21 to that number, for example, you have to add back interest
22 income from other states' bonds. That's a typical add
23 back across many jurisdictions and New York City as well.
24 And then -- excuse me. Then that net income gets
25 apportioned to New York City initially on the three-factor

1 formula of property, payroll, and receipts. And again,
2 over the years they moved to more emphasis on receipts.

3 Q Great. Thank you. In a similar to that Mobility
4 Tax, again, does the UBT allow credit for California taxes
5 paid?

6 A No. There is no credit for taxes paid because,
7 again, the income is apportioned. So there's no need for
8 credit. It's only New York's source income that is
9 subject to the tax. So there is no credit.

10 Q And same question again. Does UBT include
11 preference, alternative, or minimum tax items?

12 A No. There's no alternative, minimum tax, or
13 preference.

14 Q Super.

15 MR. BRANNAN: Okay. That's -- those are my
16 questions for Mr. Newman.

17 Judge Gast, I'm not sure if now is the right time
18 to open him up for questions, or if we should finish our
19 presentation as we walk through some of the issues that
20 were raised in -- during the briefing in this matter.
21 I'll defer to your questions and, certainly, we can have
22 questions now and questions later too. Mr. Newman is here
23 for the whole afternoon.

24 JUDGE GAST: This is Judge Gast. I want to be
25 sensitive to Mr. Newman's time. I'm not sure if he is

1 anticipating staying the entire hearing. But given that,
2 if you're done with your questions with him, I'd like to
3 turn it over to the Franchise Tax Board. And then once
4 they're done with their questions and if the panel has any
5 questions, then I'll turn it back to you, Mr. Brannan, to
6 finish your presentation.

7 MR. BRANNAN: Great. Thank you very much.

8 JUDGE GAST: Yeah. So Mr. Hall, if you have any
9 questions for the witness, feel free to ask your
10 questions.

11 MR. HALL: We have no questions for the witness.

12 JUDGE GAST: Okay. Thank you very much. All
13 right, Mr. Brannan -- oh, actually, let me ask my panel
14 first. Judge Akopchikyan, do you have any questions for
15 the witness?

16 JUDGE AKOPCHIKYAN: I don't have any questions.
17 Thank you.

18 JUDGE GAST: Okay. Thank you.

19 And Judge Akin?

20 JUDGE AKIN: Judge Akin speaking. No questions
21 at this time. And thank you for your testimony,
22 Mr. Newman.

23 JUDGE GAST: This is Judge Gast. I have one
24 question for Mr. Newman.

25 MR. NEWMAN: Can you speak up a little?

1 JUDGE AKIN: We can't hear you.

2 JUDGE GAST: I'm sorry. Can you hear me?

3 MR. NEWMAN: Barely.

4 JUDGE GAST: Okay. I have one question for
5 Mr. Newman on the UBT. Is New York City required to
6 impose -- or is any city required to impose a UBT, or is
7 that optional?

8 MR. NEWMAN: The state authorized the imposition
9 under the model local law and the Enabling Act. The State
10 will frequently -- how do I say this diplomatically? --
11 to lessen the objections of their constituents, they will
12 provide an enable authorization for the local legislature
13 to impose a tax. And, again, just share the blame for any
14 taxation with the local legislators as well as the state
15 legislators in that context.

16 JUDGE GAST: This is Judge Gast. Thank you,
17 Mr. Newman. I'll turn it over back to Mr. Brannan for the
18 rest of his presentation.

19 MR. BRANNAN: I guess in light of your question,
20 Judge Gast, Mr. Newman, I might have one or two follow
21 ups.

22 BY MR. BRANNAN:

23 Q You know, somewhat repetitive, but when we talk
24 about, you know, does the locality have a choice, the real
25 question is they don't -- does the locality in this case,

1 the New York -- does New York have a choice as to how to
2 implement this tax?

3 A Well, no. If the local legislature, the City
4 Counsel, and in the end New York City, wants to impose the
5 tax, they are have to strictly follow the model local law
6 and the enabling -- you know, the enabling legislation.
7 So all the city council can do is say yes or no. They
8 can't tinker with it. They can't change the rate. They
9 can't change the apportionment without state legislation.

10 And over the years with the unincorporated
11 business tax, every time there's been a change, it's gone
12 to the state legislature to make that change. So there
13 was a major change in 1995, I believe, '94 or '95 that had
14 to do with state legislation and every subsequent
15 amendment to the City, unincorporated business tax was
16 passed through the state legislature.

17 Q So through the legislature and then approved by
18 the governor at the end of the day; correct?

19 A That's correct.

20 Q And so the State does nothing -- excuse me. The
21 City does nothing without approval of the legislature;
22 correct?

23 A That's correct.

24 MR. BRANNAN: Okay. So with that I guess we'll
25 kind of move on to the issues that are asserted by

1 Respondent during the course of the briefing, and these
2 are listed on Slide 20. And the -- you know, the -- what
3 we're trying to do is to summarize and kind of by listing
4 it we make it efficient. If any member of the panel sees
5 any issues that are not the list, we're not trying to
6 ignore them by any stretch. We're certainly happy to
7 respond to them.

8 But, you know, as we see it, one of the issues
9 raised or the issues raised during the course of the
10 briefing is, you know, whether or not the tax is imposed
11 on that income; whether it's imposed by the State; whether
12 taxes are not paid to the state. No proof that PIMCO --
13 you know, proof that PIMCO is not an investment
14 partnership. And then there's a couple additional, like
15 the mismatch of apportionment rules is problematic for,
16 you know, for the FTB at one time; definition of fees or
17 general taxes under the California constitution. And
18 then, ultimately, whether Appellant has carried its burden
19 of proof or not. We'll kind of ignore last one for now.
20 Again, given the submissions post-hearing.

21 With respect to the discussion on net income,
22 I'll turn that over to Mr. Sperring at this point.

23 MR. SPERRING: Thank you, Mr. Brannan.

24
25 PRESENTATION

1 MR. SPERRING: As Mr. Brannan mentioned, one of
2 the requirements to claim the other state credit, under
3 Revenue & Taxation Code Section 18001 subdivision (a) and
4 18006 subdivision (a), with respect to partners in a
5 partnership, this is a credit that's only available for
6 taxes paid on net income. Therefore, I thought it would
7 be helpful to walk the panel through what constitutes a
8 net income tax.

9 Please turn to Slide 22. As seen in the
10 illustration, at the top the page is the broadest level of
11 taxes, which are known as gross receipts taxes. Ohio's
12 Commercial Activity Tax and Washington's Business and
13 Occupation Taxes are classic examples of a gross receipts
14 tax. Gross receipts taxes are applied to the gross
15 receipts from the business total sales. Unlike taxes
16 imposed on gross net income, these taxes apply to the
17 business sales without deduction for business cost. They
18 apply to all transactions a business makes.

19 In other words, they apply to every dollar that
20 the business generates. In the middle of the page you
21 have gross income taxes, which include the total revenue
22 derived from the sales and goods of services. Gross
23 income is total revenue less cost of goods sold. The cost
24 of goods sold represent all direct costs associated with
25 making a product. This definition of gross income was

1 adopted by the California Court of Appeal in the Robinson
2 Decision.

3 As you can see, taxes on gross income have a
4 smaller base than taxes on gross receipts since they
5 subtract the cost of goods sold. The dollar at the bottom
6 of the page represents net income tax. Net income is the
7 profit left after the cost of goods sold are removed and
8 after further deducting ordinary trade or business
9 expenses from gross income.

10 Please note, the business expense deduction are
11 reflected in blue lettering at the bottom of Slide 22. It
12 is the deduction if the cost of goods sold and ordinary
13 trade or business expenses that is the hallmark of net
14 income tax. Applying these principles to the MCTMT, it is
15 clear that the tax is on net income. As indicated by
16 Mr. Newman, individuals who have net earnings in excess of
17 \$50,000 from self-employment within the MCTD are subject
18 to the MCTMT. For those individuals, the MCTMT is based
19 on net income.

20 Please turn to Slide 23. This is because under
21 Section 800(e) of New York tax law, the MCTMT net earnings
22 from self-employment is defined as a net earnings from the
23 self-employment under Section 1402(a) of the Internal
24 Revenue Code without the annual limitation of 1402(b)(1).
25 For a more robust discussion, please see Slide 24, which

1 is an excerpt from the 2015 version of the New York State
2 Department of Taxation and Finance Publication 420, titled
3 "Guide to the Metropolitan Commuter Transportation
4 Mobility Tax." As you can see, the publication confirms
5 that the New York state legislature expressly tied the tax
6 base to the MCTMT for individual business owners to the
7 federal self-employment tax base.

8 Now, let's review IRC Section 1402(a) on Slide
9 25. As you can see the net earnings from self-employment
10 is gross income minus deductions, which are attributable
11 to trade or business. Bingo. That is the very definition
12 of net income. Please see Slide 26. I would also add IRC
13 Section 1402 is consistent with the federal income tax
14 definition of net income since the Schedule SE Form 1040,
15 Line 2, request the net profit from the sole
16 proprietorship or, in the case partnership, appearing on
17 Schedule C, or in the case of partnerships, Schedule K-1
18 from the federal individual income tax return.

19 Respondent has not articulated why the MCTMT
20 imposed on self-employed individuals is not a net income
21 tax under California law. In fact, Respondent's only
22 objection is that California does not incorporate
23 Section 1402 and, therefore, cannot be reconciled, quote,
24 end quote, to determine the California net income. This
25 position is specious because there's no evidence of any

1 deviation between the definition of net income found in
2 the federal self-employment tax and California's
3 definition of net income.

4 Moreover, the BOE in Robertson acknowledged in an
5 off quoted passage that a precisely and universally
6 acceptable definition of net income may not be possible.
7 As such, there is no reconciliation requirement that the
8 other state's net income tax calculation needs to exactly
9 match California's calculation of net income and the
10 California Revenue & Taxation Code.

11 In fact, FTB's own legal ruling 2017-1
12 contradicts the existence of such a requirement by stating
13 and I, quote, "A tax is analyzed by applying general law,
14 including applicable federal and California authorities."
15 Okay. So, again, general law and applicable federal and
16 California authorities determine whether a tax is net
17 income or not. New York's legislators' decision to adopt
18 IRC Section 1402 as the tax base prior to modifications
19 for the MCTMT was likely made because it is the federal
20 definition of net income. FTB, on the other hand, is
21 demanding that the New York legislature reinvent the wheel
22 by listing out in the statute all the subtractions
23 necessary to come up with a net income tax base. This is
24 silly. For the above reasons, it is clear that the MCTMT
25 imposed on individual business owners is a net income tax

1 for purposes of Revenue & Taxation Code Section 18001 sub
2 (a) and 18006 sub (a).

3 Now, let's turn to the New York City
4 Unincorporated Business Tax or UBT. Unlike the MCTMT, in
5 the case of the UBT, the instructions don't tie the tax
6 base directly to the federal definition of net income. So
7 instead we must look at the actual UBT statutes. As you
8 will know on Slide 27, UBT taxable income shall be the
9 excess of UBT gross income over UBT business deductions.
10 And on Slide 28 we see that Section 11056(a) of the UBT
11 code states that UBT gross income is the same as gross
12 income for federal purposes. And in Section 115047, the
13 UBT business deductions are same as those allowable for
14 federal income tax purposes.

15 When we look at the UBT return, we see that it
16 comports with those statutes. Please turn to Slide 29
17 which contain the first two pages of the 2014 UBT return.
18 When we turn to Slide 30, with see Schedule B, which
19 provides for the computation of total income, which is the
20 tax base prior to specific modifications to get to taxable
21 income. When you examine Section B of the UBT return, you
22 will note that it lists all the items of income found on
23 federal Form 1065. In other words, the UBT mirrors the
24 federal partnership income tax return.

25 In fact, Line 1 of Section B of the UBT return is

1 ordinary income, which allows a full deduction for
2 expenses, including the cost of goods sold and other trade
3 or business expenses since it is taken from Line 22 of
4 Form 1065. Please see Slide 31, which contains federal
5 Form 1065. You will note Line 1 starts with gross
6 receipts. As you can see, Line 2 subtracts the cost of
7 goods sold. And Line 9 through 20 provides for the
8 subtraction of all other trade or business expenses.
9 Again, bingo. We have a net income tax. Gross receipts
10 minus cost of goods sold and all other trade or business
11 expenses equal net income.

12 You will also note that Line 9 of Form 1065
13 states salary and wages to partners are not to be
14 subtracted as wages. All right. That's right on Line 9
15 of 1065, and, ironically, it's the inclusion of partner
16 distributions in the UBT that the FTB is raising as the
17 sole reason why the UBT is not a tax on net income. To
18 quote Respondent, "The UBT law provides no deduction shall
19 be allowed for amounts paid or incurred to a proprietor or
20 partner for the services or for the use of capital."
21 Respondent's opening brief, page 2, lines 12 through 13.
22 And, therefore, UBT is not net income taxed under
23 California law. Respondent's opening brief at page 6,
24 lines 12 through 13.

25 The obvious problem with this argument is that

1 under both federal and California law, payments to
2 partners are not wages, and no wage deduction is
3 available. Therefore, it is entirely consistent with
4 California law and federal law to include payments to
5 owners in the UBT tax base. Again, please see line 9 of
6 Form 1065, which disallows any payments to partners as
7 wages. After all, if payment to owners were not included
8 in the tax base, then in most cases there would be no
9 profit to tax.

10 For example, an individual operating a business
11 as a sole proprietorship is not allowed a deduction for
12 wages paid to him or herself. Similarly, in the
13 partnership context, payments to owners are not wages
14 since in general partners only have net taxable income to
15 the extent of net earnings of the partnership that flow
16 through to each partner. In case there's any doubt that
17 payments to partners represent their share of profits are
18 not wages, please see Revenue Ruling 69-184.

19 Finally, I would be remiss not to mention that
20 the FTB and the Board of Equalization considered the
21 New York State UBT with respect to tax years 1962
22 through 1964. In that instance, both the FTB and the
23 Board of Equalization clearly agree that the UBT reflected
24 a separate income tax that was in effect, the tax measured
25 by net income for California purposes. The structure of

1 the taxing scheme was the very same structure that the New
2 York City UBT was modeled after in which this is also
3 clearly a net income tax. Please see Appeal of William A.
4 Salant and Dorothy Salant 1967.

5 I now turn the presentation back to Mr. Brannan.

6
7 PRESENTATION

8 MR. BRANNAN: There we go. Focusing on the next
9 of the asserted issues from the briefing process, it's
10 whether tax is imposed and paid to the State. And we have
11 an awkward situation here. I say awkward for some but
12 really not a problem from our standpoint is that the UBT
13 is paid to the City. Mr. Newman spoke to that. And the
14 Mobility Tax is paid to the state. What the position is
15 on that is that it really doesn't matter who the recipient
16 of the tax is for purposes of the language in Section
17 18001, and here's why.

18 So we'll start with our discussion in the appeal
19 of Bartz decided by the Board of Equalization in 1994.
20 And while it's out to start with a case that all of us
21 would admit has been overruled, but we need to go through
22 the facts and the arguments in that case to get context
23 for what happened later in the Callister case. And so the
24 facts here are important. They're kind of reoccurring
25 characters. We're going to talk about three different

1 cases. They talk about the same Maryland tax.

2 And so the Maryland tax included a 5 percent
3 state income tax and a local surcharge that was equal to
4 between 20 and 50 percent of the tax. The State required
5 collection of 20 percent of that tax that allowed local
6 discretion as to any amount between 20 and 50 percent of
7 the tax. And the surcharge was paid to the State, but it
8 was used for the local benefit. So the FTB argued and the
9 SPE agreed that the local surcharge was not imposed by the
10 State because the Maryland statute enabled counties to
11 impose a surcharge and use the proceeds for the benefit of
12 the locality.

13 Bartz does not distinguish between the mandatory
14 and discretionary aspects of the tax that is already in
15 place. Further, the local surcharge was not paid to the
16 State based on the analysis in Bartz because, although,
17 the taxpayer paid the State directly, the State turned the
18 funds over to the county such that the State was merely
19 acting as an agent for the county or the locality in this
20 case. So we have those two holdings in Bartz. And,
21 again, if you look at it as two different requirements
22 imposed by and paid to, both of them were found in favor
23 of the FTB in that case.

24 So a few years later we have the Appeal of
25 Callister, and that's in Slide 34. And it was decided in

1 1999. Importantly, Callister overturned Bartz in reliance
2 in the Meyer case out of Minnesota. It's the same Meyer
3 case that the FTB has provided as Exhibit I, you know, as
4 part of their submission. And the language in Callister
5 is critical here. We've reviewed the decision of the
6 Minnesota Tax Court in Meyer and accepted its conclusion.

7 Accordingly, we will no longer file our previous
8 holding in the Appeal of Bartz completely. Instead, we
9 find that a tax credit may be allowed under Rev & Tax Code
10 Section 18002. And that's for nonresident credits, but
11 the framework for whether the credit is appropriate or not
12 is the same. But we'll allow it -- will be allowed under
13 Revenue & Taxation Code 18002 for county surcharge taxes
14 paid to Maryland in an amount not to exceed the surcharge
15 mandated by the State.

16 So in Callister they acknowledge that if the
17 State has control over the amount of the tax, then that
18 tax will be amendable or eligible for the other state tax
19 credit. And here's what's important. By overruling
20 Bartz, Callister holds that just because a tax is used for
21 local purposes does not mean it's a local tax. And that's
22 one of the arguments the FTB beats -- you know, beats the
23 heck out of in their briefing. Overruled. If the State
24 collects the tax, the State is not the agent collecting on
25 behalf of the locality, and that collection activity does

1 not make it a local tax. Same thing. FTB makes the
2 agency theory both in their briefs and also in their
3 recently -- well, recent, 2017-01.

4 In other words, the identity of the agency that
5 collects the tax is not determinative of whether the tax
6 is paid to the State or not for purposes of the OSTC.
7 What's important is who is imposing the tax. So we get to
8 Meyer, and that's Slide 35. You know, Meyer is more
9 explicit with regard to how they treat who the tax is paid
10 to. And, again, we adopt the reasoning in Meyer. That's
11 what's in Callister. That's the California Authority. So
12 Meyer consider the same Maryland tax. Again, in my other
13 taxpayer argued in part that the entire Maryland tax was a
14 state tax because payment was literally made to the
15 Comptroller of the Treasury of the State of Maryland.

16 And the Meyer court said wait, we're not worried
17 about that. We are not going to construe the word "paid",
18 literally, on the basis that the central issues is the
19 identity of the taxing authority, as it is for the both
20 the Mobility Tax and the NYC UBT. The taxing authority,
21 the person who approves, the entity that approves every
22 aspect of the tax is the State. The Meyer court concludes
23 ultimately that if the tax is State imposed, it is
24 entitled to credit under the credit provision. So those
25 arguments that the FTB has made have already been

1 considered by the SPE and rejected. And that's what
2 Callister tells us.

3 So moving into Slide 36, the Mobility Tax and the
4 UBT are, in fact, imposed by the State. Both are imposed
5 by the State because only the State of New York has that
6 taxing authority that it may delegate under certain
7 circumstances, but it takes control over every aspect of
8 that tax. Neither the City nor the district have
9 discretion as to the terms or computation of the tax. The
10 UBT, for example, has been in place since 1966. Once in
11 place, there's absolutely nothing that the City can do to
12 change the terms. That's required by state law.

13 You know, there's a provision here in Slide 36.
14 Under New York law, the City can't even raise dog
15 licensing fees without State approval. And that line is
16 noteworthy because it shows how extreme the authority is
17 placed within the State of New York. But more
18 importantly, it's actually from a part of Respondent's
19 Exhibit E that they submitted. Respondent submitted a
20 portion of a law review article, that sentence from the
21 portion of the article that was not included with
22 Respondent's submission. But it does illustrate what
23 we're talking about. The State controls everything, down
24 to the dog license fees in the cities.

25 So -- and I'll speak quickly about the article

1 itself as long as I brought it up. The article itself, it
2 speaks to home-rule, and the idea that if it's home-rule
3 there should be some sort of implicit taxing authority.
4 Ignoring, you know, the virtues of that policy, it doesn't
5 really change what the facts are for the two taxes that
6 we're talking about here today. Simply put, the labels
7 don't matter. You know, the Wynne versus Maryland, United
8 Supreme Court made that very clear. It doesn't matter
9 what we call it. It's who is the authority for imposing
10 the tax. And in this case, it's the State of New York.

11 So let's go to Slide 37. The Mobility Tax and
12 the Unincorporated Business Tax are paid to the State,
13 again, based on Bartz, Callister, and Meyer. We're not
14 going to get -- we shouldn't get caught up in the word
15 "paid", because that's what Meyer tells us not to do, and
16 Callister adopts Meyer. That's the law of the State. The
17 State is not the agent for the locality such the tax is
18 paid to the locality. And, you know, it's simply not the
19 law and it ignores precedent. And that's what a little
20 frustrating by both the FTB legal ruling and also the way
21 they brief this case. They don't mention these arguments
22 that have been rejected or overruled by Callister.

23 And I think most importantly, at the end of the
24 day, who pay -- who the taxes are paid to is not important
25 for purposes of determining whether it's a state tax or

1 not. You know, Mr. Newman referenced the sovereign. The
2 sovereign creates. The sovereign, you know, creates the
3 entities, and the sovereign determines how those entities
4 can tax, and that's what it does. Who the payment goes to
5 doesn't change. It doesn't change anything. And it
6 doesn't impact, again, the policy considerations behind
7 the intent to avoid a double tax.

8 So we go to Slide 38 and here's -- you know, it's
9 just statutory construction. To the extent, you know, we
10 think the law is clear that who the taxes are paid to
11 really doesn't impact the outcome as long as we're
12 construing everything to avoid a double tax, and that's
13 really what the statutory construction language from the
14 Eel River case in Slide 38 says. You know, it's -- the
15 idea is you can't let an administrative detail undermine
16 or disrupt what the statutory framework. Not just 18001,
17 but all of the statutes around it, and all the regulations
18 around it, you can't take a detail and let it overrule the
19 entire point of the statute. And that's what would happen
20 here if we ended up focusing on a decision based on who
21 the recipient of the tax was because the goal is to avoid
22 a double tax. And that's what should be happening here
23 and the credit should be approved.

24 So Slide 39, you know, to be clear -- and I'm
25 going to touch on this very quickly. You know, we labeled

1 some of the slides as limitations on the other state tax
2 credit. Also, you'll note from the briefs that there is
3 constitutional argument that is raised, and the idea is
4 pretty simple. Because of the limitation based on, you
5 know, the potential limitation on the credit base on the
6 use of disparate apportionment factors, what's happened is
7 a result of Prop 39.

8 It would force single sales factor on California.
9 And then the, you know, the subsequent adoption of those
10 rules for purposes of the credit under 17 -- I had it
11 written down anyway. But it's the sourcing rules for the
12 individuals. What happens there is that you have a very
13 arbitrary change in the law, and prop 39 is very specific.
14 They wanted to change the apportionment mechanism for
15 corporations. And, in fact, the ballot pamphlet says very
16 specifically that Proposition 39 does not increase taxes
17 on California families by even a penny. And that's what
18 went to the voters.

19 And, at the end of the day, if a new
20 apportionment formula reduces the amount of credit, it has
21 the effect of increasing the tax that the Mathers are
22 required to pay under the statute, and that's wrong. That
23 was never what was intended. Secondly, from a pure
24 constitutional or commerce clause standpoint, to the
25 extent that an individual who earns the same money in

1 state pays less tax than somebody who earns the money both
2 in state and out of state. That is a burden on interstate
3 commerce. That's exactly what was being talked about in
4 Wynne when the U.S. Supreme Court overturned the Maryland
5 tax credit scheme.

6 So the idea of a disparate impact based on the
7 credits is an anathema to the commerce clause. And we
8 need to consider that at some point because the client is
9 not being treated fairly if, in fact, the different
10 apportionment schemes result in a lower -- or excuse me --
11 a higher tax in California than somebody who is solely in
12 California would end up paying under California law.

13 So, lastly, a few quick arguments we hope. Slide
14 40, Respondent's additional arguments. There's a few
15 arguments that we think, candidly, we see grasping at
16 straws from Respondent. And the first one is this idea
17 that while we can't look to, either the Mobility Tax or
18 the Unincorporated Business Tax because the -- I think the
19 wording from the brief are, "Because the apportionments
20 schemes are not in harmony."

21 Okay. With regard to the disharmonious -- I
22 don't know what the word is -- apportionment schemes,
23 that's not required by any single statute or case
24 authority. It's just something formulated out of whole
25 cloth for the FTB. There's no requirement in that. And,

1 in fact, it can't. Because I will guarantee you that not
2 every state has exactly the same apportionment scheme as
3 California does. No. The idea is simply to look to
4 income to see if it's being taxed twice. And if it is,
5 tax rate gets a credit.

6 The FTB also suggest that we have not proven that
7 PIMCO is not an investment partnership. Look, the FTB has
8 no basis for making that statement whatsoever. Everything
9 that is on file with the FTB says that PIMCO is not an
10 investment partnership. An investment partnership, for
11 example, has to generate no less than 90 percent of their
12 gross income from interest or dividends or gains from the
13 exchange of investment securities. This is the investor
14 part. That's not what PIMCO does. PIMCO advises
15 investment partnerships, but PIMCO itself is not an
16 investment partnership. PIMCO manages assets for others
17 and it's a huge difference, and that's why it's not an
18 investment partnership.

19 Last point, the FTB looks to certain
20 constitutional provisions here in California that go to
21 whether something is a fee or a tax. And that distinction
22 matters with respect to what the voting threshold is.
23 Similar reference in connection with what is a general
24 tax, or what is not a general tax; again, voting
25 preferences, specifically in the constitution. Those

1 provision are important for the California Constitution
2 and the voting threshold, but those provisions have
3 absolutely nothing to do with the net income tax and the
4 payment of tax to other states, the availability of the
5 credit under 18001. Skew lines, they have nothing to do
6 with each other. Those arguments are irrelevant.

7 So with that, I think we'll close it out very
8 quickly. The Mathers are entitled to a credit for the
9 taxes imposed by and paid to the State of New York
10 understand all of the case authorities. Those taxes are
11 paid based on net income, as Mr. Sperring walked through.
12 And each dollar of that credit -- subject to proof
13 again -- is amenable or eligible for the credit.

14 So that will conclude the presentation at this
15 point.

16 MR. HALL: Judge, excuse --

17 JUDGE GAST: This is Judge Gast. Go ahead,
18 Mr. Hall.

19 MR. HALL: If the panel would allow, I just
20 wanted to clarify something that Mr. Newman said earlier,
21 if that's okay, if we have a moment to do that?

22 JUDGE GAST: Sure. Go ahead.

23 MR. HALL: Thank you.

24 Mr. Newman, I just want to clarify. You had
25 mentioned earlier that the City has the right to approve

1 or not the UBT. Can you -- can you restate what you said
2 earlier or --

3 MR. NEWMAN: And that's not exactly -- the City
4 was authorized by the State of New York to impose the tax.
5 The City Council then passed legislation and the
6 administrative code to have the Unincorporated Business
7 Tax apply within the boarders the City of the New York.
8 As I mentioned in prior testimony, in some ways that's a
9 political decision by the State of New York to say -- the
10 state legislature to say we only authorize this. It's
11 your own local legislative body that, you know, that put
12 it into effect. But again, the City of New York is a
13 municipal corporation and a creature of the State of New
14 York. So to -- I think there isn't a real difference in
15 that kind.

16 MR. HALL: Sure. But thank you. Thank you. But
17 to be clear then, the City Council could potentially say,
18 although, we're authorized by the State to impose this
19 tax, we don't -- we're not forced to. We -- we could
20 reject whatever proposal is -- is being made; correct?

21 MR. NEWMAN: The City -- yeah. The state law
22 delegates to the City legislative body the authority to
23 actually do -- implement the tax.

24 MR. HALL: Thank you.

25 JUDGE GAST: This is Judge Gast. Thank you,

1 Mr. Hall.

2 At this point I'm going to ask the panel if they
3 have questions for Appellants, and then I'd like to take a
4 10-minute break if that's okay with everyone.

5 MR. BRANNAN: Judge Gast, before we break, I
6 might ask for an opportunity to redirect Mr. Newman with a
7 few questions.

8 JUDGE GAST: Okay. Sure. Go ahead.

9

10 REDIRECT EXAMINATION

11 BY MR. BRANNAN:

12 Q Yeah. Mr. Newman, have you ever known the City
13 of New York not to adopt a tax that was granted the
14 permission, which was granted to them by the State?

15 A No, as a matter of fact, frequently, the state
16 legislature -- the City would only go forward with the
17 proposal.

18 Q What would happen to the City if they didn't
19 adopt a tax, Mr. Newman?

20 A They would have to raise some other tax. So the
21 State would --

22 Q And how would they do that, Mr. Newman?

23 A The state would end up having to fund the City
24 for that difference between what their -- what the
25 revenues are and what they came in at.

1 Q So if they took the route of adopting no taxes,
2 the city would cease to function perhaps?

3 A Well, it's hundreds -- it's billions of dollars.
4 In the course of years, it's many billions of dollars and
5 the city would -- the city has never gone and not approved
6 a -- not imposed a tax that the state has authorized.

7 MR. BRANNAN: Great. Thanks very much.

8 JUDGE GAST: Okay. Thank you.

9 This is Judge Gast again. I'm going to turn it
10 over to my panel, and then we will take a 10-minute break.

11 I'm going to start with Judge Akopchikyan, if you
12 have any questions.

13 JUDGE AKOPCHIKYAN: Judge Gast, no questions at
14 this time. Thank you.

15 JUDGE GAST: Thank you.

16 And Judge Akin?

17 JUDGE AKIN: Judge Akin speaking. I do have
18 questions, but I think I want to ask them of both parties.
19 So I'll reserve them until after Franchise Tax Board's
20 presentation.

21 JUDGE GAST: Okay. Great. Thank you.

22 And I will as well. So why don't we take a
23 10-minute break. Let's come back at 2:50.

24 Please turn off your camera and microphone but do
25 not leave WebEx. Thank you.

1 (There is a pause in the proceedings.)

2 JUDGE GAST: So Ms. Alonzo, we'll go back on the
3 record.

4 And I will now turn it over to Mr. Hall for his
5 presentation.

6 You will have 90 minutes. Please begin whenever
7 you're ready.

8 MR. HALL: Thank you. One moment.

9

10 PRESENTATION

11 MR. HALL: Thank you, panel.

12 This is Nathan Hall on behalf of the Franchise
13 Tax Board.

14 The issue in this case, as you've heard, is
15 whether Appellants have satisfied their burden to
16 demonstrate that they are entitled to claim the other
17 state tax credit with respect to the New York City
18 Unincorporated Business Tax, referred to as a UBT, and the
19 Metropolitan Commuter Transportation Mobility Tax,
20 referred to as the MCTMT tax. This appeal begins and ends
21 as a matter of statutory interpretation.

22 At the outset, Respondent reminds the panel that
23 tax credits are matter of legislative grace, and taxpayers
24 bear the burden of proving they are entitled to any
25 claimed credits. Furthermore, statutes granting tax

1 credits must be strictly construed against the taxpayer
2 with any doubts resolved in Respondent's favor. To be
3 eligible for the other state tax credit, several
4 requirements and conditions must be satisfied. If any
5 single requirement or condition is not satisfied, the
6 taxpayer is ineligible to claim the credit.

7 Generally, Revenue & Taxation Code Section 18001
8 provides for a credit of, quote, "Net income taxes imposed
9 by and paid to another state," unquote. The statute's use
10 of the word "and" means that imposed by and paid to are
11 separate and distinct requirements. An eligible tax is,
12 therefore, a net tax, which is both imposed by another
13 state and paid to another state. Here, Appellants have
14 failed to demonstrate that the UBT and the MCTMT are such
15 eligible taxes.

16 Rather, the UBT is a New York City income tax
17 applicable to unincorporated businesses earning revenue
18 within the city limits of New York, and the MCTMT is a tax
19 imposed by the Metropolitan Transportation Authority on
20 certain employers and self-employed individuals engaged in
21 business solely within the Metropolitan Commuter
22 Transportation District.

23 First, I will address Appellants' argument that
24 the UBT and MCTMT are taxes imposed by and paid to the
25 State of New York by virtue of the State's constitutional

1 powers of taxation. Second, I will discuss why the UBT
2 and MCTMT are paid to the respective entities and not to
3 the State. Third, I will discuss why these taxes are, in
4 fact, imposed by the City of New York and the Metropolitan
5 Transportation Authority respectively.

6 Appellants allege that the UBT and MCTMT are
7 taxes both imposed by and paid to the State by virtue of
8 New York State's Constitutional Powers of Taxation.

9 Respondent disagrees. In support of their position,
10 Appellants claimed that New York's home-rule provisions
11 mandate a finding in their favor. The terms home-rule or
12 home-rule provisions are used to describe legislation
13 enacted by states granting local government's lawmaking
14 authority over local affairs. It is noted that without
15 home-rule provisions most local government activity would
16 require the expressed authorization of state government.

17 The specific powers conferred by home-rule
18 provisions generally fall into four categories, including
19 structural, personnel, functional, and fiscal, with taxes
20 falling into the fiscal category. Appellants point out
21 that the New York state constitution allows the
22 legislature to delegate certain authority to local
23 governments. However, under Article 16 of its
24 constitution, the State retains all powers of taxation.
25 However, most states retain fiscal control at the state

1 level.

2 As stated in a 2016 New York University Law
3 Review article, quote, "Only 12 states have laws that give
4 local governments any fiscal control," unquote. This is
5 described on page 4 of Respondent's Exhibit E. Appellants
6 argue that because the State of New York retains fiscal
7 authority to levy taxes, the UBT and MCTMT are
8 characterized as taxes imposed by and paid to the State of
9 New York for purposes of Revenue & Taxation Code 18001.
10 This is a mischaracterization.

11 Respondent does not dispute that the New York
12 State legislature reserves the power to enact or amend the
13 statutes concerning the UBT or MCTMT. However, statutes
14 must be read to avoid absurd results. Under Appellants'
15 logic, if the UBT and MCTMT are imposed by and paid to the
16 State of New York by virtue of its authority to tax, it
17 follows that all net income taxes levied within a state's
18 borders, including all local income taxes, would qualify
19 for the other state tax credit.

20 Furthermore, given that all but 12 states appear
21 to retain fiscal control at the state level, interpreting
22 California's statute so broadly would call into question
23 potentially several dozens of local taxes from other
24 states as qualifying for the California other state tax
25 credit. Nothing in the statutory language or case law

1 involving the California other state tax credit supports
2 such an expansive interpretation. Certainly, the
3 California legislature could have stated that where
4 another state reserved its constitutional taxing
5 authority, all net income taxes levied within that state's
6 borders are consider qualifying for the other state tax
7 credit. However, it chose to use much more narrow and
8 specific language.

9 Appellants have pointed to no authority
10 suggesting a broad -- such a broad interpretation of the
11 term imposed by and paid to. As will be discussed later,
12 the Board's decision in Callister, as well as the
13 Minnesota Tax Court opinion in Meyers versus Commissioner
14 does not support Appellants' position. Under the mandate
15 that statutes granting tax credits be construed narrowly,
16 Appellants have failed to satisfy the burden that these
17 taxes are imposed by and paid to the State of New York by
18 virtue of the State's home-rule provisions.

19 As discussed, the specific requirements of the
20 other state tax credit are not disposed of by Appellants'
21 home-rule argument. Rather, Appellants must demonstrate
22 that the UBT and MCTMT are both imposed by and paid to the
23 State under a plain reading of the statute. Respondent
24 will now address why the UBT and MCTMT are not paid to the
25 state for purposes of Revenue & Taxation Code

1 Section 18001. According to applicable California law,
2 the object of statutory interpretation is to ascertain and
3 effectuate legislative intent by giving meaning to every
4 word and every phrase in the statute to accomplish a
5 result consistent with legislative purpose.

6 Additionally, the plain meaning of statutory
7 language is ordinarily conclusive. To give meaning to the
8 phrase, "Paid to another state," the tax must be, in fact,
9 paid to the other state. Here, the UBT is paid directly
10 to the City of New York, not New York State. There's
11 ample uncontroverted evidence supporting this fact. For
12 example, UBT payments are remitted directly to the
13 New York City Department of Finance for use by the City of
14 New York. This is shown at the bottom of page 5 of
15 Respondent's Exhibit C and page 6 of Respondent's
16 Exhibit D in the instructions for line 31.

17 The UBT is never collected by, accessed by,
18 controlled by, or used by the State of New York in any
19 manner whatsoever. It's paid to the City. Appellants
20 have set forth no evidence that the terms other state or
21 another state, for purposes of Revenue & Taxation Code
22 Section 188001, should be expanded to include taxes paid
23 to cities, counties, municipalities, or corporate
24 entities. Statutes granting tax credits are to be
25 narrowly construed. Regulation Section 18001-1 provides

1 that the term "state" includes, quote, "States of the
2 United States, the District of Colombia, and possessions
3 of the United States, but does not include the United
4 States or foreign countries."

5 This is an exclusive list that must be strictly
6 construed and excludes cities or other entities separate
7 from the State. As described earlier, Appellants'
8 position is that the UBT is paid to the State by virtue of
9 it being paid under State authority. However, this
10 argument conflates the distinct requirements that the tax
11 be both imposed by the other state and paid to the other
12 state.

13 There are many instances in which an amount can
14 be paid under authority of one party yet, paid to a
15 different party. For example, a trust can grant the
16 trustee of the authority to determine the timing and
17 amount of Appellants' trust funds to a beneficiary. In
18 that instance, payment may be made pursuant to the
19 trustee's authority but paid to another party. Accepting
20 that the terms imposed by and paid to are separate and
21 distinct, one cannot be the substitute for the other.

22 A close reading of Appellants' briefing reveals
23 this logical fallacy. Appellants' position that the many
24 requirements of the other state's tax credit are at once
25 disposed of by the fact that the state retains its

1 constitutional powers of taxation is incorrect, or the
2 terms of a statute are unambiguous is presumed that the
3 legislature meant what it said and the plain meaning of
4 the language governs. Here, the UBT is not paid to the
5 state.

6 Moreover, if Appellants' position is adopted and
7 the tax is considered paid to a state by virtue of it
8 being paid under a state's taxing authority, there would
9 be no instance in which a tax can be paid under state
10 authority and not be considered paid to a state. If that
11 were the case, there would be no need for the statute to
12 specifically require that the tax be paid to the state.
13 Such a reading would effectively element the meaning of
14 the words paid to under the statute and violate the canon
15 of statutory interpretation that courts are to give
16 meaning to every word of the statute.

17 With respect to the UBT, this closes the inquiry.
18 The UBT is not paid to the State and is, therefore,
19 ineligible for the California other state tax credit. The
20 MCTMT is also not paid to the State for purposes of
21 Revenue & Taxation Code 18001. The MCTMT is undisputedly
22 paid to the Metropolitan Transportation Authority, also
23 referred to as the MTA. Pursuant to New York consolidated
24 laws, Article 23, Section 805(a), MCTMT payments are held
25 in accounts designated by the state comptroller, quote,

1 "In trust for the Metropolitan Transportation Authority,"
2 end quote. A copy of the statute was included as
3 Respondent's Exhibit G for the panel's convenience.

4 The statute provides that MCTMT deposits must be
5 kept separate and apart from all other money in possession
6 of the comptroller. The statute further authorizes the
7 Commissioner to deduct a reasonable amount for necessary
8 expenses to reimburse the Department for the cost incurred
9 to administer, collect, and distribute the taxes collected
10 on behalf of the MTA. In sum, MCTMT payments are held in
11 trust by the state but not paid to the state. They're
12 held temporarily for a matter of weeks before being paid
13 to the rightful owner, the MTA. The funds are collected
14 by the state on behalf of the MTA, but they belong to the
15 MTA as a matter of law.

16 As just described, the statute unambiguously
17 calls for MCTMT to be paid to the Metropolitan
18 Transportation Authority, not the State of New York.
19 Furthermore, Appellants have failed to meet the burden to
20 allege or establish that the MTA should be otherwise
21 considered the state itself for purposes of the statute.
22 In fact, the evidence demonstrates otherwise. The MTA is
23 not an agency or department of state government, similar
24 to the Department of Agriculture or the Department of
25 Financial Services among others.

1 As reflected in MTA's governance documents
2 contained in Respondent's Exhibit H, the MTA is, quote, "A
3 corporate entity separate and apart from the State of New
4 York," end quote. If the funds are, in fact, paid to the
5 state as Appellants claim, Appellants have failed to
6 explain why the funds must be kept separate and apart from
7 all other funds held by comptroller, why the legislature
8 would require the funds to be held in trust, and why the
9 MTA would be required to reimburse the State for cost
10 incurred to administer, collect, and distribute the taxes
11 imposed. Here, it's evident the State's only role is
12 merely as a collection agent on behalf of the MTA.

13 Based on the foregoing, the MCTMT is not paid to
14 the State for purposes of Revenue & Taxation Code 18001.
15 The statute must be construed narrowly. While MCTMT funds
16 are briefly held in trust by the State comptroller, they
17 are, in fact, paid to the MTA. The state has no
18 discretion as to what to do with the MCTMT funds as they
19 belong to the MTA. These funds pass through the state as
20 a matter of administrative convenience and nothing more.
21 Appellants have failed to satisfy their burden to
22 demonstrate that the MCTMT is paid to the State of New
23 York.

24 Appellants claim that Callister supports their
25 position, that it doesn't matter who the tax is actually

1 paid to. The language in Meyer upon which Callister is
2 based actually does not support Appellant's position. In
3 Meyer, the Minnesota Tax Board analyzed its analog to the
4 California other state tax credit. In that case, the
5 taxpayer argued that because the payment was literally
6 made to the State of Maryland, it was paid to the state.
7 However, that argument was rejected as the Minnesota Tax
8 Court held in Meyer that quote, "We do not interpret the
9 word paid literally and, therefore, disagree with
10 Ms. Meyer's first argument," end quote.

11 So actually, in Meyer the Court said it disagreed
12 with the taxpayer's interpretation of the paid to
13 requirement as being literal interpretation and considers
14 it relevant who the tax was paid to in substance. Now,
15 because the case involving the Maryland statute are not
16 binding as to present appeal, the Minnesota Tax Court's
17 reasoning as to why it ultimately allowed a portion of the
18 surcharge to qualify for its credit in spite of language
19 to the contrary, or the FTB's subsequent acquiescence to
20 the Minnesota opinion need the subject of speculation.
21 Rather, the panel must only decide here whether the paid
22 to requirement is to be read expansively as Appellants
23 insist or narrowly as required by law.

24 I will now discuss whether the UBT and MCTMT are
25 imposed by the State. With respect to the requirement

1 that the tax be imposed by the state, neither the UBT or
2 the MCTMT are imposed by the State. Appellants substitute
3 the term "imposed by" with the term "authorized by." This
4 substitution of terminology, while seemingly innocuous,
5 alters its meaning and unduly expands the scope of the
6 statute in a more narrow or strict sense of the word.

7 The UBT and the MCTMT are imposed by the City of
8 New York and the MTA respectively. As to the UBT, the UBT
9 is set forth in the New York City Administrative Code and
10 is therefore imposed by the City under a plain reading of
11 the statute. This fact is undisputed. Appellants respond
12 to this fact to point out -- excuse me. Appellants'
13 response to this fact is to point out New York's home-rule
14 provisions and constitutional powers of taxation.
15 However, accepting this argument would lead to absurd
16 results as explained earlier.

17 Further, as we heard from Mr. Newman, the State
18 authorize the UBT. However, whether the tax is, in fact,
19 imposed is a different matter. And whether the tax is
20 imposed is a matter that's up to the City. As we heard
21 from Mr. Newman, the City can approve or withhold approval
22 for the UBT. The City's ability to withhold approval for
23 the UBT is further evidence that it's, in fact, imposed by
24 the City. The fact that the City has never actually, as
25 far as we know, refused to impose the UBT is irrelevant to

1 determining whether the tax is, in fact, imposed by the
2 City.

3 The fact that the City has never rejected or
4 refused to impose the UBT is merely evidence that the City
5 needs to raise money. Although, the MCTMT is found in the
6 State's statute, it's also not imposed at the state level
7 and exists for the sole purpose of generating revenue for
8 the MTA. For these reasons, under a reasonable reading of
9 the statute, the MCTMT is imposed by the MTA.

10 Respondent's position is further supported by the Board of
11 Equalization decision in the Appeal of Callister as well
12 as Meyer versus Commissioner, a Minnesota Tax Court
13 opinion that Callister is based on. Reading these cases
14 carefully, it's evident that even where authority to tax
15 is held by the state, the tax will not be considered
16 imposed by the state unless such tax is imposed at the
17 state level.

18 Appeal of Callister involve the Maryland County
19 tax that was first analyzed by the Board in the Appeal of
20 Bartz. In Bartz, the Board held that the entire Maryland
21 tax was a local tax. Of course, as was discussed and we
22 know, the Board later partially reversed its decision in
23 Bartz and Appeal of Callister as a result of a Minnesota
24 Tax Court opinion in Meyer versus Commissioner. A copy of
25 the Minnesota Tax Court opinion in Meyer is attached for

1 the panel's convenience as Respondent's Exhibit I.

2 In Meyer, the Minnesota Tax Court reviewed the
3 Maryland statute, which imposed what was described as
4 county income tax. The statute provided that the tax
5 shall, quote, "Not be less than 20 percent nor more than
6 50 percent of the state income tax liability of such
7 resident," end quote.

8 In Meyer, the Court noted that, quote, "The
9 county tax across the state was 20 percent. However, each
10 county could elect to tax an additional 30 percent if it
11 chose to do so." Notably in Meyer, the Minnesota Tax
12 Court held that only the portion of the tax equal to
13 20 percent, which was levied as to all counties, was
14 determined to be a tax imposed by the State. And any
15 amount in excess of the statewide 20 percent was deemed
16 imposed by the county and was not entitled to a credit
17 under the Minnesota Credit Provision.

18 The Court distinguished the creditable portions
19 and non-creditable portions of the tax, despite the fact
20 that the county's authority to impose any additional tax
21 was derived under the same state statute. In Callister,
22 the Board of Equalization followed the Franchise Tax
23 Board's acquiescence to the Tax Court opinion in Meyer
24 finding that only 20 percent of the tax as applied across
25 all counties was considered imposed by the State. Thus,

1 the holdings in Meyer and Callister made clear that even
2 where the authority for an individual county to increase
3 its rate is derived from the State, it will not be
4 considered imposed by the state to the extent it is not
5 imposed at the state level.

6 Here, the UBT and MCTMT are similar to the
7 non-creditable portions of the Maryland county tax because
8 they are imposed as to only specific localities and not at
9 the state level. These taxes are distinguishable from the
10 taxes that are levied on a statewide basis, but perhaps
11 ultimately paid to a locality for a specific purpose from
12 the state's general fund. As a thought exercise, let's
13 assume for a moment that the MTA, through its board of
14 directors, determines that it needed to raise revenue.
15 One way of accomplishing this might be by increasing or
16 amending the MCTMT rate. However, in order to do that, of
17 course, the MTA would need to seek permission from the
18 state legislature.

19 To that end, the MTA might, for example, hire a
20 lobbyist to lobby a state congressperson to introduce
21 legislation increasing the MCTMT rate. It might take
22 further measures to ensure that a bill, if introduced,
23 were passed. The same holds true for the UBT where the
24 City acts through its mayor or other New York City
25 municipal functions. In order to raise tax revenue, the

1 MTA must proactively seek permission from the state
2 legislature to increase the MCTMT. Although, it's
3 reasonable to conclude that although the state maintains
4 the authority to levy taxes, when it does so on behalf of
5 the MTA for the sole benefit of the MTA, such tax may be
6 consider imposed by the MTA.

7 It is also helpful to bear in mind that because
8 the MCTMT and UBT are levied only with respect to specific
9 localities, they are not taxes of New York State and do
10 not represent revenue of the state. Thus, if the New York
11 state legislature determined that it wanted to raise
12 revenue for the State, it would not do so by amending the
13 UBT or MCTMT. Instead, it would amend or increase the
14 State's income taxes. This is distinguishable from a
15 scenario in which the State collects its own revenue and
16 then determines how to spend that revenue. In those
17 cases, using state revenue to benefit a locality does not
18 change the nature of the tax as a state tax.

19 Applying this example in the context of the local
20 portions of the Maryland tax at issue in Meyer and
21 Callister shows that there is no difference as to the
22 authority to tax, only as to timing. So say a particular
23 county in Maryland was to raise revenue similar to the MTA
24 in the previous example. Because of the way the Maryland
25 statute was written, the counties had standard permission

1 from the state to increase the surcharge in their county
2 to 30, 40, or even 50 percent without seeking further
3 legislative approval.

4 Here, the only difference between the
5 non-credible portions of the Maryland County tax and the
6 MCTMT is that the legislature's approval to increase the
7 Maryland tax was given in advance. But in both cases, the
8 authority for the tax was derived at the state level and
9 specifically provided for in the state's statute. Given
10 this fact, there must be some other distinction that
11 resulted in portions of the Maryland County tax to be
12 found not imposed by the state.

13 As stated earlier, it is evident from analyzing
14 those opinions that the distinction is this, to the extent
15 the taxes not imposed on a statewide basis but imposed as
16 to a locality, it is not considered imposed by the state.
17 Practically speaking how else would one distinguish a
18 local tax from a state's tax if not on the basis that a
19 local tax is levied as to a specific geographic region and
20 a state tax is levied on a statewide basis. This is an
21 important distinction that Appellants' analysis simply
22 ignores.

23 Furthermore, there is also no evidence that the
24 Maryland state legislature couldn't have amended its
25 statute to preclude counties from increasing the

1 surcharge. The state had absolute discretion to amend its
2 state law in that case. This is additional evidence that
3 the authority of the state to impose a tax was not the
4 deciding factor in Meyer. While the Minnesota Tax Court
5 differentiated the non-creditable portion of the Maryland
6 tax in terms of county discretion, it could just as easily
7 be said tax that the extent to which the levy was
8 considered a tax imposed by the state depended on the
9 extent to which the surcharge was applied at the state
10 level.

11 Finally, the Maryland County tax was found to be
12 imposed by the state on grounds that differ from the taxes
13 in this case. The United States Supreme Court case
14 *Comptroller v. Treasury* -- *Comptroller of the Treasury*
15 *versus Wynne*, spelled W-y-n-n-e, has been raised in
16 support of the proposition that the Maryland County tax
17 was, in fact, a state tax in spite of its label. *Wynne*
18 involved the question of whether a Maryland tax violated
19 the Dormant Commerce Clause. However, with respect to
20 whether the county tax was, in fact, a state tax, the
21 court relied on a Maryland Court of Appeals Opinion in
22 *Frey versus Comptroller of the Treasury*.

23 In *Frey*, the Court of Appeals referenced its
24 decision in *Stern v. Comptroller of the Treasury*.
25 Specifically, Fray stated, quote, "We held in *Stern* that

1 the credit applies to all taxes, including the county
2 income tax, appearing in the state's income tax subtitle.
3 In reaching this conclusion we rejected the argument that
4 the local political subdivisions, rather than the state,
5 impose the county tax. That's precluding the application
6 of the credit in question. We did so in part because the
7 county income taxes were adopted, mandated, and collected
8 by the state. In other words, because the county income
9 tax was prescribed in the income tax subtitle and was
10 administered by the state, that tax was just as
11 susceptible to the credit as other state imposed income
12 taxes," end quote.

13 Thus, in the cases -- in the line of cases
14 analyzing whether the Maryland County tax was a state tax,
15 the courts found relevant that the so-called county tax
16 was found in the State's income tax subtitle. However,
17 the UBT and MCTMT are distinguishable from the Maryland
18 tax in this manner. As pointed out, the UBT is found in
19 the City administrative code, not the consolidated laws of
20 New York or the New York State personal income tax
21 article. Additionally, the MCTMT is found in Article 3 of
22 chapter 60 of the consolidated laws of New York. Whereas,
23 New York State's personal income tax provisions are set
24 forth in an entirely different article, Article 22.

25 Thus, the rationale is as to the Maryland tax, at

1 least in part, is not helpful for determining whether the
2 UBT and MCTMT are imposed by the state in the present
3 appeal. As shown, the MCTMT is more analogous to the
4 non-creditable portion for the Maryland tax found in Meyer
5 and Callister to be imposed by the county. And it is
6 distinguishable from the portion of the tax found in those
7 cases to be a state tax.

8 Now, briefly to address Appellants'
9 constitutional arguments, Appellants raised a
10 constitutional issue they feel is implicated in this
11 appeal. First and for most, whether there's a
12 constitutional right for a taxpayer to receive a credit
13 for the UBT and MCTMT, and conversely whether or not
14 credit for these taxes would, therefore, be
15 unconstitutional is a question that this panel lacks
16 jurisdiction to determine. Under OTA Regulation 30401
17 subsection (a), the OTA lacks jurisdiction to determine
18 whether a California statute is invalid or unenforceable
19 under the United States Constitution. If the tax imposes
20 a burden on interstate commerce, it is potentially an
21 issue for the New York courts and whether the UBT violates
22 the Commerce Clause, but that's not to be decided here
23 today.

24 As you heard earlier Appellants' counsel, stated
25 quote, "Who the tax is paid to doesn't dictate the

1 outcome." They refer to it as an administrative detail.
2 It's not a detail, however. It's not elective. It's a
3 requirement in the statute. Similarly, the mandate to
4 interpret Revenue & Taxation Code Section 18001 strictly
5 and narrowly is mandatory, not elective. While the
6 purpose of the California other state tax credit is to
7 help alleviate double taxation, it is not panacea for all
8 double taxation.

9 As observed in a recent Office of Tax Appeals
10 decision in Appeal of Buehler, quote, "Section 18001 is
11 narrowly drawn, applying to only cases which include the
12 required elements," end quote. Here, the required
13 elements have not been satisfied. The panel heard from
14 the taxpayer's expert, Mr. Newman, as to how these taxes
15 operate. However, Mr. Newman's testimony does not alter
16 the points made by Respondent, namely, that the statute
17 requires the tax to be actually imposed by and paid to the
18 State. It does not change the fact that the UBT is paid
19 directly to the City, nor the fact the MCTMT is paid to
20 the MTA. The expert's testimony doesn't change the fact
21 that under Meyer and Callister the tax must be imposed at
22 the state level to be considered imposed by the State.
23 Mr. Newman's testimony doesn't change the fact that local
24 taxes are not considered state taxes for purposes of
25 Revenue & Taxation Code 18001.

1 And finally, Mr. Newman's testimony does not
2 change the requirement that the statute be read narrowly.
3 On balance, it's more reasonable to find that the UBT is
4 imposed by the City of New York and paid to New York City.
5 On balance, it's more reasonable to find that the MCTMT is
6 imposed by the Metropolitan Transportation Authority and
7 paid to the Metropolitan Transportation Authority.
8 Appellants' application of the other state tax credit to
9 these taxes is based on its overly broad and incorrect
10 interpretation of the statute, which, if accepted by this
11 panel, will have potentially harmful consequences, not
12 only as to California other state tax credit, but to other
13 states with similar statutes that will be unbearably
14 affected by an overly expansive analysis.

15 Thank you.

16 JUDGE GAST: This is Judge Gast. Thank you,
17 Mr. Hall.

18 At this point, I'm going to turn it over to --
19 actually, I'm going to ask a few questions first to
20 clarifying as to FTB's position on certain issues,
21 Mr. Hall, you didn't touch on.

22 Do you still believe the UBT and MCTMT are not
23 net income taxes?

24 MR. HALL: We are not disputing that at this
25 time. To the extent that I did not address any arguments

1 on brief, you know, we stand on our briefing, but we're
2 not disputing any issues that I have not discussed today.

3 JUDGE GAST: Okay. And that goes with the tax
4 versus fee distinction?

5 MR. HALL: Correct.

6 JUDGE GAST: So just to clarify, FTB's position
7 at this hearing is that it is a tax and not a fee?

8 MR. HALL: Well, our position is not -- we're not
9 conceding that point.

10 JUDGE GAST: Okay.

11 MR. HALL: If the OTA determines that it is a
12 fee, we don't object. However, you know, we rest on our
13 brief for -- as to those issues.

14 JUDGE GAST: Okay. So the same with the --
15 whether these taxes are net income taxes, you're not
16 conceding that they are net income taxes. You're just not
17 addressing them here, and you decide to rest on the brief
18 for those issues?

19 MR. HALL: That's accurate.

20 JUDGE GAST: Okay. Thank you.

21 With that, I'm going to ask Judge Akopchikyan if
22 he has any questions at this point for either party.

23 JUDGE AKOPCHIKYAN: I don't have any questions at
24 this point. Thank you.

25 JUDGE GAST: Thank you.

1 And Judge Akin?

2 JUDGE AKIN: Yes, I do. Give me just one moment
3 to look at my notes. Okay. The first question I would
4 just like to better understand what Franchise Tax Board
5 believes the test or standard is for determining whether a
6 tax is a net income tax imposed by a state for other state
7 tax credit purposes.

8 MR. HALL: Just to clarify, Judge, are you asking
9 about the net income portion of it, or the imposed by it
10 portion?

11 JUDGE AKIN: Thank you. I'm asking about the
12 imposed by requirement, not the net income requirement.
13 I'm just wondering if there's a succinct summary you can
14 provide as to FTB's position about what's required for a
15 tax to be imposed by another state for other state tax
16 credit purposes.

17 MR. HALL: You know, I'll be honest with you. I
18 think your question sort of gets at the heart of why this
19 appeal is little bit tricky. Because when we're talking
20 about whether a tax is imposed by the State, we're talking
21 about 49 other jurisdictions and their taxing schemes and
22 whether -- you know, I don't know that I can come up with
23 a universal definition of impose by. But when we look at
24 these taxes, as stated in my argument -- and hopefully
25 when you guys get the transcripts, you'll be able to

1 relook at that and re-review what we stated.

2 But in these cases, we don't see that these taxes
3 are imposed by the State. And, you know, a simple example
4 would be for the UBT. You know, it's not even in the
5 state statute. It's in the City Administrative Code. And
6 as you heard from the taxpayer's expert, the city decides
7 whether that gets imposed or not. Whether or not the city
8 decides that it ultimately is going to impose that tax
9 really is irrelevant. The fact is they have the, ability,
10 the power to do that.

11 As with the MCTMT, I believe as we explained that
12 the cases of Meyer and Callister support finding that,
13 hey, certain taxes if they're not imposed on a statewide
14 basis, if they are local taxes, these are not taxes that
15 should be considered imposed by the State under the
16 statute. And Callister is, again, a California opinion
17 that addresses -- at least to the extent it references
18 Meyer -- addresses that issue. But I can't give you a
19 universal definition because we'd have to find something
20 that fits for, you know, potentially 50 states' different
21 taxes.

22 JUDGE AKIN: Fair enough. Understood.

23 I do want to, you know, provide Appellant the
24 opportunity to answer the same question. If you would
25 like me to repeat it, please let me know, or respond to

1 what FTB just said.

2 MR. BRANNAN: Well, I think I understand. The
3 question is, you know, how do we construe when or when it
4 is not imposed by the State. I mean, you know, I don't
5 mean to restate or re-characterize the question. That's
6 not what's intended, Judge Akin. But I think the case law
7 makes it pretty clear.

8 If -- if -- it's where the discretion over the
9 tax lays. And we would say semantics aside, that if the
10 authorities with the State, and the city can't do anything
11 without state approval, then that discretion lies with the
12 state. And, you know, I think it's when we get into the
13 difference between the word authority or, you know,
14 discretion, or power, or anything else, I mean, it's just
15 really simple. It's like where's the taxing authority?
16 And the taxing authority in both cases is it stems from
17 the State. The Constitution keeps it with the state until
18 they say it's okay.

19 So I hope that's responsive to the question. If
20 not, I'm certainly willing to, you know, to try again.

21 JUDGE AKIN: No. That's responsive. Thank you.

22 I did have one follow-up question, and I will
23 pose it to both parties, but I'll start with Franchise Tax
24 Board.

25 And, Mr. Hall, I do think you touched on this in

1 your argument, but I just wanted to clearly ask it of both
2 parties. In order for a tax to be imposed by a state,
3 does it need to be a statewide tax? Or can it be taxed
4 on, you know, on taxpayer's and just a specific locality
5 within the state?

6 MR. HALL: Thank you, Judge Akin.

7 I think that I'm not going say, you, know as to
8 taxes we don't know about or not aware of or aren't at
9 issue in this case. I know that I can answer that, but as
10 far as these taxes are concerned, again, the holding in
11 Meyer suggests strongly that "imposed by" means, you know,
12 on a statewide bases and not as to not a specific
13 locality, and that's our position as to these specific
14 taxes. We believe that definition doesn't -- that these
15 taxes don't fit the definition of imposed by the state for
16 that very reason. And also because, you know, the taxes
17 are, again, here in this case for the sole benefit of the
18 MTA. They're not state taxes. So thank you.

19 JUDGE AKIN: Okay. Thank you. Understood.

20 And I will again pose the same question to
21 Appellants. Would you like me to restate the question?

22 MR. BRANNAN: Again, I think I have it. If for
23 some reason I miss the cue, I'll just apologize in
24 advance.

25 No. I think that the idea that it must be a

1 statewide tax is simply incorrect. And the research for
2 that is really Wynne versus Maryland or Wynne versus
3 Comptroller Maryland when they say it's clearly a local
4 tax collected from a specific locality within the state.
5 And, you know, candidly, I'm not -- I'm not a fan of the
6 parade of horrors that's being suggested that says,
7 well, it's really complicated and there's a lot of states
8 and there's a lot of counties, and boy, this could be
9 really hard work and, you know, lots of tax.

10 It doesn't matter to me, the policy side of it.
11 And I don't think it really matters to the panel. At the
12 end of the day, the idea is the net income piece -- which
13 has essentially been agreed to here -- that's what levels
14 the playing field across the country and across multiple
15 jurisdictions. If it's all on net income, which it is,
16 then if we can determine, well, what is the subject of
17 that net income tax. What's the income? And if it's tax
18 twice, the purpose of the credit is to avoid that double
19 tax. But the net income base is what levels it out. It
20 doesn't matter how many different jurisdictions we look
21 at. That's the leveling influence.

22 So I don't think there's a requirement that it be
23 statewide. The requirement is that the state has
24 authority over it. And contrary to what's been suggested,
25 I don't think it's this -- you know, I don't think the

1 world is coming to an end because a lot of people have a
2 net income tax. But California, for example, reserves the
3 power to impose a net income tax for the state itself. No
4 other local subdivision can impose a net income tax in
5 California, and other states have similar rules. This one
6 is just different.

7 JUDGE AKIN: Understood and was responsive to
8 what I was asking, so thank you. And I think --

9 JUDGE GAST: Judge Akin, can I ask a follow up if
10 that's okay? Sorry.

11 JUDGE AKIN: Absolutely.

12 JUDGE GAST: Just so I understand FTB's position
13 on this, I think Appellants' position is that it doesn't
14 have to be a statewide tax. Just to clarify, I think this
15 is my last question here. And I don't want to be
16 hypothetical here, but I know we're kind of dealing with
17 it with hypos. But if we have a situation where, just
18 assume, a state requires a tax to be imposed and paid to
19 the state -- let's just assume that -- but they limit that
20 tax to a certain geographical region in the state. Does
21 that, under 18001(a), does that make it potentially
22 credible, assuming all the other requirements are met? Or
23 is your position because it's limited to a certain
24 geographical area, it can never be credible under
25 18001(a), even though it's imposed and paid to the state,

1 just under those hypothetical facts? Sorry if that was
2 convoluted.

3 MR. HALL: Yeah. I think the question kind of --
4 you know, our position is that in these cases, if you look
5 at Meyer and Callister, the non-credible portions of the
6 Maryland tax were those which were imposed by the county.
7 And they were considered imposed by the county because
8 they were imposed at the county level. And so taking that
9 rationale, we believe the position supported that to the
10 extent the tax is not imposed on a statewide level. It
11 would not be imposed by the state.

12 So I guess your question assumes that imposed by
13 is already satisfied. And I think our position is that
14 here we don't have -- the impose by requirement is not
15 satisfied by virtue of the fact that these taxes are not
16 imposed by the state. In fact, impose by in a plain --
17 you know, in a plain meaning of the term, imposed by the
18 MTA.

19 JUDGE GAST: Okay. Thank you very much,
20 Mr. Hall. Sorry for that convoluted question there.

21 I'll turn it over to Judge Akin. I think you
22 have a few more questions.

23 JUDGE AKIN: I had just one other question moving
24 onto a slightly different topic. So I just wanted to ask,
25 you know, for the paid to requirement. If I'm

1 understanding your position -- Franchise Tax Board's
2 position correctly with respect to the MCTMT, it's that
3 it's not paid to the state because it's essentially held
4 in trust for the, you know, Transit Authority as opposed
5 to -- is that correct? I just wanted to make sure I
6 understand. Because in the sense of whose -- you know,
7 who you are writing the check to or making the electronic
8 payment to, it's being --

9 MR. HALL: Yeah. That's what we believe was
10 addressed in the Meyer. And our position is we have to
11 look at paid to sort of substantively, not -- not
12 literally. And so as pointed out in Meyer, the taxpayer
13 made an argument that, hey, we literally paid our check to
14 the State of Maryland, and so it's paid to the State of
15 Maryland under the statute. And the Court actually says
16 they disagree with this analysis. They say we don't view
17 this as a literal -- you know, we don't interpret the word
18 paid to literally. And so, therefore, taxpayer, we
19 disagree with you.

20 Now, as I mentioned, it's not our place to
21 question why the Meyer Court ultimately allowed a portion
22 of the credit or have a portion of the tax to qualify for
23 their credit. But the language is there suggesting that.
24 And I believe, you know, in a world where we interpret the
25 statute in a sensible way, we're looking at the MCTMT and

1 saying, the statute under 805, the New York statute
2 requires the taxes be held in trust by the comptroller and
3 paid to the MTA. These are the MTA's funds by law and so,
4 therefore, they are paid to in substance the MTA. And for
5 purposes of 18001, they are paid to the MTA.

6 JUDGE AKIN: Understood. I just wanted to make
7 sure I was understanding fully.

8 MR. HALL: Thank you.

9 JUDGE AKIN: Thank you. That's all the questions
10 I had at this time.

11 JUDGE GAST: This is Judge Gast. Thank you,
12 Judge Akin.

13 At this point, I'm going to turn it over to
14 Appellants for their rebuttal for 30 minutes, if you're
15 ready.

16 MR. BRANNAN: Yeah. I might ask for a 10-minute
17 break, not to necessarily stretch this out, but I think it
18 might help smooth out the rebuttal as opposed my random
19 notes here. If you just give me that courtesy, I would
20 really appreciate it.

21 JUDGE GAST: Okay. So why don't we come back at
22 3:50. So again, mute your microphones, turn off your
23 cameras, but don't leave Webex. Thank you.

24 (There is a pause in the proceedings.)

25 JUDGE GAST: All right. I think we have everyone

1 back. So why don't we go back on the record, Ms. Alonzo.

2 And I'll turn it over to Mr. Brannan for
3 Appellants' rebuttal, and you will have 30 minutes. So
4 please begin whenever you're ready.

5 MR. BRANNAN: Thank you very much, Judge Gast.

6 I guess I'd like to begin by asking Mr. Newman a
7 couple of questions to clarify some facts that just really
8 need to be pinned down at this point.

9

10 FURTHER REDIRECT EXAMINATION

11 BY MR. BRANNAN:

12 Q First, with regard to the Mobility Tax,
13 Mr. Newman, who is the tax paid to when somebody writes a
14 check for the tax?

15 A It would be the State of New York Department of
16 Taxation and Finance, the Commissioner of the State
17 Department of Taxation and Finance.

18 Q So it is not paid to the MTA or any other Transit
19 Authority?

20 A That's correct.

21 Q Second question, Mr. Newman. Does the MTA have
22 any independent authority to reject a decision by the
23 State to impose the Mobility Tax?

24 A No. The Mobility Tax was imposed by state law
25 and became effective immediately on that. The MTA had no

1 discretion to choose not to.

2 Q So that makes it a little different than the way
3 you have described the UBT; correct?

4 A That's correct.

5 Q Okay. Thank you. Last question for you,
6 Mr. Newman. I believe that Respondent has suggested that
7 the UBT is not part of the state tax code. Could you
8 please respond to that -- the state laws, excuse me.

9 A The Unincorporated Business Tax is in the
10 unconsolidated laws of the general -- I'm sorry. I'm
11 giving general city law -- the model law and it's
12 Chapter 772 of the laws in 1966. It's been updated, and
13 it is included in the state acts. I mean, in the body of
14 state laws. It's in an unconsolidated law.

15 MR. BRANNAN: Great. Thank you very much. And
16 no further questions for Mr. Newman.

17

18 CLOSING STATEMENT

19 MR. BRANNAN: And I'll do my best here to kind of
20 unpack a number of things that we heard. And I think I'll
21 start with the Mobility Tax because it does illustrate, I
22 think, a number of flaws in Respondent's position.

23 First, you know, factually as indicated by
24 Mr. Newman, it's indeed paid to the State. And so we can
25 reach to this dichotomy of imposed by and paid to, you

1 know, and that's fine. We start with the impose by branch
2 of this, and I think it's very much kind of a semantic
3 exercise. I appreciate that it says impose by and in the
4 state -- or in the statute. I understand that. But I
5 think that you, you know, if you were to draw a Venn
6 diagram, which is one of my favorite things to do, you
7 can't impose if you don't have the authority.

8 And so if you have the authority, then that
9 really drives who is the one imposing the tax. Either I
10 let you do it, or I don't let you do it. And if I let you
11 do it, there you have it. Now, if I give you a choice as
12 to how to do it, then that's the discretionary part.
13 That's the 20 to 50 percent that we're talking about in
14 the Maryland surcharge. If I give you choices as to how
15 you can do it, then that's -- you know, that's different.
16 But if I tell you how to do it and I don't give you any
17 choice at all as to what the terms are, then that's -- you
18 know, that's the authority. That's the power to tax, you
19 know.

20 Now, very quickly, it's convenient, if nothing
21 else, but refer to the -- you know, at the top of -- you
22 know, it's page 1 of Exhibit H offered by Respondent in
23 that very first opening paragraph. It talks about the
24 Transit Authority as a corporate entity separate and apart
25 from the State of New York. Okay. Well, I think we're

1 all in agreement there. Without any power of taxation, so
2 there's a different word. Power of tax. Power or
3 authority, it doesn't matter. But for the Mobility Tax,
4 at least, that's very clearly and without question imposed
5 by the State.

6 So let's talk about the impose by and paid to.
7 So what's troubling here is I've heard a few times that
8 Meyers is not binding on California. Well, you know,
9 that's great. And I appreciate that a Tax Court decision
10 from another state is not binding. You know, we never
11 said it was. What we said was is because Callister adopts
12 Meyer, that Callister is binding and therefore, so is the
13 rationale of the Meyer case. And that's what the verbiage
14 in Callister. We adopt Meyer.

15 And so what it means is that we adopt all the
16 arguments. And now what is also interesting is we sit
17 there and we can now look at the Meyers language as
18 Respondent did, then he said, you know, paid to. We're
19 not going to look at as a literal requirement. But then
20 Respondent wants to turn around and rely on the terms paid
21 to. Now, I'm not sure what the difference is between
22 looking at the words paid and saying we're not going to do
23 a literal test here. That's a little too convenient.

24 At the end of the day, what's going is that
25 Respondent wants it both ways. Respondent on one hand

1 wants say, hey, if not paid to the state -- or if it's not
2 paid to the locality and it's paid to the state, well,
3 that doesn't mean what it says. But if it is paid to the
4 locality and not to the state, well, that's important all
5 of a sudden. And that's really the task is as to why it's
6 not a meaningful requirement when it stands on its own.

7 Callister didn't look at it as two distinct
8 requirements. It says imposed by and paid to. Bartz
9 looked at it as imposed by and paid to. And if you want
10 to know what the word paid means, it means have I written
11 the check. That's what all the case authority is. This
12 is a brand-new thing that the FTB is raising, literally,
13 out of nothing. Because what that word means is it's
14 like, well, did you actually pay it? I don't get it if
15 I'm credit. I don't get it if I'm filed an, you know, a
16 refund claim that hasn't been acted on. I don't -- I
17 mean, there's all these reasons that I don't get it
18 because it's not paid. But what that word means is paid.

19 And so the idea that imposed by and paid to, when
20 you look at the language of Callister and Meyers and even
21 Bartz because it was overruled, they treat them together
22 and they say, what we care about is who is the taxing
23 authority? And, again, it's the State very clearly for
24 the Mobility Tax. And we would say, you know, as we make
25 clear in our arguments, the same for the UBT.

1 Okay. Let's talk about another argument. It
2 says the MCTMT or the UBT, you know, the MCT is held in
3 trust. Okay. What they're saying, again, is that it's
4 how we use the money that determines, you know, how the
5 tax is imposed, or who it's paid to. Well, that argument
6 is just flat out rejected in Callister because that was
7 the basis for the decision in Bartz with respect to the
8 non-discretionary portion of the Maryland tax. And then
9 they said no, we're not going to follow that rationale.

10 And here's the deal. For Callister to approve
11 the credit, the non-discretionary portion of that Maryland
12 tax, they have to reject both arguments. They have to
13 reject the idea that the use of the fund matters. They
14 have to reject the idea that who it's paid to matters.
15 They have to reject all of the arguments that would
16 otherwise deny the credit in order to grant it. Because
17 as Respondent indicated, we've got to meet all the
18 requirements. I know that. But when Callister comes down
19 and says we're giving you the credit, it means all of
20 those argument are rejected.

21 And so when the FTB wants to go down that path
22 and say, hey, this is how we're using the funds, you know,
23 this whole agency concept. Again, raised in Bartz, reject
24 in Callister. This is not hard. It's incredibly
25 frustrating to sit here and watch the FTB repeatedly make

1 up the rules, like in their legal ruling 2018-01 where
2 they put forth the same arguments that are rejected by the
3 cases. They are doing it again here today. Those are not
4 important to the outcome here. Who the check is written
5 to. It's not important. The court say that. Our Board
6 says that. It's precedential decision. It's what we're
7 bound by and what we need to follow.

8 So use of funds, Meyers and Callister. So the
9 other thing that's very fascinating to me is Respondent's
10 argument that make a point. And well, clearly, it's not a
11 statewide tax. It's a city tax because it says in the
12 title it's the New York City Unincorporated Business Tax.
13 Well, I mean, it's very rare that I can sit here and say
14 look, I got a U.S. Supreme Court case that's on my side.
15 It says that the labels don't matter. Well, when it says
16 labels don't matter, labels don't matter for everybody.
17 It doesn't mean that we can decide it's important for this
18 case but not for the other case.

19 Again, what the FTB want to do is they want to
20 have their cake and eat it too by saying that who it's
21 paid to means this for this tax, and that for that tax.
22 You can't do that. We got to have a rule, and that rule
23 is articulated in the Callister case based in Meyers. And
24 then you look at the labels. Well, labels don't matter.
25 So the fact that it says it's the Transit District or it's

1 the city tax. It doesn't matter. And the authorities are
2 pretty -- they're just overwhelming, you know.

3 So this -- the other thing, this idea, and I
4 think I said this in response maybe to one of the
5 questions earlier. But the idea that, you know, the power
6 to impose. So we have power in position. We have
7 authority. We have discretion. And, again, I think what
8 drives this whole thing -- and, really, if you look at the
9 language in Callister, what they talk about is who is the
10 taxing authority. And without the state nothing happens
11 in New York for either of these taxes, and that's the
12 starting inquiry.

13 And then what we do is we say, okay. Is there,
14 in fact, a double tax. Then we go to the net income piece
15 again, and that's a leveling influence. We go to the use
16 of California Nonresident Sourcing Rules. What that does
17 is that levels out the tax again to make sure that we're
18 talking about the same revenue or income pot for purposes
19 of how the tax is determined, and what's paid. And once
20 you do that, then if there's a double tax, what the
21 statute says is our taxpayers, our residents of this state
22 deserve a remedy for that double tax.

23 We're not trying to get too much. We're not
24 trying to get too little. But if there is indeed a double
25 tax, which there is in this case, then they deserve a

1 remedy for it. And it's really that simple at the end of
2 the day. So we're all very strongly with Respondent's
3 interpretation of either the Meyer case or the Callister
4 case. And again, there's a reason I started with Bartz.
5 Because all of the arguments raised in Bartz kind of, you
6 know, have now been rejected, and there's no other
7 authority out there on those points.

8 Let's talk a little bit about the UBT, and I
9 think it's really important because the way Respondent
10 relied on the idea that where it's located in the tax code
11 matters. One, we don't think it does because the State
12 granted authority for the UBT. And once granted, once
13 enacted in 1966, for our purposes the years under
14 consideration, the City no longer had any discretion to
15 the extent they may have had it earlier, and we're not
16 even agreeing with that, Judge Gast, mindful of your
17 question.

18 But at the end of the day for the years in
19 question they couldn't change anything. They had zero
20 discretion over the tax, and that matters. It matters a
21 lot. At least that's the basis for Callister for it says
22 is credible versus what is not. What matters more is that
23 there's, in fact, a double tax because we're doing the
24 same net income stream. We're doing a portion of it
25 that's earned in the City, and at the end of the day

1 that's a clear double tax. Whether we like it or not,
2 it's a double tax.

3 And what the guidance is by looking at the Eel
4 River the statutory construction stuff says, hey, what's
5 the purpose of the statutes? What are we talking about
6 here? And what we're talking about is a credit for a
7 double tax. I understand what Respondent is saying about
8 narrow construction, but narrow construction means
9 consistent with the rules, consistent with the purpose of
10 the statute. If we deny the credit for the UBT, what
11 we're saying is yes, we know there's a double tax. But
12 there's some technical foot fault that's going to keep
13 that from happening, and that's just the wrong outcome.

14 So I think that you know -- and, again, the
15 reference, the idea, it is -- it is in the state laws.
16 The whole UBT is in the state laws. Mr. Newman gave that.
17 That it's the other thing. It's like there's so many
18 statements here that it's the reason Mr. Newman is here is
19 to give everybody reference to the New York laws, which
20 he's done. And so that we can focus on what we know. But
21 when we start saying things that just aren't accurate,
22 like, who it's paid to and where the law is found and who
23 is the driving authority behind the tax. You know, that's
24 the wrong way to go about resolving this sort of issue at
25 the panel, considering policy implication.

1 You know, if I have to sit here one more time and
2 hear the FTB threaten the panel with how bad this could be
3 if the agency loses because there's so many taxpayers out
4 there, I just -- it's not a valid legal argument. It
5 doesn't matter. I have two clients, the Mathers. They
6 paid this tax. They paid the tax twice on their income,
7 and they deserve a credit so that they don't have to pay
8 that tax twice in the same income.

9 At the end of the day, that's what this case is
10 about, not any other taxpayer in the State of California,
11 not another tax outside of the Mobility Tax or the UBT.
12 It's about whether there's a double tax. And in this
13 case, categorically there's a double tax, and they should
14 get the relief by the additional credit.

15 No further comments. Thank you very much for
16 your time today.

17 JUDGE GAST: Thank you. This is Judge Gast.
18 Thank you, Mr. Brannan.

19 I'm going to turn it over to the panel to see if
20 they have any final questions. Well, actually, let me ask
21 Mr. Hall.

22 Since, Mr. Brannan asked some questions of
23 Mr. Newman, did you want to ask him any follow-up
24 questions just to be fair here?

25 MR. HALL: Thank you, Judge. No, we don't have

1 any other questions for Mr. Newman.

2 JUDGE GAST: Okay. Thank you.

3 So I will turn it over to the panel for final
4 questions. Judge Akopchikyan?

5 JUDGE AKOPCHIKYAN: I don't have any questions.
6 Thank you everybody.

7 JUDGE GAST: Okay. And Judge Akin?

8 JUDGE AKIN: Judge Akin here. I don't have any
9 additional questions. I just want to thank both the
10 parties.

11 JUDGE GAST: And I don't have any additional
12 questions myself.

13 This concludes the hearing, and I want to thank
14 the parties for their presentations.

15 As I communicated to the parties prior to the
16 hearing and during the hearing, the record in this appeal
17 will remain open to allow the parties, if they wish, to
18 concurrently submit any additional evidence and an
19 additional brief related to the additional evidence to
20 further develop the record. The parties will have by
21 Friday, October 20th, 2023, to make their submissions and
22 will then have 30 days to respond to the opposing party's
23 submission. And then after that, OTA will note both the
24 parties that the record has been closed, which will start
25 the 100 days to issue the opinion for this matter. And I

1 will send out a post-hearing order with this information
2 after this hearing, likely tomorrow or Friday.

3 And with that, not seeing any questions on that,
4 I will lastly state, again, thank you. And we will start
5 again with hearings tomorrow at 9:30 a.m.

6 Thank you everyone.

7 (Proceedings adjourned at 4:07 p.m.)
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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for
the State of California, do hereby certify:

That the foregoing transcript of proceedings was
taken before me at the time and place set forth, that the
testimony and proceedings were reported stenographically
by me and later transcribed by computer-aided
transcription under my direction and supervision, that the
foregoing is a true record of the testimony and
proceedings taken at that time.

I further certify that I am in no way interested
in the outcome of said action.

I have hereunto subscribed my name this 23rd day
of October, 2023.

ERNALYN M. ALONZO
HEARING REPORTER