

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
KING SOLARMAN, INC., ) OTA NO. 220510291  
 )  
 APPELLANT. )  
 )  
 )

## TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, December 6, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
12900 Park Plaza Dr., Cerritos, California,  
91401, commencing at 1:00 p.m. and concluding  
at 1:32 p.m. on Wednesday, December 6, 2023,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ MIKE LE

Panel Members: ALJ RICHARD TAY  
ALJ AMANDA VASSIGH

For the Appellant: STEVEN MATHER

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
DESIREE MACEDO  
JACLYN ZUMAETA

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I N D E X

E X H I B I T S

(Appellant's Exhibit 1 was received at the prehearing conference.)

(Department's Exhibits A-F were received at the prehearing conference.)

(Department's Exhibit G was received at page 7.)

OPENING STATEMENT

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1 Cerritos, California; Wednesday, December 6, 2023

2 1:00 p.m.

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

5 We are opening the record in the Appeal of King  
6 Solarman, Inc. This matter is being held before the  
7 Office of Tax Appeals. The OTA Case No. is 220510291.  
8 Today's date is Wednesday, December 6th, 2023, and the  
9 time is 1:00 p.m. This hearing is being held in person in  
10 Cerritos, California.

11 Today's hearing is being heard by a panel of  
12 three Administrative Law Judges. My name is Mike Le, and  
13 I will be the lead judge. Judge Richard Tay and  
14 Judge Amanda Vassigh are the other members of this tax  
15 appeals panel. All three judges will meet after the  
16 hearing and produce a written opinion as equal  
17 participants. Although the lead judge will conduct the  
18 hearing, any judge on this panel may ask questions or  
19 otherwise participant to ensure we have all the  
20 information needed to decide this appeal.

21 Now for the parties introductions. For the  
22 record, will the parties please state their names and who  
23 they represent, starting with Respondent.

24 MS. MACEDO: Good afternoon. My name is Desiree  
25 Macedo, and I represent Respondent Franchise Tax Board.

1 JUDGE LE: Thank you.

2 MS. ZUMAETA: Hi there. I'm Jackie Zumaeta, and  
3 I also represent Franchise Tax Board.

4 MR. MATHER: Good afternoon. I'm Steve Mather  
5 representing the taxpayer, King Solarman, Inc.

6 JUDGE LE: Thank you.

7 And give us just one moment here. It seems we  
8 have a technical issue here. Okay. We have technical  
9 issues with our video stuff here.

10 We're going to take a break for 5 minutes. We're  
11 going to go off the record, and we will resume at  
12 1:07 p.m. Thank you.

13 (There is a pause in the proceedings.)

14 JUDGE LE: Let's go ahead and go back on the  
15 record.

16 Thank you both parties for your introduction.

17 Let's move onto my minutes and orders. As  
18 discussed with the parties at a prehearing conference on  
19 October 25th, 2023, and notated in my minutes and orders,  
20 there are two issues in this matter. The first is whether  
21 the statute of limitations bars Respondent's proposed  
22 assessment. The second is whether California conforms to  
23 federal law relating to method of accounting as applied to  
24 this appeal. After this hearing, the panel of ALJs will  
25 deliberate to determine how best to phrase the issues on

1 | appeal.

2                   No witnesses will testify at this hearing for  
3       either party.

4 Appellant's Exhibit 1 and Respondent's Exhibits A  
5 through F were entered into the record in my minutes and  
6 orders. After the prehearing conference, Respondent  
7 submitted Exhibit G. There were no objections to Exhibit  
8 G by the deadline notated in my minutes and orders. So  
9 Exhibit G is also entered into the record.

10 (Department's Exhibits G were received in  
11 evidence by the Administrative Law Judge.)

12 JUDGE LE: This oral hearing will begin with  
13 Appellant's presentation for up to 20 minutes.

14 Does anyone have questions before we start with  
15 Appellant's presentation?

16 Respondent, any questions.

17 MS. MACEDO: No questions.

18 JUDGE LE: Thank you.

19 And for Appellant, any questions before we start  
20 with your presentation?

21 MR. MATHER: No.

22 JUDGE LE: Thank you. Okay. Appellant, you have  
23 up to 20 minutes. Please begin.

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STATE OF CALIFORNIA OFFICE OF TAX APPEALS



1 trial, the IRS changed its course and argued that the  
2 taxpayer had always elected and used the accrual method,  
3 and therefore, it was the taxpayer that was trying to  
4 change the method by not including the note into income.  
5 At trial, we argued that the IRS' new argument was not  
6 properly raised. The Tax Court, however, allowed the IRS'  
7 new issue and ruled that the taxpayer had elected and used  
8 the accrual method since the beginning.

9 The Tax Court also ruled that the taxpayer was  
10 required to use the accrual method by applying an IRS  
11 Revenue Procedure, Revenue Procedure 2002-28. The  
12 taxpayer appealed to the Ninth Circuit which specifically  
13 refused to rule that the election of the accrual method  
14 and use of the accrual method had either been properly  
15 raised or had been properly decided. Instead, the Ninth  
16 Circuit relied entirely on the Revenue Procedure 2002-28  
17 to require the taxpayer to use the accrual method.

18 So based on this history, the final federal  
19 determination includes -- which is the Ninth Circuit's  
20 determination -- includes no ruling that the IRS properly  
21 raised the election of the accrual method or the use of  
22 the accrual method; no ruling that the taxpayer actually  
23 elected and used that method; and only was based on a  
24 ruling that the Revenue Procedure required the taxpayer to  
25 use the accrual method of accounting. So that's the

1 federal -- so that's the final federal determination in  
2 the case, not involving any of the findings of the Tax  
3 Court and specifically refusing to adopt the findings of  
4 the Tax Court relating to the election in use of the  
5 accrual method by the taxpayer.

6 So we're left with the Revenue Procedure. So the  
7 second kind of curiously unprecedented issue -- at least  
8 in my experience with this case -- was that what does the  
9 Office of Tax Appeals do with an IRS Revenue Procedure?  
10 Particularly in our case, this is a Revenue Procedure that  
11 was adopted in 2002 -- 13 years before our case -- and was  
12 effectively overruled by a statutory change two years  
13 later. And that statutory change was expressly conformed  
14 with by the California legislature and is now the  
15 California law.

16 So there's no question that if we were two years  
17 later, we would have prevailed because we would not have  
18 been required to adopt the accrual method of accounting  
19 under the statutory test that came in 2017. So we're left  
20 with the question of what's the fact of this Revenue  
21 Procedure, this IRS Revenue Procedure. So, ultimately,  
22 that's a question of what type of deference is due to IRS  
23 administrative guidance. So that issue for years, decades  
24 probably, has been governed on the federal side by  
25 reference to what they call Chevron deference.

1           And Chevron deference was basically -- well, it  
2       was a Supreme Court case named Chevron that said that if  
3       there's some ambiguity in the statutory law, then the  
4       courts will generally defer to an administrative  
5       regulation -- like a Treasury regulation on the IRS  
6       side -- that fills the gaps. So that was the rule with  
7       respect to a federal regulation. Well, we don't really  
8       have a federal regulation that controls the outcome in our  
9       case. We have an IRS Revenue Procedure. Well, even under  
10      Chevron deference on the federal side, an IRS Revenue  
11      Procedure was never entitled to deference.

12           Revenue rulings revenue procedures, similar  
13      pronouncements by the IRS were always only considered to  
14      be advisory. They were something that would be followed  
15      by the court if it made sense. And so it basically was a  
16      statement of IRS position and nothing more than that.  
17      So -- and what has changed recently -- and I meant to  
18      lookup the name of the case, and I didn't -- is I know  
19      that there's a case pending before the Supreme Court --  
20      the U.S. Supreme Court right now that is challenging  
21      may -- and many people think -- will throw out, even  
22      Chevron deference for regulations.

23           It's an SCC case pending before the court, and  
24      there's been a lot of coverage in the press recently about  
25      what this is going to do, and what do we do after Chevron

1        deference is actually tossed out. So in the federal area,  
2        at least, we've got a questionable issue of whether there  
3        would be any deference to a regulation, but there would be  
4        no deference to an IRS statement of position and a Revenue  
5        Procedure or a revenue ruling.

6                So now we turn to California law. So there was  
7        no California case found by either party or cited by  
8        either party in this case that has any particular -- any  
9        direct relevance of the effect of an IRS Revenue Procedure  
10       and how that's treated under California law. And more  
11       specifically, Revenue Procedure 2002-28 was never  
12       specifically adopted or even followed by the Franchise Tax  
13       Board in any case that either of the parties located. So  
14       we have this IRS statement of position basically standing  
15       on its own that was the sole basis for the final federal  
16       determination, and we need to decide whether OTA should  
17       apply this IRS Revenue Procedure that even the -- well,  
18       the federal courts did apply. So I guess -- and that was  
19       the basis of the ruling.

20               So what we really have in this case, though, in  
21       terms of looking at what rules should be applied, is we  
22       have the 13 year-old Revenue Procedure that was never law  
23       in the California versus the two-year subsequent statement  
24       of the what the accounting method rule is in the  
25       legislative change that was specifically adopted by the

1 California legislature.

2 So it's the taxpayer's position that clearly,  
3 even though it does not technically apply to our year  
4 because it was not made retroactive, if we're looking for  
5 what the statement of the California law was meant to be  
6 and now is, we need to look to the 2017 legislative rule,  
7 not some IRS statement of position that was the sole basis  
8 for the federal determination. So based on this, we  
9 essentially have a situation where the Franchise Tax Board  
10 is asking the Office of Tax Appeals to adopt a repudiated  
11 IRS statement of position as the controlling rule in our  
12 case, when under the clear statement of the California law  
13 by the California legislature two years later would  
14 clearly allow the taxpayer to prevail.

15 That's our initial presentation.

16 JUDGE LE: Thank you for your presentation.

17 Let me turn to the Panel to see if they have any  
18 questions at this time.

19 Judge Tay, any questions for Appellant?

20 JUDGE TAY: Not at this time. Thank you.

21 JUDGE LE: Thank you.

22 And, Judge Vassigh, any questions at this time?

23 JUDGE VASSIGH: I do have one question. Are you  
24 asserting that California conforms to the 2017 changes to  
25 IRC section 471-C?

1 MR. MATHER: Yes, I am.

2 JUDGE VASSIGH: Thank you.

3 JUDGE LE: Thank you.

4 Okay. Now it is Respondent's turn to give your  
5 presentation. You have up to 20 minutes starting at  
6 1:17 p.m.

7

8 PRESENTATION

9 MS. MACEDO: Good afternoon, Panel. My name is  
10 Desiree Macedo and with me is Jaclyn Zumaeta, and we will  
11 be representing Respondent, the Franchise Tax Board in  
12 this matter.

13 There are two issues on appeal: One, whether  
14 Respondent's NPA, based upon a final federal  
15 determination, was timely issued; and two, whether  
16 Appellant has shown that there is an error in the final  
17 federal determination, or Respondent's NPA, based on  
18 California's conformity to federal law.

19 I will first discuss why Respondent's NPA was  
20 timely issued. On June 28th, 2017, the IRS issued a  
21 notice of deficiency for tax year ending April 30th, 2015,  
22 because Appellant had elected to file its return using the  
23 accrual method but only reported cash payments received  
24 during tax year ending April 30th, 2015. Appellant  
25 appealed the IRS decision to the United States Tax Court

1 on September 21st, 2017. On August 19th, 2019, the United  
2 States Tax Court sustained the deficiency determined by  
3 the IRS.

4 Neither Appellant nor the IRS notified Respondent  
5 of the federal audit. However, Respondent became aware of  
6 the federal audit when they independently discovered this  
7 Tax Court opinion. Appellant subsequently appealed to the  
8 United States Court of Appeals which affirmed the United  
9 States Tax Court decision. In the present case, the final  
10 federal determination is March 27th, 2020, the date when  
11 additional tax was assessed and recorded on Appellant's  
12 federal account transcript. On May 19th, 2021, Respondent  
13 issued an NPA based on the final federal determination.  
14 Respondent's proposed assessment is based upon the federal  
15 adjustment as California conforms to the same accounting  
16 method rules that the IRS used to make its determination.

17 Appellant argues that the NPA issued by  
18 Respondent was untimely as it was not issued within four  
19 years of its filed return for the 2015 tax year. However,  
20 when there have been federal adjustments or changes to an  
21 item of gross income or deductions, the statute of  
22 limitations is extended. The statute of limitations in  
23 these situations is dependent upon Respondent upon when  
24 Respondent is notified of the federal adjustments in a  
25 sufficient manner to allow Respondent to apply the changes

1 to the state return where applicable.

2 If the Respondent is notified by the taxpayer or  
3 the IRS within six months of the final federal  
4 determination, then Respondent has two years from the date  
5 of the notice within to which issue a timely NPA. If the  
6 notice is received after the six-month period, Respondent  
7 has four years within which to issue a timely NPA. If  
8 neither the taxpayer nor the IRS provides notice of a  
9 federal determination, Respondent has an unlimited time  
10 period within which to issue the NPA based on those  
11 federal adjustments.

12 In the present appeal, neither Appellant nor the  
13 IRS reported the federal changes to Respondent. As such,  
14 the law allows Respondent to issue an NPA at any time.  
15 Respondent also notes that its NPA issued on May 19th,  
16 2021, was issued within the earliest extended period as it  
17 was only issued 14 months after the final federal  
18 determination date. Therefore, Respondent's NPA issued on  
19 May 19th, 2021, is clearly timely.

20 I will now discuss whether Appellant has shown  
21 error in the final federal determination or Respondent's  
22 NPA. The basis for the federal determination was that the  
23 IRS determined that Appellant was required to use the  
24 accrual method to clearly reflect all of Appellant's  
25 income since Appellant did not seek authorization from the



1 Commissioner to use the cash method.

2 Appellant argued as a defense that it qualified  
3 for relief under Revenue Procedure 2002-28. As such both  
4 the Tax Court and the Ninth Circuit analyzed whether  
5 Appellant was required to use the accrual method or would  
6 be provided relief under Revenue Procedure 2002-28 and  
7 allowed to use the cash method. It is important to note  
8 that both courts squarely rejected this argument because  
9 of Appellant's circumstances required the accrual method  
10 and did not meet the requirements of Revenue Procedure  
11 2002-28.

12 In fact, the Ninth Circuit affirmed findings of  
13 the Commissioner and the Tax Court when it found that  
14 Appellant was restricted to the accrual method because it  
15 was necessary for Appellant to use an inventory, and it  
16 did not receive permission from the Commissioner to use a  
17 different method. Therefore, the question on appeal today  
18 is whether California conforms to federal methods of  
19 accounting, which it does, pursuant to Revenue & Taxation  
20 Code Sections 17551 and 24701. Appellant erroneously  
21 contends that the Ninth Circuit's opinion only address the  
22 application of Revenue and Procedure 2002-28, but the IRS  
23 Revenue Procedure does not apply for California purposes  
24 and, therefore, the state adjustment does not result from  
25 the federal determination.

1           However, the opinion issued by the Ninth Circuit  
2           is not limited to the narrow holding. As Appellant  
3           argues, the threshold question clearly addressed whether  
4           or not a taxpayer was required to use the accrual method  
5           or -- and found in the affirmative. Appellant has failed  
6           to meet its burden to show that there are differences  
7           between federal and state law which would cause a  
8           different result. Respondent's NPA, which mirrors the  
9           federal adjustments, clearly results from the federal  
10          determination. Therefore, Respondent's determination  
11          should be sustained.

12           Thank you. I would be happy to answer any  
13          questions the Panel may have at this time.

14           JUDGE LE: Thank you for your presentation.

15           Let me, again, turn to the Panel.

16           Judge Tay, any questions for Respondent?

17           JUDGE TAY: One quick question for Franchise Tax  
18          Board. Does the law allow a taxpayer to use different --  
19          report on different accounting methods between California  
20          and federal like, for example, accrual at the federal  
21          level, cash at the state level?

22           MS. MACEDO: I believe they can. However, the  
23          election has to be made and, unfortunately, Appellant did  
24          not make the election.

25           MS. ZUMAETA: So generally speaking, we conform

1 to the language that you would need to get permission from  
2 the Commissioner. So if you get permission from the  
3 Commissioner, the Franchise Tax Board would utilize that  
4 permission and also allow it for Franchise Tax Board  
5 purposes. It would be conceivable that you could obtain  
6 permission solely from the Franchise Tax Board to report  
7 that way. However, that didn't happen in this case.

8 JUDGE LE: Thank you. I have no further  
9 questions for Franchise Tax Board.

10 Turning to Judge Vassigh. Any questions?

11 JUDGE VASSIGH: I do not have any questions right  
12 now. Thank you.

13 JUDGE LE: Thank you.

14 I do have one question myself. Can Respondent  
15 address -- Appellant appears to argue that the final  
16 federal determination occurred when the Ninth Circuit  
17 opinion was released. Can you address that point? I  
18 believe you mentioned that the final federal determination  
19 occurred at the different date.

20 MS. MACEDO: Yes, the final federal determination  
21 occurred when the determination occurred on the account  
22 transcripts. So that would have been -- what date was  
23 that? -- March 27th, 2020. That's the date that the  
24 additional tax was assessed and recorded on the account  
25 transcript.

1 JUDGE LE: Thank you.

2 Okay. It's now Appellant's turn for his rebuttal  
3 to Respondent's arguments. You have up to 5 minutes.  
4 Please proceed. Thank you.

5 MR. MATHER: Thank you.

6

7 CLOSING STATEMENT

8 MR. MATHER: The final federal determination is  
9 an opinion. It's not an assessment. A determination is  
10 not an assessment. A determination is either the opinion  
11 of the Tax Court or the opinion of the Ninth Circuit that  
12 explains the bases of the determination. That's what the  
13 Franchise Tax Board has to adopt. It may be for statute  
14 of limitations computational purposes that the assessment  
15 date is relevant, but it's not relevant to determine  
16 whether this body is going to be bound by a federal  
17 determination.

18 Clearly the only federal determination in this  
19 case that is legally effective is the opinion by the Ninth  
20 Circuit. And so, therefore, the Franchise Tax Board who  
21 is essentially seeking to adopt whatever the federal  
22 determination was, must be held to adopt the Ninth Circuit  
23 determination, not some kind of an assessment that is just  
24 the entry of an amount on an internal record in the  
25 Internal Revenue Service.

1           It's important to also understand here is it's  
2       really -- it's really no question that, at least in 2015,  
3       the taxpayer did not report the income on the accrual  
4       basis. It wasn't in his books, and it wasn't in the  
5       taxpayer's books, and it wasn't on the tax return.  
6       Because if it was, there wouldn't have been a  
7       determination that the promissory note had to be included  
8       as income. So the taxpayer was actually using the cash  
9       basis, and that's what the dispute was in the federal  
10      court, whether it was required to use the accrual basis.  
11           And for that determination, the Ninth Circuit did  
12      rely exclusively on the Revenue Procedure because the  
13      Revenue Procedure is what defines when inventory is  
14      required. So we accept that, at least under the  
15      regulation, there is a requirement to use the accrual  
16      method of accounting, if you're required to use inventory.  
17      The decision of when a taxpayer is required to use  
18      inventory is left to the Revenue Procedures, which is,  
19      again, not -- Revenue Procedures are not generally binding  
20      in -- under California law and, specifically, not in this  
21      case.  
22           So the question then is, I suppose, what was the  
23      inventory requirement here? So what we have in this  
24      case -- just to refresh the Panel -- is that the taxpayer  
25      received one order to produce 162 solar towers. That was

1 a build-to-order process where the taxpayer purchased all  
2 of the component parts and assembled them and produced the  
3 162 solar towers for one sale. So there certainly was a  
4 cost of goods sold involved because there were products  
5 that went into the manufacture of the solar towers, but  
6 there's no inventory the taxpayer ever had any form or  
7 fashion.

8 And the nature of the exception in the Revenue  
9 Procedure -- which we, again, say is not even applicable  
10 in our case -- is that especially when you build to order,  
11 that's not a situation in which you have inventory. So --  
12 but the fact is the taxpayer did not use the accrual basis  
13 and did not have inventory and was not required to use  
14 inventory. And that's -- those are the statutory and  
15 regulatory requirements that should apply in this case,  
16 not the Revenue Procedure which adopts a more complicated  
17 rule for determining when inventory is required.

18 And that concludes my remarks.

19 JUDGE LE: Thank you for your rebuttal.

20 Let me turn to the Panel one last time to see if  
21 they have any final questions of either party.

22 Judge Tay, any final questions for either party?

23 JUDGE TAY: I need a moment.

24 JUDGE LE: Okay. Let me first turn to  
25 Judge Vassigh. Any questions for either party?

1 JUDGE VASSIGH: I do not have any questions.

2 Thank you.

3 JUDGE LE: Thank you.

4 I do have one question for Appellant, and it's  
5 regarding the taxpayer's California -- on the California  
6 return, they checked the box for accrual method of  
7 accounting. I was wondering if you can address that?

8 MR. MATHER: Yes. There was extensive testimony  
9 in the federal case that the checking of the box was an  
10 inadvertent mistake by the return preparer. And so it  
11 wasn't an actual election. It was just a scrivener's  
12 error. So the testimony of the taxpayer's president  
13 established that and the -- even in the opinion of the Tax  
14 Court -- which I say doesn't count here -- said, you know,  
15 there were numerous mistakes in the tax return.

16 So that's not a binding election. And, again,  
17 the election part of the Tax Court's opinion was not --  
18 you know, the findings with respect to the elections in  
19 the Tax Court opinion was not adopted by the Ninth  
20 Circuit.

21 JUDGE LE: Thank you.

22 Judge Tay, do you still need another minute?

23 JUDGE TAY: I'm okay. I have no further  
24 questions. Thank you.

25 JUDGE LE: Okay. I believe if there's nothing

1       else, I believe that will conclude our hearing for today.

2       Thank you everyone for coming in today.

3               This case is submitted on December 6th, 2023, and  
4       the record is now closed. The Judges will meet and decide  
5       your case later on, and we will send the parties a written  
6       opinion of our decision within 100 days.

7               Today's hearing in the Appeal of King Solarman,  
8       Inc., is now adjourned.

9               Thank you and goodbye.

10              (Proceedings adjourned at 1:32 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 21st day  
of December, 2023.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER