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APPEARANCES :

Administrative Law Judge: KEITH LONG
CHERYL AKIN
AMANDA VASSIGH

For the Appellant: KATHY FREEMAN

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

MATTHEW MILLER
BRAD COUTINHO

I N D E X

E X H I B I T S

(FTB's Exhibits A-H were received in Judge Long's minutes and orders, page 7)

(Appellant's Exhibits 1-15 were received in Judge Long's minutes and orders, page 7)

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1 California; Tuesday, December 17, 2024

2 1:00 p.m.

3
4
5 JUDGE LONG: We're opening the record in the Appeal of
6 New Alien Corporation. OTA Case No. 22029627. This
7 matter is being held before the Office of Tax Appeals.
8 Today's date is December 17th, 2024, and the time is
9 approximately 1:00 p.m. This hearing is being convened
10 electronically.

11 Today's hearing is being heard by a panel of
12 three administrative law judges. My name is Keith Long,
13 and I will be the Lead Administrative Law Judge. Judge
14 Cheryl Akin and Judge Amanda Vassigh are the other members
15 of this tax panel.

16 All three judges will meet after the hearing and
17 produce a written decision as equal participants.
18 Although the lead judge will conduct the hearing, any
19 judge on this panel may ask questions or otherwise
20 participate to ensure that we have all the information
21 needed to decide this appeal.

22 As a reminder, the Office of Tax Appeals is not a
23 tax court. It is an independent appeals body. The panel
24 does not engage in ex parte communications with either
25 party. OTA will issue an opinion based on the party's

1 arguments, the admitted evidence, and the relevant law.

2 For the record, will the parties please state
3 their names and who they represent starting with the
4 representatives for Franchise Tax Board.

5 MR. MILLER: Good afternoon. My name is Matthew
6 Miller, representing the Franchise Tax Board.

7 MR. COUTINHO: Good afternoon. This is Brad Coutinho,
8 also representing Franchise Tax Board.

9 JUDGE LONG: Thank you.

10 And for appellant.

11 MS. FREEMAN: Kathy Freeman, representing Alien
12 Corporation.

13 JUDGE LONG: Thank you.

14 We are hearing one issue in this appeal today.
15 It is whether appellant has the capacity to maintain an
16 appeal before OTA.

17 My understanding is there is no witnesses today;
18 is that correct, Ms. Freeman?

19 MS. FREEMAN: Correct.

20 JUDGE LONG: And Franchise Tax Board?

21 MR. MILLER: Correct.

22 JUDGE LONG: Thank you.

23 The exhibits in this appeal consist of FTB
24 Exhibits A through H. At the prehearing conference,
25 appellants stated that there were no objections to these

1 exhibits.

2 Can appellant please confirm that there are no
3 objections.

4 MS. FREEMAN: There are no objections.

5 JUDGE LONG: Thank you.

6 Additionally, appellant submitted an exhibit
7 index identifying Exhibits A through O at the prehearing
8 conference and thereafter, these exhibits have been
9 relabeled as Exhibits 1 through 15.

10 Can Franchise Tax Board please confirm that there
11 are no objections to these exhibits.

12 MR. MILLER: No objections. Thank you.

13 JUDGE LONG: Thank you.

14 All right. Then FTB's Exhibits A through H and
15 Appellant's Exhibits 1 through 15 are admitted into
16 evidence.

17 (FTB's Exhibits A-H are admitted into
18 evidence.)

19 (Appellant's Exhibits 1-15 are admitted into
20 evidence.)

21 JUDGE LONG: This hearing is expected to take
22 approximately two hours, and we will begin with the
23 appellant's presentation which will last approximately 60
24 minutes.

25 Ms. Freeman, you may begin when you're ready.

1 PRESENTATION

2 MS. FREEMAN: Thank you.

3 Good afternoon. And thank you for your time this
4 afternoon to address the jurisdictional issue at hand.

5 Appellant in this case timely filed its returns
6 for the tax year and paid its self-assessed tax.

7 Appellant's tax return began on September 28th, 2014, and
8 ended on August 28th, 2015. It's considered a short
9 period return for a physical tax year beginning in 2014.

10 Appellant did not file in California prior to
11 September 28, 2014, because it conducted no business
12 activities prior to that date as it had been incorporated
13 in Delaware on April 1st, 2014. Respondent acknowledges
14 that this is appellant's only tax return file.

15 For the tax years, appellant claimed an annual
16 deduction against its income which created AMT liability.
17 Taxpayer, appellant, reduced its TMT by R&D credit and is
18 allowed by RTC Section 23036(d)(1).

19 Respondent disagreed with appellant's use of R&D
20 credits to offset its TMT and issued a notice of proposed
21 assessment which appellant timely protested in an upon
22 issuance in a notice of action by the FTB. Appellant
23 timely appealed the FTB's determination.

24 Respondent based solely on a cursory review on
25 appellant's tax return. As asserted, appellant lacks

1 capacity to pursue his PO based on Corporation Code
2 Section 2203, Section C, because it did not first register
3 with California Secretary of State.

4 Respondent has alleged with zero facts to support
5 this assertion that appellant was conducting an intrastate
6 business solely based on this cursory review of its tax
7 return filed for the tax year.

8 Assessed, respondent asserts appellant was
9 required to register to transact intrastate business which
10 it was not not conducting based on Corporation Code
11 Section 21 Oh, five.

12 Respondent further asserts because appellant was
13 required to register with SOS, Secretary of State, and
14 didn't, it cannot maintain its appeal with the Office of
15 Tax Appeals because OTA lacks jurisdiction to do so
16 -- citing the Appeal of Reitman Atlantic Corporations to
17 support its position.

18 Appellant disagrees with respondent's assertion
19 that appellant lacks capacity to pursue this timely appeal
20 on the following grounds. Each which will be addressed
21 during this discussion.

22 First, appellant was not required to register
23 with SOS. Appellant did not conduct intrastate business
24 at any time during the tax year. Respondent has no
25 evidence that either appellant or its LLCs conducted

1 intrastate business, and respondent's allegations
2 therefore lack of foundation.

3 Further, the Appeal of Reitman Atlantic
4 Corporation is not applicable for many reasons which will
5 also be discussed.

6 The balances discussions relates California
7 Corporation Code, so most of my references to sections
8 will be to the corporation code.

9 Appellant admits there was some errors in its
10 return as filed in the amended return to correct these
11 errors. They did not alter the tax at issue, but it's
12 important to remember that Appellant underwent material
13 organizational changes immediately prior to this tax year
14 which caused these errors and which have since been
15 corrected.

16 Appellant had no filing obligation prior to a
17 subsequent to the single filing and the significant
18 changes during the tax year which also contributed to
19 these unintentional issues that respondent has brought up.

20 Appellant's Exhibits are in the record to support
21 their organizational change and its business operations,
22 so I'm not going to -- except for one -- in respect to one
23 particular document, I don't plan on going through the
24 exhibits since they're already in the record.

25 The first and primary issue was appellant's

1 requirement to register with the Secretary of State.
2 Appellant is not required to register because it was not
3 conducting intrastate business. Appellant is considered a
4 foreign corporation.

5 And as a result, having been formed in Delaware
6 on April 1st, 2014, appellant formation documents are
7 included in the zip file. Not all foreign corporations
8 are required to register with Secretary of State. The
9 statute is clear that only foreign corporations conducting
10 intrastate business are required to be registered.

11 Registration of foreign corporations conducting
12 intrastate or foreign business is optional. The statute's
13 clear on that as well -- the corporation code. Foreign
14 corporations are not registered with the Secretary of
15 State may nevertheless have a filing obligation in
16 California.

17 There are thousands of such entities that have
18 filing obligations with respondent. And these entities
19 are referred to as nonqualified franchise taxpayers; or if
20 they're not doing business, they're considered
21 nonqualified income taxpayers.

22 FTB has processes and procedures in place to sign
23 such corporations, not register with Secretary of State
24 with a corporation number, and you can identify these
25 nonqualified filers by their signed corporation number

1 which starts with either a nine or an eight.

2 Here, appellant was a nonqualified franchise
3 taxpayer, and FTB assigned appellant a nonqualified
4 corporation number which is 8114781. Appellant has filed
5 an nonqualified franchise tax return as a nonqualified
6 franchise taxpayer as a result of owning two disregarded
7 single members LLCs that were treated as doing business in
8 the state during the tax year.

9 First, LLC was Alien Technology Corporation which
10 was a registered LLC with a Secretary of State because it
11 was formed in California. The second LLC owned by
12 appellant during the tax year was Butterfield LLC, which
13 is a foreign LLC. It was not registered as well.

14 FTB has not asserted any issues with respect to
15 those LLCs. Alien Technology held the legacy business of
16 Alien Technology Corporation -- I know there's a lot of
17 aliens, but each are unique and distinct.

18 What happened was Alien Technology was formed
19 when Alien Technology Corporation converted to an LLC.
20 Alien Technology itself, which is a legacy business, was
21 formed on December 13th, 1994, and was properly registered
22 with the SOS because it was formed in California.

23 Upon conversion to an LLC on September 14th,
24 2014, Alien Technology LLC also registered with the
25 SOL (sic). As a continuity of the business, it was also

1 formed in California. Documents related to the conversion
2 of the corporation to an LLC are included in the exhibit
3 package.

4 Both Butterfield LLC, which is the single member
5 to Alien Technology LLC, and Alien Technology LLC itself
6 were single member disregarded entities for tax purposes
7 and contributed to New Alien Corporation effective
8 September 28, 2014. This is why the taxpayer's tax year
9 starts on that date.

10 Prior to that date, New Alien Corporation
11 conducted no activities, and it had no independent
12 activities of its own. This caused, effective that date,
13 September 28, 2014, for New Alien Corporation to have a
14 filing obligation in California as a function of owning
15 these two single membered LLCs.

16 New Alien Corporation itself was a transitional
17 entity that was folding the disregarded LLCs for about
18 four months while the terms of the creation of a corporate
19 joint venture were worked out.

20 New Alien Corporation, after the terms were
21 worked out, sold the LLCs to resign technology company
22 limited, effective December 17th, 2014. And at that
23 point, it obtained in return cash and a minority interest
24 in the newly formed joint venture in exchange for the LLC
25 interest.

1 After the creation of the joint venture, New
2 Alien Corporation, and taxpayer and appellant, sole
3 activity was then holding the minority stock interest in
4 this newly created joint venture. So those are the
5 transactions that are reflected in new Alien Corporation's
6 tax return for the tax year.

7 In itself, had no activities. All of the
8 activities were conducted to LLCs; it had no employees as
9 well.

10 FTB has asserted after a cursory view of
11 appellant's returns that appellant was not registered with
12 Secretary of State; we agree with that. It was a foreign
13 corporation. But the FTB has also asserted -- the
14 respondent's also asserted that New Alien Corporation was
15 conducting intrastate business.

16 As a result of that, they have asserted that the
17 appellant was required by Corporation Code 2105 to
18 register with Secretary of State. The problem here is FTB
19 is relying exclusively on appellant's tax returns.
20 There's nothing within the tax return themselves that
21 state appellant was conducting intrastate business.

22 And if you -- basically, I think this is the only
23 exhibit that I would really want to go through in the
24 exhibit binder. I assume that you have the same PDF
25 pageation (sic), but it's on page 318 of the exhibits.

1 And, basically, the FTB is relying primarily on the
2 Schedule Q questions that were answered with respect to
3 the taxpayer's business.

4 So you have to remember, appellant did not start
5 doing business until September 28, 2014. But when you
6 look at the questions on Exhibit A -- at least that's what
7 the reference was when I look at the document -- page two
8 of the return, what it says is the corporations
9 includes -- if you look at Question C, it's blank.

10 Question D, it says, "Are you doing a Federal
11 consolidated return?" It says no. And then it gets into
12 its principal business activities which include
13 development sale and RFID products.

14 Well, here's the issue. These questions don't
15 reflect that the taxpayer actually is a holding company
16 and is a disregarded entity owned by the taxpayer. The
17 activities actually described on Question C are for the
18 LLC, which are its principal businesses. The other LLC,
19 Butterfield, was really only a mere holding, but all the
20 activities are in Alien Technology LLC.

21 So the questions answered on Question E are the
22 answers for the LLC. The LLC as a successor in interest
23 was incorporated under the Alien Technology Corporation on
24 December 13th, 1994, in California. But as a successor,
25 the LLC -- you have a continuity of interest, so that's

1 the correct start date for that business even though it is
2 now an LLC.

3 The problem with FTB's forms is they don't give
4 you an opportunity to fully explain what's going on with
5 the answers to these questions.

6 Question G is also correct but with respect to
7 the LLC, Alien Technology Corporation. They did first
8 start thriving income as a successor which is now a
9 division. The appellant did actually start its business
10 in 1994, but this entity, appellant, actually didn't start
11 business in California itself as a holding company until
12 September 28th, 2014.

13 So it also indicates in Question A, which is
14 consistent with the filer, that this is their first
15 return, which is correct. It also starts showing that it
16 was a successor to another corporation which explains why
17 the dates are different.

18 So really, the problem you have here is the forms
19 itself cannot accommodate when you have situations where
20 there's multiple trades or businesses or successors in a
21 business to a single corporation in this case.

22 It also does not reflect that, you know, at the
23 end of the year, the taxpayer itself wasn't doing
24 anything. It had actually sold the activities to the
25 corporate joint venture.

1 So really, that's the only exhibit I would really
2 want to go through in this case. But what I would like to
3 say is that we don't dispute that we're not registered;
4 we're not required to.

5 If you look at the rules in the statute, only
6 foreign corporations that are conducting intrastate
7 business are required to be registered. That doesn't mean
8 they don't have a filing obligation. Taxpayer did timely
9 file and reported its liability.

10 I would also go into the fact that the FTB has
11 issued discovery request with respect to this issue.
12 Taxpayer, appellant, has never admitted to conducting
13 intrastate business; has acknowledged the issues at hand.

14 Relate to Alien Technology LLC in its return,
15 Alien Technology in the course of the discovery request
16 figured out it had not filed its returns. And, again,
17 that's because of the transitions in the business
18 activities both prior and during the tax year;

19 And, had since, remedied that and filed tax
20 returns itself which were provided to the FTB for both
21 Butterfield and Alien Technology LLC.

22 And the activities of the LLC, which is really
23 Alien Technology LLC, mirror the return for the appellant
24 but for the sale of the LLCs to the joint venture.

25 So absent knowing there's an LLC in there and it

1 being identical -- like all the activities siloed into a
2 single LLC -- you will never be able to determine how much
3 the activities a particular corporation relate to an LLC.
4 But in this particular case, you can tell because there's
5 only one LLC with operations, and that was Alien
6 Technology LLC.

7 And, again, as I pointed out, many of the tax
8 forms the FTB has issued have deficiencies. And being
9 able to accommodate multiple LLCs owned by a single
10 corporation, similar problems occur with a group return
11 when you have multiple businesses because you really only
12 have an opportunity to answer the questions for one
13 entity.

14 In this case, the taxpayer did say that its
15 principal operations were from Alien Technology, but you
16 can't tell that because it doesn't ask you that question
17 in this particular case.

18 As a result of reviewing the respondent's
19 assertions, as it relates to appellant's returns, we did
20 attempt to correct some of the issues with the return.
21 The primary issue -- it didn't effect the tax, it was the
22 fact that in preparing the return at that time, they had
23 not completed the LLC returns for Alien Technology LLC and
24 Butterfield LLC.

25 That was subsequently determined to be a

1 deficiency in their filings just because there was so many
2 changes that year. They have since filed their returns,
3 and the amended return we filed did correctly change the
4 answer to, "Yes, I do own an LLC."

5 So that was an inadvertent oversight to the
6 original return. It had to be corrected in order to
7 prevent Alien Technology LLC from being forfeited. So
8 they did have a filing obligation, but that was the only
9 return that we found was missing -- was for the short
10 period, 9/28 to 12/16, and returns were filed to correct
11 that issue.

12 There was no need to correct the return for New
13 Alien Corporation because the income from the LLCs was
14 already included in the their filings. Again, aside from
15 the sale of the LLC to create the joint venture, the
16 income reported by appellant mirrors the return filed by
17 the LLCs.

18 And, again, all activities reported by appellant
19 but for this box -- or for the LLC interest sale, were
20 conducted by Alien Technology LLC. With respect to the
21 question about being a domestic entity, taxpayer does
22 admit that answer to that question was incorrect.

23 While Alien Technology LLC is a domestic LLC
24 because it was formed in California itself, New Alien
25 Corporation, appellant, was a foreign incorporated entity

1 and should have been marking that box as foreign.

2 Again, there's some confusion there when the
3 activities -- primary activities returned from a domestic
4 entity, but you yourself are foreign, so I believe they
5 corrected that issue.

6 With respect to the questions on Schedule Q of
7 the return, which are on page two, I point you to there.
8 Nowhere within the return itself, in addition anywhere,
9 else including the Schedule Q question, does -- is there a
10 question asking you whether you're conducting intrastate
11 business.

12 So in this case, they do indicate they have an
13 address in California. Again, because they were formed
14 here. But, again, there is not a single question within
15 the return stating that they conducted intrastate
16 activities either for the single member LLC or for the
17 corporation.

18 So we believe that despite the FTB's assertions,
19 there's no evidence of them conducting intrastate
20 activities since it was not audited. This issue was not
21 addressed at protest. The questions in the discovery
22 provided to respondent indicated appellant was not
23 conducting intrastate activity.

24 And there's been no inquiry whatsoever regarding
25 the single member LLC's activities and whether they

1 constitute conducting intrastate activities either.

2 The only activities conducted by appellant during
3 the tax years was inquiring the single member LLCs,
4 effective September 28th, was a contribution to capital
5 holding the interest in the single member LLCs for about
6 four months while the terms of the corporate joint venture
7 will work out and then selling the single member LLCs to
8 the joint venture once the terms were agreed upon. And
9 thereafter, holding the stock interest -- the minority
10 stock interest in the joint venture.

11 Those are the sole activities conducted by New
12 Alien Corporation during this short period tax return.
13 Appellant did not enter into repeated and successive
14 transactions of business in the state. And appellant did
15 not engage in intrastate or foreign commerce because
16 basically, it was merely holding these intangible assets.

17 Corp Code Section 191 defines what constitutes
18 intrastate business. We assert that while we did have a
19 filing obligation because we held these LLCs, they were
20 not considered doing business, and appellant's
21 registration with the SOS was optional.

22 Section 191 provides that a foreign shall not be
23 considered transacting intrastate business merely because
24 it's a subsidiary transaction or state business, or merely
25 because of its status of one or more of the following:

1 The only ones relevant in 191 would be they had
2 an interest in a domestic limit liability company which
3 would have been Alien Technology LLC, a member of a
4 foreign limited liability company which would have been
5 Butterfield LLC as well as holding stock for a minority
6 corporate joint venture.

7 None of these activities by statute are
8 considered transacting intrastate business. So,
9 basically, it's also important to point that the only
10 single transaction they engaged in was selling the single
11 member LLCs. It was a single, isolated transaction and
12 not consistent with 191 which requires repeated and
13 successive transactions of its business in the state.

14 Let alone, in this case, we believe it would be
15 considered foreign commerce because it was sold to a
16 foreign entity even as it was a transaction that was
17 relevant.

18 Appellant has fully explained its activities
19 during the tax year, and respondent has failed to identify
20 a single activity performed by appellant in California
21 during the tax year let alone identifying a repeated and
22 successive transactions in California. Appellant itself
23 has no employees or business activities. All of the
24 activities at issue were performed by Alien Technology LLC
25 which is treated as a disregarded division of appellant.

1 Finally, again, I think it's important to point
2 respondent has made the determination to audit, protest,
3 or appeal that appellant conducted intrastate, but it is
4 nearly alleged that has conducted intrastate business
5 based on assumptions from information gleamed from the tax
6 return that that actually doesn't even state they were
7 conducting intrastate business.

8 In all correspondents addressing respondent's
9 concerns, taxpayer denied conducting intrastate business,
10 and no evidence exist that it was. Respondent has
11 commented regarding a portion of fact reported by
12 appellant which is currently at 90% percent.

13 That apportionment factor is incorrect. It
14 includes the gain on sale of the LLC interest, and if it's
15 recalculated, their apportionment factors would have been
16 -- should have been adjusted or audit down to about 15%
17 percent, but it was not.

18 Where our position is, FTB's assertions that were
19 conducting intrastate business is without merit, and
20 respondent has failed to provide any factual support
21 beyond information that it was gleamed from the return.
22 It doesn't even state that it was conducting intrastate
23 business, and we believe that as a result, they have not
24 met their burden of proof factually or laid any foundation
25 to support their assertion.

1 I think it's also important to point out that not
2 only was appellant not conducting intrastate business, the
3 FTB, respondent, has failed to provide any evidence that
4 Alien Technology LLC or Butterfield was engaged in
5 intrastate business. They made merely unsupported
6 allegations that intrastate activities have been
7 conducted.

8 This issue was not addressed at audit or protest.
9 Neither Alien Technology or Butterfield have admitted to
10 conducting intrastate business. Alien Technology LLC was
11 registered with SOS because it was formed here, and the
12 successor business to Alien Technology Corporation which
13 was also formed here.

14 And they're required to register with the
15 Secretary of State regardless of whether they're
16 conducting intrastate business because they're formed
17 here.

18 With respect to the other primary issue that
19 was -- so that kind of concludes our position on whether
20 the entity was required to be register with the Secretary
21 of State.

22 We agree we're a foreign corp. We deny
23 conducting intrastate business for the reasons set forth
24 previously as well as in the exhibits. I think the final
25 remaining question is the Appeal of Reitman, the land

1 corporation, which appellant has requested we address.

2 I think, after reviewing statute and the case
3 which is addressing Corp Code Section 2105(c), it's
4 important to point out that Reitman Atlantic is a 2002
5 State Board of Equalization decision involving a business
6 that had not filed tax returns in California. In this
7 case, we have.

8 It held that Sections 2105 and 2203(c) applied to
9 Board of Equalization appeals and concluded that the
10 taxpayer was conducting intrastate business and therefore
11 didn't have standing to handle an appeal through state
12 board of equalization.

13 I think it's important to point out, as was
14 stated at the beginning of this hearing, that OTA is not a
15 court and that extensive efforts have been made to ensure
16 the Office of Tax Appeals is not a court, including the
17 allowance of non-attorneys to be panel members.

18 I think there are a couple issues to consider
19 related to the applicability of this case on the
20 jurisdictional matter including the fact, here, appellant
21 filed his tax returns. Appellant in Reitman did not.
22 Appellant paid its tax liability; appellant in Reitman did
23 not.

24 And, further, the State Board of Equalization
25 concluded the taxpayer was conducting intrastate business.

1 There's no evidence in this case that appellant was or the
2 LLCs in this case.

3 And Section 2105 provides, in relevant parts, but
4 I'm not going to say all of it, a foreign corporation
5 subject to Chapter 21 commencing with 2100 in the Corp
6 Code, which transacts intrastate business without
7 complying with Section 2105, which is registering with
8 Secretary of State, shall not maintain any action or
9 proceeding upon any intrastate business so transacted in
10 any court in the state.

11 Here we have a situation where, one, taxpayer did
12 not conduct -- appellant did not conduct any intrastate
13 business in this state. Let alone it did not conduct any
14 intrastate business with the Franchise Tax Board who
15 merely filed a return and filed an appeal when it
16 disagreed with the assessment.

17 And I think the OTA has noted that it's not a
18 court. The statute specifically applies to court
19 proceedings.

20 And as I kind of read it, if I'm conducting
21 intrastate business and I want to sue somebody that I've
22 transacted intrastate business with, I can file the
23 complaint in court. I just can't maintain the court
24 unless -- maintain the action in court unless I'm
25 registered with Secretary of State.

1 Here, not only have I not conducted any
2 intrastate business and filed in court, as the OTA is not
3 a court, I haven't conducted any intrastate business with
4 the Franchise Tax Board as well.

5 So I think you have to read the statute itself
6 which Reitman is addressing. Differentiating Reitman on
7 the basis that State Board of Equalization is a different
8 administrative body than OTA, and that OTA's not a court,
9 then I don't believe 2105 applies in this instance for
10 multiple reasons:

11 One, they're not conducting intrastate business;
12 OTA is not a court; and I do not conduct any intrastate
13 business with respondent.

14 So based on the fact that we're not conducting
15 intrastate business and I don't believe 2105 -- that corp
16 code applies here, I don't believe respondent's position
17 to deny appellant's appeal on jurisdictional basis should
18 be sustained.

19 I think that's it.

20 JUDGE LONG: Thank you.

21 I just want to turn over to my co-panelists
22 before we move forward to the Franchise Tax Board's
23 presentation.

24 Judge Vassigh, do you have any questions?

25 JUDGE VASSIGH: I do not have any questions at this

1 time. Thank you.

2 JUDGE LONG: Thank you.

3 And Judge Akin, do you have any questions?

4 JUDGE AKIN: Judge Akin's speaking. No questions for
5 me at this time. Thank you.

6 JUDGE LONG: Thank you.

7 And you covered the question that was included in
8 my minutes and orders, so I don't have any questions
9 either.

10 Franchise Tax Board -- sorry, let me just scroll
11 up in my notes here.

12 You requested 45 minutes for your presentation,
13 and you may begin when ready.

14

15 PRESENTATION

16 MR. MILLER: Thank you, Judge Long.

17 Good afternoon, Judge Long, Judge Akin, and Judge
18 Vassigh. The primary issue in this appeal is whether
19 appellant, New Alien Corporation, has the capacity to
20 maintain an appeal before the OTA as a nonqualified
21 foreign corporation.

22 To resolve this primary issue, we must first
23 address secondary issues, both legal and factual. Also,
24 in Judge Long's prehearing conference minutes and orders,
25 he asked the parties to specifically address the

1 precedential BOE opinion in the Appeal of Reitman Atlantic
2 Corporation, which I will hereafter refer as Reitman.

3 Additionally, he asked the parties to address
4 whether Corporation Code Section 2203, Subdivision C,
5 applies to the OTA, given that the OTA is not a court.

6 I will divide my presentation into two parts.
7 First, I will address the legal issues presented in this
8 appeal, including the controlling BOE precedential opinion
9 in Reitman and Corporations Code Section 2203, Subdivision
10 C. Second, I will address the factual issues specific to
11 this appeal.

12 In summary, the law and the facts in this appeal
13 are clear. The law states that a nonqualified foreign
14 corporation who transacts intrastate business in
15 California cannot maintain an appeal before the OTA.

16 According to appellant's own unconverted
17 admissions, it transacted intrastate business in
18 California between September 28, 2014, and December 17th,
19 2014; the period at issue in this appeal.

20 Because appellant transacted intrastate business
21 during this period and never qualified to do business in
22 California, the OTA should dismiss this appeal in
23 accordance with the controlling law. I'm happy to answer
24 any questions throughout my presentation or at the end.

25 First, the legal issues. The issue of whether a

1 nonqualified corporation who transacted intrastate
2 business in California has the capacity to maintain an
3 appeal before the OTA was directly addressed and decided
4 in Reitman.

5 In Reitman, the BOE held that it will dismiss a
6 nonqualified foreign corporation's appeal if it determines
7 that a nonqualified foreign corporation transacted
8 intrastate business in California.

9 Corporations Code Section 2105, Subdivision A,
10 provides, in part, a foreign corporation shall not
11 transact intrastate business without having first obtained
12 from the Secretary of State a certificate of
13 qualification.

14 Corporations Code 191, Subdivision A, provides
15 that for purposes of Section 2105, "transact intrastate
16 business" means entering into repeated and successive
17 transactions of its business in this state other than
18 intrastate or foreign commerce.

19 Corporations Code Section 2203, Subdivision C,
20 provides, in part, a foreign corporation which transact
21 intrastate business without complying with Section 2105
22 shall not maintain any action or proceeding upon
23 intrastate business so transacted in any court of this
24 state -- commence prior to compliance with Section 2105
25 until it is complied with the provisions thereof.

1 In his prehearing conference minutes and orders,
2 Judge Long correctly notes that the plain language of
3 Subdivision C references, quote, "any court in this
4 state." It does not reference administrative tribunals
5 such as the OTA or the BOE.

6 Hence his question: whether Subdivision C applies
7 to the OTA given that the OTA is not a court. The short
8 answer is, no, it does not. However, Section 2105 in
9 Reitman do.

10 The purposes of business registrations statutes
11 are to officially establish a business as a legal entity
12 separate from its owners -- providing them with legal
13 protections like limited liability, allowing them to
14 access banking and credit, and ensuring transparency by
15 making information about their business publicly
16 available while also enabling the government to regulate
17 and tax business activities properly.

18 In Reitman, the BOE specifically noted, what
19 courts have noted, that the purpose of Section 2105 is to
20 facilitate service of process and to protect against state
21 tax evasion. Californians must know precisely who it is
22 that they are transacting business with and how to obtain
23 or redress from wrongs committed by those with whom they
24 transact business.

25 Similarly, the government of California has a

1 right to regulate and tax business activities within its
2 jurisdiction. A domestic corporation, by virtue of its
3 formation under the laws of California, is registered in
4 California upon its formation.

5 However, a foreign corporation is not, and
6 therefore, it must register in California before it can
7 transact business to ensure that the purposes of
8 California's business registration statutes are
9 effectuated.

10 In Reitman, the BOE examined Sections 2105 and
11 2203 in a broader context of the relevant statutory
12 schemes, relevant case law, and the public policy served
13 by both.

14 The Reitman opinion does not rely on Subdivision
15 C of section 2203 alone. Rather, it relies on a body of
16 law addressing California's business registration
17 statutes.

18 In Reitman, the BOE also analyzed the suspension
19 and reviver statutes contained in the Revenue Taxation
20 Code. It noted that under Revenue and Taxation Code
21 23301, a foreign corporation may forfeit the exercise in
22 this state of its corporate powers, rights, and privileges
23 if it fails to pay any tax penalties or interest due.

24 This supports the policy long recognized by
25 courts and administrative tribunals, quote, "to prohibit

1 the delinquent corporation from enjoying the ordinary
2 privileges of a going concern in order that some pressure
3 would be brought to bare to force the payment of taxes.

4 Notably, the plain language of Section 23301 of
5 the Revenue Taxation Code does not specifically state that
6 a foreign corporation in forfeiture may not maintain any
7 action or proceeding in court or an administrative
8 tribunal. Rather, it provides for the forfeiture of the
9 corporations powers, rights, and privileges.

10 Courts have interpreted this to include the right
11 to bring an action in court, and the BOE and the OTA have
12 interpreted this to include the right to maintain the
13 administrative tax appeal; most recently in the OTA's
14 precedential opinion in the Appeal of Depot Repair
15 Services LLC.

16 Reitman is also in line with the BOE's previous
17 precedent in Appeal of Altirpa Associates Incorporated.
18 The BOE held that a nonqualified foreign corporation may
19 not exercise the right to bring an administrative appeal
20 before the BOE.

21 And that appeal, the BOE did not --

22 JUDGE LONG: Mr. Miller.

23 MR. MILLER: Yes?

24 JUDGE LONG: I'm sorry to interrupt. Can you say the
25 name of that last BOE case that you cited again.

1 MR. MILLER: Certainly. I'll give you the citation as
2 well.

3 It's Appeal of Altirpa and Associates
4 Incorporated. Al is A-L, tirpa is T-I-R-P-A, and
5 associates incorporated. The citation is 97-SBE-007.
6 I believe that case is also discussed within Reitman
7 itself.

8 In that appeal, the Altirpa Appeal, the BOE did
9 not distinguish between those nonqualified foreign
10 corporations that were merely doing business as defined in
11 Revenue and Taxation Code Section 23101 and those
12 nonqualified foreign corporations that were transacting
13 intrastate business as used in Corporations Code Section
14 2105 and defined in Corporations Code Section 191,
15 Subdivision A.

16 In Reitman, at the FTB's urging, the BOE limited
17 the rule established in the Appeal of Altirpa and
18 Associates Incorporated to only those nonqualified foreign
19 corporations that were transacting intrastate business.

20 The BOE's opinion in Reitman is consistent with
21 the overarching public policy that precludes corporations
22 that do not comply with the business registrations
23 statutes from exercising the powers, rights, and
24 privileges of those corporations that do, such as maintain
25 the actions in court and in administrative tribunals.

1 Under California Code of Regulations Title 18,
2 Section 30504, a precedential opinion of the BOE that was
3 adopted prior to January 1st, 2018, is precedential
4 authority to the OTA unless the OTA removes, in whole or
5 in part, the precedential status of that opinion pursuant
6 to Section 30503.

7 Thus, the OTA is bound by the BOE's opinion in
8 Reitman unless it removes its precedential status.

9 Removing the precedential status of Reitman would
10 undermine the effectiveness of the business registration
11 statutes and would be in direct opposition to California
12 public policy that precludes corporations that do not
13 comply with the business registration statutes from
14 exercising the powers, rights, and privileges of those
15 corporations that do.

16 Also, removing the precedential status of Reitman
17 would lead to inequitable and absurd results.

18 For example, a foreign corporation transacting
19 business in California that affirmatively complies with
20 Corporations Code Section 2105 and registers with the
21 California Secretary of State would have fewer rights than
22 a foreign corporation transacting business in California
23 that flouts the law and fails to register at all.

24 The former corporation will not be able to
25 maintain an appeal before the OTA if it were forfeited

1 while the latter corporation would always be able to
2 maintain an appeal before the OTA because its active
3 registration status cannot be forfeited since it
4 disregarded the legal requirement to register and to be
5 subject to forfeiture in the first place.

6 Accordingly, the FTB respectfully request that
7 the OTA follow Reitman and dismiss a nonqualified foreign
8 corporation's appeal if it determines the nonqualified
9 corporation transacted intrastate business in California.

10 Now, I will address the factual issues in this
11 appeal.

12 The parties agree that New Alien Corporation has
13 never registered with the California Secretary of State.
14 Also, appellant provided cogent documentary evidence that
15 verifies it is in fact a Delaware corporation despite
16 appellant's admission on its California corporate tax
17 return that it was incorporated in California.

18 Therefore, the parties agree that New Alien
19 Corporation is a nonqualified corporation.

20 As a nonqualified corporation, under Reitman,
21 appellant cannot maintain this appeal if it transacted
22 intrastate business during its only reporting period
23 -- September 28th, 2014, through December 17, 2014.

24 Therefore, the factual issue for the OTA to
25 determine in this hearing is whether New Alien Corporation

1 transacted intrastate business between September 28, 2014,
2 and December 17, 2014. The facts relating to this issue
3 are well documented in the party's briefs and exhibits.

4 Today, appellant alleges that FTB's position is
5 based on a cursory review of its tax return and no
6 evidence. On the contrary, respondent conducted a very
7 thorough review of appellant's tax return and based its
8 position on appellant's own admissions on that return.

9 Following, is a brief presentation of the facts
10 most relevant to the determination of whether appellant
11 transacted intrastate business during this period.

12 On June 15th, 2016, appellant filed its corporate
13 tax return for taxable year beginning September 28th,
14 2014, and ending August 28th, 2014. The return was
15 prepared by Delloite Tax LLP, appellant's representative
16 in this appeal.

17 On its sole California corporate tax return,
18 appellant reports the following: Appellant reports its
19 principal business activity code as 334410, semiconductor
20 and other electronic component manufacturing.

21 Appellant describes its business activity as the
22 development and sale of radio frequency identification
23 products. Appellant describes its product or services as
24 ultra-high frequency radio frequency identification tags
25 and readers.

1 Regarding its income, appellant reports gross
2 receipts for sales of \$7,691,864 dollars; sales within
3 California of \$1,171,449 dollars; other gross receipts
4 within California of \$38,996,041 dollars; a sales factor
5 of 90.8867% percent to California. Contrary to
6 appellant's contentions here today, at audit, FTB did in
7 fact reduce that percentage to 44% percent.

8 On its return, appellant also reported net income
9 for California purposes of \$32,576,567 dollars. Appellant
10 also reported that it does not own a single member LLC or
11 generate or claim credits that are attributable to the
12 LLC.

13 Following the audit of appellant's loan
14 California corporate tax return, appellant -- excuse me,
15 respondent issued its notice of action affirming its
16 proposed assessment which is the subject of this current
17 appeal.

18 The OTA granted respondent's motion to sever the
19 issue of the appellant's capacity to prosecute the appeal
20 in its opposition to this motion, and in its subsequent
21 briefing, the appellant contends the following:

22 One, it is a foreign corporation organized under
23 the laws of Delaware; two, it is a holding company; three,
24 all activities at issue in the appeal were conducted
25 through Alien Technology LLC, a single-member LLC owned by

1 appellant; and, four, it was not transacting intrastate
2 business during the taxable year at issue.

3 Each one of these contentions directly
4 contradicts appellant's previous admissions sworn under
5 penalty of perjury on its loan form 100. Under OTA's own
6 precedent in Appeal of Johnson, bold statements a taxpayer
7 makes on its signed tax return are considered binding
8 admissions unless there is cogent evidence that indicates
9 such statements are wrong.

10 Furthermore, the OTA held that the trier of fact
11 need not accept taxpayers self serving contentions makes
12 on it's signed tax return are unless there is indicates
13 such statements are wrong for the more held need not
14 accept taxpayers self serving contentions especially in
15 the absence of reliable corroborating evidence.

16 As detailed in respondent's briefing, there is no
17 cogent evidence or reliable corroborating evidence to
18 establish that the transactions reported on appellant's
19 form 100 were transacted by anyone other than appellant,
20 New Alien Corporation.

21 During this appeal, respondent conducted informal
22 discovery and requested all information and documentation
23 that support appellant's contentions that it did not
24 transact intrastate business in California during the tax
25 period at issue in this appeal and that all business was

1 transacted through Alien Technology LLC, its whole and
2 single-member LLC -- as appellant alleges.

3 In response, appellant provides voluminous
4 documentation pertaining to its corporate organization and
5 restructuring plan, including a power point presentation
6 and organizational documents.

7 However, it did not provide a single piece of
8 documentary or testamentary evidence pertaining to its
9 gross sales, its business income, and it's net income for
10 California purposes that itself reported on its tax return
11 at issues in this appeal.

12 Therefore, it provided no cogent evidence or
13 corroborating evidence to prove that anyone other than New
14 Alien Corporation transacted business in California
15 between September 28th, 2014, and December 17th, 2014. No
16 books in records. No declarations from percipient
17 witnesses. No invoices. No sales receipts. Nothing.

18 Under OTA precedent, a taxpayer's failure to
19 produce evidence that it's within its control gives rise
20 to the presumption that such evidence is unfavorable to
21 its case.

22 Concurrent with its subsequent briefing,
23 appellant filed an untimely and invalid form 100X.
24 Appellant concedes that the statute of limitations for
25 filing this amended return has expired and it is providing

1 it merely for informational purposes.

2 However, the information contained on the invalid
3 form 100X does not support appellant's contentions. On
4 its form 100X, appellant does not report any ownership
5 interest in the Alien Technology LLC or Butterfield LLC.

6 Thus, the only amendment that appellant appears
7 to make on its form 100X is changing its answer to
8 question BB on Schedule Q. Either it owned, had an
9 interest in, or generated, or claimed credits attributable
10 to a single-member LLC. It does not identify which LLC
11 that is.

12 Today, respondent's representative alleges that
13 the real problem with their tax return is the deficiency
14 in FTB's forms. Appellant's representative is well aware
15 that taxpayers are free to attach as many schedules and
16 attachments as necessary to fully explain its business
17 activity.

18 Also, deficiencies in FTB's forms do not explain
19 why it stated it does not own or generate credits from a
20 single-member LLC.

21 Deficiencies in FTB's forms also do not explain
22 why appellant's failed to disclose its ownership interest
23 in the New Alien Technology LLC or Butterfield LLC. And
24 deficiencies in FTB's forms do not explain why Alien
25 Technology LLC and Butterfield LLC failed to file timely

1 returns for the tax period for eight years in the midst of
2 this appeal.

3 Lastly, deficiencies in FTB's forms do not
4 explain why appellant was the only entity among these
5 related entities to file a return for that period. If New
6 Alien Corporation is the only entity reporting these
7 businesses activities for the taxable period, it is not
8 reasonable to presume that New Alien Corporation is the
9 entity conducting these business activities.

10 All other information on its amended return
11 mirror its original return including its principal
12 activity code, business activity code, its business
13 activity description, its description of its product or
14 service, and its reporting of its California income.

15 Notably, it does not report a business activity
16 code or a business activity description consistent with
17 being a holding company.

18 Per the 2014 California Corporation Tax booklet,
19 the principal business activity code for a holding company
20 other than a banking holding company is 551112.

21 Appellant also submitted copies of forms 568 for
22 Alien Technology LLC and Butterfield LLC for the period
23 September 28, 2014, through December 17th, 2014. These
24 untimely returns were filed in March 2023 approximately
25 eight years after the due date.

1 Appellant contends that all its business
2 activities were conducted exclusively by LLC as a
3 single-member LLC. However, appellant provides no
4 corroborating evidence, such as Alien Technology's
5 business records or it's own business records.

6 The untimely returns without any source
7 documentation to substantiate the reporting contained
8 therein, are unsupported assertions; and under OTA
9 precedent, unsupported assertions cannot satisfy a
10 taxpayer's burden of proof.

11 Certainly, unsupported assertions do not
12 constitute cogent evidence to indicate that appellant's
13 binding admissions on its tax return are wrong.

14 To this date, appellant still has not provided
15 any books and records, declarations from percipient
16 witnesses, no invoices or sales receipts or any witness
17 even here today to substantiate its assertions regarding
18 the intrastate sales transactions reported on its tax
19 return.

20 Its failure to do so creates the presumption that
21 such evidence is unfavorable to its case.

22 Inexplicably here today, appellant now alleges
23 that not even New Alien Technology LLC admits to
24 conducting intrastate business.

25 So none of these entities conducted intrastate

1 business despite millions of dollars of activity,
2 including sales, within California? So none of these
3 foreign entities were required to register with the
4 California Secretary of State? This simply cannot be the
5 case.

6 Accordingly, OTA should find that Appellant has
7 not established anyone other than New Alien Corporation
8 transacted the intrastate business, reported on its tax
9 return for the period September 18th, 2014, through
10 December 17th, 2014.

11 Because appellant transacted intrastate business
12 during this period and never qualified to do business in
13 California, the OTA should dismiss this appeal in
14 accordance with the controlling law.

15 And I'm happy to take any questions you may have
16 at this time. Thank you.

17 JUDGE LONG: Thank you.

18 Judge Vassigh, do you have any questions?

19 JUDGE VASSIGH: Not at this time. Thank you.

20 JUDGE LONG: Thank you.

21 And Judge Akin, do you have any questions?

22 Judge Akin: No questions at this time. Thank you.

23 JUDGE LONG: Thank you.

24 Now, with respect to this issue, the
25 jurisdictional issue, is brought up on after the appeal

1 was already in progress. It's my understanding that part
2 of the issue is that in addition to the corporation, the
3 reorganization documents, part of the issue, at least, is
4 that Alien Tech did not provide any books and records with
5 respect to its gross receipts and business?

6 MR. MILLER: Yes, that's correct. And also, even
7 though today, appellant's representative won't even admit
8 that the Alien Technology LLC conducted this business, so
9 I'm not sure if those business records would do any good.

10 JUDGE LONG: Were those business records expressly
11 asked for? I don't remember seeing that in the briefing.

12 MR. MILLER: Yes.

13 JUDGE LONG: They were?

14 MR. MILLER: We requested -- I have the jurisdictional
15 -- or the informal discovery request.

16 They weren't itemized as specific requests, but
17 we did request all information and documentation to
18 substantiate that they were not doing business.

19 I got it right here, which is Exhibit C, page
20 one. "Please provide all information and documentation
21 that supports your client's contentions."

22 I'm sorry, I should have read the first two
23 paragraphs.

24 I repeat appellant's contentions that it is a
25 foreign corporation organized of the laws of Delaware.

1 It's a holding company. All activities at issue in the
2 appeal are conducted through a single-member LLC owned by
3 their clients, Alien Technology LLC, and it was not
4 transacting intrastate business during the taxable year.

5 So I specifically referenced their contention
6 that all business activity was done through that
7 single-member LLC and requested all information and
8 documentation that supports those contentions.

9 So that was requested. And then I itemized
10 specifically additional requests that I was specifically
11 looking for, including but not limited to.

12 JUDGE LONG: Okay. Thank you.

13 Ms. Freeman, if OTA were to hold the record open
14 for 30 days following this hearing, would you be able to
15 provide additional documentation with respect to the
16 business activities of -- sorry, let me just make sure I
17 have this one correct -- Alien Technology? That's the
18 single-member LLC.

19 MS. FREEMAN: So we're long pass the record retention
20 period. The FTB has not asked for their books and
21 records. We gave them the tax returns.

22 Upon reviewing the discovery, the taxpayer -- we
23 determined for the taxpayer they were missing their LLC
24 returns which were required to be filed. So we did file
25 them based on the original return records for the LLC

1 which were included in the return for taxpayer.

2 So we had the data to provide the preparation of
3 the return, which were the books and records. And so, the
4 return you see are based on those summary of those
5 records.

6 But this entity was sold to a foreign entity back
7 in 2014, which is, what, over 10 years ago. So the
8 likelihood of, what, all books and records -- I mean, it's
9 an untimely request by the FTB to prove an issue that we
10 have actually given extensive documentation explaining the
11 conversion of the actual operating entity into the LLC and
12 conversion to an LLC. Those were the business operations.

13 So we have given him the documentation, the
14 agency, the documentation showing that the legacy business
15 was converted to an LLC, and that's where the operations
16 ended at.

17 We also gave him all the other formation document
18 showing we created an entity to hold those LLCs and that
19 nothing was occurring in those LLCs beyond validating
20 their ability to the board minutes so that they can
21 operate and hold those LLCs.

22 So the records clearly show where the operations
23 -- the actual business operations -- ended up. So they
24 have those records. To say we didn't give them anything
25 is an incorrect statement.

1 The documentation --

2 MR. MILLER: Judge Long, may I say something --

3 MS. FREEMAN: -- sorry. The documentation, including
4 the reorganization documentations, are in the file that
5 show the transactions. And we actually gave source
6 documents to show the conversion of the operating entity
7 into the LLC.

8 There are no other documents liquidating or
9 re-contributing those activities directly to New Alien
10 Corporation. They were still held in the LLC, and those
11 documents are in the record.

12 JUDGE LONG: Okay. Thank you.

13 I don't have any further questions. So with
14 that --

15 MR. MILLER: Judge Long, may I add one more thing?

16 JUDGE LONG: Sure. Go ahead.

17 MR. MILLER: Thank you. I appreciate that.

18 I just wanted to clarify, we never alleged that
19 appellant had not provided us anything. We simply allege
20 they haven't provided us any evidence relating to those
21 sales and activities that were conducted in California.

22 We understand the business reorganization;
23 however, there's no evidence in those documents provided
24 by the appellant even referencing any of those sales
25 conducted in California. That's the best evidence of

1 those sales is the appellant's own admissions on its tax
2 return that have not been controverted here.

3 Thank you.

4 JUDGE LONG: Okay. Thank you.

5 Well, then, moving forward. I think we are ready
6 for appellant's closing presentation.

7 And, Ms. Freeman, you requested 10 minutes and
8 may begin when ready.

9
10 CLOSING STATEMENT

11 MS. FREEMAN: Considering everything he's alleging, I
12 was short on the evidence. I might take a few extra
13 minutes maybe.

14 JUDGE LONG: Yes, that would be fine.

15 MS. FREEMAN: I don't expect it to go long.

16 The taxpayer in this case -- this is old and
17 cold. This has been going on since 2015, '16. I mean,
18 the taxpayer was immediately audited by the agency.

19 The FTB never looked into the issue of whether or
20 not taxpayer, appellant, was conducting intrastate
21 business at audit or protest.

22 The documentation that was provided through
23 discovery was extensive, showing a complete reorganization
24 power point presentations in intent to basically convert
25 the actual operating entity, which was Alien Technology

1 Corporation, to an LLC;

2 And contribute it to the corporation so all the
3 activities at hand were being conducted through the LLC --
4 which was held by another LLC -- and then the actual sales
5 transaction to create the joint venture.

6 The whole point of New Alien Corporation was a
7 transitory entity, which is why it never filed again after
8 this. Once it sold the LLCs to minority and held a
9 minority interest in this stock joint venture is purely a
10 transitory entity.

11 If they were going to have the activities
12 contributed to the joint venture, they would have had to
13 sell New Alien Corporation itself, which is why you see
14 the gain of the LLC in the return is because the
15 activities are in the LLC, not knew New Alien.

16 All of this could be directly conferred from the
17 return. If you're going to create a joint venture and the
18 activities are being conducted by New Alien Corporation,
19 they would have had to sell New Alien Corporation to the
20 joint venture. They did not. They sold the LLCs because
21 that's where the operating activities were.

22 Now, with that said, because there was so much
23 transitory activity to create this joint venture,
24 both prior to the tax year, which was a conversion of the
25 corporation to the LLC, the contribution of the LLC to the

1 corp so they could hold it long enough to create the joint
2 venture and work out the terms.

3 And then the sale of the actual business
4 activity, which were LLC interest to the corporate joint
5 venture and the remaining interest of New Alien
6 Corporation sitting there not sold to the joint venture,
7 its very clear that the activities are not being conducted
8 by New Alien Corporation.

9 They're being conducted through, and it can all
10 be inferred from all the documentation evidence that was
11 obtained by the agency that these activities are not being
12 conducted directly by New Alien Corporation.

13 I agree it says that its principal business
14 activities are the Alien Technology LLC activities,
15 because that's the only thing that was going on through
16 the single-member LLC and that entity.

17 It is a holding company, but because the
18 principal business activity which is treated as a
19 disregarded division of the entity, it is a fair
20 reflection on the return -- that the principal business
21 activities owned by the corporation conducted through an
22 LLC -- that's its principal business activities.

23 Nothing in those answers tell you that it's
24 conducting intrastate business. It just says this is
25 what's going on. We did fix the question on regarding the

1 LLC interest being owned. Okay.

2 The question is, or do you own a LLC? Or are
3 they -- you own a LLC conducting -- generating credit.

4 So the question BB answers both. The problem is
5 the question is so poorly worded on the return, it doesn't
6 tell you in question BB which one you're answering.

7 Now, I think subsequent to these years, the tax
8 returns -- have you disclosed who you own as a
9 single-member LLC? I think there's a schedule now. But
10 back then, there was not.

11 And you will never see the names of the
12 single-member LLCs owned by the corporation on the return.
13 You would only list out the corporate subsidiaries, and
14 you would also see those on the federal returns that's
15 attached -- because if you file a federal return.

16 But the thing is, because for federal purposes,
17 there's no filing requirements for these LLCs in a federal
18 return. You can't tell that they own a single-member LLC
19 even on the federal return.

20 So to argue that, "you didn't disclose that you
21 own them," we fixed the return. Signed under penalty of
22 perjury. And the FTB's disregarding the amended return;
23 its attempting to fix this issue.

24 You have to remember, during the tax year, the
25 taxpayer also went through an additional transition in

1 that I now contributed the LLCs. I have the LLCs. I have
2 this principal trader's business through December 18th
3 -- or 17th. And then after that, I'm doing nothing but
4 mere holding. Okay.

5 There was confusion, apparently, in the
6 preparation of these returns, because they had never filed
7 these returns because they are new entities that during
8 the course of the year, when they got to the end of the
9 year filing, they didn't notice them because they didn't
10 own them anymore.

11 So it was missed in the filing, which is why
12 Alien Technology LLC is registered. They had to file.
13 So we did get the taxpayer, which inadvertently missed
14 this filing, to file the returns and pay the tax and sign
15 those returns under penalty of perjury.

16 The documentation, the reorganization, the
17 official documents filed in California -- all of those
18 documents have been provided to the FTB, and they're
19 ignoring them. Okay.

20 But what I think foundationally supports my
21 position is the fact that New Alien Corporation was
22 actually performing the activities themselves. That is,
23 the stock of that entity would have then had to have been
24 sold to the joint venture, and it was not.

25 So, with respect to the others, as there was

1 quite a few, let's see.

2 What I'm suggesting -- I'm not suggesting whether
3 the appellant or Alien Technology LLC was conducting
4 intrastate activities or not, I don't know. Okay. The
5 return doesn't tell you that. The FTB has never asked
6 that question at auditor protest, and it wasn't until, you
7 know, eight years after the return was filed they asked
8 this question.

9 And there's no evidence. The appellant has
10 denied conducting intrastate business because all it did
11 was acquire, through contribution to capital, the LLCs,
12 hold the LLCs, sell them to the joint venture, creating
13 the joint venture, and then, after that, taking back the
14 minority interest in the joint venturing and holding it.

15 And because it was merely holding an intangible,
16 it no longer had a filing obligation because the income is
17 now flowing through a corporate joint venture, and the
18 only thing you're going to get is dividends. Okay.

19 So what happened after that, after the tax years,
20 is irrelevant. It's not a discussion. But my point is,
21 they stopped having a filing obligation, filed a short
22 period return, and, again, the return itself is
23 self-evident that itself was not conducting the business
24 itself, or New Alien Corporation would have had to been
25 sold itself.

1 If you look at the LLC returns that were filed
2 under penalty of perjury, the lowest tier LLC was Alien
3 Technology LLC -- it's reporting all the business
4 activities and mirrors the return. Based on the records,
5 our records reflect that was the only activity that was
6 used to prepare both the LLC return, the Butterfield
7 return, because that income flows up to Butterfield.

8 Although a new LLC fee is due, it's only due at
9 the lowest tier. And then, that flows into the return and
10 is indistinguishable from the activities of its members
11 because a disregarded LLC is treated -- for all purposes
12 -- is disregarded as if it was conducted by the member.

13 That's why you can't tell. That was my point.
14 If you look at the return, the questions are being
15 answered: Is the principal business activity, and the
16 only principal business activity, was conducted during
17 that four-month period by Alien Technology LLC.

18 So as far as that, there's no evidence of whether
19 they were conducting intrastate business either through
20 Alien Technology LLC. We know for a fact for New Alien
21 Technology, they were not -- the Corp Code specifically
22 exempts these activities of merely holding an LLC interest
23 from being considered doing business from holding foreign
24 stock from doing business, domestic stock.

25 And, really, those were the only activities

1 conducted by appellant during the years it was not
2 conducting intrastate business. The return itself does
3 not conclude it's conducting intrastate business, it's
4 just information.

5 And, again, my position is that the FTB has not
6 provided any evidence of what intrastate business was
7 conducted. And if it was conducted, it would have been
8 conducted through Alien Technology LLC, which was required
9 to register with Secretary of State not because it was
10 conducting intrastate business but because it was formed
11 there.

12 So just the fact that it's registered doesn't
13 even prove itself that it was conducting intrastate
14 business. As far as -- I did want to clarify, I did not
15 prepare the return. I was not at Delloite at that time
16 period. I did work with the team on the preparation of
17 the amended return and the LLC returns, which we found
18 were missing.

19 And with respect with the Reitman case, there are
20 discussions on forfeiture in there which is not an issue
21 in this case. The statute is clear that they did not have
22 to register if they're not conducting intrastate business.

23 I think Altirpa basically distinguishes between
24 our comments on the fact that there's a distinction
25 between doing business and doing intrastate business, and

1 they're two different things.

2 And, again, I reiterate the fact that I agree OTA
3 is not a court. There's no intrastate activity occurring
4 between the FTB and the appellant, so that's not an issue.
5 And then, again, that the taxpayer did not conduct any
6 intrastate business at all itself. All of it was
7 conducted through the LLC.

8 And, again, even though they're arguing that
9 -- the respondents are arguing that we didn't provide any
10 evidence, it's self evidence in the fact that it's because
11 I created a joint venture to continue New Alien -- or the
12 Alien Technology business with a foreign investor.

13 If I, in fact, was conducting the business
14 myself, I would have sold the business. That sale
15 occurred in December of 2014, and my business, New Alien
16 Corporation, was not sold because it's not conducting the
17 business.

18 I think that's it.

19 JUDGE LONG: Okay. Thank you.

20 Before we conclude, Judge Akin has let me know
21 that she has a question.

22 Judge Akin.

23 Judge Akin: Yes. Thank you.

24 I'm going to pose it to Franchise Tax Board
25 first, but then I'd also like appellant to answer it as

1 well.

2 If I understood the presentation correctly,
3 Mr. Miller, FTB did do an audit, right, of appellant. And
4 you said, I think, that FTB adjusted the apportionment
5 factor from more than 90% percent down to I think you said
6 44% percent.

7 I'm wondering if maybe those books and records
8 would show whether or not those activities were conducted
9 directly by appellant or whether that would show that it
10 was done through the single-member LLC.

11 I'm forgetting the name of the alien LLC, but the
12 the alien LLC.

13 MS. FREEMAN: There's a lot of them.

14 Judge Akin: Yes.

15 MR. MILLER: They may. I don't believe so. I
16 reviewed those records. I didn't see any indication that
17 that was evidence there. It's not in the record here
18 today, so we really can't consider it. But not to my
19 recollection, it is not.

20 As Ms. Freeman notes, the issue of transacting
21 business and who transacted the business was not covered
22 in the audit.

23 It only became an issue here today because during
24 this appeal, beginning in the course of preparing our
25 opening brief, you know, our due diligence requires us to

1 check the SOS website to make sure an entity is registered
2 before conducting an appeal.

3 In order to have capacity to conduct an appeal,
4 we discovered it was not registered. So there was no
5 reason to even suspect that New Alien was not registered
6 until it filed this appeal before the OTA.

7 So the issue of whether it transacted business
8 within California, such that it was required to register
9 with the Secretary of State, was not an issue at the audit
10 because appellant had not appealed. By appealing, that
11 issue now became an issue that we had to address.

12 So the only time to address it was in this
13 appeal, because the appeal with the OTA and it failed to
14 register.

15 Does that clarify or answer your question?

16 Judge Akin: It does, thank you.

17 And same question to you, Ms. Freeman. Do you
18 know if the documentation that was provided during the
19 audit or protest, understanding that this issue wasn't
20 specifically examined, do you think that that
21 documentation might show whether the business was being
22 conducted directly by appellant or through the LLC? Or
23 did it not show that.

24 Do you know?

25 MS. FREEMAN: Yes, I do know. As a tax practitioner

1 who helps people prepare returns -- I don't personally
2 prepare returns, I avoid them -- I do help prepare returns
3 and review the documentation all the time.

4 So the issue with a disregarded entity is when
5 you are preparing a tax return, they aggregate all of the
6 single-member LLCs into a single column. If you go way
7 back into the preparation, there are actual columns in the
8 lines for each disregarded entity, but they're summarized
9 similar to what you do with qualified subsidiaries, they
10 have a break down.

11 But in this case, there's only one operating
12 entity. So when you look at the single column that you
13 see, there's only one column because there's only one
14 operating entity. Even Butterfield LLC was just merely
15 holding the interest in Alien Technology LLC which was the
16 successor to Alien Technology Corporation. Yes, there's a
17 lot of Alien's.

18 So the original is Alien Technology Corporation
19 that converts to an LLC and is now Alien Technology LLC.
20 So the operating entity that goes back to '94 is Alien
21 Technology Corporation, and then it converted to an LLC
22 and then became Alien Technology LLC.

23 So you're not going to see a differentiation in
24 the audit work papers that would show how much was my New
25 Alien Corporation versus Alien Technology LLC because it

1 was all Alien Technology LLC.

2 Now, the audit should -- as a former FTB auditor,
3 it was self apparent in the return filing that this was a
4 nonqualified entity because, as I pointed out in the
5 beginning of my presentation, if you register with
6 Secretary of State, your first number in your corporation
7 number is somewhere between zero and five.

8 So if you're a number zero, you're a really old
9 entity. You're one of the original filers. It's an
10 ascending number, right. So they may be to the fives by
11 now. I know they're definitely to the fours.

12 So any corporation that has a number between zero
13 and four, or maybe now zero and five, is registered with
14 Secretary of State if it's a corporation. You absolutely
15 know if it's nonqualified and not registered because the
16 first number, the corporation number, is a nine or an
17 eight.

18 You would know this as an auditor. You know if
19 it's nonqualified. Day one. If they wanted to address
20 the issue at audit, they didn't.

21 MR. MILLER: Judge Akin, may I add one more thing.
22 Would you mind? I think it would be helpful.

23 Judge Akin: Yes. Go ahead.

24 MR. MILLER: Okay. Thank you.

25 I just re-familiarized myself with the audit,

1 it's not in there. The only issue at audit -- the only
2 issue that was audited during the audit was the taxpayer's
3 right to reduce their AMT using their research credit.
4 They didn't even audit the actual research credit itself
5 and verify that the research credit like a normal research
6 credit audit would.

7 It was simply the issue of whether they could
8 reduce their AMT. So that type of documentation was not
9 requested or provided by the taxpayer. Ms. Freeman has a
10 couple of other appeals with us with the same single
11 issue, and I believe there's six appeals before the OTA
12 currently with this single issue audit as well.

13 So it's really a focussed audit to disallow
14 certain taxpayers who have claimed the research credit
15 against their AMT. And as I said, it wouldn't have been
16 audited because it wasn't at issue until they actually
17 filed an appeal of the notice of action.

18 Thank you.

19 Judge Akin: Yes, understood. Okay. Thank you.

20 That does wrap up the questions I had. I did
21 have one follow up question for Ms. Freeman.

22 I noticed on the tax return that appellant
23 reports that it has offices located in California. Were
24 those appellant's offices or were those the offices of the
25 single-member LLCs?

1 And if they were appellant's, how would that
2 impact the analysis of whether or not appellant was
3 transacting intrastate business?

4 MS. FREEMAN: The office in -- I forget where it is.
5 Usually it's in Silicon Valley.

6 Judge Akin: I think.

7 MS. FREEMAN: Yeah. It's the legacy -- Alien
8 Technology's business operation location. And they use
9 the address for filing purposes, but they had no
10 employees. They had no offices. They had no other
11 buildings.

12 That's all Alien Technology LLC's acquired
13 business location as a result of the conversion from a
14 corporation to an LLC. And it's not uncommon, just so you
15 know, for entities that are not doing anything to use an
16 affiliate's address because they got to get their mail.

17 JUDGE AKIN: Understood. And that answers my
18 questions. I don't have any additional questions, so I'll
19 pass it back to Judge Long.

20 JUDGE LONG: Thank you. I believe we're ready to
21 conclude today's hearing. Just wanted to thank you for
22 joining us today. Are my co-panelists ready to close this
23 appeal?

24 Judge Vassigh.

25 JUDGE VASSIGH: Yes, I am. Thank you.

1 JUDGE LONG: Judge Akin.

2 Judge Akin: Yes, I am ready to conclude. Thank you.

3 JUDGE LONG: Thank you.

4 And this case is submitted on Tuesday, December
5 17, 2024. The record with respect to the severed issue of
6 jurisdiction is now closed.

7 (Proceedings concluded at 2:34 p.m.)

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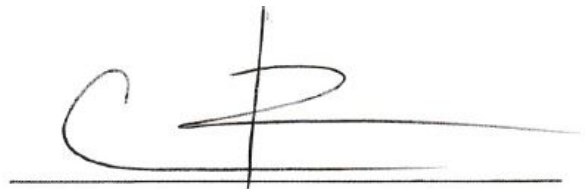
1 HEARING REPORTER'S CERTIFICATE

2
3 I, Christina L. Rodriguez, Hearing Reporter in and for
4 the State of California, do hereby certify:

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

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

14 I have hereunto subscribed my name this 1st day
15 of January.

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21 Hearing Reporter
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