BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

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| IN THE MATTER OF THE APPEAL OF, | |
| ALERE HOME MONITORING, INC. (REHEARING), | OTA NO. 250923258 |
| APPELLANT. | |

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, August 19, 2026

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at 400 R Street, Sacramento, California, 95811, commencing at 9:01 a.m. and concluding at 12:55 a.m. on Tuesday, August 19, 2026, reported by Ernalyn M. Alonzo, Hearing Reporter, in and for the State of California.

APPEARANCES:

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| Panel Lead: | ALJ ANDREW WONG |
| Panel Members: | ALJ GREG TURNER<br>ALJ KEITH T. LONG |
| For the Appellant: | JOSEPH VINATIERI<br>LEIGHTON ANDERSON |
| For the Respondent: | STATE OF CALIFORNIA<br>DEPARTMENT OF TAX AND FEE ADMINISTRATION<br><br>AMANDA JACOBS<br>CHAD BACCHUS<br>JASON PARKER |

# I N D E X

## E X H I B I T S

(Appellant's Exhibits 1-54 were received into evidence at page 8.)

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

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Sacramento, California; Tuesday, August 19, 2026

9:01 a.m.

JUDGE WONG: Let's us go on the record.

This is the rehearing in the Appeal of Alere Home Monitoring Incorporated before the Office of Tax Appeals, OTA Case No. 250923258. It is Wednesday, August 19th, 2026, and the time is 9:01 a.m. We're holding this hearing in Sacramento, California.

I'm Andrew Wong, the lead member of the three-member panel hearing this case, and with me are Administrative Law Judges Greg Turner and Keith Long.

Let us have the parties introduce themselves, beginning with the Appellant.

Could you please --

MR. VINATIERI: Good morning. Joe Vinatieri on behalf of Appellant, Alere Home Monitoring.

JUDGE WONG: Good morning.

MR. ANDERSON: My name is Leighton Anderson, also on behalf of Alere Home Monitoring.

JUDGE WONG: Good morning.

CDTFA.

MS. JACOBS: Amanda Jacobs, attorney with the California Department of Tax and Fee Administration.

MR. BACCHUS: Chad Bacchus, attorney with CDTFA.

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

JUDGE WONG: Good morning.

All right. Let us go over a few matters, including the issues that will be decided, exhibits, objections, witnesses, time allocation, and what not.

And so, there are the two main issues in this case and then a few sub-issues that I asked the parties to address. The two issues are whether OTA properly granted a rehearing; and the second issue is, if so, whether the measure of unreported inventory withdrawals of testing supplies during the liability period should be reduced, thereby, entitling Appellant to a refund.

Appellant, does that sound like an accurate description or summary of the issues?

MR. ANDERSON: It comes out of the prehearing conference orders, Your Honor, yes. Thank you.

JUDGE WONG: Thank you.

CDTFA?

MS. JACOBS: That sounds correct. Thank you.

JUDGE WONG: Thank you.

OTA also asked the parties to address several sub-issues at today's oral hearing. I'll just cover that: Number one, in determining whether OTA properly granted rehearing -- this goes to Issue One; what level of

deference, if any, does the rehearing panel, this panel, the third OTA panel involved with this case, what level of deference does it give to the opinion on the petition for rehearing by the PFR Panel or Panel No. 2? Another sub-issue is, if OTA properly granted rehearing, if Panel No. 2 properly granted rehearing, what level of deference, if any, does this panel, OTA Panel No. 3, give to the opinion by the original panel, Panel No. 1? Was there any taxable -- and also, basically, the core is was there any taxable use of the testing supplies in California?

I had mentioned at the prehearing conference, when I brought these sub-issues to offer the parties an opportunity to brief -- formally brief the sub-issues following the hearing, and I was wondering do you want to take up that offer, or do you want to wait until the end of the hearing to give an answer?

Appellant?

MR. ANDERSON: We can revisit it at the end of the hearing. At the present time, I don't know that any additional briefing would be needed.

JUDGE WONG: Okay. And, CDTFA, I know in your various briefings you've touched on it as well. Did you want to take up the offer to do that, or do you want to wait until the end?

MS. JACOBS: I don't foresee the need for additional briefing, but we can revisit it at the end.

JUDGE WONG: Okay. All right. Let's talk about exhibits then. Appellant has identified and submitted proposed Exhibits 1 through 54.

Appellant, did you have any other exhibits to add?

MR. ANDERSON: We do not.

JUDGE WONG: Okay. And, CDTFA -- CDTFA, did you have any objections to Appellant's exhibits?

MS. JACOBS: We do not. Thank you.

JUDGE WONG: Okay. So, Appellant's Exhibits 1 through 54 will be it admitted into the record as evidence.

(Appellant's Exhibits 1-54 were received into evidence by the Administrative Law Judge.)

JUDGE WONG: CDTFA has identified and submitted proposed exhibits A through J as evidence.

CDTFA, no other -- no other exhibits?

MS. JACOBS: None. Thank you.

JUDGE WONG: Okay. And I do believe Appellant has objections to Exhibits I and J; is that correct?

MR. ANDERSON: That's correct.

JUDGE WONG: Okay. Do you have any objections to exhibits A through H?

MR. ANDERSON: No, Your Honor.

JUDGE WONG: Okay. So, CDTFA's Exhibits A through H will be admitted into the record as evidence.

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

JUDGE WONG: Could you please briefly summarize your objections to Exhibits I through J.

MR. ANDERSON: The -- the objections are that the -- there's never been any challenge to the factual findings of Panel 1 that the record in the matter was completed at that time. As, a matter of fact, even in the Department's reply brief for this hearing, they indicate that there's no factual matters in dispute. It would be remarkable, I think, to find that after all these years and -- and -- and prior panel hearings, that there was new evidence to be presented. The OTA has rules with regard to the -- the discovery and presentation of new evidence. Those rules have not been complied with.

In addition, the -- under OTA rules, any new exhibits should have been submitted not later than the time of CDTFA's opening brief. And, in fact, these exhibits were submitted with CDTFA's reply brief and are out of order. For that reason, we also don't think that they are relevant to any issue pending on the -- on -- on rehearing as identified by the rehearing panel.

JUDGE WONG: Thank you, Mr. Anderson. Could you -- when you're speaking, my understanding is that you're coming across a little light on the stream. So, if you could pull the mic closer to your mouth when speaking, I think the -- that would be -- it would help make the record, and it will be more clear on the stream.

MR. ANDERSON: I don't usually get complaints about the -- the quality of my voice. So, I -- I will try to do that. Thank you.

MR. VINATIERI: Might I add that we would like to incorporate by reference our Alere Home Monitoring's objections to Exhibits I and J, which is submitted previously. It should be in the record.

JUDGE WONG: Okay. Thank you.

CDTFA, did you have a response?

MS. JACOBS: We do. Thank you.

Exhibits I and J are directly relevant to Issue Two, whether the measure of unreported inventory withdraws of testing supplies should be reduced. Regulation 30607(a) -- or(d), excuse me, contemplates additional evidence accompanying briefing in a granted petition for rehearing, and does not limit submission of additional evidence to only cases where the rehearing was granted on newly discovered evidence or insufficiency of evidence as Appellant had claimed in their object -- in their written

objections. We'd note without any accompanying legal authority.

Also, Appellant's objection to the provision of Exhibits I and J as untimely, pursuant to Regulation 30420(a) is absurd. That same subdivision contemplates the parties can continue exchanging exhibits up to 15 days before the hearing. Exhibits I and J were provided over four months ago. They could have requested additional briefing to address their concerns, but they never -- they never did so.

We also note that during the original briefing in this case, Appellant submitted additional exhibits in its own reply brief, dated June 8th, 2023, and in its additional brief, dated November 2nd, 2023. Therefore, we respectfully request that OTA admit Exhibits I and J.

JUDGE TURNER: Can I ask a question?

JUDGE WONG: Sure. Judge Turner has a question.

JUDGE TURNER: Is the -- the -- the exhibits that are being objected to -- both parties, I'm curious -- is this considered or looked upon as new evidence, or is this a reflection of evidence that's been previously entered into the record?

MS. JACOBS: Thank you for your question. It's a reflection of the exhibits that were briefly submitted. For example, the exhibits are just -- are a summary of

evidence that was -- most of the evidence was already in the record. We included the information we received from Appellant directly as Exhibit J.

JUDGE TURNER: Okay.

MR. ANDERSON: Your Honor, I -- I think that the description is not fully accurate in the sense that the way I understood the explanation of the exhibits in the reply brief. It -- it was a -- a new compilation which they said included information from the audit file, but it wasn't obvious that it only included information from the audit file or from what was previously admitted in the evidence. And Your Honor's question reminds me of a -- a -- another concern we have, which is there is no testimony. There's no evidence regarding how these --

JUDGE WONG: Sorry, Mr. Anderson. They can't hear you on the stream. If you could speak into the mic and so that the record can pick it up when it's being transcribed. Thank you.

MR. ANDERSON: Thank you. Again, is that better? I -- maybe because I was turning the other way.

The -- as I say, there's -- there's no evidentiary description of how the exhibits were prepared or what -- what assumptions went into the preparation of the -- of the summary. I mean, we've looked at it and can't really determine what information is being displayed

or what assumptions were made when the -- when the compilation was -- was put together. These are the kinds of things that in a normal evidentiary proceeding would be established through the testimony of the preparer.

But CDTFA has elected not to call any witnesses. And -- and again, I would simply say there are no factual disputes regarding the relevant matters that were ever identified either after Panel 1 issued its findings. At the time of the rehearing petition, this issue was solely one of law on the record that existed at that time.

JUDGE TURNER: Thank you for your replies.

JUDGE WONG: All right. I think the panel is going to take five minutes to discuss the objection. So, let us take a break. Five minutes, 9:20 we'll come back.

We'll go off the record. Thank you.

(There is a pause in the proceedings.)

JUDGE WONG: All right. We're gonna go back on the record.

On the objection, we're going to take Appellant's objection under advisement. Because the proposed -- I'm popping. Sorry.

The proposed Exhibits I and J become relevant depending upon how we determine Issue One -- determining how we -- how we redetermine Issue One, then Issue Two becomes relevant, and I and J may be relevant to

Issue Two. So, we will make a ruling on the objection in our rehearing opinion, depending on how we decide the other issues. So, that's -- so, Appellant's Exhibits A. Through H are admitted. Objection noted to Exhibits I and J, and we'll take the objection under advisement, and we will make a decision on that in our opinion.

Let's move onto witnesses. The parties do not intend to call any witnesses.

Just reconfirming that, Appellant, is that correct?

MR. ANDERSON: Yes, that's correct.

JUDGE WONG: And CDTFA, is that correct?

MS. JACOBS: That's correct. Thank you.

JUDGE WONG: Okay. And now let's talk about the time allocations. Appellant, you've asked for 90 minutes. You can divide that however you want, opening presentation and then a rebuttal and closing.

CDTFA you've asked for 45 minutes. You can do the same, opening and then a rebuttal and closing.

Is there any tweaks to that time estimate, Appellant?

MR. ANDERSON: No. Thank you.

JUDGE WONG: Okay. And, CDTFA, 45 minutes still good for you?

MS. JACOBS: We don't anticipate going longer

than 45 minutes. However, we do cite to many authorities in the presentation. So, if it does extend a little bit longer, we would just ask for grace to finish up what -- what we're saying.

JUDGE WONG: Okay. Since this is the only hearing of the day, we do have some leeway on the back end. That's fine.

Oh, also, did the parties have, basically, a summary of their authorities and what not? Maybe we should have taken that earlier.

MR. VINATIERI: Yes, we --we do. We have a -- a list of citations and case authorities. We also have a list of proper names that we thought would be helpful. To whom should I deliver these?

JUDGE WONG: That's a good question. Someone is coming up and will take those from you, and we will pass them on to the panel, as well as our hearing reporter who will be making the -- the transcript after this.

All right. Before we turn it over to Appellant, any final questions from either party?

Appellant, any questions?

MR. VINATIERI: No. Thank you, Your Honor.

JUDGE WONG: CDTFA, any final questions?

MS. JACOBS: No. Thank you.

JUDGE WONG: All right. We will turn it over to

Appellant for your presentation. I believe you have a PowerPoint presentation as well. Okay.

MR. ANDERSON: Which is what you see on the screen, Your Honor.

JUDGE WONG: Perfect. Okay. The floor -- excuse me.

PRESENTATION

MR. VINATIERI: So, good morning, and thank you for the opportunity to present our case.

I'll try that again. There we go, hopefully.

This is been a long and winding road.

Can somebody work on that mic?

JUDGE WONG: Yes. Sorry. Let's go off the record and -- and see if we can get the level volume.

(There is a pause in the proceedings.)

JUDGE WONG: Let's go back on the record.

Please proceed. Sorry.

MR. VINATIERI: Okay. So, for us it's been a long and winding road.

MR. ANDERSON: Let's just use this one up here.

MR. VINATIERI: Okay. One more time. For us it's been a long and winding road to get to today, which has been of great concern to our client and, of course, to us. We appreciate everyone's help today in moving this

matter along. We say thank you. I do want to introduce to you from Abbot Labs Jonathan Leigh, who's sitting behind me. He's a senior manager of taxes, as well as Mark Gant. He's -- he's state tax counsel for Abbot Labs. So, I appreciate the fact that they're here today.

So, the case is -- has a number of significant issues, a number of them, including the plain meaning of section 6009.1. But in addition, there are other important issues and policy concerns that go beyond, and you're gonna hear about them in a couple of minutes. We appreciate the fact that the California Taxpayer's Association came on board expressing their concerns also. And with that, I'm going to turn it over to my litigation partner Leighton Anderson who will be making the presentation.

Thank you.

MR. ANDERSON: Good morning, again, Your Honors. We're going to begin our presentation by identifying the subjects that the presentation will address. You'll immediately notice that this is a repetition of matters that Judge Wong already read into the record, and so I promise not to spend too much time on them. But the -- the issues are whether OTA properly granted a rehearing and, if so, what is the measure of -- of unreported inventory withdrawals.

Our own briefs, we identified the issues in slightly different terms. We -- we ask -- we thought that the issue was whether rehearing was improvidently granted. That's -- that's essentially the same. We -- we said that in the event that rehearing was -- was properly granted, how, if at all, does reconsideration of the issues change the decision reached by Panel 1? That framing, the difference between the -- the framing from the prehearing conference order and what -- what we were suggesting has to do with the question of how the Panel 1 decision should be treated by this panel. Whether or not, honestly, whether or not rehearing was properly granted by the second petition for rehearing panel, which is we know as Panel 2. That question is also an issue here, depending on the resolution of the first issue. The -- our -- our view is that the Panel 1 issue -- Panel 1 decision stands. It's not in any way wiped away merely by the granting of the rehearing petition, especially, since the granting of the rehearing petition was specifically on an issue of -- of issue of law.

In addition, we want to acknowledge that the panel has had posed the questions that it posed to us. Question No. 1, what deference does the rehearing panel; this -- this panel, OTA Panel 3, give to the opinion of petition for rehearing; and secondly, the question of, if

rehearing was properly granted, what deference does this panel give to the original panel? I -- that's part of what I was addressing a moment ago on -- on the issue of was there any taxable use of the testing supplies in California.

The panel also had a question about reporting differences. I want to acknowledge this one as -- as well as we answer all of the questions before us. This question was that Appellant reported use tax based on the cost of testing supplies shipped directly to patients within California in 2014 and 2015, but did not report use tax on testing supplies shipped to patients located outside of California those years. What was Appellant's rational for this difference in reporting, and did Appellant report, pay tax to any other state with respect to testing supplies shipped to patients in those states in 2014, 2015? We will address all of those issues in the presentation, particularly the questions asked by this panel.

But we believe that the starting point goes back to the -- the Panel 1 decision. As -- as my partner mentioned a moment ago, it's -- it's astonishing for us to consider --

JUDGE WONG: Mr. Anderson, I'm so sorry to interrupt.

MR. ANDERSON: I'm not loud enough again?

JUDGE WONG: That's right. If you could please speak into the mic. To quote your partner from an earlier hearing, could you please swallow the mic as it were. I think that's a sound engineering term.

MR. ANDERSON: I -- I was so afraid of getting the feedback, but I'll -- but thank you for the guidance. I appreciate that.

It's astonishing -- is this better?

JUDGE TURNER: Yes.

JUDGE WONG: Yes.

MR. ANDERSON: As my partner mentioned, it's astonishing for us to consider that the original hearing on the merits was held July 16, 2024. That was more than two years ago. We do not know whether that fact by itself is a concern for OTA, but we can just tell you that it's been a concern for Alere Home Monitoring. What Alere was seeking two years ago was a final decision on the merits. It hoped for a favorable one, but even if not, it could at least evaluate its remedies and go for the -- go from there. But even in July of 2024, my partner was here at that time, Jason DeMille, quoted Alere's -- opened Alere's presentation with the words, "This case has been around for a long time." That was two years ago. It's been around for a long time.

After all the tax years at issues here, go back to 2014 and 2015 with a question pending, and we can take that one up right now regarding 2013. The answer to the question about the payment of taxes in 2014 and 2015 for California sales, but not on supplies shipped outside of California, was answered by Exhibit 2 already in the record. It was in the record at the time of the Panel 1 hearing, which is the declaration of Jonathan Leigh, who, by the way, is seated in the first row behind me.

That -- this is the same -- this is the same declaration, by the way, that the Department quotes in its reply brief at page 8, footnote 14. As Mr. Leigh testified on that occasion four years ago, Alere paid use tax on product sales -- that is lancets and strips. We have some of those here -- that were shipped to patients out of state until the auditor of the previous audit for the years 2010, 2012, granted a refund with respect to use tax paid on those items shipped out of state. That's paragraph 3 of the declaration. The rational for that refund, in the auditor's view, was that the sale of lancets and strips to or for the use of out-of-state patients was nontaxable in California because the use was out of state. That was in the verification comments that are quoted in the Leigh declaration.

Based on those comments, Alere concluded that it

need not pay sales or use tax for those transactions. Alere was then considerably surprised when it received a Notice of Determination in 2019 that said in essence, well, you're wrong again. You didn't need to pay California tax on those sales in the prior audit period, but now you owe tax, interest, and penalties in this one. Those verification comments, by the, way are in the record as Exhibit 4. The verification comments said in the prior audit, through reviewing the sales data and reconciling the sales, the auditor discovered that the taxpayer reported sales tax on all products sales, whether they were shipped to a patient in California or out of state. The taxpayer was granted a refund for the tax reported on product sales that were shipped out of state.

Since no major changes have occurred, auditor and taxpayer agreed to use a percentage developed from the years 2010 to 2012 and apply it to 2013, but noted that in 2014 and 2015 the taxpayer made corrections to discontinue reporting out-of-state sales as part of their taxable measure. We think that is a complete answer to the question regarding 2013 and the difference between 2013, 2014, and 2015. We acted in reliance on written advice from the auditor. It's also important to consider that the Leigh declaration and the verification comments from the subsequent audit -- that's Exhibit 4 -- were all in

the record at the time of Panel 1's decision, and were considered by Panel 1 in making its decision. This was all in the record.

So, now we are re-plowing old grounds. The point of the hearing two years ago was to consider questions like this and the relevance of those questions. And as we know, Panel 1 found, on the basis of that record, that the out-of-state shipments were subject to the exemption -- or to the exclusion -- I'm sorry -- subject to the exclusion of Section 6009.1. While we're on the subject, the answer to the question about other states is in the affirmative. That is, other states have widely varying sales and use tax rules, as, of course, the panel is aware. And at least in some of those states, there's a health care exemption that applies. But Alere is registered to pay and does pay tax in those jurisdictions to the extent of applicable law. We also believe that the taxability or not in other jurisdictions is not relevant to the issue of how 6009.1 applies to shipments out of state for use by patients and for compensation by patients' health insurers to Alere. But there's obviously a concern for double taxation under the theory that the same transactions are subject to use tax in California.

This is a good time for me to mention that Alere's shipment of testing meters and testing supplies to

out-of-state patients include direct supplies to patients for their direct payment without the involvement of a third-party payer. It is undisputed the shipments to those patients, if they reside out of state, are not taxable. Inventory withdrawals for supplies to those patients have always been excluded from the appeal since CDTFA admits that those shipments of supplies represent nontaxable sales. But the question of how Revenue & Taxation Code 6009.1 applies to shipments out of state for compensation by the patients' health insurers was the issue before the OTA panel, Panel 1, in 2024.

Your Honor, that panel -- Your Honors, that panel reached a unanimous decision on a complete record. Panel 1 did so on the basis of careful reasoning carefully explained. Earlier I expressed astonishment for the amount of time that has transpired since 2013 to 2015 to get to today. But the single most astonishing thing about this case is that, from beginning to end, is the failure of OTA to give full faith and credit to a properly constituted panel of well qualified ALJs who exercise their quasi-judicial authority to reach a reasoned decision according to the law.

I would like to add to the list of things that should concern you then as we consider what is at stake today when we were asked what deference should you,

Panel 3, give to the previous petition for rehearing panel, Panel 2? We have an answer for that question as promised. But at the prehearing conference, I suggested you also consider what deference did that panel owe to the first panel? Because it's Panel 2's complete absence of deference for a coequal panel of ALJs that leads directly to today's hearing because there's nothing erroneous or contrary to law about Panel 1's decision. Litigants do not always agree with the decision handed down from the Bench, as it's inevitable that one side will be dissatisfied, and sometimes it's even both. But final decisions should be final decisions.

From the outset of Alere's appeal, the Department took the position that the relevant code provision 6009.1 does not mean what it plainly says. Revenue & Taxation Code 6009.1 provides that storage and use do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter outside the state. Despite 6009.1's clarity, a brief submitted by CDTFA prior to the Panel 1 hearing -- this was the Department's additional brief dated August 11, 2023, -- asserted that the exclusion provided by 6009.1 only applies to circumstances where a person purchase was property for resale, stores it in California,

and then transports it outside of California for that person's use. The words that person were italicized so that -- so to make sure that you wouldn't miss the point that it's only when a person ships it outside for their own use.

That was the argument. For that conclusion to be accepted, the statute itself would have to express or apply a limitation to that person's own use, and the statute simply does not do so. It is actually nonsensical to try find that narrow of an approach in the statute. The Department -- but yet, the Department identified that as its longstanding interpretation, and I promise I will come back to that in a moment. But the same brief on the same page acknowledge that Alere disagreed with the own use interpretation. The brief argued, well, even with the disagreement, the same conclusion applies for a different reason.

The Department independently secondarily argued that Alere owes the tax, whether or not they're being shipped -- on the lancets and strips -- whether or not they're being transported for the patient's use, rather than Alere's use, if the shipment itself constitutes some use of the supplies within California. From Alere's point of view, this is the crux of the matter. The Department had two -- in other words, the Department had two distinct

lines of argument at the Panel 1 hearing, one of which was based on the backup letter to annotation 280.0390 dated January 8, 1990, -- 1992. And I just call that the 1992 annotation.

So, the -- the first argument was based on the backup letter to the 1992 annotation. That was the one that purported to limit 6009.1 to the purchaser's, quote, "Own use," unquote, outside six California. The other line of argument was independent of that supposed interpretation of 6009.1, but it was claimed to be supported by the 1995 annotation, annotation 570-0435, dated May 19, 1995. And again, I'll call that the 1995 annotation so I don't have to keep repeating the numbers. Distinguishing between those two lines of argument is important for several reasons, including the fact by the time we get to the Panel 2 rehearing opinion, the argument based on the backup letter to the 1992 annotation disappears. The sole focus is the one based on the 1995 annotation.

But before Panel 1, consisting of Judges Brown, Lambert, and Ridenour, the -- the hearing was conducted on an evidentiary record of the 50 exhibits submitted by Alere and another 8 submitted by the -- by the Department. That was the parties' opportunity to submit evidence, Your Honors. After a lengthy hearing, after considering all of

the evidence, the panel unanimously adopted factual findings that are still not in dispute. No one disputes the fact findings of Panel 1 that reached -- that Panel 1 reached on its record, including a statement in the Department's reply brief that there's no factual issues in dispute. The only issues is the issue of law.

They -- they reach a series of factual findings that are laid out in detail in the opinion, including number, that Alere is a provider -- Alere is a provider of at home blood test. I'm summarizing a little bit -- INR blood test that Appellant provides to patients using a certain drug warfarin -- warfarin patients with electronic testing devices, and is referred to as meters, and supplies consisting of test strips. We -- we had these at the -- at the hearing previously, and -- and we'll just -- so, the meter looks like this. The -- the lancets and the -- this -- this is the old style. This is the new style. It's what the patient uses to prick the patient's finger to draw the drop of blood that the patient then places onto the strip with a little chip in the -- in the -- in the -- embossed into the strip, and then slip -- puts this strip with the patient's blood into the meter for analysis and for transmittal to the patient's doctor. You -- you see that picture on the screen as well.

So, the -- but -- but fact finding number 1 from

the -- from Panel 1 was that -- that Appellant Alere provides these provider, not user, provider of these strips -- these -- the lancets and strips to be used with the meters with a doctor's prescription, training from a registered nurse as required before the test can be used independently. Finding No. 2, in connection with the use of the blood test, Alere provides anticoagulation monitoring and management services. Patients relay -- this is what the patients do. Patients relay test results to Alere, which Alere records in its Alere CoagClinic data management system. Alere CoagClinic allows patients to track anticoagulation treatment, analyze test results, and adjust medication on the automatic results reported by the clinic.

Your Honors, it bears emphasis that from the patient's point of view, this is life or death. The -- the -- the drug can be deadly to them if it's misused or if it creates a reaction in the body that's different from what is needed for a -- for a proper -- for -- for blood to coagulate. This is a blood thinner, but you need -- you -- you need some coagulation in order to -- in order to function and in order to live. And all of this is managed by physicians using the sophisticated technology for the benefit the patient. And the patient is the key to it because it's the patient sitting in -- in their home

that's -- that's pricking the finger, putting it on the -- on the -- on the strip, inserting it into the meter, sending it to the -- sending it to the doctor. It would -- it's -- it's also worth pointing out that this is not unlike similar procedures that diabetic patients use.

Finding 3, Appellant purchases its supplies ex-tax, withdraws them from a resale inventory and ships them along with meters, via common carriers to patients. Appellant retains titles to the meters, which are returned to Appellant when the patients no longer need them. Application of tax to the sale or use of meters is not at issue in this appeal. The transactions at issue are limited to out-of-state Medicare transactions. Again, not to -- not to commercial trance -- commercial insurance transactions, not to self-pay transactions. And -- and that Appellant's -- Alere's compensation for these transactions comes slowly -- comes solely from Medicare Part B insurance.

Finding 5, during the liability period, Alere withdrew supplies from resale inventory to ship the supplies directly to patients -- to ship the supplies directly to patients. The patients use the supplies for blood testing in connection with Alere's anticoagulation monitoring and management services, which is the use for which the supplies in question were designed. Those

factual findings have not been challenged and should not be -- and should be regarded as established. Even CDTFA's reply brief -- I've said this a couple of times -- states that the facts are not in dispute.

The only questions are how should California law apply to those facts. It is very clear from the record that the three-judge panel, Panel 1, unanimously reached legal conclusions that were carefully considered in the course of a reasoned decision. To demonstrate how Panel 1 got it right, I want to go back to the transcript of that hearing, and I want to go back to CDTFA's own summary of its argument. Beginning at -- about page 50 of the transcript, CDTFA summarizes its argument by saying, "Appellant did not charge patients directly for the supplies and used common carriers to deliver the testing supplies to the patients out of state." Thus, CDTFA argued, "Alere was the consumer, not the retailer of the testing supplies that used in rendering its service." They said, "Thus, taxable use may include the withdrawal of TPP from inventory and transfer that TPP to other person, such as common carriers, in transactions that do not constitute sales," citing the 1995 annotation and also referencing California UCC 2401.

This was entirely the transfer of title argument. It is evidence that the whole way to the argument at the

time was on the mere delivery of the supplies to common carriers. The reference to the Commercial Code Section 2401, also known as UCC 2401, is to a section that concerns transfer of title. As Ms. -- as Ms. Jacobs explained at that time, "Appellant made taxable use when it withdrew supplies and shipped to them via a common carrier to Medicare patients." She admitted that Appellant -- that Alere retained title to the meters. She said, "After shipping the testing supplies, Appellant relinquished title and possession to those testing supplies, which were then consumed by Alere in rendering its services."

So, I want to note that again, we see CDTFA abandoning reliance on the 1992 annotation. It's entirely the 1995 transfer of title approach that they're -- that they're focused on. Because as if -- if as CDTFA already argue, the supplies were for Alere's use out of state, then the logic to the backup letter to the 1992 annotation was it that 6009.1 applied. To make the argument that CDTFA presented at the Panel 1 hearing, which was that Alere uses supplies out of state, CDTFA needed the panel to forget any mention of the 1992 backup letter.

Accordingly, CDTFA summary relied entirely on one, a theory of Alere's use, and two, of shipment via common carrier. CDTFA said to summarize, "Appellant was

the consumer, not the retailer of the testing supplies it used in rendering its blood monitoring services, and its withdraw from inventory and shipment of the testing supplies via common carrier to trainers and patients outside of California was a taxable use."

So, please note that the claimed distinction between the meters versus the taxability of the supplies. Alere -- the argument was that Alere consumed the supplies when shipped. Those are the lancets that the patients use to prick their fingers and the strips that the patients inserted into the meters so that the blood test information -- that's the blood of the patient's, not Alere Home Monitoring -- the blood of the patient's could be transmitted to the patents' physicians to maintain the health of their patients; those supplies. The distinction was that the Department said, "Well, the meters get returned eventually, but when the patients are drawing their own blood and testing their own blood and sending the results electronically through meters to doctors, that's Alere consuming its supplies." If that sounds odd we agree.

But look again at the words that we quoted, "After shipping the testing supplies Appellant" -- meaning Alere -- "relinquished title and possession to those supplies which were then consumed by Alere -- consumed by

Alere in rendering its services. Alere was claimed to be the consumer of the supplies merely based on the fact of shipment."

But what Revenue & Taxation Code 6009.1 tells us, tells CDTFA, tells the OTA, tells any -- tells the world is that use does not include exercising any right or power over tangible personal property, including handing it over to a carrier if it's for the purpose of subsequently transporting it out of state for use -- for use -- actual use, thereafter outside of the state. Which is exactly what Alere was doing when it quote, "Shipped the supplies directly to patients outside of California," quoting from finding No. 5. That conclusion is mandated by the plain meaning of 6009.1 itself. Shipment is not use. That is explicitly in the statute.

At the hearing, Judge Brown initially asked about the first line of argument, which was that 6009.1 only applies to tangible personal property shipped out of state for the purchaser's own use. Judge Brown asked whether that interpretation had any basis other than the backup letter to the 1992 annotation. Judge Brown said, "Okay. I believe this is the one that says that the exclusion law applies only when the person transcripts the tangible personal property outside California solely for that person's own use."

Miss Jacobs said, "Correct."

Judge Brown said, "And that was the part of what CDTFA relied on in its finding that 6009.1 doesn't apply."

"And so, my question is," Judge Brown asked, "do you know what that interpretation is based on? Like, is there anything to support that other than the backup letter?"

And it's not even in the annotation itself, I will note. It's in the backup letter.

So, then Mr. Bacchus said, "There isn't a specific statute or regulation that supports that." That's been the Department's interpretation for several decades, and the backup letter to 570.0435. They also references that 1995 there were -- they'd been going -- it had been the longstanding interpretation for 40 years at that point, so now going onto 70 years. So, the Department uses that interpretation and has used it for almost 70 years, but we are not aware of any specific statute or regulation or case law that that is based on. That was clearly an admission that the interpretation does not really apply the statute because the statute clearly does not say any such thing.

But even at the time the Department was putting more weight on the transfer of title when delivered to a common carrier argument, it is still worth mentioning that

to this day, the Department is not aware of any specific statute or regulation or case law that the interpretation is based on. It also seems worth mentioning that even the author of the backup letter to the 1992 annotation did not try to justify the underlying statement in his letter with any supporting reasoning. What I mean is, take a good look at the backup letter to the 1992 annotation. It certainly does state that 6009.1 applies to circumstances where a person purchased property outside California, stores it in California, and then transports it outside of California for that person's use. But it does not state that 6009.1 only applies in that narrow circumstance, not at all. In fact, the letter goes on to consider a different hypothetical.

The -- the letter says, "On the other hand, if the person -- if the petitioner transferred the property outside California in its own facilities and pass title to the donee outside California, the petitioner would not have been regarded as making a taxable use of the property in California. Rather, such a transaction would have been one that did qualify under 6009.1. That is, petitioner storage and transporting the property outside California would have been excluded from the definition of use, since petitioner would, thereafter, use the property solely outside of California by way of transfer of title to the

donee outside of California."

Although the case before you, our case, is still not a gift case, that hypothetical from the same backup letter comes very close to establishing Alere's argument here. Maybe it even hits the nail on the head. If the donated property is transport -- is transferred outside California with transfer of title occurring there, then the 6009.1 exclusion applies. That's the backup letter. So, Judge Lambert asked about that at the hearing. He asked -- in the backup letter for -- for the 1992 annotation, there's an example that says -- and of course the same language -- on the other hand, if a petitioner transported the property outside of California in its own facilities and passed the title to the donee outside of California, the petitioner would not have been regarded as making a taxable use for the property in California. So, Judge Lambert said, "So, it seems like that is a situation where the property was used outside of California by someone other than the person's use. And I'm wondering maybe to clarify that, or is that inconsistent at all?"

So, in response to that, Ms. Jacobs said, "Well, source saying that when the title passed, they transported it to the common carrier within California. And the back up we have for that -- and there's a history of title and possession being transferred in sales. And there's also

in use tax situations when someone like Appellant would transfer it to the common carrier for use by another individual. That's when title passes when it's transferred to the common carrier."

In thinking about this, I've reduced the Department's argument to a formula. And so, I -- I've put it on the blackboard that you see on the slide. I -- I -- I -- that's -- that's just me. But the -- the -- but you can see that -- that the equation -- reducing to equation the passage of title in California equals use in California. That's the Department's whole argument. That's exactly what they are arguing. Ms. Jacobs argued that the problem with the backup letter would be avoided. This is in response to Judge Lambert's question. She argued that that issue with the backup letter would be avoided as long as you can say the title passage occurred -- occurs in California, which is based on an argument based on the 1995 annotation, not the 1992 annotation.

But, Your Honors, the fatal defect in that equation is while that might make sense for donated property, it makes no sense at all for property provided for compensation, especially in the delivery of services. It makes no sense for property that will not be used until delivered to the actual user in Connecticut, in Kansas, or

Oregon, or wherever that actual user happens to be. Because what the legislature tells us in 6009.1, with perfect clarity, is that use does not include exercising any -- underscore "any" -- right or power over tangible personal property. And that includes the right or power to deliver title for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, which was exactly what Alere was doing when it shipped the supplies directly to patients outside of California. That's finding No. 5.

It is as clear as it can possibly be that merely delivering property to common carriers for shipment to patients outside of California is exactly what 6009.1 excludes from the meaning of use. For the Department or even a panel of OTA to turn around and say, "Oh, no, when you printed a shipping label, that was enough of a use to justify taxation." That directly contradicts the express mandate of 6009.1. So, that's exactly what Panel 1 found on the factual record before it. Panel 1 said that -- that Alere's use of its supplies consisted entirely of removing the supplies from resale inventory for out-of-state shipment. Thus, the property had no functional purpose in California other than as an object in transit and, subsequently, is exclude from tax, pursuant to Rev & Tax Code section 6009.1.

That's what they held. It was not a legal error. It can't possibly be a legal error. It was a decision on the merits by a duly constituted panel of OTA administrative law judges. Now, I get it. At this point, our -- our friends at the Department, and I've met them this morning, and I consider them friends. Our friends at the Department respond with the words longstanding interpretation. "This is our longstanding interpretation," our friends say, "and should not be taken away from us from some panel of ALJs." I think it's fair to say that's literally why we are here today. Reduced to its essence, that is what the Panel 2 decision says as well. So let me address that right now.

The shortest answer to that argument is that no matter how longstanding an agency interpretation is, if it's contrary to the directly applicable legislative enactment, it simply cannot stand. Period. That's the short answer. Another answer is that we're not, in fact, talking about the longstanding interpretation. The annotations at issue concern the completion of a donation, a gift, the delivery of possession without consideration. In terms of 6009.1, the completion of a donation in California is not made for the purpose of transporting the donated item out of state for either the donor's or the donee's use. It's made for the purposes of the donation

itself.

So, there's a rationale, and -- and, of course, case law too for the idea that a donation of property is the donor's use of that property where the donation occurs. The backup letter previously quoted -- concluded that if the donation applies outside the state, after the property is transported out of state, then 6009.1 would apply. That too is a longstanding interpretation. It's in the backup letter from 600 -- from -- from the 1992 annotation. In addition, the longstanding interpretation argument never mentions this omission is -- screams at us. It never mentions CDTFA's own regulation 1620. Regulation 1620 subdivision (b)(9) restates 6009.1 verbatim without including anything at all like the longstanding interpretation claimed by CDTFA.

In Regulation 1620 in giving examples of where -- when the exclusion does or does not apply, the Regulation says, for example, an engine transported outside the state and installed on an aircraft which does not return to the state qualify for the exclusion. Nothing there considers whether the transportation would be by a common carrier or would involve transfer of title to the aircraft owner. It simply says that transporting the component part out of the state for out-of-state use qualifies for the exclusion.

The general rule for use tax under Regulation 1620 is simply that use tax does not apply to the use of property held or stored in this state for sale in the regular course of business, nor to the use of property held for the purposes designated in subparagraph (b)(9), those purposes being for the purpose of transporting it out of the state, quoting 6009.1 verbatim. CDTFA has no other interpretation of that provision longstanding or otherwise. CDTFA can no more decide to disregard its own regulation than it can decide to do so with the legislative enactment.

Regulation 1620 also states, for purposes of this regulation, functional use means use for the purposes for which the property was designed. In the case of the lancet that's -- that's used by the patient when they take the needle, and they stick it into their finger, and they draw blood, and they put it on the strip, and then put the strip into the meter and send that to their physicians for purposes of maintaining their own health, that is the functional use for which that property was designed; and that's defined as functional use in Regulation 1620. Under regulation -- under the regulation, the location of the first functional use determines the place at which the use of the TPP first occurs. CDTFA has no other interpretation longstanding or otherwise.

Now, just to keep my presentation organized, we been considering the reasons why that formula, PTCA equals UCA, position of title -- transfer of title in California equals use in California does not work. It's -- it's been central to the Department's argument all along. What I said a few minutes ago, is while it might make sense for -- some sense for donated property for gifts, it makes no sense at all for property provided for compensation, which will not be used until delivered to the actual user in Connecticut or Kansas or Oregon or anywhere else. And -- and 6009.1 is just very, very clear that use cannot be based merely on the act of shipping that tangible personal property out of state, which is all we have in this case.

I need to come back to that now to correct a misunderstanding about the difference between gift and non-gift transactions and what that means for the location of use. That is why the analysis of Yamaha 2 -- I'm -- I'm going to be referring to these cases by name without providing for the record a full citation, but -- but I assume that's why we have the list of citations that we provided to the -- to the panel. In -- in Yamaha 2, the issue was specifically, when is a gift made for purposes of determining if a use tax is due? That is -- that's page 357 of the published opinion.

Yamaha 2 was decided after the California Supreme Court in Yamaha 1 had made important rulings regarding the weight, if at all, to be assigned to annotations and the like. The court's decision on remand, Yamaha 2 was strictly limited to the gift issue. Yamaha 2 said that even a constructive or symbolic delivery is sufficient to vest title in the donee as long as the evidence -- as long as the evidence clearly shows an intent to park presently with some substantial attribute of ownership, but is true in a gift context is not true in a sale of good -- goods context. In a transactional setting, with or without a third-party payer, the time and place of transfer of title is based on the agreement of the parties. That agreement can be explicit or implied from the circumstances.

When the Department way back at the time of the Panel 1 hearing, when the Department in the transcript pages 50 to 51 referred to the California Uniform Commercial Code 2401, it was citing the UCC provision regarding transfer of title. Under subdivision (2)(b) of section 2401, quote," if the contract requires delivery at destination, title passes on tender there." In the representative contract that's in the record as Exhibit 18, lancets and strips are required to be delivered to the user's home. That is a reference to Exhibit B within the representative agreement. So, if you

look at Exhibit 18, you find Exhibit B, and it says that lancets and strips were required to be delivered to the user's home. The structure of the agreement demonstrates clearly that the lancets and strips are not delivered and paid for until the patients use them. That could be in any state of the United States. There's no other theory of title passage that fits these facts.

Finally, the Department's arguments about its supposed longstanding interpretations are contradicted by the California Supreme Court's decision in Yamaha 1. Annotations do not have the force or effect of law and are entitled to little deference on matters of statutory interpretation. The idea that the subtext or implication of backup letters and the like can acquire special status through the passage of time, was specifically rejected by the California Supreme Court's majority opinion. Moreover, the Department's effort to derive a legal rule of general application from the penumbra, as it were, of various annotations or opinions would amount to an informal regulation of the kind forbidden by the Administrative Procedure Act.

Let -- let me make sure that that's clear. The -- the -- the Department says, well, we're just relying on annotations. We're -- we're just -- we've had these annotations for a long time. But the annotations,

number one, conflict with the Regulation 1620 as well as the statute. But -- but -- but number two, they're -- they're specifically designed and intended for use in the donation context. The Department is -- is going beyond the donation context in trying to take -- in trying to export a concept relating to transfer of title from gifts, from donations into commercial transactions. That effort isn't documented anywhere, and it certainly doesn't meet the standards required for a rule of general application under the Administrative Procedure Act.

That's what makes that interpretation to that extent, an underground regulation in the Amicus Brief from California Taxpayer's Association, we think brought that out pretty clearly. We also adopt that argument for purpose -- for purposes today -- for our purposes today. For the Department to insist that a rule of general application can be found by peering into multiple annotations and letters over the years is simply the confession of its attempt to adopt a rule without troubling to comply with Administrative Procedure Act.

Accordingly, when Panel 1's decision was issued, it made specific evidentiary findings and then applied those findings to the Department's made contention. First of all, the Department -- the Panel 1 decision acknowledged that the Department's reliance on the 1995

annotation and the backup letter to the 1992 annotation as support for its contention that Alere made a taxable use of the supplies at issue. When -- when Alere withdrew supplies from resale industry and shipped those supplies via common carrier to Medicare patients and trainers pursuant to its contracts, the Panel 1 decision said that was inconsistent with the controlling provision of law Section 6009.1. Such claimed uses could not be a taxable use since such a conclusion was ruled out by 6009.1's expressed provisions.

Second, the decision further noted the absence of any authority for the concept that out-of-state transfer -- out of state transport pursuant to a contractual requirement constitutes a functional use in and of itself. Moreover, the Department held that the Department's reasoning is inconsistent with its treatment of Alere's out-of-state transport of meters, which also fulfilled a contractual obligation.

Third, Panel 1 again cited the 1995 annotation with respect to whether title passage could be a determined fact -- a determinative factor under 6009.1. Panel 1 ruled that such an argument appears contrary to California case law which sets forth the applicability of -- that sets forth that the applicability of section 6009.1 is contingent on the purchaser's physical use of

the property.

Fourth, the panel similarly found an absence of authority supporting the position that 6009.1 only applies where the purchaser uses the property outside of California, and the part -- and that the Department's interpretation was inconsistent with case law, such as Stockton Kenworth, which found that 6009.1 applied to a lessor's transportation of trucks driven without payload to lessees in other states.

Fifth, and again returning to the backup letter to the 1992 annotation, Panel 1 observed that the Department's position that 6009.1 is limited to situations in which the purchaser transports property out of California for the purchaser's own use was not even in accord with the entire backup letter, and we've established that point earlier today. Your Honors, that decision was issued in October 2024, nearly two years ago. It should have been the end of the matter. That decision was thorough, well considered, and supported by substantial evidence. Indeed it was supported by the weight of the evidence. The decision applied the law as the Administrative Law Judges of this agency are asked and required to do.

Alere, for its part, devoted enormous internal resources, as well as engaging the services of counsel in

the expectation of one of two out comes; either Alere would prevail, or it could and would then consider what judicial remedies, if any, it could pursue. What happened instead is that CDTFA asked for a do over. We acknowledge, of course, that OTA has a rehearing rule, a rehearing rule that carried over in this substantially equivalent way from the Board of Equalization era for sales and use tax cases. Based on our experience here, we think that OTA should consider revising the rule to better suit an agency of many coequal and collegial Administrative Law Judges versus the former format of adjudicative hearings by a single elected Board of Equalization. That is, a rule designed to allow the Board of Equalization to reconsider its own decisions, is not well suited to an agency of many ALJs in which there could be a potential for form shopping.

The rule is capable of being misused when a party, especially the one that is regularly appearing before the agency, has an opportunity to overturn one panel's decision by asking another panel to do so, unless there are strong built-in safeguards to prevent such misuse. In the case of the current ruling -- and, of course, we're under the current rule. I understand that. Some safeguards do exist. It is those safeguards on which Alere is relying today. I'll turn my attention to them

now, but we also believe that the agency consider -- should consider strengthening them. In different circumstances, we do not believe that it would -- it would have cost Alere the last two years to preserve the result of an appeal in which OTA had already ruled in Alere's favor.

After panel -- after Panel 1 issued its decision, the Department filed a petition for rehearing -- we know that. That's obvious. -- in which the Department asserted the Panel 1 decision was contrary to law within the scope of Regulation 30605(a)(5). The petition for rehearing is filed on November 18, 2024. The petition for rehearing asserted that the contrary to law standard was met because it alleged the Panel 1 decision is in direct conflict with precedential case law, and the decision was also inconsistent with the Department's longstanding interpretation of 6009.1, which is entitled to great weight. Fully 10 months later -- Panel 2 issued its decision granting the PFR, 10 months later, on the sole ground that the Panel 1 decision was contrary to law.

Despite reaching that conclusion, Panel 2 acknowledged that Panel 1 considered the 1995 interpretation -- annotation, as well as the Department's longstanding interpretation that title passage in California constitutes a taxable use, but stated that

Panel 1's grounds for disregarding at the 1995 annotation are problematic. Problematic and error of law are two different things. Panel -- but Panel 2 found an absence of authority for the physical use standard and cited Yamaha 2 on the issue of when -- when and where gifts of promotional materials and the like are made for purposes of determining if a use tax is due.

The -- the question to be -- the question to be asked again is, did that really amount to an error of law? The answer must be no. There -- there's also the question that was asked of us, namely, what degree of deference is owed to the Panel 2 decision that held the other way? Consistent with my promise to answer that question, I will take it up now. While the OTA's Rules of Procedure allow for petitions for rehearing, they do not allow for such petitions to be granted on grounds other than those provided in Rule 30604. In this case, the sole basis for rehearing was asserted in the Panel 2 decision to be the ground provided by subdivision (a)(5) that the opinion is contrary to law. Such a finding must be based on the determination that the decision on a material point was clearly inconsistent with the applicable law.

As stated in Appeal of Riedel, a 2024 OTA decision, the contrary of law standard of review shall involve a review of the opinion for consistency with the

law. The question of whether the opinion is contrary to law is not one which involves a weighing of the evidence, but instead requires a finding that the opinion is unsupported by any substantial evidence. That is that the record would justify a directed verdict against the prevailing party. This requires a review of the opinion in the manner most favorable to the prevailing party and indulging all legitimate and reasonable inferences to uphold the opinion if possible.

The question before OTA on a petition for rehearing does not involve examining the quality or nature of the reasoning behind OTA's original opinion, but whether that opinion can be valid according to law -- according to the law. So, the rule specifies what does and does not constitute grounds for rehearing. An existing OTA precedent applies those rules. As stated in a non-precedential decision -- this is Starbuzz, a Starbuzz International case in 2023, a petition for rehearing case. OTA's rule in the petition for rehearing is not one in which a new panel can reevaluate the underlying appeal. The majority of the PFR Panel relied on their interpretation of the Rev & Tax Code section at issue when determining whether or not the opinion was contrary to law. Therefore, the PFR Panel made an error in granting the PFR. That's the standard that should

apply here as well.

Despite our citation of the applicable rule in prior OTA decisions, the Department's sole response to this point has been to assert that the panel -- that Panel 2 had wide discretion -- wide discretion, the exact words -- in ordering rehearing, and that exercise of its discretion should be accorded great deference. That is simply an indefensible argument there, and one that renders important procedural protections unenforceable. The panel should reject those arguments on multiple grounds. First, an agency does not have wide discretion or any discretion to disregard its own rules. A public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous. We cite for that Gregory versus State Board of Control, a 1993 case. It's in the list we provided to you. Whether adjudicative proceedings are conducted in accordance with the APA or this agency's own rules, those -- those rules cannot be disregarded or set aside without formally amending or changing the rule. And we cited Melaga County Water District versus Central Valley Regional Water Quality Control Board, a 2020 case.

The same underground regulation violation that we're talking about earlier arises when an agency informally adopts policies, like, oh, a panel has wide

discretion to just overturn a prior panel's decision. If -- if an agency informally adopts a policy like that, there's -- at variance with its own rules, that's an underground regulation. In other words, neither OTA nor any constituent panel may disregard the grounds and standards specified in the rehearing rule by claiming that it has wide discretion to do so. Instead, the Department's theory that the rehearing rule somehow granted the same discretion to Panel 2 that a trial judge in Superior Court would have in granting a new trial motion under Code of Civil Procedure Section 657, would, if adopted, add a gloss to the rehearing rule that would compromise procedural fairness by incentivizing post-decision form shopping and constitute yet another underground regulation.

Moreover, Department's reliance on Code Civil Procedure Section 657 is seriously misplaced for another reason. A trial judge does not have wide discretion, or any discretion at all, to grant a new trial based on an error of law if no such error can be found. We cited Pomona Valley Hospital Medical Center versus Kaiser Foundation Health Plan, a 2026 case, and Ramirez versus USAA Casual Insurance Company, a 1991 case. The courts declare that where a new trial is granted on the basis of legal error, we must first determine whether the ruling of

the trial court that -- that the trial court claims was made in error is a mad -- is a matter of law -- as a matter of law truly error. Again, that's Pomona Valley, the Pomona Valley case quoting Donlen, D-o-n-l-e-n, versus Ford Motor Company, a 2013 case.

Moreover, the cases say that if there are no legal errors at trial, the order granting a new trial on the basis of error of law will be reversed. So, if we're going to use section 657 as an analogy, which honestly we shouldn't, the same principal of -- of it has to be demonstrated if there's an error of law, there's no wide discretion or any discretion to do anything else is the one that would say that the Panel 2 decision should be reversed because it did not demonstrate an error of law. Instead, it disagreed with an interpretation that the previous panel had announced.

In short, no discretion was vested in Panel 2's finding that the original decision was contrary to law. The issue is a legal one. If the Panel 1 decision was not contrary to law, then the Panel 2 decision was improper as itself contrary to the rehearing rule. This panel should consider that the Department has not attempted to justify the contrary to law conclusion in Panel 2's rehearing order apart from the assertion that it had wide discretion. It is because the Panel 1 decision cannot be

shown to be contrary to law. On its face, a perceived deficiency in the quote, unquote, "weight," to be given to a non-binding agency interpretation cannot implicate the contrary to law legal standard since the weight to be given to any interpretive authority is a matter for the adjudicative body's legal analysis of the underlying rule of law, the authority granted to the agency to adopt it, and multiple other factors; and that's what the California Supreme Court held in Yamaha 1.

In addition, a fair reading of the Panel 1's decision shows that it did give consideration to the 1995 annotation. Indeed, the Panel 1 decision gave extensive consideration to the annotation and simply disagreed with it. The opinion's disagreement was expressed on a reason basis stated in the opinion as fully consistent with and not contrary to the non-binding nature of the annotation, even when limited to the context of the facts on which that annotation was baked -- was based, the weight to be give -- the weight to be assigned to it in any other context. Here for example, there's a context, is the outright transfer of tangible personal property for considerations to medical patient -- medical patients residing outside of California involving the use of medical equipment for their own in-home monitoring and treatment. The weight to be assigned to the annotation

necessarily required consideration of the validity of its reasoning and its consistency with the earlier and later pronouncements and other factors. Again, that's Yamaha 1 at pages 14 to 15 of the published opinion.

Panel 1 focused on the plain meaning of Section 6009.1 in deference to the legislative enactment, which is entitled to greater deference than the agency's apparent preference to restrict the scope and application of 6009.1. We provided an analysis of the case law on the subject in our brief in the Amicus Brief of the California Taxpayer's Association also provided its analysis. It is simply not the case that the hearing panel did not entertain or consider those factors. It clearly did. It is rather the case that on consideration, CDTFA's argument was found to be unpersuasive for reasons that are clearly articulated in the Panel 1 decision and on the record of the hearing itself. It follows that Panel 1 did not reach a decision on the merits that was contrary to law. Instead, it was the panel's fully justified effort to apply the binding rule of decision, which is found exclusively in Rev & Tax Code section 6009.1. No other conclusion survives even minimal scrutiny.

The Panel 2 decision also asserted that Panel 1 needed to address the observation in Yamaha 2, to the effect that when a taxpayer makes a gift of property, the

taxpayer exercises its right to transfer title to the property and hence, the making of a gift a use. But the Panel 1 analysis was that the shipments of testing supplies were not gifts. They're items of property being provided for compensation and for purposes of a specific intended use by the patients. That addressed the gift question to the extent needed. The rest of the analysis simply to apply 6009.1 according to its expressed terms.

Likewise, it seriously misstates the record to assert that Panel 1 failed to consider title passage of the supplies in California as a taxable use. To the contrary, Panel 1 considered it and reached a reasoned conclusion to the contrary. It follows that the Panel 2's decision stepped well outside the scope of Rule 30604 to a degree that violates minimal due process requirements. Our Supreme Court has long held that agencies and other public entities lack jurisdiction to act outside of their authority to grant certain kinds of relief or to act without the occurrence of certain procedural prerequisites. That's the off cited case of Abelleira, A-b-e-l-l-e-i-r-a, versus District Court of Appeal, a 1941 California Supreme Court case. We also cited Buckley versus California Coastal Commission, a 1998 California Court of Appeal case. Procedural requisites included -- include whether circumstances permitting a decision to be

reopened have been met. And we cited Fireman's Fund Insurance Company, a 2010 case.

Moreover, a public entity has the ministerial duty to comply with its own rules and regulations where they are valid and unambiguous. That's Gregory versus State Board of Control cited earlier. It's also CV Amalgamated LLC versus city of Chula Vista, a 2022 Court of Appeal case. In the absence of any genuine legal error in the Panel 1 decision, OTA should recognize that it lacks jurisdiction to grant the petition for review, and it should reinstate the Panel 1 decision.

Your Honors, thank you for your time and attention this morning. That completes Alere's opening statement.

It is very clear on the record that Panel 1 got it right the first time. There was no error of law shown, and so a rehearing should not have been granted. The last two years candidly have been a mistake that we hope you will rectify. The Panel 1 decision should stand as OTA's final decision in the case.

Thank you.

JUDGE WONG: Thank you, Mr. Anderson. You have about 15 minutes left for a rebuttal and closing.

All right. I'm going to turn to my co-panelist to see if they have questions for Appellant, beginning

with Judge Turner.

JUDGE TURNER: If we are examining the opinion of the -- the petition for rehearing, what's the level of deference that we are to provide that opinion relative to the one that they you allege should have been provided to by that panel to the original opinion? Does it come to a different outcome? Does -- does it result in a different outcome? Sorry.

MR. ANDERSON: So, the -- the first part of your question was if we are in unanimity with respect --

JUDGE TURNER: We're reviewing the -- the first issue is the review of the PFR.

MR. ANDERSON: Right. I see. Okay.

JUDGE TURNER: They -- go ahead. Sorry.

MR. ANDERSON: And -- and so I think I was intending to address that, but let me -- let me be clear. The -- what you should be the level of deference is strictly one of did Panel 2 follow the rules? Did Panel 2 correctly apply the rehearing rule from -- from 30604 itself to the -- to -- to 30604(b), which talks what an error of law is or isn't, what the Riedel case and what the Starbuzz case say should be done on -- at the time of petition for rehearing. So, that -- it's -- it's not a question of deference, it's a question of was there an error of law or not. If -- if the -- the -- the -- it's

not a question of deference if there's no discretion in Panel 2 to wipe out the Panel 1 decision under the rehearing rule.

Does that answer your question?

JUDGE TURNER: It just seems that that's a -- a conclusion of law in of itself. You were making the analysis is whether or not looking at the initial facts from the first opinion in a light most favorable to the victor there, which is the taxpayer, whether there was a conclusion of law -- I mean, whether there's an error of law or not. The second panel may a determination about that, and they concluded that there was. And I'm asking whether or not in -- in our review, are we simply reviewing that question of law again, or are we to provide some level of deference to that determination by the second panel?

MR. ANDERSON: So, the -- the -- I -- I have two answers to that. The -- the -- the first, the simplest is the -- the -- that question, the question before you with regard to the panel to a decision is purely a legal issue. And -- and -- and as a purely legal issue, it can be determined de novo in the sense that if -- that you have to be satisfied that applying the proper standard to the rehearing petition, Panel 2 made a legally justified decision in -- in granting it.

I don't think it's entitled to any deference in the sense that it is a legal issue entitled to de novo review. And I think that it is evident and certainly the point of my presentation this morning. It's evident that the Panel 2 didn't give any of the required deference to Panel 1. So -- so that -- and -- and if that's evident to you, then that should answer the question.

JUDGE TURNER: So, what I'm trying to get at is that the argument that you're making regarding the decision of the panel on the PFR, the second -- we'll call it the second opinion -- is that they essentially stepped into the shoes of the original panel and made a determination contrary to that original panel, and that's inconsistent with the Regs. So, that's your argument. I'm trying to get the next question up, which is why are you not asking us to do essentially the same thing, stepping into the shoes of the P -- the opinion of the No. 2 panel and basically making a legal determination that their conclusion was wrong.

MR. ANDERSON: Well, I -- I -- it -- it -- it's -- it's -- the only reason that it's not essentially the same thing is because we're talking about the difference between the merits of the case and the application of a -- of a procedural rule. Because I -- I think it's true that -- that what we're asking you to do

is to understand that the rehearing rule doesn't -- didn't permit Panel 2 to do what it did.

JUDGE TURNER: Okay. Okay. Second question on the merits. You said, I think at one point, that the supply of the lancets that are at issue here are pursuant to a contract with -- under Medicare Part B. Did I understand that correctly?

MR. ANDERSON: Yes, Your Honor, you understand that correctly. It's -- it's a contract. It's through insurance companies, in this case Blue Shield. This is Exhibit 18. It's in the record before you. So -- so -- but Blue Shield and other insurance plans offer insurance that wraps around Medicare Part B, and those are the contracts that are involved; and Exhibit 18 is a representative example.

JUDGE TURNER: So, you're essentially supplying the lancets potentially at -- so long as the payments from the -- from Medicare are coming through for the overall service, you're essentially providing the lancets to these patients indefinitely?

MR. ANDERSON: There's -- there's separate pricing though for the lancets and the strips, and the -- and -- and it's payment based on the patient's actual use.

JUDGE TURNER: Oh, okay. Thank you. That's all the questions I have. Thank you.

JUDGE WONG: Judge Long?

JUDGE LONG: No questions. Thank you.

MR. ANDERSON: Thank you.

JUDGE WONG: All right. I did have a few questions just following up on Judge Turner's questions. So, the contract was between these insurance companies and Appellant; is that correct?

MR. ANDERSON: Yes.

JUDGE WONG: And so, the -- where do the patients come in? What's their relationship in this contractual -- are they like --

MR. ANDERSON: And so the patients are insured. So, this is -- this is a third-party payment situation and in this day and age where all of us are well aware of that kind of situation. So, the patients are in -- in -- in -- have insurance with a private insurance provider that wraps around their existing Medicare coverage. And that's what pays for -- through the Medicare system but as mediated by the insurance company, that's what pays for the package of services that they are receiving as -- in relation to their consumption of the warfarin medication.

JUDGE WONG: So, when Appellant ships the supplies, the lancets and the test strips, out of state to the patients, and the patients then use them to test their blood, who is doing that use? It's the patients. It's no

longer in Appellant's possession, or -- and they no -- no longer have title to it, do they?

MR. ANDERSON: Well, so, they -- they -- certainly, Alere isn't consuming the -- the lancets and strips. And so, if -- if you're -- if you're concerned about title -- and I understand the question -- then it -- it occurs -- the transfer of title occurs at the point of delivery to the patient in their home because that's when the payment obligation is triggered, and that's where the actual use occurs.

And -- and -- and it can't be said similar to a donation hypothetical. It can't be said that Alere was completely done with the -- the lancets and strips. After all, the -- the meters in which -- to which the lancets and strips were necessary supplies still belonged to Alere. And -- and -- and Alere is still at the receiving end of the -- of the data reporting that is necessary for the patients' doctors. So -- so the -- the lancets and strips are little -- little pieces of this chain. But the -- but number one, the -- it's delivery to the patient in Utah or Nevada or -- or any state in the union. It's the delivery there that triggers the -- that completes the contract that -- that triggers the payment obligation number one.

But and -- and also, it creates taxes -- tax

issues in that for Alere in those states, not issues but, you know, taxability, number one. And number two, that's where the first functional use occurs. And -- and we argue under 1620 that's relevant as the -- as the place where it occurs, and it's certainly not relevant. That -- that, in the mean time, all Alere did was have a shipping label printed so UPS will -- will drop it off at the -- at the destination. That's what 6009 says is not a use.

JUDGE WONG: So, did Alere report taxes in those other jurisdictions on transfer of title, like use tax and these other --

MR. ANDERSON: I -- I tried to address that earlier. The answer is yes.

JUDGE WONG: Okay. And do you have any back up for that.

MR. ANDERSON: I -- I -- we -- we looked into the question, but we're -- we didn't -- we -- we haven't made any kind of evidentiary presentation on it because number one, we weren't asked to. And number two, I -- I -- again, I don't think it's relevant to the question of what 6009.1 permits and doesn't permit in terms of use taxation. I -- it -- it should be sufficient to -- to represent to you, and I'm happy to do so, that we do pay tax on -- on the lancets on the delivery of these supplies, unless there is some kind of medical exemption

for them. In which case, that's -- that's the policy of the state in which the use occurs, and that state's policy ought to be respected as well.

JUDGE WONG: Okay. Okay. I'm going to pause my question and turn it over to Judge Turner. He had another question.

JUDGE TURNER: Something you said triggered a couple of things for me. One, you said that if the lancets don't arrive that -- that doesn't trigger payment. So, you're telling risk of loss was on Alere until the lancets arrived at their destination?

MR. ANDERSON: I -- I suppose that is true, yes.

JUDGE TURNER: Second question, question of annotations. We've talked about these in your presentation a couple of different ways, a couple of different times. There are two aspects to what we colloquially refer to as an annotation. One is what you might call a summary. One might sometimes refer to as the back up. I'm trying to understand what an annotation actually is. I think under the Government Code, legal rulings of counsel are exempt from -- from the Administrative Procedures Act. Which is the legal ruling of counsel? The summary or the back up or both?

MR. ANDERSON: The -- it's -- it's -- it's my understanding -- it's a great question. It's my

understanding that the an -- that the -- that the legal statement that is annotated is considered the legal opinion of counsel, rather than the -- the -- what's called the backup letter. But the other -- the other point I would have is that number one, it's not entitled to great weight. It's entitled to limited weight, if -- if any. That's Yamaha 1.

And number two, it makes a difference what -- what the APA doesn't authorize even -- even though there's an exemption for legal rulings of counsel that -- I understand that. What it doesn't authorize is -- is to take a legal concept out of that legal ruling and expand it beyond its four corners to create a more general rule that wasn't expressed in the original legal ruling. Does that --

JUDGE TURNER: Yup.

MR. ANDERSON: Okay. In the annotation.

JUDGE TURNER: Okay. I appreciate it. Thank you.

MR. ANDERSON: Thank you.

MR. VINATIERI: [INAUDIBLE]

JUDGE WONG: Sure.

MR. ANDERSON: My -- my colleague is pointing to me that Exhibit 20 has the -- has -- has the code. This is the Medicare --

MR. VINATIERI: Yes.

MR. ANDERSON: -- provision that governs the payment for the -- for the supplies.

JUDGE TURNER: Thank you.

MR. ANDERSON: I -- I referenced Exhibit 18, and he says, well, we could have referenced Exhibit 20 as well, and so I'm happy to do that.

JUDGE WONG: Just another question regarding 6009.1. It uses the specific term "transport". Does that have any legal significance as opposed to shipping or transferring? It says transport specifically. Does that have any --

MR. ANDERSON: Well, the --

JUDGE WONG: -- specific meaning?

MR. ANDERSON: It -- it strikes me that the wording -- I mean any wording in the statute has legal significance. But it strikes me that the word is a general term because there can be more than one kind of transport. So -- so it's intended to generalize, you know, shipping on a -- on a train, shipping on a truck, shipping on a ship, shipping by, you know, giving it to Pony Express. I -- I'm being facetious, but you know what I'm saying.

There's -- there could be many different kinds of transportation in -- involved. But what the -- the

statute says is if it's for the purpose of transporting it out of state. So, that becomes, in my mind very, very clear that -- that if -- if what you're doing is you tell them we've got it here -- we've got it here in a warehouse. It has to get -- I just knocked into the mic.

But it has to get over -- it has to get across the border into Nevada, or it has to get to Arizona, or it has to get all the way to the -- to the East Coast somewhere. Any of that is -- is transporting. And -- and if that's the purpose for which it's leaving the warehouse, 6009.1 says that's not a use. Plain as day.

JUDGE WONG: Okay. So, it's -- so, under 6009.1, you would say it would apply if Appellant had its own trucks, filled it up with supplies, and then drove it across state lines and delivered it to patients. That's equivalent to -- to -- if it -- that 6009 applies to that situation and also to the situation where it drives to the post office or UPS comes picks up the supplies, a third party?

MR. ANDERSON: I -- I would say it's indistinguishable who owns the truck or the plane or the -- or the boat or whatever it is, yes.

JUDGE WONG: Okay. All right. And then -- sorry. My other question goes to the first issue talking about whether we owe any deference to Panel 2's question.

What if we found there was -- that Panel 1's opinion was contrary to law but not the law specified in Panel 2's opinion. Are we allowed to find that the right result was arrived at but for the wrong reason, or are we kind of constrained to what was determined in Panel 2's opinion?

MR. ANDERSON: Thank you for asking that question because I think the answer is important. We're -- we're -- because we're talking about the application of procedural rules, and we're talking about procedural due process. So, the this case comes here today through a path that we all well know and well understand. And -- and so it -- it's solely before you the question of whether or not rehearing was -- was properly granted is whether they did the right thing on the -- on the merits for the reasons they stated, not for any reason at all but for the reasons that they stated.

And -- and it's particularly important that they -- that they did so on the -- on the unchallenged basis of the record that had already been established by Panel 1 and that there was no challenge to any factual findings. So, I -- I -- so, I would say that you are to look solely to the legal issues that the -- that Panel 2 said were -- that were the legal error in Panel 1. Because if -- if they weren't, then there's no jurisdiction under OTA's own rules as a matter of

procedural due process to do anything else.

JUDGE WONG: Okay. Thank you. Just a follow up on that question a little bit. And I'm going to compare and contrast this case a little bit with the Starbuzz case which you had mentioned earlier. In that case, we're -- OTA was looking at one specific statute, a definition. The panel -- the first panel viewed it one way. The second panel viewed it another. The third panel says the second panel couldn't substitute their interpretation for the first panel.

So, just following on my question earlier, what if there is -- we find there is Panel 1's decision was contrary to law, but the source of law is two separate sources. They said law 1. We say well, maybe it's not contrary to law 2, but it is contrary to law 2. What would you -- would we be permitted to uphold Panel 2 in that scenario?

MR. ANDERSON: I'm not sure that I understand your question, but let me take a shot at it. And if -- and if I haven't answered it, we -- that please give me another chance.

What my understanding of what Starbuzz said, is we don't think if this was our decision to have made originally, we would have made what the original -- we would have made the decision that the original panel made.

Nevertheless, we think that the rule requires us to reinstate the original panel because the -- the showing needed to overturn it is not present. That's where we think you should do today, even if you were to disagree with the original panel's decision.

Does that answer your question?

JUDGE WONG: Not -- not exactly. I guess in Starbuzz there, we were looking at just one piece -- one, let's say, authority. In this case maybe there's competing authorities. And Panel 2 -- let's assume Panel 2 said in that the first panel got it wrong contrary to authority one. What could we say? Well, they got it wrong but because it's contrary to authority two?

MR. ANDERSON: So, the -- the -- the OTA case law that we've referred to Riedel and the text of the regulation itself make it clear that -- that -- that the -- the existence of a rehearing petition didn't give Panel 1 or this panel the -- the general permission to reevaluate the case, to -- to reconsider the -- the case starting from scratch as it were. What -- what the rules require is that you identify that -- that you give every weight, every presumption to -- to the prevailing party, Panel 1, that's my client -- give every -- give every weight and presumption to that and to the evidence that was established. Take that all for granted, and -- and be

able to identify clear -- a clear material legal error. If you can't do that, then I think you have to stop.

JUDGE WONG: Okay. But then you had mentioned there's a de novo standard. Would we be applying a de novo standard to interpretations of legal authority, legal questions?

MR. ANDERSON: To the -- to the extent of a -- to the extent you're reaching the merits. So, for example, in -- and maybe it seems inconsistent. I don't think it is. When you're looking at Panel 2's decision, you're -- you're looking to see did they correctly identify an error of law in Panel 1, such that it would have justified a directed verdict to the -- to the CDTFA applying the Riedel standard. I -- I don't see how you can answer that in -- in CDTFA's favor, and they don't even try to make that. They don't even try to make that argument.

But the -- but -- but -- their -- but to the extent -- to the extent -- let me be clear about this -- that you're looking at the legal conclusions of Panel 1, if you can identify an outright legal error and find that that legal error was found by Panel 2, then -- then you're ruling on that de novo. But that's -- that's -- that's a pretty tough filter to -- to get through.

JUDGE WONG: Okay. Thank you. Then I have one final question but just to give a road map of what's going

to happen after this. After panel questions we're gonna take a break, 10 to 15 minutes. And then after the break, we're going to turn it over to CDTFA for their presentation and then rebuttals and closings and panel questions included, and then we'll close out the hearing.

But okay. So, my question goes to -- okay. So, the -- the contract -- this goes to the merits. The contract was between Appellant and insurance companies, Medicare. They were -- Alere was paid with respect to these to provide tests, services. I believe that was the finding of Panel 1. And then I believe they also, somewhere along the way, it is found that if -- if services was the -- the main object of the transaction, then the consumption of these supplies was subject to use tax from -- by Alere. Are the patients -- so, if the contract is between Appellant and the insurance companies, and Alere is giving these -- not giving -- they're -- they're transferring these supplies to these out-of-state patients, I mean, is that kind of analogous to like a -- I don't know -- a drop shipping situation where -- where, you know, the first transfer from -- from Alere in their Livermore warehouse to an out-of-state patient through a third-party common carrier, does this touch upon any of those drop shipping principles where it becomes the first person who -- who quote, "uses it or transfers it in

California is responsible for the tax?"

MR. ANDERSON: Well, so the -- but one said drop shipment. Is it --

MR. VINATIERI: A sale.

MR. ANDERSON: A drop shipment is a sale. But that --

MR. VINATIERI: What we're talking about here.

MR. ANDERSON: Sure. But --but I -- but I still appreciate the question. I -- I don't think that the presence of Medicare -- the presence of Medicare-based insurance should really change our understanding of the substance of this -- of this transaction. After all, there are situations where a -- where Alere sends medications or sends -- sends these things to self-pay patients, and nobody thinks that those things are taxable. The patients just -- just pay for it.

So -- so, really, the only thing that's different about this case is not -- there's -- about this case is -- is it's not a structural -- a structural difference in substance. It's just a question of, well, is there a third-party paying for it. No, it's not drop shipment. It's -- it's not even a third-party beneficiary contract. It's -- it's just that -- it's in the nature of insurance company that it stands in its shoes of its insured for purposes -- for purposes of payments for certain kinds of

losses or risks; in this case, health care.

JUDGE WONG: All right. Thank you.

All right. Let's take a ten-minute break. We'll come back at 11:15.

Let's go off the record. Thank you.

(There is a pause in the proceedings.)

MS. JACOBS: Thank you.

Before I get started, I just wanted to say that exhibit page citations during my presentation are to the PDF page numbers contained in the Department's single exhibit file provided, along with our prehearing conference statement. So, it will be to that giant single PDF we gave with our PHC statement.

PRESENTATION

MS. JACOBS: Okay. Appellant Alere Monitoring Incorporated provided in-home blood testing services and patient training during the liability period of January 1st, 2013, through December 31st, 2015. During the liability period, Appellant operated an office and warehouse in Livermore, California, as -- and was enrolled in the Medicare program as a fee for service contractor under which Appellant was classified as an independent diagnostic test facility and received payment from the U.S. Government for its services; Exhibits E, pages 129

to 130 and 137 and F, page 1922.

Appellant provided patients with electronic testing meters -- not at issue in this appeal -- as well as test strips and lancets, or collectively testing supplies, and collected and reported the test results to the patents' physicians; Exhibit E, pages 129 to 130. Appellant also contracted with registered nurse trainers who met with patients and trained them how to administer the test themselves; Exhibit E, pages 128 and 1758 to 1760.

Appellant purchased the testing supplies ex-tax by using resale certificates from vendors in and outside of California, then withdrew the testing supplies from resale inventory and shipped them via common carrier to patients as part of its services; Exhibit E, pages 122, 137, 1783, and 1787. Appellant received payment based on the number of tests performed irrespective of the quantity of supplies provided, and Appellant did not directly charge trainers or patients for the testing supplies or collect sales tax reimbursement on the testing supplies; Exhibits E, page 130 and F, page 1922. Starting in 2014, Appellant reported use tax on its purchase price of testing supplies shipped to patients within California, but Appellant did not report use tax on the testing supply shipped out of California; Exhibit E, page 132 and F,

page 1926.

During the audit, the Department determined that pursuant to Revenue & Taxation Code section 6009 Appellant's taxable use of the testing supplies occurred in California when the tangible personal property or TPP was transferred to a common carrier regardless of whether the testing supplies were then shipped to patients located in or outside of California; Exhibits E, page 134 and F, page 1926. Following an audit, the Department issued a Notice of Determination to Appellant on September 26th, 2019, which included the deficiency measure for unreported withdrawals of testing supplies from resales inventory subject to use tax; Exhibits C and E.

Appellant filed a petition for redetermination and ultimately appealed to OTA. OTA Panel 1 issued an opinion on October 18th, 2014, what we'll call the original opinion -- 2024, apologies -- what we'll call the original opinion, finding Appellant was entitled to a refund on the basis that the section 6009.1 exclusion was applicable to Appellant's out-of-state shipment of testing supplies.

The Department timely petitioned for a rehearing pursuant to Regulation 30604(a)(5) on the basis that the original opinion is contrary to law; specifically, that it did not give sufficient weight to the Department's

longstanding interpretation of section 6009.1, that it failed to consider title passage as a taxable use pursuant to section 6009, and that it failed to address and is in direct conflict with precedential case law. OTA Panel 2 issued an opinion on petition for rehearing granting a new hearing, which we are at today.

The first issue is whether OTA properly granted a rehearing. This panel, Panel 3, has asked the parties to address whether the rehearing was properly granted. Specifically, you have asked us to address the degree of deference Panel 3 should afford Panel 2. The law requires Panel 3 afford Panel 2's decision to grant a rehearing great deference. OTA has found that case law pertaining to California Code of Civil Procedure section 657, which sets forth the grounds for granting a motion for new trial in a civil action is relevant to interpreting regulation 30604, which sets forth the grounds for granting a petition for rehearing before OTA. See appeal of Martinez Steel Corporation, 2020-OTA-074P. According to the case, City of Los Angeles v. Decker, 1977, 18 Cal.3d 860, pincite 871 to 872, because OTA is the body of original jurisdiction, its judges are afforded quote, "Great deference," end quote, in ruling on a petition for rehearing, and the exercise of their discretion should be given, quote, "Great deference," end quote.

The Department did not make up that standard. It is precedential case law. This is particularly true when the discretion is exercised in favor of granting a rehearing, Jimenez versus Sears, Roebuck and Company, 1971, 4 Cal.3d 379, pincite 387. The California Supreme Court held that quote, "So long as a reasonable or even fairly debatable justification under the law is shown for the order granting a new trial, the order will not be set aside," end quote; Jimenez at page 387. The deference to Panel 2's decision is so strong that the order granting the rehearing must be affirmed if it should have been granted on any grounds stated in the Department's petition regardless of whether Panel 2 specified that ground, and even if it failed to specify any grounds. See Christian v. Bolls, 1970, 7 Cal.App. -- or 7 Cal.App.3d 480, pincite 415. See also Rickley versus County of Los Angeles, 2004, 114 Cal.App.4th 1002, pincite 1008.

The burden is on Appellant to show a manifest and unmistakable abuse of discretion by Panel 2. See Jimenez at page 387 and People on Behalf of the Department of Public Works v. Hunt, 1969, 2 Cal.App.3d 158, page 1 -- pincite 163. Absent such a showing, the order may not be set aside and the rehearing must proceed. Appellant has repeatedly cited to an error of -- of law and seems to use the term interchangeably with contrary to law, but they

are not the same. For example, at the prehearing conference Appellant cited to Stotter v. Reem, which is a 1961 case, 192 Cal.App.2d 149. That case concerns judicial review of a new trial order based on an error of law, which is different grounds for rehearing than the one in this case.

Regulation 30604(b) clarifies that while the contrary to law standard of review involves a review of the Panel 1 opinion for consistency with the law, which is the grounds the Department argued and Panel 2 found, a review for an error in law involves a procedural error in the proceeding and provides an example of the erroneous admission of evidence subject to attorney/client privilege. This was clearly not the basis for this petition for rehearing. Therefore, that case is irrelevant.

All presumptions are in favor of the order granting a rehearing. See Christian v. Bolls at page 1 -- at page 415. Thus, the rehearing was properly granted. The original opinion was contrary to law and that it was in direct conflict with Revenue & Taxation Code sections 6009 and 6009.1 and precedential case law for the reasons outlined in the Department's petition for rehearing, specifically, the following cases. And bear with me as I read them. I'll only read the full citations once.

Parfums-Corday Incorporated versus State Board of Equalization, 1986, 187 Cal.App.3d 630; Yamaha Corporation of America versus State Board of Equalization, 1999, 73 Cal.App.4th 338, but we will refer to as Yamaha 2; Stockton Kenworth Incorporated versus State Board of Equalization, 1984, 157 Cal.App.3d 334, H. J. Heinz Company versus State Board of Equalization, 1962, 209 Cal.App.2d 1, and Wallace Berrie and Company versus State Board of Equalization, 1985, 40 Cal.3d 60.

Panel 3 has also asked the parties to address what degree of deference, if any, it owes to Panel 1. By law, the Panel 1 decision is entitled to no deference. The facts of this case are not in dispute, and the issues on rehearing are predominantly questions of law. When proceeding after a petition for rehearing, questions of law and mixed questions of law in fact that are predominantly legal are subject to de novo review. TRC Operating Company Incorporated versus Chevron U.S.A. Incorporated 2024, 102 Cal.App.5th 1040, pincite 1063 to 1066.

Nothing in the opinion on petition for rehearing or OTA's rules for tax appeals limits the rehearing. And the rules for tax appeals permits an opinion on rehearing to supersede the original opinion in whole. See regulation 30607(h). De novo review means that the

current panel should not defer to Panel 1's ruling or reasoning, but should decide the matter anew without deference to the Panel 1 opinion. See Stone Street Capital, LLC versus California State Lottery Commission, 2008, 165 Cal.App.4th 109, pincite 116. Deciding this case de novo would also mean that Panel 3 does not need to afford deference to Panel 2's reasoning aside from the deference it should afford its decision to grant the rehearing.

The Starbuzz case, which Appellant references, is not precedential and is easily distinguishable as it does not apply to the standard of review to be used in a properly granted opinion on rehearing, which is what occurred in this case; which brings us to the primary issue, whether the measure of Appellant's unreported inventory withdraws of testing supplies during the liability period should be reduced entitling Appellant to a refund. The answer no. The measure should not be reduced, and Appellant is not entitled to a refund.

There was a taxable use of the testing supplies in California. Appellant purchased the TPP at issue ex-tax via resale certificates with no intention of reselling them. Appellant stored the TPP in its California warehouse, and Appellant consumed the TPP when Appellant withdrew the TPP from its resale inventory and

shipped it via common carrier to patients and trainers in fulfillment of its contracts. Any one of these actions is a taxable use. Meaning, Appellant is not entitled to a refund for use tax paid.

We will begin with Appellant's purchase of the TPP via resale certificates. Panel 1 found, and Appellant does not dispute, that Appellant purchased the testing supplies ex-tax, meaning without payment of tax or tax reimbursement. Panel 1 raised the issue in the original opinion as to whether Appellant purchased the TPP at issue, quote, "Ex-tax via issuance of resale certificates," end quote. But it declined to make a factual finding as to that point despite the evidence before Panel 1 containing a written admission by Jonathan Leigh, the senior tax manager of Corporate Tax employed by Abbot Laboratories, the corporate parent of Appellant, that Appellant purchased the TPP, quote, "As inventory supplies ex-tax under a resale certificate," end quote; Exhibit E, page 1868.

Mr. Leigh then explained that Appellant removed the TPP from resale inventory when shipping it to patients as part of its testing services. As previously stated, mixed questions of law and fact that are predominantly legal are still subject to de novo review, and we request that Panel 3 make a factual finding as to this point.

This is not a new issue since it directly relates to the issue of whether the measure of Appellant's unreported inventory withdraw should be reduced. And it's not a new legal theory as Appellant claimed in its written objections as it was raised by Panel 1 in the original opinion. See original opinion, page 9, footnote 12 and page 11, footnote 16. It was raised by them twice.

Regulation 1668 (g) states that a purchaser who issues a resale certificate who, quote, "Thereafter makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business is liable for use tax on the cost of the property," end quote. The tax is due when the property is first stored or used. Therefore, Appellant owes use tax for its storage and use of the TPP in California. Furthermore, Appellant's -- Appellant purchased all its testing supplies ex-tax via resale certificate but, in fact, only resold an average of 9 percent of those purchases; Exhibit I.

Now, we pause here to note that in the Department's April 15th, 2026, reply brief, we describe how Exhibit I was compiled. The Department analyzed the total cost of goods sold for all testing supplies from Appellant's general ledger accounts and compared it to the testing supplies self-consumed. All of the information

used in the analysis was obtained from Appellant during the audit, and we have gone so far as to include the original files received from Appellant as Exhibit J. We are frankly baffled that Appellant would object to its own information that it submitted to us, which is why we did not anticipate there to be a factual dispute.

So, Appellant purchased all its testing supplies ex-tax via resale certificate but, in fact, only resold an average of 9 percent of those purchases. Of the remaining 91 is percent of the testing supplies Appellant did not resell, it intended and did ship 94 percent out of state in non-retail transactions. See Appellant's response brief June 8th, 2023, pages 4 and 16 to 17. The other 6 percent of the self-consumed supplies were sent to in-state patients for which Appellant appropriately reported use tax for part of the liability period. See response brief page 4 and Exhibit E, page 131. This means that while Appellant purchased 100 percent of the testing supplies via resale certificates, it only paid use tax on less than 15 percent and never paid any tax on 85.5 percent of the TPP.

Taxpayers may not issue a resale certificate to purchase property in this state for the purpose of transporting the property outside the state and claiming the exemption from use provided by section 6009.1 because

purchases of items in California via resale certificate known at the time of purchase to be for out-of-state use are not covered by the exclusion. See regulation 1668(d) and annotations 475.0159, 475.0073, 570.0435, and 315.0308. Issuing a resale certificate to create a use tax exclusion under section 6009.1 is a misuse of the certificate when it cannot be realistically said that the TPP was purchased for resale in the regular course of business.

Given the facts of this case, Appellant can hardly claim it did not know whether the TPP at issue would be resold or used. Thus, Appellant's attempt to claim a use tax exclusion under section 6009.1 was a misuse of the resale certificates, and its purchases are subject to tax. While the Department did not seek to impose the penalties relayed in regulation 1668(d) for improper use of a resale certificate during the liability period, this evidence provides yet another basis on which Appellant owes use tax and should be barred from claiming the section 6009.1 exclusion.

When sales tax does not apply, use tax applies to the storage, use, or other consumption of TPP purchased from any retailer for storage, use, or other consumption in California measured by the sales price, unless the use is specifically exempt or excluded by statute; Revenue &

Taxation Code sections 6201 and 6401. The use tax is imposed on the person who stores, uses, or otherwise consumes the TPP, section 6202. Storage includes any keeping or retention in California for any purpose, except sale in the regular course of business or subsequent use solely outside the state, section 6008.

As established, Appellant stored the TPP in California before shipping it to patients and trainers in non-retail transactions. Therefore, Appellant's storage was not for sale in the regular course of business, nor was it used solely outside the state and was a taxable use. Use includes the exercise of any right or power over TPP incident to the ownership of that property, except sale in the regular source of business, section 6009. Any exercise of rights incident to ownership, otherwise known as a taxable use, include title passage in California in non-retail transactions. See Yamaha 2. See also annotations 280.0040, 280.1140, 570.0035, 280.0390, 570.0037, 315.0766, 570.0435. This has been the Department's interpretation for over 60 years. This interpretation should be entitled to great weight as, quote, "An agency's consistent maintenance of the interpretation under scrutiny, especially if it is a long -- if it is longstanding is a circumstance which weighs in favor of judicial deference," end quote. See

Yamaha 2 at page 352, internal quotations omitted.

In fact, the Court of Appeal in Yamaha 2 specifically examined annotation supporting the Department's position, annotations 280.0040 and 280.1140, and found the Departments interpretation was entitled to great weight; Yamaha 2 at pages 351 to 354. The Department has not found any legal authority, nor has there be any presented by Appellant or Panel 1 in which title passage in California in a non-retail transaction was analyzed and found to be anything other than a taxable use.

In briefing, Appellant's and also in the original opinion Panel 1, as cited to Stockton -- cited to Stockton Kenworth for the proposition that out-of-state transport pursuant to a contractual requirement did not constitute taxable use. However, that is an overbroad misstatement of the holding as the ownership in Stockton Kenworth remained with the lessor purchaser, which then transported the property out of state by its own means and used the property out of state when it transferred possession of the trucks to the lessees outside California. Panel 1's interpretation and application of Stockton Kenworth is one example of where the original opinion was contrary to law. See original opinion, page 9. In both retail and non-retail transactions, title to the TPP passes upon

delivery to a common carrier unless otherwise specified. See Yamaha 2 at pages 354 to 355. See also annotation 495.0625. Appellant did not present any evidence that there was an otherwise specified occasion of title passage.

Here, the Department determined Appellant made taxable use of the TPP at issue when it withdrew the testing supplies from its resale inventory for out-of-state shipment by common carriers in fulfillment of its Medicare contracts. Upon shipping the testing supplies, Appellant relinquished title and possession to the TPP, and it was consumed by Appellant in rendering its contractual obligation to provide the TPP. Appellants have argued that its use of the TPP comes within the section 6009.1 exclusion. 6009.1 states that the terms storage and use do not include keeping, retaining, or exercising any right or power over TPP for the purpose of subsequently transporting it out of state for use thereafter solely outside the state. E.

Exemptions and exclusions are strictly construed against the taxpayer, and Appellant bears the burden of proving and providing some credible evidence of entitlement to the exclusion; appeal of Snowflake Factory, LLC, 2020-OTA-270P, Appeal of Owens-Brockway Glass Container Incorporated 2019-OTA-158P. Appellant's burden

requires proof by a preponderance of the evidence, Regulation 30219(b). That is Appellant must establish by documentation or other evidence that the circumstances it asserts are more -- are more likely than not to be correct, Appeal of AMG Care Collective, 2020-OTA-173P. Unsupported assertions are not sufficient to satisfy Appellant's burden of proof; Appeal of Amaya 2021-OTA-328P.

Appellant has not provided any legal basis or corresponding credible evidence that would make section 6009.1 applicable in this case. For nearly 70 years, 69 to be exact, the Department has given taxpayers notice of its interpretation that section 6009.1 is only applicable in cases where a purchaser has stored property in California and then transported it outside the state for that purchaser's own use, whether that use be subsequent title transfer or some other use. See, for example, annotations 570.1100, 570.1140, 570.1121, 570.0438, and annotations 280.0390, backup letter at page 3, and 570.0435, backup letter at page 1.

In briefing, Appellant argued for a plain language interpretation of section 6009.1. However, when interpreting any statute, the Supreme Court has stated that a tribunal's goal should be to determine the legislature's intent and give effect to the statute's

purpose, beginning with the language of the relevant position and considering it in statutory context, Iloff versus Lanelle -- wait.

How do I say this? Is that a P? Okay.

Iloff versus Lapaille, 2025, 18 Cal.5th 551, pincite 560.

The Department's interpretation of section 6009.1 is consistent with the statutory scheme. As already stated, section 6009. -- section 6009 defines use to include the exercise of any right or power over TPP incident to ownership of the property, and title transfer in California in a non-retail transaction has been recognized by the courts as a taxable use. See, for example, Yamaha 2 at page 357. This is because as the court found in Wallace Berrie, quote, "Transfer of the goods, other than by sale in the regular course of business, is almost by definition use," end quote; Wallace Berrie at pages 62 and 68.

When read in the context of the statutory scheme, a purchaser's non-retail transfer of TPP in California, again, a taxable use pursuant to section 6009, is disruptive to the application of section 6009.1 since the purchaser's use would not be solely outside the state as required by statute. Therefore, section 6009.1 only applies when a purchaser transports the property outside

of the state for their own use.

The Department's interpretation of section 6009.1 is uncontroverted by the legislature. Section 6009.1 has been amended twice since the 1957 issuance of annotation 570.1100; once in 1965 and again in 1980. The amendments did nothing to suggest that the legislature disagreed with the Department's interpretation of the statute, and the court in Yamaha 2 presumed that the legislature, quote, "Is aware of a consistent and very longstanding administrative interpretation. And thus, the reenactment of the statute being interpreted with no modification is a strong indication that the administrative practice was and is consistent with underlying legislative intent," end quote; Yamaha 2 at pages 353 to 354 citing six other cases for that principle.

The Department's interpretation of section 6009.1 is uncontradicted by case law. Appellant has not provided a single case in which section 6009.1 was found to apply to transportation of TPP out of state for the sole use of someone other than the original purchaser, or explained how Appellant's title transfer within the state constitutes use solely outside the state as required by statute, or provided any evidence that title transferred outside the state. Appellant has argued, and Panel 2 incorrectly suggested, that OTA should consider the first

functional use, which Appellant has been calling actual use today, which occurred out of state.

Regulation 1620 states that TPP purchased outside of California which is then brought into this state is regarded as having been purchased for use in this state if the first functional use of the property is in California; Regulation 1620(b)(3). For purposes of Regulation 1620, functional use is defined as use for the purposes for which the property was designed. However, first functional use of the testing supplies at issue is irrelevant. Even if the supplies were first functionally used outside of California, Regulation 1620(b)(3) does not preclude the imposition of use tax if the TPP was otherwise first stored, used, or consumed when located in California.

In fact, Regulation 1620(b) states that, quote, "Use tax applies to the use of any property purchased for storage, use, or other consumption and subsequently stored, used, or consumed in this state," end quote. Functional use is not the only metric by which TPP may be used for use tax purposes, nor is unqualified first functional use outside California a general use tax exclusion. This is clear from a basic reading of Regulation 1620 and has been supported substantially by case law. In Yamaha 2, the court rejected the taxpayer's

argument that it made no functional use of the TPP, stating that a gift is, quote, "Subject to use tax if the gift is made in California whether or not a functional use of any other kind is made of the property," end quote; Yamaha 2 at page 356.

In Atchison Topeka and Santa Fe Railroad Company versus State Board of Equalization, 1955, 131 Cal.App.2d 677, pages 681 to 82, the court rejected the taxpayer's argument that the time and place of the functional use of the TPP should be considered, stating, quote, "Inasmuch as section 6009.1 requires exclusive use outside the state, the functional use is irrelevant," end quote. The court concluded that when section 6009.1 was enacted, quote, "The exemption was not worded to exempt property subsequently used in interstate commerce, but only exempted property thereafter used solely outside the state," end quote.

In American Airlines Incorporated versus State Board of Equalization 1963, 216 Cal.App.2d 180, pincite 192 to 193, the court rejected the taxpayer's argument that because the TPP was substantially consumed outside California, this should exempt its use in the state finding that it was, quote, "Not particularly concerned with the ultimate consumption of the property," end quote, as it, quote, "Makes little difference," end quote, when a

taxable use already occurred in this state.

It further concluded that if the legislature intended substantial use outside the state to be sufficient in exempting the property from tax, it would have done so citing section 6009.1 and the requirement that the TPP be used solely outside the state. It is worth noting that when TPP has already been committed to a taxable use inside California, as the TPP had been here, courts have considered both functional use by a third party, in the case of Yamaha 2, as well as the taxpayer's own functional use outside the state, in the cases of Atchison Topeka and Santa Fe and American airlines, to be insufficient in exempting the TPP from use tax. Regardless, Appellant has not met its burden and supplied an actual legal basis or corresponding credible evidence on which to claim the patient's functional use of the testing supplies as its own.

And while Appellant insists the testing meters, to which it retain title and it do so in briefing, cannot be used without the testing supplies, that fact is irrelevant in determining whether Appellant had already used the TPP in California in fulfillment of its service contracts. It is also irrelevant in determining some sort of proxy use on the Appellant's behalf.

Finally, Panel 3 inquired as to whether Appellant

reported or paid tax to any other state with respect to testing supplies shipped to out-of-state patients in 2014 and 2015. Appellant has not presented any evidence on this matter or even shown a likely risk of multiple taxation. And even if Appellant did present evidence it paid tax on the TPP out of state, the court has held that payment of California use tax in instances where the TPP was purchased without payment of sales tax, which is what occurred in this case, there will -- it will not result in unconstitutional multiple taxation due to reciprocal credits granted by member states of the multistate tax compact and California's section 6406 statutory credit against tax paid in another state. See Yamaha 2 at pages 368 to 369. We also note that other states provide similar statutory credits which were outlined in the November 12th, 2021, Appeals Bureau decision, Exhibit A, pages 17 to 18. But again, Appellant has not presented any evidence on this matter.

Appellant also claims that the Department's annotations are underground regulations. However, Appellant is wrong to classify them as such because the Administrator's Procedures Act does not apply to legal rulings of counsel issued by the Department, and annotations are summaries of the conclusions reached in legal rulings of counsel. Government Code

section 11340.9(b) and Regulation 35101(a)(1). Because annotations are restatements of legal rulings of counsel, which are expressly exempt from the APA, they are not underground regulations, citing to those same two sections, as well as the fact that they give notice to taxpayers on the Department's interpretation.

Finally, a plain and good reason exists for finding use tax is due in this case. Because if it is not, Appellant will quote, "Escape paying tax on the subject property. The precise result, which the use tax statutes were enacted to prevent," end quote; Yamaha 2 at pages 354 to 355. Again, Appellant purchased 100 percent of the TPP at issue ex-tax and never paid any tax on 85.5 percent of it. To find for Appellant results in Appellant's purchase and use benefiting from an inequitable escape from taxation, which the courts have found is inexcusable. See Yamaha 2 at page 348 and 364 to 365 and Wallace Berrie at page 667.

In conclusion, the rehearing was properly granted, and the law requires that this panel afford Panel 2's decision to grant a rehearing great deference, and Panel 1's decision entirety no deference. Appellant purchased the TPP at issue ex-tax via resale certificates with no intention of reselling them. Appellant stored the TPP in its California warehouse. Appellant consumed the

TPP when it withdrew the TPP from its resale inventory and shipped it via common carrier to patients in fulfillment of its contracts. Any one of these actions is a taxable use, meaning that the taxable measure should not be reduced and Appellant is not entitled to a refund.

Thank you.

JUDGE WONG: Thank you, CDTFA. You have three-and-a-half minutes.

All right. I will now turn to my co-panelists to see if they have any questions for CDTFA, starting with Judge Turner.

JUDGE TURNER: Yup. I'm going to start out with a similar question I asked Appellant, which is on the review of the PFR opinion, opinion two. I believe it's the Department's position that we should give a significant amount of deference to the opinion, but that we ought not to give a similar deference or maybe that panel should not have given a similar level of deference to the underlying opinion. And I'm trying -- I'm trying to give the same question I asked Appellant's, which is in our review of the PFR is it different our consideration of that second panel's opinion? Is it different than that panel's determination or review of the underlying opinion?

MS. JACOBS: I think I -- sorry. I think I understand your question, and I do think it is different.

So, the court cases say that when reviewing a motion for a new trial, or in this case we'll apply that case law to a petition for rehearing, that panel's decision to grant the rehearing is entitled great deference. So, if they granted it, even if they didn't state why or even if their statements were incorrect, if you were to find that the -- or the fact that they found that the opinion was contrary to law, means that their decision to grant a rehearing stands. So, your --

JUDGE TURNER: Okay. I think I understand your point. Let me see if I can -- if I can summarize it correctly, which is if they've made a -- if that second panel made a determination that the first opinion was contrary to law, even if we might disagree with that particular conclusion, we are still to give great deference to that conclusion that that second panel reaches; is that right?

MS. JACOBS: That's correct. Absent a showing of unmistakable -- let me find the quote. It's, yeah, an unmistakable abuse of discretion. So, unless you found that, which nobody has claimed, and couldn't claim, frankly, then that decision to grant the rehearing must stand.

JUDGE TURNER: Got it. Okay. Moving to substantive questions. Does the Department dispute the

taxpayer's assertion that their contracts require that they provide these lancets, if I'm describing them correctly, to out-of-state customers that are the, I guess, the beneficiaries of those insurance contracts? Do you dispute that?

MS. JACOBS: That they're required to provide the test strips?

JUDGE TURNER: Hm-hm.

MS. JACOBS: I wouldn't -- no, we don't dispute that. That's -- that would be why them shipping them in fulfillment of those contracts makes it their own consumption and use, taxable use.

JUDGE TURNER: So, if I understand that correctly, then what you're saying is that the mere transfer of what you're saying is title transfer on the delivery of the product to the common carrier, that constitutes the taxable use be --

MS. JACOBS: Because their consuming it in fulfillment of those contracts. Their -- their consumption -- they obviously -- Alere cannot consume the TPP functionally, but they consume it by -- that their only use of the TPP could be their provision of it in --

JUDGE TURNER: Well, isn't -- isn't the premise of Yamaha 2 that the gift that the court found was a taxable use was an independent transaction, right? It --

isn't -- isn't that what we're arguing here? Is that why -- if it's a single transaction, your -- your annotation that you're citing to doesn't even apply because it talks about in other transactions. Is that not right?

MS. JACOBS: I -- I -- I guess I'm not understanding your question. I'm sorry.

JUDGE TURNER: It's all right. It wouldn't be the first time someone has been confused by my questions. So, let me ask this. So, a taxpayer manufactures prints and purchases for resale business -- and purchases for resale business forms and supplies. So, they purchase something or they've made something, and they're holding it in inventory for resale. If a shipment is made from a California warehouse to a customer's location outside the state, and the contract specifically requires delivery to the out of state location, it seems like the facts here have suggested it is, is it not?

MS. JACOBS: We wouldn't say that this is a delivery contract. We haven't given -- we haven't been given any evidence that we -- they have a contract for services. The services includes provision of supplies, but this isn't a -- this isn't -- there's no contract provisions that show title transfer would occur outside the state.

JUDGE TURNER: But you just said that that they are obligated under that contract to provide these lancets.

MS. JACOBS: They -- just because they're obligated to provide it doesn't make it a delivery upon receipt contract.

JUDGE TURNER: Explain to me the difference.

MS. JACOBS: So, we would say that -- and let me --

JUDGE TURNER: Is it because title passes in the state?

MS. JACOBS: Title -- so the -- our -- title passes in the state as -- is de facto. Like, that's what happens unless specifically stated.

Do you want to jump in?

Maybe I'm not --

MR. BACCHUS: Yea, I think -- I think that is correct. The Department's position would be that title -- absent a title transfer clause in the contract -- an explicit title transfer clause -- that that title would transfer upon delivery of the product to a common carrier in California. And it's -- it's the Department's position or understanding there isn't a specific title transfer clause despite perhaps the -- the contract requiring delivery. Obviously, the contract is going to have to

require delivery of the testing supplies. Otherwise, there wouldn't be a purpose of -- of having the --

JUDGE TURNER: Isn't that -- isn't that what we just established though, that the facts suggest or the facts indicate -- and I didn't think you objected to it -- which is that the contracts at issue here, which they're service contract, but they are a service contract that also require the transfer of tangible personal property. If we've established that fact, then how is that contract not require the deliver of the TPP?

MR. BACCHUS: Well, not that it -- not that it doesn't it require it, but that it doesn't specifically state that the title transfers upon delivery of the product. So, that be the Department's position that --

JUDGE TURNER: So let me -- let me finish my -- my summary then. If the shipment is a made from a California warehouse to a customer's location outside the state, and the contract specifically requires delivery to that out-of-state location, which maybe you're still disputing that, but I think that's what we've established is that the contract requires delivery.

MS. JACOBS: There's no provision in the contract that we found that shows that delivery is required. It -- we wouldn't -- I mean --

JUDGE TURNER: This -- okay. That's fine. I'll

take that. So, then -- but the last part, the tax will not apply even though title may have passed in California. And what I'm reading from is your annotation, annotation 325.0010. And I'm not sure how to distinguish it from the facts that we have before us. Even if we assume that title passes in California, and we'll get to what title passage means -- I'm not sure how to distinguish this annotation from the one you cite as -- in the PFR opinion decided by Panel No. 2, cites as controlling that we should have provided deference. How do you distinguish those two?

MS. JACOBS: The Department has held that when a contract does not contain a specific title provision, but the TPP is shipped via common carrier, title passes when the TPP is placed with a common carrier, which is what occurred here. So --

JUDGE TURNER: Sure. But that -- that's -- I think your -- your citation to that traditional treatment, A, presumes what title is, but B assumes it's an independent transaction, right. What we're not talking about here is independent sales transaction. This isn't a sale. At least if I understand what you've indicated before is that there is a contract that requires the Appellant to deliver this good to the customer, if you will, the user of their machine, the insured, if you will.

That's your contract. Whereas, I think what you're talking about is where there is a contract for sale, and there's a arguably a title transfer in California for shipment that that -- that's a different transaction than I think what we're looking at here, is it not?

MS. JACOBS: We are -- we would not say that these were sales. That's correct. I'm unclear as to what -- to how it being a non-independent transaction would somehow shift delivery upon receipt when it's not specifically specified by contract to be than what's been occurring. Because even in those sales transactions delivery is required.

JUDGE TURNER: Annotation 50 -- the 570.0435 that we are dancing around, it says, "Storage, use, or other -- storage or use includes but is not limited to A, for functional use," I skipped over some language, but I'm getting to the fun part -- "for functional use in the state by the purchaser" -- we know that's not applicable here -- "and for the transfer of title in this state to other persons and transactions that did not constitute sales."

MS. JACOBS: I'm sorry. Can you direct me again. I know you've repeated it multiple times to that and specific annotations so I can follow along.

JUDGE TURNER: Yeah. Annotation 570.0435, second

paragraph. Storage or use includes but not -- but is not limited to a functional use in the state by the purchaser. We know that's not applicable here. And for the transfer of title in the state to other persons and transactions that did not constitute sales. Who are other persons? If we have a contract that requires Appellant to supply tangible personal property, are they other persons?

MS. JACOBS: And this annotation some --

JUDGE TURNER: Isn't that the one you're relying on?

MS. JACOBS: Yeah, but this annotation somehow states that delivery is where TPP is transferred?

JUDGE TURNER: It's not -- I'm just reading from it. It says, "Storage or use includes, but it's not limited to. The withdrawal of property from resale inventory or other ex-tax inventory, such as property purchased from outside California for functional use in this state by the purchaser, and for the transfer of title in this state to other persons and transactions that do not constitute sales." Other persons presumably is an other contract and other use.

In the context of Yamaha you would say it's the gift to an unrelated party. But here, other persons are -- are presumably are the lancet consumers, but they're not other persons, are they? If you -- if you

agree that Appellant has to, under contract, supply goods to these insureds outside the state, that's part of an existing contract. They're not other persons. They're -- they're the parties that they're obligated to provide -- provide the TPP to.

So, I'm not even sure how you're regulation that your intending to -- you're -- you're saying controls. Not only that there was a reason why opinion one was decided improperly, but it is the basis upon which the -- the PFR was granted how is that supplying here? If you -- if you agree that there's a contract that obligates the Appellant to provide this tangible personal property.

MS. JACOBS: I'm so sorry. If feels --

JUDGE TURNER: It's okay.

MS. JACOBS: It seems like we're not understanding your question, or we're --

JUDGE TURNER: That's okay.

MS. JACOBS: -- we're missing --

JUDGE TURNER: That's fine.

MS. JACOBS: It seems like we're not connecting. If -- if you'd like us to brief this post hearing we would be happy to do that. We're not entirely sure. It doesn't seem like we're disagreeing. I read that section of the annotation storage or use includes withdraw the property from resale inventory or other ex-tax inventory --

JUDGE TURNER: Maybe we'll move onto -- to this. So, 16 -- I think you actually mentioned this so I want to make sure I understand. Regulation 1620 generally defines the taxable use, right. Any -- it's not any use that triggers taxation, right. It's a taxable use, right. And so, the courts looked at different context. Yamaha said that a gift was a taxable use. Regulation 1620 though seems to structure what constitutes taxable use in context of its functional use, right. So, it's the first functional use.

Did I understand correctly you said that that's different when we're talking about purchases from outside the state for property brought into the state. Use there goes to the first functional use. But here when we're talking about the transfer of property from California to out of state, a different rule applies. Is that -- did I understand that correctly?

MS. JACOBS: We would say that first functional use is irrelevant in this case because first functional use, while it can be a metric to define whether use occurred in California, it's not the only metric to define taxable use.

JUDGE TURNER: Isn't that how you're -- isn't that how Regulation 1620 defines what a taxable use is as a first functional use?

MS. JACOBS: First functional use is a -- is a type of taxable use, but it's not the only type of taxable use. Which as those cases that I cited to, Atchison, Topeka Santa Fe, Yamaha, there was another one while -- American Airlines, first functional use is not the only use that's relevant when determining taxable use.

JUDGE TURNER: So, the -- I think -- I think you get that correctly. The transfer -- the mere transfer of title in the state constitutes a taxable use. Is that what I understand?

MS. JACOBS: That is --

JUDGE TURNER: Could -- could a retailer ever export goods in a -- that's -- they purchase ex-tax?

MS. JACOBS: I'm sorry. But that's not our -- that's not our facts today.

JUDGE TURNER: No. Actually, it is because what we're asking is -- your argument is that the mere -- assuming title transfers in California, that that mere taking of property out of the inventory and giving it to a common carrier constitute -- go ahead. Yeah.

MS. JACOBS: But they --

JUDGE TURNER: I don't want to miss it.

MS. JACOBS: They -- they purchased the property.

JUDGE TURNER: Ex-tax.

MS. JACOBS: They didn't -- yeah. They didn't --

JUDGE TURNER: Right.

MS. JACOBS: They didn't create the property.

JUDGE TURNER: Is there a distinction?

MS. JACOBS: They purchased it ex-tax. It's not -- you were saying a retailer --

JUDGE TURNER: Well, I think in my facts the retailer both manufactures their own and purchases for resale. So, it was both. Either way they have ex-tax inventory, right. They have -- they have product that they are going to resale that's ex-tax. That's in the an -- that was from the annotation. It was both purchase and manufacturer of their own. But my question is though that if I'm -- if I'm a seller, and I'm selling tangible personal property all over the country, typically, if I'm selling to purchasers in other states, that -- that sale is exempt, right. That's 6396, the sales tax exemption.

But now what you're telling me, though, is my mere taking the product out of inventory, right, and giving it to a common carrier, the transfer of title constitutes a taxable use, which means that exemption for sales in interstate commerce just got eliminated. And I'm trying to understand the distinction of why you think that's not happening.

MS. JACOBS: Because these aren't sales.

JUDGE TURNER: Why are they not sales?

MS. JACOBS: They're not -- they're not sales because this -- because this is not a --

JUDGE TURNER: Because it's part of a contract.

MS. JACOBS: Well, no. They're -- they're not sales because it's not an exchange of TPP for consideration.

JUDGE TURNER: But I thought you just -- I thought you said earlier that the tax -- you agreed to the factual assertion by the taxpayer that they are obligated under a contract to provide it. It may be a services contract, but they have a contract that requires them to provide this tangible personal property. Don't they?

MS. JACOBS: But that's not a -- it's still not a legal sale. We -- I mean, we defined it in briefing, but this isn't a transfer of TPP for consideration. It's a legal gift. We defined it in our briefing.

JUDGE TURNER: Okay. So, your -- your position is that this constitute -- that -- let me see if I understand it correctly. Your position is that the taxpayer's provision of lancets constitutes a gift of tangible personal property; is that right? So, let me see if I get this right.

MS. JACOBS: A legal gift.

JUDGE TURNER: Because the consequences of that are if I'm -- have a service contract, right, that

requires me to provide tangible personal property, but we know the true object. We've made that determination. The true object of that transaction is a services contract. You're saying in any -- essentially, any provision of tangible personal property is part of a service contract constitutes a gift. Is that what I understand?

MR. BACCHUS: I don't know. I don't know that we would say any. It would depend on the facts. And so, if we're talking about the facts --

JUDGE TURNER: What would --

MR. BACCHUS: -- of this case, and we're not going to engage in hypotheticals in this -- in this setting. If -- if you would like us to brief it, if you have specific questions that you want us to brief, and -- and we can research and take the time to answer it more fully, then we would be happy to do so.

JUDGE TURNER: Just trying to run through your arguments. What's title?

MS. JACOBS: If you're asking for the legal definition of title, I don't have it in front of me. We're happy to -- to brief it.

JUDGE TURNER: Well, no. We've made the assertion that title is transferring in California on the mere placing of property in the hands of a common carrier. I want to know what title is. We know what that -- is

that actually happening here? Taxpayer has, at least suggested by testimony, that they were -- that the risk of loss doesn't pass until the property is in the hands of the customers -- I mean, excuse me -- or the recipient, I guess we'll call them. And so, my question is what's title? Do we have -- how am I supposed to -- are we supposed to figure out whether title actually passed? We've been talking and saying that title passed, but risk of loss is not -- is not risk of loss an element of what constitutes title?

MS. JACOBS: We've been talking about both title and possession. And, in this case, taxpayer has relinquished their possession of the TPP when they transferred it to a common carrier.

JUDGE TURNER: What is title other than possession?

MS. JACOBS: Again, I don't have the legal definition.

JUDGE TURNER: Fair enough. One more question. Annotations. We've talked a little about -- and I think in the Department's testimony you testified that the annotation constituted the summary. But I think you also referenced in reliance of -- reliance on an annotations as the rulings of counsel as the backup. Are they different? Is it one and the same? Isn't -- if we're talking

about -- we -- we know that for a rule of general application, which I think we'd all admit that these are. In order for them to exempt from the Administrative Procedures Act, right, they have to be legal rulings of counsel.

And so, we have -- we often cite whether it's the summary or may be the backup. Maybe it's both. I don't know. I'm trying to understand the Department's position of what is the annotation. Is it both? Is it the summary? Are we to rely solely on the summary and not the back up, or are we to rely on the back up and not the summary, or both?

MS. JACOBS: So, annotations are defined by the Government Code, and the APA says that legal rulings of counsel are not subject to the APA. Now, there's been court cases that given deference to annotations. Annotations are summaries of the legal rulings of counsel. We would say that in -- I'm -- we've not been presented with a case where they would be different. So, I guess we would say both.

JUDGE TURNER: Fair. Okay. That's all I wanted to know. Thank you. That's all my questions.

JUDGE WONG: All right. Thanks.

I'm gonna jump in here 'cause I wanted to follow up on a thread of Judge Turner's questions. So, he'd made

the argument, and you'd stepped through -- you had described the transaction with respect to the supplies. And you had mentioned that at various points that that constituted taxable use. Could you contrast that with the meters, which CDTFA did not assess? It seems that up to a certain point it followed the same steps, but you didn't assess use tax with respect to the meters. And I was just wondering what was different about that transaction with -- as opposed to the supplies?

MS. JACOBS: Yeah. So, Appellant retained title to the meters, which the patients returned to Appellant when they were no longer needed. So, the fact that Appellant received the meters again and retained title to them meant that we did not assess use tax on those.

JUDGE WONG: So, the key is title transfer. And what happened in one case, and it did not happen to the other case. Okay.

MS. JACOBS: Correct.

JUDGE WONG: Judge Long, any questions?

JUDGE LONG: I do have a question -- a few questions regarding annotations. I just want to verify the position with regard to -- so, first annotations are not the law; correct.

MS. JACOBS: Correct.

JUDGE LONG: Okay. But in this case, it appears

to be CDTFA's position that based on the length of time that this annotation, particularly the two discussed today, the 1992 and 1995 annotations, based on their length of time and also the apparent acquiescence of the legislature they've essentially gained the force of law?

MS. JACOBS: We wouldn't say they've gained the force of law. They've just been entitled to deference.

JUDGE LONG: Okay. And that --

MS. JACOBS: And -- and we -- sorry to interrupt you. We also -- we cite to more annotations than just those two annotations. We have a very robust history of interpreting section 6009.1 in this way because it makes sense in context of the whole statutory scheme.

JUDGE LONG: Sure. I understand, but the PFR specifically discusses the annotation for 570.0435; right. So that's why I am concerned with it. I do want to also just clarify restatements of counsel decisions are not underground regulations. Is that CDTFA's position?

MS. JACOBS: That's correct.

JUDGE LONG: And in this case, in the case of 570.0435, there -- this consist -- is a restatement of counsel decision largely because it's a digest of these other annotations that are cited within? Because this annotation basis itself on like 12 other annotations. Is -- is that the restatement of counsel decision that

we're discussing here?

MS. JACOBS: The annotations that it's based on are legal rulings of counsel. We -- we don't have any particular need for that -- I mean, that specific annotation and all the Department's annotations are entitled to deference in so much as they all purport the same thing, which is that section 6009.1 only applies to the purchaser's own use outside the state. And section 6009 title transfer is a taxable use.

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

JUDGE WONG: Thank you.

I just had one or two questions. Sorry. I know you didn't want to deal with hypotheticals, but I just want to present a hypothetical, so, if -- so, if Appellant had taken the supplies, transferred it to a third-party shipper and then shipped it out of state to itself, and -- and so there's no title transfer. So, in that case, 6009.1 would apply, and so that would be not taxable in California; is that correct?

MS. JACOBS: The Stockton Kenworth case they transported the -- the supplies, the trucks, by their own measure outside the state and then transferred title outside of there. Because this isn't what's before us, we'd have to thoroughly research your question.

JUDGE WONG: Right. So, yeah. The reason why it's 'cause I think it was based on the comparison or the contrast with the meters, in that case title transfer. In this case it didn't transfer. And so, I think we've established that transfer of title is kind of a critical element. I'm just wondering whether the handing off to a third-party common carrier is that also of -- of importance?

MS. JACOBS: The court in Yamaha 2 found it to be so.

JUDGE WONG: Okay. Got it. All right. Thank you. That's all the questions I had.

All right. We're going to turn it over for last rebuttal and closing to Appellant. We have 15 minutes, but we are -- yeah. If you could --

MR. VINATIERI: [INAUDIBLE]

JUDGE WONG: Please.

MR. VINATIERI: [INAUDIBLE]

JUDGE WONG: Sure.

MR. ANDERSON: Your Honor, we're back. You said we had 15 minutes, but if we can do it in -- in less that would be great. I think that's what we'll -- what we'll try to do.

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CLOSING STATEMENT

MR. ANDERSON: I -- I -- I think many of the panel questions have been very apt. I -- I -- I was interested in the admission.

JUDGE WONG: Sorry. Can you speak into the microphone, Mr. Anderson. Thank you.

MR. ANDERSON: I was interested in the admission just a moment ago in response to Judge Long's question that these annotations do not -- this is the admission -- do not gain the force of law merely by accumulation and -- and citation over time, and that that bears on the contrary to law standard. Counsel advanced a legal argument going way back to the top of -- of the Department's argument relating to Code of Civil Procedure 657, which is a standard applied to a trial judge in a Superior Court in granting a motion for new trial in a trial conducted by that judge. And even there the cases say that -- that the discretion that the judge has does not extend to finding -- granting a new trial based on an error of law. And -- and -- and counsel made an effort to -- made an effort to distinguish between 30604(a) -- 306045, opinions contrary to law, and 306046 which is an error of law in the appeals hearing or proceeding.

But it is perfectly clear from the case law under sections 657 that -- that a judge does not have any

discretion -- any discretion at all to grant a new trial based on an error of law if there is no error of law. And -- and it's still the case, Your Honors. It is still the case that -- that the Department has not tried to defend the error of law analysis in the Panel 2's -- in Panel 2's decision. And I believe that's because it is in defensible.

Now, the -- with respect to -- with -- with -- with respect to title it's -- it's -- it's conceded that the contracts required provision of test materials, and that's Exhibit 18. We cited it earlier. It specifically requires provision of test materials and equipment for home INR monitoring to patients. That's Exhibit B to Exhibit 18, which is the Blue Shield of California representative contract. And we also cited --

What was the exhibit number?

MR. VINATIERI: That's --

MR. ANDERSON: We -- we also cited earlier the exhibit which the -- with the HCPCS codes, the same ones cited in Exhibit 18 G0249, which specifically includes the same language, provision of test materials and equipment for home INR monitoring. That's exhibit -- that's Exhibit 20. Those facts are -- are just absolutely clear, absolutely established.

And -- and -- and so counsel makes this curious

argument that somehow we have not cited authority to establish that merely putting a box onto a truck to ship to a patient in -- in the State of Washington or in Alabama or New Jersey or where -- wherever it might be, merely doing that somehow -- they say where's the authority that says it doesn't constitute use in California? And the answer to that question is 6009.1. It says that does not constitute use in California. Regulation 1620 makes it clear that that's not functional use. That's not -- it does not constitute use in California. Stockton Kenworth case specifically considered that issue and says no, that does not constitute. That -- that -- that was where the lessor was driving it's -- it's -- it's own trucks, but they say that does not constitute use in California.

I -- I -- I just want to -- and -- and it's so striking, Your Honors, that CDTFA tells you -- Counsel says this flat out. Panel 1 is entitled to no deference. That's what they said. Panel 1 is entitled to no deference. The argue -- their argument taken this logic of conclusion is that any case is subject to a do over. And I don't think that's the intention of OTA's rules, and -- and I don't think OTA's rules could be stretched to say any such thing. But -- but as soon as they strip the Panel 1 decision of any right to any deference, that's

exactly where it puts you.

Lastly, we've objected to Exhibit I and J. We've objected on the basis that yes, I -- I say again, this is a brand new theory. Counsel referred to footnotes 12 and 14 -- 16, 12 and 16 in the Panel 1 decision which reference resale certificate. The Panel 1 decision mentions that CDTFA never brought up resale certificate at any prior time. They -- they noted that as a potential issue on their own motion in the course of reaching that decision. But what panel -- what footnote 16 tells you, the very last sentence of footnote 16 says, "In reaching the conclusion that an adjustment is warranted, this opinion makes no factual finding about whether the -- the supplies were purchased ex-tax via issuance of a resale certificate."

In other words, their finding with regard to the -- with regard to an adjustment, with regard to a refund is independent of any question relating to the -- to the resale certificate. That was not claimed at any time to have been an error of law. CDTFA made no effort at any time to put in the analysis, Exhibit I or J, as -- as a way of challenging the Panel 1 decision, at any time, until the reply brief before this Court, and -- and we objected to on the basis. We objected to those exhibits on the basis that -- that -- that is two years too late to

try to bring new evidence into this proceeding.

If -- if you look at Exhibit I -- again, we've objected to it. We don't think that you should consider it. But I -- I just want to point out to you that -- that there is a category of self pay -- the self-pay patients. Some percent we don't agree with the percentage calculations here. We don't think that they've established how they've -- how they've done it. This is coming entirely outside of the -- outside of the record. But -- but even taking it for face value, those -- those percentages, however low, indicate that some of these transactions are simply delivery pursuant to a direct contract with the -- with the patient, and those are all considered nontaxable. None of those are involved in this case.

So, the question is why should insurance contracts be treated any differently? And the answer is they should not. The answer is that the insurance contracts require us to do exactly what we would do in a self-pace situation. The only difference is that the insurer is standing in the shoes of the insured in making the -- in making the payments. The -- I -- I -- I believe that is a sufficient answer. We think that this case --

MR. VINATIERI: I got a copy too of this.

MR. ANDERSON: All right. And -- and -- but I

wanted to let you go, but my --

MR. VINATIERI: Yeah --

JUDGE WONG: Just a quick question. You had mentioned error in laws as grounds for rehearing, and CDTFA had noted that there was a distinction between error in law --

MR. ANDERSON: Right.

JUDGE WONG: -- and versus contrary to law. Did you mean contrary to law, or do you actually mean error in law?

MR. ANDERSON: So -- so the -- the 5 and 6 refer -- the difference between 5 and 6, contrary to law versus an error of law in the OTA appeals hearing or proceeding, is a distinction that exists only within the OTA rule itself. What Counsel was trying to suggest is that they could still rely on discretion under Code of Civil Procedure 657, the new trial procedure, which we say doesn't -- it doesn't enter into this at all. Shouldn't enter into this at all because of the radically different procedural settings between a trial judge granting a new trial, and -- and -- and OTA Panel 2 looking at OTA Panel 1 under -- under this rule for a rehearing.

But -- but we made the argument that the case law under 657 grants the judge no discretion for legal -- for granting a new trial on the basis of legal error. If

there's going to be a new trial on the basis of legal error, that legal error has to be shown. And if it's not shown, the new trial is overturned by the Court of Appeal. That's what we're saying should be the rule here, whether 657 is directly applicable or -- or not because no legal error has been shown. I -- I -- I hope that's -- I hope that's clear.

JUDGE WONG: Now, Judge Long has a question for you.

MR. ANDERSON: Yes. Thank you, Your Honor.

JUDGE LONG: Regarding the difference between the trial court rule and the OTA rule, is there any effect on the applicability of the trial court rule, whereas here the second panel's lead is the same as the first panel's lead?

MR. ANDERSON: That's a great question, and there is -- there is absolutely no analogy. And that -- that's what -- frankly, that's what's wrong with looking to case law under section 657. I mean, as my colleague points out, I spend a lot of time litigating cases in court. I know what a new trial motion is and isn't. And it's a motion addressed that -- that you have a trial judge in charge of a trial. At the end of the trial you don't like the result, so you move the court for a new trial showing that there's -- there's some problem with the facts, some

problem with the evidence, some problem with the conduct of a jury, some problem with this, some problem with that, and including legal or procedural error.

What I'm suggesting to you here is that the -- that the legal error standard requires -- requires -- like a Court of Appeal will look at that and say we need to see the actual legal error. We can't just decide, Superior Court Judge, that you just changed your mind and -- and reversed yourself on a -- on a ruling that was not legally erroneous. That's not going to be a basis for a new trial. So -- so, the only thing that I can think of is it -- it -- it can't -- it makes no sense to apply rules relating to new trial motions in Superior Court to an appellate situation, Office of Tax Appeals, where you've got multiple appellant panels in operation to hear cases. And it makes no sense to say what we want to do is we -- we don't like what Panel 1 did, so we're going to go down the hall and -- and ask Panel 2 if they'll fix it for us. There's -- there's no analogy -- zero analogy to new trial motions in that setting.

Maybe that answers your question.

JUDGE LONG: Yes. Thank you.

MR. ANDERSON: All right. Thank you. And -- and my colleague wanted to make a brief final argument.

MR. VINATIERI: Yes. A comment was made by

Counsel that quote, "The first functional use is irrelevant," and I find that to be very, very disturbing because for our patients, the first functional use is the lancets and the strips into the meter. And 1620(b)(3), which we talked about, is where the tangible personal property is what it's designed for. This tangible personal property right here that we're talking about today was designed to be used by the patients and to be transmitted to the CoagClinic. And we talked about it a little bit, but the CoagClinic you don't -- this doesn't work unless it's the Coag Check Access System. It's all three.

And we spent a lot of time in front of Panel 1 talking about the fact, well, just because the meters aren't taxable, but that means then the supplies are taxable. No. It is one functional unit that works together, whether -- however, the CDTFA wants to determine of how it works. And the problem is that if the first functional unit -- use is irrelevant, then under Exhibit 18, the Blue Shield contract where it says specifically provision of test materials and equipment and the rate is $128 -- $182.25 each under HCPC Code G0249, which is Exhibit 20. If -- if these materials are not functionally used, Alere doesn't get paid. It's -- it's that simple. So, I -- I just -- I -- I had to point that

out.

Next item, the statement was made that the contracts needs a title passing clause. Well, I mean, we're used to in sales and use tax a title passing clause. We all know that. We all grew up with that, whether we're at the BOE or CDTFA or the private sector. We all know that. But the reality is in contracts, such as this service contract, you're not going to have a title passing clause to these items. All that is cared about is the fact that these items are used together to find out whether warfarin is doing a number on a patient's blood, and it's too thin or it's too thick. Either way, it could be life endangering. So, the title passage clause is irrelevant. I mean, we'd like to have it. I get that. But this is a service contract specifically.

I'm glad the question was asked about the annotations. So, I think Leighton just hit that. But part of the problem is its counsel rulings, and the question becomes -- and I've got -- I'm looking at annotation 570.0438. I'm gonna talk about it in a minute. There's the annotation. It's five lines long, and there are 2 letters, May 7th, 1992, and then May -- almost a year later -- February 5th, excuse me, 1993 there's a second counsel. So those are the counsel rulings. If somehow that -- those 2 make it into 5 sentences, let

alone 12 other annotations all of a sudden become the penumbra of counsel rulings.

Well, there is a question, I think, under the APA. And I don't think it's ever been discussed here at OTA, and I don't think it's been discussed previously because of the carve out. Everyone just assumes, well, there's a counsel ruling then therefore, the annotation must be covered. I remember when annotations, some were counsel rulings and many of them were determinations made by the audit staff in audit situations. They had nothing to do with counsel. Now, I don't know if those are still there or not because we had the annotation project a couple of years ago at -- at BOE and then CDTFA. So, I mean, there's an issue relative to the annotations.

And then the last thing is it was brought up, and I -- I put together a response. I'm not going to read it. But belatedly there was brought up in the brief of the CDTFA about this -- this new quote, unquote, "issue," that Leighton, Mr. Anderson just talked about. And that issue is, well, is there a -- Appellant's purchase of testing supplies ex-tax resale certificates is inappropriate, thus, barred, et cetera. That's a new issue, and I want to make sure it's clear for the record that the OTA rules is real clear on what it says about new issues, and that's Rule 30607(b)(2). And it says non-filing parties opening

brief that -- excuse me -- (b)(3), filing parties reply briefs. It says that basically that there is to be no -- they're going back to look at 30302, which is the general briefing schedule, which says very clearly in 30303(c) Appellant's reply brief, in this case, CDTFA's reply brief.

It says, "The Appellant's reply brief if submitted may only address new facts, issues, or arguments raised in the Respondent's opening brief. Our opening brief, we didn't say anything about resale certificates or anything. So, they're requesting something that goes beyond what OTA's clear rule is. And we actually have -- if I had to go to the actual merits of what they're saying, there's a series of annotations that say that if you pull something from resale inventory for use in California, he or she is liable for use tax measure by the cost of the property. However, where the property is consumed out of state tax does not apply.

Revenue & Taxation Code section 6009.1, that's based upon a legal counsel ruling that I'm holding in my hand here. And it says, "It has now come to my attention that several years ago we decided that where the taxpayer consumes the property out of state at the time of purchase is unable to determine which items we self-consumed or which we sold. 6009.1 protects the withdraw for out of

state use for use tax liability."

So, the question there, of course, is where the taxpayer consumes the property out of state, and that's at an issue that we've been talking about. But the point is that if it's going to go outside the state and at the time you purchase it, you don't know whether you're going to be using it yourself or reselling or whatever the situation might be. You can go ahead and do that, but you'll have to self-accrue use tax when you use it in the state. The question is what about outside the state, and this -- this is the back up --

JUDGE WONG: Mr. Vinatieri, you're up against your time. If you could just finish up.

MR. VINATIERI: And so I just want to say thank you to the panel. I indicated when we began that there were a number of issues here. I mean, there's the issue of the 6009.1, and on its face what it says, and then there's another number of issues. So, we know this has been a hard case for the Department. It's been a hard case for us. It's a hard case for OTA, a third panel. This is rare that there's a third panel. So, we just want to say thank you to the management, to -- to this panel, the other panels for taking the time, and we know that you're going to give this a great, great deal of thought because the issues here.

And by the way, Leighton didn't say it, but our law firm was the one that handled Yamaha at the State Supreme Court and then back at the Court of Appeal. So, we're very familiar with gift annotations and title passage. So, we just say thank you for taking the time to hear us here today.

JUDGE WONG: Thank you.

CDTFA, rebuttal and closing. You have three-and-a-half minutes.

MS. JACOBS: We're open to ending the hearing.

JUDGE WONG: Okay. Thank you. So that -- no closing? All right.

I did have one follow-up question. When you had mentioned with regards to my last hypothetical, you mentioned about Yamaha. I believe Yamaha, if I'm not mistaken, the taxpayer in that case transferred the -- the instruments to a third-party common carrier, delivered it to the giftees out of state. My -- my scenario was a little bit different. It was like the -- the person who is gifting it in that case was gifting it to themselves. In between, they transferred it to a third-party common carrier. It arrived out of state also to the, maybe an office of the giftor, and then that office transferred it out of state to the giftee.

Does -- does Yamaha apply in that case because

I -- I think the -- the facts are a little different than Yamaha. In that case was there -- there's no title transfer, but is the trance -- but is the delivery of the tangible personal property to a third-party common carrier and delivered to out of state to itself, is that a taxable use in California with no title transfer?

MS. JACOBS: We would want to first note those aren't the facts here, but we would also say that there wouldn't be title transfer in that instance. So --

JUDGE WONG: There would be or --

MS. JACOBS: There would not be.

JUDGE WONG: Okay. Got it. Okay. All right.

For the last time turning to my co-panelists, any final questions, Judge Turner, for either party?

JUDGE TURNER: None from me. Thank you.

JUDGE WONG: Judge Long?

JUDGE LONG: No further questions. Thank you.

JUDGE WONG: Okay. And then going back to the beginning of the hearing I had mentioned the offer for additional hearing -- additional briefing with respect to the standard of deference to be given by this panel to Panel No. 2. Are both -- are either party they're okay with its briefings and their arguments as is with the cites and all that, starting with Appellant?

MR. ANDERSON: We're satisfied with the argument

we made here, Your Honor. Thank you.

JUDGE WONG: Great. CDTFA?

MS. JACOBS: Only if OTA deems it necessary.

JUDGE WONG: Okay. Great. So that will include the hearing for today. The evidentiary record is closed -- well, yeah. The record is closed, and there are -- and these cases are submitted -- this case is submitted today.

The panel will meet and decide the case based on the exhibits presented, and we will make a ruling on the objected Exhibits I and J. And so we will base our opinion on definitely the admitted exhibits, and we'll make a ruling on the contested exhibits. Then we'll send our -- the parties our written decision no later than 100 days from today.

The oral hearing in this case is now adjourned.

I appreciate both sides' presentations.

And then the oral hearings will commence online tomorrow at 9:00 a.m.

Thank you, everybody.

Let's go off the record.

(Proceedings concluded at 12:55 p.m.)

HEARING REPORTER'S CERTIFICATE

I, Ernalyn 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 10th day of September, 2026.

_____

ERNALYN M. ALONZO
HEARING REPORTER