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HEARING

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

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In the Matter of the Franchise and

Business Tax Appeals Hearing of:

CITY TOWER CLUB 2200, LLC,

Appellant.

NO. 18093832

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JULY 18, 2019

10:44 A.M.

 ORIGINAL

OFFICE OF TAX APPEALS  
855 M STREET  
FRESNO, CALIFORNIA

Reported by GRACIE E. BECERRA, CSR No. 13136

APPEARANCES

Panel Lead:

JEFFREY ANGEJA, ADMINISTRATIVE LAW JUDGE  
STATE OF CALIFORNIA  
OFFICE OF TAX APPEALS  
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SACRAMENTO, CALIFORNIA 95811

Panel Members:

MICHAEL GEARY, ADMINISTRATIVE LAW JUDGE  
SARA HOSEY, ADMINISTRATIVE LAW JUDGE

For Appellant:

PAUL GIENGER, TAXPAYER

For Department of Tax and Fee Administration:

JARRETT NOBLE, TAX COUNSEL  
STEPHEN SMITH, TAX COUNSEL  
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(Exhibits premarked and retained  
by Administrative Law Judges.)

1 THURSDAY, JULY 18, 2019 - 10:44 A.M.

2  
3 ALJ ANGEJA: We're now on the record in the Office of  
4 Tax Appeals oral hearing for the Appeal of City Tower Club,  
5 case number 18093832. We're in Fresno, California. The  
6 date is July 18th, 2019, and the time is approximately  
7 quarter to 11:00. My name is Jeff Angeja. I'll be the lead  
8 administrative law judge for this hearing. My co-panelists  
9 today are Mike Geary and Sara Hosey.

10 ALJ HOSEY: Good morning.

11 ALJ ANGEJA: And, Appellant, could you please identify  
12 yourself for the record.

13 THE APPELLANT: Paul Gienger.

14 ALJ ANGEJA: Can you spell that?

15 THE APPELLANT: G-I-E-N-G-E-R.

16 ALJ ANGEJA: All right. Thank you. And for CDTFA?

17 MR. NOBLE: Jarrett Noble.

18 MR. SMITH: Steven Smith.

19 MS. RENATI: Lisa Renati.

20 ALJ ANGEJA: All right. Thank you. And this appeal  
21 involves one issue, which is whether appellant's membership  
22 fees constitute gross receipts subject to tax. During our  
23 preconferences the parties agreed to the -- agreed to the  
24 admission into evidence of Appellant's Exhibits 1 through 3.  
25 CDTFA had Exhibits A through D. And neither party had any

1 objection to the admission of those exhibits at that time.  
2 Is that still correct? All right. Thank you. Then I  
3 hereby admit those evidence -- sorry -- those exhibits into  
4 evidence.

5 (CDTFA's Exhibits A through D and Appellant's Exhibits 1  
6 through 3 admitted into evidence.)

7 ALJ ANGEJA: And based on our prehearing conference,  
8 it's my understanding that neither party will have any  
9 witness testimony today.

10 I did swear in the prior taxpayer. I can do so  
11 for you. I didn't explain then, but I should. We don't --  
12 we don't swear in the attorneys for the Department because  
13 they're making arguments. Their statements aren't evidence.  
14 If I swear you in, your statements would be evidence. We  
15 could rely on -- we could draw factual conclusions based on  
16 that. So if you would like me to swear you in, I can,  
17 otherwise you can just make your argument. We've got the  
18 facts in the record.

19 THE APPELLANT: I'll just make my arguments.

20 ALJ ANGEJA: Okay. All right. And as we agreed during  
21 our prehearing conference, we'll begin with appellant's  
22 argument not to exceed 30 minutes. CDTFA can then ask  
23 questions if they wish, as will the panel of judges. You've  
24 already seen how this works, so I can speed that up a bit.  
25 They've said their presentation would take about ten

1 minutes, you'll have a five-minute rebuttal, and after  
2 either party's presentations anybody, including the panel,  
3 can ask questions. If nobody has any procedural questions,  
4 we can get started. No? All right.

5 Okay. Mr. Wil -- or sorry -- Mr. Gienger, go  
6 ahead and tell us your presentation.

7 THE APPELLANT: It's -- it appears to be pretty simple  
8 to me, although the language in the -- in the regulation is  
9 a little bit -- a little bit hard to understand. But just  
10 reading from the regulation in general, "Membership fees  
11 related to the anticipated retail sale of tangible personal  
12 property are includable in taxable gross receipts." And I  
13 guess my question is: What does "related to anticipated  
14 retail sale of tangible personal property," what does that  
15 even mean? And in order to come up with an answer, I tried  
16 to find a business model where this would be applicable.  
17 And if you consider a business which charges \$100 for a  
18 membership fee in exchange for an agreement to settle to you  
19 at some point in time in the future for the sum of \$10 \$100  
20 worth of goods, okay, clearly that membership fee is in  
21 exchange for some tangible personal property and should be  
22 taxed. That's not what we did. There was nothing tangible  
23 that our members received in exchange for the membership fee  
24 that they paid.

25 The Department's audit in the narrative provided

1 that -- that their audit concluded that the relationship  
2 between the cost of goods sold and the taxable sales met  
3 their criteria as reasonable; therefore, all of the tangible  
4 personal property consumed at the club by the members, sales  
5 tax was charged, collected, and paid to the Department.

6 The regulation continues on in part saying that  
7 "Charges for membership fees not related to anticipated  
8 retail transactions are not subject to tax." And it gives  
9 some examples of clubs talking about country clubs and golf  
10 and swimming and tennis and those types of things, but  
11 simply as examples, not to say that it's those organizations  
12 exclusively. So I just think that there should be a level  
13 playing field. And I look at -- at our club and I look at a  
14 country club which has social memberships where the social  
15 members don't pay sales tax on their membership dues, yet  
16 they don't play golf, they don't play tennis, they don't use  
17 the swimming pool. And they are our competitors. So we're  
18 at a -- put at a disadvantage if our membership fees are  
19 taxed and theirs are not.

20 I guess I'd like to talk a little bit about this  
21 whole process and give you a little bit of background about  
22 the Tower Club and how it got started. And I don't know how  
23 familiar you are with -- with the area in Ventura County  
24 where Oxnard is, but it's not close to much of anything  
25 and -- and, you know, a great distance from the San Fernando

1 Valley and far enough away from Santa Barbara. It's kind of  
2 out there on its own. And a man named Martin V. Smith, who  
3 traded in -- in the early 1940s traded a collection of  
4 jukeboxes for a piece of property in Oxnard and in exchange  
5 for a run-down hamburger stand. After World War II he went  
6 back to Oxnard and refurbished the hamburger stand and from  
7 that point going forward developed a multi-million dollar  
8 portfolio of real estate. He developed the Oxnard financial  
9 plaza where there are two tall buildings, the only two tall  
10 buildings between the San Fernando Valley and San Jose.

11 In 1987, he was constructing a 22-story building  
12 and having accumulated a substantial amount of wealth and a  
13 lot of life experiences, he wanted to create something very  
14 special. So he took the top floor of the 22-story building,  
15 got a bunch of his friends together and they started the  
16 Tower Club. The goal was never to make money. It was to  
17 create something special that the people who were  
18 Mr. Smith's friends -- and he was one of those people who  
19 was kind of bigger than life, you loved to be around him,  
20 you loved to spend time with him, he threw great parties.  
21 So the club attracted a lot of people that wanted to  
22 socialize with a group of people that were his friends. And  
23 he took in other members.

24 In 19 -- or ten years later, let's say pretty  
25 closely in the late 1990s, he decided that he was going to



1 sell his entire real estate portfolio, and the buyer of the  
2 financial plaza also got the Tower Club, not for any  
3 consideration, but Mr. Smith had no reason to run it and own  
4 it and didn't want the liability anymore, so it was kind of  
5 a throw-in in the transaction. That company's goal was to  
6 break up all of the real estate pieces as they were worth  
7 more in pieces more than they were as a whole, so they began  
8 selling off pieces.

9 In 2002, a man named John Anderson, through his  
10 investment company, purchased the financial plaza, and I  
11 worked for Mr. Anderson. So when he bought the plaza,  
12 again, the Tower Club was just a throw-in. It was a tenant  
13 in the building, it didn't really make any money, but it  
14 became one of his holdings, so it was put into a separate  
15 corporation. And ran the Tower Club the same as it had  
16 since 1987, and there were never any taxes paid on the  
17 membership fees or dues from the time the club was  
18 originally conceived, and everybody just kept doing the same  
19 thing.

20 In two thousand -- 2008/2009, the Anderson family  
21 decided that the Tower Club was not really part of their  
22 core holdings and they were uncomfortable continuing to own  
23 and operate it. So they went to Robert, Robert, Robert,  
24 French, Lopez who had been the -- originally the -- the head  
25 waiter and then maitre d and then general manager of the

1 Tower Club and asked him if he wanted to take over the  
2 operation. And at that point in time he was 67 or 68 years  
3 old and not ready to retire, loved his job and was concerned  
4 that if somebody else came in and took over, he might not  
5 have a job anymore. So he agreed to take over and insisted.  
6 At that point in time he was reporting to me. I was his  
7 supervisor. I knew nothing about his business, but he still  
8 had to report to me. He said -- he said I'd like to do it  
9 because I'm not ready to retire yet, but I am uncomfortable  
10 doing it by myself. So he says, I want you to be involved.  
11 And I said, Robert, I don't really want to, but I'll do it  
12 just to help you out, so we formed an LLC. He owned  
13 90 percent, I owned 10 percent with no expectation of ever  
14 getting anything from it, other than just to be there to  
15 help him.

16 The rough economy, the fact that the club was  
17 isolated in an area where it was difficult to continue to  
18 attract members, not having the enormous personality of Bud  
19 Smith to kind of hold it together, membership started  
20 dropping off, so it no longer became -- and I told him when  
21 he took it over, I said, you have no financial liability.  
22 Don't put any of your own money into this business, don't  
23 let it take you down. When it got to the point where it was  
24 no longer profitable, he began talking to people about  
25 taking it over. Finally came across an individual who was a

1 member of the club whose business was running food and  
2 beverage operations at golf courses where he hoped to break  
3 even on -- on the food and beverage service at the golf  
4 course but would make profit on using the venue for  
5 banquets, because it's much easier to control your costs  
6 with a banquet where you have a fixed number of people that  
7 you know that are coming, you can staff it properly, much  
8 more profitable than -- than an a la carte restaurant  
9 business. So he was interested in taking an assignment of  
10 the lease, giving Robert some cash for -- for that. And  
11 Robert would stay involved for a couple of months and then  
12 he would be gone. So they concluded a transaction, Robert  
13 sold the business. Last day of business was February 15th  
14 of 2015.

15           Several months later, September 18th of 2015,  
16 Robert contacted the -- the Department to cancel his retail  
17 sales license. On September 22nd we get a notice from the  
18 Department that they want to audit the Tower Club, City  
19 Tower Club 2200. So we go through that process with them,  
20 which took a substantial amount of time, and they came back  
21 with their audit. I think what they were originally looking  
22 for was probably some tax on the sale of the business and  
23 transfer of assets. Since that wasn't there, they came up  
24 with this tax on membership fees and began pursuing that,  
25 because there was nothing else for them to get. We

1 explained to them at that point in time that what Robert  
2 received from the sale of the business was simply enough  
3 money to pay off his past due accounts, to pay his employees  
4 their wages and accrued vacation time, to pay his vendors,  
5 and at that point in time he had about 25,000 or \$28,000  
6 left over.

7           The first thing we had to do when we got the  
8 notice that we owed \$98,000 or whatever it was was hire an  
9 attorney. \$12,000 later and no progress and no money. We  
10 stopped that and started attending the hearings on our own.  
11 The process at that point and always realizing that the  
12 people who were saying that this was correct and proper  
13 application of the tax were the same people that were  
14 collecting the tax and that we weren't really going  
15 anywhere. In the documentation that we received on the  
16 notice of determination the very first paragraph, it says,  
17 "LLC members are personally liable for taxes collected but  
18 not paid to the Department." So reading the extension of  
19 that, taxes that are not collected are not the personal  
20 responsibility of the individual LLC members.

21           At the conclusion of one of the meetings that we  
22 had with the staff down in Ventura and we pointed out we  
23 don't have any money, they said we can come after you  
24 personally. We'll get your personal assets. That makes  
25 this very personal both for Mr. Lopez who is 75 on his next

1 birthday, and I'm 72 years old. And we don't need this kind  
2 of burden hanging over our heads. We need to know where  
3 this is going and are we at risk. That's not what we  
4 anticipated. We never knew, we don't believe today that  
5 taxes are -- should be charged on membership fees and we  
6 hope you'll agree with us.

7 ALJ ANGEJA: Okay. Does that conclude your  
8 presentation?

9 THE APPELLANT: That concludes my presentation.

10 ALJ ANGEJA: I've got a potential question, but I'll  
11 wait. Do you want to let the Department go before yours?

12 ALJ GEARY: Yes, I will.

13 ALJ ANGEJA: All right. Any questions?

14 ALJ HOSEY: No.

15 ALJ ANGEJA: All right. CDTFA, go ahead and make your  
16 presentation.

17 MR. NOBLE: Under the Revenue and Taxation Code a  
18 retailer's sales of tangible personal property, such as food  
19 and beverages, are subject to tax measured by the retailer's  
20 gross receipts. Gross receipts are measured by the total  
21 sales price of the property, including services that are  
22 part of the sale without any deduction for labor, service  
23 costs or other expenses. It is presumed that all gross  
24 receipts are subject to tax until the contrary is  
25 established. Regulation 1584 addresses the application of

1 tax to membership fees and provides that membership fees  
2 related to anticipated sales of tangible personal property  
3 are part of a retailer's gross receipts when the property is  
4 only sold to members and the membership fee exceeds a  
5 nominal amount. However, charges for membership fees that  
6 are not related to anticipated sales of tangible personal  
7 property are not subject to tax.

8 In this appeal there is no dispute that only  
9 appellant's paid members and their guests could purchase  
10 food and beverages. In addition, there is no dispute that  
11 appellant's members -- membership fees exceeded a nominal  
12 amount.

13 As for whether the fees were related to  
14 anticipated sales of tangible personal property, appellant  
15 marketed itself as a private dinner club. For example,  
16 Exhibit C is screenshots of appellant's website describing  
17 the Tower Club as a sophisticated private member dinner club  
18 which provided a fine dining experience, exemplary service,  
19 and an outstanding wine list. Appellant's testimonial  
20 section of its website focused exclusively on the dining and  
21 service provided at the restaurant and banquet facility.  
22 Reviews for the Tower Club on TripAdvisor and Yelp attached  
23 as Exhibits A and B respectively are also consistent with  
24 appellant's website and focus on the restaurant and dining  
25 events. In addition, 70 percent of appellant's revenue was

1 derived from the sales of food and beverages while appellant  
2 provided access to a small approximate 12 by 12 foot gym and  
3 spa. There is no evidence the purpose of the membership  
4 fees were for the use of the gym and spa with only  
5 incidental sales of food and beverages. Rather in this  
6 appeal the evidence indicates that appellant's restaurant  
7 and its sales of food and beverages were the primary purpose  
8 for paying the membership fees. In other words, appellant's  
9 customers paid the membership fees to gain access to the  
10 restaurant and lounge so that they could purchase food and  
11 beverages and the services that were part of those sales.

12 Therefore, the evidence establishes that  
13 appellant's membership fees were related to anticipated  
14 sales of tangible personal property and are subject to tax.

15 ALJ ANGEJA: That concludes your presentation?

16 MR. NOBLE: Yes, sir.

17 ALJ ANGEJA: All right. Would you like a rebuttal to  
18 what he said?

19 THE APPELLANT: I think he's, you know -- I don't know  
20 about the -- the measured by gross receipts. I don't see  
21 that anywhere in the regulation. I think the facts are  
22 pretty clear.

23 ALJ ANGEJA: Okay. I know my colleague has questions.  
24 I just want to clarify one fact. There's no dispute that  
25 I'm aware of that tax reimbursement was not collected.

1 MR. NOBLE: That is correct. I can't find any  
2 indication in the audit working papers anywhere, and I  
3 believe the decision also notes the membership fees --  
4 there's no indication that they collected tax reimbursement  
5 on membership fees and failed to remit that to the State,  
6 so...

7 ALJ ANGEJA: So as I understand the law, and I don't  
8 know if you're going to be able to concede it, but I'd like  
9 to give an answer to his question. There cannot be personal  
10 liability, at least under Section 6829, because that's one  
11 of the crucial elements that's not met.

12 MR. NOBLE: Without speaking directly to the facts of  
13 this case, I -- I don't know if the Department can concede  
14 that or not. But, yes, that's exactly correct. The  
15 personal liability that he was talking about, one of the  
16 required elements is that sales tax reimbursement was  
17 collected on sales and then failed to be paid over to the  
18 State. So with regard to the membership fees here, because  
19 there's no evidence that they ever collected tax  
20 reimbursements on those sales, they could not be hold  
21 personally -- held personally liable under the Revenue and  
22 Taxation Code.

23 ALJ ANGEJA: You understand what he's saying?

24 THE APPELLANT: Yes.

25 ALJ ANGEJA: Okay. My colleague has some questions.



1 You want to go ahead?

2 ALJ GEARY: Pronounce your last name for me again.

3 THE APPELLANT: It's like singer, only with a G,  
4 Gienger.

5 ALJ GEARY: Gienger. Gienger?

6 THE APPELLANT: Gienger.

7 ALJ GEARY: Hard G? Okay. Mr. Gienger, tell me a  
8 little bit about -- you haven't mentioned anything about the  
9 property that I believe was supposed to be part of the club  
10 operation but was located in the building next door that  
11 housed a gym, a spa, and a tennis court if I'm not mistaken.  
12 How did that property figure into this operation?

13 THE APPELLANT: The -- the gym/spa was on the same  
14 floor as the restaurant.

15 ALJ GEARY: Oh, okay.

16 THE APPELLANT: And this -- this was on the 22nd floor  
17 of the building. The tennis court was in the grounds  
18 outside of the building.

19 ALJ GEARY: All right. And the gym/spa took up how  
20 much space on that floor, if you can recall, approximately?

21 THE APPELLANT: Certainly -- certainly larger than 12  
22 by 12, but less than 10 percent of the space.

23 ALJ GEARY: All right.

24 THE APPELLANT: Probably less than 5 percent of the  
25 total space.

1 ALJ GEARY: And I gather from the information that I  
2 saw regarding how the club was marketed that it was  
3 considered to be a somewhat insubstantial part of the  
4 operation, that the operation was primarily as a dinner club  
5 for the members, including the lounge, for the members to  
6 dine and socialize; is that fair?

7 THE APPELLANT: That is. That is fair.

8 ALJ GEARY: Okay.

9 THE APPELLANT: But the, you know, the marketing of the  
10 club, our members came from other members more than anything  
11 else, just from -- from the website -- well -- well, we did  
12 that more to try to attract banquet people who were thinking  
13 about weddings and venues and those types of things and  
14 thinking, oh, I know so-and-so who's a member at the Tower  
15 Club, maybe they can sponsor us and we can have a wedding  
16 there. So we didn't get members from the website. We got  
17 members from other members.

18 ALJ GEARY: All right. Thank you.

19 ALJ ANGEJA: Does anybody else have any questions?

20 ALJ HOSEY: No. Thank you.

21 ALJ ANGEJA: No? All right. If the parties don't have  
22 additional questions, I think that concludes our hearing,  
23 and I would close the record and thank everybody for coming.  
24 That will conclude the hearing for today. Thank you.

25 MR. NOBLE: Thank you.

1 THE APPELLANT: Thank you.

2 ALJ HOSEY: Thank you.

3 ALJ ANGEJA: Sorry. I -- I forgot to indicate we have  
4 a hundred days from today's date to issue the decision. I  
5 know you heard that from watching Watkins, so...

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7 (The proceedings concluded.)

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5 I, Gracie E. Becerra, CSR No. 13136, a Certified  
 6 Shorthand Reporter in and for the County of Fresno, State of  
 7 California, do hereby certify:

8 I am the person who stenographically recorded the  
 9 Business Tax Appeal Hearing held on July 18, 2019.

10 The foregoing transcript is a true record of said  
 11 proceedings.

12  
 13  
 14 IN WITNESS WHEREOF, I have hereunto subscribed my  
 15 name this 5th day of August, 2019.

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 18 \_\_\_\_\_  
 19 Gracie E. Becerra  
 CSR No. 13136

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