

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
V.A. AUTO SALES, INC.,) OTA NO. 18073394
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, August 21, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

BEFORE THE OFFICE OF TAX APPEALS

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Transcript of Proceedings, taken at
355 South Grand Avenue, South Tower, 23rd Floor,
Los Angeles, California, 91401,
commencing at 2:00 p.m. and concluding
at 3:15 p.m. on Wednesday, August 21, 2019,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

APPEARANCES:

Panel Lead:

Hon. ANDREW KWEE

Panel Members:

Hon. JEFF ANGEJA

Hon. TERESA STANLEY

For the Appellant:

ERIC SIEN

MARC BRANDEIS

For the Respondent:

DEPARTMENT OF TAX AND
FEE ADMINISTRATION

By: SUNNY PALEY

SCOTT CLAREMON

LISA RENATI

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I N D E X

OPENING STATEMENT

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By Mr. Brandeis

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DEPARTMENT'S

WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

(None Offered)

APPELLANT'S

WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

Eric Sien

24

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E X H I B I T S

(Appellant's Exhibits were received at page 7.)

(Franchise Tax Board's Exhibits were received at 7.)

OPENING STATEMENT

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By Ms. Paley

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By Mr. Brandeis

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Los Angeles, California; Wednesday, August 21, 2019

2:00 p.m.

ADMINISTRATIVE LAW JUDGE KWEE: We are opening the record in the appeal of V.A. Auto Sales, Inc., before the Office of Tax Appeals, OTA Case No. 18073394. Today's date is Wednesday, August 21st, 2019. And the time is approximately 2:00 o'clock p.m. This hearing is being convened in Los Angeles, California.

And for the record, will the parties at the table please state their names and who they represent. We'll start with the CDTFA.

MS. PALEY: Sunny Paley for CDTFA.

MR. CLAREMON: Scott Claremon for CDTFA.

MS. RENATI: And Lisa Renati for CDTFA.

MR. BRANDEIS: Mark Brandeis for the taxpayer, and to my right is Eric Sien, the taxpayer.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

Today's hearing is being heard by a panel of three Administrative Law Judges. My name is Andrew Kwee, and I'll be the lead judge. Judge Jeff Angeja to my right and Judge Stanley to my left are the other members of this tax appeals panel. All three judges will be meeting after the hearing and will produce a written decision as equal participants. Although the lead judge, myself, will

conduct the hearing, any judge in this panel may ask questions or otherwise participate to ensure that we have all the information needed to decide this appeal.

The documents for Appellant, evidence marked for identification, includes 1 through 80 for V.A. Auto Sales. And Exhibits A through E for CDTFA. The exhibits are described in the minutes and orders that was sent out after the prehearing conference with the exception of Exhibit 80, which is a document titled "Bank Deposit Detail Reconciliation to Audit Schedule", which was provided to -- which was handed out at the hearing today.

And there are no objections to any of these exhibits. The parties have agreed to the facts as also summarized in OTA's minutes and orders for the prehearing conference. And the parties agree that these facts are correct and not disputed.

Will the parties please confirm for the record that this summary that I have just provided is correct, and that they have no objections to admitting any of this evidence into record as I just described.

Counsel for CDTFA?

MS. PALEY: Yes.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. And Counsel for the taxpayer?

MR. BRANDEIS: We have no objection.

ADMINISTRATIVE LAW JUDGE KWEE: Great. Thank you.

So the above evidence is now admitted into the oral hearing record.

(Appellant's Exhibits 1-80 were received in evidence by the Administrative Law Judge.)

(CDTFA's Exhibits A-E were received in evidence by the Administrative Law Judge.)

ADMINISTRATIVE LAW JUDGE KWEE: We're ready to move onto the taxpayer's -- well, just to summarize the issues in this appeal. There are two issues in this appeal. The first issue is whether the taxpayer is liable for sales and use tax in connection with the transfer of salvage title vehicles; and the second issue is whether the taxpayer made a taxable use of any salvage title vehicles prior to resale.

And the new issue -- the new question is -- at the prehearing conference I placed the parties on notice that OTA is also raising a question with respect to the second issue. And that question is whether it is reasonable to project errors that appear to be from outside the test period to that entire audit period, when the audit liability was established, based on a test period. And the parties have both indicated they are able to proceed with this at the oral hearing.

So with that said, I believe we're ready to proceed with the taxpayer's opening presentation. Would you like to proceed?

MR. BRANDEIS: All right.

OPENING STATEMENT

MR. BRANDEIS: Good afternoon, panel members. I would like to start with a -- a little bit of the nature of the taxpayer's businesses. I use the word plural, "businesses", because he does own and operate, during this period of time, two separate and distinct businesses.

One business is the business in question in this matter before this panel, V.A. Auto Sales, Inc. And the other is a clothing business, Sexy Star Design, Inc. Both entities were selected for audit around the same time and covering nearly similar periods. V.A. Auto covers the audit period, January 1st, 2011 through 12/31/2013. And Sexy Star Design covered an audit period of October 1st, 2011, through September 30, 2014.

Both audits were performed concurrently by a tax auditor from the West Covina field office. Both entities are corporations that are owned and operated by Mr. Sien. Both entities had no prior audits.

Let me start with the audit of Sexy Star Design. The audit of Sexy Star was summarized in a reported field

audit dated 9/18/2015, which we supplied as Exhibit 1, disclosing additional taxable measure of 400 -- approximately \$419,000. The auditor made the finding based on a three-quarter test period. When we sent sufficient documentation that disproved her audit, she then changed her audit approach and submitted a new report of field audit, dated 4/19/16, which reduced the taxable measure to 145,000 approximately in additional taxable measure. That's in Exhibit 2.

That amount consisted of two separate findings, first reported versus audited exempt sales of 80 -- approximately 84,000 in measure, and a bank deposit versus reported analysis, which resulted in approximately 61,000 measured. Again, we provided documentation to review her audit findings. She refused to accept the documentation. We appealed to the principal auditor at the time, who looked at what we had provided and ordered the liability reduced to zero. We received that new revised report of field audit, dated 7/1/16, showing no -- no unreported taxable measure. The audit became a no change.

I point this out because it's my opinion that the auditor who was assigned to this case was inexperienced. The things that she was questioning, for example, the bank deposits. One of the items that she -- that I remember in particular when she was doing her bank deposit analysis,

was that she was questioning a large deposit of approximately \$20,000. This is the audit of Sexy Star, the clothing retailer.

That deposit was wired in from one individual. We informed her then that that deposit was -- the person who wired the \$20,000 was making a purchase for resale. What other conclusion can you draw? Who is going to buy \$20,000 worth of jeans and t-shirts if they're not reselling it, or your last name isn't Kardashian?

I mean, this should have been an obvious sale for resale allowance, but she couldn't accept it. So we had to take it all the way to the principal auditor, who fortunately for the taxpayer, did see the error in her judgment and did eliminate the audit liability in its entirety.

However, we also had the audit of V.A. Auto Sales, which started out with -- let me give you the background on V.A. Auto Sales. V.A. Auto Sales operates as a wholesale dealer in used cars that are purchased from insurance auto auctions. The insurance auto auctions sell salvage vehicles that have been involved in accidents. Insurance companies deem these vehicles to not be redeemable. They're just not -- it would cost more money to repair them and put them back on the road. So they are just written off.

To mitigate their losses, insurance companies then sell these vehicles to these insurance auto auctions to help recoup some of their losses. So these vehicles cannot be sold to the public and put back on the road. In fact, as this Department has also pointed out, they're not considered vehicles as under the Vehicle Code. They cannot be driven. They cannot be registered.

In order for these vehicles to be put back on the road, they would have to be repaired. Those vehicles would then have to be inspected by the California Highway Patrol. And I don't know if it's the DMV as well, but they have to go through an inspection process. And then after that, they would get a salvage title, and then they could be put back on the road.

But as you can imagine, if you look at the documentation of the vehicles that are being purchased, I mean, we're talking about 10, 11-year-old Toyota Camrys here. Nobody is going to buy one of these vehicles to fix them up. It's just not economical. These are not collector's item-type cars. Nobody is going to do it.

So there is a market for these vehicles, and that is in their parts. The only value left in these vehicles is in their parts. So V.A. Auto Sales buys these salvaged vehicles from the companies, like, insurance auto auction, I think Co-Part, and there's a third one. The lion's

share of them are from IAAs, insurance auto auctions.

Mr. Sien holds a wholesale dealer's license with California Department of Motor Vehicles. What that means is he's licensed to make sales of vehicles at wholesale only. He's not licensed to make any retail sales of vehicles. If he were to do so, that would be considered a crime.

Mr. Sien through V.A. Auto Sales, contracts with purchasers in Cambodia. He is also of Cambodian descent. There are two main purchasers, a Mr. Sovey and a Mr. Kim. These foreign purchasers bought -- so what the insurance auto auction website allows you to do, once you have an account set up, is it allows you to setup buyers under your account.

So he's given these -- there's four of them. He's given these four trusted purchasers login credentials that are under his credentials as V.A. Auto Sales, Inc. These four individuals are in Cambodia. They log into the website. They find the vehicles that they want. They bid on them. If they're successful on the bid, then they -- it works a little different.

Since 2012 some of the purchasers sent him the money, and then he wired the money to the insurance auto auctions. Some of them send just send the money directly to the insurance auto auctions. Excuse me. The buyers

were then, after making the purchase, would make arrangements with the company called Packers Express. A driver would pick up the vehicle at the insurance auto auction and bring it to Packers Express' facility. I think it is in Wilmington, California.

Packers Express, who took their orders not from Mr. Sien, but from the purchasers in Cambodia, they would either put the entire salvage vehicle into a shipping container. But some of the vehicles they would dismantle into parts, and they would put the parts into the vehicle containers. When they put the entire vehicle into the containers, they list it on the waybill the VIN number of the vehicles. When they just put the parts into the shipping container, they only listed -- they would put down a notation that said auto lot parts; no VIN numbers, no other notation.

So Mr. Sien's business model for V.A. Auto Sales, Inc., was to make a small commission on the purchase of each vehicle. He made anywhere from \$60 to \$80 in commission. So this is a very low-involvement business for him. Almost all his time is spent with the clothing business. Okay.

The purchasers are logging on. They're making the bids. They're arranging for the vehicles to be picked up. They're wiring the money to the insurance auto

auction. They're sending and e-mailing instructions to Packers Express, and Packers Express is then shipping the vehicles to them in Cambodia.

Mr. Sien would then -- I don't know if he did it weekly or monthly. But on occasional basis, he would log into his account at IAA. He would get a report. He would then send a -- well, he created a sales journal, handwritten sales journal, and he would send an invoice to the purchasers. This is how many vehicles you bid on and were successful times \$70.00. And whatever that amount came to, then that's how he would get paid.

So there's really very, very little involvement. In fact, as he described it to me, this is something he did when he came home from work at his dinner table. He'd login and update the sales journal and send some invoices out at the end of the year. Then he filed a sales tax return and filed an income tax return.

So one of the problems that the auditor had in looking at this is there is -- looking at the 1414Z, which is the assignment contact audit history, I could tell that there was some back and forth with getting access to the records. Mr. Sien's English is not the best. There were some issues with the BNR letter. The BNR letter, which is the initial letter that the Department sends out informing a taxpayer that they've been audited. The auditor notes

in her -- in the Z that the letter came back undeliverable.

So there's a myriad of reasons which led to some confusion as to what records do you want to see, and what is the audit period, and so forth. At some point, I think that those issues largely did get resolved, based on reading her comments in the audit. She did -- so she largely then said okay. And if you look at the transcripts of the returns that he filed -- again, as somebody who is a former auditor myself, one year the taxpayer claimed 900,000 in, I believe it was interstate commerce. And then one year he claimed 20,000 as other deductions, which turned out to be his commissions. And then the third year he claimed 50 some-thousand in resale.

So as an auditor I would look at this and go, why is this all over the map? What is going on? This is somebody who doesn't know what they are doing. The bottom line, though, is on each one of those returns he reported gross receipts, a deduction in one of those three categories. Net taxable was zero. He wasn't reporting any taxable sales.

Why? Because all the vehicles, 100 percent of the vehicles, were being sold to these four individuals. They're being shipped to this Packers Express. They were then being shipped to Cambodia. There was not one vehicle

that was sold at retail in the states. I'm using the term vehicle loosely because as we described earlier, these are technically not vehicles that would be considered a vehicle under the California Vehicle Code.

But the auditor decided -- and, again, I think this is somewhat maybe inexperience on her part. She decided to run a test, and said well, if all these vehicles are shipped out of state, I want to do a test on shipping documents. Get me all the shipping documents. Well, he didn't have all the shipping documents because the purchaser made all the shipping arrangements with the shipping company.

So there is, again, another disconnect between the taxpayer and the auditor in getting the shipping documents from the shipping company to the auditor. But with that said, when all was said and done, the auditor, even in her general comments, notes that the taxpayer's records were adequate for sales and use tax purposes. He provided income tax returns. He provided a sales journal. He provided bank statements.

She circulated the insurance auto auction. She had purchases from all three of the insurance auto auction companies. She had everything that she needed. She even had -- and she uses the word "fragmented", and I agree with that phrase. She had fragmented shipping documents.

She did also complain that she didn't have any invoices.

I would argue, based on the way the taxpayer is operating, invoices were not necessary in this type of business. This is a business where somebody is going online making a purchase. Everything is already prearranged, pre-negotiated between him and these four individual. The model is I get \$70.00 per vehicle. That's it. There's no sales invoices or written -- he might have had a written contract with them, but there's no sales invoices.

So the bottom line is she concluded that records were considered adequate. There's no penalty being applied in this audit. But yet, she basis the entire audit on the vehicles that he cannot provide a shipping document for. Well, initially, we told her that the -- again, the main issue is that the vehicles that were dismantled, the shippers didn't write the VIN numbers. And we don't have anything to show that, other than you can clearly see on 90-some percent of the waybills, it lists underneath the vehicles that he did record VIN numbers on lot auto parts.

She tabbed some e-mail exchanges with the -- a representative from Packers Express. There are a number of e-mails back and forth. He provided an additional list of VINs that he says were dismantled vehicles; what

records he looked at; how thorough he was. We don't know because he did not have a real relationship with Packers Express. But that did not cover every single vehicle in question.

At any rate, on appeal she started out at 5.8 million. We met with Larry Nakano. We agreed to limit the audit to a block sample, third quarter of '13. She ran this test on claimed exempt sales in interstate commerce for third quarter '13. Again, we weren't able to provide waybills for each and every vehicle shipped because, again, I don't know how thorough this person was when they went through their records over at Packers Express.

However, there's another way that these vehicles can be exempt. And that is they could be exempt as a sale for resale. We've made that argument over and over again. Larry Nakano mentioned it in one sentence. It's in his 836. But these vehicles are also exempt as a sale for resale. They are being sold to the same four individuals over and over again. And what are those four individuals doing with these vehicles? They're either reselling them to somebody in Cambodia, or they are dismantling them and the selling the parts from the vehicles to somebody in Cambodia. So she never considered that. She -- she just became singly focused on the shipping document issue.

The other thing is there's -- when you look at the audit, there's a number of inconsistencies. They're saying that -- well, let me back up. When we made our case before the appeals attorney at the appeals conference, the issue was raised as to if he's not make -- if they're disallowing these deductions, then the conclusion is he must be making retail sales of these vehicles. Well, there's only two possible conclusions you can reach.

Either he's trying to retail the salvaged vehicles. I can tell you right now there's no market for making a retail sale of a wrecked Toyota Camry. There's no market for it. Nobody is buying those at retail. Okay. So then the only other conclusion that you can come to is that he's buying these vehicles, dismantling them, and then selling the parts, and for a markup of 1.54 percent.

This is absurd. There's no way that that could happen. Let me explain why. Number one, V.A. Auto Sales, has no vehicle location, unless you consider his home his physical location. There's no -- there's no lot. There's no physical store. He has no website. There's no Internet presence. He doesn't advertise in any magazines. There's just no way for customers to know about him and find him.

Number two, he has no employees. Finding these vehicles, dismantling them, inventorying them, photographing those inventoried parts, signing and pricing them is a labor-intensive process. There's no way you can do this without employees. He has no employees.

Number three, if it were operating that way, he'd have to be all the time because this has to be a cash-base business. There's no 1099K. He's not taking credit cards. And the risk, if you're not there, of having employees to assign prices to items and then selling them for cash, that the employees are not going to pocket some of that cash, the risk of that is enormous. So you would have to be there all the time.

You would have to be there. You would have to have tight inventory controls. This would be a labor-intensive business. There's no advertising. In order to do it, you would also have to have a California dismantler's license. Otherwise the California Vehicle Code says they could consider you to be a chop shop. So you can't dismantle vehicles without a California dismantler's license, which he doesn't have.

The other thing is -- so I said, well, let me look at -- who would he be competing against? Well, the biggest one that I could find is Pick a Part. So I went to their website. I looked at what -- I mean, they have a

facility in Orange County that takes up an entire city block. There's hundreds and hundreds of vehicles parked on that site. They have on their website, one of the things they are advertising is 40 percent off. For the next month they have 40 percent off. Why are they giving 40 percent off?

There are high markups in that type of business. The Department says he has a markup of 1.54 percent. This is absurd. There's no employees. No physical location. It's a labor-intensive business. It would be all for cash, all for 1.54 percent markup. Absurd.

What's really going on here is the auditor is failing to -- to conduct the audit in a professional manner. Here's what I mean by that. Audit Manual Section 0101.20, tax auditors are a professional tax classification. They're not clerks. They're professionals. The job of tax auditor requires them to be -- to look at things and to look at the whole picture versus what a clerk would do.

A clerk would say, you claimed a sale of interstate commerce. You don't have the shipping document. That's an error. End of story. That's what a clerk does. The Board is not looking for clerks. These are not clerks. They're professionals. They're supposed to be inquisitive. They're supposed to ask themselves,

okay, let me interview the taxpayer. Let me find out from him what the story is. They're supposed to be skeptical, but they're supposed to be professionally skeptical.

Professional skepticism is the bedrock of auditing. But it seems to be that the auditor is going beyond professional skepticism and applying unreasonable amount of skepticism here. She's applying an unreasonable amount of evidence. Now, what is the standard of evidence? Standard of proof, Audit Manual Section 0101.20 says that the standard of proof will be the preponderance of evidence.

It's a standard that relates to the probability of truth, and it can be defined as such evidence when weighed with that opposed to it has more convincing force and greater probability of truth or more succinctly more likely to be true than not. The preponderance of evidence standard does not require that the existence or nonexistence of a fact be proven by clear and convincing evidence or beyond a reasonable doubt. Rather, it simply requires proof that the existence or nonexistence of a fact is more probable than not.

She's applying a standard here that is almost beyond any doubt. She looks, and she says the records are adequate. We've given her a sales journal. She's accepted everything on the sales journal. But if you look

at these sales journal -- it's in exhib -- it's listed in the exhibits. It's a handwritten journal. It lists the date. It lists the VIN number. It lists the vehicle make, the model. And every single one either says Sovey and Kim. Some of them say Kam. And I don't remember who the fourth person is.

But the same four names appear over and over and over again, and she just -- she just ignores it. So then, again, what you look at when you're left with disallowing all these sales that we can't find the shipping document for, we can't provide a VIN number on a waybill, the only conclusion you can to -- the only reasonable conclusion is that he is stripping these cars of their parts and has an operation going somewhere where he's selling them; a labor intensive operation all for cash. That doesn't make any sense. It doesn't make any sense.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I believe the CDTFA waved their opening presentation. So I believe we can go on to testimony from the witness. But before we do that, I'd like to swear him in.

Mr. Sien, would you raise your right hand.

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ERIC SIEN,

produced as a witness, and having been first duly sworn by the Hearing Officer, was examined and testified as follows:

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you. You may proceed with your testimony.

DIRECT EXAMINATION

BY MR. BRANDEIS:

Q Why don't you just explain why you started the business and how your business model works.

A Oh, okay. I starting this business because I want to have my family. Because this money is, like, not too much. So I want to, like, get labor for my family only. I don't know, like, make a big deal like this because I've been -- everything is by law, you know. I have a recall everything.

So because this one is wholesale, I didn't sell anything in the United States. Everything I got a commission, small commission only, you know. I don't -- everything from go -- ship to Cambodia. Okay. And this car is broken, you know. I -- I just ship to Cambodia, you know. Yeah, so I didn't sell everything. This business is home office. It's home office. I have no

location. No nothing. Okay. I have time to do my, like, garment, clothing store only, you know. Yeah. Thank you.

MR. BRANDEIS: If I could add, I forgot to talk about Item 2 on the audit.

ADMINISTRATIVE LAW JUDGE KWEE: Yes, if you could proceed.

MR. BRANDEIS: Okay. So in the auditor's analysis of the purchases and the sales journal, she noted that there were three vehicles that -- we're talking about Schedule 1R12G-1. There were three vehicles that were purchased, and that there was a significant amount of time between when the vehicles that were purchased and when they were ultimately documented as being shipped to Cambodia.

So she presumes that the taxpayer made use -- taxable use of those vehicles. Again, these are vehicles -- I don't know how you make taxable use. One of them, I'll give as an example, is an 11-year-old Porsche Boxster that he purchased for \$2,490.

What kind of condition do you think an 11-year-old Porsche for \$2,400 -- we'll call it \$2,500 is in? You can't even drive this thing. It's been in an accident. It's damaged and destroyed. What kind of possible use can you make out of it?

So at the appeals conference, the appeals

attorney suggested that be upheld for the Department on the ground that we could not show where the vehicle was during that time; whether it was at his home, or whether it was at Packers Express, or where it was. I don't know what that has to do with anything. It was at Packers Express. He doesn't keep any of these vehicles at his house.

And the other part of it is, like, what documentation could we provide that showed that he didn't make a taxable use of a wrecked vehicle. What use could you make of a wrecked -- you can't drive this thing. It's not -- you cannot register it unless you have it fixed, and have it inspected, and have it retitled as a salvage vehicle. The cost of doing that, again, is not worth it. That's why the insurance companies wrote these vehicles off. So I don't know what taxable use can be made out of it.

And then to add insult to injury, during the year she finds three of these vehicles, and she says, "Well, during this test period, because we found three of them, we're going to develop a percentage of error and project it against the population. So that means that during the three-year period of time, he purchased -- he used 9 vehicles, 9 salvaged vehicles for his own use.

This is just absurd. This is the coup de grâce.

This is an auditor who it almost feels like she's just out to get whatever she can get.

BY MR. BRANDEIS:

Q Do you want to say anything about those vehicles? Do you use any of them?

A Okay. For those vehicles, because the customer they buy wrong -- because they buy for the customer order him. So when they order already, so they get the car when ready. So when they get already, not a customer. They don't want it. So we can't do everything. We just put over here. When we take this vehicle and go back to Cambodia, that's more expensive.

So better to put like here, you know, better. If when you ship, we have to pay tax. It's double, you know. So we lose a lot of money. That's why better.

MR. BRANDEIS: So what he's saying is sometimes the buyer in Cambodia, not his customer, but sometimes they already have a buyer in mind, backs out of the deal. Once you become a successful bidder at this insurance auto auctions, you can unwind the deal with them, but it's \$1,000 -- I didn't submit this as an exhibit, but you can look it up on their website. It's \$1,000 or 15 percent of the cost of the vehicle, whichever is more.

So when you're talking about 25 -- the average price of these vehicles is, like, \$2,500 to \$3,500.

You're not gonna -- you might as well hold on to the vehicle. You're not going to pay the \$1,000 to unwind it and ship it back to insurance auto action. So the vehicle sat at Packers Express until -- remember Packers Express is taking their instructions from the buyers at Cambodia.

The vehicle sits at Packers Express until the buyer in Cambodia finds another buyer. Why don't they ship it immediately to Cambodia? Because my understanding is that if they were to -- the vehicle that sits here, all they're paying is storage lot fees at Packers Express. But if they were to ship it to Cambodia and they didn't have a buyer, not only would they have to pay storage fees in Cambodia, but apparently the government requires them to start paying taxes on the vehicle as soon as it's unloaded from the shipping container.

So it would cost twice as much money to store the -- keep the vehicle in resale inventory in Cambodia than to just leave it in resale inventory here in California. That's what he's trying to say.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I believe you provided some testimony, and the witness was sworn in, but you weren't. So if the witness could just confirm that what you said is an accurate representation of what would happen in the scenario would be helpful.

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BY MR. BRANDEIS:

Q Is what I just said accurate?

A Yes. What he says is right.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you. And because you had testified that CDTFA has -- if you're finished with your presentation, CDTFA will have an opportunity to present questions of your witness.

MR. BRANDEIS: We're finished. Thank you.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Would CDTFA like to ask any questions?

MR. CLAREMON: Do you mind if we take, like, a five-minute recess just to discuss it?

ADMINISTRATIVE LAW JUDGE KWEE: Okay. So let's resume at 2:40. Does that sound good?

MR. CLAREMON: Yes.

ADMINISTRATIVE LAW JUDGE KWEE: Okay.

(There was a pause in the proceedings.)

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Let's go back on the record.

At this point, we are returning to CDTFA to allow them an opportunity to present questions of the witness.

MS. PALEY: I have none, but I'm prepared to proceed with my presentation.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. I think we, the panel, might have a couple of questions for the

witness. Well, I did have one clarification because there was discussion about the Sexy Star Design corporation. I'm just wondering what the relationship is between Sexy Star Design and V.A. Auto Sales, Inc., the corporation at issue. Are there intracompany transactions? I understand one was a clothing retailer and another is a car retailer. So I'm just wondering what the relevance of Sexy Star Design is. Is that only to show, I guess, what the audit issue was with the auditor? Or was there some other reason to bring in Sexy Star Design?

MR. BRANDEIS: It was to show bias or inexperience. I don't know if I want to use the right word bias. I don't know the auditor personally. Maybe it's inexperience. But, you know, when we took over the case, we were not the initial representatives. When we took over the case, she was half a million -- almost half a million in measure, 400-some odd thousands. We had to take to the principal auditor, and he brought it down to zero.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. I got it. Thank you. And there was one -- some other references to a waybill referencing One Cost Auto Parts. Are those --

MR. BRANDEIS: One Lot.

ADMINISTRATIVE LAW JUDGE KWEE: Oh, One Lot Auto Parts.

MR. BRANDEIS: One Lot.

ADMINISTRATIVE LAW JUDGE KWEE: Are those in the oral hearing record that we have?

MR. BRANDEIS: Yes. It's in the list of exhibits presented by the Department. You'll see they say at the top -- sorry. There's over 400 pages. They say at the top -- they look like this. They say at the top, "Mitsui Osk Luntz Limited. Waybill. Nonnegotiable." And then it says, "Shipper, Packer Express. Consignee" -- the consignee on every single one you're going to see is either going to be Sovey or Kim. It's going to be one of those four customers, every single one.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. And if I understand Mr. Sien's testimony correctly, that the invoices for all of the disallowed --

MR. BRANDEIS: There's no invoices.

ADMINISTRATIVE LAW JUDGE KWEE: All right. I guess the waybills. What you're discussing and showing me right now, that covers all the disallowed transactions?

MR. BRANDEIS: That covers all the allowed transactions. But for example, this one is a perfect example. It has two vehicles listed, 2001 Toyota Tacoma and a 2002 Toyota Camry. And then right underneath that it says, "Used automobile in One Lot Auto Part."

So it's that One Lot Auto Part is what -- that's

the phrase their using. Right. He's got two vehicles. Well, this one -- I've never seen this. It says, "Used automobile and One Lot Auto Parts." So I don't know if there's a third car that they didn't list the VIN number for. But usually it'll say "One Lot Auto Parts".

ADMINISTRATIVE LAW JUDGE KWEE: And that's supposed to cover the disallowed transactions?

MR. BRANDEIS: So, initially, that's what she was using to disallow, but then she contacted Packers Express. There's several e-mails in here. It's an exchange of e-mails between her and Packers Express. Page 296 is an example where a person at Packers Express went through their records, and, I guess, they were able to provide VIN numbers for some of the vehicles that were dismantled.

But, again, not all of them. And so we don't have access to those records. So we don't know how thorough a job or a -- it looks like whoever did this had to do a lot of work. So they might have just gotten tired, lazy, or maybe they don't have all of their records in order.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I guess my understanding then is for the disallowed transactions then, you did not have waybills in -- in the --

MR. BRANDEIS: For the disallowed transaction we either did not have a waybill, or we couldn't get

confirmation from Leland at Packers Express that the -- that he provided a list of VIN numbers for vehicles that were dismantled.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. I understand now. Thank you. And as far as the issue with whether these are non-taxable sales for resale, I'm just wondering, was any evidence provided to show that the same person who made payments on the allowed transactions also made payments for the disallowed transactions? Or is that information that is not available?

MR. BRANDEIS: So in my initial presentation, I mentioned that there was a big change in the way that they handled the payments beginning in 2012. I think it's -- I think it's prior to 2012. It looks like Sovey and Kim were always sending the payments directly to the insurance auto auctions. But there's a couple, and that's where -- so it's a 2011 is when there were two gentlemen -- two purchasers, that were making deposits -- wiring deposits directly to Mr. Sien's bank account at Bank of America. That is a Mr. Kiev Narren and a Luann Kokim.

So I did an analysis on his Bank of America accounts for 2011. It reconciled to the auditor's schedule 12D to the penny. And in one account, 99 and a half percent of the deposits were wired in by one person. And in the other account, 86 and a half percent were wired

in by one person.

The other thing is the auditor relies heavily on -- in fact, if you go back to one of her schedules, it's one of the basis for the taxable measure. It's a worksheet. I'm not sure who prepared it, if the taxpayer prepared it, or his accountant prepared. Hold on. Let me find it. Here it is.

This was Exhibit 1 in the auditor's original. So not the Department's Exhibit 1 for the purpose of the appeal. But this should be -- it's part of the original audit. So this is a worksheet.

Who prepared this? You or Advance Tax?

MR. SIEN: Advance Tax.

MR. BRANDEIS: Okay. There is a worksheet prepared by the taxpayer's CPA firm that filed their income tax returns, Advance Tax. So he has on here sales. He lists Owen and Sovey. Cost paid out per client's worksheet is 1.575 million. These are amounts paid directly to the auto auctions. And then he says, "Cost paid per client's check register, 874,00. Which when you look at 874,00 and you add up all the deposits from those two individuals, plus the branch deposits, it comes to 874,000. So we can't tie a bank deposit to a particular vehicle.

ADMINISTRATIVE LAW JUDGE KWEE: Okay.

MR. BRANDEIS: But there is -- so the way he kept track of it, again, it's in -- it is in the list of exhibits by the Department. He had a handwritten -- there's pages and pages of this. This is just an example. He wrote handwritten sales journals. This is in effect, a sales journal. It has the date, the lot number, which I'm assuming is the lot number for the auto auction. He has a partial VIN -- I think he's just taken the last five digits -- the year of the vehicle, the make of the vehicle, the amount, and then the customer's name. Page after page after page.

So again, a reasonable auditor would look at the sales journal and say -- see the same names over and over and over again, Sovey, Sovey, Sovey, Kim, Kim, Kim. You would be -- most people would conclude that these are sales for resale.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. And this is in the record what -- the sales journal you're referring to?

MR. BRANDEIS: This is in one of the exhibits provided by the Department.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great. And I have one last question for Mr. Sien. I just want clarification on the three disallowed vehicle transactions. What happened to them? What -- where were

they during those 12-plus months between the purchase date and the date it was ultimately shipped out to Cambodia? Was that sitting on a -- like, where did you store them or where were they stored?

MR. SIEN: For the what?

MR. BRANDEIS: Yeah. The three vehicles, the Porsche, the --

MR. SIEN: Still there. I think still there.

MR. BRANDEIS: But during the period of time between the -- where they were shipped to Packers Express and during the time they were ultimately shipped to Cambodia, where were those? Where were the vehicles? Were they at your house?

MR. SIEN: Not my house. They are at Packer. I have nothing --

MR. BRANDEIS: They were at Packers Express.

MR. SIEN: -- and that's why they are at Packers Express.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. I got it.

MR. BRANDEIS: So my understanding in discussion was that they were at Packers Express, again, taking their instructions from his buyers in Cambodia. My understanding is they are charging a storage fee while the car is sitting at their facility at Packers Express. But because they're sending these bills to his customers, he

doesn't have them.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Do either of the co-panelist have questions at this point?

ADMINISTRATIVE LAW JUDGE STANLEY: I have one.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Go ahead.

ADMINISTRATIVE LAW JUDGE STANLEY: Just one quick follow-up question to that. Did anybody try to get records from Packers Express about storage to get, like, storage documents that could be tied back to those three vehicles?

MR. BRANDEIS: We -- we didn't. But I also -- we don't dispute that the vehicles were here in California for a year or whatever. But what we're saying is that they were sitting, essentially, in resale inventory, and they were never used. I don't know how you use a salvage vehicle that can't be driven.

These vehicles are -- go to the insurance auto auction website and look at the vehicles that they're listing for sale. They're all smashed up. You wouldn't drive these things on the road.

And that's the other thing. Again, it's one of our exhibits. He has a personal vehicle. We provided a copy of his registration. He has no need or reason to drive a wrecked vehicle around. He has a perfectly good late model 2011 Toyota Siena. Why would he drive around a

wrecked vehicle?

Again, this is what I mean about inexperience of the auditor not being inquisitive, not asking questions.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. I would just like to turn to CDTFA briefly. So I guess with the -- I guess I don't want to jump the gun before you address the sales and use tax issue. So maybe I should -- how about we let CDTFA do their presentation, and then maybe the panel will have more questions at that point.

MS. PALEY: May I? There were a few more issues that were raised by that. May I ask questions of the witness?

ADMINISTRATIVE LAW JUDGE KWEE: Yes. Of course. Go -- please proceed.

MS. PALEY: Sure.

CROSS-EXAMINATION

BY MS. PALEY:

Q Mr. Sien, you've indicated that the 2011 Toyota -- sorry. Let me turn on my speaker.

ADMINISTRATIVE LAW JUDGE KWEE: Thank you.

BY MS. PALEY:

Q Mr. Sien, you've indicated that the 2011 Toyota submitted in as Exhibit 79 is your personal vehicle; is that correct?

THE WITNESS: I'm sorry.

MR. BRANDEIS: Is that your personal?

THE WITNESS: Yes. I buy from the dealer, make payments.

BY MS. PALEY:

Q It's registered to a Selena Lee; is that correct?

A Yes. It's my wife.

Q And that's at the Commonwealth Avenue address?

A Yes.

Q It notes an amount paid of registration of \$21.

Is it your contention that is a registration fee for that vehicle?

MR. BRANDEIS: Was that the registration fee that you paid, \$21?

THE WITNESS: That's my wife.

MR. BRANDEIS: Pardon.

ADMINISTRATIVE LAW JUDGE KWEE: I'm sorry. If the parties could speak into their microphones because these --

THE WITNESS: My wife is vehicle.

MR. BRANDEIS: Was that the amount -- the total amount of vehicle fees paid?

THE WITNESS: Oh, yeah. Fee. The sticker. This is one. The sticker.

MR. BRANDEIS: For the registration sticker?

THE WITNESS: Yes. Yeah.

MR. BRANDEIS: So you paid \$21?

THE WITNESS: Yes, yes.

BY MS. PALEY:

Q Isn't it true that \$21 is the fee that you pay for a non-op vehicle, and that registration would actually be much greater?

MR. BRANDEIS: So is that the fee for registering the vehicle as nonoperational?

THE WITNESS: I don't know. I don't know this one for my wife. My wife take care about this. Because my English not very good, you know, and later it's not very good. This one my wife take care about this.

BY MS. PALEY:

Q Isn't it true that registration for a vehicle, a Toyota 2011, would be well over \$100 a year?

MR. BRANDEIS: I don't know how he would know that, but it sounds right.

MS. PALEY: He does deal in vehicles; correct?

THE WITNESS: I -- yeah. I try. I'm say my wife. Yeah.

BY MS. PALEY:

Q Yes. But you paid or she paid \$21 --

A Yes.

Q -- which is standard fee for a non-op vehicle?

A I -- I -- she -- she pay everything.

Q And it's your contention that this is the vehicle that you use to drive?

A Use to drive, yes.

Q Yes?

A Yes.

MS. PALEY: Thank you. I have no further questions.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. So are you ready to proceed with your closing presentation--

MS. PALEY: Yes.

ADMINISTRATIVE LAW JUDGE KWEE: -- or your presentation?

MS. PALEY: Yes.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. All right. Thank you.

MS. PALEY: Thank you.

CLOSING STATEMENT

MS. PALEY: To begin with, we would object to the consideration of items -- to the consideration of items that have not been included in evidence, and that would include the unsworn testimony of Mr. Brandeis. We would also note the numerous inaccuracies of Exhibit 80 and would ask the panel to give it the weight we feel it is

due.

There are at least a dozen inaccuracies. There are at least four unknown source deposits that total 15,181. And there are five transfers between the two accounts, totaling 10,253. So the summaries are incorrect because they're not actually other wire deposits as noted in the summaries, and that is shown by the actual bank deposits in evidence.

ADMINISTRATIVE LAW JUDGE KWEE: Right. And I did state at the beginning of the hearing that evidence that we would consider as sworn testimony under oath to the extent that there was testimony that was not affirmed by the witnesses, then that would not be considered as evidence by this panel. We would consider any arguments presented by Counsel.

As far as the issues with or objections to Exhibit 80, I could afford the CDTFA an opportunity to provide, after the hearing, any objections it has to specific inaccuracies. Otherwise, the panel could consider it and give it the weight that we feel it deserves and take into consideration the exhibit with other exhibits as we feel appropriate and close the record after the hearing.

If you would like additional time, I'm offering that to you. Otherwise, we'll just close the record.

MS. PALEY: We would request that the record be closed. We would simply point out the inaccuracies which are refuted by the bank records in evidence.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. I understand that CDTFA does have an objection, and that is noted on that basis.

MS. PALEY: Thank you.

Appellant is a business located in Alhambra, California. It's a licensed seller of salvage vehicles and auto parts. According to Appellant, its customers browse online insurance auto auctions to choose vehicles. But since the auctions are only open to DMV licensed dealers, Appellant purchases the vehicles and then resells them to its customers.

Taxpayer claims that all the salvaged vehicles they purchased were shipped to international customers, and as such, were nontaxable sales in foreign commerce. The audit methodology and calculations are not in dispute. Based on Appellant's purchase journals and logs contained in Exhibits C and E, and vendor reports of Exhibit D, it was determined that its purchases totaled over \$6 million during the liability period, January 1st, 2011, through December 31st, 2013.

During the agreed upon test period of 3rd Quarter 2013, 74 salvaged vehicles were purchased at the cost of

approximately \$335,000. Audit staff accepted Appellant's contention that the only markup on its sale was a \$70.00 commission, which equated to \$5,180.00 in commissions during the test period.

In a computed markup of 1.54 percent, applying this markup to the liability period, Appellant's audited gross sales were about 6.2 million. Appellant did not provide adequate sales or shipping records for the test period. So audit staff obtained third-party shipping records, found in Exhibit A-2 and Exhibit C.

There was no record of shipment out of state for the 29 of the 74 vehicles sold during 3rd Quarter 2013, or 39.51 percent based on vehicle identification numbers provided by the third-party shipper for cars shipped intact or in parts. This is reflected in Exhibit D, pages 67 through 76.

As you can see from Exhibit E, audit staff exchanged multiple communications with the shipper to obtain and confirm complete records for the test period. Projecting the 39.51 percent rate to the total audited gross sales for the entire liability period, Appellant was determined to have disallowed claim exempt sales of about 2.4 million during the liability period reflected in Exhibit D, pages 63 and 64.

Contrary to Mr. Brandeis' claims, there were, in

fact, VIN numbers associated with those. And we attributed them where possible, where the evidence showed such. California law imposes sales tax on a retailer measured by the gross receipts from the retail sale of tangible personal property in the state, unless the sale is specifically exempted or excluded from taxation by statute.

All of the retailer's gross receipts are presumed subject to tax, unless the retailer confirms otherwise. According to regulation 1620(a)(3)(b), sales tax does not apply when tangible personal property is required to be shipped and is shipped to a point outside the state by the retailer.

Regulation 1620(a)(3)(d) requires that bill of lading or other documentary evidence of the delivery of the property to a carrier for shipment outside of California must be retained by the retailer to support an exemption for interstate or foreign commerce.

The taxpayer bears the burden of establishing its entitlement to any claim exemption. And it is the taxpayer's responsibility to maintain and make available for examination on request, all records necessary to determine the correct tax liability. If the taxpayer's records are insufficient, it's appropriate for the Department to use alternative means to establish and

compute the taxpayer's liability.

For the Department's determination appears reasonable, the taxpayer bears the burden to explain why it's not valid. In this case, gross sales were calculated using Appellant's own purchase journals, logs, and vendor reports received from the auction houses, and there is no dispute as to the measure of gross receipts established by the audit.

Despite ample opportunity to do so throughout the audit process, and as reflected in the e-mail correspondence of Exhibit E, pages 115 to 325, and the 414Z action log starting at page 340, and during the appeals process, Appellant failed to provide any documentation supporting its entitlement to the exemption with regard to almost 40 percent of its sales during the test period.

With regard to Appellant's Exhibits 1 through 72, the bank records, they were reviewed and summarized at the time of the audit in Schedule 12D, Exhibit D, page 101. They do not change the analysis or conclusions that there were only a handful of purchasers is not relevant.

The relevant issue in this appeal is whether the property purchased and sold was shipped out of the state, and as to almost 40 percent of the property sold, the taxpayer has provided no evidence to support its

entitlement to the exception. Rather, the evidence provided by the third-party shipper indicates that a portion of the property sold was not shipped out of state.

As a separate matter, as shown in Exhibit D, pages 77 through 78, the shipping records indicate that among the vehicles that were shipped by Appellant in 3rd Quarter '13, were a 2003 Mercedes S500 purchased in March 2011; a 2003 BMW 745 purchased in September of 2012; and 2001 Porsche Boxster purchased in December 2012; meaning that Appellant retained the vehicles in California for respectively two-and-a-half years, one year, and nine months prior to shipment.

Regulation 1669.5(a)(6) states that vehicles withdrawn from resale inventory for personal or business use are subject to tax. The tax is measured by the purchase price of a vehicle. Since Appellant has not provided any documentation regarding the use or storage of these vehicles, audit staff reasonably determined that the vehicles were withdrawn from resale inventory and used in California during these extended periods.

Since there is no specific information regarding the use or storage of these vehicles, it was also reasonable to attribute a withdrawal from inventory to the year 2013, the year in which audit staff had a more complete picture of Appellant's business, and to project

the error onto 2011 and 2012.

Appellant has not produced any evidence indicating that this determination is not valid. Mr. Brandeis has stated that, "How would we possibly show that?" He would show that by the storage bills, which would have been the case at the shipping yard -- the shipping company.

In conclusion, Appellant has not provided sufficient evidence to show an entitlement to an exemption with regard to the undisputed measure of gross receipts during the audit and has failed to establish that it held the three vehicles in its resale inventory, in one case for as much as two-and-a-half years.

Therefore, we request that the appeal be denied. Thank you.

MR. CLAREMON: I'm going to add something as well in response to some of the things that have been discussed here. We note that with regard to the three vehicles, I believe Appellant has testified that they were sold to his purchaser, and then that purchaser stored them in California during that period. That's what was testified to today.

We note that to meet the exemption for sale in interstate commerce under regulation 1620, there needs to be -- it needs to be delivered to a shipping agent or some

other agent with irrevocable commitment to the exportation process. And it could be stored in state for a reasonable time pursuant to that exportation process.

So alternatively, we don't have evidence, and all we have is the testimony it would -- that happened. So it's still a reasonable determination those were withdrawn from resale inventory by Appellant. Alternatively, even if what they're saying here happened, those were sales that were made in state, and they would not be subject to the exemption for out of state -- for interstate commerce because they were not delivered to a forwarding agent in -- with an irrevocable commitment to the exportation process given that they were there for up two-and-a-half years.

With regard to the sales that -- where there's no shipping information, again, as Ms. Paley said, there's no evidence of their use in California. And I think there's conjecture of what could possibly be done with them. We don't -- there's no evidence that they could not have been sold in a retail sale.

But we do point and -- in consumed or used by the purchasers in California, but we do note that, if as Mr. Brandeis is contending, that even if they took place in California, they were sales for resale, then we have statutes and regulations on how you establish a sale for

resale in California.

Under regulation 1668, the burden of proving a sale of tangible personal property is not at retail is upon the seller, unless the seller timely takes in good faith a certificate from the purchaser that the properties purchased for resale and subdivision E and F of regulation 1668 establish what evidence you can provide in the absence of the time taken of resale certificate.

So, again, we go back to the basic premise of this case, which is a lack of documentation by the Appellant. If these were sold in California and as Mr. Brandeis is contending that they were sold for resale because they couldn't have possibly been used by those purchasers, then Appellant should have taken a resale certificate at the time or otherwise proven that they were resold in fact.

And I think there's one other point that we wanted to make, which is that in that correspondence -- and I think it's on this. But in that correspondence with the shipping company in terms of determining which vehicles were shipped and which were not, those notations of One Lot -- the One Lot of Auto Parts were discussed. And they provided -- and what are the page numbers of the summaries they provided?

Starting on page 283, they provided information

as to those lots of auto parts, and they indicated the VIN numbers of the automobiles that corresponded with those lots. So the information -- so the audit is based on the correspondence with the shipping company in which they provided VIN numbers for the automobiles shipped in -- as lots of auto parts, as indicated on these bills of lading, and not just the cars that were sent whole.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Just clarification on Issue 2. I guess on the audit that was based on a test period of the 3rd Quarter of '13; is that correct?

MS. PALEY: Yes.

ADMINISTRATIVE LAW JUDGE KWEE: And according to the DNR, the disallowed vehicle transactions one, was disallowed in 2011 and two were disallowed in 2012. That's outside the audit of the test period. I was just wondering why those were projected into the --

MR. CLAREMON: Into when they were purchased?

ADMINISTRATIVE LAW JUDGE KWEE: Right.

MR. CLAREMON: Well, so -- and, again, the test period is for the sale -- the sales tax due on sales that were -- there was no evidence. They were sales of interstate commerce. I mean, those were purchases picked up where the audit picked them up as use tax transactions.

MS. RENATI: So on page 359 is the 836 report of

discussion written by the district principal auditor. And in the discussion ---

ADMINISTRATIVE LAW JUDGE KWEE: Could you turn on your microphone. I'm sorry.

MS. RENATI: It is on.

ADMINISTRATIVE LAW JUDGE KWEE: Oh, okay.

ADMINISTRATIVE LAW JUDGE STANLEY: Turn off the other mic next to you.

MS. RENATI: Okay. So there's multiple -- there were other items that the auditor was asked to look at.

I think my mic is going in and out. Let's switch.

(There is a pause in the proceedings.)

MS. RENATI: So the auditor was asked to do a test of 3rd Quarter 2013. I believe that was agreed upon. The district principal auditor also noted that it didn't appear that we had all purchases of the vehicles and asked the auditor to look if there was any other known source of the vehicles.

So while the auditor was doing her test of 3rd Quarter '13, and she was matching the sales with exemption documentation, she was also looking back to see when it was purchased. And in most cases, those purchases and subsequent sales were fairly quick. On these three vehicles, there was the Mercedes, the BMW, and the Porsche

one, they found in the purchase records 30 months before. One was 12 months before, and one was 9 months before.

So she looked back to see, you know, do we know those purchases? And once she noticed them, that's where it became a separate item. It's not part of the test of sales. It's these purchases that were made and were never sold. And those are the only three they noted because they only looked in that test period. Had they expanded it, they could have found more. We don't know. Or they could have not found anymore.

But in this 3rd Quarter, they found three vehicles that were purchased months ago and then later sold. These are the questions. What did they do with them?

ADMINISTRATIVE LAW JUDGE KWEE: All right. And I'm just curious because -- so you added up the 2011 transaction plus the 2012 transactions. It came to 15,000, but then that was multiplied by three. But these were picked up from two different years. So I mean, I'm just curious about the methodology for that.

MS. RENATI: So we did a test of 3rd Quarter '13, and had we done -- that we found three. The auditor could have multiplied that and said every quarter you must have three. But instead the auditor said, "No. I'm going to say every year you have to have three."

Normally when you'd find an error, you would project it.

ADMINISTRATIVE LAW JUDGE KWEE: Right. I guess where I'm getting confused is that the error is the purchase, not the resale. The disallowed transaction was purchased. You're disallowing the purchase in 2011 and the purchase in 2012 and -- but you're treating it as occurring in 2000 -- during the test period of 3rd Quarter '13. That's where, I guess, my mental block is. Because what you disallowed was the purchase transaction and said that's a use and -- but then it's being projected based on the 3rd Quarter '13.

MS. RENATI: The idea is if we looked at, say, 4th Quarter '13, we could have found cars from 2012, 2011, 2010. In this test period, we found three transactions that were purchased, that were not resold later on, until much later. So it's completely separated from the test of sales.

MR. CLAREMON: I think to answer that question, again, since we don't have information of what happened to these cars, and there's no documentation, these were purchased for resale and withdrawn from resale inventory, the use would have occurred when they were withdrawn from resale inventory, and we don't know when that was.

And so at what point in the 9 months, 12 months,

35 months, or 38 months that these were being held?

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Well, I don't want to get too stuck up on this issue. But I did have just, I guess, one more question of that. And I mean, it seems like you have a DMV license wholesaler with a seller's permit for this specific type of property at issue, and that property is being sold in the regular course of their business because a number of other transactions were allowed. The property is basically a wrecked salvage titled vehicle, but they can't legally operate it.

The taxpayer states it wasn't used. CDTFA's own audit records admit that it was, in fact, resold at some point. I mean, I'm just -- it just doesn't seem like this is the type of transaction we normally pick up a person for and say that, based on the amount time, it's something that -- that it was pulled from resale inventory.

It seems like this is -- I mean, there's a lot of stuff there, and I'm just -- I'm just wondering if that -- if I'm missing something here, or if you could help me understand why, I guess, in this taxpayer's case why this was specifically pulled out and identified.

MR. CLAREMON: Again, I mean, I think that was based on the fact that we don't know what happened. And given the length of time, they used the preponderance of

the evidence what is more likely than not that it -- without any evidence of where it was, was it used in California or not? But then -- and then we also note that the testimony at the hearing today, was that it was not sold interstate commerce.

ADMINISTRATIVE LAW JUDGE KWEE: Okay.

Understood. Do the other panel members have any questions today?

Okay. Then I believe we're ready to close the hearing. Is there anything further from either party?

MR. BRANDEIS: I'd like to address, provide a rebuttal to their testimony on the withdrawal from resale inventory.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Please proceed.

CLOSING STATEMENT

MR. BRANDEIS: So if we look from an accounting standpoint, from a law standpoint of what's going on here, the sales are being made from the insurance auto auctions to Mr. Sien. There's a transfer of title of these vehicles from the insurance auto auctions to Mr. Sien. Mr. Sien has a resale certificate on file with the insurance auctions. Those sales are sales for resale.

They then sit in resale inventory on Mr. Sien's

books until he arranges payment or invoices the customers in Cambodia and transfers title to them. I guess, technically, you could say while those vehicles are sitting here in California, those vehicles belong to the customers in Cambodia.

But sometimes an unwind happens. This happens in business all the time. But generally, speaking when a transaction is unwound, the item that was being sold is put back into resale inventory. There's never any use of it. And again, what the absurdity is here, the item -- the specific item we're talking about, there's no use for it. There's no use for a wrecked car that you can't drive.

So, you know, for the Department to say that it was withdrawn from resale inventory is an absurd. That's an interpretation of the law that's just bizarre. Second, Mr. Claremon cites Reg 1668 and says that the burden of proof of sale for resale is upon the taxpayer, and once the taxpayer takes a timely certificate in good faith in the form set forth in subdivision (b) of that regulation.

If you listen to his testimony, he makes it sound like unless you have that resale certificate, you -- that sale would be disallowed because you don't have this document. That's the furthest from the truth. Anybody that looks at an audit manual knows, if you read the audit

manual, if you don't have a resale certificate, auditor shouldn't pick something up just because you don't have a resale certificate.

You'd look at the nature of the transaction. You'd look at the type of things being sold, the character, the quantity, the units. Maybe you have personal knowledge that something that's being sold is clearly being sold for resale. You know, when I was an auditor in training, one of the things I said is, if you go out and you're auditing a company that sells widgets, and you see an invoice for 10,000 widgets to XYZ Widget Company for resale, there's no resale certificate. You'd be foolish to pick that up.

What does XYZ Widget Company doing with the 10,000 widgets that they're buying? Clearly, they are reselling them. You're going to pick that up and say you don't have a resale certificate. You'd be laughed at. You'd be laughed at. So this is almost the same thing. They're selling hundreds, literally hundreds and hundreds and hundreds of vehicles to the same four individuals, and he's saying that's not relevant. That's absurd.

ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

I believe we're now ready to proceed, unless the panel has any questions at this point? Okay. Thank you.

This case is submitted on August 21st, 2019, and

the record is now closed. Thank you, everyone, for coming in today. The judges will meet and decide your case later on, and we'll send you a written decision, generally, within 100 days from today, the date the case is submitted. Thank you.

This hearing is now adjourned.

(Proceedings adjourned at 3:15 P.M.)

HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 17th day of September, 2019.

ERNALYN M. ALONZO
HEARING REPORTER