

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HEARING
OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Business
Tax Appeals Hearing of:

OTA Case No. 18083545

MOUNT DIABLO TILE & STONE COMPANY,
Appellant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, SEPTEMBER 24, 2019

11:06 A.M.

OFFICE OF TAX APPEALS
1400 R STREET
SACRAMENTO, CALIFORNIA

REPORTED BY: PEGGY A. PORTER, RDR, RMR, CRR
CSR No. 6086

1 APPEARANCES:

2
3 PANEL LEAD:

4 ALJ JEFF ANGEJA

5
6 PANEL MEMBERS:

7 ALJ ANDREW KWEE

8 ALJ AMANDA VASSIGH

9
10 APPEARING FOR TAXPAYER:

11 AVI NAHMIAS, TAXPAYER

12 SHAMRA REED

13
14 APPEARING FOR DEPARTMENT OF TAX AND FEE ADMINISTRATION:

15 SCOTT LAMBERT, HEARING REPRESENTATIVE

16 KEVIN HANKS, HEARING REPRESENTATIVE

17 CHRISTOPHER BROOKS, TAX COUNSEL

I N D E X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TUESDAY, SEPTEMBER 24, 2019

PAGE

PROCEEDINGS

4

E X H I B I T S

Exhibits A through H

(Marked prior

to proceedings.)

1 Tuesday, September 24, 2019, 11:06 a.m.

2 Sacramento, California

3
4 ALJ ANJEJA: Okay. We will go on the record
5 for the appeal of Mount Diablo Tile & Stone. Case ID
6 is 1808 -- I'll wait for the video. Are you ready?

7 All right. For the appeal of Mt. Diablo Tile &
8 Stone. Case ID is 18083545.

9 Good morning, everybody. Thank you for coming.
10 We are in Sacramento, California. And the date is
11 Tuesday, September 24th, and the time is approximately
12 11:05. My name is Jeff Angeja and I'm the lead
13 administrative law judge for this hearing.

14 My fellow co-panelists today are Andrew Kwee
15 and Amanda Vassigh.

16 ALJ KWEE: Good morning.

17 ALJ VASSIGH: Good morning.

18 ALJ ANJEJA: And before I get too much further,
19 these mics do not turn off. They are sensitive. So it
20 will pick up whispers. That said, do please speak
21 directly into the mic when you speak. So feel free to
22 move it around so you're talking directly into it.
23 That way it gets on the video and the livestream and
24 our court reporter can accurately transcribe what we
25 say.

1 Appellant, could you please introduce yourself
2 for the record.

3 MR. NAHMIA: Avi Nahmias with Mount Diablo
4 Tile & Stone.

5 MS. REED: Shamra Reed with Mount Diablo Tile &
6 Stone.

7 ALJ ANJEJA: Can I get you to spell that?

8 MS. REED: S-h-a-m-r-a. Reed is R-e-e-d.

9 ALJ ANJEJA: Okay. Thank you.

10 And for CDTFA?

11 MR. LAMBERT: Scott Lambert representing CDTFA.
12 And to my left is Chris Brooks. And to Mr. Brooks'
13 left is Kevin Hanks.

14 ALJ ANJEJA: Okay. Thank you.

15 This appeal involves two issues. Which are
16 first whether reductions are warranted to the audited
17 amount of unreported taxable sales. And, two, whether
18 relief from the failure to file penalty for the fourth
19 quarter of 2014 is warranted.

20 During our prehearing conferences the parties
21 agreed to provide exhibits to each other and to OTA
22 before September 13th. We have Exhibits A through H
23 from CDTFA that were provided both to appellant as well
24 as to us.

25 I don't have any exhibits from appellant.

1 MR. NAHMIAS: No. I don't have anything.

2 ALJ ANJEJA: Okay. Have you given them
3 anything that you haven't given to us?

4 MR. NAHMIAS: No.

5 ALJ ANJEJA: Okay. Because I have no hearing
6 record exhibits, I'm assuming -- well, okay. Whatever
7 you need is in there, A through H?

8 MR. NAHMIAS: Yeah.

9 ALJ ANJEJA: Okay. And based on our prehearing
10 conference, it's my understanding that, Mr. Nahmias,
11 you will testify today. Is that still correct?

12 MR. NAHMIAS: Yes.

13 ALJ ANJEJA: Okay. So I'll swear you in in a
14 bit.

15 CDTFA has no witnesses?

16 MR. LAMBERT: That's correct.

17 ALJ ANJEJA: The distinction -- and for the
18 benefit of the audience, your testimony will be sworn.
19 We will be able to make factual findings based on your
20 testimony. Theirs, because it's not witness testimony,
21 it's just argument. So we can make factual findings on
22 documentary evidence, exhibits, testimony, but not
23 argument.

24 And as we agreed during our prehearing
25 conference, we'll begin with appellant's testimony and

1 argument which should not exceed 20 minutes. CDTFA
2 will then be allowed to ask questions, if they wish, as
3 will the panel.

4 And then CDTFA will make its presentation not
5 to exceed 20 minutes. Appellant and the co-panelists
6 can ask questions. And then we'll allow a five-minute
7 rebuttal.

8 All right. If there's no procedural questions,
9 I'll start.

10 And forgive me if I mispronounce the name.
11 Mr. Nahmias, correct?

12 MR. NAHMIAS: That's correct.

13 ALJ ANJEJA: Okay.

14 MR. NAHMIAS: The name is Nahmias. That's
15 fine.

16 ALJ ANJEJA: Nahmias. Okay. I will get that.

17 Mr. Nahmias, please stand and raise your right
18 hand.

19 AVI NAHMIAS,
20 was sworn by the administrative law judge to tell the
21 truth, the whole truth and nothing but the truth,

22 ALJ ANJEJA: Thank you.

23 Okay. Whenever you're ready, go ahead and
24 begin.

25 MR. NAHMIAS: Well --

1 ALJ ANJEJA: Speak into the microphone. Feel
2 free to pull it in front of you.

3 MR. NAHMIAS: I believe the Board of
4 Equalization is saying there's a past due on the sales
5 tax overdue. And the numbers that they have on their
6 record is the wrong amount.

7 The business had a fire and -- which burned all
8 the records and computers. So the only records I had
9 to give them was the tax returns that were filed prior
10 to the fire.

11 And pretty much, yeah, whatever they have in
12 records, that's how much I owe. They have a different
13 amount that I'm -- you know, I'm not too sure where
14 they got from.

15 And that's about it.

16 ALJ ANJEJA: That concludes your presentation?

17 MR. NAHMIAS: Yeah.

18 ALJ ANJEJA: Okay. I presume the panelists
19 have no questions?

20 ALJ VASSIGH: No questions.

21 ALJ ANJEJA: Go ahead.

22 ALJ KWEE: Just a matter of clarification.

23 I understand from one of the exhibits that you
24 were requesting an adjustment for non-taxable sales for
25 resale to three purchasers; Portofino, La Castellán --

1 I'm not sure if I pronounced that correctly -- and to
2 Coliseum Tile -- Tile; is that correct?

3 MR. NAHMIAS: That was -- that was sales orders
4 that took place, yeah, to a wholesaler, yes.

5 ALJ KWEE: Okay. So in the exhibit index I see
6 sales invoices to Portofino and sales invoices to La
7 Castellan, but I don't see any sales invoices to
8 Coliseum Tile. Is --

9 MR. NAHMIAS: That's the same company. Same
10 location.

11 ALJ KWEE: Oh.

12 MR. NAHMIAS: And they kept changing their
13 names. So it's the same company.

14 ALJ KWEE: Okay.

15 MR. NAHMIAS: Same address. Just same -- same
16 owners.

17 ALJ KWEE: Were there any resale certificates
18 that were provided with these sales invoices, or is it
19 just the sales invoices that you --

20 MR. NAHMIAS: I -- I gave them the resale
21 numbers as well from those companies.

22 ALJ KWEE: Okay. Thank you.

23 ALJ ANJEJA: CDTFA, would you like to make your
24 presentation?

25 MR. LAMBERT: Sure.

1 In this particular case, the taxpayer is a
2 retailer of -- mainly a retailer of flooring materials.

3 Originally how the audit was initiated is one
4 of the corporate officers filed the complaint with our
5 investigation division in regards to the taxpayer
6 deleting sales out of their point of sales system. And
7 so that's how this audit was initiated.

8 So the taxpayer was contacted for audit. And
9 they requested three weeks in order to gather the
10 records together.

11 In that time, about two and a half weeks in,
12 there was a fire where apparently all the records or
13 most of the records were destroyed. So there were
14 limited records in which to conduct the audit.

15 So we did have the income tax returns for 2011,
16 2012 and 2013. It appeared that the amounts reported
17 on the income tax returns for 2012 and 2013 appeared
18 reasonable based on our -- or the 1099 information,
19 which is the credit card receipts.

20 So based on a ratio between that and what was
21 reported, we essentially accepted the sales reported on
22 the income tax returns for 2012 and 2013 as being the
23 true sales of the business.

24 For the fourth quarter of 2011, because
25 dividing up the income tax return by four for that

1 period was less than the credit card receipts for the
2 fourth quarter of 2011, we used a -- the credit card
3 ratio method in order to establish the liability for
4 the fourth quarter of '11.

5 For 2014, we used the average quarterly sales
6 from the 2013 period. And also for the first quarter
7 of 2014 we used the average for the 2013 daily sales as
8 the business was only open until February 7th of 2015
9 for that year.

10 So we added up all those figures and we came to
11 \$3,084,000 rounded. We made an adjustment for resales.
12 The appellant was able to provide us with sales
13 invoices for that period of time and it added up to
14 \$776,000, which we made an adjustment for. We did not
15 have any resale cards for that period.

16 And also the 776 includes sales to the three
17 customers in question that were mentioned earlier. And
18 that was \$658,000. So we did make an adjustment for
19 658 based on those three customers.

20 There was also another adjustment that we made
21 and that was for installation labor. The appellant had
22 provided us with invoices of purchases of labor where
23 another person had installed materials that they were
24 selling. We marked that up 10 percent and it came to
25 300 -- just under 301,000.

1 So we subtracted the resales and installation
2 labor from the total sales that we had established to
3 come up with the audited taxable sales of \$2,006,000.
4 We subtracted that from what was reported, which was
5 \$382,000 and we came up with a difference of \$1.624
6 million.

7 So after the appeals conference, the appellant
8 had provided us with additional resales invoices and he
9 had indicated that he had received those from the three
10 customers in question, which was Coliseum Title (sic),
11 La Castellan, and Portofino Tile & floors.

12 So in this instance we decided to contact the
13 representatives from that company. And the response we
14 got back from La Castellan, the manager stated that he
15 did not provide the invoices to the appellant or
16 couldn't remember doing that, which would I would point
17 out would had to have been only a couple months before
18 we had contacted him. They also stated it wasn't
19 reasonable for them to make large purchases with such
20 high dollar amounts.

21 Now, I will point you to our exhibit. And I'll
22 use 100, Exhibit 100. And if you take a look at that
23 exhibit --

24 ALJ KWEE: I'm sorry. Exhibit 100 or page 100?

25 MR. LAMBERT: Page 100 of Exhibit C. So I

1 should have said page 100 of Exhibit C. Or maybe --
2 well, that's our Bates stamp number that's on the
3 bottom of the page.

4 Are you able to follow --

5 ALJ ANJEJA: That's an invoice for --

6 MR. LAMBERT: It's an invoice, yes.

7 ALJ ANJEJA: Okay.

8 MR. LAMBERT: So what I'd point you to is the
9 dollar amount. It's for 4,560 square feet. And if you
10 look all the way to the right, it has a dollar amount
11 and then it has a T after that. And what that
12 generally indicates is that that's a taxable amount.

13 So the owners -- the owner of Coliseum Tile
14 indicated that the invoices that we provided to him
15 appeared to be bogus. And this is kind of an indicator
16 when it has a T on there. It generally means that it's
17 a taxable item. But if you look down, there is no
18 sales tax on this.

19 So essentially we did not accept the additional
20 resale invoices that were provided to us. There was no
21 resale certificate that was provided to us.

22 So we did accept -- we had already accepted a
23 large percentage of the sales to Portofino. So that
24 was \$195,000 that we had already accepted in our
25 initial review of the invoices. And based on this

1 information, it's quite possible that we shouldn't have
2 accepted that. But in fact we did.

3 We have -- if you look at Exhibit B, Bates
4 stamp 65, that is our memo that explains how we went
5 out afterwards and contacted the individuals that were
6 associated with the customers and the results from
7 that.

8 I would also refer you to Exhibit A, page 12.
9 And the date at the bottom, the entry at the bottom,
10 which is July 9th, 2015. If you look at the second to
11 last sentence of that entry -- and they're talking to
12 Lily Novoa.

13 She's -- this -- it states, "The auditor asked
14 her about resale information. She mentioned the resale
15 should not be material for the business."

16 So she's indicating that they do not have a
17 material amount of resale transactions.

18 In regards to the failure to file penalty.
19 There was -- the fourth quarter of 2014 was not filed
20 timely. The return was due January 31st, 2015. The
21 fire took place after the return was due and therefore
22 that penalty remained.

23 The first quarter of 2015 return was also not
24 filed timely. But due to the fire, the department did
25 remove that failure to file penalty.

1 So, accordingly, I'm available for any
2 questions.

3 ALJ KWEE: I have a question. It looks like
4 one of your decisions indicates this audit was referred
5 from the investigation bureau. And I guess I was
6 curious about that.

7 Was there evidence that they were using sales
8 suppression devices or software in this case?

9 MR. LAMBERT: Other than the complaint that was
10 made, we don't have any evidence. And I would point
11 out before we were able to look at the computers, they
12 were destroyed.

13 So we never had an opportunity to review that.

14 ALJ KWEE: Okay. So this case doesn't involve
15 any criminal charges or anything like that?

16 MR. LAMBERT: That's correct.

17 ALJ KWEE: Okay.

18 MR. LAMBERT: It does not. This is a civil
19 matter.

20 ALJ KWEE: I did have a question for the
21 taxpayers.

22 Are you the president of the corporation?

23 MR. NAHMIAS: Yes.

24 ALJ KWEE: So then in the decision and
25 recommendation or the decision on the Exhibit F for

1 CDTFA it states that an investor in the business stated
2 that petitioner's president was making and subsequently
3 deleting sales from the firm's point of sale system to
4 underreport taxable sales.

5 And I'm just wondering if you could briefly
6 address that or if you have a response to that
7 contention.

8 MR. LAMBERT: Lily Novoa was my partner
9 effective April 27, 2012. She joined the company on
10 that date. And since the first few months, we both
11 realized it was a bad partnership. And it was going
12 downhill since that day.

13 I was trying to run a business with, you know,
14 a lot of wholesalers and designers that bought stuff
15 from us. It wasn't the majority retail. It was more
16 of a wholesale and a designer place in Walnut Creek
17 right on the main -- Mt. Diablo Boulevard.

18 So it was a really small little hole in the
19 wall pretty much, a thousand square feet. So it
20 wasn't, you know, a big exposure to clients. So we
21 dealt with a lot of designers.

22 And Lily Novoa, I found out probably five
23 months through the audit that she actually did call in
24 I guess the complaint just out of spite of the
25 partnership.

1 And yeah, it was real bad. It was -- it was --
2 yeah, it was an eye opener for me. It was an
3 experience I'll never want to remember. It was just a
4 horrible three and a half years that we were together.

5 As far as for the invoice that you said were
6 the taxable, we used a QuickBooks program. And on some
7 occasions if it's not checked out, the T by the dollar
8 amount, it will show taxable or non-taxable.

9 But when it's a wholesale like Coliseum or La
10 Castellan or another company, there's a bracket on the
11 bottom that shows no sales tax, because it's a resale.
12 So it doesn't matter whether the T if it's there for
13 tax or non-tax. It's irrelevant.

14 With the QuickBooks, if we have a resale
15 number, you enter it under non-taxable. That's why
16 there's no tax on that invoice. So the T, it's
17 probably just -- it was checked by accident or checked
18 off by accident. I'm not too sure.

19 And one more thing. Lily Novoa, throughout the
20 whole partnership used to take the computers home with
21 her and bring them back on Monday. I'm not sure what
22 she did. You know, I texted her, I called her, you
23 know.

24 Every Monday she'd go there in a timely manner
25 to open the shop and she's not there till like 1, 2

1 o'clock with the computers. So I'm not sure exactly
2 what she did with the invoicing or the sales tax.

3 She's the one that actually did do the sales
4 tax online when we actually paid the stuff quarterly.
5 So she's the one that filed the stuff off the
6 QuickBooks, taxable, what to do. And that's how we
7 paid the sales tax.

8 So whatever the amounts they have over there,
9 I'm not sure how they came up with. From her
10 paperwork, I'm not sure. Because I gave the Board of
11 Equalization my tax returns, my personal tax returns,
12 and the business.

13 So the amount of money they're talking about
14 doesn't make sense as far as for sales tax and money
15 that we made. So yeah. So, you know, like I said, I'm
16 not sure what Lily did with the business, with the
17 computers while, you know, she had them in her
18 possession over the weekends.

19 And like I said there's an employee over here
20 with me, Shamra Reed. She witnessed what's going on
21 for the past three years. And, you know, if you want
22 to ask questions, you're more than welcome. But that's
23 what happened.

24 And as far as for their numbers, the only thing
25 that I do know that we owe is that last quarter prior

1 to the fire. It was during the holidays, the last
2 quarter. Business was very slow and Lily Novoa was
3 withdrawing all the money out prior to the holidays.
4 So as far as for the sales tax for that fourth quarter,
5 I know the company does owe it.

6 And for the first -- the first for 2013 -- oh,
7 no, 2000 -- right after the fire, that first quarter,
8 yeah, nothing was filed because everything was burned.
9 I couldn't figure out what's owed and what's not owed.

10 So the same, you know, when I did my taxes, my
11 federal and state, I gave them all the paperwork and
12 they just zeroed it out for, you know, no earnings at
13 all for that first quarter.

14 ALJ KWEE: Okay. One more question.

15 So it looks like the fire was in February '15
16 and the close-out of the corporation was also in
17 February of '15. Did the business close out because of
18 the fire or terminate business because of the fire?

19 MR. NAHMIAS: Yeah. We closed the business
20 after the fire. It would cost -- I mean it would take
21 almost six months to relocate to find a new place. And
22 I just didn't want to stay in that same partnership so
23 we just dissolved everything.

24 ALJ KWEE: Quick question for CDTFA.

25 Has there been any 6829 responsible person

1 billing in this case?

2 MR. LAMBERT: Not that I'm aware of.

3 ALJ KWEE: Okay. I don't think I have any
4 further questions. Thank you.

5 ALJ VASSIGH: I have no questions.

6 ALJ ANJEJA: For the benefit of the court
7 reporter, the name that we're referring to, Lily Novoa,
8 L-i-l-y, last name is N-o-v-o-a. Is that correct?

9 MR. NAHMIAS: Yes.

10 ALJ ANJEJA: Okay. 'Cause we're all saying it
11 very quickly so I want to make sure.

12 I don't believe that I have any additional
13 questions. I haven't given you the opportunity do a
14 rebuttal, but it seems like you gave one in the answer
15 to his question.

16 But that said, I want to make sure you get the
17 last word and have a five-minute rebuttal, if you'd
18 like, before we close the record.

19 MR. NAHMIAS: As far as I would say that CDTEFA
20 has the paperwork that I sent over which shows that
21 she's 50 percent owner of the property. And, you know,
22 how come she's not involved in the whole audit and the
23 hearing as well?

24 MS. REED: And who made the complaint. Did
25 Lily make the complaint?

1 MR. NAHMIAS: Yes.

2 ALJ ANJEJA: We need to -- one at a time and we
3 need to have you speak into the microphone.

4 MS. REED: I wanted to know who made the
5 complaint. And where is Lily. Because everyday that
6 she would come in, she would come in late. She wasn't
7 working. She was stressing out about money. She made
8 lots of threats. She was violent towards Avi.

9 And she was a new owner. She really had --
10 she'd never been in the tile business before. I
11 believe she has her contractor's license, but didn't
12 know how to figure out square footage.

13 ALJ ANJEJA: So I'll sort of answer on your
14 behalf. You've already identified Ms. Novoa as the
15 complainant, correct?

16 MR. LAMBERT: That's correct.

17 ALJ ANJEJA: That was the tip that you got.

18 MR. LAMBERT: That's right.

19 ALJ ANJEJA: I can't speak for Ms. Novoa, but
20 the billing that they've issued is to the corporation
21 rather than to an individual. So you're representing
22 the corporation.

23 I would say she's got the same right to be here
24 as you do, but it's your company. So presumably if the
25 partnership's terminated, she's out of the picture.

1 But they haven't issued a determination against
2 her as an individual. So that's my speculation as to
3 why she's not here.

4 MS. REED: So she wouldn't be responsible for
5 50 percent of what went on? Or -- I'm kind of
6 confused. Because if she was part partner, I mean --

7 ALJ ANJEJA: Right now, with what they have
8 said, is that they've not issued an individual billing
9 to anybody for this case. It's only as to the
10 corporation. So not only not as to her, but not as to
11 you.

12 Okay. Did you have more for rebuttal? You had
13 that question.

14 MR. NAHMIAS: No. Pretty much, you know, like
15 I said before, he has all the business income tax and
16 federal tax, my personal taxes that shows that the
17 place was not making any money, losing money on a
18 monthly basis. Barely making ends meet.

19 So yeah, so this figure that he's talking
20 about, you know, 1.2, it just doesn't make sense to me
21 at all.

22 And, you know, like I said, I'm not sure what
23 the numbers, you know, Lily gave them an indication
24 with the -- with this outrageous sales tax -- I mean
25 the sales, it just doesn't -- doesn't make sense.

1 ALJ ANJEJA: Okay. If there's no questions
2 from my panel --

3 ALJ VASSIGH: No questions.

4 ALJ ANJEJA: I think then that we will close
5 the record and we will conclude this hearing.

6 I'd like to thank each party for coming in
7 today. Following this hearing, my co-panelists and I
8 will discuss the evidence and argument and then we will
9 issue a written opinion within 100 days.

10 Thank you. And this hearing is now closed.

11 MR. LAMBERT: Thank you.

12 (The proceedings concluded at 11:32 a.m.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, PEGGY A. PORTER, do hereby certify:

That the said proceeding was taken before me at the said time and place, and was taken down in shorthand writing by me;

That I am a Certified Shorthand Reporter of the State of California;

That the said proceeding was thereafter, under my direction, transcribed into computer-assisted transcription; and that the foregoing transcript constitutes a full, true, and correct report of the proceedings which then and there took place; that I am a disinterested person to the said action.

IN WITNESS WHEREOF, I have hereunto subscribed my hand this 7th day of November 2019.

PEGGY A. PORTER, CSR 6086