

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
ERAN DRORI,) OTA NO. 18053245
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Van Nuys, California

Tuesday, October 29, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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STATE OF CALIFORNIA

IN THE MATTER OF THE OF,)
ERAN DRORI,) OTA NO. 18053245
APPELLANT.)
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Transcript of Proceedings, taken at
6150 Van Nuys Blvd., Van Nuys, California, 91401,
commencing at 10:00 a.m. and concluding
at 11:20 a.m. on Tuesday, October 29, 2019,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

1 APPEARANCES:
2
3 Panel Lead: Hon. JEFF ANGEJA
4
5 Panel Members: Hon. SUZANNE BROWN
6 Hon. ANDREW KWEE
7
8 For the Appellant: GARY M. SLAVETT
9
10 For the Respondent: STATE OF CALIFORNIA
11 DEPARTMENT OF TAX and
12 FEE ADMINISTRATION
13 By: CHAD BACCHUS
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I N D E X

OPENING STATEMENT

PAGE

Mr. Slavett

9

Mr. Bacchus

41

DEPARTMENT'S
WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

(None offered)

APPELLANT'S
WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

Robert Malina

19

Eran Drori

24

E X H I B I T S

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

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

CLOSING STATEMENT

PAGE

Mr. Slavett

55

1 Van Nuys, California; Tuesday, October 29, 2019

2 10:00 a.m.

3

4 JUDGE ANGEJA: Let's go on the record.

5 We're now on the record in the Office of Tax

6 Appeals oral hearing for the appeal of Eran Drori. The

7 Case ID is 18053245. We are in Van Nuys, California. The

8 date is Tuesday, October 29th, and it's approximately

9 10:00 a.m.

10 My name is Jeff Angeja, and I'll be the lead

11 Administrative Law Judge for this hearing. My fellow

12 co-panelists today are Andrew Kwee and Suzanne Brown.

13 And Appellants, can I get you to identify

14 yourselves for the record.

15 MR. SLAVETT: Gary Slavett, Counsel for

16 Appellant, Eran Drori.

17 MR. DRORI: Eran Drori.

18 MR. MALINA: Robert Malina.

19 JUDGE ANGEJA: All right. Thank you.

20 And for CDTFA.

21 MR. BACCHUS: Chad Bacchus.

22 MR. SMITH: Steve Smith.

23 JUDGE ANGEJA: That should be on. If not, we may

24 have to share.

25 MS. RENATI: And Lisa Renati.

1 JUDGE ANGEJA: All right. And this is a good
2 opportunity for me to remind everybody, please speak
3 directly into these microphones and slowly enough so we
4 can have everything heard by the court reporter.

5 So this appeal involves two issues, which are:
6 Whether the Notice of Determination issued to Appellant
7 was barred by the statute of limitations; and, whether
8 Appellant is personally responsible under Revenue and
9 Taxation Code, Section 6829 for PD Financial's unpaid
10 liabilities for the period of April 1, 2009, through
11 June 30th, 2009, basically, the second quarter.

12 I realize the NOD was for a broader period of
13 time, but an amended return has eliminated that. So we're
14 talking about one quarter.

15 And is that correct, or am I missing anything for
16 the issues?

17 MR. SLAVETT: That's correct, Your Honor.

18 JUDGE ANGEJA: During the prehearing conference,
19 the parties agreed to the admission into evidence of
20 Appellant's Exhibits 1 through 3. This was provided -- I
21 think it's already in the record.

22 MR. SLAVETT: I thought it was. I do not believe
23 it is in the record. That is simply the 3rd sales tax
24 return that I don't believe is in the record.

25 JUDGE ANGEJA: Is it part of your exhibits,

1 CDTFA?

2 MR. BACCHUS: I'm not entirely sure. It might be
3 part of the duel packet. I can check.

4 JUDGE ANGEJA: Well, let's mark it Exhibit 4.
5 And if there's no objections, we'll admit Appellant's
6 Exhibits 1 through 4.

7 MR. BACCHUS: No objections.

8 (Appellant's Exhibits 1-4 were received
9 in evidence by the administrative Law Judge.)

10 JUDGE ANGEJA: And CDTFA had Exhibits A through L
11 with the revised exhibit list that was added. I don't
12 believe there's any objection to the admission of those
13 exhibits?

14 MR. SLAVETT: No objections.

15 JUDGE ANGEJA: All right. Then I hereby admit
16 those exhibits, CDTFA's A through L.

17 (Department's Exhibits A-L were received in
18 evidence by the Administrative Law Judge.)

19 JUDGE ANGEJA: And based on the prehearing
20 conference, it's my understanding that both Mr. Drori and
21 Mr. Malina will testify as witnesses today. All right.
22 I'll swear them in in a minute.

23 And then during the prehearing conference, it was
24 agreed that we would begin with Appellant's testimony and
25 argument, not to exceed 40 minutes. CDTFA as well as the

1 judges can ask questions if they wish. And then CDTFA
2 would make its presentation, not to exceed 30 minutes.
3 Co-panelists can ask questions. And then Appellant has a
4 10-minute rebuttal.

5 Does anybody have any questions on the process
6 before we start?

7 MR. SLAVETT: No, Your Honor.

8 JUDGE ANGEJA: All right. Okay. I can swear you
9 both in . If you both would please stand and raise your
10 right hand. And then I'll turn it over to you to begin
11 your presentation.

12

13

14 ERAN DRORI,

15 produced as a witness, and having been first duly sworn by
16 the Administrative Law Judge, was examined and testified
17 as follows:

18

19 ROBERT MALINA,

20 produced as a witness, and having been first duly sworn by
21 the Administrative Law Judge, was examined and testified
22 as follows:

23

24 JUDGE ANGEJA: All right. Thank you.

25 Mr. Slavett, go ahead and begin when you're

1 ready.

2 MR. SLAVETT: Thank you, Your Honor.

3

4 OPENING STATEMENT

5 MR. SLAVETT: As you're aware, the issue
6 indicates is whether Mr. Drori is personally responsible
7 for this sales tax liability of PD Financial Corp for the
8 second quarter of 2009. PD Financial, also known as Peach
9 Direct, sold electronic goods to consumers that made
10 purchase on credit.

11 The corporation was large, had over \$200 million
12 in revenue. It had dozens and dozens of employees,
13 multiple departments, different job functions. Mr. Drori
14 was the CEO. Mr. Malina was the president and secretary.
15 And Dan Grant was the CFO. The payables were managed by
16 the CFO, Daniel Grant and its finance staff of seven
17 individuals. Sales tax matters were also handled by CFO
18 Daniel Grant and his staff.

19 In fact, all communications with the CDTFA was
20 clearly with CFO Dan Grant and his staff as reflected in
21 the exhibits and the ACMS call logs with the Department.
22 The corporation ceased operation in October 2009 due to
23 issues with the finance company. It was after the company
24 ceased operations that CFO Daniel Grant advised Mr. Malina
25 and Mr. Drori that there was substantial amount of unpaid

1 tax liabilities, including sales tax liabilities.

2 The first issue are procedural issues, Your
3 Honors. It's whether that the CDTFA issued the Notice of
4 Determination under 6829(f) in a timely manner. They
5 initially issued the -- they did issue the notice to
6 Mr. Malina in April of 2013. They claimed to have also
7 issued one to Mr. Malina, however, they mailed it to the
8 incorrect address. And the Board has subsequently dropped
9 that appeal based on the fact that there was an error in
10 the improper mailing of their notice.

11 So here under 6829(f), the CDTFA has three years
12 from the last date of the calendar month following the
13 quarterly period in which the Board obtains actual
14 knowledge of termination, dissolution, or abandonment of
15 the corporation. That's a mouthful. But what that means
16 is here there's no dispute that the business activities
17 terminated on October 30, 2009.

18 The dispute is whether the Board had knowledge of
19 the termination in the last quarter, the 4th quarter of
20 2009. If they had actual knowledge in the last quarter of
21 2009, the last day to issue the notice would be
22 January 31st, of 2010. And if that is true, which we
23 believe is true, the notice is late. The Board contends
24 that they have actual knowledge early January,
25 mid-January. Which luckily for them, under their theory,

1 gives them another quarter and gives them until April
2 30th, 2010 to issue the notice.

3 And lo and behold, they issued the notice on
4 April 26, 2010, four days -- approximately four days
5 before they claim the statute ran. However, it was over
6 three-and-a-half months -- two-and-a-half-months after the
7 statute ran. And lo and behold, in their rush they mailed
8 it to the wrong address. And lucky for Mr. Malina he's no
9 longer on the hook for this -- potentially on the hook for
10 this.

11 I want to bring your attention to an exhibit,
12 Exhibit 1. Exhibit 1 is a -- this is a memo from Board
13 Specialist Rita Lopez responding to Henry Chen's questions
14 of tax counsel and appeals. And under paragraph
15 Number 3 -- question Number 3, the second paragraph under
16 3, she states, "Additional research was conducted on PD
17 Financial Corp's ER STF093-080656 Account. ACMS notes
18 show that on 12/16/2009, Daniel Grant informed Special
19 Taxes and Fees representative, A. Sabile, that Peach
20 Direct ceased operations on October 31, 2009."

21 So there's the knowledge. The Board will try to,
22 I believe, try to distinguish that. And there were some
23 statements that's -- that's -- maybe Daniel Grant said
24 something different. Maybe he said there were some other
25 activity other than Peachtree -- I'm sorry -- other than

1 Peach Direct.

2 But PD Financial had no other activities other
3 than this Peach Direct. Peachtree Direct was their trade
4 name as well as Venue. It was all one activity. And so
5 clearly right there in the Board's -- in a memorandum from
6 the Board under her research, she identifies 12/16/2009 as
7 the date the Board had knowledge. Therefore, the notice
8 is late.

9 We can look to Exhibit 2. Exhibit 2 has a second
10 Exhibit 2 because Exhibit 2 is a memo from Rita Lopez that
11 she attached to her own Exhibit 2 to that. So it may be a
12 little confusing. But when you look to Exhibit 2 of
13 Exhibit 2, the 4th page in, this is also ACMS notes dated
14 11/13/2009. Now, this is about a month prior to
15 December 16th, 2009. ACMS notes show Board Representative
16 A. Sabile called VP Finance Shiva Bahrami on 11/13/2009.

17 The notes read, "Called and spoke to Shiva
18 regarding possible payment on their account. She told me
19 that Peachtree Direct is closing business operations in a
20 week and have laid off all of their employees."

21 Consistent with the 12/16/09 call to Dan Grant. Also
22 on -- in that exhibit on November 18, 2009, also a month
23 before the 12/16/09, A. Sabile spoke to Shiva Bahrami
24 again.

25 Notes read, "Spoke to Shiva to get updates and

1 additional information for Peachtree. Gave -- Shiva gave
2 same info that business is closing down and currently they
3 are receiving calls from other creditors demanding
4 payments. I asked her if PD Financial Corp have any other
5 business ventures aside from Peach Direct, and she said
6 there's no other business operations for PD Financial
7 Corp."

8 Clear indication of knowledge. On
9 November 24, 2009, the notes say, "Received levy response
10 from Bank of America Merchant Services with merchant
11 processing account already closed." The merchant
12 processing account was closed. More indication that this
13 is just adding up, adding up, adding up to the indication
14 the Board had actual knowledge of the ceased operation.

15 On 12/07/2009 in the notes, A. Sabile tried to
16 call Shiva Bahrami to get an update on the account. But
17 now the phone is disconnected. Okay. Consistent with
18 then her trying to reach out to an officer or somebody
19 else. That's when she reached out to Daniel Grant on
20 12/16. I believe she sent a letter to him at his home.
21 Why? Because the business was no longer operating
22 anymore, and she couldn't contact anybody. She sends a
23 letter to Daniel Grant at his home. This is all in the
24 record.

25 And he calls -- he call her, Shiva, to say I'm

1 sorry -- Sabile and says what's this about? And in that
2 conversation he says the business is no longer operating.

3 And so based on these contacts, it's clear the
4 Board had actual knowledge that the business terminated
5 operations on or before December 16th, 2009. Therefore,
6 the notice is issued outside the statute of limitations.
7 On the second -- and we will get testimony from the
8 individuals on this. I think the testimony is not overly
9 necessary for the first issue because it's all in the
10 Board's records of ACMS notes.

11 Okay. So the second issue is whether Mr. Drori
12 is personally responsible under 6829. As you know there's
13 four elements to -- for him to be responsible. As I think
14 Your Honor mentioned, the first two are not in dispute in
15 that the corporation business has been terminated.
16 Everybody agrees it was terminated on October 30th, 2009.
17 Again, the dispute is when -- going back to the first
18 issue -- when they received the actual notice of that.
19 But there's no dispute October 30, 2009 is when business
20 terminated.

21 The second element is also not in dispute.
22 That's just a technical rule that the corporation
23 collected sales tax reimbursements on its sales of
24 tangible personal property and failed to remit the tax.

25 So what's the remaining two issues, right? It's

1 that Mr. Drori did not have control or supervision of and
2 was not charged with responsibility for filing the returns
3 or payment of tax, nor did otherwise have a duty to act on
4 the corp -- for the corporation complying with sales and
5 use tax. And there will be testimony to this as well that
6 Mr. Drori was not responsible for the sales tax. Rather,
7 Dan Grant the CFO of this large corporation was
8 responsible and his staff.

9 Further, he did not -- Mr. Drori did not sign any
10 tax returns. He did not review or prepare any of the tax
11 returns. You'll see in the record the second quarter is
12 signed by William Chao who was the controller at the time,
13 who worked under the CFO, Daniel Grant. The 3rd, which we
14 just added to the exhibits also shows that an individual
15 Ty Reaber took over -- was also working under Dan Grant,
16 took over some functions, and he signed the 3rd.

17 And why is Ty Reaber relevant? Ty Reaber has a
18 declaration in Exhibit Number 3, which is in the record. I
19 won't go over it too much because the -- Your Honors can
20 read that. But it explains the duties of Daniel Grant and
21 his staff and the lack of responsibility for Mr. Drori and
22 Mr. Malina. The Board tries to discount Ty Reaber mainly
23 because his title in this declaration, the Board believes
24 that he would not have specific knowledge of this.
25 However, it's clear Ty Reaber does have knowledge. In

1 fact, he signed the 3rd return set forth in Exhibit 4, the
2 sales tax return.

3 So he clearly has hands-on experience. He signed
4 the return. So any claim by the Board that Ty wouldn't
5 know, Ty made a statement that in the declaration that the
6 only time the checks went to Malina or Drori is when there
7 was two signatures needed on those checks. The Board
8 tries to discount that because there was some testimony
9 that in 2008 two signatures were no longer needed anymore.

10 So how is that relevant? I think it's unclear if
11 that's true. But I don't think there's any relevance to
12 that and argument by the Board. So his declaration speaks
13 for itself. It's under penalty of perjury. The Board does
14 their questionnaires of different people during their
15 investigation, and I find it interesting when we look at
16 Form BOE 1509. They are in under Exhibit B. There's many
17 of them, maybe dozens of them even.

18 And question number five is the one asking who is
19 responsible and everybody is pointing to different --
20 there's inconsistency. Some point to Malina. Some point
21 to Drori. Some point to Shiva Bahrami who is the finance
22 person, and some point to Daniel Grant. But interesting
23 thing, the question in question number five, and I think
24 it's very important to read this question.

25 It says, "Provide the name, address, and

1 telephone number of any officer, manager, member, or
2 person who had control, supervision, responsibility, or
3 duty to act for the business in sales and use tax matters
4 when the business was terminated." Was terminated. Was
5 terminated. When it was terminated, no employees were
6 there anymore. And sure, everybody is going to say
7 Mr. Drori and Mr. Malina. They're the ones left standing.

8 And so -- and I think I picked that up when I --
9 when one of the answers said, "At termination. I don't
10 know." Okay. And so I think this question is written --
11 if I don't know what the intent of the question is -- but
12 at termination, I don't think there's a dispute at
13 termination of the business there's two people left
14 standing there. Okay. So the reliability of these
15 statements, which is everything the government is basing
16 their case on has flaws, severely flawed.

17 And for the second -- the fourth element of the
18 6829 is willfulness. Now, we all know this is not a
19 willfulness -- criminal willfulness standard,
20 unfortunately. It's more like a negligence in my opinion,
21 it look like. But in any event, just because Mr. Drori is
22 an officer, clearly, does not make him a responsible
23 person. I think it's in the manual. It's in the law. And
24 I think that the government is relying on the fact that
25 he's an officer, therefore, he's responsible.

1 The testimony will show, and the record shows
2 that he did not -- Mr. Drori did not learn about the
3 unpaid taxes until after the business ceased operations.
4 When did it cease operations? October 30th, approximately
5 2009. Sometime after that, Mr. Drori learned about this,
6 and at that point it was too late to do anything about it.

7 And you'll see, you know, testimony or statements
8 that Mr. Grant when -- excuse me one second -- when asked
9 about who to pay William Chao, who was the controller,
10 made a statement somewhere in here that he went to Daniel
11 Grant. He's like, "Who do we pay? We're low on money, I
12 believe." And he claims that Daniel Grant said, "I need
13 to go talk to Mr. Drori and Mr. Malina."

14 Mr. Grant then came back and told Mr. Chao that
15 they were going to payroll, payroll taxes, and sales
16 taxes. And Mr. Chao seems to indicate that he believes
17 that Daniel Grant got those instructions from Mr. Drori
18 and Mr. Malina. We do not believe that can be an accurate
19 reflection of what happened. At no time did Mr. Grant go
20 to Mr. Malina and Mr. Drori and asked those questions.

21 In fact, there were some issues with Mr. Grant.
22 There's some embezzlement issues. He was taking some
23 money from the company. There was a note repayment that
24 he got stuck to it and was attempting to pay it back. So
25 we're not sure about his credibility. He's pointing the

1 finger at these two guys. Why? Because he -- the Board
2 was looking at him. Okay. He was a potential responsible
3 personal.

4 In fact, he is the responsible person. He is the
5 CFO. This is a large company. He had a staff of seven,
6 and he should have paid the sales tax, or he should have
7 brought to the attention of somebody that believed they
8 could not be paid.

9 And at this time I think I would like to call a
10 witness.

11 JUDGE ANGEJA: Okay. Sure.

12 MR. SLAVETT: Okay. I call Mr. Bob Malina first.

13 JUDGE ANGEJA: And you're already under oath.
14 Just please speak into the microphone.

15 MR. MALINA: Okay.

16

17 DIRECT EXAMINATION

18 BY MR. SLAVETT:

19 Q Mr. Malina, tell me what was your role with PD
20 Financial?

21 A Technically, I was the president of the company
22 and the secretary of the company. Most of my
23 responsibilities dealt with business development and
24 relationship between the company and its lenders and
25 investors and venders.

1 Q Tell us a little bit about the company?

2 A The company was a -- we were a significant
3 operator in the business of offering a wide range of
4 merchandise, principally, electronics -- consumer
5 electronics with a very strong bias towards providing
6 financing for individuals who might have difficulty
7 otherwise being able to afford these kinds of consumer
8 goods.

9 We functioned over the years -- probably, the
10 company did 2 to \$300 million in revenue. We were
11 financed by a number of major institutions, by HSBC, by GE
12 Money Bank. Ultimately, during the period of time that's
13 relevant here by ABS, a subsidiary of ABS World Financial
14 Bank.

15 And we functioned principally over the Internet,
16 we would take orders over by telephone and online. And
17 that was essentially the business we were in.

18 Q And what was the structure of the departments?

19 A We had a very substantial overhead and a very
20 substantial number of personnel. And, again, the relevant
21 issue here has to do with our finance operation. And our
22 finance operation was headed by CFO Dan Grant. He had a
23 staff of maybe six or seven below him. We had a financial
24 vice president. We had a controller. We had a number of
25 clerks and others that were performing those services.

1 And we were relied upon Dan. The fact that we
2 relied upon Dan ultimately turned out to be a substantial
3 error. Because the fact was that over a period of time
4 without our knowledge, in fact, he managed to appropriate
5 for himself close to \$800,000 of the company's funds.

6 But the reality was that happened in large
7 because Dan ran a completely independent operation. We
8 relied upon him. We relied upon his staff that we didn't
9 get involved in the normal course with any of the kind of
10 daily and monthly and quarterly routines, including issues
11 with regard to sales tax.

12 We were a company that -- we took these
13 obligations seriously. The company was audited during
14 that period of time by Price Waterhouse. Dan had come out
15 of a large accounting firm, and we were confident that he
16 was doing what needed to be done to protect us.

17 Q And do you have any -- did you or Mr. Drori have
18 any responsibility with the sales taxes?

19 A It depends on what you mean by responsibility. I
20 mean the -- if you're asking whether we were involved in
21 that process, the answer is absolutely not. We looked to
22 Dan and his staff to deal with that. We didn't sign the
23 returns. We didn't review the returns. That was all done
24 by Dan and his staff.

25 Q At some point did you and Mr. Drori become aware

1 that there was a sales tax issue?

2 A The answer is yes. We became aware of that
3 subsequent to the point at which the company had basically
4 ceased operations. And I think it's relevant if you think
5 of it in terms of the posture that we had it; that it
6 turns out we're talking about the second quarter of 2009,
7 but 3rd was paid.

8 The reality is we had no reason to believe that
9 there was a -- any kind of a prior omission in terms of
10 sales tax obligations. We learned about it at a point in
11 time the company no longer had the funds to deal with it.

12 Q Okay. So there's a statement from William Chao.
13 I think I talked about it a little bit earlier. That
14 sometime before the filing of the second quarter return,
15 which was signed on July 29, 2009, the controller -- this
16 is a statement that said -- that the controller said that
17 he had -- that controller, Mr. Chao, asked CFO Grant how
18 much to pay before filing the second quarter 2009 sales
19 tax return.

20 CFO Grant, according to Chao, responded that he
21 needed to first discuss it with you and Mr. Drori. And
22 that he then came back and told the controller that the
23 priority payments would be first to payroll, second to
24 payroll tax, and third to sales taxes.

25 Do you recall -- here's the question. Do you

1 recall Mr. Grant coming to you at that time and asking you
2 to pay, what to pay, and how to pay, or priority of
3 payments?

4 A I do not.

5 Q You don't recall, or you don't believe that
6 happened?

7 A No. I do not believe that happened. I do not
8 recall, and I don't believe that it happened. It would
9 have been entirely out of character for Dan to be dealing
10 with us with those kinds of issues.

11 Q Okay. And tell me a little bit about Ty Reaber?

12 A Ty was a very longstanding employee of the
13 company. He rose from being -- I think, recently hired --
14 I'm not sure what the title was -- I believe as a clerk in
15 the accounting group. He ultimately ended up becoming the
16 controller of the company.

17 He certainly had access to and kind of an insight
18 on all of the operations of the accounting group. And
19 when this issue arose -- because it was inconsistent with
20 our understanding and our record and of how the company
21 had operated -- we we want to Ty to ask for that
22 declaration.

23 Q And who is Shiva Bahrami?

24 A Shiva was the vice president of finance. She
25 worked for Dan Grant.

1 Q And who was William Chao?

2 A He was -- during this period of time prior to Ty
3 becoming the controller, he was the controller who worked
4 for Shiva. And Shiva in turn worked for Dan.

5 Q Do you have anything you'd like to add?

6 A I don't think so at this point, no.

7 MR. SLAVETT: Okay. I'd like to call the next
8 witness, Mr. Drori.

9 JUDGE ANGEJA: Go ahead.

10

11 DIRECT EXAMINATION

12 BY MR. SLAVETT:

13 Q Mr. Drori, tell me what what was your title with
14 PD Financial?

15 A Chief Executive Officer.

16 Q And what was your job function or job
17 responsibilities with PD Financial?

18 JUDGE ANGEJA: Please speak into the microphone.

19 THE WITNESS: Over all, the responsibility was
20 managing the corporation, including strategic
21 partnerships, financial marketing, and overall day-to-day
22 operation.

23 Q Do you have a responsibility and/or knowledge of
24 how the sales taxes were being reported?

25 A No.

1 Q Do you have any role in the sales taxes?

2 A No.

3 Q Whose responsibility in the company was it to
4 handle sales tax?

5 A CFO and a team of seven people that worked under
6 him at the time, qualified sales tax attorney. I'd like
7 to emphasize that for 20 quarters all taxes were paid on
8 time, both federal and state. And for best of my
9 knowledge until the company ceased operation, they were
10 all paid on time.

11 Q Okay. And I asked Mr. Malina a question
12 regarding a statement by Mr. Chao that Mr. Grant -- that
13 he believes that Mr. Grant went to you guys, you and
14 Mr. Malina, to ask the priority of certain payments of the
15 second quarter sales tax. Do you recall Mr. Grant asking
16 you what should be paid; what priority with respect to the
17 second quarter sales tax?

18 A No. I would like to emphasize the company at the
19 time generated nearly \$20 million a month in revenues,
20 headed in discretion of the CFO to prioritize payables on
21 a regular basis. This was never the case that such small
22 amounts, again, relative to the turn of the company would
23 come to my attention.

24 They were, basically, quarterly budget reviews.
25 And those quarterly budget reviews would typically sign

1 off on budget, but I was not involved in the day-to-day
2 disposition of payables to vendors or tax authorities.

3 JUDGE ANGEJA: Can I interrupt? Quarterly
4 budget -- what? I didn't get that last word.

5 THE WITNESS: There was a quarterly budget
6 review.

7 JUDGE ANGEJA: Okay.

8 THE WITNESS: And I was not involved in the daily
9 dispositions of cash to vendors or tax authorities. It
10 was handled by the accounting department. And I mention
11 again, that the company turned over nearly \$200 million a
12 year. The sales tax portion was a very small part of the
13 overall expense and, therefore, it was under the CFO
14 financial controller and accounting department to process
15 that on a regular basis.

16 BY MR. SLAVETT:

17 Q And do you believe the sales taxes were being
18 paid at all times?

19 A Yes.

20 Q And when did you learn that there was an issue
21 with the sales tax?

22 A About, probably, the first week or second week of
23 November -- I can't recall the specific date -- of 2009.
24 It was brought to my attention that all the sales tax were
25 paid through Q3. There was a leftover from Q2 that was

1 not paid. At the time the corporation was out of business
2 and out of resources.

3 Q I think there are some statements somewhere that
4 the -- in the appeals decision, that somehow you did
5 not have -- that you could not recall when you learned
6 about it. Is that accurate, or do you recall?

7 A I recall it happened, like I say, first week to
8 second week of November of 2009.

9 Q How do you know it was about that time?

10 A Because it was after the termination by the bank
11 partner of the financing agreement. That was the time
12 that we determined that the company ceased operation. And
13 we had a meeting, I recall that, to review where we are
14 at. And that was one of the topics that was brought up
15 based on my request and my question of where are we? Do
16 we have any outstanding issues?

17 And I was told that the sales tax initially were
18 paid through Q3. I was told that the payroll taxes were
19 paid or payroll were paid. But then later on it was
20 brought to my attention that there was a second quarter
21 amount that wasn't paid. And when I asked why, the people
22 said they believed it would be subject to offset due to
23 returns and cancelations, which is the reason why they
24 hadn't been paid for. That's what I was told.

25 Q Okay. Is there anything else you'd like to add?

1 A I'd like to add, yeah. So in our line of
2 business we would learn about cancelations sometimes 30
3 and 60 days after the facts. Those cancelations would
4 typically come from the bank partner. Customer would
5 request to close the account sometime 60 days after the
6 initial sales.

7 And in that case, our obligation to the bank
8 partner at the time was ADS, World Financial Capital Bank,
9 was to refund the customer's purchase. And at that point,
10 obviously, the sales tax. So since those things happened
11 in the rear, there were a lot of pending cancellations
12 that were in the pipeline. And I was told at the time
13 that the team believed that there would be enough
14 cancelations to offset 100 -- I don't remember the exact
15 amount -- thousands of dollars of sales tax.

16 Again, I would like to remind everyone that at
17 the time the volume that we generated was in the range of
18 \$20 million a month, and the sales tax portion for the
19 State of California was probably about 1 percent of that
20 turn over.

21 MR. SLAVETT: I have no further questions at this
22 time.

23 JUDGE ANGEJA: All right. Does that conclude
24 your presentation?

25 MR. SLAVETT: Yes.

1 JUDGE ANGEJA: So before I go any further, does
2 the Department have questions for these witnesses?

3 MR. BACCHUS: No, we do not.

4 JUDGE ANGEJA: All right. Does my panel have any
5 questions?

6 JUDGE KWEE: I did have one or two questions, I
7 think, for Mr. Malina the president. There was reference
8 that was mentioned that there was embezzlement by Dan
9 Grant. Was he fired for that?

10 MR. MALINA: The answer to that was ultimately he
11 left the company. He was not fired immediately because we
12 were in the mist of trying to raise capital. And the
13 prospect of raising capital with no CFO was problematic.
14 So what we did was we docked him the substantial equity
15 that he had and a variety of things in conjunction with
16 our outside counsel.

17 JUDGE KWEE: Okay. When did he end up leaving
18 the corporation?

19 MR. MALINA: When the company closed.

20 JUDGE KWEE: Okay. So that would have been in
21 October or November?

22 MR. MALINA: October of 2009.

23 JUDGE KWEE: Okay. When the embezzlement was
24 discovered, was there any additional oversight given to
25 this?

1 THE MALINA: The answer is yes. There was
2 oversight given, particularly, with respect to
3 instructions to Shiva who worked for him. The area in
4 which the embezzlement had taken place was basically his
5 taking advances. Wisely from his point of view because it
6 turns out not -- to avoid any criminal action, he actually
7 posted them on the books. And, ultimately, we think --
8 believe that it gave Price Waterhouse an erroneous
9 statement with regard to what activity had taken place in
10 the company's books.

11 So the answer is yes. There was substantial
12 oversight with regard to anything that he could take for
13 himself. It did not change because there had been no
14 indication that anything had gone wrong with respect to
15 how he was dealing with the company. It was only with
16 respect to self-dealing. And that was the area in which
17 we created substantial-additional oversight.

18 JUDGE KWEE: Okay. Shift gears a little. There
19 is some reference, I think, in the ACMS notes for PD
20 Financial for possible -- I'm not sure if there was a DBA
21 as Peachtree Direct?

22 MR. MALINA: Yeah. There's a -- of course, it's
23 difficult for us reading notes that were taken by a third
24 party from yet another third party'S statement. The
25 reality is that the way that is reflected is no way that

1 Dan ever would have talked about the company. The -- what
2 appears to be the case that somehow or other Dan is making
3 a distinction between Peach Direct's operations and PD
4 Financial.

5 What I think -- knowing what the reality is, I
6 think in fact what Dan was saying is PD Financial still
7 exist. It hasn't been terminated. We haven't, you know,
8 done anything to eliminate or end its corporate existence.
9 The company still exist.

10 But the reality is that the only function that
11 the company had, the only business that we were in, we had
12 no other subsidiaries. We had no other lines of business.
13 The only business we had was the Peach Direct/Venue
14 business. And he was clear in that statement in that
15 phone call that that, in fact, had already terminated.

16 Consistent also, by the way, with what Shiva had
17 been telling other representatives of the Board during the
18 period of about a month before that phone call. So the
19 answer is that Venue was a trade -- was a DBA. We had an
20 online website called venue.com. Peach Direct had been an
21 earlier -- the reason for PD. Peach Direct had been an
22 earlier brand name.

23 But the reality is that all of the company's
24 business terminated in October of 2009. The only thing
25 that remained was the corporate existence.

1 JUDGE KWEE: Okay. So the Venue was an online
2 DBA for PD Direct, but that also terminated; is that
3 correct?

4 MR. MALINA: That's correct. The company's
5 entire business terminated in October of 2009. And that,
6 in fact, is what Shiva specifically explained to the
7 people that had called her. Yes, we're out of business.
8 And, ultimately, when they tried to reach her, they
9 couldn't because the phone lines had been cut off.

10 JUDGE KWEE: Okay. I did have one question for
11 CDTFA. Did you want me to wait until their presentation
12 or -- as it related to this?

13 JUDGE ANGEJA: They might answer it in their
14 presentation but go ahead.

15 JUDGE KWEE: Okay. So I was just curious about
16 that ACMS note because -- from 2016 with the conversation
17 with Dan Grant. My understanding was the note, it
18 indicated that CDTFA had researched that the Venue was
19 still an active DBA for PD Financial, and so I was
20 confused about that. And it did indicate that a letter
21 was sent out.

22 So does CDTFA have any other evidence to indicate
23 what was discussed during that phone call? Or is all you
24 have is that ACMS note?

25 MR. BACCHUS: Essentially, what we have is that

1 ACMS note where after the phone call with Mr. Grant where
2 he indicates that PD -- or that Peach Direct ceased
3 operations but that the business was continuing as Venue.
4 That department employee, pursuant to our ACMS notes, did
5 some online research and found a venue.com, I believe, as
6 a viable website. And that's essentially what we have
7 from that -- from that phone call and that activity on
8 that date.

9 JUDGE KWEE: Okay.

10 MR. MALINA: Your Honor, may I add something?

11 JUDGE ANGEJA: Go ahead.

12 MR. MALINA: The note that he is referring to
13 said that the individual involved had done some additional
14 research and was able to confirm A, that the business was
15 still operating and B, still being financed by ADS. The
16 reality is -- you got it in in your evidence package. The
17 reality is that ADS formally terminated the relationship.

18 Technically -- formally and technically
19 terminated the relationship on November 11th long before
20 whatever that research was, if in fact, had been done. So
21 whatever the research was, it was clearly faulty since ADS
22 was no longer funding anything, and venue.com was no
23 longer in business.

24 JUDGE KWEE: Yeah. I was basically just trying
25 to understand what was -- if, in fact, that conversation

1 took place, I guess, the corporation pointed to that.
2 That's why I was just asking to see what evidence there
3 was. That's why I was asking that question. Thank you for
4 answering.

5 MR. SLAVETT: Maybe a point of clarification on
6 this issue.

7 JUDGE ANGEJA: Go ahead if you want to say
8 anything.

9 MR. SLAVETT: The reference to the website access
10 on November 13, 2009, it says, "Tried to access
11 www.peachtreedirect.com to get additional information.
12 Website declined to show their webpage." I'm not sure if
13 there was statements that she tried to access venue.com.

14 MR. BACCHUS: That what they said that was on the
15 ACMS note on December 16th, 2009.

16 JUDGE ANGEJA: So let me save that until you get
17 into your presentation so that we don't have it twice.

18 MR. SLAVETT: One more point of clarification?

19 JUDGE ANGEJA: Sure. Go ahead.

20 MR. SLAVETT: With respect to Daniel Grant in the
21 taking of the funds, Mr. Malina, is it my understanding
22 that there was some agreement for him to pay them back or
23 resolve that issue?

24 MR. MALINA: The answer is yes. There was both a
25 termination of all his equity in the company. There was a

1 settlement agreement that required him to make repayments.
2 And he did, in fact, had a compensation, began to repay
3 us. We had, in fact, anticipated the possibility of
4 criminal charges. But after consultation with counsel, we
5 were advised that was not appropriate.

6 JUDGE ANGEJA: Okay. Questions, Ms. Brown?

7 JUDGE BROWN: I just want to follow up a little
8 bit with Mr. Drori about his testimony that he did not
9 have any involvement in paying sales taxes or vendors.
10 What level of oversight would you say that you had in --
11 and what level of detail would you say you heard in the
12 meetings that you described regarding those kinds of
13 payments? Let's be specific, payment of sales taxes?

14 MR. DRORI: So anything that conceded were
15 payable payments, such as cost of goods sold. Sales tax
16 was handled directly by CFO and his team. Anything out of
17 the ordinary that would require my approval would consider
18 things that are not payable, such as new business, new
19 banker agreement, bonus to an employee. Things that are
20 part of normal day-to-day operation will not be managed by
21 me.

22 This is why we had a big team of accountants that
23 would process that. And I'm sure, Your Honor, you would
24 mention that any large corporation that has a CEO, I did
25 not believe the CEO is involved in the daily preparation

1 of accounts payable and sales tax returns. And same
2 applies here.

3 JUDGE BROWN: Were you presented with documents
4 that confirm to you that taxes had been paid? Did you see
5 it on the list each month or each quarter?

6 MR. DRORI: I would not get every day or once a
7 week, but I would be presented once a quarter with a
8 financial statement that suggest that all taxes were paid.
9 Typically done in the rear. You get typically a month and
10 a half after close of quarter. So in the case of Q3, I
11 would typically see that by, let's say, middle of
12 November, which is 45 days after closing of a quarter.

13 JUDGE BROWN: So in 2009, if we're looking at,
14 say, the second quarter of 2009, you'd be in the third of
15 2009 when you would have received that financial
16 statement?

17 MR. DRORI: That's correct.

18 JUDGE BROWN: So do we remember anything about
19 what happened during that period?

20 MR. DRORI: No one ever reported to me that there
21 is unpaid taxes at the time. It was simply part of
22 quarterly statement and only show here is what is paid,
23 but it does not show what is not paid. I get to see a
24 balance sheet. I get to see a P&L. And the balance
25 sheet, it typically would show me if there is any

1 reserved, let's say, funds or payroll taxes or sales tax.
2 In the normal course, all I would see is basically one
3 item -- one line item on a balance sheet that says,
4 "Reserve."

5 And at that time, I was never reported that there
6 is a missing payment. In fact, there was a payment, as
7 much as I recall, in Q3. I believe in Q3 payroll taxes
8 were paid in full. So I found it a little bizarre that
9 after the corporation ceased doing business, we found that
10 there is an unpaid balance for Q2 when I was reported that
11 Q3 was paid. So I'm not sure exactly how that happened.

12 JUDGE BROWN: I think that's all I have at this
13 time.

14 JUDGE ANGEJA: I didn't mean to not give the
15 microphone to my colleague. I didn't want to drag it past
16 my computer, but then I saw the court reporter's looks.
17 So I will be giving the microphone from now on.

18 I just have two quick -- go ahead.

19 JUDGE KWEE: Before you move onto them, I was
20 going to ask one more question for the taxpayer since you
21 had submitted that return as an exhibit. I was just
22 wondering is there any dispute with respect to how the
23 liability was calculated, or are you only disputing the
24 elements of 6829?

25 MR. SLAVETT: Just the elements. But are you

1 asking why the third tax return was submitted?

2 JUDGE KWEE: I guess I was just wondering if
3 there was a dispute with that?

4 MR. SLAVETT: No. The reason is -- just to
5 clarify, the reason why it was submitted is the Board had
6 somewhere stated that Ty Reaber wasn't -- his job function
7 was not involved in sales tax. The third shows that he
8 signed that return.

9 JUDGE KWEE: Okay. Understood. Thank you.

10 JUDGE ANGEJA: So I have just two questions.
11 Well, it starts off as two questions. When and how did
12 you discover -- I don' know if it's -- I guess it's okay
13 to call it embezzlement. When and how did you discover
14 the embezzlement of Mr. Grant? And whoever knows the
15 answer can answer it.

16 MR. DRORI: Yes. One of the representative on
17 our team came to me and suggested that the CFO is using my
18 credit card, which was a corporate card that I wasn't in
19 control of, without my knowledge. I then approached the
20 VP of finance, while Mr. Dan Grant was out to lunch, and
21 asked if she knows anything about it.

22 First she mumbled, and she denied it. But then
23 when I pressed her, she admitted, "Yes, I'm aware that
24 he's taking private trips to the Bahamas with his kids on
25 your credit card. I'm aware he has paid for other

1 personal expenses on your credit card."

2 And after I continued to press her, I asked her,
3 "Are you aware of anything else that may happen here?"

4 And then she suggested, "Well, there is that
5 account."

6 I said, "What do you mean that account?"

7 "Well he's been taking taking some advances."

8 I said, "Are you talking about a one-time
9 situation or ongoing?"

10 She said, "Ongoing." And she said, "Well, maybe
11 I should not be talking about it. You should be talking
12 to him."

13 I asked again, "May I see that account?"

14 And for about 10 minutes she printed about
15 20 pages that probably show hundreds of transactions of
16 \$1,000 to \$1,500 at a time that total about \$780,000. I
17 at the time owned about 53 percent of the company. I was
18 the major shareholder, and Mr. Malina had probably another
19 30 percent of the company.

20 It was not a public company. It was a private
21 company. That was basically money out of our pocket. I
22 then waited for him to come back from lunch. I caught him
23 in the elevator alone. And I didn't even have to say
24 much. He already knew what I was about to say, and I have
25 a feeling that he was tipped by his lieutenants. The same

1 people that threw me under the bus right now are the same
2 people who corroborated with him, knew about his
3 embezzlement.

4 Needless to say, we hired a private investigator
5 to try to find the money. We asked him to stay home and
6 basically put him on leave. And then, unfortunately, we
7 found out that as a result of the fact that he put that on
8 the books and recorded that as advances, we didn't have a
9 course to press criminal charges. And then we worked a
10 deal with him to pay back the money that he has taken.
11 And I think we were able to recover maybe 25 or 30 percent
12 at the time.

13 JUDGE ANGEJA: What time frame did that discovery
14 happen when you were in the elevator and talking?

15 MR. DRORI: I think it happened in March or April
16 of 2009.

17 JUDGE ANGEJA: Okay.

18 MR. DRORI: And we obviously had gone out of
19 business by November, kind of end of October of that year.

20 JUDGE ANGEJA: And then there was a reference to
21 a PWC, Price Waterhouse Cooper. The PWC audit, when did
22 that happen and for what period did they audit you?

23 MR. DRORI: It would be the audit of 2007, 2008,
24 and I believe --

25 MR. MALINA: And we went out of business in 2009.

1 MR. DRORI: Yes. And we went out of business in
2 2009. What happened, I believe, PWC issued a letter,
3 which is what they do with every vendor that declare what
4 money owed. He forged my signature on that letter and
5 acknowledge that's an advance account. So we never knew
6 that exist until after the fact.

7 JUDGE ANGEJA: Okay. Okay. Thank you. I don't
8 have any other questions. So after a little bit of delay,
9 we'll turn it over to CDTFA.

10 MR. BACCHUS: Thank you.

11

12 OPENING STATEMENT

13 MR. BACCHUS: I'm going to start with the
14 timeliness of the notice, and then I'll go into the
15 elements of personal responsibility.

16 Revenue and Taxation Code Section 6829(f)
17 provides that a Notice of Determination must be mailed
18 within three years after the last day of the calendar
19 month following the quarterly period in which the
20 Department obtains actual knowledge of determination,
21 dissolution, or abandonment of the business of the
22 corporation.

23 Here the Department issued the Notice of
24 Determination to Appellant on April 26th, 2013.
25 Accordingly, to be timely, the Department must have

1 learned of the business termination, dissolution or
2 abandonment no earlier than January 1st, 2010. As shown
3 in the Automated Compliance Management System, or ACMS
4 notes, found in Exhibit D, page 142, the Department
5 contacted PD Financial's landlord on January 25th, 2010.

6 The landlord informed the Department that
7 PD Financial vacated the premises on January 8th, 2010.
8 While Appellant argues that the Department obtained
9 knowledge of business termination in December 2009, the
10 facts do not support this conclusion. The Department was
11 aware that PD Financial was experiencing financial
12 difficulties.

13 And Exhibit B, page 55, Mr. Malina sent an e-mail
14 to PD Financial's CIO, Joan Loof. That e-mail was dated
15 November 24th, 2009. In that e-mail it says -- he says
16 that, "The company is attempting to resume active
17 operations within 45 days."

18 Another ACMS note shows that Daniel Grant and
19 Shiva Bahrami told the Department that the business was
20 planning on closing. And that's Exhibit D, page 144,
21 where Ms. Bahrami on November 10th, 2009, stated that the
22 business had no money and that employees were on two-week
23 furloughs.

24 Exhibit D, page 52, is another ACMS note where
25 Ms. Bahrami on November 13th, 2009, stated that Peach

1 Direct was closing business operations later that week.
2 And Mr. Grant on that same phone call stated that Peach
3 Direct didn't have phones, and that the business was
4 closing down.

5 However, there's no indication by PD Financial or
6 any statement to the Department that constitutes actual
7 knowledge prior to January 25th, 2010, that the business
8 of the corporation was terminated, dissolved, or
9 abandoned. We do acknowledge that Mr. Grant informed the
10 Department on December 16th, 2009. That's Exhibit D,
11 page 43, that Peach Direct, the DBA of PD Financial,
12 ceased operations on October 31st, 2009.

13 However, Mr. Grant also stated that PD Financial
14 was continuing on with a new DBA of Venue. We note
15 pursuant to an ACMS note dated December 16th, 2009,
16 Exhibit D, page 43, what I referred to earlier, that after
17 speaking with Mr. Grant, that Department employee
18 researched PD Financial and confirmed that Venue was the
19 new DBA, and that Venue's business was the same as Peach
20 Direct business, which was, as we've already heard, a
21 private label credit card with online catalog sales.

22 There is also a letter to PD Financial's
23 creditors dated January 22nd, 2010, which is in Exhibit B,
24 page 61, where Mr. Malina states that despite efforts to
25 keep the business open, it was clear that the business was

1 not able to resume operations and was going to go forward
2 with a liquidation of its assets.

3 This is evidence that the business of the
4 corporation, which was the sale of consumer electronics
5 through a private label credit card, did not terminate or
6 dissolve until January 2010. We understand that sales did
7 not happen after October 2009, but the business continued
8 and with attempts to secure other lines of financing.
9 There's also evidence that Venue -- there's a little bit
10 of confusion, I think, in the record about when Peach
11 Direct ceased or when Venue began, and perhaps they were
12 operating at the same time. It's not really clear.

13 But there is evidence. There's letters on Venue
14 letterhead from October of 2009. There are invoices
15 issued under Venue letterhead in June 30th, 2009 and
16 July 1st, 2009. Those are all in Exhibit B, pages 11, 27,
17 28, 56, and 57. Accordingly, the Department did not
18 obtain actual knowledge that the business of PD Financial
19 terminated until January 25th, 2010. Based on all of this
20 evidence, the Notice of Determination issued to Appellant
21 was issued timely within the applicable statute of
22 limitations.

23 Now, onto Section 6829, personal liability. A
24 person may be held personally liable for the unpaid sales
25 and use tax liabilities of corporation, pursuant to

1 Revenue and Taxation Code Section 6829, if the following
2 elements are satisfied.

3 First, the business of the corporation must be
4 terminated. Second, the corporation must have collected
5 sale tax reimbursement on its sales of tangible personal
6 property. Third, the person must have been responsible
7 for sales -- for the sales and use tax matters of the
8 corporation, including the filing of returns and the
9 payment of tax. And fourth, the person's failure to pay
10 the tax must have been willful.

11 As we have already discussed, there's no dispute
12 as to the first two elements. So moving on to the third
13 element, responsible person means any person having
14 control or supervision of, or who was charged with the
15 responsibility for the filing of returns or the payment of
16 tax, or who had a duty to act for the corporation in
17 complying with any provision of the sales and use tax law
18 when the taxes became due.

19 Initially, we note that there is no dispute that
20 Appellant was PD Financial's CEO for the duration of PD
21 Financial's existence, including the second quarter of
22 2009. As PD Financial's CEO, Appellant had authority and
23 the duty to direct the affairs of the corporation, which
24 includes the duty to act for the corporation in complying
25 with the sales and tax use law.

1 Moreover, in a phone call with the Department on
2 March 7th, 2013, Exhibit D, page 94, Mr. Grant stated that
3 he met with Appellant every week to discuss what payments
4 needed to be made, and that during these meetings, he
5 provided a report to the Appellant and Mr. Malina of how
6 much money was in the bank and what expenses, including
7 sales tax liabilities, needed to be paid.

8 Mr. Grant repeats in an e-mail dated
9 March 9th, 2013, found in Exhibit B, page 13, that he met
10 with Appellant daily to discuss PD Financial's financial
11 matters. In their business operations questionnaires,
12 Ms. Bahrami, who was the VP of finance, and that's in
13 Exhibit B, page 36, and William Chao the controller, found
14 in Exhibit B, page 45, both stated that Appellant was one
15 of the individuals who had control, supervision, or
16 responsibility, or duty to act for the business in the
17 sales and tax use tax matters when the business
18 terminated.

19 In a phone call with the Department on
20 March 7th, 2013, found in Exhibit D, page 93, Joan Loof,
21 who is the CIO, stated that Appellant controlled every
22 single penny of the company. In an e-mail dated
23 March 9th, 2013, in Exhibit B, page 59, Ms. Loof states
24 that Appellant was actively involved in the daily
25 management of the business and that he oversaw the daily

1 cash flow.

2 Based on this evidence, Appellant was a person
3 having control or supervision of PD Financial's sales an
4 use tax matters, or that he had a duty to act for the
5 corporation in complying with the sales and use tax law
6 when the taxes at issue became due. That was
7 July 31st, 2009, through the close of the business.

8 As to the fourth element, a person's failure to
9 pay is willful if the person had knowledge that the taxes
10 were not being paid and had the authority or ability to
11 pay the taxes but failed to do so. As to knowledge, PD
12 Financial's tax liabilities originate from a sales and use
13 tax return, for the second quarter of 2009, that was filed
14 without the payment of tax owed.

15 Accordingly, the earliest that Appellant could
16 have knowledge of the unpaid sales tax for the second
17 quarter of 2009 is July 29th, 2009, when the original
18 return was filed without payment. In a phone call with
19 the Department on March 7th, 2013, found in Exhibit D,
20 page 96 and 97, Mr. Chao stated that when he filed the
21 second quarter return, he asked Mr. Grant how much he
22 could pay with the return.

23 And Mr. Grant told him that he needed to ask
24 Appellant and Mr. Malina. Mr. Grant later told Mr. Chao
25 that the payment priority was payroll, then payroll taxes,

1 and then sales taxes. In a letter to the Department,
2 dated February 13th, 2010, found in Exhibit B, page 12,
3 Mr. Grant states that he was aware of the unpaid sales
4 taxes and that he prepared reports detailing the
5 liabilities for Appellant and Mr. Malina.

6 During a phone call with the Department on
7 March 7, 2013, found in Exhibit D, page 94, and followed
8 up in an e-mail to the Department dated March 9th, 2013,
9 found in Exhibit B, page 13, Mr. Grant states that he met
10 with Appellant daily to review the payments that were due
11 that day, and that he would provide Appellant with a
12 report of the status of money in the bank and what
13 expenses, including sales tax liabilities, that needed to
14 be paid and that Appellant and Mr. Malina would authorize
15 which payments he could make.

16 In a phone call with the Department on
17 January 14th, 2013, found in Exhibit D, page 106,
18 Mr. Malina stated that he and Appellant always made sure
19 everything was paid on time, and that they had to pay
20 printers and venders and eventually the corporation ran
21 out of money.

22 In a phone call with the Department, found in
23 Exhibit D, page 93, and followed with an e-mail to the
24 Department dated March 9th, 2013, found in Exhibit B,
25 page 58, Ms. Loof states that Appellant was actively

1 involved in the daily management of the company, and that
2 Appellant controlled every single penny of the business.

3 These facts establish that Appellant was involved
4 in financial matters and decision making for PD Financial.
5 Combined with the fact that PD Financial was experiencing
6 financial difficulties as shown in various places that
7 have already been pointed out, specifically, in Exhibit B,
8 pages 55 to 58 and page 73. And also, as was referenced
9 earlier, that Mr. Grant was caught, essentially,
10 embezzling over \$700,000.

11 And the agreement -- I'll point out the agreement
12 that was signed. We have it in Exhibit B, page 62. That
13 was signed at the beginning of July of 2009. There's also
14 reference to an Exhibit D, page 88. Based on all of these
15 facts, the financial difficulties, the fact that the CFO
16 was caught embezzling almost \$800,000 from the company, it
17 is not believable that Appellant left Mr. Grant
18 unsupervised to handle the corporation's financial
19 matters.

20 Based on the foregoing, Appellant had actual
21 knowledge that the second quarter 2009 taxes were not paid
22 as of July 29, 2009, when the return was filed without the
23 payment of tax. At the very least, Appellant had actual
24 knowledge as of October or November of 2009, as he stated
25 in his responsible person questionnaire found in

1 Exhibit B, page 33.

2 As to the authority to pay the taxes, Appellant
3 was PD Financial's CEO, and there's no dispute that he
4 owned the majority of PD Financial stock. At the appeals
5 conference, which was -- notes were included in ACMS found
6 in Exhibit D, page 20. Appellant stated that he had the
7 authority to tell someone to write a check to pay a
8 liability.

9 In a phone call with the Department on
10 January 14, 2013, found in Exhibit D, page 106, Mr. Malina
11 stated that he and Appellant always made sure everything
12 was paid on time. In an e-mail to the Department dated
13 March 9th, 2013, found in Exhibit B, page 13, Mr. Grant
14 states that Appellant was a signer on the business
15 account -- bank account.

16 And then in a phone call with the Department on
17 March 7th, 2013, found in Exhibit D, page 94, Mr. Grant
18 stated that Appellant and Mr. Malina authorized which
19 payments he could make. Based on this evidence, Appellant
20 had the authority to pay the taxes or to cause them to be
21 paid. Finally as to the ability to pay the taxes,
22 PD Financial had funds available to pay the taxes but
23 instead used those funds to pay other creditors.

24 In a phone call with the Department on
25 October 1st, 2009, found in Exhibit D, page 148, Mr. Grant

1 stated that the financial institution backing their
2 private label credit card, which was ADS, have high credit
3 losses. So PD Financial had to use the collected sales
4 tax reimbursement to pay ADS to offset those losses.

5 At the appeals conference, again, found in
6 Exhibit D, page 19, the ACMS notes state that Appellant
7 stated that he, along with Mr. Malina and Mr. Grant,
8 decided to pay employees instead of creditors in fourth
9 quarter 2009. Bank statements show funds available for
10 July 2009, found in Exhibit H, page 12, August 2009,
11 Exhibit H, Page 15, and September 2009, Exhibit H,
12 page 38.

13 PD Financial made payments to one of its vendors,
14 Synnex, I think it's pronounced, on August 6, 11, 31st,
15 September 16th, 23rd, 30th, and October 7th and 15th of
16 2009. And those are found in Exhibit I, pages 3 and 4.
17 PD Financial's merchant settlement reports show monthly
18 sales of over \$3 million for August of 2009, shown in
19 Exhibit J, page 15, and over \$3 million for September
20 2009, found in Exhibit J, page 35.

21 Finally, EDD annual reconciliation statements --
22 statement shows wages paid of over \$1 million in 3rd 2009,
23 and \$377,000 in 4th quarter 2009. And that's in
24 Exhibit L, page 4. This evidence shows that there were
25 available funds to pay PD Financial's tax liability for

1 the second quarter of 2009 from the time that the tax was
2 due on July 31st, 2009 through the end of the fourth
3 quarter 2009. But the funds were paid to other creditors
4 instead.

5 Appellant has presented no documentary evidence
6 to dispute this evidence. Based on the foregoing, the
7 Department has met its burden of proving that Appellant is
8 personally liable for PD Financial's unpaid sales tax
9 liabilities for the second quarter of 2009.

10 JUDGE ANGEJA: Okay. Thank you.

11 Questions from my --

12 JUDGE KWEE: Oh, I guess I did have one question.
13 And if I'm understanding correctly, I think the taxpayer
14 had basically some concerns with relying on the statements
15 by Mr. Grant or some of those people, the basis that, you
16 know, depending on what they say. They could be on the
17 hook for this liability. So I'm just curious if the CDTFA
18 either billed or informed any of these other people, like,
19 Mr. Grant or anyone else, that for 6829 responsibility to
20 any other person besides the two people here?

21 MR. BACCHUS: Sorry. We had just a conversation
22 about potential confidentiality issues. No other dual
23 determinations were issued aside from the ones that were
24 issued to Mr. Drori and Mr. Malina.

25 JUDGE KWEE: Okay. And if I'm understanding

1 correctly, only Mr. Drori is still the one duly?

2 MR. BACCHUS: Correct.

3 JUDGE KWEE: Okay. Thank you. No further
4 questions.

5 JUDGE ANGEJA: Ms. Brown?

6 JUDGE BROWN: I just have one question, I think.
7 Mr. Bacchus, when you were referring earlier to some of
8 the ACMS notes that you're arguing show that -- the
9 Appellant's knowledge. For example, I'll just point to
10 one. I believe it's the ACMS record dated
11 March 7th, 2013, that indicates that the controller asked
12 the CFO Mr. Grant -- and this is in an ACMS note recorded
13 by a CDTFA employee --

14 MR. BACCHUS: Correct.

15 JUDGE BROWN: -- who spoke with the controller,
16 who said that he spoke with the CFO, who said he spoke
17 with the Appellant.

18 MR. BACCHUS: Correct.

19 JUDGE BROWN: And the Appellant reportedly
20 described a payment-priority instruction that input
21 payroll first, then payroll taxes, then sales taxes.

22 MR. BACCHUS: Correct.

23 JUDGE BROWN: Okay. But you were describing it
24 as if we knew that this conversation actually happened as
25 described in the ACMS note, where the CDTFA employee

1 described what the controller said, that the CFO said,
2 that the Appellant said; correct?

3 MR. BACCHUS: Correct.

4 JUDGE BROWN: All right. And obviously, we know
5 that hearsay is admissible. But in terms of how much we
6 can rely on the accuracy of the employee -- assuming the
7 employee typed very correctly -- do you see my concern
8 about describing how that conversation happened versus
9 accurately describing that the employee recounted what the
10 controller that the CFO said that the Appellant said?

11 MR. BACCHUS: I do.

12 JUDGE BROWN: All right. So how much should we
13 be relying on -- lets just start with that note, for
14 example.

15 MR. BACCHUS: Ultimately, I guess, how much you
16 rely on the evidence provided is up to you.

17 JUDGE BROWN: Understood.

18 MR. BACCHUS: We feel that -- the Department
19 feels that that evidence is something that is likely to
20 have happened given the rest of the evidence that was
21 presented about the financial difficulties and the fact
22 that the CFO was caught embezzling money, that such an
23 interaction would have happened in a reasonable business
24 environment.

25 And so we believe that taking all of the evidence

1 together there is more than adequate evidence to show that
2 Appellant had knowledge that the taxes were not paid.

3 JUDGE BROWN: I think that was my only question.
4 Thank you.

5 JUDGE ANGEJA: And you stole my question. I have
6 no further questions. You have a 10 minute -- or up to 10
7 minutes to rebut if you would like.

8 MR. SLAVETT: Sure.

9

10 CLOSING STATEMENT

11 MR. SLAVETT: With respect to following up on
12 Your Honor Brown's questioning with respect to reliance on
13 a statement from William Chao as to how a conversation
14 turned into hearsay upon hearsay, I would like to point,
15 Your Honors, to Exhibit 3, which is a signed declaration
16 under penalty of perjury, which I believe holds much more
17 weight under the -- if the rules of evidence did apply in
18 this forum. And it's very clear that -- as to the
19 responsibilities. I think that counters a little bit as
20 to what William Chao said what happened.

21 Also, the testimony of the parties sitting here
22 are open to cross-examination and the credibility to be
23 determined by Your Honors, versus a statement, a note from
24 a third party, double hearsay. So I'd just like to
25 address that point. Also, there were statements that the

1 government stated that Appellant, Mr. Malina, I believe --
2 Mr. Drori -- I believe Mr. Malina met with Dan Grant
3 weekly or daily meetings with Mr. Grant.

4 Mr. Drori, were there any daily meetings with
5 Mr. Grant regarding the finances of the company regarding
6 who to pay?

7 MR. DRORI: No.

8 MR. SLAVETT: Mr. Malina, were there any daily
9 meetings with Mr. Grant regarding finances as --

10 MR. MALINA: No, there were not.

11 MR. SLAVETT: Regarding who to pay and what to
12 pay?

13 MR. MALINA: No, there were not.

14 MR. SLAVETT: Also I'd like to -- Mr. Drori, tell
15 me about Venue and when -- there was some issue about
16 Venue being a new DBA, a new operation. Tell me about the
17 name "Venue."

18 MR. DRORI: Venue commenced operation as a DBA in
19 January of 2007 and was an active website. Peach Direct
20 was not an active website since 2007. You can look at
21 that. It's available online in a statement by ADS that
22 made a public statement that Venue launched in 2007 in
23 connection with signing a multi-agreement with ADS. So
24 that is public knowledge.

25 I would like, if I may, Counsel, to just mention

1 that if I was directing to pay first payroll, then payroll
2 taxes, and then sales taxes, how do you explain the
3 million of dollars that were paid by Mr. Grant to other
4 venders outside of that direction? You will see that
5 there is probably 6 or \$7 million after Q2 that were paid
6 among them to many venders.

7 So if my direction was to pay those three items,
8 he definitely didn't follow my instruction then.
9 Mr. Grant, I believe, has tried to escape any
10 responsibility and roll it on me. And I would take my
11 responsibility, as this Court determined, that I will tell
12 you that the daily decision of cash disbursements of sales
13 tax filing were not made by me, a CEO of a 20
14 million-dollar company. It was made out of the accounting
15 team that was very skilled with their responsibility to
16 manage that.

17 I did not authorize every day or every penny as
18 discussed to you. If that was the case, I wouldn't be
19 able to see \$700,000 missing. So there is a lot of
20 conflicting statements here that, unfortunately, that came
21 from an attempt by certain individuals, I believe, to
22 alter the responsibility.

23 I'm going to take whatever my responsibility is
24 as this Court may determine, but the facts are the facts.
25 And I believe my Counsel did present here our position

1 with respect of the facts.

2 MR. SLAVETT: Also another point of
3 clarification. Government's Counsel made repetitive
4 points to the evidence with respect to the funds in the
5 bank accounts in June, I think, July, August, September.
6 But it's the testimony and our position here that
7 Mr. Drori did not learn about this until early November,
8 when there was not sufficient funds to pay. And so all
9 this -- I'm not sure the relevance of showing there's
10 funds before the knowledge of Appellant.

11 All right. Anything else you would like to add?

12 MR. DRORI: Yeah. I just want to say the same
13 point. There was 6 or 7 million dollars and probably much
14 more than that since March, probably 15 or 20 million
15 dollars. And I knew that this is my personal
16 responsibility. We would -- would I let other things get
17 paid and avoid paying \$100,000 of sales tax when there is
18 7 or 8 million or 10 million dollars after that? Why
19 would I do that?

20 So there is a lot of conflicting statements here
21 that unfortunately are not consistent with reality. And
22 the evidence is that after that point in that second
23 quarter, every dollar was paid on time to the tax
24 authorities, both with respect to sales tax and the
25 federal taxes.

1 So it's not a pattern. It's, unfortunately,
2 might have been an oversight. There was change of
3 controller right around the second quarter. I believe it
4 fell through the cracks. And by the the time the team
5 found out about it, they did report that to me after the
6 company cease operation. Simply, there were no additional
7 funds available to pay for it.

8 And anything other that, in my opinion, was
9 simply an attempt to roll it to my door and take no
10 responsibility by the CFO that, unfortunately, doesn't
11 exactly have a very credible history.

12 MR. SLAVETT: Mr. Malina, is there anything you
13 would like to add or clarify?

14 MR. MALINA: The only thing is going back to the
15 Venue issue. I think that it makes clear that there was a
16 misapprehension. At best a misapprehension on the part of
17 the person who was talking to Dan Grant. Dan, knowing
18 that Venue had been used since 2007, would not have made a
19 distinction between -- well, you know, Peach Direct is
20 over, but now PD Financial is going forward with Venue.
21 Dan would obviously have known that Venue and Peach
22 Direct, all of that, was what terminated in October of
23 2013 and 2009.

24 JUDGE ANGEJA: Any questions?

25 JUDGE KWEE: No.

1 JUDGE ANGEJA: Judge Brown?

2 JUDGE BROWN: No.

3 JUDGE ANGEJA: Okay. If that concludes your

4 rebuttal and the panel has no questions --

5 You have no questions for the witnesses?

6 MR. BACCHUS: No.

7 JUDGE ANGEJA: So at this point I will close the

8 record, and we will conclude this hearing. These were

9 good arguments from both parties. We have our work set

10 out for us up here. I would like to thank everybody for

11 coming in today. Following this hearing, my co-panelists

12 and I will discuss the evidence and argument, and then we

13 will issue a written opinion within 100 days.

14 Off the record.

15 (Proceedings adjourned at 11:20 a.m.)

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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
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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 19th day
of November, 2019.

ERNALYN M. ALONZO
HEARING REPORTER