

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
MARTHA A. SILVA,) OTA NO. 18083529
)
APPELLANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Thursday, December 19, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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APPEARANCES:

Panel Lead: ALJ JOSHUA LAMBERT

Panel Members: ALJ LINDA CHENG
ALJ NGUYEN DANG

For the Appellant: MARTHA A. SILVA, TAXPAYER
JAIME F. TRICERRI, REP
TERRENCE J. MOORE, ATTORNEY

Interpreter: ALDO RUIZ RIVERA

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION
By: SCOTT LAMBERT
LISA RENATI
DANA FLANAGAN-MCBETH

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I N D E X

E X H I B I T S

(Appellant's Exhibits were received at page 8.)

(Department's Exhibits were received at page 8.)

DEPARTMENT'S

WITNESSES:

DIRECT

CROSS

REDIRECT

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(None offered)

APPELLANT'S

WITNESSES:

DIRECT

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REDIRECT

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Martha Silva

9

23

Eufemio De Ceita

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35

WITNESS STATEMENT

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By Jaime Tricerri

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By Mr. Scott Lambert

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By Mr. Moore

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1 Cerritos, California; Thursday, December 19, 2019

2 11:25 a.m.

3

4 JUDGE JOSH LAMBERT: We're now on the record in
5 the Office of Tax Appeals Oral Hearing for the appeal of
6 Martha Silva, Case Number 18083529.

7 Before we proceed, we have an interpreter for
8 this appeal, and I need to qualify and swear in the
9 interpreter. Could the interpreter please approach the
10 Appellant's table. Could you please state your name for
11 the record?

12 THE INTERPRETER: Aldo Ruiz Rivero.

13 JUDGE JOSH LAMBERT: And what are your
14 qualifications as a Spanish language interpreter?

15 THE INTERPRETER: Yes, I am.

16 JUDGE JOSH LAMBERT: You can go back. All right.
17 Okay. Raise your right hand.

18

19 ALDO RUIZ RIVERA,

20 The Spanish interpreter herein, was duly sworn to
21 interpret the following proceedings to the best of his
22 ability:

23

24 JUDGE JOSH LAMBERT: You may go back.

25 THE INTERPRETER: Thank you.

1 JUDGE JOSH LAMBERT: We are in Cerritos,
2 California, and the date is Thursday December 19th, 2019,
3 and the time is approximately 11:25 a.m. My name is Josh
4 Lambert, and I am the lead Administrative Law Judge for
5 this hearing. And my co-panelists today are Linda Cheng
6 and Nguyen Dang.

7 JUDGE DANG: Good morning.

8 JUDGE CHENG: Appellant and reps, could you
9 please identify yourselves for the record.

10 MR. MOORE: My name is Terrence Moore for the
11 Appellant Martha Silva.

12 MS. SILVA: I'm Martha Silva.

13 THE INTERPRETER: My name is Aldo Ruiz the
14 interpreter.

15 JUDGE JOSH LAMBERT: And also Mr. De Ceita?

16 MR. MOORE: We have behind me is Mr. De Ceita.

17 MR. DE CEITA: My name is Eufemio De Ceita as a
18 witness.

19 JUDGE JOSH LAMBERT: Thanks.

20 MR. MOORE: And then behind me also is
21 Mr. Tricerri.

22 MR. TRICERRI: Jaime Tricerri.

23 JUDGE JOSH LAMBERT: Thank you.

24 CDTFA, could you please introduce yourselves for
25 the record.

1 MR. SCOTT LAMBERT: My name is Scott Lambert
2 representing the California Department of Tax and Fee
3 Administration. To my left is Lisa Renati, and to
4 Ms. Renati's left is Dana Flanagan-McBeth.

5 JUDGE JOSH LAMBERT: And I want to state for the
6 record that there's no relation between me and
7 Mr. Lambert.

8 The issues in this appeal are: Whether any
9 adjustments are warranted to the determined measure of
10 tax; and, whether the fraud penalty was properly imposed.

11 Appellant, do you agree to these issues.

12 MR. MOORE: Yes.

13 JUDGE JOSH LAMBERT: CDTFA do you agree.

14 MR. SCOTT LAMBERT: Yes.

15 JUDGE JOSH LAMBERT: Thank you.

16 For the record, there was a concession made in
17 correspondence dated December 11th, 2019. The CDTFA
18 concedes the liability period covering April 1st, 2010, to
19 March 31st, 2012. Therefore, the liability period at
20 issue is April 1st, 2012 to March 3st, 2015.

21 The parties agree to the admission into evidence
22 of Appellant's Exhibits 1 through 14 and CDTFA's Exhibits
23 A through B, and neither party had any objections to the
24 admission of those exhibits.

25 Appellant, is that still correct?

1 MR. MOORE: That is correct.

2 JUDGE JOSH LAMBERT: And CDTFA, that is correct?

3 MR. SCOTT LAMBERT: That is correct.

4 JUDGE JOSH LAMBERT: Thank you.

5 And I hereby admit those exhibits into the
6 evidence.

7 (Appellant's Exhibits 1-14 were received
8 in evidence by the Administrative Law Judge.)

9 (Department's Exhibits A-B were received in
10 evidence by the Administrative Law Judge.)

11 JUDGE JOSH LAMBERT: We will begin with
12 Appellant's argument, which should not exceed 30 minutes.
13 CDTFA and the judges will then be allowed to ask questions
14 if they wish. CDTFA, can ask questions to the witnesses.
15 And CDTFA will make its presentation not to exceed 15
16 minutes, and the judges may ask questions.

17 After that, Appellant, you will have 30 minutes
18 for rebuttal. So Appellant, this is your opportunity to
19 explain your position. And we can swear in Ms. Silva at
20 this time, if that's okay.

21 MR. MOORE: And will I be able to have a closing
22 after the rebuttal, or is that part of my --

23 JUDGE JOSH LAMBERT: That would be your --

24 MR. MOORE: Rebuttal.

25 JUDGE JOSH LAMBERT: That 30 minutes is,

1 basically, you could have a closing and rebuttal, whatever
2 you want to discuss during that time period.

3 MR. MOORE: Thank you.

4 JUDGE JOSH LAMBERT: Okay. Ms. Silva, can you
5 please stand and raise your right hand.

6

7 MARTHA SILVA,

8 produced as a witness, and having been first duly sworn by
9 the Administrative Law Judge, was examined and testified
10 as follows:

11

12 JUDGE JOSH LAMBERT: Thank you. And when
13 Mr. De Ceita speaks, we can just swear him in, and he
14 could come approach -- I mean, he goes up to the
15 Appellant's table and we could swear him in at that time
16 when he's ready to speak.

17 MR. MOORE: Perfect.

18 JUDGE JOSH LAMBERT: Okay. Appellants, you may
19 begin when you're ready.

20 MR. MOORE: Thank you.

21

22 DIRECT EXAMINATION

23 BY MR. MOORE:

24 Q Ms. Silva, when did you start your restaurants?

25 A In 1992.

1 Q And what was your role in your restaurants?

2 A I'm a cooker.

3 Q Did you do any type of management in -- at the
4 restaurants?

5 A No, I didn't.

6 Q What is your highest level of education in the
7 United States?

8 A Well, I didn't study here at the United States,
9 but back in Mexico, I graduated from high school.

10 Q Did you complete high school in Mexico?

11 A I couldn't complete.

12 Q I'm going to make references today to many of my
13 questions, and they're all going to be regarding during
14 the audit period -- during the periods in the audit. Do
15 you understand that?

16 A Yes, I do.

17 Q Back during the audit period, and you were a cook
18 at the restaurants -- strike that.

19 Let me come back to that. Have you ever taken
20 any accounting classes?

21 A No, I don't.

22 Q Did you ever take any classes regarding the sales
23 tax?

24 A No, I haven't.

25 Q Have you ever read any materials on how to

1 calculate sales tax?

2 A I haven't.

3 Q If you can speak a little bit louder, that will
4 be better.

5 A It's okay.

6 Q Who taught you, if anybody, how to keep your
7 sales tax records?

8 A Well, I asked about that to other persons who had
9 a business.

10 Q What role did those other persons have? Were
11 they business owners? Were they accountants?

12 A Yeah. They were the owners of the restaurants.
13 They guide me.

14 Q Did you, in essence, kind of learn how to report
15 sales tax as you went along?

16 A Can you repeat the question, please?

17 Q Did you learn how to calculate sales -- excuse
18 me. Did you learn how to prepare and calculate your sales
19 tax based upon learning as you went?

20 A No.

21 Q When you first got your sales permit, did you --
22 were you -- do you recall if you were handed any
23 materials?

24 THE INTERPRETER: I'm sorry. Can you repeat the
25 question?

1 BY MR. MOORE:

2 Q When you first got your sales permit from the
3 State, do you recall if you received any materials?

4 A No. I don't because I don't write nor read
5 English.

6 Q If those pamphlets would have been given to you
7 in Spanish, would you have read them anyway?

8 A I didn't have any time at that time. So I didn't
9 read anything.

10 Q Were you ever involved in a furniture store?

11 A Yes.

12 Q What did you do for the furniture store?

13 A Well, I used to talk to the clients or customers.
14 Also, I went into sales of all the furniture that they
15 made at the store. I was also involved in upholstery. I
16 should -- for example, I would separate the chairs and
17 prepare them for sale. I really loved that kind of work.

18 Q Did you ever report sales tax for the furniture
19 store?

20 A I didn't.

21 Q Going back to the restaurants, did you have a
22 daily schedule at Cactus 2 on a normal basis?

23 A Yes.

24 Q What was your schedule on a normal basis at
25 Cactus 2 during the audit period?

1 A Well, I normally get into work around 6:00,
2 7:00 a.m. I finish by noon, 12:00 p.m. I used to cook
3 there, you know, beans, that kind of stuff.

4 Q After you left Cactus 2, where did you go?

5 A Well, after that I used to go to Cactus 1. And
6 during two hours, I would do the inventory for the
7 restaurant. I used to clean the fridge there and talk to
8 the customers.

9 Q And after you were at Cactus 2 for about two
10 hours, where would you go on a normal-average basis?

11 A Okay. So in -- after Cactus 2, I would go to
12 Cactus 3. So I worked there for one hour -- around one
13 hour doing same things as before. I used to verify that
14 the food was fresh and everything safe, talk to the
15 customers too, and I leave by 2:30 p.m. because I had to
16 pick up my daughter.

17 Q And when did you add Cactus 3? Or when did you
18 open Cactus 3?

19 A It was in 2013. I would say at the end of 2013,
20 more or less.

21 Q At Vine did you ever stay and work past
22 10:00 p.m.?

23 THE INTERPRETER: Can you repeat the question?

24 BY MR. MOORE:

25 Q At Vine, the restaurant located on Vine, did you

1 ever work past 10:00 p.m.?

2 A No. No, I couldn't.

3 Q So you had three locations, did you hire managers
4 to operate your restaurants?

5 A Yes, I hired some people to help me.

6 Q Okay. Did you ever operate or run the POS
7 system?

8 A No.

9 Q Did you hire any people to run the POS?

10 A Yes, I did. I hired some cashiers that were
11 experienced in the management of this system.

12 Q When did you buy your POS?

13 A 2013.

14 Q And why did you buy your POS?

15 A Yeah, because they told me that the line will be
16 faster. They could process the orders quickly, and that
17 will improve the business.

18 Q Did the POS work well?

19 A No, it wasn't working properly.

20 Q How often did it break down?

21 A Many times we had problems. We used to have many
22 problems with that.

23 Q Would you call a repair man, and what would he
24 say?

25 A Well, so the lady will let me know that this was

1 going on. So I would give her a telephone number so she
2 could reach this person who come fix the issue with the
3 lady, and they will let me know that everything was fixed.

4 Q Okay. So we're running out of time. I'd like to
5 get more to our -- keep your answers a little shorter.
6 That might be helpful.

7 A That's fine.

8 Q Did you ever instruct anyone to alter or erase or
9 remove information from the POS?

10 A No.

11 Q Did you use guest checks in your restaurants?

12 A Yes.

13 Q And what were your guest checks used for?

14 A Well, those are used in order to manage the
15 orders to go or to take out. The cashiers also used those
16 checks. And myself, I used those checks when I am
17 reviewing the things that are inside the fridges. And
18 also, if I receive an order, I will put it in the checks
19 with our phone calls.

20 Q Is Exhibit 14 a copy of a guest check?

21 A Yes. Yes, that is the one.

22 Q Did your restaurant experience any theft on a
23 normal basis?

24 A Yes. We, we had a lot of theft.

25 Q I would like to turn to Exhibit 9. Do you

1 recognize this exhibit?

2 A Yes, of course. This is mine.

3 Q And what is this document?

4 A Well, I do this daily. They need -- they gave me
5 some paperwork, and I write on that.

6 Q And who would give you the paperwork?

7 A I do this paperwork.

8 Q I'm sorry. Who? Is this your handwriting?

9 A Yes, I write everything.

10 Q And how often would you write this document?

11 A Everyday.

12 Q And did this document record all your sales?

13 A Yes. Everything that the cashiers give me, I
14 record it here.

15 Q And would the cash registers give you the sales
16 receipt and the guest checks?

17 A Yes, of course, and I record all that here.

18 Q Did you have notebooks like this to be presented
19 to the auditor during the audit period?

20 A Well, I show to the person this, and the person
21 told me that it -- this was trash, that he or she didn't
22 want to have it.

23 Q Is that the auditor?

24 A Yes.

25 Q And although these records are for 2019, did you

1 have very similar records to these for the audit period?

2 A Yes.

3 MR. MOORE: No further questions for this
4 witness. I'd like to call Mr. De Ceita, please.

5 JUDGE JOSH LAMBERT: Do you think maybe, if you
6 want to pause, we can have the Department ask Ms. Silva
7 questions, or the judges, while she's up here with the
8 interpreter.

9 MR. MOORE: Of course.

10 JUDGE JOSH LAMBERT: CDTFA, if you have any
11 questions of Ms. Silva?

12 MR. SCOTT LAMBERT: No questions.

13 JUDGE JOSH LAMBERT: Judge Dang, do you have any
14 questions.

15 JUDGE DANG: Just some brief questions for you,
16 Ms. Silva. Do you happen to know why some of the sales
17 for the Cactus restaurants were not processed through the
18 POS?

19 MS. SILVA: Well, sometimes the POS system didn't
20 work properly. So they couldn't use that -- use it. So
21 anyways we record the sales manually.

22 JUDGE DANG: Okay. I just want to make sure I
23 understand correctly. Based on what you've just testified
24 to, you were preparing your -- you were recording your
25 sales based on reports that came from the POS; is that

1 correct?

2 MS. SILVA: Well, yes. But when the system
3 wasn't working, I received anyways the paperwork, you
4 know, the hard copies from the ladies so I could write it
5 down everything and do the calculations accordingly.

6 JUDGE DANG: Okay. And I have one other
7 question. When the POS system was reset on a monthly
8 basis, how come no backups were kept of those records or
9 printouts were made? Was there some reason for that?

10 MS. SILVA: I don't understand much about the
11 system. I really didn't use it myself. I just received
12 what they gave me.

13 JUDGE DANG: Okay. Thank you. I don't have any
14 further questions.

15 JUDGE JOSH LAMBERT: Judge Cheng, do you have any
16 questions?

17 JUDGE CHENG: Just a couple. Ms. Silva, did the
18 POS system, it had consistent problems throughout the
19 whole audit period; is that correct?

20 MS. SILVA: Yes. In fact, this was an old
21 system, not really good, is what they told me. And yeah,
22 I should have another one better.

23 JUDGE CHENG: So you looked into getting a better
24 one, a different one?

25 MS. SILVA: Yes. Right now we have a new one.

1 Better.

2 JUDGE CHENG: Were you concerned at all that
3 using the POS machine and the guest checks, you know, at
4 the same time might have created some accuracy in
5 reporting issues?

6 MS. SILVA: Well, the reason why we use -- well,
7 the reason why I use this guest checks is because in -- my
8 restaurants operate with a lot of phone calls, you know.
9 And those phone calls, ordering things, sometimes they --
10 the customer don't come to pick -- the customer doesn't
11 come to pick up the food or just cancel later the order.

12 So for me it is a problem to put it in the
13 system. Because if I recorded those calls on the system,
14 they will remain there. And I don't know why this kind of
15 transaction would be there if I am not selling, in fact,
16 the food, you know. Well, not myself because I don't
17 prepare the food.

18 JUDGE CHENG: So you didn't think it was a
19 problem using both the POS and the guest checks?

20 MS. SILVA: No. Because when they write down
21 those orders, when the client comes, and they would record
22 the sale and give it to me with all the paperwork. That
23 would be the correct way to proceed with this.

24 JUDGE CHENG: Okay. Did you ever find out what
25 the problem was with the old POS machine?

1 MS. SILVA: Well, I really don't know. I'm
2 really scared about POS. Up to date I'm scared of those
3 machines. So I would let the cashiers that knew about the
4 system, work with the technician to fix the problems. So
5 I don't know.

6 JUDGE CHENG: Okay. And when did you finally
7 replace the old POS?

8 MS. SILVA: Well, when we had some money and we
9 were contacted with a gentle -- from a gentleman who gave
10 us the system in payments, you know.

11 MR. MOORE: There's no question.

12 MS. SILVA: So we took it and bought it.

13 JUDGE CHENG: When? What year?

14 MS. SILVA: I'm not quite sure. It was 2014. It
15 was somewhere around 2014.

16 JUDGE CHENG: So as of 2014, you started using
17 the new POS. And did you have problems starting then?

18 MS. SILVA: Well, I don't have myself problems
19 with the system because, like I said before, the cashiers
20 are the ones who really take care of the system. But
21 definitely there were less problems with the new system.

22 JUDGE CHENG: Okay. Thank you.

23 JUDGE DANG: I have one brief follow-up question.
24 I wasn't quite clear what the problem was with the POS.
25 You had mentioned -- made some references to it being

1 unreliable. I was wondering if you could perhaps
2 elaborate on that?

3 MS. SILVA: Well, the main part the system used
4 to not work. Just that. And so the technician would come
5 up and fix it up and put to work again, the system. And
6 that happened very often. And the cashiers will -- will
7 let me know that.

8 JUDGE DANG: So I'm wondering if that was the
9 case, do you have an explanation for why on certain days
10 sales were processed through the POS? Some customers
11 would receive their receipt from the POS and others would
12 not. And then following that, another customer would
13 receive a sale. So that would indicate that the system
14 was -- it appears, at least to me, that would be operating
15 during that period.

16 MS. SILVA: Well, I really don't know what
17 happened because I don't work with the system personally.
18 So I just received, you know, the news that the system
19 wasn't working. So when I received that notice, I would
20 give the cashier the number of the technician so he could
21 help us with the system. But I really don't know, really,
22 what was going on all the time because I am not a cashier.

23 JUDGE DANG: Okay. Thank you.

24 MS. SILVA: You're welcome.

25 JUDGE JOSH LAMBERT: I have a question. Is there

1 any evidence or receipts to indicate repairs that were
2 made to the POS system?

3 MS. SILVA: Yeah. I have no receipt for that
4 service because the technician would go to the place, fix
5 the things up, and the cashier will pay him some money.
6 It wasn't that much.

7 JUDGE JOSH LAMBERT: And the repairs that were
8 made, were they for -- were they due to the deletion of
9 orders from the POS system? Were things being deleted?
10 Was that one of the problems she was getting repairs for?

11 MS. SILVA: Well, I really don't know what they
12 would do with the system. I repeat, again, I wasn't the
13 cashier. I was the cooker. So I didn't know exactly what
14 was going on with the repairman. They just let me know
15 that the thing wasn't working, but working again. That's
16 it.

17 JUDGE JOSH LAMBERT: How were you aware that
18 there was a problem with the POS system?

19 MS. SILVA: They always called me. All the time
20 they are calling me.

21 JUDGE JOSH LAMBERT: Okay. That's it for
22 questions. Mr. Moor, you can proceed.

23 MR. MOORE: Can I have a few questions to address
24 the questions that you asked?

25 JUDGE JOSH LAMBERT: Sure. Yeah. I'll put

1 you -- that's fine.

2 MR. MOORE: I'll try to be quick.

3

4 REDIRECT EXAMINATION

5 BY MR. MOORE:

6 Q Ms. Silva, did you ever use the POS system?

7 A No.

8 Q Did you buy the new POS system after the audit?

9 A No.

10 Q We have the answer. We'll move along.

11 JUDGE DANG: Can we have the answer translated.

12 MR. MOORE: Yes.

13 MS. SILVA: Yes, when the old system didn't work
14 anymore.

15 BY MR. MOORE:

16 Q Were the employees authorized to use guest checks
17 when the POS system was working?

18 A Yes. They were authorized to use these checks,
19 guest checks, when they could take orders by phone or when
20 the system wasn't working.

21 Q Were they authorized to use guest checks when the
22 POS System was working for orders other than a phone-in
23 order.

24 A No. They were not authorized to do that.

25 Q Did you ever fire an employee for using the guest

1 checks when the POS System was working, and it was not for
2 a phone order?

3 A Yes.

4 Q Why?

5 A Because I noticed that this person was robbing
6 me.

7 Q And approximately how much theft did you have a
8 month in the store -- the restaurants?

9 THE INTERPRETER: Again, with the question?

10 BY MR. MOORE:

11 Q Approximately how much theft did you experience
12 in your restaurants on a monthly basis?

13 A Yeah. It was a lot of money, around \$8,000 to
14 \$10,000.

15 Q And was it the use of the guest checks that you
16 found out that your employee was using that to steal from
17 the company?

18 A Very probably, yes.

19 Q I point you back to your notebooks. Did you
20 include all of the guest checks and the POS receipts into
21 your notebooks when you made your journals?

22 A Yes. I did it.

23 Q Was it your journals that you considered the most
24 accurate records for the recording of sales tax?

25 A Yes. Yes, I do.

1 Q Did you ever instruct anybody on the POS System
2 to make a monthly backup?

3 A No.

4 MR. MOORE: No further questions.

5 JUDGE JOSH LAMBERT: Okay. You can proceed with
6 the rest of your presentation.

7 MR. MOORE: Thank you. I would like to call
8 Mr. De Ceita, please.

9 MS. SILVA: Thank you.

10 JUDGE JOSH LAMBERT: Thank you. Please stand and
11 raise your right hand.

12

13 EUFEMIO DE CEITA,

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

17

18 JUDGE JOSH LAMBERT: Thank you.

19

20 DIRECT EXAMINATION

21 BY MR. MOORE:

22 Q Mr. De Ceita, what is your profession?

23 A I'm a business consultant and business
24 management.

25 Q Were you present at any of the audits for the

1 Appellant?

2 A Yes.

3 Q And how many?

4 A All of them.

5 Q And were you representing her during that time?

6 A Yes.

7 Q Were you being paid for being here today?

8 A Not at all.

9 Q Do you still work for the Appellant?

10 A No, not at all.

11 Q Are you familiar with the Appellant's
12 understanding and use of the POS System during the audit
13 period, and if you can you tell us?

14 A Can you repeat the question?

15 Q Yeah. Are you familiar with the Appellant's
16 understanding, use, and capability with the POS System
17 during the audit period?

18 A Yes. I'm just going to rephrase some statements
19 that Ms. Martha did because I was representing her at the
20 time, and I did my assessment on the POS. The problem was
21 consistent with the computer, not with the POS software,
22 which is defective. One is the hardware, and one is the
23 software.

24 MS. FLANAGAN-MCBETH: I'm going to -- excuse me.
25 I'm going to object to him clarifying another witness'

1 testimony. He can testify as to what he knows personally,
2 but he cannot redo her testimony based on his
3 interpretation of what she said.

4 JUDGE JOSH LAMBERT: Okay. Well, we'll note that
5 and take it into consideration when we're discussing the
6 evidence amongst ourselves and give it the appropriate
7 weight, whatever that is.

8 MS. FLANAGAN-MCBETH: Thank you.

9 JUDGE JOSH LAMBERT: But we'll let him discuss
10 what he wants at this time and allow him to speak and then
11 discuss it later in terms of weight.

12 Go ahead and proceed.

13 MR. DE CEITA: All right. I'm going to briefly
14 tell my assessment. So I realize there was a difference
15 between the POS and the hardware, and that was the main
16 issue at this point. So the data provided to the board at
17 the time was, basically, the only backup existed on the
18 computer.

19 And the reason for this was because of a computer
20 malfunction. The POS itself as a software, it works fine.
21 We didn't have any issue at all. So the data existed on a
22 computer was the only one they have, so the board can do
23 the assessment for the audits. And when I talked to
24 Ms. Martha, she explained to me that she used mainly the
25 POS to facilitate the event -- the sales, because she

1 didn't know exactly the POS was to record the sales.

2 So that's why she did double work using a
3 handwritten books all the time. So she -- she rely more
4 on her notebooks daily.

5 BY MR. MOORE:

6 Q Were you at the August 10th, 2015, audit meeting
7 with the BOA -- the BOE the Department conducted?

8 A Yes, I was.

9 Q And then have you read the report -- the audit
10 reports from Mr. Gomez as to what occurred during that --
11 their position to what occurred that day?

12 A Yes, I did. And this was one of the reasons I'm
13 here. Because I was really surprised at the report from
14 Ms. Gomez, because I did work side by side since the first
15 time that they came to my office. And I noticed there was
16 a few mislead statements. They even use myself admitting
17 admission to the word manipulation of data, which is never
18 used.

19 I did agree on the point that the technician used
20 to fix the computer by using the cheapest way to fix it,
21 which is erase the memory of the computer. That was
22 admitted at the meeting. But never POS data, which I'm
23 trying to just clarify that it's two different things.

24 Q In that meeting on August 10th, did the Appellant
25 indicate that she instructed any repairman to erase,

1 alter, or delete any information from the system?

2 A Not at all. She and myself, because I did a
3 translation to Ms. Martha, and she mentioned that -- the
4 same statements -- that she used to get calls, and she
5 used to give a number for the repairman to go to the site
6 and repair the POS system, which is that, case; repair the
7 computer malfunction.

8 And during the computer audit, Mr. Lopez's
9 presence, a few times the computer being freezing and not
10 working properly, and we have to wait hours before we even
11 get to the data.

12 Q Was there any conversation or did the Appellant
13 make any statement in that meeting regarding the USB or
14 back-up as to the system?

15 A Ms. Martha mentioned that she might have some
16 backups on USB, which she didn't know what USB. I had to
17 explain to her that is a flash drive that the technician
18 may give it to her. And she mentioned at -- at the audit
19 that she used to keep everything in a storage, which is
20 the furniture store that she has in Burbank, that has
21 damage, which she proved to the BOE that there was a --
22 from water damage, that she lost all the archives.

23 Q So your understanding at the audit period -- at
24 the time of the audit that the Appellant had a good
25 understanding with computers?

1 A No, not at all.

2 Q Did she have a good under -- your understanding
3 is she had good understanding on the sales reporting
4 requirements required, ever?

5 A Not at all. Actually, taxpayer didn't actually
6 compute the sales tax. So many times we have to go over
7 the numbers. Because at one point her menu -- her menu
8 includes taxes. So the report that she used to do was
9 completely misunderstood. Because when the gross was to
10 include taxes, there's a certain way to calculate the math
11 so they can subtract from the gross to calculate the
12 taxes.

13 She didn't follow those steps. She was guided or
14 misled by friends that just take a percentage of the taxes
15 of those numbers and just pay the taxes. That was my
16 understanding.

17 Q And was your understanding that she was
18 calculating sales tax based upon advice of another
19 professional?

20 A Correct. Which something I referenced to the
21 board, that the meeting we had the first time, they should
22 approach Ms. Martha as -- as a form to educate her, not to
23 threaten her to accept what she did. And that was clear
24 at the meeting when she's -- three members of the board
25 was present that there was no fraud talked about at the

1 meeting, just cooperation so they can understand how she
2 miscalculated the taxes.

3 Q In that meeting, did she make any admission that
4 she might have made a mistake? She might have
5 miscalculated.

6 A She did. She did. And I actually did translate
7 the part that I was like, she might underreport because
8 she didn't know how to calculate. But at that point, we
9 were trying to figure out a way why the discrepancy was a
10 huge amount.

11 Q Was she admitting the fact that she intentionally
12 underreported or that it was a --

13 A From my -- from my own assessment, she didn't
14 have a clue. She was clueless as to what she was doing at
15 that point.

16 Q Do you recall in that meeting if she that
17 instructed her employees to alternate between the POS and
18 the guest checks when the POS system was working?

19 A No, I did not hear her say that.

20 JUDGE JOSH LAMBERT: Mr. Moore, I think we're
21 getting to two minutes away from 30 minutes.

22 MR. MOORE: Oh, okay.

23 JUDGE JOSH LAMBERT: So if you want it to go
24 longer, we can just have your second period of 30 minutes
25 to be reduced by whatever you --

1 MR. MOORE: That's fine.

2 JUDGE JOSH LAMBERT: Okay.

3 MR. MOORE: Thank you. I have no further
4 questions for Mr. De Ceita at this time.

5 JUDGE JOSH LAMBERT: Mr. Lambert, do you have any
6 questions for the witness?

7 MR. SCOTT LAMBERT: No questions.

8 MS. FLANAGAN-MCBETH: I have one question. I'm
9 sorry. Since you were aware or you testified that you
10 were present during the audit and you were translating for
11 Ms. Silva, did she ever mention any police reports that
12 were filed from the thousands and thousands and thousands
13 of dollars she testified that were stolen from her?

14 MR. DE CEITA: No just verbally.

15 MS. FLANAGAN-MCBETH: Okay. That's fine.

16 JUDGE JOSH LAMBERT: Judge Dang, do you have any
17 questions?

18 JUDGE DANG: No questions.

19 JUDGE JOSH LAMBERT: Judge Cheng, do you have any
20 questions?

21 JUDGE CHENG: Mr. De Ceita, did you -- when did
22 you come to help Ms. Silva? When did you start?

23 MR. DE CEITA: That was after she received the
24 letter of audit, they contact my office. I believe it was
25 2014.

1 JUDGE CHENG: So around April 2015?

2 MR. DE CEITA: Yes. Right after they received
3 the letter, correct.

4 JUDGE CHENG: So this is -- what you testified to
5 is what you -- information you gathered after the fact.
6 It's not percipient. You weren't there when all of this
7 was actually happening. You were told that the POS System
8 was fine, that the computer had problems, or did you
9 personally see that the computer had problems?

10 MR. DE CEITA: I personally -- I saw some of the
11 computers because at that point they have three locations.
12 And I presence myself with the member of the BOE,
13 malfunctioning computers, which is after a few months they
14 replaced two or three computers that they should have
15 receipts to show you that.

16 JUDGE CHENG: So were the computers in any way
17 connected to the POS, or is this -- are we talking about
18 personal computers to do bookkeeping and word processing?

19 MR. DE CEITA: Yeah. A computer is basically the
20 software POS, which is the POS software which they use a
21 bellow to run through the computers. So it has to have
22 some sort of specs in order to be well functioned. Which
23 at that time they rather save money. They purchased old
24 computers with the old touch screens. And that was one of
25 the main reasons the computer did not work well. So the

1 POS didn't function all the time.

2 JUDGE CHENG: So we're talking about PCs? We're
3 talking about personal computers that you used the POS
4 software on?

5 MR. DE CEITA: It's a special computer with
6 special specs with the touch screens that you have to
7 import all those. And you load the software into the
8 computer so that way you make the sales, or your customer
9 uses the computer as a POS. It's sort of an integration.

10 JUDGE CHENG: And what was actually replaced?
11 Was it the POS machine that was replaced or the computers?

12 MR. DE CEITA: The software is still the same
13 which is Adelo, and the computers were replaced.

14 JUDGE CHENG: Okay. All right. That's all I
15 have.

16 JUDGE JOSH LAMBERT: Okay. I have just a
17 question. Maybe you could explain or if you know why
18 erasing the memory on the computer would fix it.

19 MR. DE CEITA: On a point of view, erasing the
20 computer fixed the problem. I can't say is that the
21 correct way to do it, but a lot of technicians that's the
22 easiest way. If you have a computer which is 2.5
23 gigabytes or RAM memory, after accumulated certain data,
24 you have to erase to make the processer go faster. So
25 it's a lot of practice for a lot of technicians.

1 JUDGE JOSH LAMBERT: Okay. I think I have no
2 more questions. So I think we're -- you can proceed with
3 your presentation.

4 MR. MOORE: Thank you. I would like to recall
5 the Appellant for a quick question, please.

6 JUDGE JOSH LAMBERT: Yes. That's fine.

7

8 REDIRECT EXAMINATION

9 BY MR. MOORE:

10 Q I just want to ask another question. Did you
11 ever make a police report regarding any thefts in your
12 business?

13 A Yes, I did it once.

14 Q Why only once?

15 A Because this person who I reported against, he
16 sue me.

17 Q Did you end up paying money because of that
18 lawsuit?

19 A Yes.

20 Q Have you made any other police reports after that
21 time?

22 A I didn't want to do it again.

23 Q Why not?

24 A Because I lost money.

25 Q And you didn't want to get sued?

1 A I don't want.

2 MR. MOORE: No further questions.

3 JUDGE JOSH LAMBERT: CDTFA, do you have any
4 further questions?

5 MR. SCOTT LAMBERT: We do not.

6 MS. FLANAGAN-MCBETH: No.

7 JUDGE JOSH LAMBERT: Judge Dang, do you have any
8 further questions?

9 JUDGE DANG: No questions.

10 JUDGE JOSH LAMBERT: Judge Cheng?

11 JUDGE CHENG: No questions.

12 JUDGE JOSH LAMBERT: Okay. Go ahead.

13 MR. MOORE: Thank you. We would like to call
14 Jaime Tricerri, please. He's here for argument as far as
15 why we think the numbers should be different.

16 JUDGE JOSH LAMBERT: Okay.

17 MR. MOORE: So I don't know if this is going into
18 our rebuttal or --

19 JUDGE JOSH LAMBERT: I think it's about a little
20 over 30 minutes now, so, according to my clock. So I'll
21 just reduce your rebuttal time by however we go over 30
22 minutes.

23 MR. MOORE: That's fine. We'll work within the
24 time allotted.

25 JUDGE JOSH LAMBERT: Okay. Thank you.

1 MR. MOORE: We'll do our best.

2

3

WITNESS STATEMENT

4 MR. TRICERRI: Apologize I need to get my papers
5 ready. My name is Jaime Tricerri as it was stated. I was
6 retained back in August of 2015 by Mr. De Ceita. At that
7 time that's Ms. Martha's financial consultant in handling
8 the audit. The reason for my -- that I was retained is
9 because I have my experience. I have 32 years with the --
10 at the time with the Board of Equalization, now the CDTFA.

11 And so I was hired to evaluate the audit, to look
12 at the audit working papers that were presented at what is
13 sometimes termed "The Exit Conference" that was held, I
14 believe it was in August. And the papers and the audit
15 working papers that were presented to Mr. De Ceita and
16 later to Ms. Silva.

17 So I did my assessment. And, basically, what I
18 have determined that, you know, the Department did a what
19 is called an indirect approach, and I don't think there's
20 any issue with that. They have the right to do that,
21 especially, when they feel that the records might not be
22 reliable and so forth. So they did that. So I didn't see
23 any issue with that.

24 However, I did see the issue with the fact that
25 the Department is well aware that in their approach has

1 many factors. And a lot of these factors at the time of
2 presentation was affecting the final result on it. So one
3 of the items I did when I reviewed the audit working
4 papers initially that was presented, I felt that there
5 were some crucial factors that were not considered in the
6 audit.

7 The -- to kind of just explain what the indirect
8 audit approach was basically trying to determine, okay,
9 what is a selling price or the average selling price at a
10 particular time? In this case, it was used in 2015. They
11 were -- the auditor was able to compute what is the
12 average selling price of an item -- overall. I'm sorry.

13 And then they have to, of course, determine what
14 is the average number of transactions that you're going to
15 apply this average selling price. And then taking those
16 factors and computing what they feel is the total sales of
17 the taxable sales that should have been reported for that
18 period. So the Department took -- originally took April
19 and May to set what the average selling price was.

20 Later they did another -- another test was done
21 that was back in November of 2015. And as they
22 computed -- what they took these things for that period,
23 they took that average number of transactions for August,
24 September, and October of 2014. They took the average
25 selling price that was computed in 2015, and they used

1 these two factors to determine they -- what the audited
2 taxable sales would be comparing to what was reported, and
3 they came out with a percentage of error.

4 Initial percentage of error was something like
5 415 percent of error, which they just, of course, they
6 went back and applied it, going back to -- originally, it
7 was 2012. They recommend a fraud. It was two more years
8 were added. And then, of course, it was extended and
9 projected to 2010. That was their method.

10 When I saw the initial -- the initial -- examine
11 the initial preliminary report that was discussed in
12 August 2015, something struck me very odd. The auditor
13 had taken not the average selling price. He took the
14 highest price in their computation. And so doing, by
15 taking the highest price, the assessment that was
16 presented was inflated by the taxable -- the audit taxable
17 sales were almost inflated by over \$2 million.

18 That's where Mr. De Ceita and I presented with
19 him and-- and we called a meeting with the auditor to
20 express what my recommendations would be. And those
21 recommendations, basically, has to do with the fact that
22 when -- when you look at a business and you look at
23 average selling prices, you have to consider facts -- the
24 fact that prices tend to change.

25 And if you're going to go back to 2010, the

1 average selling price in 2010 definitely are not the
2 average selling price in 2015. Same thing applies with
3 the average number of transactions. The average number of
4 transactions that they computed in 2014 would not have
5 been the same amount of transactions back in 2010 or 2012
6 on there.

7 And so those factors, there has to be some kind
8 of adjustments made for these factors as you go in time.
9 The auditor did agree later. He did agree to make an
10 adjustment for what is called price variance. He compared
11 the -- I believe it was -- let me see my notes here. He
12 took the 4th quarter 2014 and the August 2015, those two
13 periods, and say there's 8 and 8.16 percent variance in
14 price. He took that and applied it to the audit.

15 There was nothing done, or any effort made by
16 the -- by the Department to try to make any adjustments
17 for the average number of transactions going back in time.
18 Due to time constraint, I'm going to try to -- I'll show
19 you what exhibits, what I did. But what I just stated as
20 adjustment that when I said is very critical that all
21 factors are considered. They have a large potential in
22 the results.

23 This is an example. This -- this, like I said,
24 this 8.16 percent of price adjustment had over \$2 million
25 effect on the results. So with that in mind, basically,

1 Mr. De Ceita asked me to compute and how can we compute a
2 price variance going back in time. We tried to get
3 historical menus, which would be the thing in order for us
4 to compute that. And then also we -- I tried to consider
5 how we can reflect an adjustment in the average number of
6 transactions. We go back in time.

7 So I've done that. I believe that the board had
8 in its position enough information that they should have
9 been able to do that. They went -- and one of our
10 contentions was that they found historical records in Yelp
11 where customer had posted. So they had it available to
12 them historical menus, which they could have computed a
13 price variance per year as depending on the menus.

14 Well, I've done this. I've taken the menus that
15 were found in Yelp, and I've computed a price variance
16 going back per year. And then I also have, as far as the
17 number, the other factor which is the average number of
18 transactions. That's a little tougher to have that. But
19 the only thing that I feel it would be fair and would have
20 been, hopefully, acceptable is that we looked at the bank
21 accounts.

22 And so what we did is I looked at the bank
23 accounts and determined what is the relationship or the
24 amount of deposits going back from 2012, 2015, to the --
25 actually, 2014 when they had computed the average number

1 of transactions. And I took that relationship of deposits
2 during their test period, which was August, September and
3 October. What were the deposits at that time in the bank?
4 What were the deposits back in 2012? In '13? I computed
5 that ratio and computed a variance.

6 So -- and you will see that in my exhibits. Now,
7 you know, I believe that it's unfortunate that the
8 Department did have this available. Especially, when
9 you're considering and you're thinking that there might be
10 fraud involved. Every information that you have available
11 should be utilized, and, if anything, to the advantage of
12 the taxpayer because she's facing fraud. That's a big
13 one.

14 And the burden of proof, as the Department knows,
15 is on the Department to prove fraud. So -- and there's
16 one more thing that I think, before I get into my
17 exhibits, that I feel is a big factor and was neglected by
18 the Department. And I'll read that from -- I'm going to
19 read from Chapter 8 of the Department's audit manual on
20 Section 1810.35.

21 It says regardless of the audit procedures used
22 by the auditor, if a tax deficiency has been established,
23 an alternative method must be used and documented in the
24 audit working paper to support the reasonableness of the
25 audit findings.

1 This is generally referred to as reasonableness
2 accumulation under Section 80315 of the same chapter.
3 Which in part reads, the preferred method for the
4 reasonableness evaluation is an analysis of the taxpayer's
5 net income. In other words, you take -- you take what the
6 taxpayer is showing as net income.

7 You show -- you come up with the -- you look at
8 the -- you add the assessment that you're coming up with.
9 Which in this case was over \$8 million. And you look at
10 the -- basically, analyze the net worth to make sure the
11 Department's policy is to make sure that what you're doing
12 is reasonable. The Department did not do that. They did
13 not provide an alternative method to support their -- what
14 their conclusion and the results.

15 Like I said, I went back and computed what --
16 what I feel would be a proper adjustment going back in
17 time for the average selling price and for the average
18 number of transactions going back. And I tried to use the
19 same format as the auditor, so to make it more
20 understandable. So I use the -- I went ahead and computed
21 an average price based on the menus. I did that for every
22 year. So there's a '12. There's a '13, so forth based on
23 menus.

24 So the exhibits that I'm going to use is
25 Exhibit 5, and that's page 1 through 26. And there's also

1 Exhibit 6, page 1 through 16. Yeah. And also Exhibit 13,
2 page 101.

3 Now, due to time constraint, the schedules I
4 prepared in those exhibits are self-explanatory, but I'll
5 go through maybe one year. And you let me know if you --
6 if I should go through other periods. But if we just take
7 2012, for instance, which is Exhibit 5, page 1 of 26,
8 which is the computation, which I've -- I've -- let's
9 start out in column D.

10 Column D has the average price that was
11 established in the audit. And by the way, there was a --
12 like I mentioned before, the Department did a test in
13 April, in May, and came up with the average selling price.
14 Then they felt that was not a valid test. And so they did
15 another one, which included, I believe, November 2015 for
16 three months. It was three and a half months.

17 My position has been that you did one test. You
18 did a second test in order to establish an average. The
19 more transactions you have available to compute that
20 average, the better it is. So I believe those two tests
21 should have been combined. And that's what is represented
22 here on my schedule on column D, instead of just taking
23 the last -- eliminating or not using one and just using
24 one test. So that's my representation on D.

25 And as you look at Column E, there's the

1 2012 percent of average price variance of 12.83. The way
2 that computed is by taking the menu. And if you look at
3 Exhibit 5, page 2, 3, 4, and 5, that's the detail. That's
4 basically comparing the prices the Department had back in
5 2015 that they did. I compared it to 2012 menu prices.
6 And as you see in column -- on the bottom of page 5 of
7 Exhibit 5, there's a 12.83 variance that was found between
8 2012 and 2015.

9 That's applied here. And so that gives you --
10 that, in other words, that average price in 2015 is
11 decreased by 12.83 percent, which is Column F, which you
12 see \$1.42, \$1.52. And it gives you the average price in
13 2012 of 9.65 and 10.30. I might want to mention that
14 there's only two locations at that time in 2012. The
15 Moorpark location was not open yet until 2013. So I did
16 not include here. This was another error on the part of
17 the Department. They assumed all three locations.

18 The percentage error was just applying going back
19 without any consideration of the fact that when you have
20 opened another location, obviously, your average number of
21 transactions are also going to increase because now you
22 got another location. So this is the thing that was so
23 important to be able to consider the fact and adjustment
24 for the average number of transactions.

25 So you can see my computations there that the

1 next factor, of course, is the average number of
2 transactions that we want to apply the average selling
3 price to. In this case, the Department had -- as you look
4 at Column K for those two locations, they had determined
5 there's an average number of transactions based on August,
6 September, October of \$38,138 and \$20,779 for those two
7 locations.

8 Okay. But this is 2014. So how are we going to
9 make this adjustment going back to 2012? And the way that
10 I did it is once again, it's based on bank statements. So
11 if you look at exhibit -- Exhibit 5, page 7, there's a
12 bank deposit comparison. And we compare the number of
13 deposits in 2012, we only happen to have bank deposits
14 from July to December 2012. And you can compare that to
15 the deposits that were made in 2014 of \$123,889. You can
16 see the variance in deposits.

17 In this case, for the six months it's 48.96 of
18 the deposits. That, I used over here to reflect on the
19 fact that the Department had come up with audit number of
20 transactions. And in this case, if we look at the
21 combined two locations of 58,917, and I'm saying that you
22 have to adjust the number of transactions by 48.96 percent
23 to come up with what would be the applicable number of
24 transactions for 2012 for those two locations.

25 You take that and now you have the average number

1 of transactions that I come up. You have the average
2 selling price. You multiply. You come up with what --
3 projected that the sales should have been. In this case
4 we're looking for 2012, and we look at \$285,033 for the
5 quarter. That's just the quarter.

6 And then we -- when we look at the total audited
7 sales would be for the 2004 -- '12, would be 855. The
8 month that was reported was \$24,000. There's a difference
9 of \$430,000, which computes to 101 percent of their
10 statement for the 2012, which we use in a projection for
11 '12. I did the same thing for '13, '14, and the other
12 periods. Pretty much the same procedures, same method.

13 So I'll let Mr. Moore know if he wants me to go
14 on with the constraint of time, but my schedule -- my
15 exhibits there is pretty self-explanatory and the
16 procedure is the same that I did for all the years.

17 JUDGE JOSH LAMBERT: CDTFA, do you have any
18 questions?

19 MR. SCOTT LAMBERT: We do not.

20 JUDGE JOSH LAMBERT: Oh, actually --

21 JUDGE DANG: I have one brief question. I'm
22 having a difficult time understanding, I believe, it's the
23 relationship between the variance and the bank deposits
24 and how you tie that into the variance in the number of
25 transactions which occurred.

1 MR. TRICERRI: Like I said, that one was a
2 difficult. We had to have the -- the only source that I
3 feel could be reliable and that could may be acceptable to
4 the Department, because of what we had. We've had the
5 discussion with the Department as far as, okay, how to
6 come up with a correct -- the only thing that is available
7 that is a -- as far as records, is the bank deposits that
8 we can go back there.

9 So you look at the relationships in August,
10 September, and October, if we look at schedule --
11 Exhibit 5, page 7. So I'm comparing -- okay.

12 JUDGE DANG: I mean, I understand how you arrived
13 at the numbers. I just don't understand how you can --
14 how you're making the assumption that because bank
15 deposits were less, there are also fewer transactions. Is
16 it not also possible the taxpayer perhaps just deposited
17 less cash during that period? Or that variance is also
18 due to the price variance that you're asserting occurred
19 during that period?

20 MR. TRICERRI: Well, like I said, this is the
21 best. I'm not saying that it's perfect in the way that we
22 wish we had a -- going back historically. Like for the
23 price variance, you have the menus. These are menus that
24 were accepted by the Department because they found them on
25 Yelp, and I used that. So that's what I used. In this

1 case, unfortunately, we need to find an activity or
2 something that we can, kind of, be able to compare with
3 the current project.

4 So the activity in this case was just the bank
5 deposits. The fact that, well, you don't know if they --
6 she had deposit her -- her habit of deposit. But the same
7 things applied when the Department projects the percentage
8 of error that they did in 2015. They figure, well,
9 there's a pattern here. There's a pattern so we -- we
10 have the right to project it back because we've identified
11 a pattern.

12 Well, we asked that -- well, on the bank deposits
13 it could be that same pattern. You tend to deposit -- you
14 take so many -- most of the time when you don't deposit
15 cash in this industry, it's because you're using cash to
16 pay your vendors, your employees, and so forth, and the
17 rest goes into the bank.

18 JUDGE DANG: I understand your position.
19 Let's -- let's forget about the deposits for a moment.
20 But how do we know there's not overlap between price
21 variance in this case and the number of transactions based
22 on, you know, the reduced number of deposits?

23 MR. TRICERRI: We don't know.

24 JUDGE DANG: Wouldn't there be, naturally, some
25 other overlap in that case?

1 MR. TRICERRI: Well, I -- there could -- there
2 could be, but just that my position was in my -- my
3 assessment was that there -- we know that when somebody
4 has two locations, and then they add a third location, and
5 they're expanding their business, the average number of
6 transactions will also increase significantly. How do we
7 determine that?

8 Like I said, the only thing we have here is the
9 bank statement. If there was something else, I definitely
10 would have used it, but this is the only thing that
11 records or source that we have in order to compute. But
12 that adjustment, I feel, has to be made because it's
13 common sense that you cannot have the same number of
14 transactions, 2014 going back to 2010. You know four
15 years, it changes.

16 JUDGE DANG: But your calculations do not account
17 for the fact that there could have been also price
18 variance that explains the reduced number of deposits?

19 MR. TRICERRI: No, it doesn't.

20 JUDGE DANG: Thank you. No further questions.

21 JUDGE JOSH LAMBERT: Judge Cheng?

22 JUDGE CHENG: No questions.

23 JUDGE JOSH LAMBERT: I have just one question.
24 You said you used Yelp menus. You also mentioned
25 historical menus. So I was wondering on these

1 calculations, are they only using Yelp menus?

2 MR. TRICERRI: Yeah, it's only Yelp. But this
3 was based on our hearing. The Department's -- that we had
4 a hearing. I already resubmitted it. We try to get menus
5 from -- Mr. De Ceita tried to get them from the printer.
6 And some of them he -- he did not identify them as to what
7 year. It was hard to identify. Originally, those menus
8 were given to me. And then in the hearing that the
9 Department disclosed -- and this was the first time we had
10 heard, "Well, the reason why we didn't accept your
11 historical menus is because we found in Yelp this menu or
12 this menu."

13 So I say, okay. Fine. So I went to Yelp. And,
14 of course, Yelp is postings by customers. It's what it
15 is. They, you know, randomly take pictures. They post
16 everything in there. And so I was able to, let's say, be
17 able to say make a copy if it was -- we found a posting in
18 2012 that we assume that menu belongs in 2012. Same thing
19 for '13 or '14. And so that's when I say -- and they're
20 still considered historical menus because they're from
21 going back in time.

22 JUDGE JOSH LAMBERT: Okay. So you're just using
23 the Yelp menus?

24 MR. TRICERRI: Right now it's only the Yelp
25 menus.

1 JUDGE JOSH LAMBERT: So if you have a 2013 Yelp
2 menu, you're using that for 2013?

3 MR. TRICERRI: Correct.

4 JUDGE JOSH LAMBERT: Okay. That's all.

5 MR. TRICERRI: And the copies of the menus are as
6 part of my exhibits over there.

7 JUDGE JOSH LAMBERT: Okay. Yeah, I saw them.
8 Okay. That's all the questions that we have.

9 MR. TRICERRI: And if I might mention? I forgot
10 to mention that also, there was one more exhibit that
11 pretty much summarizes the -- and once again, it's based
12 on the same format as the Department's audit working
13 papers. But Exhibit 13, page 101, basically, summarizes
14 what I found as far as the percentage of error by period.

15 JUDGE JOSH LAMBERT: Okay.

16 MR. TRICERRI: And so --

17 JUDGE JOSH LAMBERT: Okay. Thank you.

18 Mr. Moore, I'm at 15 -- 50 minutes. So that
19 would leave 10 minutes left for rebuttal. Did you want to
20 continue, or would you like to save some time for after
21 when CDTFA speaks?

22 MR. MOORE: I would like to save some time.

23 JUDGE JOSH LAMBERT: Okay.

24 MR. MOORE: Thank you.

25 JUDGE JOSH LAMBERT: So CDTFA, you have

1 15 minutes, and you can proceed when you're ready.

2 MR. SCOTT LAMBERT: I'm ready.

3

4 CLOSING STATEMENT

5 MR. SCOTT LAMBERT: There's a lot here, but I
6 will delve into as much I can, broadly, and if you have
7 questions afterwards, I'll be able to take it.

8 In this particular case, the office that
9 conducted this audit was looking into taxpayers in the
10 restaurant industry that underreport their tax. And what
11 they found is a lot of -- frequently, taxpayers use what's
12 called "zappers". And what it is an audit program that
13 will systematically eliminate sales out of your system.

14 So you can set it to whatever you want it to be.
15 If you want to eliminate 10 percent or 20 percent, you can
16 put that information into the program, and it will remove
17 the sales from it. It will also eliminate your purchases
18 so that your ratios all come out. So that's kind of the
19 background of how we started this audit.

20 So the office between the periods of August of
21 2014 through March of 2015 made unannounced purchases.
22 And so they're able to determine how many purchases or --
23 I'm sorry -- how many sales that a taxpayer makes during
24 the day because they can see the order number. And when
25 they go in to purchase, they'll do at certain times of day

1 and so it's consistent. And they just get an idea.

2 The other thing that they do is when they do
3 select it for audit, they take those purchases and trace
4 them back into the system to make sure that those sales
5 are still in the system. In this particular case, we were
6 unable to do that due to the fact that the taxpayer or the
7 Appellant did not provide us with any of the POS
8 information for periods during the audit.

9 So the Appellant gave us limited records, which
10 were income tax returns for 2012 and 2013. They gave us
11 bank statements. And then they gave us POS information
12 for periods outside the audit. What I should point out is
13 when the Appellant was notified of an audit in April of
14 2015, we continued to make unannounced purchases. And
15 after that time, the order number was no longer on the
16 receipt that we received from the Appellant.

17 So someone would have to go into the system and
18 eliminate that information from the system. It's not by
19 accident. It's by design. So what I should point out
20 here is this is a civil matter. This is not a criminal
21 matter. Therefore, the Appellant is responsible for the
22 reporting on the return. Any acts by her agent, she would
23 be responsible for. The only exception would be if
24 somebody was defrauding her, and that was the reason for
25 the underreporting. She would not be responsible for

1 that.

2 There does not appear to be any evidence of that
3 based on the amount of sales that were underreported.
4 It's in -- on the average, if you look at the five years,
5 it's over \$1.6 million a year on average in sales that are
6 being underreported. You could not continue in business
7 with someone taking that from you.

8 I would also point out that the Appellant has
9 collected the sales tax on the invoices that we received.
10 Sales tax was separately listed on those receipts. So in
11 effect, she has collected this money from her customers,
12 and she has kept it for herself. And that's really the
13 issue that we're here about. And I believe when you take
14 a look at our fraud memo, it'll be clear and convincing
15 that she intentionally underreported that. Or whoever was
16 responsible for reporting this, which we believe she was,
17 is responsible for the under reporting and subsequently
18 responsible for the penalty.

19 Now, there's a discrepancy between what she said.
20 Well, our -- our employees heard her say something
21 different than what is being argued now. And so she is
22 basically -- the Appellant is saying she never admitted
23 she was fraudulent, and it's our word, basically, against
24 hers. I believe when I go through the evidence, you'll
25 see that it was consistent underreporting.

1 But that leads us to why we conceded the first
2 two years of the audit period. So under our -- under our
3 policy guidelines, if we do not have a signed waiver of
4 limitations, in order to go back to earlier periods, you
5 would have to show evidence of underreporting. So just --
6 if you take a look at her returns, it's fairly obvious
7 that there was underreporting for those periods.

8 Unfortunately, that's not our current policy. It
9 was a number of years ago, quite a long time ago, that we
10 were able to go back to 1933 when they first put in the
11 sales tax in 1934 when they had the use tax. We were able
12 to go back to those periods. That's not the way it is
13 anymore. So the fact that she's recanted and does not
14 admit that she was fraudulent, that's the reason why we
15 originally included those 2 years -- first 2 years,
16 8 quarters, in the audit period.

17 So if you -- and I'll just read under -- it's
18 Exhibit 274. Basically, it says, "During one of the
19 appointments to extract the data, auditor Luis Gomez
20 observed a blank guest check booklet next to the
21 register." Actually, this is the wrong one. I'll
22 continue reading it.

23 When this was discussed with Martha A. Silva, she
24 stated that the guest checks were used by management to
25 record food transferred between Cactus locations." So

1 I'll get back to that one. Actually, the statute of
2 limitation comments is on Exhibit 004. And just to
3 surmise that. Basically, what I'm telling you is we
4 included the first two years because of her, admission.
5 We had no records.

6 If you disagree with the Department, we're fine
7 with that. If you want to include those two years, that's
8 fine. If you take a look at Exhibit 42, the Department's
9 Exhibit 42, that's a transcript of the returns that were
10 filed. If you took a look at Column G, what that will
11 show is a fairly consistent underreporting. So this does
12 not appear to be by accident where you are just writing
13 down figures on a piece of paper and you're accidentally
14 coming up with a different number.

15 If you look at the Column G numbers, it falls
16 right in line. And so this appears to be a coordinated
17 systematic underreporting of tax. I would also point out
18 if you -- she provided the income tax returns for 2012 and
19 2013. The gross receipts on those returns tie out to the
20 sales reported on the sales and use tax returns. And
21 what's interesting from those returns, is when you take a
22 look at her cost of goods sold, which she did not provide
23 any purchase invoices for. But the ratio of the cost of
24 goods sold and the sales are consistent in both years.

25 In 2012 it is 156 percent. In 2013 it's a

1 150 percent. So the whole thing appears to be a
2 coordinated effort to underreport. As far as getting the
3 information from the POS system, which she had told us, is
4 that she hired a person named Ching that came in every
5 month to basically reset the sales data and would provide
6 her with a thumb drive with the information on it.

7 So she now -- I'm not sure if that's -- she still
8 agrees to that or not, but that's what she told us. What
9 I would say is the sales data is not on the POS System,
10 and she did not provide us with the thumb drives. So she
11 didn't provide us with any sales records. I think her
12 testimony was that she had the handwritten sales, which is
13 one of her exhibits. We have no record of receiving that.

14 And one other thing I would say. In these types
15 of situations, these owners of the business, they know
16 about what their sales are each day. So whether they know
17 how to calculate the sales tax, whether they know how to
18 run the POS System, they know what their sales are for the
19 day. And that's why it's interesting when she said she
20 noticed her employee stealing from her.

21 So she knew enough about the business to know
22 that somebody was taking money from her, and I believe she
23 said \$8,000 to \$10,000. That's substantially less than
24 the \$8.8 million that we say was taken from us. But she
25 was aware enough to know that that employee was taking

1 from her.

2 And so what these owners do is -- and they have
3 to because they have multiple locations, and these
4 locations were growing throughout, that she started
5 20 years before this started. She started operating for
6 20 years. She -- I was thinking of several different
7 things at once. So well, let me move on. That escaped
8 me.

9 So as I said, the number of locations were
10 increased during these three years. I'm back on track.
11 They -- the owners of these businesses, at the end of each
12 day, have a ring out of that register. So of her
13 locations, Location Number 1 was cash only. Location
14 Number 2 was cash and credit card. Location Number 3 was
15 cash only. So you can't be at all those locations. You
16 have to have somebody that is going to, at the end of the
17 day, ring out the register and tie out the cash in those
18 registers to the sales that you're ringing up.

19 And they keep, basically, a ring-out sheet where
20 they write down all the sales. They write down all the
21 cash. That cash has to go somewhere, which is generally
22 the safe before somebody takes it to the bank. So you
23 have to have all these systems in place in order to make
24 sure that people aren't taking from you, because they will
25 do that.

1 JUDGE JOSH LAMBERT: Also Mr. Lambert, I think
2 you have about a minute left in that time.

3 MR. SCOTT LAMBERT: Okay. 15 minutes is a short
4 time for what's here.

5 JUDGE JOSH LAMBERT: If you want to go maybe a
6 little extra, but I want to make sure we have enough time
7 for the other hearings.

8 MR. SCOTT LAMBERT: Yeah. Okay. Well, I would
9 go on the indirect, and I'll -- sorry. I'll try to speed
10 up as fast as I can. The indirect audit approach that was
11 discussed at the end, I have a number of problems with
12 that particular -- and just as Judge Dang pointed out,
13 that when you're using the deposits to calculate the
14 number of transactions, what you're doing is essentially
15 comparing that to one period, but you're taking the price
16 differences into account.

17 So just an example. If you had seven -- you sold
18 just one burrito for, say, \$7.00 in an earlier period, and
19 in the test or the period you have the information it was
20 \$10.00, you had one transaction for both. But the way
21 it's calculated here when you go back to that \$7.00 one,
22 they would just have .7 of a sale. And then they would
23 also reduce the price of the item down to \$7.00.

24 So in effect, in the first period for a \$7.00
25 sale, the way they calculated it you'd have \$7.00

1 times .7, and it would only be 4.9. And that's how you
2 can tell that what they have done is not correct.

3 I'd also point out that they've taken averages of
4 averages, which is not the correct way of doing it. And
5 so there's a number of issues. They've also used
6 deposits. As I pointed out, a large percentage of their
7 receipts were from cash deposits, and that was not
8 deposited in the bank. And so that distorts what is
9 happening here.

10 So there's a number of reasons why what they've
11 calculated should not be accepted. So with that, I'll
12 conclude my presentation. I'm available for questions.

13 JUDGE JOSH LAMBERT: Okay. Thank you.

14 Judge Dang, do you have any questions.

15 JUDGE DANG: I don't have any questions.

16 JUDGE JOSH LAMBERT: Judge Cheng?

17 JUDGE CHENG: I don't have any questions.

18 JUDGE JOSH LAMBERT: I have no questions. So
19 Appellant, if you want, you have 10 minutes to do your
20 rebuttal.

21 MR. MOORE: That would include my closing;
22 correct?

23 JUDGE JOSH LAMBERT: Yes.

24 CLOSING STATEMENT

25 MR. MOORE: Okay. What we have here is the

1 Department is trying to assess a specific intent and fraud
2 on the Appellant. They're trying to come up with this
3 extreme scheme that she was -- as I read in their
4 papers -- that she was managing, and that she operated a
5 furniture store, and that she had publication. So as
6 such, she must be a prudent business owner.

7 Even here they say this is apparent facts based
8 upon other businesses. But they are neglecting to look at
9 the specific Appellant here. We have somebody who has an
10 education, not even like a high school completed
11 education, and that is in Mexico in of itself.

12 She has no accounting degrees, no accounting use
13 whatever so far. She learned how to report her sales tax
14 based upon professionals telling her what to do. The --
15 she makes specific time. Daily she went through and made
16 her journal. She would take all the guest checks that she
17 was given. She would take the receipts and she would put
18 those into her journal.

19 For her, there was no reason to keep the POS
20 receipts because her journal far superseded that. Her
21 journal was her accurate set of sales records. She would
22 obviously not be at every location. In fact, if we look
23 back at the exhibits, the exhibits show approximately the
24 restaurants were open 75 -- 45 hours a day. She's
25 testified that on an average, she was there seven hours a

1 day. So you can almost classify her as an absentee owner.

2 She is not a type of owner that runs a business
3 or operates hands-on, that's right there that's watching
4 everything happen. As she said she was a cook. She would
5 go and make her burritos and her tacos and sell those.
6 She would go to other locations, and she would figure out
7 how many beans were left. Do they need to get tortillas?
8 She did not have anything to do with the POS System when
9 she had it.

10 Even when it was broken, she would just have a
11 repairman fix it. Mr. De Ceita testified that she did not
12 have a good understanding of the system. She testified
13 she never even used the cash register. That was not what
14 she was doing. And yet, they are -- the Board -- excuse
15 me. The Department is trying to classify all these
16 actions over to her specific intent to evade taxes.

17 Maybe she did not have the best method. Maybe
18 she did not have the best management skills in running the
19 business. That is far different than creating fraud and
20 trying to evade sales tax. For instance, they argue in
21 their paperwork that because she had a furniture store,
22 that she obviously knew how to report sales tax. That's
23 far different.

24 She was at the furniture store. She sold.
25 That's all she sold. She sold and she upholstered. That

1 had nothing to do with sales tax. That does not make her
2 qualified in the sales tax area. They-- if you look at
3 their exhibits, Exhibit B, 119, it talks about when they
4 did their, you know, on-site sales, that they would go,
5 and they would see somebody writing a guest check and/or
6 sometimes writing a -- punching it in the cash register.

7 Those times are 10:57 p.m. at night on Vine
8 Street. Those times are 11:38 p.m. She was never there
9 past 2:30, 3:30 in the day. She is not going to be -- a
10 mother is not going to be at the stores late at night when
11 she has hired a manager and employees to operate the
12 business. She's testified that it was not her position
13 that guest checks and the POS -- the guest checks being
14 used during the time of which and when the POS System was
15 working.

16 So what the Board representatives would see, they
17 would observe somebody stealing from her by writing a
18 guest check. You want three burritos. I write it down.
19 That's \$7.00. It does not go into the cash register, then
20 they stick it in their pocket. That allocation -- that's
21 not evidence of running two sets of books.

22 That's evidence of something that may be going
23 on. Maybe that employee is doing that, but how can you
24 attribute that action to the taxpayer who wasn't even
25 there at the time. They don't even mention that she was

1 there at the time. There is a reference at one -- even
2 Mr. Cobbs the supervisor, he said that he was there, and
3 saw somebody in the cash register use a guest check as the
4 system froze. Well, she's not -- that wasn't her.

5 She admitted -- she testified she was not a
6 cashier. So they are trying to push other people's
7 actions into her specific intent to come out with this
8 huge -- this complicated scheme to evade sales tax. That
9 is not the case at all, and she is not to be held liable
10 for theft and stealing by other individuals. And that
11 should not be translated over to her creating fraud.

12 We also have Mr. De Ceita here today who
13 testified under oath. He doesn't work for her anymore.
14 He has no obligation with her. So these were not the
15 things she said. She didn't have a complete understanding
16 of what was going on in that meeting. She answered as
17 best as she could. You can see today even, that's she's
18 sometimes not familiar with all the questions that are
19 being asked.

20 Judge Cheng asked her questions, and she really
21 was not very responsive to those particular questions that
22 were asked. She's not the best answer provider, let's
23 say. And I think that has to do with her education, which
24 brings us back to all she was is a cook.

25 She's trying to do her best to report her sales

1 tax. She spent time and days to create her journals, and
2 that is what she would provide to her CPA or her
3 accountant to prepare the sales tax return. We don't have
4 specific allegations that she was involved in having a
5 system of using guest checks to reduce the sales, to evade
6 the tax. There was no actual evidence that she used two
7 sets of books.

8 All those things are just pure assumptions. They
9 are allegations without any substantial facts to back them
10 up. And as Mr. Tricerri said, if you're going to show an
11 assessed fraud, you've got to make every reasonable effort
12 to make sure that your facts are correct. And the Board's
13 actions, their assumptions, their facts, their allegations
14 are just allegations, and they're unsupported.

15 There's no specific showing of her intent to
16 create fraud in the reporting of her sales tax. And we
17 request that the Judges see to that, and understand that
18 perhaps undoubtedly, she was probably negligent in
19 operating her business. But there has been no showing
20 that she intentionally, specifically intended to
21 underreport her sales tax.

22 Thank you.

23 JUDGE JOSH LAMBERT: Thank you.

24 If there's nothing further, I'm going to close
25 the record and conclude the hearing. I want to thank each

1 party for coming in today. We will issue a written
2 opinion within 100 days.

3 Thank you. This hearing is now closed.

4 (Proceedings adjourned at 1:15 p.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 testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

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

I have hereunto subscribed my name this 21st day of January, 2020.

ERNALYN M. ALONZO
HEARING REPORTER