

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
BRET PATRICK MOSHER,) OTA NO. 19014157
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, February 19, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE OF,)
BRET PATRICK MOSHER,) OTA NO. 19014157
APPELLANT.)
_____)

Transcript of Proceedings, taken at
12900 Park Plaza Dr., Cerritos, California, 90703,
commencing at 10:04 a.m. and concluding
at 12:37 p.m., on Wednesday, February 19, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

1 APPEARANCES:
2
3 Panel Lead: ALJ SUZANNE BROWN
4
5 Panel Members: ALJ KENNY GAST
6 ALJ NGUYEN DANG
7
8 For the Appellant: MARC BRANDEIS
9
10 For the Respondent: STATE OF CALIFORNIA
11 DEPARTMENT OF TAX AND
12 FEE ADMINISTRATION
13 By: AMANDA JACOBS
14 STEPHEN SMITH
15 JASON PARKER
16
17
18
19
20
21
22
23
24
25

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

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-13 were received at page 12.)

(Appellant's Exhibits 14-15 were marked at page 15.)

(Department's Exhibits A-I were received at page 17.)

P R E S E N T A T I O N

P A G E

By Mr. Brandeis 18

By Ms. Jacobs 63

R E B U T T A L S T A T E M E N T

P A G E

By Mr. Brandeis 84

1 Cerritos, California; Wednesday, February 19, 2020

2 10:04 a.m.

3

4 JUDGE BROWN: We are on the record in the Office
5 of Tax Appeals oral hearing for the appeal of Bret Patrick
6 Moshe. And this is OTA Case Number 19014157. Today is
7 February 19th, 2020, and it is approximately 10:04 a.m.

8 My name is Suzanne Brown, and I am the lead
9 Administrative Law Judge for this case. My co-panelists
10 are Nguyen Dang --

11 JUDGE DANG: Good morning.

12 JUDGE BROWN: -- and Kenny Gast.

13 JUDGE GAST: Good morning.

14 JUDGE BROWN: And first, I will ask the parties
15 to identify themselves for the record. CDTFA, could you
16 please identify yourselves first. State your first and
17 last names and your role or job title for the case.

18 MS. JACOBS: My name is Amanda Jacobs. I'm a Tax
19 Counsel III Specialist.

20 MR. SMITH: My name is Steven Smith. I'm a Tax
21 Counsel IV.

22 MR. PARKER: And I'm Jason Parker. I am the
23 Chief of the Headquarters Operations Bureau.

24 JUDGE BROWN: And for the Appellant, please
25 identify yourself for the record.

1 MR. BRANDEIS: My name is Mark Brandeis, CPA for
2 the Appellant. And to my right is the Appellant Bret
3 Patrick Mosher.

4 JUDGE BROWN: Thank you, everyone.

5 I will just note, we are technically going out of
6 order on the agenda. This case was listed last on the
7 agenda, but we're starting with it first. And then once
8 we're done with this case, the cases will proceed in the
9 order specified on the agenda.

10 First, I will confirm that everyone received the
11 prehearing conference minutes and orders that I issued in
12 this case. I was -- and then also, I'll confirm that
13 everyone should have received yesterday the e-mail with
14 the copy of the hearing exhibit binder. And I will note
15 that -- we'll get into the exhibits in a minute. I will
16 note that I know there were some duplicate pages in there,
17 and I'm sorry about that. All right.

18 I thought first I would identify the issues, and
19 then we can move on to the -- talking about what the
20 exhibits are going to -- the documents and exhibits, and
21 I'll admit the exhibits. And then once I'm done with
22 that, I will move onto arguments.

23 It is my understanding that neither -- as we
24 clarified during the prehearing conference minutes and
25 orders -- as it's stated in minutes and orders and

1 clarified during the prehearing conference, neither party
2 is intending to call witnesses today.

3 And that's still remain the case correct,
4 Mr. Brandeis?

5 MR. BRANDEIS: That's correct.

6 JUDGE BROWN: Okay. And Ms. Jacobs.

7 MS. JACOBS: Correct.

8 JUDGE BROWN: Okay. Very good.

9 Then why don't we just briefly confirm that the
10 issues are still as they were stated in my minutes and
11 orders. I have one clarification. I was pointed out by
12 my co-panelists in one of our discussions, I realize that
13 for Issue 3 I should have -- it would have been good if I
14 had clarified what time period is at issue.

15 Because originally in the decision from CDTFA,
16 the issue was about both the fourth quarter of 2009 and
17 the first quarter of 2010. But since that was issued, now
18 the first quarter of 2010 is no longer at issue. And,
19 therefore, Issue 3 is only concerning the fourth quarter
20 of 2009.

21 And is that correct, Mr. Brandeis?

22 MR. BRANDEIS: Give me one second, please.

23 JUDGE BROWN: Okay.

24 MR. BRANDEIS: It's in the pre -- prehearing
25 conference statement?

1 JUDGE BROWN: Right. It's just my Issue 3 didn't
2 say what time period we we're looking at. But, obviously,
3 we're not going to hear an issue about a time period of
4 liabilities for the first quarter of 2010 because the
5 first quarter of 2010 is not at issue, because CDTFA is
6 not no longer holding Mr. Mosher liable for that quarter.

7 MR. BRANDEIS: I think there's some confusion.

8 JUDGE BROWN: Okay.

9 MR. BRANDEIS: They are -- there is a liability
10 in first quarter 2010. They dropped the liability in
11 fourth quarter 6 -- '06.

12 JUDGE BROWN: I'm looking at, for, example,
13 CDTFA's prehearing conference statement dated
14 January 23, 2020. And it says, "The Department later
15 conceded that Appellant is not personally liable for
16 periods after December 31st, 2009."

17 MS. JACOBS: That is correct.

18 JUDGE BROWN: So --

19 MR. BRANDEIS: You're dropping personal liability
20 for periods after third quarter '09?

21 JUDGE BROWN: Yes.

22 MR. SMITH: No.

23 MS. JACOBS: No.

24 JUDGE BROWN: Oh.

25 MR. SMITH: After fourth quarter '09.

1 JUDGE BROWN: Oh, yes. That's right. That's
2 correct. Sorry.

3 MR. BRANDEIS: So you're dropping liability on
4 first quarter '10?

5 JUDGE BROWN: Correct.

6 MR. BRANDEIS: Okay. I was not aware of that.

7 JUDGE BROWN: Okay. Well, then I'm glad we
8 clarified. And that's why in the prehearing conference
9 minutes and orders, my Issue 1 states whether Appellant is
10 personally liable for the unpaid liabilities of Blue
11 Velvet for the period of July 1st, 2006, through
12 December 31st, 2009.

13 MR. BRANDEIS: Okay. The only issue I would take
14 there is that there is no liability from third quarter '06
15 to first quarter '07. And that is from Schedule 12A-R2.
16 That was already conceded by the Department.

17 MS. JACOBS: Yeah.

18 JUDGE BROWN: Okay. Can you repeat that time?
19 I'm not sure I saw it somewhere, but can you repeat the
20 time period.

21 MR. BRANDEIS: The Department has already
22 conceded liability from third quarter '06 to first
23 quarter '07. And that is documented in the second
24 re-audit on Schedule 12A-R2.

25 JUDGE BROWN: Okay. So CDTF, what's the first

1 date of liability that we are looking at?

2 MS. JACOBS: Just a moment.

3 JUDGE BROWN: Sure.

4 MR. SMITH: The earliest quarter in which the
5 corporation has a liability is the second quarter of '07.
6 And Appellant is not personally liable for the first
7 quarter of '10 because of the bankruptcy filing. So
8 really, the disputed period is second quarter of '07
9 through fourth quarter of '09.

10 JUDGE BROWN: Okay. So my Issue 1, instead of
11 beginning with July 1st, 2006, should begin with
12 April 1st, 2007. Okay. And everyone is nodding, so I'm
13 taking it as correct. So we've confirmed liability period
14 from April 1st, 2007, through December 31st, 2009 for
15 Issue 1.

16 And for Issue 3, it -- the issue remains the same
17 but we're specifying that it's adjusted -- whether
18 adjustments are warranted to the measure of Blue Velvet's
19 sales and use tax liabilities for the fourth quarter of
20 2009. Okay. Thank you, everyone.

21 Then I think we clarified the issues to the
22 extent that is necessary. Everything else is as stated in
23 the prehearing conference minutes and orders. And I'll
24 also confirm that we discussed during the prehearing
25 conference that for Issue 1, in terms of the four elements

1 at issue for 6829, we discussed that the element of
2 termination is not in dispute. It's only the remaining
3 three elements. And then for the fourth element of
4 willfulness, the prong of whether there were funds
5 available is not in dispute. And I'm just confirming
6 what's in my order already. Okay.

7 Then I think I have confirmed the issues. I'll
8 move on to discussing the evidence. Okay. First, I will
9 discuss that we've received new documents from Appellant
10 today. And as I stated in the -- during the prehearing
11 conference, and as I stated in the minutes and orders, if
12 additional exhibits are submitted after the
13 February 7th, 2020, deadline, such exhibits may not be
14 allowed into the evidence record unless there's a showing
15 of good cause. Meaning, good cause as to why it could not
16 have been produced sooner.

17 So Mr. Brandeis, can you explain why these
18 documents weren't produced previously?

19 MR. BRANDEIS: It's possible that they are
20 already in the documentation provided, but there's just --
21 there's well over a thousand pages of documentation.
22 So --

23 JUDGE BROWN: I thought -- I have 900.

24 MR. BRANDEIS: Or 920. I'm sorry.

25 JUDGE BROWN: I just want to make sure I wasn't

1 missing any.

2 MR. BRANDEIS: And so, you know, I didn't go
3 through all 920. Or at least I did not go through them in
4 detail one by one. But the documentation that we're
5 providing is a go-back that was written. If you're not
6 familiar with the audit process --

7 JUDGE BROWN: I am.

8 MR. BRANDEIS: -- there's a district reviewer who
9 reviewed the field work of the auditor and wrote an
10 extensive go-back. That document is not necessarily as
11 important. We're just trying to establish the quality of
12 the work done by the auditor. But of much greater
13 importance is that there was a second review. I've never
14 seen this before.

15 But there was a second review done by the
16 district principal auditor, Mr. Albert Lai, and he
17 essentially -- I don't know if I would call it a go-back
18 because he made all the corrections for the auditor. I've
19 never seen that done before. But there -- there were very
20 significant and material corrections made to the general
21 comments to the 1296 that did not come from the auditor,
22 that contradicts what the auditor originally wrote, and
23 were entirely written by the principal auditor who was not
24 there and didn't review any of the source documents.

25 And these comments specifically speak to the

1 issue of the tax requirement, one of the four elements.

2 JUDGE BROWN: But if you can address my question
3 of why you didn't produce these sooner. I issued a --

4 MR. BRANDEIS: I -- I don't know. It's possible
5 that it's part of the audit-working papers. It should
6 have been a part of the audit-working papers that I know
7 that the Department submitted, but I didn't go through to
8 verify that. It's possible that it's not included with
9 the audit-working papers. But it should have been part of
10 the audit-working papers. Go-backs are part of the audit
11 file.

12 JUDGE BROWN: Well obviously, they produced it to
13 you or your client or else we wouldn't have it. And I
14 still don't understand. You haven't addressed my question
15 of why you didn't produce it sooner, given that I issued
16 not only did we have this prehearing conference, but I
17 issued a request for prehearing conference statement
18 asking you to identify your exhibits pursuant to the
19 regulations that govern these hearings. So you have -- is
20 there some reason why you couldn't produce them?

21 MR. BRANDEIS: It's possible that it's in there.
22 If you want, I can go -- we can take a recess, and I can
23 go through the exhibits provided by the Department,
24 specifically the audit file, and see if it's in there.
25 And which case it would be your -- irrelevant or

1 unnecessary to submit it now.

2 JUDGE BROWN: Okay. CDTFA, do you want to
3 respond? Do you have any objection to the admission of
4 these documents?

5 MR. SMITH: We've been trying to figure out
6 whether their documents were already submitted or not. We
7 would have checked if they haven't been submitted already.
8 Their documents are, you know, often part of audit-work
9 papers, but we haven't been able to confirm that they are
10 in the exhibits.

11 JUDGE BROWN: And I guess I will note my office
12 puts together the exhibits based on what you've indicated.
13 I can never -- this is a courtesy copy. So I can never
14 guarantee that we included every single page. We do our
15 best. So I guess the question is, you know, partly
16 what -- I don't know if this is something you possibly
17 submitted to us and -- previously in the zip file that you
18 provided that I didn't capture in the exhibit binder, but
19 maybe you meant to submit it.

20 MR. SMITH: On the other hand, I do think that if
21 Appellant wants to introduce it, it's kind of should have
22 incumbent on Appellant to indicate where in the exhibits
23 before we reached this point. We're prepared to talk
24 about where the evidence we're going to be pointing to
25 within the submitted exhibits.

1 JUDGE BROWN: I understand. All right. And I
2 will note that I have reviewed, or I've done my best to
3 review all 900 pages of the exhibits. I don't recall
4 seeing these. I can't guarantee it that I didn't see
5 them, but I don't recall.

6 All right. Mr. Brandeis, do you have any further
7 response?

8 MR. BRANDEIS: No. But I do I think it's
9 relevant that on the issue of tax reimbursement that the
10 audit -- that the general comments in the audit are not
11 produced by the auditor. They are produced by the
12 principal auditor.

13 JUDGE BROWN: All right. I have to mark these as
14 exhibits either way, because we have to identify what is
15 included in the record and what is not included. So I
16 will say I will mark these as Exhibits 14 and 15.

17 (Appellant's Exhibits 14-15 were marked
18 for identification by the Administrative.
19 Law Judge.)

20 JUDGE BROWN: But at this time I am going to say
21 that I'm not going to admit them into evidence because
22 they were produced late, and we have regulation regarding
23 production of evidence. I haven't heard an establishment
24 of good cause for why they were not produced sooner.

25 However, Mr. Brandeis, you can refer to them in

1 your argument. You can refer to these in your argument,
2 but it's -- excuse me -- yeah. They're produced late, and
3 we already have 900 pages of exhibits, and it's not fair
4 to the other party to scramble to respond to late produced
5 evidence.

6 So at this time I'll say Exhibits 14 and 15 are
7 not admitted. And I will say 14 is the comments in the
8 go-back sheet, and 15 is the account update information.
9 Okay. Let's move onto the remainder of the exhibits in
10 the binder. For Appellant's Exhibits 1 through 13, I
11 mentioned Exhibit 13 is the one where there's duplicates
12 because we received the pages from the -- it was like
13 pages from an e-mail.

14 We received that first and then separately we
15 received the report of discussion of audit findings to be
16 BOE 836-A. We added them together but, really, we didn't
17 need the extra -- the first pages from the e-mail. So
18 they're just duplicates. Otherwise I'll start with
19 Appellant's Exhibits 1 through 13.

20 Does CDTFA have any objection to admission of any
21 of these exhibits?

22 MS. JACOBS: No.

23 JUDGE BROWN: Okay. Appellant's Exhibits 1
24 through 13 are admitted.

25 ///

1 (Appellant's Exhibits #1-13 were received
2 in evidence by the Administrative Law Judge.)

3 JUDGE BROWN: Okay. Then I'll move on to
4 Respondent's Exhibits A through I. Does Appellant have
5 any objection to admission of any of these exhibits?

6 MR. BRANDEIS: No.

7 JUDGE BROWN: Okay. Respondents Exhibits A
8 through I are admitted.

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

11 JUDGE BROWN: Then since we've addressed the
12 issues and admitted the evidence, I think we're ready to
13 proceed with arguments. As I discussed previous -- as we
14 discussed, we begin with taxpayer's arguments.

15 And Mr. Brandeis, I believe you had -- we said
16 30 minutes. Is that --

17 MR. BRANDEIS: I don't think we'll need that
18 long, but that's a margin of safety.

19 JUDGE BROWN: Okay. All right. And that's fine.
20 And then everyone knows that the judges may have
21 questions. And then next CDTFA presents its argument, and
22 we had an estimate of 45 minutes.

23 MS. JACOBS: That's correct.

24 JUDGE BROWN: Okay. And then CDTFA may have
25 questions, as the Judges may have questions of CDTFA. And

1 then Appellant will have an opportunity for rebuttal. We
2 said up to 15 minutes, and the Judges may have questions,
3 and then we should be able to conclude. Does anyone have
4 any questions or anything to raise before we begin?

5 Okay. Then Mr. Brandeis, whenever you're ready,
6 please go ahead with your argument.

7 MR. BRANDEIS: Thank you.

8

9 PRESENTATION

10 MR. BRANDEIS: I'd like to begin with a
11 discussion with my client, Mr. Brent Mosher.

12 JUDGE DANG: Mr. Brandeis, I apologize for
13 interrupting, but can you please turn on your mic for the
14 video recording purposes. Thank you.

15 MR. BRANDEIS: I'd like to begin the -- my
16 presentation with a -- some background on my client,
17 Mr. Mosher. We're going to talk a little bit about his
18 education, his work experience, and how he came into
19 operation of Moxie and Blue Velvet. So first I'm going to
20 get into his education.

21 Mr. Mosher, if you could please describe your
22 education?

23 JUDGE BROWN: All right. And I will note,
24 Mr. Mosher is not a witness. He has not been sworn.
25 There was no identification that there was going to be any

1 witness testimony. However, anyone can make argument, and
2 I will allow -- I will consider this as -- we the panel
3 will consider Mr. Mosher's statements as Appellant's
4 argument.

5 MR. MOSHER: Okay. Yeah. Again, Bret Patrick
6 Mosher, education was at Cal State Fullerton. I went to
7 night school there for five years to get my degree in
8 marketing, business administration. I graduated from Cal
9 State Fullerton in 1985 and switched careers at that
10 point. I went into real estate brokerage. And typically,
11 I would represent buyers and sellers of small market
12 buildings.

13 1985 to 1990 I, while I was brokering those
14 properties, I would typically try to buy one small duplex
15 or fourplex per year for myself to try and eventually
16 become a real estate developer. And so up until 1990, I
17 had five properties. Business was going pretty good for
18 me, and then the great recession hit in 1990 until
19 about -- oh, gosh -- probably '96, '97.

20 So I continued brokering properties at that
21 point. I -- I started getting aggressive to buy more
22 properties in late 90s and build those small apartment
23 buildings and the equity in those with partners to larger
24 apartment buildings. And so work experience was both in
25 brokering multifamily and, obviously, in investing and

1 adding value to multifamily properties, and in addition to
2 manage these.

3 Those properties took me to --out of state
4 opportunities, both in Minnesota and Kansas. The
5 Los Angeles market only had limited opportunity for me.
6 So at that point, I was traveling quite a bit in -- at two
7 large apartment buildings in Kansas and one in Minnesota.
8 So I spent all of that energy building things up. Things
9 were going pretty well.

10 Then in early 2000 -- I forget the exact date --
11 I saw an opportunity. I saw an old Holiday Inn Hotel that
12 was built in the 60s in Downtown Los Angeles. And so with
13 my marketing background, I thought what a great
14 opportunity to take this unutilized property and turn it
15 into something similar to what the standard hotel was in
16 Downtown L.A.

17 I was very impressed with the changes in Downtown
18 Los Angeles. At the time the population was a fraction of
19 what it is currently, but I saw the opportunity there. I
20 saw the good energy that the Standard Hotel was doing
21 there as a hotel, restaurant and lounge. I wanted to take
22 that same energy and utilize it in this property.

23 So sure enough, eventually, I was able to acquire
24 the property, purchase it, and renovate all 205
25 apartments.

1 MR. BRANDEIS: So it was around this time that
2 you met -- we're not going to use full names for some of
3 the other persons in this thing. We're just going to use
4 first names. It's around this time that you met Tom--

5 MR. MOSHER: Yes.

6 MR. BRANDEIS: -- and Robert. Explain how you
7 came to meet them and what their role was in this new
8 venture that you acquired with the Holiday Inn property.

9 MR. MOSHER: Okay. Yeah. I came to meet them
10 because they were employees of that facility.

11 MR. BRANDEIS: The Standard Hotel?

12 MR. MOSHER: The Standard Hotel, yeah. Tom was
13 the bar lounge manager, and I think they had -- already
14 had two potentially three bars in that location. And then
15 Robert was -- I forget his exact title. But basically, he
16 was in charge of all of the food with a good culinary
17 background, educated at the Culinary Institute and is a
18 graduate of Pepperdine University.

19 So good background and Tom had a great background
20 on some other things that had great detail on. So
21 basically, befriended these guys a little bit. I said,
22 you know, ever -- ever thought of doing some opportunities
23 and partnering up on -- on other party. And I explained
24 the location, et cetera, et cetera.

25 And so that was the origination of our

1 relationship with these entities.

2 MR. BRANDEIS: So did you enter into an informal
3 partnership agreement with Tom and Robert? If you can
4 describe that.

5 MR. MOSHER: Yes, I did. The informal
6 partnership was -- my role was actually to be preferred as
7 the investor. My background is in real estate development
8 and real estate brokerage. As far as the hospitality
9 business, that's not what I do. It's not my area of
10 expertise, but that's -- these guys did it successfully, I
11 saw that. And I wanted to present an opportunity for
12 these two -- these two guys to earn in and, actually, add
13 value to a restaurant location that was phenomenal.

14 So anyway, they both -- they both thought it was
15 a great opportunity. Tom continued to maintain his
16 current the position while we were doing a build out of
17 Blue Velvet restaurant. And he sent Robert over to
18 oversee the build out of the restaurant location. And the
19 plan was once that restaurant location was built up, then
20 Tom would come over and join in as a partner.

21 And, again, our partnership agreement was
22 supposed to be an earn in. I put a lot of money up and
23 that's was my -- that's my job. I put a lot of money up
24 to the build out of the restaurant and to fund operations.
25 And their job was to do their respective roles in their

1 area of expertise. Tom --

2 MR. BRANDEIS: What were those roles? What was
3 Robert's role, and what was Tom's role?

4 MR. MOSHER: Robert's role was overseeing all of
5 the bookkeeping, management Forte and food side. And then
6 Tom's role, he's got a phenomenal, phenomenal background
7 in basic bar lounge management. Again, I go in his
8 resume, but some of the top -- top bars and lounges in Los
9 Angles. He had a great reputation. So -- and any of the
10 clientele, they'll bring.

11 So that's -- he stayed on board a couple of
12 months after opening, and then the person he worked for
13 did not want to lose him. So he came out and had a
14 meeting with him and just pulled him back into -- into his
15 respective role. So later on he did not become a partner,
16 and Robert -- it's supposed to be Robert managing the
17 entire operation, and then myself strictly as the investor
18 side.

19 MR. BRANDEIS: Did Robert contribute funds to the
20 construction build out of Blue Velvet?

21 MR. MOSHER: Yes, he did. If memory serves,
22 approximately 100 to \$150,000 before the operation opened
23 up.

24 MR. BRANDEIS: Okay. So Robert's role, once
25 operations -- but he kept you apprised of what was going

1 on during construction, during build out, during that time
2 you were running your business in part in Minnesota and
3 Kansas. You don't have an accounting background. You're
4 not an auditor. You sort of trusted them and relied on
5 them and the information that they gave you. And that
6 relationship continued into when construction was
7 completed, and you began actual operations; is that
8 correct?

9 MR. MOSHER: That's correct and accurate.

10 MR. BRANDEIS: Okay. So who did the accounting
11 at Blue Velvet and Moxie? Who's role was that?

12 MR. MOSHER: Martha.

13 MR. BRANDEIS: And who hired Martha?

14 MR. MOSHER: Robert.

15 MR. BRANDEIS: Okay. And where did they work?
16 Where were their offices?

17 MR. MOSHER: Their offices were on-site. Behind
18 the restaurant was one of the small --

19 MR. BRANDEIS: So their offices were at 750 South
20 Garland?

21 MR. MOSHER: Correct.

22 MR. BRANDEIS: And did you have another office in
23 Los Angeles? And if so, where was that?

24 MR. MOSHER: Yes, I did. And that was over at
25 1425 West 7th Street.

1 MR. BRANDEIS: Okay. So they sort of did their
2 thing, working over at the restaurant at South Garland,
3 and you managed your other business entities from
4 1425 7th Street in Los Angeles.

5 MR. MOSHER: Correct.

6 MR. BRANDEIS: How often did they update you on
7 the operations? And how often did you have physical
8 meetings?

9 MR. MOSHER: Update via e-mail. Again, I was out
10 of state mostly at that time. But via e-mail a couple of
11 times a week perhaps. When I was back in town, we'd try
12 to get together for a meeting maybe once a month, twice a
13 month. And I tried to give my input as best I could, not
14 being in the business but just be there for support.

15 MR. BRANDEIS: Who applied for the seller's
16 permit?

17 MR. MOSHER: I know that Robert would have been
18 procuring that, but I don't remember who signed on that.

19 MR. BRANDEIS: Okay. So we have, as part of the
20 dual package, the seller's permit application was
21 submitted, and it was signed by both Robert H. and my
22 client, Bret Mosher.

23 Who filed the sales and use tax returns during
24 the time that Robert was there?

25 MR. MOSHER: That would be the responsibility of

1 Robert and Martha.

2 MR. BRANDEIS: Okay. And again, as part of the
3 dual package, there's copies of the returns that were
4 submitted.

5 And during the time that Robert was there,
6 Robert -- when did Robert leave? When did you and Robert
7 part ways?

8 MR. MOSHER: I wish I could tell the exact date.
9 More than decade ago. I don't remember.

10 MR. BRANDEIS: Okay. The evidence shows that
11 Robert parted ways on February 10th, 2000 -- I'm sorry.
12 Yeah, February 10th, 2008. So during that period of time,
13 prior to Robert's departure, all the returns -- sales tax
14 returns are signed by Robert. I know that there's dozens
15 upon dozens of e-mails where they're updating you on the
16 financial results. But in any one of those e-mails, did
17 Robert indicate to you that they were underreporting the
18 sales tax liability?

19 MR. MOSHER: No.

20 MR. BRANDEIS: So you basically were being
21 informed of the operations, but you had no knowledge that
22 sales taxes were being underreported?

23 MR. MOSHER: That's correct.

24 MR. BRANDEIS: Did Robert have signing authority
25 on your bank account?

1 MR. MOSHER: Yes, he did.

2 MR. BRANDEIS: Did Robert have -- who processed
3 payroll and had authority to process payroll.

4 MR. MOSHER: Robert.

5 MR. BRANDEIS: Okay. So I'm going to move --
6 that's -- we sort of wanted to lay the groundwork for what
7 the history leading up to the development and the
8 relationship between my client and Robert, Robert H.

9 Robert H. was, as far as we know, he was also
10 dual as a responsible person. The exact period of time,
11 we're not 100 percent sure, but I would assume that was up
12 to his departure date. Mr. Hartstein -- I'm sorry.
13 Robert H., he was the person that had operational
14 knowledge and financial control. He had hired the
15 bookkeeper. He signed the returns. He filled out the
16 sales tax application. He listed his name as an officer
17 under the sales and use tax application.

18 And if we look at -- if we look at Section 6829,
19 there are four elements that are necessary in order to
20 dual somebody as a responsible person. As we have already
21 indicated, we're not going to dispute the issue of
22 termination. But 6829, Subsection B states in part, that
23 a member, manager, or partner, or other person shall be
24 liable only for taxes that became due during the period
25 that he or she had control, supervision, responsibility,

1 or a duty to act.

2 And if you look at the CPPM Section 764.080,
3 under responsible persons it says, "Additionally the
4 responsible person shall liable only for transactions
5 where the taxes became due during the periods he had
6 control -- he or she had control, supervision, and
7 responsibility."

8 That is, from the opening date until Robert's --
9 until the fourth quarter '07 return was filed, that
10 responsibility vested with Robert H. My client, although,
11 he's being informed of financial results via e-mail, he
12 had no knowledge of underreporting. He had no knowledge.
13 He only knows what they're telling him. And he is
14 spending the bulk of his time and efforts and energy
15 running his businesses in Minnesota and Kansas, and also
16 the operations in Los Angeles, his real estate development
17 business in Los Angeles.

18 He's totally reliant on Robert and the bookkeeper
19 to keep him informed. There's not one e-mail that informs
20 him of underreporting, and there's not one e-mail asking
21 for his authority to act. All of those vested with
22 Mr. Hartstein, who is in effect a de facto partner in this
23 informal partnership.

24 Let's talk about the second element, sales tax
25 reimbursement. In order to hold somebody responsible as a

1 responsible person, the Department has to establish that
2 during the period of liability, the entity collected sales
3 tax reimbursement. Now, just sort of to remind folks
4 here. Civil Code Section 1656.1 creates the presumption
5 under which we can presume that parties have agreed to
6 sales tax reimbursement.

7 Those presumptions are stated -- there's three of
8 them -- that an agreement of sale expressly provides for
9 such addition, such as contract. Well, there's no
10 contracts. You know, a customer comes in to buy dinner.
11 There's not a contract signed. So that one is not really
12 relevant.

13 The second is sales tax reimbursement is shown on
14 the sales check or other proof of sale. The auditor spent
15 517 hours -- let me say that again -- 517 hours on this
16 case. He says that he had bank statements, he had P&L
17 statements. He had financials. He had the sales tickets.
18 He doesn't make one photocopy of a receipt showing tax
19 reimbursement. Not one.

20 Form 1296, which is part of the audit-working
21 papers. And if you read the Audit Manual in section --
22 let me find it here. Well, if you read the Audit Manual,
23 it talks about Form 1296. And it states in there that
24 you're required to fill out that form. You're required to
25 note on the form whether tax reimbursement is added to the

1 retail selling price of property sold. And you're
2 supposed to include a copy of a document -- a sample
3 document that supports that. So 517 hours spent on this
4 case, he didn't -- he photocopied bank statements, and he
5 photocopied P&Ls. He didn't photocopy one receipt. Not
6 one.

7 The other area of the audit that you would note,
8 sales tax reimbursement is in the general comments. His
9 general comments are literally all over the place. He has
10 changed the general comments probably five or six times.
11 He has -- I'm going to read them. Again, this should all
12 be part of the audit-working papers. General comments are
13 part of the audit workbook.

14 Under source of data, he says, "Federal income
15 tax returns for 2006, 2007, profit loss statements for
16 2000 --

17 THE HEARING REPORTER: Can you slow down, please?

18 MR. BRANDEIS: Federal income tax returns for
19 2006 and 2007, profit and loss statements for 2007, 2008,
20 and the first half of 2009, purchase and sales invoices
21 for the same period above." And then somebody who
22 handwrites in "Number 4, sales tickets."

23 Under tax reimbursement, this is where --

24 JUDGE BROWN: Let me ask. Can you point me to
25 where in the exhibits you're reading from?

1 MR. BRANDEIS: It's from the general comments.
2 It's -- it's -- it should be part of the audit workbook.
3 JUDGE BROWN: I'm just looking for a page number.
4 MR. BRANDEIS: I don't have a page number in
5 front of me. But it's -- the general comments there's --
6 JUDGE BROWN: Oh, okay. Hold on.
7 MR. BRANDEIS: There's -- there's about four or
8 five different dates and the comments are constantly
9 changing.
10 JUDGE DANG: Are these the comments on the form
11 414-E?
12 MR. BRANDEIS: These would be the comments that
13 end up -- well, this version is -- is in an Excel
14 workbook. This is what the auditor types in to enter the
15 general comments. The general comments are then
16 eventually uploaded into the IRA system, and looks like
17 this, which is what I think you refer to as the 414-E.
18 JUDGE BROWN: All right. Go ahead.
19 MR. BRANDEIS: So the comments change from --
20 this is comments from 2010. He says, under tax
21 reimbursement, "Sales tickets and other records reviewed
22 showed sales tax included, but those were not given
23 consideration by taxpayer in determining taxable total
24 sale." I don't have even what that means.
25 Then on the same date, the comments change under

1 the same heading, "No sales tax reimbursement was included
2 in determining taxable sales." Then on November 22, 2010,
3 again, under general audit comment books and records,
4 "Double entry set of books and records supported by books
5 of original entry adequate for sales and use tax. Sales
6 tax reimbursement was not included in the sales tax
7 returns."

8 You know, the Audit Manual gives guidance on what
9 the general comments should say, what you should be
10 addressing in Chapter 4 of the Audit Manual, which I'm
11 having trouble finding that section. Let me pull it up
12 online.

13 JUDGE BROWN: If you know what you're going to
14 refer to, you don't have to give me the section number. I
15 can pull up the Audit Manual.

16 MR. BRANDEIS: Okay. I just -- give me one
17 moment. It's Chapter 4, General Audit Procedures. I'm
18 sorry. Chapter -- chapter 2, Preparation of Field Audit
19 Reports. Section 020636 under Books and Records. There's
20 six things listed in that A.M. section, and he doesn't
21 address any of them.

22 Number 4 is whether sales tax reimbursement is
23 included or added in the selling price of item sold. That
24 along with the 1296, which is required to be completed,
25 Section 0201.20 of Chapter 2, auditors must complete form

1 CDTFA Form 1296. And it states in there about two-thirds
2 down, "Detailed completion of form CDTFA 1296 can assist
3 in determining a responsible person liability when needed.
4 As soon as form 1296 is completed, a copy of it," comma,
5 "along with proof of tax reimbursement and any documents
6 used to verify changes in corporate officer should be
7 routed to the district principal compliance supervisor."

8 It wasn't done. 1296 Chapter 2, 02.120. It
9 states under -- again, this is under Form 1296 that they
10 should -- examples of taxpayer records illustrate that the
11 taxpayer included or added sales tax reimbursement include
12 copies of sales receipts, register receipts, point of sale
13 documentation. And it says examples must be included with
14 the Form 1296. It wasn't done. It wasn't done.

15 In fact, the comments written in the general
16 comments, which is part of the exhibit that I submitted
17 today, those general comments were written by the
18 principal auditor. Why did he write them? Well, if you
19 look at these go-backs he's getting, I mean, he's getting
20 four or five page go-backs paid top to bottom of issues
21 with his audit. They were under a statute deadline.
22 There was no more time left to him to muddle around and
23 fix this thing. So the principal auditor just wrote his
24 comments.

25 That is what I submitted to you earlier. And I'd

1 like to read you what Mr. Lai says under books and records
2 comment. "When you have to disregard the recorded sales
3 and estimate the sales using bank deposits and" --

4 THE STENOGRAPHER: Can I please have you slow
5 down when reading?

6 MR. BRANDEIS: Oh, I'm sorry.

7 "When you have to disregard the recorded sales
8 and estimate the sales using bank deposits and markup
9 methods, the books and records are inadequate."

10 Do not say it is inadequate for a full audit but
11 enough to estimate sales and use tax. Also, we are
12 interested in whether sales tax reimbursement is added or
13 included in the selling price. Because in order to dual
14 determine, the corporate office is required that the
15 business collected sales tax reimbursement.

16 You comment that sales tax deduction is not taken
17 on the sales tax return, is not the correct comment
18 because the business can deduct sales tax reimbursement
19 but does not deduct sales tax included, because you
20 reported total sales on Line 1 is already X tax. I
21 modified the comment for you.

22 Under the 1296, his -- Albert Lai's comment, "I
23 modified your comments regarding sales tax reimbursement."
24 These are not the auditor's comments. The auditor's
25 comments were, "The books and records were adequate." He

1 examined sales receipts. He makes a comment about there's
2 no sales tax included in gross receipts, but these
3 comments are written the -- the comments that you see in
4 the final version of the audit are written by the DPA.

5 He wasn't there, and he didn't examine any other
6 records. This is, in a court of law, they would -- this
7 would be like planting evidence. So what evidence does
8 the Department have that sales tax reimbursement was added
9 to the retail selling price? The only thing that I could
10 see that they have is a comment and a questionnaire filled
11 out by the bookkeeper. Who, by the way, was terrible at
12 her job.

13 The reporting -- I look at the transcripts. The
14 transcripts to me are so -- the reporting is so bad that's
15 grossly obvious that underreporting was occurring. At
16 whose direction that was happening? I don't know. I
17 wasn't there. Mr. Mosher only relied on the information
18 that he's being fed by the bookkeeper and Robert H. But
19 this is incompetence or potentially intentional fraud.
20 It's that bad. It's that bad.

21 But it certainly was not at the direction of my
22 client. It certainly wasn't with his knowledge that this
23 was happening. The Department may point out that while --
24 there was internal work sheets that showed sales tax. We
25 don't dispute that, but that's not evidence of tax

1 reimbursement. Sales tax on an internal worksheet could
2 be calculated without tax reimbursement.

3 I'll give you an example. Let's say you have
4 invoices totaling \$1 million, and the invoices have no tax
5 reimbursement and had no indication on the invoices that
6 tax was included in the retail selling price. And now
7 lets say that same taxpayer reported that million dollars
8 in gross receipts as sales tax included. If and auditor
9 were to examine that and see that there was no tax
10 reimbursement or notation stating that tax reimbursement
11 is included in the retail selling price or any document,
12 such as a contract stating the tax is included.

13 There's no way that the auditor would allow the
14 taxpayer to report tax included. They would -- they would
15 require them to report X tax. And the presumption is
16 created under Civil Code 1656.1, would be their basis for
17 that. Those -- that -- the items laid out in that civil
18 code create the presumption of tax reimbursement. They
19 don't exist here. There's no receipts. There's no
20 documentation.

21 He doesn't even -- the auditor doesn't even
22 comment what kind of a cash register system they use. Do
23 they use a point of sale, electron -- the incompetence
24 here is off the charts. That's why he got the go-back
25 that is four or five pages long, and the principal auditor

1 had to fix everything for him and even planted some
2 evidence.

3 On the issue of responsible person liability,
4 this is one of the elements. I believe that there can
5 only be one responsible person at a given period of time.
6 The responsibility to file and pay sales taxes, which is
7 what the law section and State has used. They're trying
8 to go after the -- the spirit of law. The legislature's
9 intent is to go after the person who had the
10 responsibility for filing and paying the taxes. That
11 person from opening day through fourth quarter 2007 was
12 Robert H., and Robert H. alone.

13 If you read the CPPM, if you read the Audit
14 Manuals, and if you read the law sections, they have to
15 make a determination who is responsible at each period of
16 the audit because that responsibility can change. I would
17 argue after that, my client had to take more of an
18 involvement. He did hire another manager to replace
19 Robert. My client did not -- treated that second manager
20 in the same sort of fashion as Robert. He sort of left
21 him to manage the restaurant.

22 And then there was a -- as the Great Recession
23 really started to kick in, there was quite a bit of
24 turnover. If you read the comments by the auditor, there
25 is a number of turnover in staff until he hired -- I don't

1 know the name of the company, but he hired a specialized
2 account-restaurant bookkeeping firm. And, again, if you
3 look at the transcripts, you can see in the last two
4 periods of the audit the reporting improves dramatically.

5 Well, that's when he finally got rid of all these
6 restaurant managers who really didn't know what they were
7 doing. By the way, the bookkeeper hired by Mr. Hartstein,
8 she continued to stay on with the company and process the
9 filing of the returns up until her departure, we believe,
10 sometime in late '09?

11 MR. MOSHER: That sounds about right. It's
12 Martha.

13 MR. BRANDEIS: Martha. Yes. So the person whose
14 gross competence during the period of time that the
15 returns are filed, you can see that there's no way that --
16 in some periods they are reporting quarterly sales of
17 \$5,000 a month. There's just no way. It would not take a
18 genius auditor to figure out there's a problem here. But
19 she's involved in the bookkeeping and between her and
20 Robert they are both involved in filing the returns. Some
21 returns are signed by Robert. Some returns are signed by
22 Martha.

23 The issue of willfulness, Mr. Mosher, as far as I
24 can tell, had no knowledge of underreporting until -- I'm
25 looking at the 414Z, which is the assignment activity

1 history entry dated December 31st, 2009 by the auditor.
2 It says, "At the business on 12/31/2009. Met with owner
3 and bookkeeper Janice. Explained in detail the schedules
4 I had. The schedules included bank statements. The owner
5 was surprised to see that whoever did his books and
6 records was likely not reporting one location to BOE. He
7 said he had a full-time bookkeeper."

8 This is the date that I would -- that the first
9 evidence that I could find where he is become aware of
10 what's going on, that the potential for significant
11 underreporting. Prior to that, he had no knowledge. He
12 just -- he had other businesses that he was running. He's
13 in Montana -- Minnesota. He's in Kansas. He's a real
14 estate developer. He's not a restaurateur. He's not an
15 accountant. He's not a bookkeeper. He's not an auditor.

16 And I don't believe you could take that knowledge
17 and make it retroactive to satisfy the responsible person
18 portion. He did not. He -- he -- he seceded the
19 supervision and control to Robert H., at least through the
20 end of '07.

21 Final note as part of the dual package,
22 Exhibit 1, page 1 of 2, his ACMS note from a collector for
23 a phone call made to Robert H. on June 17th, 2013. I'm
24 going to read to you what the collector noted in those
25 ACMS notes.

1 "I received a call from Robert H. He was the
2 original GM for the company from 2006 to early 2008, and
3 was listed as such on the seller's permit application. He
4 stated that Blue Velvet was a single member LLC, and Bret
5 Mosher was the sole member, owner, and investor.
6 Hartstein stated that he helped Mosher setup up the
7 company and get all the permits. He stated he was a paid
8 employee that was responsible for the day-to-day
9 operations. He had signing authority on the bank account
10 and was responsible to ensure sales taxes were filed and
11 paid."

12 This is board's employee noting the details of
13 the phone call with Robert H. I'd also like to note
14 Robert H. was -- and we believe was dual during this
15 process. He wrote a statement also dated -- actually,
16 dated the previous day, June 16th, 2013. I'm not going to
17 read you the whole thing. It should be part of the dual
18 package.

19 Second paragraph, "I was an employee of Blue
20 Velvet LLC. Blue Velvet LLC had an entity number," blah,
21 blah, blah, "and was a single member LLC filed by Bret
22 Mosher in February 2005. I he was not a member nor
23 manager of Blue Velvet LLC."

24 I mean, my gosh. He's not even a manager. I
25 mean, this is a lie. He's on the bank account. He files

1 the sales tax returns. He's operationally and financially
2 in control of this business. But why does he say that?
3 Because he's been given a letter from the Board of
4 Equalization at that time indicating that they're going
5 after him for personal liability for \$813,000. So yeah,
6 he's scared. I would be. And sometimes when people are
7 frightened like that, I would be terribly frightened they
8 might say things that are not true.

9 And with that I'm going to turn over my time to
10 the Department.

11 JUDGE BROWN: Okay. And you'll have additional
12 time on rebuttal.

13 MR. BRANDEIS: Thank you.

14 JUDGE BROWN: Okay. Just a moment. I'll go
15 ahead with questions.

16 JUDGE DANG: I have some questions for you,
17 Mr. Brandeis. I'm a little confused when you were making
18 your argument. You had mentioned the applicability of
19 Civil Code Section 16.561. I believe that pertains to
20 when the Department can establish that sales tax was
21 included in the selling price of property, but not
22 necessarily as to whether tax reimbursement has been
23 collected.

24 For example, you could have a situation where tax
25 was not included in selling price. I sell you a bottle of

1 water, for example, but the tax is not included in the
2 sale price of that water bottle. Yet, tax could still be
3 collected on that sale.

4 So I'm wondering, is your argument here that all
5 the sales are made with tax included in the sale price and
6 that the measure reduced accordingly? Or are you simply
7 stating that --

8 MR. BRANDEIS: Let me --

9 JUDGE DANG: -- tax has not been collected at
10 all?

11 MR. BRANDEIS: -- I'm stating -- if I could read
12 to you. This is out of the Field Audit Manual Section
13 0801.45, Under Sales Tax Included. It says, "Certain
14 presumptions concerning the addition of sales tax
15 reimbursement are created by Civil Code Section 1656.1.
16 It shall be presumed that the parties agree to the
17 addition of sales tax reimbursement to the sales price of
18 tangible personal property sold at retail to a purchaser
19 if," -- there's three things listed here.

20 "Number 1, the agreement of sale expressly
21 provides for such addition of sales tax reimbursement.
22 Number 2, sales tax reimbursement is shown on the sales
23 check or other proof of sale. Or Number 3, the retailer
24 post in his or her premises in a location visible to
25 purchaser or includes on price tag or on advertisement or

1 other printed material directed to the purchasers a notice
2 to the effect that reimbursement for sales tax will be
3 added to the sales price of all items or certain items,
4 whichever is applicable."

5 Without one of those three, you cannot presume
6 that a seller has collected sales tax reimbursement.
7 Without one of those three, it is presumed there is no
8 sales tax reimbursement. So who has the burden of proof
9 here when it comes to responsible person liability? The
10 Board. The Board has the burden of proving the facts, and
11 they didn't do that here. There's no receipts showing tax
12 reimbursement.

13 Let's go down the list. There's no receipts
14 showing tax reimbursement. 517 hours on this audit. He
15 was there with the sales receipts. He didn't photocopy
16 one of them. All he had to do is photocopy a few receipts
17 to show as document -- as evidence, are they collecting
18 sales tax reimbursement? His general comments, he doesn't
19 address it. He says books and records are adequate.

20 The DPA completely changes his general comments,
21 who I might add, wasn't there and never looked at the
22 source documents. So burden of proof is on the Board.
23 The auditor did not document it. There's three things he
24 could have looked for. The first one doesn't really apply
25 because agreement of sale, you know, usually a contract --

1 somewhere in the contract you might have a clause that
2 says, "We are adding sales tax reimbursement," but we're
3 talking about a restaurant. They don't have contracts.
4 They have receipts. He didn't get -- there's not one.
5 And the presumption -- this is what is required to
6 establish that presumption of tax reimbursement. It's not
7 there.

8 JUDGE DANG: I understand what you're stating --
9 what you're arguing regarding the collection of
10 reimbursement. But based on what you just read to me, it
11 sounds like that statute pertains to the addition of sales
12 tax to the selling price, not the collection of the tax
13 reimbursement itself. Is there any argument that sales
14 tax was, in fact, added to selling price whether or not it
15 was collected?

16 MR. BRANDEIS: I wasn't there. I met
17 Mr. Hartstein in 2013. I have never looked at -- other
18 than bank statements and the P&L statements that we got
19 from the Department, I have never seen a sale receipt.
20 They had a point of sale system. I believe, they've
21 mentioned Aloha.

22 There's -- there's no data. There's no receipts
23 out of the system. I've never seen one document that
24 shows tax reimbursement, a sales receipt. I haven't seen
25 a menu. I haven't seen a price list, signage, nothing.

1 And without that, you cannot presume tax reimbursement.

2 JUDGE DANG: Okay. Got it. I'm going to ask
3 Mr. Mosher, were you aware of, I guess, the billing
4 practices of Blue Velvet in this case? Were the menu
5 items listed merely without tax included in those prices?

6 MR. MOSHER: I don't remember.

7 JUDGE DANG: You don't recall?

8 MR. MOSHER: Yeah. That's not my area of
9 expertise.

10 JUDGE DANG: Okay. Thank you.

11 MR. MOSHER: Yeah.

12 JUDGE DANG: I noticed also in the prehearing
13 conference minutes and orders the -- there had been an
14 issue raised. And I think it was also raised in your
15 opening brief regarding the application of payments. Is
16 that still at issue here?

17 MR. BRANDEIS: I don't like the way that the
18 Department has applied payments, and I don't agree with
19 the way that they've applied payments. When I -- I'm a
20 former auditor myself. And one of my first roles when I
21 was hired as an auditor, they put me in charge of
22 something they called a spot-check review of fiscal
23 controls.

24 Now, what that means is it was my job to audit
25 compliance and to review -- make sure that they were

1 following Board policies and procedures with respect to
2 their duties. And most of that involved the collection of
3 payments. As part of that training, we reviewed how
4 payments were applied -- accepted and applied by
5 collectors. And as part of that training -- and it's
6 always been my understanding -- that taxes applied --
7 there's a hierarchy. And it also has to do with the way
8 the Board calculates interest.

9 The Board only calculates interest on outstanding
10 tax. They don't do like what banks do. They don't
11 calculate interest on outstanding penalty, and they don't
12 calculate the interest on outstanding interest. So it
13 would be beneficial -- tax as a general rule, payments
14 were applied in the manner that was most beneficial to the
15 taxpayer. So that meant applying the payments in their
16 entirety to outstanding tax first.

17 Once outstanding tax liabilities were paid, then
18 remaining payments would be applied to interest and
19 penalty accordingly. That would be the most beneficial
20 way to apply a payment to a taxpayer. And here, they're
21 saying, "Well, we didn't get direction of how this," -- so
22 they applied the payments part of the tax, but part of it
23 to interest and penalty.

24 That goes against everything I know and the way I
25 was trained when I was a fiscal reviewer, you know, back

1 in 1999.

2 JUDGE DANG: You had cited something I thought
3 seemed to be on point, the CCPM --

4 MR. BRANDEIS: Yeah, so C --

5 JUDGE DANG: 707 -- sorry. 707.020. I'd like to
6 read from a portion of that because I feel that perhaps
7 I'm missing something here. It states that at the very
8 end of that section, "There's no ability to direct the
9 payments specifically to the tax interest penalty portion
10 of the liability." It also mentions that, "Payments
11 received from warrants can only be applied to specific
12 periods covered by the warrant."

13 MR. BRANDEIS: Could -- could -- I'm sorry. Can
14 you -- what section is that?

15 JUDGE DANG: It is 707.020.

16 MR. BRANDEIS: Okay. I'm there.

17 JUDGE DANG: Okay. It would be the final two
18 sentences of that section.

19 MR. BRANDEIS: 707.20?

20 JUDGE DANG: Yes.

21 MR. BRANDEIS: The heading I see for that section
22 is "Where no adjustment made to original audit findings."

23 JUDGE DANG: It should say, "Payment Application
24 Rules." 707.02.

25 MR. BRANDEIS: Okay. I'm looking at -- the

1 version I'm looking at is online. I don't -- there's the
2 changes to --

3 JUDGE DANG: Okay. I understand.

4 MR. BRANDEIS: But that section does not exist on
5 the CDTFA's website. But that said, let me see if I can
6 find it. What's the heading title of that section?

7 JUDGE DANG: Payment Application Rules, I
8 believe. Yes.

9 MR. BRANDEIS: I'm sorry. I was looking at the
10 Audit Manual not the CCPM. 707 -- Payment Application
11 Rules. Okay.

12 JUDGE DANG: So if you look at the -- I don't
13 know how to describe it, but I would say the first page of
14 that -- that section at the very bottom, the last
15 sentence, "However, there's no ability to direct the
16 payment specifically to the tax interest penalty or
17 collection cost recovery fee portion of the liability."

18 That would be the first part. And then if you go
19 to the following page, again, the last sentence. And I
20 don't know if this would be applicable here but, "Payment
21 received from warrants can only be applied to the specific
22 periods covered by the warrant."

23 MR. BRANDEIS: Okay. So even if it is applied to
24 a period covered by the warrant, it would have to cover
25 the tax portion in full first before it's applied to any

1 interest or penalty.

2 JUDGE DANG: And are you saying that's not what
3 occurred here?

4 MR. BRANDEIS: I -- I don't have that
5 particular -- which payment are we talking about?

6 JUDGE BROWN: I'm trying to understand which --
7 yeah. Which payment you're saying was not applied
8 correctly and where --

9 MR. BRANDEIS: Well, there's a payment for the
10 sale of the liquor license, and there was --

11 JUDGE DANG: I believe a claim paid bankruptcy as
12 well.

13 MR. BRANDEIS: Yeah. There was a claim paid in
14 bankruptcy. But I'm the bankruptcy filed -- I'm not a
15 bankruptcy attorney. But the bankruptcy filing, I believe
16 they would have noted on the bankruptcy filing the period
17 for which the BOE/CDTFA was a creditor and if there were
18 amounts paid; I would imagine it would go to that period.
19 It would identify the period that the BOE/CDTFA was a
20 creditor. And, again, it should have been applied to tax
21 first.

22 JUDGE DANG: Okay. Are saying for those periods
23 that were paid -- those liability periods that were paid,
24 the amounts were not paid towards the tax first and that
25 there are still outstanding amounts of tax on those

1 periods?

2 MR. BRANDEIS: If you -- if you have \$2,000 in
3 outstanding tax for a particular period the -- and a
4 \$1,700 payment comes in, the entirety of that \$1,700
5 payment should be applied to the tax. Not one penny of it
6 should be allocated to interest or penalty for the period
7 of liability that exist.

8 JUDGE DANG: Okay.

9 MR. BRANDEIS: It's always been a general rule
10 that payments are applied in a manner most beneficial to
11 the taxpayer.

12 JUDGE DANG: Okay. I believe from what I
13 understood from reading your brief was that the tax was --
14 I'm sorry. The payments were applied to the tax first,
15 but that also the interest and penalties for any given
16 liability were also paid before applying additional
17 payments to other liability periods.

18 MR. BRANDEIS: And that's my point. It shouldn't
19 be. It should be only applied to tax. And when tax --
20 outstanding tax liability is fully exhausted, then payment
21 should be applied to interest and/or penalty.

22 JUDGE DANG: My question, therefore, is looking
23 at this section, where in this section would support the
24 application of payments as you've stated?

25 MR. BRANDEIS: Number one, it's directed by the

1 taxpayer at the time of voluntary payment. Now, again,
2 the payment was made by the bankruptcy court. I don't
3 know what instructions came with that. But generally
4 speaking, again, sometimes payments come in, and it's not
5 indicated how the payment is to be applied.

6 And when that's the case, it goes to the oldest
7 outstanding period first, and it applies to tax. Then it
8 goes to the next outstanding period and applies to tax
9 and -- until it's exhausted. If it's not exhausted, if
10 all the tax is paid, then it would go to satisfying
11 outstanding interest or penalty.

12 JUDGE BROWN: Let me chime in for a second. So
13 are you -- you are giving -- payments by a bankruptcy
14 trustee are voluntary payments?

15 MR. BRANDEIS: I don't know how the law defines a
16 voluntary payment. I -- I don't know. I don't know how
17 to answer that.

18 JUDGE BROWN: Then the same question about the
19 liquor license payment.

20 MR. BRANDEIS: When the liquor license --

21 Do you recall how the liquor license sale
22 transpired? Did that happen through bankruptcy or was
23 that before bankruptcy?

24 MR. MOSHER: I don't remember.

25 JUDGE DANG: Perhaps ask CDTF. Was the liquor

1 license sold by CDTFA, or was this sold to the -- I'm
2 sorry -- the LLC, sell the license and then remit the
3 funds?

4 MS. JACOBS: It was sold through the -- it's
5 complicated, but it was during the bankruptcy pending that
6 it was sold. And I'll address that in my argument.

7 JUDGE DANG: Okay. Thank you. I just have one
8 final question. I also noticed that you had raised an
9 issue pertaining to Blue Velvet's audit liability for the
10 fourth quarter of 2009?

11 MR. BRANDEIS: Yes.

12 JUDGE DANG: Yes. And I realize that this was a
13 policy that the Board had -- a practice the Board had
14 allowed for many years that -- to allow in these type of
15 6829 personal liability cases allowing the taxpayer to,
16 essentially, contest the underlying entity liability. One
17 thing that I didn't quite understand is, I was unable to
18 find any authority that would allow a body like us to
19 adjust, what's in essence, a final liability.

20 If we were to find the taxpayer in instance was a
21 responsible person, you would have had the opportunity to
22 have contested, essentially, Blue Velvet's liability when
23 Blue Velvet was issued the NOD for these varying periods
24 which are now being held personally liable. At this
25 point, what would be the impetus or the authority to allow

1 us to then now just what is essentially a final liability
2 against Blue Velvet?

3 MR. BRANDEIS: Under the rules for tax appeals --
4 the OTA rules for tax appeals. I have to look them up
5 because I didn't have them memorized. We had this
6 discussion, if you recall, Ms. Brown, over the phone about
7 whether or not the agency had the authority to hear a case
8 involving the movement of payments. And when I said that
9 affects interest and, therefore, affects the liability.
10 And you cited a section, and we responded. Can you remind
11 me what that's --

12 JUDGE BROWN: I think you mean Regulation
13 CS30420, is the one you're referring to.

14 MR. BRANDEIS: Let me look it up.

15 JUDGE BROWN: But that's just a provision that
16 limits our jurisdiction.

17 MR. BRANDEIS: Right. So isn't that your
18 question, whether you have the jurisdiction?

19 JUDGE DANG: Correct.

20 MR. BRANDEIS: Okay. So what was that? 30 --

21 JUDGE BROWN: 30420. But I'm doing that from
22 memory. So if I'm wrong, somebody correct me.

23 MR. BRANDEIS: Okay.

24 JUDGE GAST: 30103?

25 JUDGE BROWN: That's the one that we have our --

1 that is jurisdiction.

2 JUDGE GAST: Limitations, 30104.

3 JUDGE BROWN: Yeah, 30 -- I'm sorry. I was

4 wrong. 30104.

5 MR. BRANDEIS: I believe that's for FTB.

6 JUDGE BROWN: Oh, okay.

7 JUDGE GAST: No, CDTFA as well.

8 JUDGE BROWN: Oh, right. 30420 is evidence and

9 witness. Sorry.

10 MR. BRANDEIS: So 301 --

11 JUDGE GAST: 04.

12 MR. BRANDEIS: 04. 30104.

13 JUDGE BROWN: That was the one I had cited, the

14 limitations on jurisdiction. The one that actually

15 provides our jurisdiction is the previous regulation,

16 30103.

17 MR. BRANDEIS: Subsection B. Subsection little B.

18 JUDGE BROWN: Yes.

19 JUDGE DANG: I don't believe that my question

20 implicates 30104. I'm merely speaking as to the finality

21 of a tax assessment against Blue Velvet.

22 MR. BRANDEIS: If you could give me a second.

23 Let me --

24 JUDGE DANG: Yeah. Sure.

25 MR. BRANDEIS: Okay. So 30103(b) says -- under

1 appeals from CDTFA -- "In general, OTA has jurisdiction to
2 hear and decide an appeal that has been timely submitted
3 pursuant to these regulations of any if the following
4 circumstances apply. An Appeals Bureau decision is
5 adverse to taxpayer in whole or in part. The local
6 entity" -- I'll skip that -- "the state agency" -- so
7 we -- we argued at the Appeals Bureau about the issue of
8 the application of -- of payments, and the decision was
9 adverse.

10 So right there that -- that is the impetus for
11 the jurisdiction of this body to hear the case. And it
12 does affect the amount of liability of the taxpayer. The
13 liability is overstated. Why? Because they're applying
14 payments to interest and penalty instead of applying to
15 tax, which would reduce the overall interest calculation.
16 So under that subsection, I believe this body has the
17 appropriate jurisdiction to hear the matter.

18 JUDGE DANG: I'm sorry for any confusion. I was
19 speaking to the audit issue you had raised in your
20 briefing concerning the fourth quarter of 2009 and, I
21 believe, also the first quarter of '10, which is now
22 the --

23 MR. BRANDEIS: That generated the underlying
24 audit liability?

25 JUDGE DANG: Correct.

1 MR. BRANDEIS: Well, again, the -- my client
2 received a Notice of Determination for personal liability
3 that is overstated. It's overstated because the audit was
4 overstated. And we have a huge adjustment at the Appeals
5 Bureau level because of the way that the underlying audit
6 was performed. We received a huge adjustment.

7 We don't -- the adjustment that they made didn't
8 go far enough. And as a result, the liability of my
9 client is still overstated. So we filed a timely and
10 valid petition. His NOD is overstated because the
11 underlying audit that created it is overstated, and we
12 have a right to appeal that. We have now received an
13 adverse opinion from the Department in the form of a
14 decision, and OTA has the jurisdiction to hear that.

15 JUDGE DANG: Mr. Mosher, is there a reason that
16 when Blue Velvet received the NOD for that period of time
17 that the LLC itself did not appeal that?

18 MR. MOSHER: Again, I rely on my professionals.
19 I'm -- I'm a marketing guy. I don't understand this form.
20 So I --

21 MR. BRANDEIS: If -- if I could --

22 JUDGE DANG: Sure. Go ahead.

23 MR. BRANDEIS: So once -- again, if you go 414Z,
24 I mentioned the date that Mr. Mosher became aware that
25 there was significant underreporting. That was in

1 December of -- end of December 2009. He hired a gentleman
2 by the name of Kai Mickey, who like myself, a former BOE
3 auditor and sales tax specialist. And Mr. Mickey
4 represented him in the audit portion -- during the field
5 audit portion. Now, I believe Mr. Kai Mickey passed away.
6 I don't know.

7 JUDGE BROWN: He did not.

8 MR. BRANDEIS: He did not?

9 JUDGE BROWN: I saw him recently.

10 MR. BRANDEIS: Okay. Then the rumors of his
11 demise are not true. Okay. I don't know why, but he was
12 the original representative. I apologize to Mr. Kai
13 Mickey if you're out there. He was the original
14 representative. Why he did not file a timely petition, I
15 don't know.

16 JUDGE DANG: Okay. Thank you. I don't have any
17 further questions.

18 MR. BRANDEIS: Apparently, he was alive and well
19 to do something.

20 JUDGE BROWN: I saw him a few weeks ago, so
21 that's why.

22 Do you have any questions?

23 JUDGE GAST: No questions.

24 MR. BRANDEIS: Maybe I'm thinking of Abe Galome.

25 JUDGE BROWN: Yes. Yes. I'll have just a couple

1 of questions -- one or two questions now, and then I will
2 probably have more afterwards. I guess I just want to ask
3 about this collection of sales tax reimbursement issue.
4 You know, it seems remarkable to me that there would be a
5 restaurant in Los Angeles that was not collecting sales
6 tax reimbursement or adding sales tax reimbursement.
7 Wouldn't -- wouldn't that be --

8 MR. BRANDEIS: Unusual?

9 JUDGE BROWN: -- highly unusual? Yes.

10 MR. BRANDEIS: I don't go to Starbucks as much as
11 I used to. But I have never been to a Starbucks in
12 California that charged sales tax. Never. Well, I mean
13 that's the thing. I guess technically they do. They
14 usually have signage somewhere if you search for it.
15 Because I'm a sales-tax person sometimes I look for it.
16 Sometimes I see it, and sometimes I don't. But I've never
17 been to a Starbucks that charges sales tax.

18 They are a cafe, Moxie cafe. Was there sales
19 tax? Remember I -- I met Mr. Mosher in 2003. I wasn't
20 there. I never -- the only records I've seen are what --
21 records I've been provided by the Department. The records
22 are gone. You know, this is, you know, 2006 to 2010. But
23 you can't presume sales tax reimbursement. The law
24 doesn't permit it.

25 The additional of sales tax -- the presumption

1 for the addition of sales tax is created in that Civil
2 Code section I cited. And so without that evidence, you
3 can't presume sales tax reimbursement. You just can't do
4 it.

5 The example I gave earlier about a gentleman or a
6 business that has a million dollars in sales; no sales tax
7 reimbursement, no documentation, or notation to the
8 customer that it's included in the selling price, nothing
9 in the sale of contract. If they tried to take a sales
10 tax included deduction on the million dollars, they would
11 be called out on that in an audit. Why? Because they
12 don't have the presumption to create -- documented in
13 1656.1. You have to have those.

14 JUDGE BROWN: So are you arguing that 1656.1 is
15 the sole and exclusive measure of -- not measure -- the
16 sole and exclusive tool by which we can evaluate whether a
17 sales tax reimbursement was collected?

18 MR. BRANDEIS: That -- well, you have
19 Regulation 1700.

20 JUDGE BROWN: Right. 1700 but --

21 MR. BRANDEIS: But -- but the regulations are the
22 Board's interpretation of the law. The law is
23 controlling. And the law says that in order to presume
24 that the parties have agreed to the reimbursement of sales
25 tax, these are the three -- without that -- three elements

1 that must be present. They haven't done it. They haven't
2 documented it.

3 JUDGE BROWN: But you're saying that those are
4 the only -- we can't look at other evidence?

5 MR. BRANDEIS: No. I'm not saying you can't.
6 You could look at other evidence. But the other evidence
7 that I've seen cited by the Department, such as internal
8 work sheets, e-mails to Mr. Mosher saying that this was
9 our sales and this was tax, that doesn't prove that tax
10 was -- reimbursement was added to the retail selling
11 price. It only shows that they made a calculation for
12 tax, but that could have been an internal calculation that
13 doesn't meet the requirements under 1656.1.

14 JUDGE BROWN: And then going back to my original
15 question about wouldn't it be unusual, you cited the
16 example of a coffee shop. But for a restaurant, wouldn't
17 the customers be commenting that there's no sales tax?
18 What's going on? How do I calculate my tip because --

19 MR. BRANDEIS: Well, there's --

20 JUDGE BROWN: -- how will I double the tax?

21 MR. BRANDEIS: There's no law in California that
22 says you have to charge sales tax.

23 JUDGE BROWN: Right.

24 MR. BRANDEIS: Sales tax reimbursement is
25 contracted between THE retailer and THE seller. Would it

1 be unusual? Yes, but it's certainly not illegal. And --
2 and so 6829 and 1702.5 make it very clear. The Board has
3 the burden of establishing the facts. They have the
4 burden of proof. So what do they have? They don't have
5 copies of any receipts. They don't have signage. No
6 picture of signage. They don't have -- they don't have
7 copies of any receipts. They don't have signage. They
8 don't even have appropriate audit comments, unless you
9 consider the comments written by the DPA who wasn't there
10 to be appropriate comments.

11 All they have is a questionnaire filled out by
12 Martha Winner indicating that tax reimbursement was added.
13 That's it. Is that strong enough evidence? You got to
14 ignore all the -- if you read, actually, the CPPM under
15 Dual Determinations, Chapter 7, this is Section 764.130.
16 They list -- this is a guideline for the compliance
17 Department to document sales tax reimbursement for the
18 purpose of a Section 6829 dual.

19 The important ones they -- they put in bold. So
20 I'll go over them. The first one, which is not in bold,
21 ACMS notes for statements by officers, members, partners,
22 and employees. I don't -- again, I don't know if there's
23 any ACMS notes that states that and by whom.

24 JUDGE BROWN: In the interest of time, just tell
25 me again what section are you citing?

1 MR. BRANDEIS: This CCPM Section 764.130. The
2 title of that section is "Establishing the Elements of an
3 RTC Section 6829 Dual Determination-Sales Tax
4 Reimbursement and Use Tax Liability."

5 JUDGE BROWN: Okay. I understand that your
6 argument is pointing to the CCPM. I'm just trying to --
7 so we don't need -- I don't need you to read it into the
8 record.

9 MR. BRANDEIS: Okay. Okay. But just to
10 summarize. I have gone down this list, and I'm looking at
11 all the bolds here. And I'm putting a yes or no. Do they
12 have evidence of this or not? And the answer is no down
13 the board. They don't have -- they don't have the
14 evidence. The best that they've got is a questionnaire by
15 the bookkeeper.

16 I don't consider internal documents to be
17 sufficient proof of tax reimbursement. The general audit
18 comments don't -- the original general audit comments
19 written by the auditor don't support it. He was out there
20 with the receipts. He didn't photocopy one. It was
21 12/96. Those comments were written by the principal
22 auditor. And he even says it's a requirement in the Audit
23 Manual.

24 Attach a sample. What documents shows that they
25 are adding sales tax reimbursement? Attach a sample. Why

1 didn't he do that? He was out there. He was there. I
2 wasn't. Mr. Mosher is not an accountant, not a CPA, not
3 an auditor. The guy who spent 517 hours on this case was
4 out there with the records. Why didn't he make some
5 photocopies of foresee -- showing that, the addition of
6 tax reimbursement? That would have created the
7 presumption under 1656.1.

8 JUDGE BROWN: Okay. Thank you.

9 Then if we are ready -- if everyone is ready, we
10 can move onto hearing CDTFA's presentation. Ms. Jacobs,
11 you have 45 minutes. If you are ready, you can proceed.

12 MS. JACOBS: Thank you.

13

14 PRESENTATION

15 MS. JACOBS: As you're aware, four elements must
16 be met for personal liability to attach under Section 6829
17 of the Revenue and Taxation Code. First, the corporation
18 must be terminated. Second, the corporation must have
19 collected sales tax reimbursement. Third, the person must
20 have been responsible for the payment of sales and use
21 tax. And fourth, the person's failure to pay must have
22 been willful.

23 In this case, as was stated in the prehearing
24 conference, and today there's no dispute as to the first
25 element. Both parties agreed that Blue Velvet closed in

1 September 2010.

2 As to the second element, there's ample evidence
3 that Blue Velvet collected sales tax reimbursement.
4 Personal liability only be -- can be imposed only to the
5 extent that Blue Velvet collected sales tax reimbursement
6 on sale of tangible personal property in the state but
7 failed to remit the tax to Department when due, consumed
8 tangible personal property and did not pay the tax when
9 due, or collected or issued a receipt for the use tax but
10 failed to remit the tax.

11 We have copies of Blue Velvet's own daily
12 financial reports for December 1st, through
13 December 27th, 2007, which indicate that it collected
14 sales tax reimbursement. These reports show Blue Velvet's
15 revenue by type, have a separate line item for the sales
16 tax reimbursement, and contain an accounting of all cash
17 received and credit cards processed by Blue Velvet.
18 That's in Exhibit A, pages 40 through 66.

19 Collection of sales tax reimbursement was
20 confirmed by former employees, including Blue Velvet's
21 former general manager, Mr. Hartstein, and bookkeeper,
22 Martha Winner. I'm not sure how to pronounce her last
23 name. Comments in the audit-working papers also recorded
24 that sales tax reimbursement had been added to the
25 selling -- oh, sorry. That's Exhibit A, pages 31

1 through 37.

2 Comments in the audit-working papers also record
3 that sales tax reimbursement had been added to the selling
4 price of food and included the sales of bar drinks,
5 Exhibit C, page 77. Appellant has argued that the
6 presumption in Sales and Use Tax Regulation 1700(a)(2) is
7 relevant in this matter. 1700(a)(2) speaks directly to
8 whether a retailer and purchaser agree to the addition of
9 sales tax reimbursement in the sales price, which is not
10 at issue here.

11 And while the circumstances described in
12 regulation 1700 would, by default, establish that Blue
13 Velvet collected sales tax reimbursement, meeting a
14 presumption is not a reimbursement. When there's other
15 evidence of collection of sales tax reimbursement, as
16 there is in this case in the form of Blue Velvet's own
17 records corroborated by statements by former employees,
18 the Department has clearly met its standard of proof,
19 which is more likely than not, Blue Velvet collected sales
20 tax reimbursement.

21 We also note that Appellant is not denying that
22 Blue Velvet collected sales tax reimbursement but relying
23 on this false understanding of the presumption of
24 Regulation 1700.

25 As to the third element, it is clear Appellant

1 was a person responsible for handling Blue Velvet's sales
2 and use tax matters throughout the liability period. A
3 responsible person is any person having control or
4 supervision of or who is charged with the responsibility
5 for a filing of returns or the payment of tax or who had a
6 duty to act for the corporation in complying with any
7 provision of sales and use tax law when the taxes became
8 due.

9 Appellant was the owner, sole corporate officer,
10 managing member, and tax matters member of Blue Velvet
11 from its genesis in 2006 through the close of business
12 operations. Direct evidence that Appellant was
13 responsible for Blue Velvet's sales and use tax matters
14 include his signature on forms BOE 122, which are waivers
15 of limitation in 2009 and 2010. That's Exhibit A, pages
16 93 through 95; meetings with the Department regarding the
17 audit, Exhibit A, pages 116 to 117; and Blue Velvet's own
18 operating agreement signed by Appellant, which
19 specifically identifies the Appellant as Blue Velvet's,
20 quote, "Tax matters member," end quote, and authorizes him
21 to represent Blue Velvet and all examination by taxing
22 authorities. That's Exhibit A, page 172, and it's
23 Section 1.6 of the Operating Agreement.

24 Appellant's role is confirmed by Blue Velvet's
25 formal general manager, bookkeeper, and former CPA.

1 That's Exhibit A, pages 33 through 37, 77 through 78, and
2 123 through 124. Appellant is listed as the owner of Blue
3 Velvet on the corporation seller's permit application,
4 Exhibit C, page 89. Appellant is identified as the sole
5 managing member on Blue Velvet's Statement of Information
6 and Articles of Organization filed with the Secretary of
7 State, Exhibit A, pages 83 through 85.

8 And Appellant conceded his role as the managing
9 member during the appeals conference. And that's noted in
10 Exhibit A, pages 15 through 16. As the managing member,
11 Appellant had a fiduciary duty to act on Blue Velvet's
12 behalf. The duties of a managing member of an LLC include
13 a broad responsibility for any manner -- any matter
14 related to its activities, including its sales and use tax
15 compliance. You can find that duty in Corporation Code
16 Sections 17701.02(n) and 17704.7(c).

17 Appellant asserts that another person should be
18 held responsible for the liability. He argues that he was
19 not a responsible person because he did not have direct
20 hands on involvement with Blue Velvet's sales and use tax
21 matters. However, Appellant was Blue Velvet's tax matters
22 member. He was the owner and sole corporate officer for
23 the entire life of the business.

24 Absence an expressed limitation on Appellant's
25 duties and powers, Appellant was responsible to ensure the

1 corporation's sales and use tax obligations, even if he
2 had delegated those tasks. And you can find that in --
3 you can find precedent for that in commercial -- in the
4 case Commercial Security Co v. Modesto Drug Co, which is
5 43 Cal. App. 162, page 173.

6 Here is undisputed that Appellant was Blue
7 Velvet's managing member. And there's direct evidence
8 that Appellant's powers and duties included Blue Velvet's
9 sales and use tax compliant. Furthermore, regardless of
10 what anyone may believe, more than one person may be found
11 to be a responsible person for a corporation's unpaid
12 liabilities. Based on our evidence, Appellant as the sole
13 owner, corporate officer, managing member, and tax matters
14 member of Blue Velvet, was responsible for handling and
15 had a duty to act with respect to sales and use tax
16 matters.

17 As to the fourth element, the evidence
18 establishes that Appellant's failure to pay Blue Velvet's
19 tax liabilities was willful. Failure to pay is willful if
20 the person had knowledge that the taxes were not being
21 paid and had the authority and ability to pay the taxes
22 but failed to do so.

23 As to ability, Appellant has conceded, and the
24 prehearing conference order confirmed that Blue Velvet had
25 the ability to pay the taxes at issue. As to knowledge,

1 the evidence shows that Appellant knew or should have
2 known that Blue Velvet failed to pay its sales and use tax
3 liabilities for the periods at issue.

4 The evidence contains several e-mails from the
5 company's general manager to Appellant, specifically,
6 notifying him of outstanding sales tax liabilities,
7 including one on February 1st, 2007, regarding a late
8 payment of fourth quarter '06; April 24th, 2007, regarding
9 a potential nonpayment of first quarter '07; and
10 November 16th, 2007, regarding a late payment of third
11 quarter '07. You can find that in Exhibit A, pages 177,
12 179, and 207 through 209.

13 And another e-mail to Appellant, dated
14 October 8th, 2007, discussed the corporation's negative
15 cash flow. After informing Appellant that vendors had
16 changed its terms to, quote, "Collect on Delivery," and of
17 the outstanding accounts payable, the general manager
18 stated, quote, "If we were closer to hitting break even,
19 that amount would not be concerning. As it stands now,
20 every dollar that we make goes into keeping the operations
21 running, including revenue generated for sales tax."
22 That's Exhibit A, page 271.

23 Earlier today Mr. Brandeis stated that it is
24 grossly obvious that underreporting had occurred.
25 Appellant was included in other e-mails specifically

1 related to sales and use tax matters, including an
2 exchange with the general manager relaying information
3 from Blue Velvet's CPA, dated October 10th, 2007. And
4 another with Blue Velvet's bookkeeper, dated
5 December 12th, 2007. That's Exhibit A, pages 181 and 27.

6 The record includes many other e-mails, either to
7 or from Appellant, regarding Blue Velvet's budget and
8 financial matters. That's Exhibits A, pages 178 through
9 179, 186, 189, 191, 193, and, 195 through 196, 210, 212,
10 258 to 259, 284, 303, and 310, including daily sales
11 reports from Blue Velvet's bookkeeper, Exhibit A, pages 40
12 through 66. Given that he was apprised of the financials
13 of the corporation and given that it was grossly obvious
14 that underreporting had occurred, I think it is clear to
15 say that Appellant had knowledge of Blue Velvet's unpaid
16 sales and use tax liabilities.

17 Furthermore, Appellant listed Blue Velvet's 2009
18 tax liability to the Board of Equalization on Schedule E
19 of its -- of Blue Velvet's Chapter 11 bankruptcy petition
20 filed April 29, 2010. He filed a declaration on
21 September 27, 2010, declaring that he was a member of the
22 LLC and acknowledging the Department as the corporation's
23 largest creditor. He also acknowledged that he could be
24 held personally liable for the liability. That's found in
25 Exhibit A, pages 68 through 70.

1 Thus, Appellant knew Blue Velvet failed to pay
2 its tax liabilities on, or at the very least, after they
3 became due. Appellant met with the Department on
4 October 7, 2009, and February 11, 2010, to discuss the
5 audit and received the November 1st, 2010 audit report.
6 That's documented in Exhibit A, pages 116 and 117.
7 Appellant also signed three BOE 122 Forms Waivers of
8 Limitation in 2009 and 2010 related to the audit. That
9 can be found in Exhibit A, pages 93 to 95.

10 As the business's sole owner, corporate officer,
11 managing member, and tax matters members, Appellant had
12 access to the corporation's books and records. During the
13 audit period, Blue Velvet underreported its taxable sales
14 by several million dollars of an error rate of over
15 300 percent. This amount of underreporting could not have
16 escaped Appellant's notice.

17 It's more likely than not that Appellant knew
18 that Blue Velvet failed to pay its sales and use tax
19 liabilities when they became due. Appellant claims he was
20 a passive investor in Blue Velvet. However, the evidence
21 shows that Blue Velvet [sic] was actively involved in the
22 business operations, even stating that he received weekly
23 e-mails of monthly meetings. He was present at the
24 business location, at least monthly, and he made
25 suggestions regarding its operation.

1 As for Appellant's authority to pay taxes or
2 caused them to be paid, as the sole owner, corporate
3 officer, managing member, and tax matters member,
4 Appellant had authority to direct the affairs of the
5 corporation throughout the liability period, including
6 authority to pay taxes. Nothing indicates that his
7 authority was limited in any way.

8 Direct evidence that Appellant had authority to
9 make payments of tax is a business check signed by
10 Appellant to the Board of Equalization on
11 April 27th, 2009. That can be found in Exhibit C,
12 page 207. It's also in Exhibit A, but a clear copy is in
13 Exhibit C. Appellant also signed a business check to West
14 Coast Produce on February 3rd, 2009, which is further
15 evidence that Appellant had authority to make payments on
16 Blue Velvet's behalf. That can be found in Exhibit A,
17 page 91.

18 Appellant was also identified by Blue Velvet's
19 former general manager, bookkeeper, and CPA, as a person
20 able to make financial decisions on behalf of the
21 business. The record of that can be found in Exhibit A,
22 pages 33 through 37, 77 through 78, and 123 through 124.
23 Furthermore, Appellant was the sole owner, corporate,
24 officer, managing member, and tax matters member. Without
25 evidence to the contrary, those positions confer Appellant

1 with authority to direct Blue Velvet's payment of tax.

2 As the evidence shows, Blue Velvet collected
3 sales tax reimbursement, and Appellant was a person
4 responsible for handling Blue Velvet's sales and use tax
5 matters. And Appellant's failure to pay Blue Velvet's tax
6 liabilities was willful. Appellant argues that he should
7 not be held personally liable because he had delegated the
8 corporation's authority to pay taxes to another person.
9 However, there's no evidence that Appellant was relieved
10 of his authority or duty as the sole owner, corporate
11 officer, managing member, and tax matters member to act on
12 the sales and use tax liabilities.

13 Which brings our attention to Issue Two, whether
14 there is reasonable cause to relieve the finality and
15 failure to file penalties. I didn't hear the Appellant
16 argue this matter today, but it was included in the
17 prehearing conference order, so I wanted to address it.
18 Revenue and Taxation Code Section 6592, provides the
19 penalties may be relieved when a finding that the persons
20 in this case, Blue Velvet's failure to make a timely
21 return or payment is due to reasonable cause and
22 circumstances beyond its control, and occurred
23 notwithstanding the exercise of ordinary care in the
24 absence of willful neglect.

25 Statute requires that the person seeking penalty

1 relief must admit in a statement signed under penalty of
2 perjury, setting forth the facts upon which the person
3 basis this claim for relief. That can be found in Revenue
4 and Taxation Code Section 6592(b). Appellant submitted
5 four CDTFA 736 [sic] Forms, which are requests for relief
6 of penalty collection cost recovery fee and/or interest
7 dated November 6th, 2007. And that can be found in
8 Exhibit 11.

9 One is a request for relief of collection cost
10 recovery fees, Exhibit 11, page 7. However, collection
11 cost recovery fees at the primary account, in this case
12 Blue Velvet's, are not subject to dual and were not
13 included in Appellant's dual determination. Two are
14 request for relief of penalties which relate to periods in
15 2010, which had been removed from Appellant's liability
16 and are no longer in dispute.

17 And then one, Exhibit 11, page 3, is related to
18 the finality payment -- penalty for the audit liability
19 period. Appellant's argument that Blue Velvet lacked
20 funds at the time the returns became due does not
21 establish reasonable cause or circumstances beyond its
22 control necessary to grant him relief of those penalties.
23 Especially, as evidence shows, Blue Velvet had funds
24 available to pay its liabilities but chose to subsidize
25 its business operations.

1 Furthermore, Appellant's argument that he lacked
2 sufficient knowledge does not relate to reasonable cause
3 and circumstances beyond Blue Velvet's control. And as we
4 discussed earlier, Appellant did know that Blue Velvet
5 failed to pay its liabilities. Therefore, relief of
6 penalties is not warranted.

7 Appellant raised a third issue regarding whether
8 adjustments to measure Blue Velvet's sales and use tax
9 liabilities for fourth quarter '09 should be made. It is
10 the taxpayer's responsibility to maintain and make
11 available for examination on request all records necessary
12 to determine the correct tax liability. You can find the
13 citation for that in Revenue and Taxation Code Sections
14 7053, 7054, and Regulation 1698(b)(1).

15 Here the Department had to estimate a liability
16 for this period because Appellant did not provide adequate
17 records. In instances such as this, when sales cannot be
18 verified by direct audit approach and reliance cannot be
19 placed on the taxpayer's records, the Department must
20 calculate the sale from whatever information is available,
21 including indirect audit methods to determine the tax
22 liability. You can find background for that in Audit
23 Manual Section 0404.05 and 0407.05.

24 The Department used Blue Velvet's bank statements
25 to establish its taxable sales, which is a recognized

1 method of determining whether the taxpayer had reported
2 all sales. The background for that is Audit Manual
3 0405.25. The Department met its burden and provided a
4 reasonable explanation for the basis of the deficiency
5 determination, which may be found in audit-work papers and
6 summarized in a December 6th, 2010 -- or 2018 -- excuse
7 me -- appeals deciding.

8 Therefore, the burden of proof is on the
9 Appellant to establish why the Department's deficiency
10 determination is not valid. There is no dispute that Blue
11 Velvet did not provide any bank statements to verify its
12 deposits for the period at issue, fourth quarter '09.
13 Appellant argues only the second quarter '09 and third
14 quarter '09 should be used as a basis for determining the
15 underreported taxable sales, asserting that sales fell
16 during this period due to the Great Recession.

17 There is some evidence that Blue Velvet's sales
18 declined during this second and third quarter '09.
19 However, it's deposits first quarter '10 or first quarter
20 2010 -- excuse me -- the period directly after the one at
21 issue are \$28,000 greater than the deposits for first
22 quarter '09, Exhibit A, page 27 through 28. While the
23 record shows fluctuation over the course of the year, we
24 do not believe Appellant has established his requested
25 methodology. It's more likely than not to be correct.

1 It is also reasonable to presume that the sales
2 for fourth quarter '09 would be higher than the previous
3 periods, due to the holidays. In an e-mail exchange with
4 Appellant discussing the possibility of resolving some of
5 the corporation's debt, Blue Velvet's general manager
6 noted, and I quote, "The holiday months are the highest
7 grossing for the restaurant industry," end quote,
8 Exhibit A, page 271.

9 Furthermore, there is no evidence that Blue
10 Velvet deposited all of its cash receipts. While Blue
11 Velvet's then deposits may have declined over the course
12 of the second and third quarters of 2009, this decrease is
13 correlated with the decrease in cash deposits. There does
14 not appear to be a similar decrease in credit card
15 deposits. For example, credit cards deposits in April
16 2009 were \$77,000 and \$79,000 in June of 2009. You can
17 find evidence of that in Exhibit A.

18 It's a common practice for restaurants to make
19 purchases and pay other expenses with cash from its sale
20 proceeds, which the quarter finding that Blue Velvet did
21 not deposit all of its cash sales during the entire audit
22 period and may have increased this practice during the
23 second quarter '09 and third quarter '09. We further note
24 that this practice of withholding cash deposits likely
25 resulted in an overall underestimated liability. To

1 further reduce the liability is unreasonable. Therefore,
2 no adjustment to the liability is warranted.

3 And finally, at the prehearing conference,
4 Appellant raised a new issue regarding application of two
5 payments for its Blue Velvet tax liability. The first
6 payment was a December 24, 2012, application of \$23,000
7 from the sale of Blue Velvet's liquor license.
8 Appellant's representative in an e-mail to OTA on
9 January 30th, 2020, appears to have withdrawn the appeal
10 of this payment. However, it was unclear so we'll proceed
11 with our argument.

12 The \$23,000 payment was applied to Blue Velvet's
13 audited tax liability consistent with a payment
14 application rules in CCPM 740.180 and 1707.020. The audit
15 liability was billed on January 31st, 2011. And
16 Appellant's dual determination was not issued until
17 October 30th, 2013. This is found in Exhibit D. As such,
18 the \$23,000 was applied to the most current delinquent tax
19 liability by billing date for which a dual determination
20 or successor billing has not been issued.

21 As is evidenced by Exhibits H and I, the \$23,000
22 was properly applied to the tax portion and the tax
23 portion only of the audit liability. The second payment
24 was a November 24th, 2015, application of \$34,000 --
25 \$34,713.82 from the bankruptcy trustee. The Department

1 filed a Post-Petition Administrative Expense Claim for
2 taxes incurred during the pendency of bankruptcy
3 proceedings. Also known as an Expense of Administration
4 Claim for \$34,713.85 for the period of April 15th, 2010,
5 through September 15th, 2010. Proof of that claim is in
6 Exhibit F.

7 At the conclusion of the bankruptcy case, the
8 trustee paid that claim in full according to its priority
9 placement in bankruptcy cases, which may be found in
10 11 USC Section 507(a). The evidence of which is clear in
11 the trustee's final report, which may be found in
12 Exhibit G. The Department followed the payment
13 application rules from CPPM 740.220(1), which states that
14 quote, "Payments by a trustee for payments of a bankruptcy
15 claim through the bankruptcy court must be applied to the
16 period specified in the CDTFA's proof of claim," end
17 quote.

18 Therefore, the Department properly followed both
19 bankruptcy law and its own Compliance Policies and
20 Procedures Manual when it applied the \$34,713.82 to Blue
21 Velvet's outstanding tax liabilities. Based on all of the
22 evidence presented, the Department has clearly met its
23 burden of proving all elements for imposing liability to
24 Appellant. Appellant by contrast has not met his burden.

25 Therefore, relief of penalties and adjustment of

1 the audit liability is not warranted. For these reasons
2 we request the appeal be denied. Thank you.

3 JUDGE BROWN: Okay. Thank you.

4 Any questions?

5 JUDGE DANG: I just have some brief questions for
6 CDTFA. Excuse me. I believe that Regulation 1702.5 has
7 since been amended to require the Department to establish
8 actual knowledge. In your presentation, you had noted
9 that there are numerous e-mails and correspondents going
10 back and forth informing Mr. Mosher of the various
11 financial on-goings of Blue Velvet. Did those e-mails
12 cover every quarter of the liability period in this case?

13 MS. JACOBS: We have only e-mails going
14 through -- I believe we only have e-mails going
15 through 2007. But then after 2007 in the first quarter,
16 even before the end of first quarter '08 is when
17 Mr. Hartstein left. And it's -- we've not been given any
18 evidence that any other person was managing Blue Velvet at
19 that time. So the fact he was the sole, you know, owner,
20 corporate officer, all those things, we would take that to
21 mean that he had actual knowledge at that time.

22 JUDGE DANG: Okay. Regarding the correspondence
23 that we do have, I noticed that some of them had mentioned
24 specifically tax liabilities of the entity, others had
25 not. They were just general financial.

1 MS. JACOBS: Correct.

2 JUDGE DANG: And you're saying those go to just
3 establishing that he was involved in the finances. He, I
4 guess, should have known, for a lack of a better word?

5 MS. JACOBS: Correct.

6 JUDGE DANG: Okay. Thank you. Sorry. My second
7 question is, I'm looking at the daily sales reports, and
8 this goes to the collection of tax reimbursement.
9 There's, obviously, items here listed here as sales tax
10 BV, sales tax MX. How does CDTFA know those taxes were
11 actually collected from customers of these entities?

12 MS. JACOBS: Could you repeat your question? I'm
13 sorry.

14 JUDGE DANG: Sure. I understand that there is
15 financial reports from the entities that CDTFA has
16 presented. I see that sales tax is reflected on those
17 documents. How do we know that these are just not amounts
18 that the taxpayer has accrued and pay, rather than amounts
19 that were collected from its customers?

20 MR. PARKER: Yeah. So let me -- excuse me. On
21 the daily sales report, it shows all the different
22 categories and has the sales tax collected and the grand
23 total up top. And then if you look down at the bottom, on
24 the second to last line in the chart of Micros report,
25 which from knowledge is a point of sale type system. And

1 so this is the daily consolidated total revenue, which
2 matches the entire amount that they have. So based on
3 that, I would assume that the sales tax was actually
4 included or charged as part of those sales.

5 JUDGE DANG: Because they are reflected in the
6 POS section?

7 MR. PARKER: Yes.

8 JUDGE DANG: Okay. Thank you. That's all the
9 questions I have.

10 JUDGE BROWN: Okay. Hold on just a minute. I
11 guess I would want to ask CDTFA, following up on a
12 question raised earlier, the liquor license payment. Is
13 that considered a voluntary payment or an involuntary
14 payment?

15 MS. JACOBS: Oh, I'm sorry. I referenced the
16 Code Section or the CPPM Section, but I can reference it
17 again here. It's not considered a voluntary payment. So
18 CPPM 740.180 has to do with liquor licenses during its
19 sale of access of a debt during bankruptcy, and I -- I can
20 read it for you, or you can just look it up.

21 JUDGE BROWN: I can look at it.

22 MS. JACOBS: Okay.

23 JUDGE BROWN: So that's my understanding is the
24 liquor license is money that CDTFA collects from a
25 different agency --

1 MS. JACOBS: We --

2 JUDGE BROWN: -- correct?

3 MS. JACOBS: Well, we collect it directly from
4 escrow. So we place a withhold on transfers of liquor
5 licenses. And then it goes outside of the bankruptcy is
6 my understanding, but it's -- but it's -- it only happens
7 during bankruptcy that we do this, that we would then
8 place a withhold of the transfer, and then collect it, you
9 know, directly out of escrow without, like, passing
10 through to the -- you know, through to the business and
11 then to us, if that makes sense.

12 MR. SMITH: And all the money was applied to the
13 tax liability in the audit. So it reduced the
14 corporation's tax liability before Appellant was billed as
15 a responsible person.

16 JUDGE BROWN: When you say all the money, you
17 mean all the money from the liquor license payment?

18 MR. SMITH: Right. \$23,000.

19 JUDGE BROWN: Okay. I guess I wanted to ask a
20 question about -- I don't have the exhibit page. It was
21 an August 2011 ACMS note, that I don't recall if it was
22 one of the -- I don't recall if it was one of the ones
23 that you referred to in your arguments when you were
24 pointing -- when you were citing to. I think it was in
25 Exhibit A.

1 MS. JACOBS: Do you recall --

2 JUDGE BROWN: It was an August 2011, and it
3 was -- one second. I will see if I can find it and get
4 back to you. Okay. I'll say I'll look and see if I can
5 find the page.

6 MS. JACOBS: I think I might have found it.

7 JUDGE BROWN: Okay.

8 MS. JACOBS: Are you referencing page 97?

9 JUDGE BROWN: I don't remember. I'll get back to
10 it if I -- I just had a note to ask about it. All right.
11 I'll say that CDTFA, if you've concluded your presentation
12 at this time, and my co-panelists have concluded their
13 questions at this time, we now have to move onto
14 Appellant's rebuttal.

15 And Mr. Brandeis, you can begin your rebuttal
16 whenever you're ready.

17

18 REBUTTAL STATEMENT

19 MR. BRANDEIS: The Department's statement that --
20 where they take my statement that underreporting is
21 obvious to anybody that looks at these transcripts has
22 knowledge; I stand by that statement. Anybody that looks
23 at these transcripts and understands the restaurant, it
24 should be obvious that there's underreporting. There's no
25 evidence that my client ever saw these transcripts.

1 JUDGE BROWN: When you say "these" --
2 MR. BRANDEIS: These are the -- the --
3 JUDGE BROWN: -- tell me what exhibit page are
4 you looking at? Is this the one that you --
5 MR. BRANDEIS: This is the --
6 JUDGE BROWN: -- were just --
7 MR. BRANDEIS: -- this is what is known as 414M.
8 It's --
9 JUDGE BROWN: Oh, okay. The 414M.
10 MR. BRANDEIS: So I don't know that my client has
11 ever seen a 414M. I don't know that my client has ever
12 seen the sales tax returns that they filed. I have copies
13 of the tax returns that were filed for the period of 2007
14 when Mr. Hartstein was there, and I find some of these
15 extremely troubling.
16 First quarter, 2009, line 1, gross sales
17 \$374,219. Go to line 1 of 2007, \$389,000. But then we
18 have another return also first quarter showing sales of
19 \$15,575. Both of them are first quarter 2007. Both are
20 under the permit number 100632545. Are they keeping --
21 are -- is the bookkeeper keeping two sets of books? What
22 are they showing my client? Can you show me one e-mail?
23 They cite numerous e-mails. Can you show me one e-mail
24 where they informed my client were grossly underreporting
25 sales; just to let you know, you know.

1 She pointed out that there's e-mails saying,
2 "We're short on sales tax."

3 What they're saying is, "We don't have the money
4 to pay the sales tax that we're telling you is due. You
5 need to kick in more money into the business." That's
6 what they're telling him.

7 They're not telling him, "Hey, we're
8 underreporting, just to let you know. You're overseeing
9 this."

10 So it's a little misleading what they're pointing
11 out. There's not one e-mail that makes him aware that
12 there's this gross underreporting going on. But there are
13 several returns for the same periods with vastly different
14 gross amounts in terms of these gross receipts. I don't
15 know what's going on with the bookkeeping. Is this
16 information that they're withholding from my client? I
17 find no evidence that he's aware of what's going on.

18 Again, Martha was hired by Robert. Martha was
19 managed by Robert. Again, I've never met Martha. I've
20 never met Robert. What's going on is something that's
21 going on at that level, and it's not being conveyed to
22 Mr. Mosher. He has no knowledge.

23 CPPM Section 764.110, this is under Establishing
24 in RTC Section 6028, Dual Determination Number 2. This is
25 giving guidance to determining who is responsible for the

1 periods of liability. Who was responsible for sales and
2 use tax matters while the sales occurred and when the
3 taxes became due? For 2007, that was Robert H.

4 My client is a real estate developer. He's not
5 an accountant. He's not an auditor. He's not a CPA. He
6 only knows what they're telling him. He only knows what
7 they're telling him because he trusted Robert. And -- and
8 there's no evidence to show that he's looking at the
9 amount -- he never saw transcripts.

10 And so somebody can create a return and show you
11 and say, "Hey, these are the returns," or, "Here is an
12 e-mail telling what the numbers are." But how would
13 anybody know that those numbers are accurate? Again,
14 there's no e-mail saying, "Hey, we're underreporting."

15 There's e-mails that say, "Hey, we're short of
16 cash this month. We need you to put in more money." But
17 there's no e-mail saying that, "Hey, just to let you know
18 we're underreporting. We're not paying the tax."

19 The Department is putting on a lot of emphasis
20 and focus and titles here. There's a lot of emphasis on
21 he's the managing member. He's -- he's a single member.
22 This is a partnership. This is a partnership between Blue
23 Velvet, LLC, which is a single member LLC and Robert H.
24 Robert H. contributed approximately \$150,000, somewhere
25 there.

1 Do employees do that? Do employees contribute
2 money to a venture? That sounds like a partner. There's
3 e-mails, and I know the Department has seen them. There's
4 e-mails, especially, the parting e-mail where Robert H.
5 departs -- passes -- separates from the company where he
6 apparently gave away some laptops as bonuses to employees
7 without Mr. Mosher's knowledge, and Mr. Mosher told Robert
8 to get those laptops back. I didn't authorize it.

9 Well, so the next e-mail is from Robert H. to
10 those employees. And he states in there that, "I thought
11 I was a partner but, apparently, I'm not. I thought I had
12 the authority to do this, but apparently" -- he believes
13 he -- he knew it was a partnership. He believes that he
14 has the authority to act as partner. He did have the
15 authority to act as a partner.

16 But in those e-mails when he's separating ways
17 and he starts giving away laptops, yeah, if you were the
18 guy who is kicking money into this business, you would
19 say, "I want that back. Our partnership is ending. I'm
20 going to give you back your partnership interest and these
21 laptops that you're giving away. I want those back."
22 That's essentially his money.

23 And so like I said, the Department is focusing a
24 lot on titles here. This is a partnership. Robert was a
25 partner. And, again, if you read 1702.5(b)(1), it lists

1 these various titles: Member, officer member, manager,
2 employee, director, shareholder, partner, or other person
3 having control or super -- and then the very second
4 sentence from the left of that section it says, "The fact
5 that a person possesses any of the aforementioned titles,
6 in and of itself, is not sufficient to establish that the
7 person is a responsible person.

8 But if you listen to their -- their testimony,
9 they are asserting a managing member of an LLC, you have
10 the authority, boom, you're a responsible person. The
11 regulation is saying you're not. That's not enough. They
12 have to establish that you were in control. You had, as
13 it says in the -- as it says in the Audit Manual, we need
14 to establish who was the person who had control and the
15 duty and the responsibility for filing and paying the
16 sales and use tax. During 2007 it was Robert H.

17 On the issue of tax reimbursement and these
18 reports, the reports that you have in the system looks
19 like a little worksheet that was created by -- I don't
20 know if it's Martha or Robert. Somebody in the accounting
21 Department created a little worksheet. There's no
22 printouts from Aloha or Micros or any POS system. So
23 again, those worksheets are an internal document. And as
24 such, they are insufficient to establish proof of
25 reimbursement.

1 Statements by Robert H. -- well, we know he lied
2 in his statement after he's contacted by the collector
3 informing him he's being investigated as a responsible
4 person, and he lies about his role in the company. You
5 know, I don't know that I can believe anything he says.
6 And when I look at what's going on with these returns for
7 multiple amounts and what was filed, I seriously question
8 the ethics of the responsible person who was filing those
9 returns. I don't know if I would buy any statement by
10 that person.

11 And bottom line is -- and, again, I disagree with
12 the Department. You don't presume sales tax
13 reimbursement. The Civil Code outlines the facts that
14 create the presumption. Those are not present. The
15 general comments that you see written by the DPA, he was
16 never out there. He never saw any records. The auditor's
17 comments are all over the map.

18 Senior tax auditor -- and, again, on the issue
19 517 hours. You know, there's about 2,000 working hours in
20 a year. Just to get to the point of competency of this
21 auditor, that means this auditor can only complete four
22 restaurant audits a year. This -- he is a senior tax
23 auditor. That's absurd. That is absurd. He is grossly
24 incompetent. The methodology, he doesn't know how to
25 break -- he doesn't know how to write audit comments, so

1 the DPA has to write them for him.

2 And now they're trying to salvage this garbage.

3 I mean, if you're going to uphold responsible liability on
4 some internal worksheets and a questionnaire, then why
5 would anybody need to get any documentation? And why --
6 why -- get rid of the form of 1296. Get rid of these
7 requirements saying get evidence of tax reimbursement.
8 All you need is a questionnaire. All you need is --
9 that's weak.

10 To Ms. Brown's earlier position is that all we --
11 there's a list of evidence that is -- is listed in the
12 CCPM. They've gotten the weakest evidence. The weakest
13 evidence. They're required to make -- established that
14 this happened, and the best they can do is a
15 questionnaire. If that gets upheld, I -- I don't -- then
16 this really sort of pseudo requirement that the Department
17 has to prove tax reimbursement.

18 That's all I have.

19 JUDGE BROWN: Okay. I just -- go ahead.

20 JUDGE DANG: I'm sorry. Just brief question,
21 Mr. Brandeis. I was wondering if you could perhaps
22 elaborate on the Micros. Micros is the point of sale
23 system used by Blue Velvet.

24 MR. BRANDEIS: So, again, I wasn't there. I -- I
25 established a working relationship in late 2013. I've

1 never seen any Micros reports. I've never seen any sales
2 tax receipts. I'm not a -- I'm -- I'm pretty
3 knowledgeable about restaurant POS systems. I --

4 JUDGE DANG: Is Micros one of those?

5 MR. BRANDEIS: Micros is a restaurant POS system.

6 JUDGE DANG: Okay.

7 MR. BRANDEIS: Would I say I'm an expert on it?
8 No. But, you know, most restaurant POS systems have the
9 ability to download data. Today auditors would download
10 the data, or they would request a download. Auditors
11 frequently go in to make undercover buys. People post
12 pictures of receipts on Yelp. There's -- there's all
13 sorts of ways.

14 And -- and this auditor was there while the
15 business was still in operation. He could have made
16 copies of the receipts. He notes that the receipts, sales
17 tickets are available to him. He could have -- he went to
18 the restaurant. He could have asked them to generate a
19 receipt and immediately void it so he could see what
20 receipts looked like. Do they have tax reimbursement or
21 not have tax reimbursement? He could have done all these
22 things. He just chose not to.

23 It sort of fits this general degree of
24 incompetence in -- in his overall audit approach. He
25 failed. He failed to do his job in the requirements as

1 set forth in the Audit Manual and the CPPM to get this
2 evidence.

3 JUDGE DANG: I think --

4 MR. BRANDEIS: The strongest evidence, the bold
5 items that are listed in the CCPM, they don't have one.

6 JUDGE DANG: My concern sort of reflects what
7 you've saying, is that we don't have -- typically in these
8 cases you would see a POS -- a receipt or an invoice or
9 something indicating that tax reimbursement was charged to
10 the customer. Here we're relying on, it appears, these
11 daily-sales reports which show that the Micros amounts
12 from the POS - and I'm assuming any amount that is totaled
13 from the POS would include tax, reimbursement, if it also
14 matches what's being said here on the daily sales reports
15 as tax -- as sales tax DB, sales tax MX. Do you have a
16 response to that?

17 MR. BRANDEIS: Yes, I have a response.

18 JUDGE DANG: Okay.

19 MR. BRANDEIS: So, again, I haven't seen any
20 Micros reports. Again, I think what you're looking at are
21 internal worksheets created by the bookkeeper. But even
22 if they had a copy or a printout of a Micros report and it
23 listed, you know, sales and -- and let's say it listed tax
24 below that. That could be, and again, an internal
25 calculation by the system calculating tax on the gross

1 total X tax.

2 It doesn't -- it doesn't mean that the customer
3 saw a receipt with tax reimbursement or any notation to
4 the effect that tax is included in the retail selling
5 price.

6 JUDGE DANG: Okay. Thank you.

7 CDTFA, did you want to respond to that?

8 MR. SMITH: I'm not sure why the corporation's
9 internal accounting records would show that they were
10 collecting tax reimbursement, if they weren't collecting
11 tax reimbursement, and Appellant has no objection to
12 reducing the tax reimbursement collected from the bank
13 deposits when we were determining the audited taxable
14 sales.

15 I think the Appellant is in a difficult position
16 when they have to impeach their own internal records, and
17 they don't -- that's our position.

18 JUDGE DANG: Was CDTFA ever able to match any of
19 the amounts on any of these reports to, say, bank
20 deposits? I know you had received some bank records.

21 MS. JACOBS: Just a second.

22 MR. BRANDEIS: Can I interject on that point?

23 JUDGE DANG: Sure.

24 MR. BRANDEIS: Typically, a restaurant doesn't
25 send all the receipts taken into the bank. The reason is,

1 credit card tips are generally paid out with cash receipts
2 for the day. So say you were a server, and you had \$100 in
3 credit card tips. You would take the cash receipts that
4 you received, and they would offset the credit card tips
5 at the end of the day with cash receipts.

6 So you don't -- the cash -- all the cash doesn't
7 make -- that's a normal operating procedure of any
8 restaurant. You're not going to be able to look at
9 deposits and tie them to a report. That's just,
10 generally, that's not the way it works.

11 MS. JACOBS: You asked if we were able to match
12 the daily-financial reports to a bank statement. I'm sure
13 that we were able to do that.

14 JUDGE DANG: That's fine. That's fine.

15 MS. JACOBS: Yeah.

16 JUDGE DANG: I was just curious. Do we have
17 credit card information in this case?

18 MS. JACOBS: So I do know that, like, we did
19 submit in our exhibit two with our original response
20 brief. And then, you know, we included that in our
21 exhibits with our prehearing conference statement, and not
22 all of those documents are in -- are in here. The
23 audit-working papers are not fully -- are not fully
24 represented in here. And so --

25 MR. BRANDEIS: If I could add, the bank

1 statements, which they have, show merchant card deposits.
2 So even though they might not have a 1099-K, they do have
3 merchant card deposits per the bank statements.

4 JUDGE BROWN: All right. And let me just add.
5 As I said in the beginning, this is a courtesy copy. We
6 are doing our best to collect what we -- our support staff
7 is doing their best to collect what you think you mean.
8 So for all parties, if there's something that we've left
9 out of this binder, there's pages missing, we're relying
10 on you to say there are pages missing.

11 In any event, ultimately, the exhibits that are
12 technically admitted are the ones that you submitted
13 previously and provided to the other side, as well as to
14 OTA. So if there's pages missing from this copy, that
15 doesn't mean they are not in evidence. But again, point
16 out to me if we've missed pages.

17 MR. PARKER: I did want to note that on -- in
18 Exhibit A, page 66, which is the daily sales summaries.
19 It's for December 27, 2007. It shows cash of \$114,863.
20 And then in the audit when we scheduled -- on Schedule
21 12A4, column C, we had cash deposits for Blue Velvet of
22 \$7,860. So that shows that not all the cash that was
23 collected or at least on their daily sales reports was
24 deposited into the bank account.

25 MR. BRANDEIS: Again, that's normal operating

1 procedure for a restaurant. All the cash does not make
2 its way to the bank. The majority of the cash is used to
3 tip out credit card tips to the employees. And there's no
4 requirement in the law requiring the taxpayer to
5 deposit -- make any cash deposits ever. Cash could be
6 used to pay vendors and a number of other things.

7 JUDGE DANG: Okay. Thank you. I don't have any
8 follow-up questions on that.

9 JUDGE BROWN: I guess have one -- oh, I don't
10 know if there's anything further from CDTFA on that last
11 part. Okay.

12 I wanted to follow up with Appellant about the
13 issue of the -- Issue 3 about the dispute about the
14 measure for the fourth quarter of 2009. Am I correct in
15 my understanding, from what I've read of the case, that
16 Appellant and Blue Velvet didn't provide bank statements
17 for that quarter, for fourth quarter of 2009?

18 MR. BRANDEIS: So, again, they brought me in
19 2013. By the time we got to an Appeals Bureau hearing, it
20 was, I'm going to guess, 2015, maybe 2016. I don't recall
21 exactly. We had a hearing and then -- with a Corin
22 Saxton, and then he left. And then we had to have another
23 hearing with another -- Keith Long, I want to say.

24 So we -- you know, this issue came up, and now
25 it's, like, 2017, and the business has been closed for

1 seven years. And, you know, we can't go to the bank and
2 say, "Hey, can you give us a bank statement from seven
3 years ago?" So we didn't have them. But what we're
4 noting here -- excuse me. The Great Recession, if we can
5 go back and sort of remember this time, if you look at the
6 bank deposits, which both the Department and the taxpayer
7 are accepting as a reasonable amount for the gross
8 receipts.

9 So we look at first quarter of 2009. We have
10 almost \$445,000 in deposits into the Blue Velvet account.
11 Net deposits are \$438,000. Remember -- if we can, just
12 sort of go back and think about what was happening at this
13 time in the country and in the world. The stock market
14 meltdown happens in late 2008 and is continuing. And it
15 is the worse financial meltdown in my lifetime. I'm
16 50 years old. And people compare is to the Great
17 Depression.

18 So, you know, the sky is falling kind of a thing
19 going on here. Sales decline from first quarter 2009, net
20 deposits of \$438,000. The following quarter they plummet.
21 The monthly amounts are plummeting. They go down to
22 \$241,000, and third quarter they're continuing to fall to
23 \$191,000. Our position was we don't have the bank
24 statements for the next two quarters. Let's take the two
25 quarters proceeding it.

1 We know that sales are declining, and let's
2 average them together. It should be a reasonable
3 estimation of what deposits would have been.

4 And the Department said, "No, no, no. We want to
5 grab first quarter '09 too." Why? Because that quarter
6 just raises the liability. That's the only reason that
7 they want to grab it. But you -- but you have to ask
8 yourself, by first quarter '09 and first quarter '10, was
9 the economy better or worse? It was terrible. Things
10 were terrible at that time. Things didn't get better.

11 JUDGE BROWN: All right. You're arguing, if I
12 understand correctly, that those records were just
13 unavailable to you or to the LLC? You couldn't produce
14 them?

15 MR. BRANDEIS: We couldn't produce them. By this
16 time it would be like, you know, trying to go back and get
17 bank statements from seven -- you know, whatever it was at
18 that time, seven or eight years ago.

19 JUDGE DANG: I'm sorry that had triggered a
20 question from me to CDTFA. For the first quarter '10, was
21 there a non-remittance assessment for that quarter? And
22 I'm wondering if that amount was higher than what the
23 Department had assessed for fourth quarter '09.

24 MR. SMITH: I'd have to look that up to see. But
25 I think there was a non-remittance for that quarter. I

1 can see what the amounts are for those.

2 JUDGE DANG: Sure.

3 MR. SMITH: So for the first quarter of '09, the
4 reported amount of tax was \$12,453. And then the first
5 quarter of '10, they had a reported self-assessed amount
6 of \$17,868. So they reported more in the first quarter
7 than they did in the fourth quarter of '09.

8 JUDGE DANG: Okay. Thank you.

9 JUDGE BROWN: I do have that page I was going to
10 ask about. Actually, my question is directed to
11 Appellant, Exhibit A, page 95, 96 -- 95 and 96. It starts
12 on 95. Are you at the page?

13 MR. BRANDEIS: Exhibit A, page 95?

14 JUDGE BROWN: Yes. I'm talking -- it's 95 of
15 Exhibit A. It's page 403 of the PDF, if that makes it
16 easier.

17 MR. BRANDEIS: I'm on -- I'm looking at
18 Exhibit A, page 95 of 319, and it's page 402 of the 902
19 page PDF.

20 JUDGE BROWN: Okay. Scroll down one page.
21 Sorry. Page 403.

22 MR. BRANDEIS: Page 96.

23 JUDGE BROWN: 96. That's it.

24 MR. BRANDEIS: Okay.

25 JUDGE BROWN: Okay. 96. So this appears to be

1 what they call an ACMS note. It's -- at the time it was
2 Board of Equalization, not CDTFA's internal system where
3 they keep track of phone logs and phone contacts that they
4 have with different parties about cases. And this appears
5 to be a notation of a discussion with Mr. Mosher.

6 MR. BRANDEIS: Okay.

7 JUDGE BROWN: Okay. I guess I just wanted to
8 hear what Appellant's position is about this where he says
9 that -- when asked why the sales tax wasn't paid, he said
10 that, "The managers didn't pay it. They were trying to
11 keep the business afloat by paying suppliers and payroll."

12 I guess my question is --

13 MR. BRANDEIS: So -- so this -- so this note,
14 this ACMS note is dated 8 -- is that --

15 JUDGE BROWN: 8/18/2011.

16 MR. BRANDEIS: 18/2011. By this time he became
17 aware of the underreporting. He knew that there were
18 cash -- significant cash shortfalls. He was funding
19 those -- personally funding those, and he must have become
20 aware that they were using the cash shortfalls to keep the
21 business afloat.

22 And, again, given that he's already seen work
23 papers from the auditor by this time, he's probably come
24 to the conclusion that they've used the sales tax to keep
25 the business afloat. Meaning, Robert H. -- I'm going to

1 say Robert H. because he's the one who had operational
2 control.

3 JUDGE BROWN: Okay. So Appellant's position is
4 this refers to what was going on in 2011, not --

5 MR. BRANDEIS: Well, by 2011 Robert is gone.
6 Martha Winner was still there until 2009? Sometime in
7 2009?

8 MR. MOSHER: Definitely.

9 MR. BRANDEIS: But by 2011 the business is
10 closed. It's -- it's finished.

11 JUDGE BROWN: Okay. I'm just saying that's --
12 your position is this was you're referring to a period
13 where Mr. Mosher knew that -- knew that this was -- the
14 taxes weren't being paid, but this was after the liability
15 period that we're looking at?

16 MR. BRANDEIS: After the liability period, yes.

17 JUDGE BROWN: Okay. Do you have anything
18 further?

19 JUDGE DANG: I do not.

20 JUDGE BROWN: All right. Have I heard everyone's
21 arguments? Is there anything else I need -- we need to
22 address before we close the hearing today? Okay.

23 Then I will say that given that arguments have
24 concluded, the record is closed. And we will be issuing a
25 written opinion within 100 days.

1 Thank you all very much for your participation
2 today. And I believe I can now say that we are off the
3 record.

4 (Proceedings adjourned at 12:37 p.m.)

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

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

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 30th day
of March, 2020.

ERNALYN M. ALONZO
HEARING REPORTER