

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
IMRAN MULLICK,) OTA NO. 19034515
)
)
) APPELLANT.
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TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, July 28, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
400 R Street, Hearing Room, Sacramento,
California, 95811, commencing at 10:03 a.m.
and concluding at 11:44 a.m. on Tuesday,
July 28, 2020, reported by Ernalyn M. Alonzo,
Hearing Reporter, in and for the State of
California.

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APPEARANCES:

Panel Lead: ALJ SUZANNE BROWN

Panel Members: ALJ ANDREW KWEE
ALJ ANDREA LONG

For the Appellant: IMRAN MULLICK

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION
By: MARIFLOR JIMENEZ
JASON PARKER
KEVIN SMITH

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received at page 13.)
(Department's Exhibits A-J were received at page 13.)

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1 Sacramento, California; Tuesday, July 28, 2020

2 10:03 a.m.

3

4 JUDGE BROWN: I will say at this point that we
5 are now on the record for the appeal of Imran Mullick, and
6 this is OTA Case Number 19034515. Today is Tuesday
7 July 28th and shortly after 10:00 a.m. We're holding this
8 hearing by video conference, but the location, for the
9 record, is technically Sacramento, California.

10 This hearing is before the Office of Tax Appeals.
11 OTA is an independent agency that's separate from the
12 California Department of Tax and Fee Administration and
13 also separate from the Franchise Tax Board and any other
14 tax agency.

15 My name is Suzanne Brown. I'm the lead
16 Administrative Law Judge, ALJ, who will be conducting the
17 hearing for this case. Also on today's panel, in addition
18 to myself, we have Judge Andrea Long and Judge Andrew
19 Kwee. While I am the lead ALJ for purposes of conducting
20 this hearing, my co-panelists and I are equal decision
21 makers and may ask questions of either party during the
22 hearing at any time.

23 Further, our panel of three ALJs will decide all
24 of the issues presented to us, and each of us will have an
25 equal vote in making the decisions for the hearing. Also

1 present is our stenographer, Ms. Alonzo.

2 Next, I will ask each of the parties to identify
3 themselves for the record. I will start with the
4 Appellant, Mr. Mullick can you please state your name for
5 the record. We cannot hear.

6 If Mr. Mullick, you can unmute yourself?

7 MR. MULLICK: Can you hear me now?

8 JUDGE BROWN: Yes, thank you. Go ahead. Please
9 identify yourself for the record.

10 MR. MULLICK: My name Imran Mullick, and I am the
11 Appellant.

12 JUDGE BROWN: Very good. Thank you.

13 And CDTFA, could each of the representatives
14 identify themselves for the record.

15 Ms. Jimenez, do you want to start?

16 MS. JIMENEZ: Sure, Judge Brown. This is
17 Mariflor Jimenez. Good morning. I'm representing the
18 CDTFA.

19 MR. PARKER: Okay. I'm Jason Parker. I'm the
20 Chief of Headquarters Operations bureau, and with the
21 CDTFA.

22 MR. SMITH: This is Kevin Smith. I'm from the
23 CDTFA legal department. Thank you.

24 JUDGE BROWN: Thank you, everyone.

25 I will repeat for the record, in response to the

1 Covid-19 state of emergency, the Office of Tax Appeals
2 will be conducting today's hearing electronically with the
3 agreement of all parties and participants. All,
4 participants, including the ALJs, are video conferencing
5 into this hearing. I'm going to just clarify the issue
6 today and then move on to identifying in the meeting the
7 exhibits.

8 I'm just going to confirm that we discussed
9 during the prehearing conference and I confirmed during --
10 in my prehearing conference minutes and orders that the
11 issue today is whether adjustments are warranted to the
12 measure of unreported taxable sales for the audit period.
13 And the audit period is May 15th, 2009, through
14 December 31st, 2011.

15 Let me ask first the Appellant, Mr. Mullick, can
16 you confirm is that your understanding of the issue?

17 MR. MULLICK: That's my understanding, yes,
18 ma'am.

19 JUDGE BROWN: Okay. And CDTFA can you confirm
20 also.

21 MS. JIMENEZ: Judge Brown, this is Mariflor
22 Jimenez. That is correct.

23 JUDGE BROWN: Okay. Thank you. This is -- thank
24 you for reminding me to identify myself before I start
25 speaking again. This is Judge Brown.

1 I am now going to move on to identifying and
2 admitting the documentary exhibits. We've received
3 documentary exhibits from both parties to be considered
4 for admission into evidence. Our regulations require that
5 proposed exhibits must be submitted at least 15 days in
6 advance of the hearing. And both parties submitted their
7 proposed exhibits by that deadline.

8 Also the parties have not indicated any objection
9 to the other party's exhibits. And I will also remind
10 everyone that once the exhibits are admitted either party
11 can refer to any exhibit that has been admitted into
12 evidence. So CDTFA can refer to the Appellant's exhibits.
13 The Appellant can refer to CDTFA's exhibits. It does not
14 matter who submitted them.

15 All right. First, I will address Appellant's
16 exhibits. My office organized these exhibits and sent
17 them out to the parties last week. These were just a
18 compilation of exhibits that we had received from
19 Appellant, and we numbered them as Exhibits 1 through 3.
20 And Exhibit 1 and 2 are photos, and Exhibit 3 is pages
21 from the audit-working papers.

22 Mr. Mullick, can we just confirm that these
23 exhibits -- these documents that we've marked as
24 Exhibits 1 through 3 contain the correct pages and all the
25 documents you intend to be admitted into evidence; is that

1 correct?

2 MR. MULLICK: Imran Mullick. Yes, ma'am, that's
3 correct. Although, I do have a package -- an earlier
4 package which is the one that I was going to refer to.
5 It's essentially the same. I will refer to the one that I
6 recently got -- the three packages that I got. I will
7 refer to those as well. But I base all of it really,
8 essentially, on the first packet that I got.

9 JUDGE BROWN: Are there any pages that I --
10 sorry. This is Judge Brown. Are there any pages that
11 did -- from your earlier package that didn't get included
12 in what we sent you last week?

13 MR. MULLICK: So I think the order may be
14 different. So --

15 JUDGE BROWN: I did reorganize them. This is
16 Judge Brown. I did reorganize them so that we can refer
17 to them by number. So that rather than trying to describe
18 a page as this is a photograph of a table and chairs that
19 you could -- everyone could say this is Exhibit 1, page 3,
20 or something specific.

21 MR. MULLICK: Understood. Yeah. So the one that
22 I sort of organized my whole presentation on is, the first
23 package that I got which was --

24 JUDGE BROWN: Do you mean -- this is Judge Brown.
25 Do you mean your opening briefs?

1 MR. MULLICK: Yeah. So exactly. Yeah.

2 JUDGE BROWN: Okay. I have your opening brief.
3 This Judge Brown. Sorry. I just want to clarify. I
4 think as I discussed during your prehearing conference to
5 the extent that you submitted written argument, all of
6 that will be considered, but we just don't mark it as
7 evidence. We call that briefing. But all of your briefs,
8 the one from May 2019 and then there were a few more and
9 including the statement you submitted a just a couple of
10 weeks ago; all of that will be part of the briefing as
11 part of the record. I just want to make sure that there
12 aren't any additional documents to be moved into evidence
13 that were somehow omitted.

14 MR. MULLICK: Imran Mullick. Understood. I'm
15 just referring to this one particular package that has all
16 the exhibits marked and numbered. And so I was following
17 those numbers, and I will be sort of pointing out the
18 different exhibits by those numbers.

19 JUDGE BROWN: This is Judge Brown. Mr. Mullick
20 are --

21 MR. MULLICK: So this -- this package is numbered
22 071320-1903451. Imran Mullick.

23 JUDGE BROWN: I'm talking about the exhibits my
24 office sent you last week, and I think that's what you're
25 talking about.

1 MR. MULLICK: Right. It was maybe two weeks ago.

2 JUDGE BROWN: Okay. Yeah. It was around -- I
3 think it went out on July 14th, two weeks ago. This is
4 Judge Brown. I believe we're talking about the same
5 document.

6 MR. MULLICK: Okay. Well, I guess we could
7 proceed, and then we'll see if we're on the same page, so
8 to speak.

9 JUDGE BROWN: Well, but if you look at the
10 document that you're referring to, it has a list of your
11 exhibits. And there's Exhibits 1 through and 3, and then
12 the different photos are numbered. Exhibit 1, I believe,
13 has 10 photos. Exhibit 2 has 4 photos.

14 MR. MULLICK: Right. So what I have here is the
15 initial one, which is, I think, total of 85 exhibits.

16 JUDGE BROWN: 85. I'm sorry. This is
17 Judge Brown. 85 exhibits.

18 MR. MULLICK: Yeah. So they're numbered almost
19 85 pages, and they're all numbered.

20 JUDGE BROWN: Oh.

21 MR. MULLICK: And the one you sent us two weeks
22 ago, I have those as well. But I was wondering if you
23 have the one with the 85 exhibits so that I can forward
24 it.

25 JUDGE BROWN: This is Judge Brown. When you're

1 talking about 85 pages do, you mean the revised exhibit
2 index from CDTFA?

3 MR. MULLICK: Right. Exactly.

4 JUDGE BROWN: Yes. Yes. We are -- those will be
5 included as well, but I'm first addressing what you've
6 submitted. And then you can also refer -- we're also
7 going to admit what CDTFA has submitted.

8 MR. MULLICK: Okay.

9 JUDGE BROWN: And yeah. So the 85 pages is
10 CDTFA's revised exhibit index, and that's Exhibit A
11 through J.

12 MR. MULLICK: Right. Yes. Right. So that's the
13 one I was --

14 JUDGE BROWN: Okay. Well, I first -- this is
15 Judge Brown. I first wanted to admit the documents that
16 you submitted, and then next I will admit the documents
17 that CDTFA submitted. So they will all come into evidence
18 and you can refer to either one.

19 MR. MULLICK: Okay. Sounds good.

20 JUDGE BROWN: Okay. So CDTFA you have -- this is
21 Judge Brown. Do you have any objection to admitting
22 Appellant's Exhibits 1 through 3?

23 MS. JIMENEZ: Judge Brown, this is Mariflor
24 Jimenez. No issues with those exhibits.

25 JUDGE BROWN: Okay. Thank you. Then Appellant's

1 Exhibits 1 through 3 are admitted.

2 (Appellant's Exhibits 1-3 were received
3 in evidence by the Administrative Law Judge.)

4 This is Judge Brown. Next, I will move on to
5 CDTFA's revised exhibit index, which is exhibit --
6 contains Exhibits A through J as evidence and totals
7 approximately, I believe, 85 pages.

8 And, Mr. Mullick, you previously indicated -- or
9 it's my understanding that you do not have any objection
10 to CDTFA's Exhibits A through J being admitted, the 85
11 pages; is that correct?

12 MR. MULLICK: Correct.

13 JUDGE BROWN: Thank you. Then I will say that
14 CDTFA's revised exhibit index and revised Exhibits A
15 through J are admitted into evidence.

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

18 All right. Next, I'm going to move on to
19 identifying who the witnesses will be today. Mr. Mullick
20 you indicated that you will be testifying as a witness
21 today; is that correct?

22 MR. MULLICK: That's correct, Your Honor.

23 JUDGE BROWN: Thank you very much. I will swear
24 you in before you testify.

25 And I will confirm CDTFA does not intend to call

1 any witnesses; is that correct, Ms. Jimenez?

2 MS. JIMENEZ: Judge Brown. This is Mariflor
3 Jimenez. You are correct. No witnesses for us.

4 JUDGE BROWN: Okay. Then I'm just going to
5 briefly go over what our time frame is today. And when
6 I'm done with that, I will swear in Mr. Mullick as a
7 witness, and then we will begin the presentations. I
8 anticipate we'll take a little more than an hour, maybe an
9 hour and 10 minutes, something like that.

10 We will begin with Appellant's presentation,
11 including his testimony, and that will take 30 minutes.
12 And then CDTFA may cross-examine the witness, and the ALJs
13 may have questions for the witness. And then after that
14 CDTFA may make its presentation, which will take up to
15 15 minutes, and the ALJs may have questions. And then I
16 also included time for Appellant to make a rebuttal which
17 he can take up to 10 minutes. I reviewed the evidence and
18 identified the witnesses. Does anyone have any questions
19 before I swear in the witness? Any question about
20 procedure or process or anything else? Okay. Very good.

21 Then I will move on to saying, Mr. Mullick, if
22 you are ready, I will swear you in as a witness. If you
23 could please raise your right hand.

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IMRAN MULLICK,

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

JUDGE BROWN: Thank you very much. Okay.

Mr. Mullick, you may begin with your testimony and presentation. You have up to 30 minutes.

PRESENTATION

MR. MULLICK: Okay. Very good. Thank you very much for this opportunity, and I wanted to thank everybody for being here and listening to our case.

So I wanted to start off by telling you about starting this business and how it was like a shoe-string operation and we started off with essentially nothing. And when we started this business, the whole build-out took a lot longer than we expected. It took us a good two years to actually put the whole thing together, and we were in this process, constantly running out of money. Not only were we running out of money, we were severely in debt.

And so our goal at that point where there was so many things going on, and we were in that process. We were, like, our main drive was to open the business the

1 way we could, which is called a soft opening or whatever
2 you want to call it. So we just wanted to get going. And
3 I'm sure you heard this story before. Anybody who is
4 going into business or open a business knows the story,
5 and this is very typical.

6 So when we finally opened, we were absolutely
7 broke. And so this issue of sales tax, collecting sales
8 tax, we went to the Board of Equalization. It used to be
9 the Board of Equalization back then, and we asked the
10 question. So okay, what about taxes? Do we have to
11 collect taxes? We were told categorically coffee is food,
12 and there is no food -- there's no tax on food. Okay.
13 Well, that's easy enough.

14 You know, we were -- I mean, so no tax on food.
15 So we were not informed. You know there is -- I have not
16 seen any attempt by anybody even today to make sure that
17 when you open a food business you tell people that, okay,
18 people are going to end up eating at your establishment
19 will have to pay a sales tax. There was no -- nothing in
20 the brochures. Nothing anywhere.

21 Anyway, so we opened in May of 2009, and the
22 first year is horrible. In fact, the first two years are
23 horrible, which is not surprising for a lot of businesses.
24 So we were running at a loss starting off. We were
25 running at a loss. We have creditors that are, you know,

1 coming at us, and we are just trying to keep our heads
2 above water. Okay. And in all of this, of course,
3 there's confusion. So we were -- I mean, we were doing
4 right as far as the Board of Equalization is concerned or
5 taxes are concerned. That was something we are -- we're
6 not being collecting taxes.

7 We were under the impression -- we were told not
8 to collect taxes because you are selling food. Okay. So
9 we did not collect taxes for these many quarters, which is
10 11 quarters there. So the -- and I want to reiterate at
11 this point that this is something that we did not collect.
12 You know, it was something that -- it's not like we
13 collected this money and didn't pay it. We just did not
14 collect this money, okay. There was confusion. You know,
15 there was misinformation and -- okay. That's the extent
16 of it.

17 So in 2012 we get audited. And the auditor picks
18 a two-week period, and he actually sat there and watched
19 the transactions for two weeks just to measure how many
20 were actually sitting down and how many people were
21 actually, you know, having coffee to go. Now, he picked a
22 certain period of time, which to begin with, it was in the
23 midsummer, which is a busier time of the year for us.

24 Secondly, we had the business two years versus
25 the third year. It's a completely different business. We

1 have slowly tried to change the business. We have -- we
2 noticed from the very beginning that people wanted --
3 people were coming in and asking to -- wanting to work in
4 there or hang out in there, and they were asking for more
5 places to sit. I mean, initially, we didn't have the
6 money to buy chairs. You know, we were running on IKEA
7 chairs, which is all we could afford at that point.

8 So we made a decision to say, okay. We would
9 turn this business into -- we will sort of court these
10 people who want to sit down. So we moved the business to
11 bring in more people who actually wanted to just hang out
12 and actually work, you know. So that sort of became our
13 reputation, a place where you can hang out and work. That
14 took a little while. We sort of went from basically not
15 going after those people to actually deciding to go after
16 those people.

17 So that was one point I brought up with the
18 auditor over and over and over again. I said, "Please do
19 not judge this business on the basis of what's going on
20 today. And please don't do that because it's -- we were a
21 completely different animal from when we first opened."

22 So now I wanted to go to exhibit -- the report of
23 the field audit, which is Exhibit 7 on CDTF's package.
24 We can't hear you.

25 JUDGE BROWN: Sorry. I tried to unmute. This is

1 Judge Brown. CDTFA's exhibits are marked by letter A
2 through J. So when you say Exhibit 7, do you mean --

3 MR. MULLICK: I think it's page --

4 JUDGE BROWN: Oh, do mean page -- page 7. Okay.
5 Sorry. Go ahead.

6 MR. MULLICK: Okay. Very good. One of the
7 auditor's reports -- and in that you can see -- you can
8 see that I'm telling the auditor, even when the audit is
9 going on, we were not busy the first two years, and the
10 sitting patterns are different. The word of mouth spread,
11 and business regularly picked up. And then we also -- I
12 also mentioned teapots and outside seating was added. And
13 then, again, I brought it up. I said, "Look, this is not
14 the pattern here. You cannot measure this off of it."

15 So then you see the auditor's position was based
16 on a percentage. I said, "How can you base it on a
17 percentage? The sales were lower in the beginning than
18 first two years, and the taxable sales would be lower."
19 That's kind of a silly position. If we had no seats at
20 all in the beginning, we would have zero-down sales. I
21 mean, if you were to apply the percentage when we added
22 the seats it would definitely be different.

23 And then so he sorts of ignores the teapot issues
24 as well. Yeah, I mean, you know, teapots -- if you have a
25 teapot where you can go back and refresh the hot water

1 whenever you want it -- it is more conducive to people
2 sitting down and wanting to come in and sit down. It --
3 it makes a difference, but he sorts of, like, ignored it.

4 And then the ratio that he came up with,
5 51.7 percent is ratio for those two weeks. Okay. Now, we
6 still don't have that ratio. 51 percent of that week, the
7 ratio for sit down versus to go orders for that particular
8 two weeks was kind of a freak in a way. It was not --
9 it's not representative of the overall picture because he
10 picks these two weeks. The weather is nice. People are
11 sort of hanging out, and these patterns shift.

12 The pattern shifts because certain times of the
13 year people want to, you know, hang out more, and the
14 other time they don't hang out as much. In the rainy
15 season certain days they don't. But anyway the auditor
16 just fixated on this number of 51.7, and then he based
17 it -- everything on that number. So if we could go to
18 exhibit -- it's page 21.

19 So here we are. This is for the 11 quarters.
20 This is the total amount of sales \$533,110, and we
21 reported all of that as nontaxable sales. Because again,
22 we're under the impression we're selling food. I mean,
23 and we're not withholding any tax on it. It's not like we
24 collected the tax and didn't give it to the Board. We
25 just didn't collect it, you know, because we were

1 misinformed or ignored or -- I don't know. Anyway, so
2 this is the number.

3 Now, if you can go to page 23 -- -okay. This is
4 very instructive. So if you look at the -- so this is
5 where all of the auditor's math is. He counts the number
6 of chairs and tables and comes up with a number for
7 seating inside, which is 42. It says, "Total seat inside
8 seating is 42." And then for the outside he comes with a
9 total available seating -- outside seating of 32. So
10 that's the total available seating of 32. So he's got
11 these two numbers. 42 and 32 is the number of seats.

12 And once again I pointed it out to him several
13 times. I said, "We did not have this many seats when we
14 first opened. We added seating." We added seating
15 because people were asking for it despite the fact that we
16 were absolutely broke. We're running the business at a
17 loss. We were sort of somehow trying to add seats because
18 all of that meant money even. It was such a touch and go
19 situation that we didn't even have the money to buy tables
20 and chairs.

21 Anyway, so now I would like to go to some of the
22 pictures to show you what the seating actually looked
23 like. Now, if we can go all the way down to some of the
24 pictures. So it's 49, page 49.

25 JUDGE BROWN: Yes. Go ahead.

1 MR. MULLICK: So this is -- great. And this is
2 from -- all of these pictures were posted on Yelp by
3 customers, none by us. I've never posted a picture on
4 Yelp. This is just people liking the place from the very
5 beginning and just posting these pictures. So this is,
6 essentially, the first order that we opened. Now, you can
7 see how many seats we have in there.

8 There's no -- we have bench seating now on this
9 wall, which will be to the right as you look at it. There
10 is no bench seating there. We have bench seating now to
11 the left against the wall. We don't have that there.
12 There is a sofa back there, which we still do have. And
13 if you look all the way in the back, there's nothing. No
14 seating in the back -- in the backyard. So this, in
15 essence, is where we started.

16 Now, if you keep going down to say, I think
17 Number 52, you will see that we added this little bench in
18 there, and this is the months following. And -- and now
19 if you go down to 52, you will see that again. Again,
20 against the wall we still don't have any seating and that
21 seating was not added for another year. So, essentially,
22 if you count the number of seats that we have, we had
23 maybe 11 chairs that were those chairs that we bought from
24 IKEA.

25 Now, if we go down to 54, this is the following

1 year. And so we have at this point we've added the
2 benches there. But if you still remember the number of
3 chairs and if you count the number of chairs, and if you
4 see how many people are actually sitting on this side, you
5 will see there is 1, 2, 3, 4, 5, 6, 7. And you could
6 possibly -- 8, 9, 10, 11, 12 -- you seat maybe 12 people
7 on this side. And maybe you can seat another 10 people on
8 the side, which is not visible in this picture.

9 So this number of 42 seats inside, which the
10 auditor used as a basis, is fraud. We did not have, for
11 the first two years, did not have 42 chairs. We did not
12 have 42 seats inside. And so you cannot apply that number
13 of 42 at all. And so if you want to look at the other
14 package of pictures that is part of the --

15 JUDGE BROWN: This is Judge Brown. Yes, we have
16 the other packet. Go ahead.

17 MR. MULLICK: And these are all pictures also.
18 So let's see if I can get in there. Okay. So these -- if
19 you look at the first -- Number 2 on the exhibit folder,
20 page 2, you can see that we -- this is a picture of the
21 west side wall. And so, essentially, we got 1, 2, 3, 4, 5
22 chairs there. I think we had a total of maybe 11 or 12 of
23 these IKEA chairs. And then if go down here to Number 4,
24 you can see the same maybe 10 or 12 chairs, and we still
25 don't have the bench seating on this side. And you can

1 also again -- once again, you can see there's no bench
2 seating on this side.

3 So and then here's a picture of the backyard.
4 And once again, the auditor is counting -- the backyard
5 for the first year was not available at all. For the
6 second year or so or maybe even the third year, we had
7 this going on in the backyard, which is essentially two
8 tables and, again, some plastic IKEA chairs. And we still
9 had construction stuff back there. We were not
10 encouraging people to sit back there.

11 We are -- this is a project, you know. We have
12 to get around to it. So here, again, the auditor is using
13 a number of 32, which is we don't have 32 seats back here
14 back then. So now, if you can go back to the CDTFA
15 package of exhibits, I would like to go back to
16 Exhibit 23, page 23. And so here on page 23, if you look
17 at it again, you can see that this math is really, really
18 wrong because so -- so, again, if you look at the total
19 number of -- and then the auditor calculates the
20 percentages.

21 So for the first three years -- for the first
22 three quarters or the first four quarters, he agrees with
23 us that there's no seating outside. Okay. So in his mind
24 he's been generous. And he's saying, "Well, okay. Well
25 I'm going to give you a break and assume that there's no

1 seating outside. And so I'll still count the inside
2 seating as 42."

3 So he's got a percentage. A number of
4 15.76 percent is the ratio of seats available that he
5 applies if there is no seating available outside. So the
6 first year he agrees with us that there is no seating
7 outside. So he gives us zero for the total seating
8 outside. But the still number of 42 seats inside is
9 fraud. It's not 42. We have maybe 20 seats inside, if we
10 are lucky.

11 So right there you need another adjustment for
12 the first quarter. You need another adjustment of at
13 least 50 percent right there because there are -- we don't
14 have 42 seats inside. Okay. That's one. Then what he
15 does is, again, he comes around and for the sixth
16 quarter -- second quarter, that would be line number 6 --
17 line number 5 and 6. I think he adds the 32 seats. Well
18 and -- and he says 100 percent of the seats available.
19 But it's not true. We don't have 30 -- 42 plus 32 seats
20 available. That's like, again, you have to -- we have 8
21 seats available outside, maybe 10 seats at the most, you
22 know.

23 So that number right there should be -- there
24 should be another adjustment factored right in there to
25 accommodate for that. So and the same thing applies on

1 the outside seating. Again, 32 and 32 -- no. There are
2 no 32 seats available. We don't have these 42 seats
3 available inside. We are -- 50.71 percent is the
4 percentage for your measure. Period. That's not.

5 Now, if you look at our numbers today, we're
6 still running at 45 percent. Despite the fact that we
7 have added so many seats and -- and, again, I wanted to
8 show the pictures of the shop today. And I think that's
9 part of the package that --

10 JUDGE BROWN: This is Judge Brown. First, I'll
11 say yes, you did mean your Exhibit 2?

12 MR. MULLICK: Yes.

13 JUDGE BROWN: Okay. Mr. Mullick, let me also
14 just give you a 5-minute warning. You have 5 minutes left
15 on your 30-minute presentation, but you know that after
16 CDTFAs presentation you'll have a 10-minute rebuttal. So
17 you can finish at that time. Go ahead.

18 MR. MULLICK: Okay. Sounds good. Thank you. So
19 then in the packet we have 14, Number 14, which the
20 picture of what it looks like today, 14, and 15. And you
21 look at the place today where we have enhanced it quite a
22 bit. We're still not doing 51 percent of sit down -- of
23 people sitting down, you know. We still run most of
24 the -- it's like 45 -- I mean, the past 2019 I'm not sure
25 about 2018, we were running about 40, 45.

1 And each year when we improve our seating, the
2 numbers go up. So again, my contention totally is simply
3 this, that all of the total income went up from when we
4 opened to what we're doing today is basically because we
5 improved the seating. And more people are wanting to sit
6 down. So the percentage needs an adjustment factor of at
7 least I would say 50, 60, 70 percent. Need -- all of
8 these percentages need to be brought down by another
9 60 percent for the --

10 So we need another column in here that applies
11 the actual available seating adjustment to these numbers,
12 which is based on what was really actually available for
13 people to sit down. You cannot say oh, the percentage
14 increased, business increased, no. If we had zero seats,
15 we would have zero for here sit-down business. If we have
16 five percent seats, we have five percent sit down
17 business.

18 It's -- I mean, you cannot ignore the amount of
19 seats that were available for people to sit down. Now, a
20 couple of other things is we should have presented Z-tapes
21 and things like that. The auditor's intention was -- well
22 we just did not make a distinction between people who were
23 sitting down, and people were, you know, having it to go.

24 So -- and he talks about the paper cup data.
25 Well, the paper cup data is we didn't collect that data.

1 We were getting cups from all over the place. Sometimes
2 our coffee venders were giving us cups. Sometimes we
3 would buy cups and hold onto them for, you know, beyond
4 the periods. It was -- that data is not -- that paper cup
5 data is not going to be -- not going to produce any real
6 results.

7 So, essentially, the auditor is guessing about
8 what -- and he's guessing at it very, very poorly and
9 sloppily. And this is -- we are a very small struggling
10 business. And the sloppiness really is, you know, it will
11 destroy us. Essentially, that's what I want to say.

12 JUDGE BROWN: Okay. This is Judge Brown. Thank
13 you, Mr. Mullick.

14 Now, I'm going to ask CDTFA, do you have any
15 questions for this witness?

16 MS. JIMENEZ: Judge Brown, this is Mariflor
17 Jimenez. No questions for the witness.

18 JUDGE BROWN: This is Judge Brown. Thank you
19 very much.

20 I do have a few questions for the witness, but I
21 first will say -- ask if my co-panelists. First, I will
22 say, Judge Kwee, do you want to ask questions of the
23 witness at this time?

24 JUDGE KWEE: Yes. This is judge Kwee, and I
25 was -- I did have a couple of questions that I was just

1 hoping the witness could help me understand some facts a
2 little better. So maybe I could start by saying that the
3 trouble that I'm having grasping this case and this audit
4 is just really because we have this taxpayer where no
5 taxable sales were reported during the audit period.

6 So, basically, what we're doing now is we have to
7 go back and estimate what those taxable sales were based
8 on available that, you know, we have now 10 years after
9 the fact, trying to figure out what happened in 2009 based
10 on, you know, photos, Yelp reviews, and the witness
11 testimony. So in helping me decide what the correct
12 answer is, the question I have to ask is was CDTFA's audit
13 projection reasonable and rational? It's the heart of the
14 matter for me.

15 So I understand that there is, you know, lots of
16 talk about the chairs because that's some of the
17 information that we have, you know, available now. But,
18 you know, I don't think the total number of chairs is
19 really a -- always direct correlation with the taxable
20 ratio of for to go orders. You know, I -- on some extent
21 I get that if you reduce the total number of chairs, that
22 could impact the number of people that decide to stay for
23 here when they order coffee.

24 But, you know, does that -- how does that
25 impact -- my question is how does that impact the

1 51 percent or 30 percent taxable ratios that CDTFA came up
2 with? You know, for example, if you went with the 74
3 chairs that was used during 2000 -- June of 2012, but say,
4 for example, you dropped that down to 25 chairs for 2009,
5 but if there were only 20 customers, then changing that
6 number of chairs, to me it doesn't seem like it would
7 necessarily make a difference in the number of customers
8 that are choosing to stay for here or to go because it
9 would seem to me that impact -- that change would only be
10 impacted if there were no chairs available for the
11 customers -- insufficient chairs available for the
12 customers to choose for here as opposed for go -- taking
13 it to go.

14 So that's, I guess, one aspect that I'm having
15 trouble with is understanding the correlation with
16 reducing the number of chairs, reducing the taxable ratio
17 used by CDTFA. So it would kind of help me if the
18 taxpayer could clarify, like, first, well like what
19 periods are you requesting an adjustment to the ratios
20 determined by CDTFA? For example, is it 2009 when the
21 business was first started because things were still
22 getting up?

23 Is it 2009, 2010? Or is it the entire audit
24 period? And is it kind of like a final adjustment
25 throughout? And then the other thing that would help me,

1 I guess, understand this is just trying to understand why
2 reducing the number of chairs directly impacts the amount
3 of people who would have chosen for here versus to go, you
4 know. And thinking of that, it really seems like for me,
5 for example, you look at the chairs? And would other
6 records, you know, records for a later period, would
7 people -- like, to show seasonal differences, do people
8 order more for here or to go with the winter versus the
9 summer?

10 And it does seem like CDTFA made an adjustment
11 for that. It looks like the taxable ratio was 30 percent
12 in 2009 and 30 percent in the winter months of 2010 and
13 2011 versus 51 percent for the summer months. So I'm just
14 trying to understand how -- what additional adjustments
15 are being asked and what the correct ratios and the tax
16 ratio would be, if that's kind of -- I'm sorry it took a
17 long time explaining what my concerns were, but if --

18 I'm just trying to give the taxpayer an
19 opportunity to help me to understand and to also
20 understand where I'm coming from, what I have to do as my
21 job in understanding why CDTFA's determination isn't
22 reasonable or rational. And those are the issues that
23 were coming through my head, and I just wanted to share
24 that with the taxpayer to see if he could help me
25 understand better. So that's all I have to say.

1 MR. MULLICK: Can I respond to that? Okay. So I
2 think it's a good question. I think you're absolutely
3 right. And that is the question. That is essentially
4 what we're doing is what the auditor is doing and what
5 we -- I am doing is we're all guessing. Okay. These are
6 the 11 quarters that we don't know what actually happened.
7 And so we're guessing as to what actually happened.

8 Like how many people actually sat down and were
9 sit-down customers, and how many people were actually to
10 go customers. So my argument simply is that the basic
11 assumptions that the auditor is making are not fair and
12 are not correct. And the basic assumption number one, is
13 the number of seats. So the question we ask is, okay,
14 does having more seats make it more conducive for people
15 to sit down?

16 Well, the answer, number one, is obvious. If we
17 are completely packed, people actually come in. They'll
18 peak inside sometimes, and then leave. People also have a
19 comfort level of how close they will sit next each other.
20 Even if the seats are available, sometimes if it is not up
21 to their comfort level, they will leave if they want to
22 come in and sit down.

23 But the point is the number of seats available
24 for somebody to sit down has a direct -- direct
25 correlation to whether it will be a sit-down customer or

1 not. So if you can imagine a place which has two tables
2 and a couple of chairs versus a place that has 50, you
3 know, chairs and tables and is more like conducive to --
4 has more ambiance, more feel for you to want to sit down.

5 Even if you walked in and you said I just need a
6 cup of coffee. You will be, like, just by looking at the
7 place will be more conducive to you saying, "Okay, I'm
8 going to sit down and take it here." So the amount of
9 seats makes a difference, and it makes a direct
10 difference. And that -- people would explicitly be asking
11 for more seats. People are explicitly saying that we want
12 more places to sit. People were explicitly asking us,
13 "When will you fix the backyard? When will you add more
14 seats to the backyard?"

15 We couldn't do any of those because our finances
16 would not allow us to do this. So it is a direct
17 percentage. So if the auditor is -- is coming up with
18 numbers that are essentially very approximate and based on
19 number of seats available, you know, he is setting it up.
20 Okay. You have four 42 seats and you have 32 outside. So
21 the outside seats are not available. So we will give you
22 zero on those and apply that percentage.

23 He is obviously admitting that the number of
24 seats matter. You have more seats outside. More people
25 are going to sit outside which is obviously the case. But

1 if you don't have seats even inside, you will have fewer
2 people. Even right now I'm thinking about improving the
3 quality of our seats. That makes people want to sit down
4 too. Then you get to a point where you say, okay, maybe
5 we don't want them to be too comfortable. We don't want
6 people to be hanging out too long either.

7 So then you want them to be sort of like, okay,
8 some comfortable, some not very comfortable seats, and so
9 all of that stuff. But the point is the number of seats
10 available is a direct percentage wise thing that should be
11 taken into account. Now, I can give you -- I can tell you
12 exactly how the seats were added. Okay. And then you
13 can -- I mean, I can approximate how the different seats
14 were added.

15 For first year we don't have 42 seats available.
16 Maybe we have 20 seats available for the whole year. For
17 the second year, again, we don't have these 32 outside
18 available. We have maybe 8 or 10 available. And then
19 once, again, you cannot apply 100 percent of the
20 51 percent. You would have to do, you know, the way to do
21 it would be, okay, how many seats were actually available?
22 And then you multiply that into a percentage, and then you
23 apply it. I mean, I can do the math on it and give you a
24 approximate number.

25 But I think by the end of the eleventh quarter,

1 we pretty close to 70 -- we were still not 74 seats, I
2 mean, total that is. But he did give us a variance on the
3 outside because out is really, in all honesty, not
4 available. We have northern exposure, which means there's
5 no sun back there and it gets pretty cold. So,
6 essentially, you have October onward -- October to March
7 there's no sunlight back there.

8 So there's very -- even now very few people that
9 want to sit back there. So again, the point is we are
10 trying to guess. The auditor is guessing, and I think
11 he's guessing. I mean, this is huge. I mean,
12 51.71 percent based on a 2-week, you know, pattern that
13 he's applying, then based on the number of seats that are
14 not available, the 51 percent, 1 week -- 2 weeks' worth of
15 a busy two weeks. So when people wanted to sit inside and
16 then the number of seats that were available that were not
17 available. I mean, this -- this whole ratio needs to be
18 readjusted on the weight of -- you know, at least 60
19 percent less seats for the first two years. And then for
20 the last three quarters I think we can say maybe, you
21 know, based on we're still not at 74 seats.

22 It's still not 74. We would need an adjustment
23 for maybe 30 percent or 40 percent on those last three
24 quarters. So I would say an adjustment of at least
25 60 percent the first seven or eight quarters. And then

1 the last three quarters an adjustment of maybe 40 to 30,
2 40 percent. Yeah, because I think it's all based on --
3 and again, we -- we chatted. I chatted with the auditor
4 because he was there every day, you know. We chatted and
5 I got it up with him every day, and he -- the auditor said
6 yeah, that's true. That's true. But here we are 10 years
7 later.

8 JUDGE KWEE: This is Judge Kwee. Thank you,
9 Mr. Mullick. And I did have one short question. You had
10 mentioned in your opening presentation that CDTFA and --
11 I'm sorry. That BOE -- and BOE advised you that your
12 sales were not going to be taxable. And I was just
13 wondering if you have any -- if you ever got that in
14 writing from BOE or if you have any record of that advice?

15 MR. MULLICK: Yeah. Unfortunately, I didn't get
16 it in writing. And, you know, we went up there, and I
17 wish I had got it in writing. And I didn't think of that
18 because like I said, there were -- our plate was more than
19 full at that point. We just went up there and said,
20 "Okay, do we have to collect sales tax?" And they said
21 nope. Coffee is food, and food is not taxable.

22 Now, again, in my understanding, of course, I've
23 gone to Starbucks, and I've gone to Pete's Coffee. They
24 never tax you whether you sit down or not. Later, of
25 course, I found out that they have an agreement with CDTFA

1 where the CDTFA charges them a flat rate, which is somehow
2 confidential information. I don't know if I can subpoena
3 it for this hearing.

4 But I think that number is -- whatever CDTFA
5 charges Starbucks and Pete's is -- well, I'm pretty sure
6 it's not 51.71 percent, you know, and they give them a
7 pretty good deal. And I mean, again, like I said, that's
8 51.71 percent is not even, you know, a fair number for
9 anybody really. You know, it just happened to be that
10 number for that particular two weeks. And despite the
11 fact that it was, you know, it varies quite a bit. And I
12 understand for a few quarters he gave us no seating
13 outside, so we get, you know, a percentage 56 percent off
14 of that.

15 But that's got to be cut down less than half. I
16 mean, yeah. Even that. Because we just did not, could
17 not seat that many people. People were not sitting down
18 that much. We were just -- and our sales were poor. I
19 mean, our sales if you look at it, we're not doing much,
20 you know. When we built the business up sort of like,
21 okay. People wanted to come in and seek warmth and sit
22 down. And so that became, oh, okay, we must have been
23 doing something from day one. We were not.

24 JUDGE KWEE: This is Judge Kwee. Thank you,
25 Mr. Mullick.

1 And I'll turn it back over to lead Judge Brown at
2 this time. Thank you.

3 JUDGE BROWN: Okay. Thank you, Judge Kwee and
4 Mr. Mullick.

5 I will now turn to Judge Long and ask, do you
6 have any questions for the witness at this time? I think
7 you are muted, Judge Long.

8 JUDGE LONG: Sorry. This is Judge Long. I have
9 no questions.

10 JUDGE BROWN: Okay. This is Judge Brown. I will
11 have a couple of questions for the witness at this time.
12 Mr. Mullick, if you could turn to CDTFA's exhibits, if you
13 could go to page 50? If you see that photo of the outside
14 of the cafe?

15 MR. MULLICK: Yes. So this the CDTFA's exhibit.
16 Yes.

17 JUDGE BROWN: Yes. And it indicates at the top
18 that it was posted to Yelp on June 7th, 2009?

19 MR. MULLICK: Correct. Yes.

20 JUDGE BROWN: I wanted to ask about the bench in
21 front of the cafe. Do you agree that bench was there in
22 June of 2009?

23 MR. MULLICK: Yeah. That could have been there.
24 We actually experimented with that little bench for a
25 little while. And what ended up happening with that was

1 that, unfortunately, 24th Street is not conducive to
2 having benches outside. So what ended up happening was
3 that we started getting a lot of people who wanted to sit
4 on the bench and not be our customers.

5 And, of course, a liquor around the corner, and
6 they would go to the liquor store and buy alcohol and come
7 into our store and get a paper cup and pour it in there --
8 pour their alcohol in there and sit there. So we had to
9 put all the benches back in. It became a nuisance. So we
10 experimented with that for just a few months, I think.

11 JUDGE BROWN: This is Judge Brown. Do you
12 recall -- you said a few months. So do you recall when
13 you pulled -- specifically when you took the bench away
14 from the front area?

15 MR. MULLICK: I don't recall, and I'm kind of
16 surprised. I think we had another bench, and then in this
17 picture there is just one. But the benches, essentially,
18 were all -- it's sort of considered to-go sales any way.
19 Anybody who wants to sit and drink coffee just go outside.
20 We were busing tables, I mean, cups and things from the
21 benches outside. So I think we had them for maybe a
22 couple of months. At the most, one quarter or something
23 like that. But it became kind of a real automatic thing
24 that we had a lot of people just hanging out.

25 JUDGE BROWN: This is Judge Brown. Thank you.

1 I'll move onto my next question. Mr. Mullick, you
2 indicated that later in the audit period the cafe added
3 teapots. Did you have a menu from -- did you have printed
4 menus or photos of the menus that showed when you did add
5 teapots or when there weren't teapots on the menu? I
6 mean, I understand. When I say teapots on the menu when
7 they -- could the customers -- when could the customers
8 start ordering tea in a teapot and do you have any old
9 menus that would show when that was?

10 MR. MULLICK: Yes, ma'am. I may have some old
11 menus. I'll be happy to look them up. We always served
12 tea. As the auditor pointed out that we always had tea on
13 the menu. However, there was a difference. The
14 difference was we added a whole menu of teas with the
15 teapots. So, like, right now if you walk in, you have,
16 like, a dozen different teas. We have several herbal teas
17 and several, you know, different kind of black teas. So
18 we have a whole tea menu.

19 Initially, for the first couple of years we had
20 just tea. So when you order tea you would just get a
21 black tea. And so slowly we added all these different
22 teas with the teapot, which is really kind of cool thing.
23 And then you can sort of sit there and drink, sip your tea
24 and then you can bring your teapot back and we can give
25 you more hot water. So that actually makes people hang

1 out more and come in more also when you have a teapot.

2 JUDGE BROWN: Okay. This is Judge Brown. It's
3 my understanding from reading the paperwork that the
4 auditor asked if you had purchase invoices of when you
5 bought the teapots, but you didn't have those; correct?

6 MR. MULLICK: I may have those. I will have to
7 go -- I don't think the auditor ever asked us for the
8 teapots, or maybe I showed it to him. I'm not sure. But
9 I think he knew when we added the teapots, and there was
10 no contention on that. The only contention was that he --
11 well, that it was not relevant whether or not the teapots
12 are not.

13 He said that having teapots doesn't make up a
14 whole lot of difference because we had tea on the menu.
15 So that never was sort of like a point of contention. In
16 other words, he would never adjust anything based on when
17 we added the teapots. You know, to him it was irrelevant.

18 JUDGE BROWN: Okay. And then this is
19 Judge Brown. I have one more question. It's just to
20 clarify something. In your, briefing, Mr. Mullick, you
21 indicated that the measure in dispute is \$219,534, but the
22 audit work papers seem to -- that I looked at, seem to
23 show that the measure is \$206,978. So it's a difference
24 in measure of about, say, \$13,000. Is the \$206,978 dollar
25 amount of the measure, is that incorrect?

1 MR. MULLICK: Yeah, I'm not sure. I think there
2 might have had an interest by the time they did the math.
3 They might have added the interest. Maybe that's why the
4 two numbers are different. But the actual number might
5 have been \$206,000, something like that. But you know --

6 JUDGE BROWN: All right. Okay. This is
7 Judge Brown. I understand then if you were including
8 interest in your calculation. That may explain the
9 discrepancy. Then I'm done with my questions for the
10 witness for now. So we will move onto CDTF's
11 presentation.

12 Ms. Jimenez, if you are ready to begin, you
13 indicated you would take about 15 minutes. You can go
14 ahead whenever you are ready.

15 MS. JIMENEZ: Judge Brown, this is Mariflor
16 Jimenez.

17
18 PRESENTATION

19 MS. JIMENEZ: Appellant operated a coffee shop in
20 the Mission District area of San Francisco. It had that
21 typical table and chairs plus benches, sofa, and
22 fireplace. There is a free and fast Wi-Fi outlets and
23 extension cords. It kind of created that environment that
24 was suitable for working, studying, and writing. So it
25 attracted the laptop crowd. And you will see that on the

1 Yelp reviews and photos on your Exhibit J starting on
2 page 62.

3 The Appellant operated this cafe from
4 May 15, 2019 through December 31st, 2011, as a sole
5 proprietor, and that is also the liability period. On
6 January 1st, 2012, Appellant created a limited liability
7 corporation with himself as the only beneficiary.

8 So Appellant sold coffee, tea, and pastries and
9 had seats for 42 people inside and seating for 32 people
10 outside. During the audit period, total sales of
11 approximately \$533,000 was reported, and a deduction of
12 the same amount was claimed for sales of exempt food
13 sales. Basically, Appellant reported zero taxable sales
14 and no sales tax for entire liability period.

15 Copies for federal income tax return for 2009 and
16 2010, profit and loss statement for 2011, cash register
17 Z-tape reports, and purchase invoices were provided.
18 Since sales tax reimbursement was not charged on the
19 for-here sales, the Department performed a test of sales
20 to compute the taxable sales ratio. Appellant was
21 requested to keep track of the to-go sales and the
22 for-here sales for a two-week period.

23 The cash register was reprogrammed.

24 JUDGE BROWN: Ms. Jimenez, can I interrupt you
25 for just a second. We're getting some background noise.

1 Can I ask Mr. Mullick if you can mute your
2 microphone?

3 MR. MULLICK: Sure. I think I muted it.

4 JUDGE BROWN: There you go. Now you are muted.

5 Ms. Jimenez, please proceed.

6 MS. JIMENEZ: All right. So Appellant was
7 requested to keep track of the to-go sales and for-here
8 sales for a two-week period. The cash register was
9 reprogrammed to track these two types of sales. Cash
10 register Z-tapes for the period of June 26, 2012, through
11 July 9, 2012, were then provided to the Department.
12 During this time period Appellant had total sales of
13 approximately \$9,700 and taxable sales of around
14 \$5,000. from this a taxable ratio of 51.71 percent was
15 computed. And that will be on your Exhibit B, page 23.

16 Now, the Department only used the 51.71 percent
17 taxable sales ratio for the spring and summer. And this
18 is the second and third quarters of 2010 and 2011. Now,
19 to account for the fall and winter, which is the first and
20 fourth quarters, the Department compared the total seating
21 for both inside and outside, which is 74 chairs to the
22 indoor seats of 42 chairs. Then a ratio of indoor chairs
23 to total chairs of 56.75 percent was calculated.

24 This indoor chair ratio was applied to the
25 computed taxable ratio of 51.71 percent, computing a lower

1 taxable ratio of 29.35 percent. So this 29.35 percent was
2 applied for all of 2009 and for the first and fourth
3 quarter of 2010 and 2011. The Department gave the
4 Appellant the benefit of the doubt that the outside
5 seating was not used during this time. The calculation
6 can be found on your Exhibit B, page 22.

7 We want to point out that this greatly benefit
8 Appellant, as there are many nice days during the fall and
9 winter where the outside seating could be used. The audit
10 calculation presumed that the interior seating was the
11 only available space for 21 of the 33 months, which is
12 64 percent of the audit period. Once again, this
13 presumption provides a benefit in the form of a lower
14 taxable dine-in percentage for these periods.

15 If you take a look at the Yelp reviews,
16 Exhibit J, page 65, on June 7th, 2009, one reviewer
17 mentioned that, "There's a table and chairs in the patio."

18 In June 11, 2009, another reviewer on your
19 page 68 mention that, "There's a large patio with some
20 tables."

21 Now, a different reviewer on January 27th, 2010,
22 a reviewer stated that, "There are loads of outdoor
23 seating". That's on your page 71. So the Department
24 believes that Appellant has benefited from the lower
25 taxable ratio used in the audit for periods when Appellant

1 stated that he did not have outside seating.

2 So the Department applied two taxable sales
3 ratios to reported total sales for the respected periods
4 computing approximately \$207,000 for disallowed claim
5 exempt food sales. And you will see that on your
6 Exhibit B, page 21.

7 California imposes sales tax on the retail sales
8 in the state of tangible personal property. Measured by
9 the retailer's gross receipt, unless the sale is
10 specifically exempt or excluded from taxation by statute.
11 That's Revenue and Taxation 6051. All of a retailer's
12 gross receipt are presumed subject to tax, unless the
13 retailer can prove otherwise. That's Section 6091.

14 Although, gross receipt derived from the sale of
15 food products are generally exempt from sales tax, sales
16 of food served at a restaurant are subject to tax. That's
17 Section 6359. When the Board is not satisfied with the
18 accuracy of tax returns filed, it may base its
19 determination of the tax due upon the facts contained in
20 the return or upon any information that comes within its
21 possession. That's Section 6481.

22 It is a taxpayer's responsibility to maintain and
23 make available for examination on requests, all records
24 necessary to determine the correct tax liability,
25 including bills, receipts, invoices, or other documents of

1 original entry, supporting the entries in the books of
2 account, that's Section 7053 and 7054. When a taxpayer
3 challenges a Notice of Determination, the Department has
4 the burden to explain the basis for that deficiency.
5 Whether the Department's explanation appears reasonable,
6 the burden of proof shifts to the taxpayer to explain why
7 the Department's asserted deficiency is not valid.

8 The applicable burden of proof is by a
9 preponderance of the evidence. That is, the taxpayer must
10 establish by documentation or other evidence that the
11 circumstances it asserts are more likely than not to be
12 correct. When it is determined that a taxpayer's records
13 are such that the sales cannot be verified by a direct
14 audit approach or reliance cannot be placed on the
15 taxpayer's records, as in this case here, the Department
16 must calculate the sales from whatever information is
17 available using indirect audit methods to determine the
18 correct tax liability.

19 Appellant in this case did not charge sales tax
20 reimbursement on the for-here sales during the audit
21 period. The Department was justified in using an
22 alternate method to compute Appellant's sales. Therefore,
23 the burden of proof shifts to Appellant to provide
24 evidence to refute the audit findings.

25 The Appellant has provided pictures posted to

1 Yelp to support their contention that less seating was
2 provided to customers during the early portion of the
3 audit period. All pictures and reviews posted to Yelp
4 were examined. That will be on your Exhibit F, pages 48
5 through 57. The Department notes that a picture posted to
6 Yelp on June 19th, 2009, page 51, shows a long bench used
7 for seating attached to the wall opposite of the counter.

8 Therefore, it appears the bench seating was added
9 during the second month of operation. Also a picture
10 posted on Yelp on June 7th, 2009, on page 50 of a wood
11 bench outside the front of the business. Note, our audit
12 calculations do not include any outside seating of the
13 front of the business.

14 The Department requested the Appellant provide
15 more register Z-tapes to support a more accurate taxable
16 sales ratio. I mentioned earlier that Appellant created a
17 limited liability corporation in January 1st, 2012. In
18 June 2012, the cash register was reprogrammed to track the
19 for here and to-go sales. So the Appellant should be able
20 to provide us with this information and reported taxable
21 sales if he feels the for-here ratio is too high.

22 We calculated around \$207,000 taxable sales out
23 of \$531,000 total sales in the audit. This is less than
24 39 percent taxable ration compared to the overall average
25 of 48 percent taxable ratio required by other similar

1 cafes in the area. I think even the Appellant, during his
2 opening, he mentioned that his taxable ratio is now 45
3 percent. So we're only assessing 39 percent.

4 So in the spring and summer of 2009, which is
5 second quarter 2009 and third quarter 2009, the Department
6 only applied a 29.35 percent taxable ratio. The Appellant
7 was requested to provide purchase information for paper
8 cups to support the contention of having more to-go sales
9 in the earlier quarters of the audit period. Plus we also
10 asked for copies of purchase invoices to confirm the date
11 of additional seating added during the audit period.
12 Appellant did not provide any additional documentation.

13 Regarding the outdoor seating, the audit
14 calculation presume outside seating was in use for only
15 four quarters. However, it is more than likely customers
16 used the outdoor seating during other periods. The
17 Appellant has not provided any documentation or essential
18 information to support any additional adjustment to the
19 audit findings. The Department audit findings are more
20 than reasonable and fair. Therefore, the Department
21 request the Appellant's appeal be denied.

22 This concludes my presentation. I'm available to
23 answer any question you may have. Thank you.

24 JUDGE BROWN: This is Judge Brown. Thank you,
25 Ms. Jimenez. I do have one or two questions, but first I

1 will give my co-panelists the opportunity to ask
2 questions.

3 Judge Kwee, do you have any questions for CDTFA
4 at this time?

5 JUDGE KWEE: This is Judge Kwee. One
6 clarification. So for the test period, which was I think
7 it was May 15th through -- I'm sorry -- June 26th to
8 July 9th.

9 MS. JIMENEZ: Right.

10 JUDGE KWEE: Was that just an examination of the
11 Z-tapes, or was there an auditor on-site during that time
12 period?

13 MS. JIMENEZ: My understanding is that the
14 auditor was there for a few days, but the Z-tapes came
15 from the taxpayer.

16 JUDGE KWEE: Okay. Yeah. So I basically just
17 want to make sure the Z-tapes were the entire day, not
18 like a portion of the day, like, in the morning -- four
19 hours in the morning and four hours in the afternoon. But
20 it included the -- basically, all sales for the day?

21 MS. JIMENEZ: Judge Kwee, that's correct. It's
22 for the whole day.

23 JUDGE KWEE: Okay. Thank you. This is
24 Judge Kwee. I had one more question. You had mentioned
25 that there was an industry average of 48 percent taxable

1 ratio for similar businesses. Is that specifically in
2 reference to coffee shops in the San Francisco area or is
3 that, like, a state-wide average?

4 MS. JIMENEZ: That would be specifically the San
5 Francisco Mission District area.

6 JUDGE KWEE: Okay. Thank you. Oh, and one
7 further question. So there was some reference to a
8 45 percent taxable ratio. Was that the LLC's experience
9 of year-round average or is that something I have to ask
10 the taxpayer about?

11 MS. JIMENEZ: I think the taxpayer mentioned that
12 earlier that he's reporting around 45 percent taxable
13 ration.

14 JUDGE KWEE: Okay. Thank you. At this time I'll
15 turn it back to Judge Brown.

16 JUDGE BROWN: Thank you. This is Judge Brown.

17 Judge Long, do you have any questions for CDTFA
18 at this time? And I think you are still muted,
19 Judge Long. So you are still muted, if you can unmute?

20 JUDGE LONG: My apologies. This is Judge Long.
21 I have no questions at this time.

22 JUDGE BROWN: Okay. This is Judge Brown. Thank
23 you very much.

24 I do have I think just one question for CDTFA.
25 So Appellant is currently -- Appellant is arguing that for

1 periods after the audit period, the reported taxable sales
2 ratio is 43 percent for the successor LLC, as I think we
3 were discussing earlier. My question is -- first off, I
4 understand that the successor is technically a different
5 entity, but because the successor -- this whole
6 beneficiary is Mr. Mullick, I don't think there's a
7 confidentiality issue with asking about the successor's --
8 comparing a successor's taxable ratio to the taxpayer for
9 this period, but if there is, please, you know, I'll
10 understand if you include that in your response.

11 I wanted to ask that Appellant was arguing that
12 the successor -- or at least I saw it in a brief -- that
13 the successor's lower-reported taxable percentage is
14 evidence that the audited taxable percentage for this
15 audit period is too high. And I wanted to ask if CDTFA
16 can address that argument?

17 MS. JIMENEZ: Judge Brown, this is Mariflor
18 Jimenez. My understanding is that the information for the
19 LLC is confidential because it is a different entity. But
20 the Appellant did mention that his reported taxable sales
21 on his current LLC is 45 percent.

22 JUDGE BROWN: 45. Sorry. This is Judge Brown.
23 I guess I just mean to say I'm not asking you to reveal
24 any confidential information about the successor. I'm
25 just asking if you can address the argument that

1 Mr. Mullick is making about that taxable percentage.

2 MS. JIMENEZ: Okay.

3 JUDGE BROWN: Considering that argument, does
4 that -- how should we -- what does that mean in terms of
5 comparing that reported taxable percentage to the audited
6 taxable percentage at issue here?

7 MS. JIMENEZ: Right. So when we computed -- oh,
8 sorry. This is Mariflor Jimenez. The average taxable
9 ratio that we applied for this audit because considering
10 we applied 29.35 percent on some periods and also 51.71
11 percent on other periods, our total average is about
12 39 percent. So it's a -- 39 percent is lower than the
13 45 percent that he is currently saying that he's reporting
14 for the same cafe, same location.

15 JUDGE BROWN: Okay. This Judge Brown. Thank
16 you.

17 Then if my co-panelists do not have any further
18 questions, then we will go back to the Appellant,
19 Mr. Mullick, for a rebuttal.

20 Mr. Mullick, you have 10 minutes to make any
21 further arguments you wish to make in response to CDTFA's
22 presentation.

23 Oh, and Mr. Mullick you are on mute. So please
24 unmute before you begin.

25 MR. MULLICK: Okay I'm unmuted right now. Thank

1 you very much.

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CLOSING STATEMENT

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MR. MULLICK: So I wanted to address this 45 and 39 percent. Of course we are a different entity, and we are very different. But I use that 45 percent number just as a -- for comparison. So if we are doing 45 percent now with about three times as much seating, is it reasonable to charge us 39 percent with one-third the seating?

So I mean, this is blatantly absurd to make that contention. So the other thing about outside seating is, like, well, there are several days out when people can sit outside in those quarters that we did not count them as seating. Yes, but the week -- the days when you counted the seating in the back, there are several days in San Francisco when people can't sit outside like today. It's all fogged in. It's cold outside. Nobody would want to sit outside. So it really is a wash.

You're going to be sloppy and just say okay, well, we will charge you more at this particular quarter, but in this quarter we'll only charge -- it's just -- I mean, you can call it a wash, but really it shouldn't even be brought up. Okay.

Then in the review section when people are saying there is seating in back, you know, there is no seating in

1 the back. People will sometimes drag a chair out there or
2 something. And sometimes people want to give you a good
3 review, and they exaggerate and say oh, there's loads of
4 sitting in there or things like that, you know.

5 But the fact is that, you know, are we showing
6 you evidence in the form of pictures here, and the
7 pictures are saying we don't have 42 chairs inside. We
8 have zero for the first year outside. There should be
9 less than half. We have maybe 20 seats inside. We -- how
10 can you -- I mean, if you're basic contention is that the
11 percentages count, then the percentages of the seats
12 should count.

13 And, you know, you can see in the pictures that
14 nobody is, like, the place is not packed, right. In the
15 first few -- it's not a busy place. And the fact that it
16 is kind of -- now it's kind of a sit-down place where
17 people like to hang out, it is because we moved in that
18 direction in the first few years. You can see it in the
19 picture.

20 In the absence of evidence, we don't -- the other
21 evidence we are giving you this particular evidence, which
22 is actually visually more compelling, I think. And the
23 bench seating, yeah, on one side the bench seating was
24 added fairly quickly. But the rest of the bench seating,
25 which is what we have today, was added one year later.

1 And then there was some added just recently, like a couple
2 of years ago.

3 So the point is simple. Let me go back to the
4 45 percent versus 39 percent that the overall percentage
5 that is being charged. 39 percent when our total seating
6 is 30 percent of what we have today, you know, these
7 numbers should not be 39 percent. It should be one-third
8 of 39 percent. It should be 39 percent is what we're
9 saying because that is the basic premise of the whole
10 calculation.

11 And so it's 45 based on the total number of seats
12 that are available today. And 39 percent based on
13 one-third of the seats just doesn't make any sense at all.
14 And I'm not even talking about all the other things that
15 we did to make it a sit-down place; like the tea, like,
16 you know, making more things on the menu, adding better
17 cups, and you know. I mean, like today we're serving a
18 little bit of food like toast and things like that. We
19 didn't have anything like that. We didn't have any food.
20 We didn't have -- we barely had pastries.

21 So it was our whole vision for the place evolved,
22 and it evolved slowly. And for some businesses, some
23 coffee shops in the Mission it's exactly the opposite.
24 They don't want people hanging out. They want their --
25 there are shops that are taking out the computer sockets

1 and extension cords and things like that because they want
2 people to buy coffee and leave. So there are all kind of
3 business models within the coffee industry. I mean,
4 across the street from us is filled.

5 I don't know if it actually pays for their tax.
6 He's -- he serves everybody in a to-go cup. He's got
7 seating, but they don't make a distinction. I don't even
8 know if the Department has a flat rate arrangement with
9 those coffee people or not. There are a lot of people
10 that hang out there. And it's somehow in our case we are
11 being charged this huge percentage.

12 By the way also on the issue of the auditor, yes,
13 the auditor was there every day for the duration of the
14 period of the audit. He was there from the opening to the
15 close, and he took notes of everything. And we had
16 conversations, and he was not aware of -- but he
17 understood and agreed, but he was -- but the way he was
18 looking at it was, like, okay. Well, you know, the
19 outside seating is not available. So we will not charge
20 you for that.

21 That's why, but it does even out because
22 39 percent ratio of sit-down people is -- when there is
23 just not enough seats to sit down is ridiculous. It
24 should be one-third of that 39 percent. And, essentially,
25 if you're going to read the comments and you can read all

1 the comments in the Yelp section, and you'll see all kinds
2 of, you know, the contradictory comments and people will
3 say there are a lot of seats or not a lot of seats.

4 But, again, photographic evidence is probably the
5 best evidence here. And, again, the pictures that I
6 posted today are different -- I don't know a different
7 picture. And that's all I have to say, Judge Brown.

8 JUDGE BROWN: This Judge Brown. Thank you very
9 much, Mr. Mullick.

10 And now I will give my co-panelists an
11 opportunity if they have any final questions. Hold on a
12 second.

13 Okay. Judge Long, do you have any final
14 questions of the witness? If you can unmute your mic
15 first.

16 JUDGE LONG: This is Judge Long. I don't have
17 any questions. Thank you.

18 JUDGE BROWN: And I understand, Judge Kwee, you
19 don't have any final questions either?

20 JUDGE KWEE: That's correct. This is Judge Kwee.
21 I have no further questions.

22 JUDGE BROWN: Okay. And I have asked all of my
23 questions.

24 CDTFA, do you have any final questions of the
25 witness?

1 MS. JIMENEZ: Judge Brown, this is Mariflor
2 Jimenez. No questions for the witness.

3 JUDGE BROWN: Okay. Then we have asked all the
4 questions and taken all the evidence. I have admitted the
5 parties' exhibits, and I believe that I can wrap up the
6 hearing. We have heard the arguments, and the record is
7 closed, and the case is submitted today.

8 The judges will meet and decide the case based on
9 the evidence, the arguments, and applicable law. We will
10 mail both parties our written decision no later than
11 100 days from today.

12 This hearing is concluded and is now adjourned.

13 (Proceedings adjourned at 11:44 a.m.)

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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 24th day of August, 2020.

ERNALYN M. ALONZO
HEARING REPORTER