

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
W. DISTIN,) OTA NO. 19044591
)
)
) APPELLANT.
)
)
)
_____)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, September 29, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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APPEARANCES:

Panel Lead: ALJ ALBERTO ROSAS

Panel Members: ALJ DANIEL CHO
ALJ RICHARD TAY

For the Appellant: W. DISTIN
PAMELA LINDO

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION

MARIFLOR JIMENEZ
JASON PARKER
CHAD BACCHUS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-46 were received at page 6.)
(Appellant's Exhibit 47 was received at page 88.)
(Department's Exhibits A-E were received at page 6.)
(Department's Exhibit G was received at page 8.)
(Department's Exhibit J was received at page 51.)

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1 Cerritos, California; Tuesday, September 29, 2020

2 2:19 p.m.

3

4 JUDGE ROSAS: Good afternoon. We're on the
5 record in the matter of the Appeal of W. Distin, OTA Case
6 Number 19044591. This matter was originally scheduled to
7 take place in Cerritos, California. But because of the
8 ongoing concerns with Covid-19, this matter is being held
9 virtually. The time is approximately 2:19 p.m.

10 The panel of Administrative Law Judges include
11 Daniel Cho, Richard Tay, and me, Alberto Rosas. And
12 although I may be the lead administrative law judge for
13 purposes of conducting this hearing, please know that this
14 panel, the three of us, we are all equal participants and
15 equal decision makers.

16 We held two prehearing conferences in this
17 matter. I'm going over the key and relative orders from
18 those conferences. The first prehearing conference was
19 held on September 8th, which resulted in six orders. I'm
20 going to list the top four, the four most relevant to
21 today's hearing.

22 Number One, Appellant's Exhibits 1 through 46
23 were admitted into evidence without objection. Two,
24 respondent's Exhibits A through E, alpha through echo,
25 were admitted into evidence without objections.

1 (Appellant's Exhibits 1-46 were received
2 in evidence by the Administrative Law Judge.)

3 (Department's Exhibits A-E were received in
4 evidence by the Administrative Law Judge.)

5 Three, only one witness shall testify in today's
6 oral hearing, and that's the Appellant, Wilton Distin.
7 And Four, the parties shall comply with the hearing time
8 limits that we discussed during the prehearing conference.

9 We held a second prehearing conference on
10 September 24, 2020, which resulted in four orders. Number
11 One, Exhibit F, foxtrot, was not admitted into evidence,
12 but that is subject to reconsideration. Number Two,
13 Exhibit H, hotel, was not admitted into evidence. Three,
14 Exhibit I, India, consist of a four-page response to
15 Appellant's opening brief. This was not admitted into
16 evidence. However, the three exhibits attached to the
17 four-page response were admitted into evidence. And Four,
18 Exhibit J, Juliet, was not admitted into evidence, but
19 this is subject to reconsideration.

20 I do want to discuss two additional exhibits.
21 Respondent's Exhibit G, Goth, which is correspondence with
22 prior representative, six pages, and Appellant's latest
23 exhibit, Exhibit 47, which is the administrative protest
24 e-mails and consist of three pages.

25 To summarize, it is my understanding that

1 Ms. Lindo, you have no objections to Respondent's
2 Exhibit G, Goth, so long as your Exhibit 47 is also
3 allowed into evidence. Is that correct. Ms. Lindo?

4 MS. LINDO: Judge Rosas, the connection -- Judge
5 Rosas, yes. The connection is going in and out. I don't
6 know if anyone else is experiencing that, but that's what
7 we're experiencing on this end. So we're not hearing
8 every single word you're saying.

9 JUDGE ROSAS: Thank you, Ms. Lindo, for bringing
10 that to my attention. By the waving of the hands, is
11 anyone else experiencing sound issues regarding the
12 inability to hear me? I'm not seeing any hand.

13 Ms. Lindo, there might be some issues on your
14 end. But just to summarize, Ms. Lindo, because I don't
15 want you to have missed anything. Ms. Lindo, I recapped
16 the orders from the two prehearing conferences. I just
17 recapped those orders, and then I was discussing the two
18 additional exhibits. Exhibit G, Goth, and Exhibit 47.
19 Ms. Lindo, regarding those two exhibits, in summary, it's
20 my understanding that you would wave your objection to
21 Exhibit G so as long as your Exhibit 47 will come into
22 evidence; is that correct?

23 MS. LINDO: Judge Rosas, I'm still having -- it's
24 not that I'm not hearing you, you're -- so I'm hearing,
25 like, every other word. I understand the gist of what

1 you're saying. So hopefully that will work as -- I would
2 like to submit my exhibit, I will -- I no longer object to
3 the exhibit.

4 JUDGE ROSAS: This is Judge Rosas. Thank you,
5 Ms. Lindo.

6 Ms. Jimenez, any objections to Appellant's
7 Exhibit 47?

8 MS. JIMENEZ: Judge Rosas, this is Mariflor
9 Jimenez. I have no objection to Appellant's exhibit.

10 JUDGE ROSAS: This is Judge Rosas. Very well.
11 In that case, OTA will go ahead and admit Respondent's
12 Exhibit G, golf, and Appellant's Exhibit 47 into evidence.

13 (Department's Exhibit G was received in evidence
14 by the Administrative Law Judge.)

15 (Appellant's Exhibit 47 was received
16 in evidence by the administrative Law Judge.)

17 As we discussed at the first prehearing
18 conference there are two issues for OTA to decide.
19 Issue 1 is whether any additional reduction to amount of
20 unreported taxable sales is warranted. Issue 2, whether
21 Appellant has established reasonable cause for relief of
22 the finality penalty. As we discussed both sides will
23 have an opportunity to provide a brief opening statement,
24 two to three minutes at the most.

25 Ms. Lindo, whenever you're ready you may proceed

1 with your opening statement for the Appellant.

2 MS. LINDO: We have the issue the taxpayer
3 Wilton -- and Jamaican restaurant, a tiny take-out
4 restaurant located at -- Inglewood, California, operating
5 as a schedule C sole proprietorship. Hungry Joe's
6 reported taxable sales -- excluding tax of \$324,393 in
7 2009, \$225,809 in 2010, and \$204,613 --

8 JUDGE ROSAS: Ms. Lindo.

9 MS. LINDO: Yes.

10 JUDGE ROSAS: My apologies. This is Judge Rosas.
11 My apologies for the interruption. Our stenographer,
12 Ms. Alonzo, is indicating that she's unable to understand
13 you. The connection is really bad. Give me one second.
14 We're going to -- please bear with us. We're going to try
15 to see if there's an alternative option, perhaps asking
16 you to call in. Give me one second as we try to ascertain
17 what the issue is.

18 I ask everyone for their patience.

19 (There was a pause in the proceedings.)

20 JUDGE ROSAS: Let's go back on the record, and
21 let's continue.

22 Ms. Alonzo, whenever you're ready, but please,
23 Ms. Alonzo, let me know if you're having issues and
24 difficulties in hearing Ms. Lindo.

25 But at this point, Ms. Lindo, please proceed

1 whenever you're ready with your opening statement.

2 MS. LINDO: Can you hear me?

3 JUDGE ROSAS: Yes, we can hear you.

4 MS. LINDO: Okay. They can hear me.

5 In January 2012 the CDTFA, which I'll refer to as
6 the Department, contacted the taxpayer for audit for the
7 time period 2009 through 2011, and this was the taxpayer's
8 first audit. Determined that the taxpayer has unreported
9 sales of \$728 --

10 JUDGE ROSAS: Ms. Lindo, my apologies for the
11 interruption.

12 MS. LINDO: -- totaling 1 million --

13 JUDGE ROSAS: Ms. Lindo. My apologies for the
14 interruption.

15 MS. LINDO: Yes.

16 JUDGE ROSAS: It seems we're having a very
17 difficult time hearing you. It's not just me. Our
18 stenographer and some of my co-panelists are indicating
19 the same issue. Can you try calling in telephonically?
20 Ms. Lindo, I wasn't sure if you were able to hear that. I
21 was inquiring and asking about whether you are able to log
22 off from the video conferencing and try to call in
23 telephonically using the phone number that was provided in
24 the oral hearing packet?

25 (There is a pause in the proceedings.)

1 JUDGE ROSAS: Ms. Lindo, if you could just begin
2 from the top of your opening statement. Thank you.

3

4 OPENING STATEMENT

5 MS. LINDO: This is Pamela Lindo speaking, Judge
6 Rosas, to give you quick summary of the issue. The
7 taxpayer is Wilton Distin doing business as Hungry Joe's
8 Burgers and Jamaican Restaurant, a tiny take-out
9 restaurant located in a low-income crime-ridden
10 neighborhood of Inglewood, California, and is operating as
11 a schedule C sole proprietorship.

12 Hungry Joe's reported taxable sales, excluding
13 taxes of \$324,393 in 2009, a \$125,809 in 2010, and
14 \$204,613 in 2011, a total of \$754,815. In January of
15 2012, the CDTFA, which I'll refer to from this point as
16 the Department, contacted the taxpayer to audit these time
17 periods. And it was the taxpayer's first audit. It is
18 the taxpayer's first audit. Now over nine years later
19 after several revisions, the Department has determined
20 that the taxpayer has -- had unreported sales of
21 \$1,728,525.

22 They are claiming, therefore, that the taxpayer
23 made taxable sales of totaling \$1,483,340 for the audit
24 period, which is an average of \$495,000 per year.
25 Historically since inception in 2000, the taxpayer has had

1 a steady increase in sales each year. The only exception
2 to that historical pattern was his other audit, 2009
3 through 2011.

4 The overwhelming evidence today will show that
5 the sole reason for the decrease in sales during the audit
6 period was the well-known Great Recession. And the
7 evidence will show that the Department has completely
8 ignored the sole factor that led to decrease in sales.
9 Now, personally I've been an auditor for the Franchise Tax
10 Board for 28 years.

11 And the first thing we do as auditors when
12 screening or scoping a potential unreported income issue
13 is to look at the economic reality, the issue, the time
14 period, and the taxpayer's overall situation at the time.
15 And if the taxpayer -- if that tax return does not pass
16 the economic reality test, we do not waste the State's
17 resources and to elect the return for further examination.

18 This clearly has not been done here, and the
19 Department has failed to consider the economic reality of
20 the audit time period and the result and effect on not
21 only the taxpayer -- not only on the taxpayer's sales from
22 his business, but also on his personal life. Now almost
23 nine years and hundreds of hours later we find ourselves
24 here.

25 JUDGE ROSAS: Ms. Lindo.

1 MS. LINDO: Yes.

2 JUDGE ROSAS: This is Judge Rosas. My apologies
3 for the interruption. You passed the three-minute mark.
4 If you want, we can just reserve the rest of your
5 statement and argument for when we allow you time for
6 argument after your witness' testimony?

7 MS. LINDO: Judge Rosas, that will be fine.
8 Thank you.

9 JUDGE ROSAS: This is Judge Rosas. Thank you,
10 Ms. Lindo.

11 Let me turn it over to Ms. Jimenez for CDTFA's
12 opening statement.

13 MS. JIMENEZ: Judge Rosas, this is Mariflor
14 Jimenez. Thank you for the opportunity, but the
15 Department is waving our opening statement.

16 JUDGE ROSAS: This is Judge Rosas. Thank you,
17 Ms. Jimenez.

18 In that case, at this moment, we're going to call
19 Mr. Wilton Everton Distin as a witness.

20 Mr. Distin, if you would please raise your right
21 hand.

22

23 WILTON EVERTON DISTIN,

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

1 as follows:

2 JUDGE ROSAS: Thank you, Mr. Distin.

3 Ms. Lindo, as you're witness, we discussed three
4 options for Mr. Distin is to testify as your witness. So
5 I'll allow you to discuss with him how you should proceed
6 with his testimony.

7 MS. LINDO: This is Pamela Lindo. Judge Rosas,
8 the taxpayer will just read a narrative for his testimony.

9 JUDGE ROSAS: This is Judge Rosas. Thank you,
10 Ms. Lindo.

11 Mr. Distin, you may begin whenever you're ready,
12 sir. Thank you.

13

14 WITNESS TESTIMONY

15 MR. DISTIN: Well, hello. Good afternoon
16 everyone. My name is Wilton Distin the owner of Hungry
17 Joe's Burger. I'm just here to tell the truth of what
18 happened during those three years. Bear with me the
19 accent and all of that. Considering fact that I'm not a
20 lawyer and an accountant, no experience in these fields,
21 it takes a lot of courage to be here today. But I'm here
22 to lay the truth and nothing but the truth.

23 I operated a restaurant in Jamaica for a few
24 years before moving to the U.S. With little or no
25 knowledge, I decided to conduct business here. I decided

1 to get back in the restaurant business. Hungry Joe's
2 burger was established in June of 2000. It started out as
3 a burger joint. First day of sale was \$50 and change.
4 From there it grew steadily to an average of \$5,000 plus
5 to date currently.

6 From the point of inception, I have been working
7 14 hours per day, 6 days per week. I'm the cook, the
8 bookkeeper, and the manager. A few years in I introduced
9 Jamaican food, for example, oxtail, curry goat, jerk
10 chicken, fish. Costly items which will no doubt boost the
11 sale with little profit. Reason for that, it's a poor
12 neighborhood and the competition are so -- impact the
13 business.

14 Later through 2008 I noticed sales were declining
15 and got worse into 2011. Many businesses all over the
16 country start feeling the impact of the recession and was
17 forced to close. The strip mall that I occupied housed
18 five tenants. And I was the only tenant -- I was the only
19 tenant that was left on the property who was not closed at
20 that point. There are some of the restaurants that went
21 on that I could name, including quarters Jamaican, Larry's
22 Jamaican, King Fish, Pico Fish No. 2, Crab Pit, Golden
23 Bird. These are just in my area.

24 However, I got to the point where my electricity
25 was turned off twice, my gas once or maybe twice.

1 Becoming too much to bear, mid-July of 2011 I made a call
2 to my landlord telling him I will have to close.
3 Surprisingly, he actually begged me to stay. The reason
4 for that, I was the only tenant there, and he didn't want
5 the place to be empty. Stating that I -- okay. He was
6 stating that I'll have to -- I'll not have to pay rent
7 unless I'm able to. Also, I can make partial payments.
8 That was huge to me.

9 I also met with two vendors who have been doing
10 business over the years, namely, Sinclair's Trade-In,
11 Island Boy Production -- Products. I'm sorry. And they
12 themselves needed to stay in business so they offered
13 goods on consignment. That's how I was able to keep the
14 door open throughout 2011. Where gas and electricity is
15 concerned, I have to make a deposit of \$600 to electric
16 and \$1,300 to the gas company in order to keep service on
17 because of so many late payments of -- of this all.

18 Late January, early February, I received a letter
19 from the State Board at the time, now CDTFA, stating I'm
20 being audited. I was told to provide Z-tape, purchase
21 receipts, and I did. Audit period was from 2009, 2010,
22 2011. After the audit came back, the auditor came back
23 with her findings. She determined that I was -- I owed
24 \$45,000, of which I will only have to pay 30. She went on
25 to explain that after conducting the audit, she determined

1 that 2009 was good. That brought the amount down to
2 \$32,000. So apparently that would be for 2010 and 2011.

3 She said if I agree, I should sign. If not, then
4 I don't have to sign, which I didn't. I was in shock. I
5 know that finding was impossible, after, which things even
6 got worse. I'm sure Pamela will get into more detail as
7 to their findings and her findings. The recession had --
8 has brought horror to me in many ways. I lost my home, my
9 rental properties. The only thing I have left was a small
10 take-out restaurant, which was saved by the landlord and
11 the two vendors.

12 To get rid of debt and obtain a fresh start, I
13 had to file bankruptcy in 2011. With all this happening
14 throughout the period, CDTFA claimed I underreport
15 \$1.7 million in sales. With all due respect, these were
16 just hypothetical numbers that were generated and used in
17 their findings. In some cases it may come close to the
18 truth, but in this case they are wrong.

19 All of this info I provided is the truth, which
20 give me the strength to fight to the end hoping that
21 someone with no bias will look at the evidence, hear the
22 argument, and mistake a decision. In this case. It's
23 three judges.

24 I want to thank you.

25 JUDGE ROSAS: Thank you, Mr. Distin.

1 At this point, I'm going to turn it over to
2 Ms. Jimenez or anyone else from CDTFA. Do you have any
3 questions for Mr. Distin?

4 MS. JIMENEZ: Judge Rosas, this Mariflor Jimenez.
5 The Department has no questions for the witness.

6 JUDGE ROSAS: This is Judge Rosas. Thank you,
7 Ms. Jimenez.

8 At this point I'm going to ask my co-panelist
9 whether any of them have any clarifying questions for the
10 witness. Judge Cho, do you have any questions for the
11 witness?

12 JUDGE CHO: This is Judge Cho. I have no
13 question. Thank you.

14 JUDGE ROSAS: This is the Judge Rosas.
15 Judge Tay, do you have any questions for the witness?

16 Judge Tay, I was not able to hear anything that
17 you just said. If you can please repeat that, thank you.

18 Judge Tay, this is Judge Rosas. We're not able
19 to hear you, and I see Ms. Alonzo shaking her head.

20 JUDGE ROSAS: I tell you what, Judge Tay. If you
21 have any questions, can you give me the thumbs up, and if
22 you have no questions, a thumbs down? I see a thumbs
23 down. In that case we will move forward.

24 Mr. Distin, I just wanted to say I have no
25 questions, but you did make a statement about how

1 difficult this is for you. I realize this is difficult.
2 I just want to thank you for taking the time to express
3 yourself and to provide your testimony. We really
4 appreciate it. Thank you, sir.

5 At this point, we have no questions for this
6 witness. Thank you, Mr. Distin.

7 We're going to turn it over to Ms. Lindo.
8 Ms. Lindo, whenever you're ready. As Mr. Distin's
9 representative, you can present your presentation whenever
10 you're ready.

11

12 PRESENTATION

13 MS. LINDO: Okay. This is Ms. Lindo. Thank you,
14 Judge Rosas. I'll continue.

15 I'd like to start off by giving the court the big
16 picture of the issue at hand. Since inception, the
17 taxpayer's sales have been growing steadily. Then the
18 Great Recession and the slow recovery period right after
19 the Great Recession hit, and the taxpayer's growth in
20 sales decreased. Then when the recession ended, the
21 taxpayer's sales resumed its steady growth.

22 My supplemental opening brief, my Exhibit 42 at
23 the bottom of 150, top of page 151, shows the history of
24 taxpayer's sales from 2007 to 2018 and the reason for the
25 increases and decreases. And if you'll take a look,

1 you'll see that the only time that the taxpayer sales
2 decreased was during the recessionary periods of 2009 to
3 2011, the years under audit. This, therefore, should be
4 no reason for an audit, and it should be no big mystery
5 here.

6 However, after all the supported documents
7 provided to the Department, not once, either through work
8 papers, correspondence, meetings, or conferences have they
9 acknowledged the possibility that the decrease in sales
10 could have been caused by the recession. Instead, the
11 evidence shows that the Department made several statements
12 saying or insinuating that the economy was good during
13 this period.

14 To give you a time -- the time period of the
15 recession, if you look at Exhibit 13, page 64, the article
16 the Great Recession and Its Aftermath by John Weinberg of
17 the Federal Reserve Bank of Richmond written in November
18 2013, in the middle of the page 64 says, "In December 2009
19 the US economy entered a recession." Further down it
20 says, "In the fall of 2008, it was large enough to be
21 labeled the Great Recession. The U.S. economy bottomed
22 out in the middle of 2009. However, the recovery in the
23 years immediately following was unusually slow."

24 And if you turn to page 66 of that same article
25 under the effects of the broader economy it says,

1 "December 2007 is when the month -- is the month the
2 National Bureau of Economic Research, the NBER, who are
3 the official authorities of the U.S. recession, recognize
4 as the beginning of the recession. The decline and
5 overall economic activity was modest at first, but it
6 steepened sharply in the fall of 2008.

7 The next page, 67, reads, "The recession ended in
8 June 2009, but economic weakness persisted. Economic
9 growth was only modest averaging about two percent in the
10 first four years of recovery." So that would be from
11 June 2009 through June 2013. "And the unemployed rate
12 remained at historically elevated levels."

13 In another article, my exhibit page 70, the
14 Recession of 2007 Through 2009 written by the U.S. Bureau
15 of Labor Statistics. The article written in February 2012
16 discusses unemployment. It states, "Many of the
17 statistics that describe the U.S. economy have yet to
18 return to pre-recession values."

19 In the middle of the page under employment it
20 reads, "One of the widely recognized indicators of a
21 recession is higher unemployment rates. In December 2007
22 the national unemployment rate -- the national
23 unemployment rate was 5 percent, and it had been at or
24 below that rate for the previous 30 months. At the end of
25 the recession in June 2009, it was 9.5 percent. In the

1 month after the recession the unemployment rate peaked at
2 10 percent.

3 So both articles referred to the recession and
4 resulting financial crisis immediately following the
5 recession as two separate events. So based on these
6 articles, when we are talking about the time period of the
7 recession, we have to keep this in mind that the official
8 time period determined by the NBER was from December 2007
9 through June 2009. However, the recovery period lasted
10 beyond that period.

11 Now, that is important to keep in mind because as
12 you will see, the Department is saying that the recession
13 was over after 2009. The Department was saying that the
14 recession was over after 2009. So there was no reason for
15 sales to decrease so drastically in 2010 and 2011. When
16 you go back to the taxpayer sales, Exhibit 42, page 150,
17 gosh -- sorry -- Exhibit 42, page 150, you will see that
18 in 2008 the recession started taking affect and the
19 taxpayer's growth in sale compared to 2007 was small.

20 However, between 2008 and 2009, sales declined.
21 Now, as the article reads, "Although the NBER considered
22 the recession ended in June 2009, the recovery in the
23 years immediately following was unusually slow." This is
24 reflected in the taxpayer's sales in 2010 and 2011 with
25 the sharp declines. The evidence shows that the

1 Department apparently had no knowledge of the effects the
2 recession had on a small take-out restaurant, such as
3 Hungry Joe's, which was located in a small low-income
4 area.

5 Did he disappear?

6 And which because of higher unemployment rates
7 and the housing crisis are typically hit harder than other
8 neighborhoods during a recession. During the appeals
9 conference that was held in September 25, 2018, the audit
10 principal, Albert Lai was the acting supervisor at the
11 time actually stated that the economy has nothing to do
12 with the taxpayer's sales.

13 In the Department's Exhibit A -- the Department's
14 Exhibit A, 156 -- page 156, Mr. Lai's post-conference
15 submission in discussing the reason for the increase in
16 sales from 2011 to 2012, in the last paragraph, six lines
17 down, Mr. Lai alleges that, "This sudden and large
18 increase in reported total sales is not a coincidence or
19 due to the economy recovery, but was triggered by the
20 knowledge of being audited."

21 He goes onto state at the very bottom of the page
22 that, "The reverse trend in the petitioner's recorded data
23 is unreasonable and can only be explained by the reason
24 the petitioner recorded and reported more cash after they
25 knew they were being audited." So this speaks to the

1 mindset of the Department and why none of the supporting
2 documents that we presented was given any credibility.

3 They are basically accusing the taxpayer of not
4 reporting all of his cash sales during 2009 and 2011. And
5 the only reason he began reporting it in 2012 is because
6 he was contacted for audit. So his sales didn't increase
7 in 2012 because the economy had entered into that
8 post-recession period. The sales increased only because
9 he was contacted for audit. The taxpayer not only finds
10 that offensive, but it is absolutely untrue. The
11 taxpayer's history of sales refutes Mr. Lai's claim.

12 Going back to my Exhibit, 42 page 150, in my
13 supplemental opening brief, the data show that the
14 taxpayer's sales in 2012 was \$335,426 compared to \$209,000
15 in 2011. The taxpayer's average sales between 2007 and
16 2009 before any audit notification was \$350,270. The
17 sales reported in 2012 and 2013 which are, again,
18 post-recession periods, \$335,426 and \$384,654,
19 respectively, are right in line with the average sales
20 before the recession.

21 So following Mr. Lai's logic, if the only reason
22 that the taxpayer was -- if the only reason for their
23 increase in sales in 2012 was because of the taxpayer's
24 knowledge of the audit, what was the reason for the almost
25 identical sales reported in 2007 through 2009, keeping in

1 mind that this was his very first audit. If he was hiding
2 cash sales in 2009 through 2011, why wouldn't he be hiding
3 these sales in 2007 and 2008 also?

4 Analyzing Mr. Lai's claim even further, if you
5 look at my Exhibit 19, starting on page 78, which is the
6 historical data of the taxpayer's quarterly sales, you'll
7 see on page 80 that in the fourth quarter of 2011 the
8 taxpayer reported total sales. It's the last column to
9 the right, \$13,458 and \$15,573, and \$15,050 for October,
10 November, and December, respectively. For the following
11 month, January, the first month of the first quarter of
12 2012 and page 81, it shows that he reported \$16,213, which
13 is just a slight increase from the previous month,
14 \$15,050.

15 Now sales tax payments for each month are due on
16 the 24th of the following month. So the taxpayer's
17 January 12th -- January 2012 payment would have been due
18 on February 24th, 2012, which was after he knew about the
19 audit. So following Mr. Lai's logic, if the only reason
20 the taxpayer -- taxpayer's increase in sale between 2011
21 and 2012 was the fact that he was contacted for audit, the
22 taxpayer's increase between December 2011 and January 2012
23 would have been significantly higher. Instead, between
24 December 2011 and January 2012 the increase was only
25 \$1,163.

1 You see that for 2012 sales each month continued
2 to increase as the recovery continued to pick up. For the
3 first quarter of 2012 you see sales was \$76,710. Now, if
4 you turn to page 78, you'll see -- keeping the \$76,000
5 amount in mind -- you'll see that this amount matches
6 almost exactly to the quarterly amounts reported in the
7 last two quarters of 2008, which was \$76,311 in the third,
8 and \$75,398 in the fourth.

9 Now staying on this page, if you remember in the
10 article the Great Recession and Its Aftermath, the NBER
11 stated that, "Although the U.S. economy entered into a
12 recession in December 2009, it was not until the fall of
13 2008, which is made up of months in the third and the
14 fourth quarters, that it was large enough to be labeled
15 the Great Recession."

16 The article says, "The decline in overall
17 economic activity was modest at first but it steepened
18 sharply in the fall of 2008." This exact point is
19 reflected here in the taxpayer's sales records. In the
20 first two quarters of 2008, sales were \$105,627 as you can
21 see on the same page 78, and \$107,049. Although the
22 recession had officially begun, it did not begin to take
23 effect until the third quarter.

24 Also, going back to Mr. Lai's claim, if the
25 taxpayer was hiding sales up until the point that he was

1 contacted for audit in 2012, why did he report such large
2 sales in -- in the beginning of 2008? Page 81 shows that
3 he didn't make close to this amount again until the third
4 quarter of 2013 when he made \$103,287. Mr. Lai's
5 post-conference letter is addressed to Cindy Feng, the
6 appeals conference auditor.

7 And even though during the conference I presented
8 all the supporting documents showing how the recession
9 effected the taxpayer's business following Mr. Lai's
10 reasoning and statements made during the conference, in
11 her appeals decision, which is my Exhibit 21, page 94, the
12 beginning of the third paragraph, Mrs. Feng reiterates
13 Mr. Lai's comments during the conference that, quote,
14 "Although the economy in 2010 and 2011 was slow, it was
15 good in 2009."

16 Again, what is this based on? What research was
17 done? Not only does the research show we were still in
18 the middle of recession in 2009, but it is common
19 knowledge that the economy was bad in 2009. Mrs. Feng
20 disregarded all of the supporting documents that I
21 presented and relied on this inaccurate finding to
22 conclude that no further adjustments are warranted. The
23 auditors and the reviewers handling this case also did not
24 acknowledge the effect of the recession on the taxpayer's
25 business.

1 In my Exhibit 36, page 139, the auditor's work
2 papers, after calculating gross sales markup in the
3 mid-40 percent range in 2009 through 2011, she stated the
4 markup is unrealistically low for this type of business
5 and that further investigation was warranted. She then
6 recalculated the markup and got a much higher percentage
7 in order to determine unreported sales. What type of
8 business is she referring to when she says unrealistically
9 low -- the markup is unrealistically low? What types of
10 restaurants were she comparing the taxpayer's restaurant
11 to?

12 It would be reasonable to assume that before
13 making such an assumption and making a determination
14 based on that assumption, that specific research and
15 analogy should have been conducted. The data used in that
16 analysis should be as specific as possible and as
17 comparative as possible to the taxpayer's business.

18 In order to make an accurate determination, a
19 comparison of the markups of similar restaurants in the
20 vicinity of Hungry Joe's, preferably Jamaican restaurants
21 since they are so unique, should have been conducted. The
22 vicinity of the restaurant used in the comparison should
23 be Inglewood or a similar low-income neighborhood with the
24 majority of the customers being black or Hispanic, as is
25 the case at Hungry Joe's, and also during the same

1 recessionary period.

2 When alleging unreported income, the burden of
3 proof is on the Department. Therefore, when they ignore
4 the taxpayer's actual books and records and determine
5 income based on other accounting methods and hypothetical
6 data, the data should be as sound as possible. The record
7 show that no such comparison was made by the Department,
8 and that the methods used to determine unreported income
9 were flawed. A broad statement like, the markup is
10 unrealistically low for this type of business, without
11 specific data to support it, should be given no
12 credibility.

13 Now, the only clue that I was able to use to
14 figure out what research the Department is using to
15 determine an inappropriate markup was from the auditor's
16 work papers, my Exhibit 35, page 138. In her comments,
17 she said she recalculated the markup with the audited
18 taxable sales for 2010 and 2011. They were 108.90 percent
19 and 126.37 percent, respectively. Audited taxable sales
20 were calculated based on a three-day observation test.

21 Then she said the markup was within the industry
22 average. Again, what's the industry average? There's no
23 cite as to what information she's relying on. Going back
24 to the article, my Exhibit 14, page 70, the article -- and
25 I want to also stop here, and say they obviously had no

1 idea of a markup -- a markup in this type of restaurant.
2 You'll see on exhibit -- the markup is low based on the
3 customers, based on the neighborhood, based on the
4 demographics.

5 I mean, he's not in business to make millions.
6 He was just, you know, coming from Jamaica. All he knew
7 how to do was to cook. So this is what he knew how to do.
8 He just wanted to survive. So his markup can't be sky
9 high because he would -- he wouldn't have any customers in
10 that neighborhood. So that should really be taken into
11 consideration. Exhibit 38, my Exhibit 38 -- I'll have to
12 go back to that.

13 I was just giving you an example of them not
14 really knowing the price of items. Oh, actually
15 exhibit -- it's actually page 144. At the bottom it shows
16 that the price of fish was \$6.99 per pound. And the fish
17 that they use at Hungry Joe's is the best fish. Jamaicans
18 pride themselves on the best. So it has to be red
19 snapper. So the reviewer had mentioned the cost of the
20 fish that was used in the shelf test was too high, \$6.99
21 per pound. The auditor called the business that morning,
22 the market, and verified that yes, it was actually \$6.99
23 per pound.

24 And then when you look at the menu on page 140,
25 you'll see that he can only sell that -- because of the

1 neighborhood, he can only sell that fish for \$15. So the
2 markup can't be high, and Jamaican food -- the cost of
3 Jamaican food because of the seasoning, oxtail, goat meat,
4 these are not -- it's not chicken, and it's not burgers.
5 So the markup -- keep that in mind when we're talking
6 about markup.

7 Going back to the article, Exhibit 14, page 70,
8 the article discusses how unemployment rates for blacks
9 and Hispanics in California was higher in any other race
10 and most other states. This information is critical when
11 imputing income. As my Exhibit 4, starting on page --
12 shows the majority of the Jamaican restaurants in the
13 five-mile radius of Hungry Joe's went out of business
14 during the recession.

15 Also, a lot of take-out restaurants, similar
16 restaurants to Hungry Joe's, they all -- just like the
17 taxpayer mentioned, they all went out of business. And my
18 exhibit shows all the Jamaican restaurants that went out
19 business during that time and right after that time
20 because they just couldn't survive.

21 What's a typical markup of a business right
22 before it goes out of business? I'd like to add here that
23 not only is Hungry Joe's located in a low-income
24 neighborhood, it is also located in a crime-ridden
25 neighborhood where there's a bulletproof glass between the

1 cashiers and the -- and the customers. In 2000 -- in
2 April of 2018, two customers were killed there. And if
3 you Google Hungry Joe's right now, that is one of the
4 first stories that you'll pull up.

5 Just earlier this year the tenant right behind
6 Hungry Joe's -- which is what, a couple of feet? -- was
7 killed right there, the tenant. That place is still
8 empty. Just a few months ago they broke into the place
9 Hungry Joe's. They broke in stupidly looking for cash,
10 and they stole the point of system register. All that
11 is -- a police report was done and everything. But this
12 should be -- this should all be taken into consideration
13 when look at markup percentages.

14 And considering a price point, the taxpayer has
15 to take into consideration, like I said, the demographics
16 of the location and his customers. What price would they
17 be willing to pay for his food? And the answer to this
18 question is the reason for the low markup.

19 The article, Exhibit 15, starting on page 73 at
20 the top, The Great Recession 2008 to 2009 a California
21 Perspective written by William Small of the law firm
22 Blank Roam LLP of Los Angeles written in March 2010 states
23 that, "The U.S. and California economies continue to
24 struggle in the wake of the worse economic recession since
25 the Great Depression. California has been particularly

1 hit hard with higher employment than the national average
2 and the collapse of housing market."

3 It states that, "The current unemployment rate in
4 California is about 12.4 percent, representing a twofold
5 increase in the state's unemployment rate during the
6 two-year period since January 2008. This compares to the
7 average national unemployment rate of 10 percent." So
8 like I said, you have to get as specific as possible to
9 where the taxpayer is located when you're throwing out
10 these percentages.

11 Hungry Joe's is located in Los Angeles County.
12 So it's necessary to determine the effect that the
13 recession had in his county. In the article, my
14 Exhibit 45, which starts on page 168, "Housing and Health
15 in Los Angeles County, The Social Detriment of Health
16 written by the Los Angeles County Department of Public
17 Health in February 2015, it states on page 170 that
18 "California is one of the state's most severely impacted
19 by the economic recession."

20 It states that, "Between 2007 and 2011, incomes
21 declined for all but the highest paid earners in the
22 county. Low income households suffered the most with the
23 earnings for the poorest fifth of county residents
24 declining 12 percent between 2007 and 2011. The most harm
25 by job loss were largely communities of color.

1 Historically disadvantaged groups experienced a
2 disproportionate deterioration in economic conditions
3 during the recession. To make matters worse, Southern
4 California has recovered from the recession more slowly
5 than other parts of the state."

6 So even though this article was written in 2015,
7 it states that the drastic declines in the Los Angeles
8 County's residents' incomes lasted through 2011. And this
9 would offer another good explanation for the overall
10 decrease in sales beginning in 2012. Also, the article
11 explains that the evidence shows that financial
12 institutions specifically targeted African American and
13 Latino families for predatory deceptive lending practices
14 and sub-prime loans.

15 If you remember, that was the reason -- that was
16 the beginning of the great -- the reason for the
17 recession. So during the audit period, not only the
18 demography of Hungry Joe's customers being affected by
19 disproportionate levels of high unemployment, a lot of
20 them, including the taxpayer, were also losing their
21 homes.

22 During the audit the taxpayer did not have a
23 sophisticated bookkeeping system. Not only was he the
24 head chef of Hungry Joe's, he was the bookkeeping system.
25 The bookkeeping merely consisted of sales, which he

1 recorded.

2 Can -- Judge Rosas, can I show you the sales
3 journal on the screen?

4 JUDGE ROSAS: Sorry. I was muted. My apologies.
5 Ms. Lindo, does it contain any private identifying
6 information for Mr. Lindo -- I'm sorry -- for Mr. Distin?

7 MS. LINDO: Judge Rosas, no. No private
8 information. Just want to give you an idea of the actual
9 sales journal and what it looks like and what he relied on
10 to pay his taxes.

11 JUDGE ROSAS: Is this an exhibit that's already
12 been provided to OTA and to CDTFA?

13 MS. LINDO: Judge Rosas, if you remember, I
14 sent -- because of the way the copies turned out, and I
15 wanted the Department to have a clear legible copy, I sent
16 the original to the Department. And I did not make a copy
17 for myself. So if you remember, we discussed this. And
18 the Department was going to look for that, but it has not
19 been provided. So what I have -- my Exhibit 1 are
20 actually just what it looks like, but these amounts are
21 for 2008.

22 JUDGE ROSAS: I understand.

23 MS. LINDO: So if you could look at Exhibit 1, I
24 just wanted to show you the actual ledger.

25 JUDGE ROSAS: I understand.

1 Ms. Jimenez do you have any objection to
2 Ms. Lindo displaying Exhibit 1 on the screen?

3 MS. JIMENEZ: Judge Rosas, I'm not really sure
4 what she's trying to show. Is this part of the Exhibit 1?
5 Because I know Exhibit 1 is out of the audit period, which
6 is 2008. This is 2009 or 2010? Is it within the audit
7 period?

8 JUDGE ROSAS: This is Judge Rosas. Ms. Lindo,
9 could you address -- you're referring to Exhibit 1;
10 correct?

11 MS. LINDO: I'm referring to Exhibit 1. However,
12 as I explained, the entire 2009 through 2011 sales journal
13 was mailed to the Department. And the Department was
14 supposed to look for that so I can include -- I -- I did
15 not make a copy. I sent the original. So I don't have
16 the original in my possession. The only reason why I used
17 2008 as an exhibit is to show you what his sales journals
18 look like because I don't have the actual years.

19 JUDGE ROSAS: This is Judge Rosas. Ms. Lindo,
20 thank you for that explanation. Considering Exhibit 1 has
21 already been admitted into evidence, please go ahead and
22 you may show Exhibit 1 on the screen, the copy that you
23 have with you.

24 MS. LINDO: This is his sales journal. Like I
25 said, he would -- he would-- at the end of each day, he

1 would write the daily sales. So like I said, he was doing
2 all the bookkeeping after a hard day's work. You'll see
3 that each he -- he would report the sales for the day
4 based on the Z-tape. Then he would add those up to get
5 the weekly sales, add those up to get the monthly sales.
6 He would then apply the sales tax rate and pay his monthly
7 taxes.

8 At the end of each quarter, he would use this
9 information to file his quarterly returns. For the
10 purchases we would gather up all of his purchase receipts
11 and purchase invoices and record the monthly totals. And
12 this would be his purchases journal. At the end of the
13 year he would then give this information to his tax
14 preparer, who would then prepare his personal tax returns,
15 which included his Schedule C business.

16 For the audit, the taxpayer's tax preparer at the
17 time, Mr. Nwaeze Nwachuku of Accurate Bookkeeping
18 represented the taxpayer. And as I mentioned earlier,
19 this was the taxpayer's first audit. So this was a very
20 unfamiliar experience for the taxpayer. But he had no
21 reason to believe that he wouldn't be represented well
22 during the audit. And, therefore, he relied on his tax
23 preparer to do just that.

24 However, based on my review of the correspondence
25 between the previous representative and the audit staff, I

1 determined that the previous tax preparer did not do a
2 good job representing the taxpayer and pretty much left
3 him to fend for himself without adequate knowledge of
4 bookkeeping, the accounting, the audit process, and most
5 importantly, the adverse effects that an inaccurate audit
6 finding would have on him.

7 Some of the examples of bad representation,
8 although, the representative provided three years' worth
9 of the Z-tapes for the auditor, he did not provide the
10 sales journal. It is not --

11 JUDGE ROSAS: Ms. Lindo.

12 MS. LINDO: Yes.

13 JUDGE ROSAS: This is Judge Rosas. My apologies
14 for the interruption. Just a friendly reminder, you have
15 approximately 15 minutes left to wrap up your
16 presentation.

17 MS. LINDO: Okay. So, basically, what I'm saying
18 is that he did not represent the taxpayer well. The
19 representative should have accompanied the taxpayer to
20 each of these meetings, and he did not. Ultimately, what
21 he did was he filed the -- the petition for
22 redetermination. He filed it two days late, which
23 resulted in the filing of an untimely protest, which
24 before I stepped in. Since the Department was not
25 allowing it as an administrative protest, this would have

1 been the end of the taxpayer's business and livelihood.

2 And I just wanted to mention that the taxpayer
3 was offered several -- several times as he mentioned, he
4 was offered certain amounts. First it was \$45,000 he was
5 offered, and then he was offered \$30,000. However,
6 because -- \$30,000 in unreported sales. However, because
7 he knew that he reported the correct amount of tax, he did
8 not accept this offer.

9 In my Exhibit 17, page 76, it shows the auditor's
10 work papers, which he offered \$30,000. It states, "Based
11 on the three-day observation test, the 2009 sales were
12 accepted as reported," and the auditor reduced the
13 unreported sales to \$292,897. However, he did not accept
14 it.

15 Okay. So on May 31st, 2013, the auditor's tax --
16 the auditor's work papers, which is the Department's
17 Exhibit A, page 28, shows a markup percentage of
18 314 percent was applied to increase the percentage of
19 error from \$53,028, \$135,058 percent and 126 percent to
20 244 percent, 235 percent, and 222 percent for 2 -- 2009
21 through 2011. And if you look at page 16 of the same
22 exhibit, the State's exhibit, you'll see that this is now
23 resulted in unreported sales of \$1.7 million. So the
24 Department is now saying that the taxpayer made
25 \$2.5 million for the three years period.

1 More specifically, the Department is now saying
2 during the Great Recession period the taxpayer made sales
3 of \$1,117,339 in 2009, \$756,844 in, 2010, and \$659,284 in
4 2011. All while all the other Jamaican restaurants and
5 other similar restaurants were going out of business, and
6 he was the only one left in his strip mall.

7 Now, because of the statute of limitation was
8 about to expire, this is the amount that stuck. And this
9 is the amount that the Notice of Determination was based
10 on. This was when the prior representative filed the
11 Petition of Determination late. On November 2nd, 2013,
12 the Department sent the taxpayer and his prior
13 representative a letter -- if you see Exhibit A,
14 page 137 -- stating that because the petitioner was --
15 because the petition was not filed timely it will not be
16 accepted as an administrative protest, and that his only
17 recourse to appeal the matter would be pay the liability
18 in full and then file a claim of refund.

19 Now if you go to Exhibit A, page -- the State's
20 Exhibit A, page 1, you'll see that total liability on that
21 \$1.7 million is \$231,837. Okay. And this is where I got
22 involved. So they're saying that he made \$1,117,000 in
23 2009 during the middle of a recession. And you'll see, if
24 you look at my Exhibit 42, page 151, you'll see that the
25 taxpayer didn't even close -- didn't even make

1 \$1 million -- barely \$1 million in sales until 2018, just
2 two years ago.

3 This was when the economy had completely
4 recovered from the recession and was doing very well. By
5 then the taxpayer had made improvements to his business.
6 Like he said, first day of business he made \$50. Today
7 he's -- \$50 a day. Today he's making \$5,000 in one day.
8 And Hungry Joe's is known for having a line out the door.
9 So business is booming. He implemented a computerized
10 power -- point of sales system. He -- he has a huge
11 following on social media, 4,000 followers on Facebook,
12 where he does all of his advertising. And he has a great
13 Yelp and Google rating. This is a stark contrast from
14 2009.

15 So after realizing that -- after realizing the
16 grave predicament that the taxpayer was in, I arranged an
17 immediate meeting with the auditor and her supervisor,
18 Mr. Fred Duenes, on December 16th, 2013. Now, the
19 Department's Exhibit 12 -- Exhibit, A page 112, Auditor's
20 Assignment History December 16, 2013, entry, at the top of
21 the page it says that, "The taxpayer, myself, met with the
22 auditor and her supervisor to request to accept the late
23 petition."

24 Because I knew how untimely protests were handled
25 at the Franchise Tax Board, I knew that -- or thought that

1 this would be a good candidate for administrative protest.
2 I requested that the case be accepted as one. But during
3 the meeting Mr. Duenes said that he would accept it as an
4 administrative protest, however, that he would not put it
5 in writing. And being a veteran auditor, I thought this
6 comment was odd to not put it in writing. However, I
7 continued with our meeting.

8 I provided the books and records showing
9 everything that I discussed. I provided the taxpayer's
10 2009 home foreclosure documents, my Exhibit 5, page 17.
11 He also had three properties in Atlanta, Georgia that were
12 foreclosed on in 2009. I provided that, my Exhibit 16.
13 I'm sure if he had \$1.7 million in extra income, he would
14 have used some of that to save his home and to save his
15 rental properties. Instead he was living in a small
16 apartment.

17 I provided on Exhibit 8, just some of the utility
18 bill notification of disconnection letters he was
19 receiving. Like I said, he got his electricity and gas
20 turned off a couple of times. And I provided a lot of
21 other documents, but I'm running out of time. But one
22 document -- he was receiving so many non-sufficient fund
23 notifications. That's my Exhibit 7.

24 And if you take a look at page 41, for example,
25 you'll see that in one day he was charged three NSF fees

1 for items as small as \$1.75. So this is just an
2 indication of the desperate situation that he was in.
3 Certainly, if he had any extra money, he would have
4 prevented that from happening.

5 Okay. And then he filed bankruptcy in 2011. And
6 I provide those documents in my Exhibit 6. During the
7 same period as the bankruptcy when he could no longer
8 afford to pay his rent at the business location, he
9 decided to walk away. My Exhibit 3 shows the letter --
10 the letter that the landlord wrote ask -- telling him what
11 happened in that period, telling him not to walk away, to
12 just hang in there for a few more months. He was an
13 accountant, so he knew the economy was about to recover.
14 So he begged the taxpayer to stay, and he agreed to allow
15 him to pay him piecemeal.

16 After this meeting, Mr. Duenes informed me that
17 he would not accept the case as an administrative protest.
18 And, again, what this means is that the only way the
19 taxpayer could appeal was to pay the \$231,000. I had to
20 get the State Board Advocate Office involved. And because
21 I know the experience with the Franchise Tax Board and my
22 letter page -- Exhibit 23, if you look at the 5th
23 paragraph, you'll see that I'm requesting that the
24 Department accept the petition for redetermination as
25 timely.

1 Now, that was what my late -- my exhibit was,
2 which you allowed. I think it's my Exhibit 47. It just
3 shows a string of e-mails between Diana Tay and Fred
4 Dumas [Sic] asking him what happened, and him admitting
5 that he did tell me that he -- he would accept it as an
6 administrative protest, but he didn't put it in writing.

7 Bu thank God, after Diana Tay got permission from
8 the higher ups, I'm assuming Bruce Morgan, I think his
9 name is. She told me that yes, she would allow it as an
10 administrative protest, and that he could continue to
11 protest.

12 JUDGE ROSAS: This is Judge Rosas. Ms. Lindo,
13 just a reminder. You're down to your final five minutes.
14 So if you could wrap up your --

15 MS. LINDO: Okay. I'd like to wrap up by --

16 JUDGE ROSAS: You will have additional time on
17 rebuttal afterwards.

18 MS. LINDO: According to Revenue & Taxation
19 Code 6481, if the board is not satisfied with the tax
20 returns or the amount required, they can use other
21 methods. Okay. However, if you look at -- where is it --
22 Paine versus the State Board of Equalization Board. And
23 my cite is in my work papers. It basically says that the
24 Department cannot use a test period -- if data from a test
25 period and apply it to an audit period, if the conduct and

1 the -- if the conduct is not substantially similar in both
2 periods. Okay.

3 So what this -- what it's based on, the
4 adjustment is based on a shelf test, which was using data
5 from 2013. And the final determination is based on a
6 three-day observation test that was using data in 2012.
7 2012 and 2013 are periods that are not substantially
8 similar to the audit period. And according to Paine
9 versus Board of Equalization, that should not be allowed.
10 And that's exactly what they're doing.

11 And if you -- the Department did a thorough
12 analysis of the books and records. That is the Z-tapes
13 and sales journal for 2011. This analysis is included in
14 the Department's Exhibit 1. Pages 235 through 238 show
15 the previous representative schedule of all the Z-tapes
16 for the year. The previous representative did not have
17 the sales journals to compare these Z-tapes. For the
18 missing tapes, he would assign an average for the day. In
19 my review of those averages, they seemed overstated base
20 on a typical day.

21 The total sales labeled, Quart Totals, was
22 \$210,244 for the total year of 2011. This compares to the
23 total sales labeled, V of V Quarter Taxes Filed, of
24 \$209,00. So the representative is saying that when he
25 added everything up and applied the averages, he got

1 \$210,000. But what the taxpayer actually reported was
2 \$209,000. But like I said, the representative applied
3 averages for missing Z-tapes. So this amount would be
4 including taxes.

5 Page 240 through 248 is the Department's
6 analysis -- the Department's analysis of the Z-tapes
7 compared to the sale journal. Because now, like I said, I
8 reported the sale -- I provided the sales journal.
9 Because the Department did not apply an average for the
10 missing Z-tapes, the total amount they came up with was
11 \$158,000. The total for the sales journal, however, was
12 \$205,212, including taxes.

13 Again, the taxpayer reported \$209,572, which is
14 \$4,000 more than what he -- and the reason why it was
15 \$4,000 more is because it was seven days out of the whole
16 year that he had missing journal entry. And six of those
17 days was in February where he was out, and he didn't -- he
18 was out. I think he was sick, and he didn't report the
19 sales. So if we use this, we'll see that the taxpayer
20 over reported.

21 So based on everything that I've said, if you
22 apply the law to the facts and the circumstances
23 presented, you will -- you will see that the taxpayer in
24 no way owes this ridiculous amount of money. And I
25 believe both the unreported sales amount and the finality

1 penalty should be withdrawn.

2 JUDGE ROSAS: Thank you, Ms. Lindo, for your
3 presentation.

4 At this point, I'm going to turn it over to my
5 co-panelists to see if any of them have any questions for,
6 you, starting with Judge Cho.

7 JUDGE CHO: This is Judge Cho. I don't have any
8 questions at this point, but I might have questions after
9 the Department's presentation. Thank you.

10 JUDGE ROSAS: This is Judge Rosas. How about
11 Judge Tay? Any questions?

12 Judge Tay, it looks like we're still having a
13 difficult time hearing you. Let's use the same method
14 that worked before. A thumbs up if you have questions.
15 Thumbs down if you do not.

16 I see a thumbs down. No questions.

17 JUDGE ROSAS: I just have one clarifying
18 question, Ms. Lindo, before we turn it over to the
19 Department for their presentation. You made a -- towards
20 the end you made a reference of that the taxpayer over
21 reported sales. Is there -- can you point me to your
22 exhibits? Are there any exhibits where you outline what
23 you believe were the correct amount of sales during the
24 audit period?

25 MS. LINDO: The correct amount of sales?

1 JUDGE ROSAS: I understand your position. You're
2 disagreeing with the audit and what they determined were
3 unreported taxable sales. But I'm trying to make sure
4 that I'm not overlooking any of your exhibits. Is there
5 anything in the exhibits that outlines what you believe
6 were the correct amount of sales that your client made
7 during each quarter during that audit period?

8 MS. LINDO: Yes. I believe that the sales
9 journals that I provided that, like I said, the Department
10 was unable to find, and I did not keep a copy. If you
11 look at the State's Exhibit I, you'll see starting on
12 page 240. You'll see that the Department for the entire
13 2011, they -- they mentioned that every single day that
14 the taxpayer wrote in his journal, they have every single
15 day in taxable sales per handwritten sales. And then they
16 compared this amount to the taxable sales per the Z-tapes.

17 The taxable sales per the -- per the handwritten
18 journal as you can see on page 248, the total based on the
19 sales journal was \$205,212. Again, what the tax --
20 because there were a few missing days, like I said, there
21 was only six missing entries for the whole entire year. I
22 mean, seven missing entries for the whole entire year, and
23 six of those in February when he was, when he had to apply
24 an average. And he overstated just to be on the safe
25 side.

1 So that's why he actually reported \$209,000
2 compared to this \$205,000. I believe this exhibit shows
3 that this is the correct amount. He actually overpaid.
4 And if you apply to that -- this is only one year. You
5 apply that to all three years, the taxpayer owes no
6 additional money.

7 JUDGE ROSAS: Thank you, Ms. Lindo. One final
8 question. And it's mostly to make sure that I understand
9 the essence of your argument. So generally when there's a
10 Notice of Determination based on allegations of unreported
11 sales, CDTFA has the initial burden. It's a minimal
12 initial burden to show its determination was reasonable
13 and rational.

14 So if I'm understanding the essence of your
15 argument, you're saying that CDTFA's determination was not
16 reasonable and was not rational because their markup
17 assessment did not take certain factors into
18 consideration, such as the makeup of Inglewood and the
19 ethnic makeup of the customers; correct? You're basically
20 saying that they are comparing apples to oranges, and
21 that's why their determination was not reasonable and
22 rational?

23 MS. LINDO: Right.

24 JUDGE ROSAS: Am I understanding your argument
25 correctly?

1 MS. LINDO: Judge Rosas, you are partially
2 understanding it. What I am saying specifically is the
3 CDTFA did not take the reason why the taxpayer's sales
4 decreased, the reason being the Great Recession. They did
5 not take that into consideration. If that were the case,
6 they would not take a test period which was not in the
7 same -- was not -- as I say, the conditions were not
8 similar to the audit period. They would not take data
9 from the test period and apply it to the audit period.

10 As I said, that cite would be Paine versus Board
11 of Equalization. They did not take anything into
12 consideration. They did not take the markup into
13 consideration. There was a lot of things. But the
14 jarring thing is the Great Recession. And as I said, the
15 historical data shows that the only time the taxpayer's
16 sales decreased was these three years, and then the sales
17 went back up again.

18 Sales were up before the recession. Sales were
19 down after the recession. So that has to be the only
20 reason why sales went down. And I believe that even
21 though his books and records weren't perfect, because like
22 I said, he was the bookkeeping. I think he made a huge
23 attempt to pay the correct amount of tax. This Exhibit I
24 alone shows that he made an attempt.

25 He only missed seven days and based on this --

1 and there could be no reason not to believe this is not
2 correct. Based on this, he actually over reported sales
3 just to be on the safe side.

4 JUDGE ROSAS: This is Judge Rosas. Thank you,
5 Ms. Lindo for that clarification. I appreciate it.

6 Before turning it over to CDTFA, just a few
7 matters regarding exhibits. As I mentioned there are two
8 exhibits that were -- I was going to reconsider my ruling
9 if necessary. Exhibit F was not admitted into evidence,
10 and that ruling stands. I'm not admit -- OTA is not going
11 to admit Exhibit F into evidence.

12 However, Exhibit J, which was not previously
13 admitted into evidence, I'm going to reconsider. You
14 mentioned during your presentation various articles
15 regarding the Great Recession that are part of your
16 presentation. I think it's only fair to also allow
17 Exhibit J, which is also another article regarding the
18 Great Recession, just to have an article in evidence from
19 CDTFA.

20 So at this point I've reconsidered my initial
21 ruling, and I am going to allow Exhibit J to come into
22 evidence.

23 (Department's Exhibit J was received in evidence
24 by the Administrative Law Judge.)

25 But Exhibit F is not coming in. So with that

1 said, at this point, I'm going to turn it over to CDTFA.

2 Ms. Jimenez, whenever you're ready, you may begin
3 your presentation.

4

5 PRESENTATION

6 MS. JIMENEZ: Thank you, Judge Rosas. This is
7 Mariflor Jimenez.

8 Appellant was a sole proprietor who operated a
9 quick-service restaurant serving American and Jamaican
10 style dishes. The facility was more of a carry-out
11 pick-up to-go type of place with very limited seating.
12 The restaurant is located in a residential area in
13 Inglewood, California. It operated from June 1st, 2000,
14 through September 31st, 2017. On October 1st, 2017,
15 Appellant incorporated and transferred the business to the
16 corporation.

17 Now, the liability period is from
18 January 1st, 2009, through December 31st, 2011. Appellant
19 provided federal income tax returns for 2009 through 2011,
20 a sales summary, and a purchase summary for 2011 only, and
21 some cash register Z-tapes, and bank statements. The
22 Department compared taxable sales reported on the sales
23 and use tax return with cost of goods sold claim on the
24 federal income tax return.

25 The computed book markups are 43.66 percent for

1 2009, 44.52 percent for 2010, and 48.89 percent for 2011.
2 The overall markup is 46.58 percent for the three years
3 combined, and that will be on your Exhibit A, page 37.
4 Now, these book markups are considered very low for a
5 limited service restaurant. For this type of business, we
6 would expect a markup of over 150 percent. The federal
7 income tax return also reflect a net loss of around
8 \$11,600 for 2009, a net loss of \$13,000 for 2010, and
9 another net loss of \$36,000 for 2011. This information is
10 on your Exhibit A, page 38.

11 On that same page the total wages claimed are
12 around \$27,000 for 2009, \$19,000 for 2010, and \$19,000 for
13 2011. Now, the Department also noted that the purchases
14 recorded in the 2011 purchase summary totaled around
15 \$175,000. This exceeds the amount claimed in the 2011
16 federal income tax return by around \$38,000. Using the
17 reported taxable sales for 2011 and the purchases from the
18 2011 purchase summary, the Department computed a lower
19 book markup of less than 17 percent for 2011. That
20 calculation is on your Exhibit A, page 40.

21 Now, this is lower than the markup expected for
22 this type of business. And if that additional \$38,000 is
23 added back to the cost of goods sold on the federal income
24 tax return, the net loss for 2011 is actually \$74,000.
25 And this is with wages of less than \$19,000 for six

1 employees with no claim rent payments. The Department
2 rejected reported taxable sales due to the lack of
3 reliable records, the substantial net loss for all three
4 years, and unreasonably low book markups.

5 Initially, a one-day observation test was
6 performed on Thursday, May 31st, 2012. It was later
7 expanded and included two additional days, Tuesday,
8 October 2nd, 2012, and Saturday, October 13th, 2012. The
9 data from these three-day observation tests can be found
10 on your Exhibit A, page 148. Now, Department counted 305
11 business days per year considering the Sunday closure and
12 an additional eight days for holidays. The average daily
13 sales of \$1,600 is multiplied by 305 days for the year and
14 then multiplied by the three years to compute taxable
15 sales of \$1,483,000 for the audit period.

16 The computed taxable sales are then compared to
17 reported taxable sales of around \$755,000. This is to
18 establish unreported sales of around \$720,000 for the
19 audit period. This would be on your Exhibit A, page 145.
20 The Department sent an audit engagement letter to
21 Appellant on January 17, 2012, and followed it up with a
22 phone call on February 2nd, 2012. Appellant's reported
23 taxable sales went up from \$44,000 for fourth quarter 2011
24 to \$77,000 for first quarter of 2012. This is a sudden
25 increase of 74 percent.

1 Now, if you look at from January 2012 to
2 February 2012, there's a sudden 71 increase in sales from
3 \$16,000 to \$28,000. From January 2012 to March 2012, it
4 more than doubled from \$16,000 to \$33,000. You'll find
5 these handwritten tools on Appellant's opening brief on
6 page 48 and the spreadsheet on Appellant's Exhibit 19,
7 page 81.

8 The Department also performed a markup of cost
9 analyses to compute taxable sales. The schedule is on
10 your Exhibit A starting on page 97. Audited purchases
11 were calculated using the cost of goods sold, amounts
12 claimed on the federal income tax return. The Department
13 adjusted for additional purchases of \$38,000 as noted on
14 the test of 2011 purchases invoice. Then consideration
15 was made for supply items and the cost of food for
16 self-consumption.

17 Shelf tests were performed, which revealed an
18 audited markup of cost of 166 percent. But keep in mind,
19 on the federal income tax return, it was in the 40s and
20 16 percent when we used their purchase invoices. So the
21 calculation of taxable sales using purchases and mark up
22 of cost revealed taxable sales of approximately
23 \$1,498,000. This amount supports the reasonableness of
24 the audited taxable sales of \$1,483,000 computed using the
25 three-day observation test. The difference between the

1 two test performed is only 1 percent.

2 The Department wants to emphasis that the audited
3 taxable sales calculated in the three-day observation test
4 are lower compared to the sales computed using the markup
5 of cost method by around 15 percent. The three-day
6 observation test, which is the lower of the two tests in
7 this case, was used by the Department.

8 So another analysis that the Department performed
9 to support the reasonableness of our finding is the cash
10 to credit card method. That information is on your
11 Exhibit A starting on page 162. Audited 2011 credit card
12 ratio of 19.65 percent was used to compute the taxable
13 sales of around \$1,572,000 for the audit period. The
14 estimated taxable sales of \$1,572,000 computed using the
15 credit card method support the \$1,483,000 that the
16 Department computed using the three-day observation test.

17 The Department wants to emphasis again that the
18 audited taxable sales determined in the three-day
19 observation test are lower compared to the sales
20 calculated using the credit card method. The difference
21 is about \$89,000 or less than 6 percent. So now, the
22 Department had done three examinations. The lowest of the
23 three tests, which is the three-day observation test, was
24 used by the Department.

25 California imposes sales tax on a retailer's

1 retail sale in the state of tangible personal property
2 measured by the retailer's gross receipt, unless the sale
3 is specifically exempt or excluded from taxation by
4 statute. Although, gross receipts derived from the sale
5 of food products are generally exempt from sales tax,
6 sales of food sold in a heated condition and food sold for
7 consumption in a restaurant are subject to tax. That's
8 Revenue & Taxation Code 6359.

9 When the Department is not satisfied with the
10 accuracy of the tax return filed, it may base its
11 determination of the tax due upon the facts contained in
12 the return or upon any information that comes within its
13 possession. It is the taxpayer's responsibility to
14 maintain and make available for examination on request all
15 records necessary to determine the correct tax liability,
16 including bills, receipts, invoices, or other documents of
17 original entry supporting the entries in the books of
18 account. That's Section 7053 and 7054.

19 If a taxpayer's records are insufficient, or
20 proven unreliable, it is appropriate for the Department to
21 compute an estimate the taxpayer's liability by
22 alternative means. That's Section 6481. When a taxpayer
23 challenges a Notice of Determination, the Department has
24 the burden to explain the basis for the deficiency or the
25 Department's explanation appears reasonable. The burden

1 of proof shifts to the taxpayer to explain why the
2 Department's asserted deficiency is not valid.

3 Except as otherwise specifically provided by law,
4 the burden of proof is upon the taxpayer to prove all
5 issues of fact by a preponderance of evidence. That is,
6 the taxpayer must establish by documentation or other
7 evidence that the circumstances it asserts are more likely
8 than not to be correct. Here, purchases recorded on
9 Appellant's 2011 purchase summary exceed the cost of goods
10 sold shown in the 2011 federal income tax return. The
11 book markup is less than 17 percent for 2011. That's if
12 we use the purchases recorded on the purchase summary.

13 Appellant did not provide purchase summaries for
14 2009 and 2010. Now, if we use the cost of goods sold
15 shown on the federal income tax return, the book markup is
16 a bit higher with 43.66 percent in 2009, 44.52 percent for
17 2010 and 48.89 percent for 2011. The Department once
18 again expects these mark ups for this type of limited
19 service restaurant to exceed 150 percent. These low
20 markup values are an indicator that taxable sales are
21 understated, and books and records are unreliable.

22 The Department was unable to verify reported
23 sales due to the lack of reliable records. When it's
24 determined that records are such that sales cannot be
25 verified by a direct audit approach, or reliance cannot be

1 place on the records, as it is in this case here, the
2 Department must calculate the sales from whatever
3 information is available using indirect methods to
4 determine the correct tax liability.

5 Now, the use of average daily sales resulting
6 from the observation test is an approved method of
7 establishing taxable sales. Therefore, the burden of
8 proof shifts to Appellant to provide evidence to support
9 adjustments to the audit. The Department's observation
10 test covers three full days, which is sufficiently a large
11 sample. The audited taxable sales from the observation
12 test resulted in mark ups of 153 percent for 2009 and 165
13 percent for 2010, and 178 percent for 2011; an overall
14 markup of 163 percent for the three-year audit period.
15 That will be on your Exhibit A, page 162.

16 This overall markup from the observation test is
17 close to the markup we calculated during the shelf test of
18 166 percent. The audited markups are within the
19 expectation and reasonableness for Appellant's business.
20 The Department also calculated taxable sales using the
21 credit card ratio method. And the outcome is slightly
22 higher than the audited taxable sales calculated from the
23 three-day observation test we use in the audit.

24 The Department finds that the sale from the
25 observation test are representative of this business

1 during the audit period. All of these tests relied on
2 assumptions because of the lack of records. All of these
3 methods showed substantial understated taxable sales. The
4 difference between the highest and lowest estimate is less
5 than 6 percent. But the fact that the variances are so
6 small between these estimates show that these tests are
7 reasonable and supporting each other.

8 In addition, the Department ultimately used the
9 understated sales established from the observation test,
10 which is the most favorable for the Appellant. Therefore,
11 we conclude that no further adjustment is warranted with
12 this issue.

13 I do want to address Appellant's comment
14 regarding the Great Recession. We do sympathize with
15 Appellant's homes foreclosing, his inability to pay the
16 bills and levies for both the IRS and Board of
17 Equalization during the liability period. But these do
18 not establish that the unreported taxable sales are
19 excessive. These events are not basis for making an
20 adjustment to the liability.

21 As far as the Great Recession, which it's from
22 December 2007 to June 2009, was the result of the
23 sub-prime mortgage crisis. You know, the large financial
24 institutions invested heavily in mortgage-backed
25 securities. There's expensive high-interest loans that

1 were given to people. Then came the housing bubble.

2 However, Appellant's articles do not specifically
3 address restaurants, specifically, their type of
4 restaurant, which is the limited-service restaurants. And
5 that's where my Exhibit J, Summary Report of the Economic
6 Research Service, talks about that.

7 And also based on my experience -- and I have
8 been with the Board of Equalization and now CDTFA for
9 almost three decades -- in general -- and the research
10 support this as well. In general, full-service
11 restaurants' sale do go down during a recession. I'm
12 talking about facilities where guest are cared for by
13 server from the moment they sit down until the moment they
14 leave. However, the limited-service restaurants, like the
15 ones where you pay upfront before you eat the food, kind
16 of like the Appellant's, their sales normally do not
17 fluctuate during an economic downturn.

18 Food is a basic necessity, and this type of
19 restaurant, you know, not only provide convenience, but
20 it's almost more affordable than the full-service
21 restaurant. You'll even see that in today's Covid
22 recession. The affordable counter service for pickup and
23 to-go restaurants are one of the very few businesses doing
24 well in this economy. Even the Appellant, during her
25 presentation, stated the business is booming.

1 So that tells me that, you know, that this
2 restaurant is doing well in this recession and possibly
3 also from the previous recession. That concludes my
4 response to this issue. And once again, that summary
5 report of the economic research service talks about
6 limited-service restaurants. Sales are steady even
7 through the recession.

8 The other issue of this case is the finality
9 penalty. Revenue & Taxation Code Section 6565 provides
10 that a Notice of Determination is due and payable at the
11 time the determination becomes final. It provides that a
12 penalty of 10 percent will be added to the amount of the
13 determination if the determination is not paid when due
14 and payable. In this case a determination became final on
15 November 3rd, 2013, and the Appellant did not pay the tax
16 portion of the determination by that date. Therefore, a
17 finality penalty of \$7,200 was added to the determination.

18 The Department is willing relieve this finality
19 penalty for this case. Otherwise, the Appellant has not
20 provided documentation or essential information to support
21 any additional adjustment to the unreported taxable sales.
22 The Department's audit findings are more than reasonable
23 and fair. Therefore, the Department request the
24 Appellant's appeal be denied.

25 This concludes my presentation. I'm available to

1 answer questions you may have.

2 JUDGE ROSAS: This is Judge Rosas. Thank you,
3 Ms. Jimenez.

4 Let me turn it over to my co-panelists.
5 Judge Cho, do you have any questions?

6 JUDGE CHO: This is Judge Cho. Yes, just a
7 couple of quick questions. First for the Department, and
8 I don't know if you have this information off the top of
9 your head or not, but do you know whether the tax
10 liability has been completely paid off at this point in
11 time?

12 MS. JIMENEZ: Judge Cho, it appears the tax was
13 paid off. And, of course, there's the penalty and the
14 interest. But it appears that the tax was all paid off.

15 JUDGE CHO: Okay. So as of today the tax has all
16 been paid off; correct?

17 MS. JIMENEZ: That is correct.

18 JUDGE CHO: Thank you.

19 Appellant, it looks like you wanted to say
20 something.

21 MS. LINDO: This is Pamela Lindo. Can you please
22 clarify your question as far as the tax being paid off?
23 Do you mean the total tax liability of the \$78,000 where
24 it now stands, Judge Cho?

25 JUDGE CHO: My question was just for the tax, not

1 the interest and penalties, but just the additional tax in
2 the Notice and Determination based off of the --

3 MS. LINDO: Well, we know that the taxpayer has
4 paid. He's on a payment plan of \$1,000 a month, and he
5 has paid approximately --

6 MR. DISTIN: About \$80,000 so far. I'm not
7 100 percent sure because I don't receive any information
8 and how much do I know in the past two months or so. So
9 I'm not clear, but from my calculation I probably pay
10 about \$80,000. I'm not -- I'm not 100 percent sure.

11 MS. LINDO: This is Pamela Lindo speaking. Yes,
12 he's been paying since they allowed the administrative
13 protest at \$1,000 a month. So it's nine years later, that
14 equals about \$80,000. But he's still paying \$1,000 a
15 month.

16 JUDGE CHO: Okay. Thank you.

17 And back to Department just to confirm again. So
18 the Department is recommending relief of the finality
19 penalty; correct?

20 MS. JIMENEZ: Judge Cho, that is correct. And as
21 of last night I did look at the balance, and the tax at
22 this time has all been paid off. And there's still that,
23 of course, the penalty and some portion of the interest.

24 JUDGE CHO: Great. Thank you.

25 MS. JIMENEZ: Okay.

1 JUDGE CHO: The other question I had was actually
2 for the Appellant. Appellant, would you mind -- just give
3 me a quick, I guess, counter argument or reasoning as to
4 why the Department's credit card ratio test would not be a
5 reasonable standard here to test their audit in this case.
6 Because from what I understand, they received the credit
7 card information from the credit card companies and then
8 applied an error rate, and then projected that based off
9 of a reasonable --

10 JUDGE ROSAS: Judge Cho, this is Judge Rosas.
11 And my sincerest apologies, Judge Cho. I don't want to
12 overstep or interrupt your question, but the Appellant
13 will have an opportunity for rebuttal. So I don't know.
14 At this point we were just asking questions of CDTFA any
15 clarifying questions. And then after the Appellant was
16 done with her rebuttal, we were going up to questions of
17 either party. I don't know if you want to reserve your
18 question, because it may be something that Ms. Lindo is
19 going to address as part of her rebuttal.

20 JUDGE CHO: Oh, I apologize. In that case,
21 Ms. Lindo, would you just mind addressing that question in
22 your rebuttal?

23 MS. LINDO: This is Pamela Lindo. Judge Cho,
24 yes, I will.

25 JUDGE CHO: Thank you very much. Those are all

1 the questions that I had. Thank you.

2 JUDGE ROSAS: This is Judge Rosas. Judge Tay, do
3 you have any questions for CDTFA?

4 JUDGE TAY: Can you hear me? Great. I have no
5 questions but thank you. This is Judge Tay.

6 JUDGE ROSAS: This is Judge Rosas. Judge Tay, I
7 just want to mention we've been waiting all day to hear
8 you speak. And when the mic works, you got no questions.

9 JUDGE TAY: I'm glad I made it to this point.

10 JUDGE ROSAS: Thank you, Judge Tay.

11 So at this point we're going to turn it over to
12 Ms. Lindo for rebuttal. Ms. Lindo, you have up to 10
13 minutes for your rebuttal to address anything that CDTFA
14 mentioned in their presentation. You may begin when
15 you're ready.

16

17 CLOSING STATEMENT

18 MS. LINDO: I would first like to reiterate as
19 far as the observation test and the show of test that
20 they're comparing these two methods, and they're picking
21 the one method that is lower to be in the taxpayer's
22 favor. But these two -- the two assessment are still
23 large in the \$750,000 range.

24 Again, I would like to cite Paine versus State of
25 Equalization. And you can see the exact cite in

1 Exhibit 42, page 155. And it's holding the Court of
2 Appeal discussed the importance of -- when using data from
3 a test period and applying the data to an audit period to
4 determine sales, the condition and conduct of the
5 taxpayer's business must remain substantially similar
6 during both periods.

7 Applying the Paine test to the taxpayer's case,
8 the test period and the taxpayer's case would be 2013 for
9 the shelf test and 2012 for the observation test. These
10 were both, like I said, post-recession years. Meaning,
11 the recession was over, and the business was back on
12 track. The audit period would be 2009 through 2011.

13 Because the audit period was during the Great
14 Recession where most consumers were still dealing with the
15 extreme downturn of the economy, and also the taxpayer's
16 sales were way down, so he would not have -- for the shelf
17 test that was conducted in 2013 using -- using purchases
18 from 2013 and the menu from 2013 using -- using purchases
19 from 2013 and the menu from 2013, this -- this information
20 is going to be skewed.

21 He would not have had as much sales, and he would
22 not have -- he would not have bought so many items in a
23 post-recession period in 2013 that he would have in a
24 recessionary period. So the condition and conduct of the
25 taxpayer's business certainly did not remain substantially

1 similar during both periods. In this case alone, which is
2 very much on point, shows the Department's error in using
3 the shelf test and the observation test.

4 The observation test was conducted in 2012. The
5 three days that they used were, typically for the
6 taxpayer's neighborhood, it was biased. One day was a
7 Saturday right -- Saturday is typically the taxpayer's
8 most busiest day. The other days were, I think,
9 October 13th, and the other day were days -- the first of
10 the month and the last of the month. Typically, this is
11 when people get paid. In the low-income neighborhood this
12 when they get their what they call county checks or county
13 assistance checks. So they would have money, more money
14 than before.

15 So, again, citing Paine versus State Board of
16 Equalization, I mean it -- the test periods are not
17 similar. So neither one of these tests should be made --
18 should be used. As far as the Department's analyses or
19 research, these -- when I looked at this research, it
20 compared full-service restaurants to fast-food
21 restaurants. Again, Hungry Joe's is not a fast-food
22 restaurant. The price of the food, like I said, Jamaican
23 food is very expensive.

24 The oxtail dinner was, like, \$20.00. The fish
25 dinner right now is, like, \$25.00. Those are not -- it

1 definitely cannot be considered fast food. Fast food is
2 like a burger that cost what, \$5.00. So it's like a
3 full-service restaurant only -- I mean, the prices would
4 be the same as a full-service restaurant, but it -- it's
5 take-out restaurant because he does not have the space.

6 And as far as her comment about the business
7 doing well in the middle of a recession, right now we're
8 in the middle of a recession. The reason why it's doing
9 well right now is because the consumers, they're effected
10 by unemployment. However, unlike in the recessionary
11 period back then, they are receiving unemployment checks
12 from the EDD. So they have extra money. If you remember,
13 they were getting \$600 a week on top of what they're usual
14 weekly unemployment check would be.

15 So if the Department is following the news and
16 following what's going on with the Covid and how it's
17 affecting some of these restaurant, it's actually --
18 they're actually turning around, and they're actually -- a
19 lot of restaurant are doing very well. The -- the
20 taxpayer is -- is making record sales. And the only thing
21 that we can -- we can say -- apply this to the Covid
22 situation and the unemployment checks where people in that
23 type of neighborhood who are mostly unemployed because of
24 this Covid situation.

25 I would agree that if the Department is

1 unsatisfied with the taxpayer's records, which like I
2 mentioned, I think it was adequate and sufficient.
3 Observation test and the shelf would be used -- could be
4 used. Maybe they would have no choice but to use these
5 tests. However, citing Paine versus State Board of
6 Equalization, the test periods and the audit periods have
7 to be similar in order for those tests to be sound.

8 And I think that's all I have to say. Do you
9 have anything to add?

10 JUDGE ROSAS: Thank you very much, Ms. Lindo.

11 At this point I'm going to turn it over to the
12 panel to see if they have any questions of either side.
13 And we will start with Judge Cho.

14 JUDGE CHO: This is Judge Cho. I might have
15 missed it but, Appellant, did you respond to the credit
16 card ration analysis as to why that would be not be a
17 reasonable standard?

18 MS. LINDO: This is Pam Lindo, Judge Cho. I'm
19 looking for my exhibit, but I did my own -- I did my own
20 credit card ratio analysis, Exhibit 19, pages 79 and 81 --
21 pages 79 through 81. And to get the monthly ratio, you
22 divide the credit card sales by total monthly sales. And
23 I use a billing -- merchant billing statements, which are
24 in Exhibit 20, to calculate the monthly credit card sales.

25 And the data shows that the ratio for 2009

1 through '10 and '11, respectively, was \$22,000, \$30,000,
2 and \$44,000; an average of \$32,000; so based on what was
3 higher than what the Department calculated. So this means
4 that during a recessionary period as cash sales decreases,
5 credit card sales increases. This information is logical.
6 And it is reasonable to assume that during a recessionary
7 period when consumers' disposable income -- that's cash --
8 decreases, they rely more on credit card sales to buy the
9 things that they want to buy.

10 They may not be able to pay the bill at the end
11 of the day, but they can use that credit card. For 2012,
12 a post-recession year, as cash sales increased at a higher
13 rate compared to the rate of credit card sales, the credit
14 card ratio will also decrease, which it did in 2012 at
15 34,000 -- at 34 percent. So information that I have shows
16 a way higher credit card ratio than what the Department
17 has.

18 JUDGE CHO: Okay. Thank you very much. Those
19 are all the questions that I have.

20 JUDGE ROSAS: This is Judge Rosas. Thank you,
21 Judge Cho.

22 And thank you, Ms. Lindo.

23 Judge Tay, do you have any questions for either
24 party?

25 JUDGE TAY: This is Judge Tay. I have no

1 questions for either party. Thank you.

2 JUDGE ROSAS: This is Judge Rosas. I do not have
3 any questions at this time. I think we're getting close
4 to wrapping this up. I know we estimated two hours for
5 this oral hearing, and we're close to the two-hour mark.

6 I do just want to say to Mr. Distin, I know how
7 difficult the restaurant business can be. And I just --
8 from everything I've heard today, sir, I just applaud your
9 efforts. For lack of a better term, it seems that you are
10 a survivor, and that you've done really well to weather
11 the storm, as they say. And I was happy to hear argument
12 from Ms. Lindo that things got a lot better for you
13 towards the end, sir.

14 And lastly, I just want to make a comment on
15 Ms. Lindo and Ms. Jimenez, great oral advocacy from both
16 of you. I realize you are -- neither of you are
17 attorneys, but I just want to applaud your efforts. Even
18 during the prehearing conferences, both of them, I just --
19 I know that we can be adversarial, but you did that with
20 dignity and civility and the utmost professionalism and
21 courtesy. And so I want to thank you both for how you
22 comported yourselves during this oral hearing.

23 In terms of last questions, Ms. Jimenez, does
24 CDTFA have anything else they would like to add?

25 MS. JIMENEZ: Judge Rosas, this is Mariflor

1 Jimenez. We have nothing else to add. Thank you.

2 JUDGE ROSAS: This is Judge Rosas. Ms. Lindo,
3 your client is the Appellant, so I do want to give you the
4 last word. Other than what you've already argued here
5 today, and other than what Mr. Distin has already
6 testified to, and other than the exhibits that you've
7 already submitted, and there are a lot of exhibits; but is
8 there anything else that you want this panel to know in
9 order for us to make a well informed decision?

10 MS. LINDO: I would like to -- Judge Rosas, this
11 Pamela Lindo speaking. I would like to have the
12 Department and the judges look at the big picture of the
13 Great Recession. Like I said in the beginning, the
14 taxpayer was offered \$30,000. Now, that compares to the
15 \$1.7 million. The fact that he turned \$30 -- \$30,000 down
16 shows that he knew that he paid the right amount of tax.

17 If he thought that he was hiding income to the
18 tune of \$1.7 million, at the offer of \$30,000, he would
19 have gladly taken that just for the situation to go away.
20 So that talks to the honesty of the taxpayer and, you
21 know, this whole situation. And as I said, there's no way
22 possible that the taxpayer owes this money.

23 If anything, I would say that because his books
24 and records weren't perfect, maybe a portion of the
25 negligible penalty or the finality penalty, but there's no

1 way possible that he owes \$728,000 during this
2 recessionary period. It makes absolutely no sense,
3 respectively -- respectfully.

4 JUDGE ROSAS: Thank you, Ms. Lindo.

5 I have no further questions for either party. So
6 that concludes the hearing in the Appeal of W. Distin.
7 The record is now closed, and the matter is submitted as
8 of today, September 29th, 2020. The parties will receive
9 this panel's written decision no later than 100 days from
10 today.

11 Thank you all very much. I just want to remind
12 everyone stay safe and stay healthy. We're now off the
13 record. Thank you.

14 (Proceedings adjourned at 4:19 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

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

I have hereunto subscribed my name this 26th day of October, 2020.

ERNALYN M. ALONZO
HEARING REPORTER