

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
RUDE DOG BAR & GRILL, INC., ) OTA NO. 18011970  
 )  
APPELLANT. )  
 )  
 )

## TRANSCRIPT OF VIRTUAL PROCEEDINGS

Cerritos, California

Tuesday, January 26, 2021

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Virtual Proceedings, taken at  
12900 Park Plaza Dr., Cerritos, California, 91401,  
commencing at 10:09 a.m. and concluding  
at 10:33 a.m., on Tuesday, January 26, 2021,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

1 APPEARANCES:  
2  
3 Panel Lead: ALJ JOSHUA LAMBERT  
4  
5 Panel Members: ALJ DANIEL CHO  
6 ALJ ANDREW WONG  
7  
8 For the Appellant: TRACY FICKETT  
9  
10 For the Respondent: STATE OF CALIFORNIA  
11 DEPARTMENT OF TAX AND  
12 FEE ADMINISTRATION  
13  
14 MARIFLOR JIMENEZ  
15 JASON PARKER  
16 CHRISTOPHER BROOKS  
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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-11 were received at page 7.)  
(Department's Exhibits A-M were received at page 7.)

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

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CLOSING STATEMENT

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1 Cerritos, California; Tuesday, January 26, 2021

2 10:09 a.m.

3

4 JUDGE LAMBERT: We are now on the record in the  
5 Office of Tax Appeals hearing for the appeal of Rude Dog  
6 Bar & Grill, Case Number 18011970. The date is  
7 January 26th, 2021, and the time is approximately  
8 10:09 a.m.

9 Due to ongoing health concerns related to  
10 Covid-19, we're holding these hearings electronically with  
11 the agreement of all the parties. My name is Josh  
12 Lambert, and I am the lead Administrative Law Judge for  
13 purposes of conducting this hearing. And my Co-Panelists  
14 today are Andrew Wong and Daniel Cho. I'm going to have  
15 the parties introduce themselves for the record.

16 Ms. Fickett, can you please identify yourself for  
17 the record.

18 MS. FICKETT: My name is Tracy Fickett, and I  
19 represent Rude Dog Bar & Grill.

20 JUDGE LAMBERT: Thank you.

21 And CDTFA, could you please introduce yourselves  
22 for the record.

23 MS. JIMENEZ: This is Mariflor Jimenez  
24 representing the CDTFA.

25 MR. PARKER: Jason Parker, representing CDTFA.

1 JUDGE LAMBERT: I believe you're muted,  
2 Mr. Brooks. I believe you have to unmute. It should be  
3 at the bottom of the screen. Okay. We seem to be having  
4 some technical difficulties.

5 But, Ms. Jimenez, is it okay if we proceed and  
6 identify that Mr. Brooks is present.

7 MS. JIMENEZ: Mr. Lambert, let me contact  
8 Mr. Brooks real quick, if I can have, like, a five-minute  
9 recess.

10 JUDGE LAMBERT: Okay. Then --

11 MR. BROOKS: Well, can you hear me?

12 MS. JIMENEZ: Oh, yes.

13 JUDGE LAMBERT: We can hear you now.

14 MR. BROOKS: Okay. I don't know what -- I mean,  
15 I had mute and unmute and either way it wasn't working.  
16 So I apologize. This is Christopher Brooks, Tax Counsel  
17 for CDTFA.

18 JUDGE LAMBERT: Yeah, it happens. Thanks. Okay.  
19 So the issue in this appeal as discussed previously, is  
20 whether Appellant has shown that further adjustments are  
21 warranted to the audited understatement of reportable  
22 taxable sales -- reported taxable sales.

23 Ms. Fickett, is that correct?

24 MS. FICKETT: Tracy Fickett speaking, yes, sir.

25 JUDGE LAMBERT: And, Ms. Jimenez, do you agree

1       that is the issue?

2               MS. JIMENEZ:   This is Mariflor Jimenez.   That is  
3       the issue.

4               JUDGE LAMBERT:   Thanks.

5               And we're going to be entering the evidence into  
6       the record.   Ms. Fickett provides Exhibits 1 through 11.  
7       CDTFA provides Exhibits A through M, and there were no  
8       objections.

9               Is that correct, Ms. Fickett?

10              MS. FICKETT:   Tracy Fickett speaking.   I have no  
11       objections.

12              JUDGE LAMBERT:   And, Ms. Jimenez, is that correct  
13       that there are no objections?

14              MS. JIMENEZ:   Mr. Lambert, this is Mariflor  
15       Jimenez.   That is correct.   No objections.

16              JUDGE LAMBERT:   Thanks.

17              So we will be entering that evidence into the  
18       record.

19              (Appellant's Exhibits 1-11 were received  
20       in evidence by the Administrative Law Judge.)

21              (Department's Exhibits A-M were received in  
22       evidence by the Administrative Law Judge.)

23              As previously discussed, there will be no  
24       witnesses introduced by the parties and -- oh, sorry.   I  
25       was just noticing a technical issue, but I think it's

1 correct now.

2 The order of the hearing will be that Appellants  
3 will be able to make a presentation with Ms. Fickett  
4 representing Rude Dog, the Appellant, and she will be 10  
5 minutes. At that time after she is done, OTA judges can  
6 ask questions. Then CDTFA will have 20 minutes to give  
7 their presentation, and the OTA judges may ask questions.

8 And after that, Ms. Fickett, if you want to, you  
9 can give a rebuttal for five minutes. So at this point  
10 let's get started. Ms. Fickett, if you're ready this is  
11 your opportunity to explain your position. And you may  
12 proceed.

13

14 PRESENTATION

15 MS. FICKETT: This is Tracy Fickett speaking.

16 On Exhibit 4 that was submitted, you can see that  
17 the audit allowed for a standard 2 percent pilferage in  
18 calculating the tested markup for determining complete  
19 sales reporting to the CDTFA. If you look at Exhibit 5,  
20 which is from the first audit, which is the audit we are  
21 discussing. It shows lower markups than the second. Let  
22 me give you some numbers. I'm sorry. Okay.

23 The markups in the -- excuse me. Okay. The  
24 markups in the first audit -- reported markups range from  
25 77 percent to a 111 percent over the audit period. The



1     audit period started in early 2012. When that audit  
2     period started, the Appellant, Rude Dog Bar & Grill,  
3     realized there was an issue with his inventory and having  
4     some of it consumed or taken by staff. And he implemented  
5     additional changes to address that. There was increased  
6     security on the excess inventory to control what was  
7     available for pilferage.

8             And then if you look at Exhibit 6 on the reported  
9     taxable sales markup analyses performed by the CDTFA, you  
10    will see that the markup change significantly from 2012 to  
11    2014 with the reported -- excuse me -- calculated markup  
12    of 157 percent to 209 percent, averaging at 167 percent  
13    over those -- that three-year period, which the -- the  
14    audited markup based on segregation testing and such done  
15    by CDTFA, came in at about 158 percent.

16            So the fact that the Appellant took the extra  
17    measures for security was able to control what happened,  
18    and we are looking for that 10 percent pilferage to be  
19    allowed.

20            Thank you.

21            JUDGE LAMBERT: Thank you, Ms. Fickett.

22            I'm going to ask the ALJs if they have any  
23    questions. Judge Wong, do you have any questions?

24            JUDGE WONG: This is Judge Wong. I have no  
25    questions at this time. Thank you.

1 JUDGE LAMBERT: Judge Cho, do you have any  
2 questions?

3 JUDGE CHO: This is judge Cho. I don't have any  
4 questions at this time. Thank you.

5 JUDGE LAMBERT: Thanks.

6 I don't have any questions at this time either.  
7 So we're going to proceed to CDTFA.

8 Ms. Jimenez, please proceed with your  
9 presentation. You have 20 minutes.

10 MS. JIMENEZ: Yes. Thank you, Mr. Lambert.

11

12 PRESENTATION

13 MS. JIMENEZ: This is Mariflor Jimenez.

14 The Appellant operates a sports bar in downtown  
15 Covina, California. The liability period is from  
16 January 1st, 2009, through December 31, 2011. Appellant  
17 did not provide any sales receipts, drinks menu, or any  
18 sales record showing the selling prices of drinks and food  
19 sold. There were no cash register Z-tapes, no guest  
20 checks, and no sales tax worksheet available for the audit  
21 period.

22 The Department compared reported taxable sales  
23 with cost of goods sold recorded on the profit and loss  
24 statement. The computed overall markup is 92 percent for  
25 the three years combined, and that will be on your

1 Exhibit C, page 164. This 92 percent book markup is  
2 considered very low for a sports bar. A low markup value  
3 is one of the indicators that taxable sales that are  
4 understated. The Department rejected reported taxable  
5 sales because of the lack of records and the low book  
6 markup.

7 A credit card ratio analysis was performed to  
8 estimate taxable sales. A one-day observation test was  
9 done on April 27, 2012. Credit card sales was divided by  
10 total sales for that day to compute a credit card to total  
11 sales ratio of around 48 percent. The credit card sales  
12 for the audit period is divided by 48 percent to compute  
13 the audited taxable sales. When that audited taxable  
14 sales were compared to Appellant's reported taxable sales,  
15 a difference of around \$1,873,000 was computed for the  
16 audit period. This calculation is on your Exhibit C,  
17 page 151.

18 The Department also estimated Appellant's taxable  
19 sales using the markup method. Because of the lack of  
20 sales records, a shelf test for food and nonalcoholic  
21 drinks cannot be performed. During the audit, the  
22 Appellant was requested to keep records of food sales,  
23 like, detailed register tapes and guest checks. You'll  
24 see that comment on your Exhibit Z, page 157.

25 However, no detailed sales documents were ever

1 provided. The appeals decision report recommended using  
2 100 percent as the markup for food and nonalcoholic  
3 drinks. Considering Appellant's type of business and the  
4 type of food served, this markup is more than reasonable  
5 and fair. After making allowances of 2 percent for  
6 pilferage and then another 2 percent for self-consumption,  
7 the markup factor of 100 percent was applied to the cost  
8 of food to compute the audited food sales of around  
9 \$354,000. And that's on your Exhibit B, page 64.

10 This amount was added to the audited alcohol  
11 sales, approximately \$3,337,000, to compute the total  
12 audited taxable sales of \$3,691,000. When the total  
13 audited taxable sales were compared to Appellant's  
14 reported taxable sales, a difference of around \$1,114,000  
15 was computed for the audit period; Exhibit A, page 35.  
16 Now, this amount supports the reasonableness of the  
17 audited taxable sales estimated using the credit card  
18 ratio method.

19 The Department wants to emphasize that the  
20 audited taxable sales calculated using the markup test are  
21 lower compared to the sales computed using the credit card  
22 ratio method. The markup test, which is the lower of the  
23 two tests, was used by the Department which benefits the  
24 Appellant. Both tests relied on assumption because of the  
25 lack of records. Both methods show substantial

1 understated taxable sales. Both tests also show over a  
2 million dollars of understatement.

3           The Department notice that the Appellant began  
4 reporting more of its taxable sales when the audit  
5 started. The average reported taxable sales during the  
6 liability period was around \$215,000 per quarter. And  
7 that will be on your Exhibit A, page 94. The auditor  
8 started the audit in February 2012. And for the first  
9 quarter 2012, Appellant reported taxable sales of  
10 \$291,000. And that will be on your Exhibit I, page 268.

11           I mentioned earlier that the overall book markup  
12 for this case is less than 92 percent. The Department  
13 ultimately used the understated sales established from the  
14 markup test, which is the most favorable to the Appellant.  
15 The post-audit overall markup is 144 percent. Now, the  
16 subsequent audit, which is from 2012 to early 2015, that  
17 has an overall book markup of 167 percent, which is on  
18 your Exhibit I, page 272.

19           This also supports the 144 percent markup  
20 calculated for this case. Appellant is now claiming that  
21 a 10 percent pilferage allowance on alcoholic beverage  
22 should be allowed. This 10 percent allowance was not a  
23 contention during the audit and even at the appeals  
24 conference. It was just conveyed recently when the case  
25 went to the Office of Tax Appeals.

1           Now, the Department utilizes a form called the  
2     "Bar Fact Sheet". This form is completed at the beginning  
3     of a bar audit. The information is obtained from the  
4     taxpayer or someone authorized to act on his or her  
5     behalf. It provides documentation for many areas that  
6     effect a bar markup, such as the pour size and glass  
7     sizes, drink pricing, self-consumption, and even  
8     pilferage.

9           If you take a look at the signed Bar Fact Sheet  
10    on your Exhibit C, page 172, if you look towards the  
11    bottom of that page, specifically, number 9, the question  
12    is, "Was there any inventory loss due to theft?"

13           The response is "no" to that question.

14           And it goes on to ask, "If yes to any of the  
15    above, please provide explanation, documentation, and  
16    amount of loss." That portion was left blank.

17           The form was completed and signed by Andy  
18    Wheeler, the Appellant, on February 1st, 2012. Based on  
19    this form, there's no indication that theft was a major  
20    issue at this establishment.

21           Now, to give a perspective, Appellant's alcohol  
22    cost of goods sold amount is around \$1,330,000. So  
23    10 percent of that amount is \$133,000 at cost. If we  
24    apply the markup factor using this audit of 258 percent,  
25    the retail value of this claim is actually \$343,000.

1           Now, the Appellant has been running this business  
2     for almost 30 years now. You'll see on your Exhibits J,  
3     K, and L, pages 274 to 284 that the Appellant has been  
4     operating this sports bar since 1992. An experienced  
5     owner such as the Appellant would know that \$133,000 worth  
6     of alcohol with a retail value of at least \$343,000 is  
7     missing. Also Appellant has not offered any evidence,  
8     such as police reports or insurance claims to support this  
9     huge inventory loss.

10           Now as far as bartenders giving away drinks, no  
11     self-consumption of ex-tax purchases was reported during  
12     the audit period. According to the Bar Fact Sheet,  
13     self-consumed alcoholic drinks were around \$300 each  
14     month. Therefore, the Department multiplied \$300 by  
15     36 months to compute unreported cost of self-consumed  
16     alcohol of \$10,800 for the audit period. And that's on  
17     your Exhibit C, page 136. The cost of alcohol purchases  
18     was reduced by \$10,800 for self-consumption.

19           As far as employees taking inventory, the cost of  
20     goods sold was also reduced by a 2 percent pilferage  
21     allowance. And that's on your Exhibit C, page 114. A  
22     pilferage amount of \$26,381 at cost was adjusted for  
23     alcohol for account -- to account for situations like  
24     employee theft. In addition, a pilferage amount of \$3,600  
25     of cost was adjusted for food and nonalcoholic drinks.

1           Now, CDTFA Audit Manual Section 809.30 states  
2     that an allowance for pilferage in excess of 2 percent may  
3     be given if the taxpayer provides evidence, such as police  
4     reports, insurance claims, reports from inventory control  
5     companies, or similar service firms. Appellant has not  
6     offered any evidence to substantiate its contention. And  
7     it also has not provided evidence to establish that any  
8     additional adjustment is warranted.

9           The Department's audit findings and adjustments  
10    are more than reasonable and fair. Therefore, the  
11    Department request the Appellant's appeal be denied. This  
12    concludes my presentation. I'm available to answer  
13    questions you may have.

14           Thank you.

15           JUDGE LAMBERT: Thanks.

16           I'm going to ask the Administrative Law Judge on  
17    the panel if they have any questions. Judge Wong, do you  
18    have any questions.

19           JUDGE WONG: This is Judge Wong. I have no  
20    questions. Thank you.

21           JUDGE LAMBERT: Thanks.

22           And Judge Cho, do you have any questions?

23           JUDGE CHO: This is Judge Cho. I don't have any  
24    questions for CDTFA. But if I can, I'd like to request  
25    that Appellant please discuss a response as to CDTFA's



1 statements regarding the \$343,000 in loss in the retail  
2 value of how -- what evidence you may have to show the  
3 additional pilferage amounts, and also, have an  
4 explanation as to why the owner didn't realize it sooner  
5 because of the significant value in loss, in your closing  
6 statement. Thank you.

7 MS. FICKETT: Tracy Fickett speaking. You wanted  
8 that answered now or did Judge Lambert have a chance to  
9 ask questions?

10 JUDGE LAMBERT: Ms. Fickett, you can answer the  
11 question now. Thanks.

12 MS. FICKETT: Okay. Okay. The gentleman was  
13 also -- the owner was not always there. And some of the  
14 theft questions on the Bar Fact Sheet would -- were  
15 interpreted as actually, you know, somebody coming in and  
16 steeling large quantities of product for which there would  
17 be a police report. The -- the missing sales question,  
18 again, he was working another job, and this is just a lack  
19 of oversight. I have no specific police reports or  
20 anything as indicated in the audit manual.

21 JUDGE CHO: This is Judge Cho. Thank you for  
22 your response. That's all the questions I had.

23 JUDGE LAMBERT: Thanks.

24 And I don't have any questions for CDTFA. So at  
25 this time, Ms. Fickett, if you'd like to speak, give a

1 rebuttal, you can have five minutes if you want.

2

3 CLOSING STATEMENT

4 MS. FICKETT: My rebuttal at this point, part of  
5 which I just gave -- this is Tracy Fickett. I'm sorry.

6 I was brought in to represent this taxpayer and  
7 take a look at the audit. I believe after the initial  
8 conference there were several items that has been  
9 reaudited and revised in the audit that I located that the  
10 previous representative did not. That's the answer or the  
11 response to Mariflor's comment about this is a new claim.  
12 As long as I've been involved with this audit, that has  
13 been an issue that I have raised.

14                      Thank you.

15 JUDGE LAMBERT: Thanks.

16 I guess one more time I'll just ask the judges if  
17 they would like to ask any more questions. Judge Wong, do  
18 you have any questions?

19 JUDGE WONG: This is Judge Wong. I have no  
20 questions. Thank you.

21 JUDGE LAMBERT: And Judge Cho, do you have any  
22 further questions?

23 JUDGE CHO: This is Judge Cho. I don't have any  
24 further questions. Thank you.

25 JUDGE LAMBERT: If there's nothing further, I'm

1     going to close the record and conclude the hearing.  I  
2     want to thank each party for coming in today.  In 100 days  
3     we'll issue a written opinion.

4             Thank you.  This hearing is now closed.

5             (Proceedings adjourned at 10:33 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was  
taken before me at the time and place set forth, that the  
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 3rd day  
of February, 2021.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER