

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
BARK EM SUPPLIES, LLC,) OTA NO. 19064942
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Thursday, December 17, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
BARK EM SUPPLIES, LLC,) OTA NO. 19064942
)
) APPELLANT.)
)
)
_____)

Transcript of Proceedings, taken at
12900 Park Plaza Dr., Suite 300, Cerritos,
California, 91401, commencing at 2:06 p.m.
and concluding at 3:07 p.m., on Thursday,
December 17, 2020, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

1 APPEARANCES:
2
3 Panel Lead: ALJ MICHAEL GEARY
4
5 Panel Members: ALJ TERESA STANLEY
6 ALJ JOHN JOHNSON
7
8 For the Appellant: JOHN FOUCHER
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
17
18
19
20
21
22
23
24
25

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

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received at page 10.)

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

OPENING STATEMENT

PAGE

By Mr. Foucher 11

APPELLANT'S

WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

Zena Carlson 12

PRESENTATION

PAGE

By Mr. Foucher 26

By Ms. Jimenez 32

CLOSING STATEMENT

PAGE

By Mr. Foucher 42

1 Cerritos, California; Thursday, December 17, 2020

2 2:06 p.m.

3

4 JUDGE GEARY: Good afternoon again everyone. My
5 name is Michael Geary. I'm the lead Administrative Law
6 Judge in this appeal, and we're here today to take
7 evidence and hear argument in the appeal of Bark Em Pet
8 Supplies, Limited. Office of Tax Appeals Case 19064942.
9 Today is December 17th, 2020, and the time is 2:05 --
10 2:06 p.m.

11 The issues in this case will be decided by a
12 panel of three judges. And I'm joined by my colleagues,
13 Judges Teresa Stanley and John Johnson. While I am lead,
14 each of us will be coequal participants in the
15 deliberations, and the issues will be decided by majority
16 vote.

17 Let's get the appearances for the record
18 beginning with the Appellant.

19 MR. FOUCHER: John Foucher on behalf of Zena
20 Carlson and Bark Em Pet Supplies.

21 JUDGE GEARY: And the Respondent.

22 MS. CARLSON: Zena Carlson with Bark Em Pet
23 Supplies, LLC.

24 JUDGE GEARY: That was the Appellant identifying
25 herself. Thank you.

1 Go ahead for Respondent.

2 MS. JIMENEZ: Good afternoon, Mr. Geary. This is
3 Mariflor Jimenez representing the CDTFA.

4 MR. PARKER: This is Jason Parker, Chief of
5 Operations Headquarters Bureau.

6 MR. BROOKS: And this is Christopher Brooks, tax
7 counsel for CDTFA.

8 JUDGE GEARY: Thank you everybody. This
9 Judge Geary speaking again. This is an appeal from a
10 decision issued by Respondent, California Department of
11 Tax and Fee Administration, denying in part Appellant's
12 petition for redetermination of an April 5th, 2018, Notice
13 of Determination by audit of additional tax due of
14 \$31,908.09, plus accrued interest, for the period
15 July 1st, 2012, through June 30, 2015. I say denied in
16 part because Respondent agreed earlier in the appeal to
17 delete a negligence penalty. So that is no longer
18 contested in this appeal.

19 The issue for hearing is whether Appellant is
20 entitled to a reduction of the measure of underreported
21 taxable sales determined by Respondent in its audit.

22 Before we discuss the evidence, I want to remind
23 the parties that OTA is an independent agency completely
24 separate and apart from the tax agencies that appear
25 before it. So arguments and evidence that may have been

1 filed with the agency do not always make it into OTA's
2 files. Our decision will be based upon the evidence
3 presented in this hearing.

4 Appellant has disclosed its intent to call two
5 witnesses, Ms. Zena Carlson who is participating in this
6 proceeding by telephone. And also there was an accountant
7 identified, a David Mitchell.

8 Mr. Foucher, is Mr. Mitchell still planning to
9 testify?

10 MR. FOUCHER: No, Your Honor. We are not able to
11 reach him.

12 JUDGE GEARY: All right. Thank you. So it will
13 just be Ms. Carlson, I take it, who will testify today?

14 MR. FOUCHER: That's correct.

15 JUDGE GEARY: Thank you.

16 Appellant has offered exhibits as proposed
17 evidence, and they have been marked for identification as
18 1 through 3. Respondent has indicated that it does not
19 plan to call any witnesses, but it has also offered
20 exhibits that have been marked for identification A
21 through E. My office, Office of Tax appeals, has
22 incorporated Appellant's witness disclosure and all
23 offered evidence into a digital binder, which my
24 Co-Panelists and the parties should have.

25 And I will address Mr. Foucher first.

1 Mr. Foucher, did you receive the binder?

2 MR. FOUCHER: I received it yesterday, Your
3 Honor.

4 JUDGE GEARY: And have you reviewed it to ensure
5 that it contains all of your proposed evidence?

6 MR. FOUCHER: It does contain all my proposed
7 evidence, yes.

8 JUDGE GEARY: Does the Appellant have any
9 additional physical evidence that it wants to offer?

10 MR. FOUCHER: No, Your Honor.

11 JUDGE GEARY: Thank you. Have you reviewed
12 Respondent's proposed evidence?

13 MR. FOUCHER: I have not. I believe it's no
14 different from what's been presented previously, and I'm
15 okay with all that.

16 JUDGE GEARY: All right. And this is Judge Geary
17 again. The Respondent has indicated that its evidence is
18 what has already been produced earlier in this appeal.
19 I'm going to ask you whether you have any objection to the
20 admission of Respondent's proposed evidence, Mr. Foucher.

21 MR. FOUCHER: I do not.

22 JUDGE GEARY: All right. The Respondent's
23 evidence Exhibits A through E are admitted.

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

1 Does -- pardon me. Ms. Jimenez, does Respondent
2 still plan to call no witnesses?

3 MS. JIMENEZ: Mr. Geary, this is Mariflor
4 Jimenez. That's correct. We will not have any witnesses
5 today.

6 JUDGE GEARY: This is Judge Geary again. And
7 have you reviewed the hearing binder to ensure it contains
8 all of Respondent's proposed evidence?

9 MS. JIMENEZ: We did, and we have all the
10 complete evidence in there.

11 JUDGE GEARY: All right. Thank you. And this is
12 Judge Geary again. Does Respondent have any additional
13 physical evidence that it want to offer?

14 MS. JIMENEZ: Mr. Geary, this is Mariflor
15 Jimenez. We don't have additional exhibits.

16 JUDGE GEARY: Thank you. Judge Geary here.

17 And does the Respondent -- has the Respondent
18 reviewed all of Appellant's proposed evidence,
19 Ms. Jimenez?

20 MS. JIMENEZ: We have.

21 JUDGE GEARY: Ask does Respondent have any
22 objections to Appellant's proposed evidence 1 through 3?

23 MS. JIMENEZ: Mr. Geary, we have no objections to
24 Appellant's exhibits.

25 JUDGE GEARY: Thank you. Judge Geary here.

1 Appellant's proposed evidence is admitted,
2 Exhibits 1 through 3.

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

5 Mr. Foucher, because you plan to call a live
6 witness, I will allow you to give an opportunity to give a
7 very brief opening statement for the sole purpose of
8 providing a brief outline of what you expect Ms. Carlson's
9 testimony to be. You're not required to do that. If you
10 want to, I will give you that opportunity. Do you want
11 to?

12 MS. CARLSON: Yes.

13 MR. FOUCHER: This is John Foucher and, yes, I
14 would like to give a very short opening statement.

15 JUDGE GEARY: All right. And after you give your
16 opening statement let me know when you're through. I will
17 administrate an oath or affirmation to Ms. Carlson before
18 she actually gives her testimony. I don't administrate
19 oaths or affirmation, obviously, to you or to the
20 Department's representatives because you are not here to
21 testify to any facts.

22 Can you tell me, Mr. Foucher, do you plan to
23 examine Ms. Carlson in a question and answer format, or do
24 you plan to ask her to just testify in a narrative form?

25 MR. FOUCHER: I'm going to be asking her

1 questions in a question and answer format, Your Honor.

2 JUDGE GEARY: Okay. All right. You may proceed
3 with a very brief opening statement.

4 MR. FOUCHER: So yes, Your Honor. Thank you.

5

6 OPENING STATEMENT

7 MR. FOUCHER: What we hope to establish here is
8 that Ms. Carlson had a process in place at Bark Em Pet
9 Supplies, LLC, that would catch everything, all products
10 being sold and to collect sales tax on it; that the markup
11 system that was used by the CDTFA is misstating what --
12 how much she sold in product. And that the -- and that it
13 does not take into account a lot of other cost that would
14 go into cost of goods sold to affect the markup, including
15 shipping and handling and items like that. And so
16 that's -- that's what we hope to show in here, and that's
17 my opening statement.

18 JUDGE GEARY: Thank you, Mr. Foucher.

19 Ms. Carlson, can you hear these proceedings okay?

20 MS. CARLSON: Yes, sir.

21 JUDGE GEARY: Good. And we can hear you fine so
22 far. I'm going to ask you to please raise your right hand
23 and tell me when it's raised, since I can't see you.

24 MS. CARLSON: It's raised.

25 JUDGE GEARY: Thank you.

1 ZENA CARLSON,
2 produced as a witness, and having been first duly sworn by
3 the Administrative Law Judge, was examined and testified
4 as follows:

5
6 JUDGE GEARY: Thank you.

7 Mr. Foucher, you may begin your examination of
8 the witness.

9 MR. FOUCHER: Thank you, Your Honor.
10

11 DIRECT EXAMINATION

12 BY MR. FOUCHER:

13 Q Ms. Carlson, when did you start Bark Em Pet
14 Supplies?

15 A 2010.

16 Q Okay. And where did you start it?

17 A In Camarillo.

18 Q Okay. And what were you selling at first?

19 A Product only.

20 Q By product, what would that be?

21 A Pet food, pet supplies, miscellaneous. Pretty
22 much all pet supplies, yeah.

23 Q Okay. Thank you. And did you ever start to sell
24 anything other than pet supplies?

25 A We opened up grooming and training at first, and

1 then we moved onto boarding, daycare, V.I.P. service,
2 teeth cleaning.

3 Q Thank you. And -- I'm sorry. I'm getting
4 off-track already. And during the period of this audit,
5 2013 to 2015, how many stores did you operate?

6 A We opened -- we started off with one store, and
7 then in 2013 we opened up a location in Oxnard,
8 California, so two. But we also closed it a year later,
9 something close to that.

10 Q Okay. And about how much of your sales was in
11 services during the 2013 to 2015 period?

12 A More service than product, I can say that.

13 Q And how do you know that?

14 A Well, the way we did it was -- the easiest way
15 for us is when we printed -- when we closed our register
16 out at the end of the day, whoever closed that night would
17 pull the daily report -- register report, and they would
18 pull tax money for product that was sold that day and put
19 it into a separate bank bag. And then I would get that
20 and process deposits and pull the tax money, separate it.
21 And then when the quarter -- the quarter would end, I
22 would go onto BOE online website and process the quarter
23 taxes.

24 Q Okay. So you did this on a quarterly basis?

25 A Correct.

1 Q Is that correct?

2 A Yes.

3 Q Did ever change?

4 A It changed once we received an audit. The gal
5 that I was working with, the first person, I don't recall
6 her name. But she told me that it wasn't wrong the way I
7 was doing it, but I really should report every quarter
8 product sales plus service sales. So we changed it at
9 that point, but to every year every quarter we always did
10 it the easiest way we knew how.

11 Q Okay. Thank you. And were you actually
12 physically in the store yourself?

13 A No. I worked for a computer parts warehouse in
14 Camarillo from 2003 to 2016 full time.

15 Q So who was pulling these receipts?

16 A It would be the staff -- the register operates.

17 Q Okay. And so can we take a look at Exhibit 3?
18 That's on page 7 of your binder.

19 MR. FOUCHER: Your Honor, I'm having trouble
20 getting to it myself. There you go. Okay.

21 BY MR. FOUCHER:

22 Q And page 7, do you recognize this?

23 A The register receipt?

24 Q Yes.

25 A Yes.

1 Q Okay. And what -- can you tell me what this
2 represents?

3 A This represents the daily sales for 3/13. That's
4 the day. And then boarding, cat food, dog food, grooming,
5 dog miscellaneous, bath, daycare, and nails are separated
6 by department.

7 Q Okay.

8 A So on that day grooming was \$827 by itself.

9 Q Okay. And so that would be a service; right?

10 A Yes.

11 Q Okay. And so it looks like we've got \$1,356.29
12 total sold that day; is that correct?

13 A That's correct.

14 Q Okay. And we show tax \$8.34. How was that
15 arrived at?

16 A That was calculated at for at 7.25 percent for
17 all product; cat food, dog food, dog miscellaneous on that
18 ticket.

19 Q Okay. And is that automatically done by the
20 register?

21 A Yes.

22 Q Okay. Okay. And then we've gone an entry for
23 void, negative \$58. What is that?

24 A Sometimes things are voided if people don't
25 have -- if their credit card doesn't go through or if it

1 was put in the wrong department or anything like that
2 pretty much.

3 Q Okay. And then I think some of the items below
4 that are pretty self-explanatory; how much cash, how much
5 came in by checks, how much came in by charge card.

6 A Correct.

7 Q At the bottom it says, "CID, \$298.27." What is
8 that?

9 A That's the balance in the cash drawer because
10 there was a payout for \$56.43. So after that was taken
11 out, the total amount in the register was \$298.27.

12 Q Okay. And why was \$56.43 taken out and paid?

13 A It could have been for a cash service. People
14 come and clean our windows or, you know, stuff like that,
15 or lunch for the employees. It was a payout. It was a
16 payable.

17 Q Okay. And then at the bottom, "GT". I assume
18 that means "Grand Total", \$245,000 --

19 A Yeah.

20 Q -- and change?

21 A Yeah. Yes.

22 Q And what is that?

23 A Well, that's the gross total of all sales up to
24 3/13. But a lot of times you can't really bank on that
25 because if there's a mistake it can't be corrected. It's

1 just that's the daily take for that day. And if it's
2 corrected, it goes on to a different day if there was an
3 issue. Sometimes Craig, my husband, would run the
4 register, and his big fingers would hit the wrong keys and
5 we would have a sale in there that was just outrageous.

6 So I would have to correct it the next day with a
7 copy of the correction. And all that would be put into
8 the registers for back up.

9 Q Okay. And so that's the grand total of sales for
10 all year; is that correct?

11 A Yes. For that grand total, yes.

12 Q Starting January 1st going to March 13th?

13 A 13, yes. Correct. Yeah.

14 Q Okay. Good. Thank you. All right. Let's see.
15 Okay. And so with this tape it shows a certain amount of
16 sales tax. What would have happened on that amount of
17 sales tax for that day?

18 A That there would be a receipt -- an extra receipt
19 printed to go along with the taxes that were due for that
20 day. And they would pull \$8.34 out of that register, and
21 that would all be put in one separate bag for taxes only.

22 Q Okay.

23 A And that would be given to Craig, and Craig would
24 bring it home. And I would, you know, do my accounting in
25 the evenings.

1 Q Okay. And we refer to Craig a lot. Can you tell
2 us who Craig is?

3 A Craig is my husband. He's the one that ran the
4 store 100 percent.

5 Q All right. Thank you. And do you see any way
6 that you would have missed any items that you owed sales
7 tax on?

8 A You know, we have to bank on our staff to ring
9 things up correctly. That's pretty much the way it's --
10 I mean, there's no way I'd know, you know. So we did have
11 cameras over the register. And, you know, so we know, you
12 know, the product that they -- if -- if there was an
13 issue, we'd be able to see if there was something rung up
14 wrong or, you know. But there was no flag. There was no
15 way that I would know.

16 Q Okay. Thank you. Now let's -- and so you're
17 familiar with how the CDTFA did its -- its audit on your
18 store; correct?

19 A Yes.

20 Q Yeah. Okay. And they included a markup on the
21 product. Do you have any issues with that markup?

22 A Yes, I do. Because a lot of times, like the
23 Green Tripe invoice, the product was calculated for the
24 markup but none of the packing fees or the freight. And
25 that vendor is one vendor that charges a lot because they

1 shipped us these frozen tubes of Green Tripe, and it's
2 heavy. They are frozen foods. So they charged, you know.
3 They have to in order to -- for it to make sense for them.
4 So we do pay a lot on freight and packing fees. So I
5 don't feel that's been counted into the markup figures.

6 Q Okay. Well, let's go to -- let's see. It's
7 Exhibit 1 or Exhibit A, page 5, in the binder.

8 A I'm there, if you're there.

9 Q Okay. Good. So and -- so can you tell us what
10 this is?

11 A This is the Green Tripe invoice.

12 Q Okay.

13 A Is that what you're looking at?

14 Q That's what we're looking at, yeah.

15 A Okay.

16 Q So you would get a shipment of Green Tripe, and
17 so what would you have to -- or for the shipment, it looks
18 like you would have to pay \$413.91; correct?

19 A Correct.

20 Q Okay. Was that the figure that the CDTFA used
21 for its markup?

22 A You know, I'm not sure because they just figured
23 a percentage based on the sale of the price of the items.
24 So we're looking at the Green Tripe, and then we're
25 looking at the Excalibur.

1 Q Okay.

2 A It should be on there. Yeah.

3 Q Let's go to the next page, if we can.

4 A Okay.

5 Q Do you recognize this piece of paper?

6 A I don't have that one in front of me. Which one

7 is it?

8 Q It's the next page. It's going to be page 6 in

9 the in that binder. I've got it marked as Exhibit A, and

10 that OTA has marked it as Exhibit 2?

11 A Okay. I don't have that binder up. I just went

12 off my printed paper.

13 Q Oh, okay.

14 A Yeah. So if you could --

15 Q So it's --

16 A -- pretty much remember them all.

17 Q Yeah. I'll represent to you it's the shelf test.

18 A Okay.

19 Q And it's a list of products, and there's some of

20 your handwriting at the top and bottom of it?

21 A Oh, yeah. I have that. Yeah.

22 Q Okay. So do you see. I guess it's line 25. We

23 have Green Tripe two-pound roll. Do you see that?

24 A Yes, I see it.

25 Q Okay. And so they're showing a markup there of

1 399-and-a-half percent. Is that a correct markup for
2 Green Tripe two-pound roll?

3 A Well, I don't think so because they didn't
4 calculate the freight and the packing fees in there. I
5 mean, I don't see it on here.

6 Q Okay. And we can see the freight and packing
7 fees on the page previous to that, the invoice we were
8 just talking about; correct?

9 A Correct. They're just calculating the \$7.99, but
10 it should be actually more than \$7.99.

11 Q Okay. Thank you.

12 A You're welcome.

13 Q And how representative is Green Tripe of the
14 shipping costs for product that you had?

15 A I'm sorry. What was that?

16 Q So how -- did other products have similar
17 shipping cost to Green Tripe?

18 A Yes. We had other products that charged for
19 pallets. They would charge for packaging, you know, for
20 boxes. It just varied, you know. Some of them, if they
21 were big -- big venders, they didn't charge because they
22 could have -- you know, they had deep pockets. So --

23 Q Okay. All right. I'm going move to -- talk
24 about the income tax returns you filed for these years.
25 How did you calculate how much you owed on income tax?

1 A Well, what I did at the end of the day of the
2 year is I would pull all the expenses, all the sales, and
3 put them on an income statement and balance sheet. And I
4 would send them over to our accountant, and they would
5 calculate our taxes for us.

6 Q Okay. And so do you know what went into the cost
7 of goods sold on your --

8 A I don't. I don't. I questioned them. I have
9 e-mails that I've sent them. I've called them, and they
10 wouldn't respond to me of how they came up with the cost
11 of goods sold.

12 Q Okay. All right. Thank you. Do you have any
13 idea how you could have missed 100 percent -- or how you
14 could have missed 50 percent of the product that was being
15 sold?

16 A There's no way, because money was pulled daily
17 and it was put aside. And then when the quarter came, I
18 went online and processed the taxes and recorded the sales
19 for product only and paid that amount online. So I don't
20 know how that could have happened if we went off the
21 register receipt.

22 Q Okay. And what has happened to Bark Em Pet
23 Supplies?

24 A We closed the store 2019 in April. So we don't
25 exist anymore. It just got really hard to manage it with

1 my husband and myself. So we decided to close the store.

2 Q Okay. And if the -- if this determination is
3 sustained, what will it do to your family?

4 A It would be a huge hardship. Craig and I are
5 both on unemployment. That's the only income we have, and
6 that is running out at the end of December. So we -- we
7 really don't know, you know. We've been looking for work,
8 but it's really been hard. So --

9 Q All right. Thank you.

10 A You're welcome.

11 Q I'm going to ask if there's anything that you
12 want you want to add to what we've discussed so far?

13 A No. I just -- I just want to say that, you know,
14 we did it the easiest way we knew how. And if numbers
15 didn't look right or didn't get crunched in right at the
16 year, you know, I don't -- I don't know, you know. I'm
17 not an accountant. But I just know how I processed our
18 sales taxes each quarter on product.

19 I mean, we had service and we had product, and
20 everything went through the register, and we ran receipts.
21 And when they were printed out at the end of the day and
22 collected the money for it, that's what was processed. If
23 something was missed or if somebody rung something up
24 wrong, there's really no way that I would know. So --

25 Q All right. Good.

1 A And we were consistent with that until we got
2 audited, and then we changed it.

3 Q Okay. All right. Thank you.

4 A You're welcome.

5 MR. FOUCHER: I have no further questions.

6 JUDGE GEARY: Thank you, Mr. Foucher. This is
7 Judge Geary again.

8 I'll turn to Respondent. Ms. Jimenez, do you
9 have any questions for this witness?

10 MS. JIMENEZ: Mr. Geary, this is Mariflor
11 Jimenez. We have no questions for the witness.

12 JUDGE GEARY: Thank you. This is Judge Geary
13 again.

14 Let me ask my Co-Panelists, beginning with
15 Judge Johnson. Judge Johnson, do you have any questions
16 for the witness?

17 JUDGE JOHNSON: This is Judge Johnson. No
18 questions. Thank you.

19 JUDGE GEARY: Thank you. Judge Geary again.

20 I'll turn to Judge Stanley. Judge Stanley, do
21 you have any questions for the witness?

22 JUDGE STANLEY: This is Judge Stanley. I don't
23 have any questions for Ms. Carlson. Thank you.

24 JUDGE GEARY: Thank you. Judge Geary again. And
25 I have no question for the witnesses.

1 Thank you. Ms. Carlson. For your testimony.

2 And I take it, Mr. Foucher, that this concludes
3 the testimony part of your case?

4 MR. FOUCHER: That's correct, Your Honor.

5 JUDGE GEARY: All right. Let me just confirm
6 with the Department. The Department has no live witnesses
7 to offer; correct?

8 MS. JIMENEZ: Judge Geary, this is Mariflor
9 Jimenez. You are correct.

10 JUDGE GEARY: All right. Then the evidence has
11 been presented, and we are now going to move to the
12 argument phase. I think we discussed in a prehearing
13 conference that the parties would be allowed approximately
14 15 minutes for their chief arguments. Because the
15 substantial part of the burden in a case like this rest
16 with the taxpayer.

17 I believe I indicated to Mr. Foucher that he
18 would be allowed 15 minutes for his first argument, and
19 the Department would be allowed -- Respondent would be
20 allowed 15 minutes for its argument. And then I would
21 allow Mr. Foucher to make a closing brief argument with
22 approximately five minutes to conclude the argument phase.

23 I'll just mention to you, Mr. Foucher, that if
24 you wanted to reserve a little time from your first
25 closing and save it for a final closing, I'll leave that

1 up to you. And the final closing is entirely optional.
2 You're not required to give a final closing if you don't
3 want to. Mr. Foucher, are you ready to give your closing
4 argument?

5 MR. FOUCHER: I am.

6 JUDGE GEARY: In that case you may proceed.

7 MR. FOUCHER: Okay. Thank you.

8

9 PRESENTATION

10 MR. FOUCHER: This is John Foucher, again, on
11 behalf of Zena Carlson and Bark Em Pet Supplies. And I
12 wanted to first -- let's look at the Green Tripe receipt.
13 And we see there's packaging and shipping there in an
14 amount of more than \$111 on a -- on sales of less than
15 \$300 or just over \$300. They came in a single shipment.
16 It makes sense to consider them together. And so when we
17 look at these, we can do calculations same way as the
18 CDTFA did to determine what's -- to determine the amount
19 of markup here.

20 So the shop paid \$92 for the Green Tripe and
21 \$211.60 for the Excalibur. We add these up, and the shop
22 is paying \$313.60 for the product alone. The Green Tripe
23 makes up 30.3 percent of that. The Excalibur makes up
24 69.7 percent. The actual cost of all this is \$413.91.
25 The portion of the Green Tripe of that is \$125.43, and the

1 Excalibur would come to \$288.48.

2 So if you include the cost of shipping and
3 freight in the price per pound for Green Tripe, we come up
4 to \$2.73. For Excalibur it's \$3.14. That means the cost
5 for each of these items is understated by 36.5 percent.
6 The cost for Excalibur should -- you know, most of these
7 should be 36.5 percent higher. Adjusting the cost by 36.5
8 percent would bring us to \$500.29.

9 When we go to -- when we go to the second page of
10 my Exhibit A, that would be Exhibit 2. And so we look
11 here at the retail price on the cost. At line 24,
12 Excalibur, they show a cost of \$2 .30. That should be
13 \$3.14. And the total cost of these two items should be
14 \$520.29. The total retail price that they show on the
15 lines 24 and 25 would be \$597.50. If we readjust this
16 chart it should now show the cost as -- or the -- I'm
17 sorry.

18 The total retail price would be adding the -- so
19 if we go down -- so let's apply 36.5 percent to -- as an
20 adjustment to the cost of everything. We would go from
21 \$366.51 at the bottom of Column E. That should come up to
22 \$500.29 because we're adjusting it by 36.5 percent,
23 because we're including freight and shipping in there as
24 part of the cost. We've got a gross profit that's going
25 to be a lot less. The total retail on this doesn't

1 change.

2 If we add the cost and the gross profit, that
3 comes to -- on this chart comes to \$597.50. But if we are
4 putting \$500.29 at the bottom of Column E, that means that
5 the gross profit should be \$97.30, and the markup should
6 really be 19.44 percent. It seems to me that the CDTFA
7 has overstated the markup a great deal because it hasn't
8 included the shipping and handle. That's something that
9 commonly goes into cost of goods sold. We have a cost of
10 goods sold in Bark Em Pet Supplies' income tax returns
11 that appears to be higher than the cost -- than the price
12 of the product that was sold.

13 Part of that has got to be because the
14 accountant -- who we've heard won't come and talk about
15 what was going on here -- he must be putting a lot of cost
16 like this into cost of goods sold, which is a standard
17 thing for accountants to do, for tax returns to include
18 these kinds of cost and the cost of goods sold. So we
19 should be looking at a 19.4 percent markup.

20 I'm also going to talk about just how this works.
21 I mean, we have, you know, we've got documentary evidence
22 from the CDTFA who came in and did a statistical -- it did
23 a statistical survey of what's going on with Bark Em Pet
24 Supplies' records. I understand the basis for this. It
25 makes sense statistically. I understand the process they

1 took. It's a long and complicated process. It's hard to
2 understand for a layman. And I'll say I usually don't
3 practice in sales tax. I come from the income tax world.

4 And so what we've got here is we started with a
5 sampling of month of sales or less than 3 percent of the
6 total audit period. We're applying a bunch of factors to
7 that month of sales; the percentage of sales by credit
8 card; the percentage of sales that are product versus
9 services. And they came up with an error factor of
10 100 percent and applied it to all three years, assuming
11 that every month looks the same, like the sampled one. It
12 makes sense, and it gives the burden on the taxpayer to
13 come back and say, hey, you're wrong. We've got more
14 records that show that this is wrong.

15 Unfortunately, she doesn't have those records.
16 Some of them were stolen. The -- as you'll see in the --
17 in the CDTFA's evidence, some of them the receipts faded
18 over time. And so if there's an error -- if that sampled
19 month isn't representative of the entire period, there's
20 an error that's going to be magnified by 36 times
21 throughout the -- throughout this whole audit period.

22 And yeah, she's got the opportunity to bring more
23 documentation to challenge the statistics, but the
24 problems of doing that are immense to her. She's lost the
25 underlying documents, and she's got a tough time figuring

1 out the CDTFA's methods. And so she allegedly
2 underreported her product sales by 100 percent. We've got
3 her oral testimony that she has no idea how something like
4 this could have happened.

5 100 percent. That means every -- for every piece
6 of product that she sold, there's another piece of product
7 that she didn't collect the tax on, that somehow got out
8 of store that she -- that got paid for, and that with her
9 system of paying sales tax everybody and having cameras
10 looking on the people -- on the people at the cash
11 register or the cashiers, somehow she missed every other
12 piece of product going out there. And that -- that just
13 kind of boggles the mind.

14 This is somebody who reported sales tax in good
15 faith, and now the Department says, basically, she owes
16 much again as she has already paid out. It's going to
17 break her financial back. She's not sophisticated. She
18 doesn't make a lot of money, and she couldn't keep all of
19 the receipts. And it just seems that this is a situation
20 where the audit may make sense -- may make statistical
21 sense, but it doesn't. And we've got her oral testimony
22 that she did a system that would catch all the sales tax
23 and oral testimony is evidence.

24 So with that, I'll turn it over and hope to hear
25 from the CDTFA.

1 JUDGE GEARY: Thank you, Mr. Foucher. This is
2 Judge Geary.

3 Let me just ask my Co-Panelists if they have any
4 questions for Mr. Foucher about the -- about the
5 Appellant's argument. First, Judge Johnson.

6 JUDGE JOHNSON: This is Judge Johnson. No
7 questions. Thank you.

8 JUDGE GEARY: Thank you. Judge Geary again.
9 Judge Stanley, do you have any questions for
10 Mr. Foucher?

11 JUDGE STANLEY: Just a quick one with respect to
12 your Exhibit 3, Mr. Foucher, do you -- are you applying
13 shipping and handling charges to every vendor that's on
14 that chart based on the one invoice you included in the
15 exhibits?

16 MR. FOUCHER: No. It's just to the product sales
17 and not to the service sales. What I'm showing is that
18 we -- and Ms. Carlson testified that the shipping and
19 handling charges from Green Tripe were pretty
20 representative. So, yes, we would be applying it to the
21 dog food and cat food and nothing else on the -- or the
22 miscellaneous, the taxable items but not the services.

23 JUDGE STANLEY: This is Judge Stanley. Thank
24 you, Mr. Foucher.

25 JUDGE GEARY: Thank you, Judge Stanley. This is

1 Judge Geary again.

2 Ms. Jimenez, are you prepared to -- I assume
3 you'll be giving the argument for Respondent?

4 MS. JIMENEZ: Mr. Geary, this is Mariflor
5 Jimenez. You are correct.

6 JUDGE GEARY: And you're ready to go?

7 MS. JIMENEZ: I am.

8 JUDGE GEARY: You may proceed.

9

10 PRESENTATION

11 MS. JIMENEZ: All right. Appellant is a limited
12 liability company operating a pet store with two
13 locations. Both stores sold pet food, supplies and also
14 provided grooming, vaccination, training, and pet daycare
15 services. The first store was located in the City of
16 Camarillo. It operated from July 1st, 2012, through
17 April 27, 2019. The second store was located in the City
18 of Oxnard. This shop operated from May 4, 2013, through
19 November 28, 2014.

20 The Department performed an audited examination
21 for the period of July 1st, 2012, through June 30, 2015.
22 According to Appellant, the daily sales are recorded in a
23 sales tax worksheet, and reported sales are based on the
24 sales tax reimbursement collected. Therefore, Appellant
25 did not report its nontaxable sales.

1 Appellant failed to provide cash register Z-tapes
2 for the audit period. So there were no source documents
3 to show the total sales on both stores. There are no
4 purchase journal or inventory records. And Appellant only
5 provided merchandise purchases invoices for first quarter
6 2015. Based on the reported taxable sales of around
7 \$292,000 for 2013 and 2014, and the recorded cost of goods
8 sold of \$421,000, the Department computed a taxable
9 bookmark up of negative 31 percent. And that would be on
10 your Exhibit D, page 1352.

11 A negative markup means reported taxable sales
12 are less than the cost of goods sold. It also means that
13 Appellant did not report all of its taxable sales. The
14 Department rejected reported taxable sales due to the lack
15 of reliable records and the negative taxable book markup.

16 California imposes sales tax on a retailer's
17 retail sales in the state of tangible personal property
18 measured by the retailer's gross receipts, unless the sale
19 is specifically exempt or excluded from taxation by
20 statute. And that's Revenue & Taxation Code Section 6051.
21 All of a retailer's gross receipt are presumed subject to
22 tax unless the retailer can prove otherwise.

23 It is the taxpayer's responsibility to maintain
24 and make available, for examination on request, all
25 records necessary to determine the correct tax liability,

1 including bills, receipts, invoices, or other documents of
2 original entry supporting the entries in the book of
3 accounts. That's Section 7053 and 7054.

4 When the Department is not satisfied with the
5 accuracy of the tax return filed, it may base its
6 determination of the tax due upon the facts contained in
7 the return or upon any information that comes within its
8 possession, Section 6481. When a taxpayer challenges a
9 Notice of Determination, the Department has the burden to
10 explain the basis for that deficiency.

11 Where the Department's explanation appears
12 reasonable, the burden of proof shifts to the taxpayer to
13 explain why the Department's asserted deficiencies not
14 valid. Except as otherwise specifically provided by law,
15 the burden of proof is upon the taxpayer to prove all
16 issues of facts by a preponderance of the evidence. That
17 is, the taxpayer must establish by documentation of other
18 evidence that the circumstances it asserts are more likely
19 than not to be correct.

20 When a right to an exemption from tax is
21 involved, the taxpayer has the burden of proving his --
22 this right to the exemption. Any taxpayer seeking
23 exemption from the tax must establish that right by the
24 evidence specified by the regulation. A mere allegation
25 that sales are exempt is insufficient.

1 The Department performed a shelf test based on
2 randomly selected purchase invoices from 2017. The test
3 was based on the retail sale prices of 28 item that
4 included pet food and supplies. This test disclosed a
5 shelf test markup of approximately 63 percent. And that
6 would be Exhibit A, page 68. Now, compare that to taxable
7 bookmark up negative 31 percent using the reported taxable
8 sales and reported cost of goods sold.

9 Department reduced that shelf test markup by
10 10 percent, from 63 to 53 percent, in order to allow for
11 sales discounts offered to customers. Also, the
12 Department reduced the claimed cost of goods sold by 1
13 percent pilferage allowance. Now, the Department did not
14 adjust the cost of goods sold for self-consumption since
15 Appellant claimed that customers provided their own feed
16 for their pets in daycare and training. Plus, Appellant
17 stated that the cost of goods sold did not include any
18 grooming supplies which indicates that there was no
19 self-consumption of resale merchandise. These discussions
20 are in your Exhibit A, page 24 and page 103, and
21 Exhibit E, page 7.

22 The reduced taxable markup of 53 percent, plus a
23 markup factor of 1, was applied to the reduced cost of
24 goods sold of around \$162,000. This is to compute the
25 audited taxable sales of approximately \$246,000 for 2014.

1 Department compared the audited taxable sales to the
2 reported taxable sales of around \$122,000 for 2014 to
3 compute unreported taxable sales of approximately
4 \$123,000. This is an error ratio of around 101 percent.
5 The calculations are in your Exhibit A, page 67.

6 The Department applied the error ratio of
7 101 percent to the reported taxable sales of around
8 \$435,000 for the audit period to compute unreported
9 taxable sales of \$438,000. And that will be on your
10 Exhibit A, page 66. A portion of the understatement was
11 then allocated to each business location to account for
12 the applicable tax rates and local allocation. The
13 Department wants to point out that the Appellant only
14 reported taxable sales of \$435,000.

15 By using the markup of cost, the audited taxable
16 sales of around \$873,000 was established. By using the
17 credit card projection of sales method, the audited
18 taxable sales of around \$823,000 was computed. That will
19 be on your Exhibit A, page 50. Now, both tests relied on
20 assumptions because of the lack of records. Both methods
21 showed substantial understated taxable sales. The
22 difference between the two methods that the Department
23 used is only 6 percent. The fact the variance between the
24 two tests is small shows that the markup test is
25 reasonable.

1 I do want to address Appellant's contention
2 regarding the separately stated charge for packing and
3 shipping. The Department agrees that the purchases from
4 GreenTripe.com have shipping and packing charges on it.
5 However, there's no evidence that shipping was added to
6 all the inventory purchases as Appellant is claiming. In
7 fact, majority of the available purchase receipts have
8 free shipping. You'll see all the purchase invoices on
9 Exhibit A, pages 109 to 136.

10 Now, the Department already adjusted down by 10
11 points the computed markup of 63 percent per shelf test to
12 reflect that lower markup of 53 percent. This is in order
13 to factor in the coupons and discounts offered to
14 customers. This greatly benefits the Appellant. The
15 Appellant did not provide purchase journals or purchase
16 invoices to support the amount claimed on the 2014 federal
17 income tax return. So the Department was unable to verify
18 if that purchase amount was complete.

19 In addition, the Department was unable to perform
20 purchase segregation testing to assert if any expense
21 items were actually inadvertently included with the
22 purchase amount posted to the cost of goods sold. The
23 Department asked Appellant on multiple occasions if the
24 amount claimed as cost of goods sold on Appellant's
25 federal income tax return included the cost of any

1 supplies or products, such as pet shampoo used in the
2 service side of the business for pet grooming, training,
3 or even the pet daycare.

4 The Appellant told the Department the only items
5 included in the cost of goods sold were purchases of items
6 for sale to customers in the retail portion of that
7 business. Therefore, the Department accepted the purchase
8 claimed on the 2014 federal income tax return without
9 additional investigation or surveys of vendors. The
10 Department is willing to make additional adjustments by
11 adding the prorated shipping and packing charges to the
12 cost on the individual items listed on the shelf test on
13 Exhibit A, page 68.

14 This in turn, will increase the cost of the item
15 which will lower the markup and would decrease the taxable
16 measure. If the purchase invoice for the shelf items
17 listed on Exhibit A, page 68, includes a separately stated
18 shipping, freight, and packing charges, the Department
19 will adjust the cost of that specific item to include the
20 prorated and/or handling when calculating that markup.

21 Besides that, the Appellant has not provided
22 documentation or essential information to support any
23 additional adjustment to the unreported taxable sales.
24 The Department's audit findings are more than reasonable
25 and fair. Therefore, the Department request the

1 Appellant's appeals be denied.

2 This concludes my presentation. I'm available to
3 answer questions you may have.

4 JUDGE GEARY: This is Judge Geary. Thank you,
5 Ms. Jimenez. I have a question to begin with for you.

6 MS. JIMENEZ: Okay.

7 JUDGE GEARY: I'll also open it up to my fellow
8 Judges to see if they have anything. But you mentioned
9 that the Department might be willing to make or would be
10 willing to make some adjustments.

11 MS. JIMENEZ: Yes.

12 JUDGE GEARY: Are you -- is the Respondent
13 proposing that we keep the record open to allow the
14 Department to make adjustments based upon information it
15 has now? Or does Respondent need additional information
16 from the Appellant in order to make the adjustments you
17 referred to?

18 MS. JIMENEZ: Mr. Geary, this is Mariflor. We
19 could use the information that we already have at this
20 point, because we do have the purchase invoice for the
21 shelf test. And we're willing to adjust those cost on
22 that shelf test if there is freight and handling charges
23 included on that purchase invoice.

24 JUDGE GEARY: Okay. So Judge Geary again. At
25 the conclusion of our discussion, it sounds like the,

1 Department, Respondent, agrees that if we allow the record
2 to remain open for a period of time, the Department would
3 be able to make those adjustments?

4 MS. JIMENEZ: Mr. Geary, this is Mariflor
5 Jimenez. Yes, that's correct.

6 JUDGE GEARY: All right. Thank you. This is
7 Judge Geary again.

8 Before I turn back to Mr. Foucher and ask him if
9 he would like to make a final closing, let me ask my
10 colleagues. Judge Johnson, do you have any questions for
11 Respondent?

12 JUDGE JOHNSON: Judge Johnson. No questions.
13 Thank you.

14 JUDGE GEARY: Thank you. Judge Geary again.

15 And let me ask Judge Stanley if she has any
16 questions for Respondent.

17 JUDGE STANLEY: Yes. This is Judge Stanley, and
18 I just -- I was trying to follow along with you,
19 Ms. Jimenez, and missed what page number you were talking
20 about when you were talking about making additional
21 adjustments. So you have the purchase invoices somewhere
22 in Exhibit A, but I missed the page number or numbers.

23 MS. JIMENEZ: All right. This is Mariflor
24 Jimenez. Ms. Stanley, are you talking about the shelf
25 test or the actual copies of the purchase invoices?

1 JUDGE STANLEY: This is Judge Stanley. I'm
2 asking about the documents upon which you're going to base
3 your additional adjustments. Where are you finding the
4 shipping and handling charges that you propose to
5 adjustment for?

6 MS. JIMENEZ: Okay. That will be, I believe,
7 page -- Judge Stanley, this is Mariflor Jimenez. The
8 shelf test items are listed on Exhibit A, page 68.

9 JUDGE STANLEY: This is Judge Stanley. Thank
10 you. I don't have any more questions.

11 MR. PARKER: Ms. Stanley, this is Jason Parker.
12 I wanted to add, you asked about the purchase invoices
13 that we would be looking at. We would be looking at the
14 Green Tripe invoice that the Appellant offered in their
15 exhibits that has the shipping and handling. Then we
16 would also be looking at the purchase invoices from --
17 it's Exhibit A, page 109 to, I believe, page 133, if they
18 have freight or shipping on those invoices.

19 JUDGE STANLEY: This is Judge Stanley. Thank
20 you, Mr. Parker. That makes sense.

21 JUDGE GEARY: Thank you. This Judge Geary back
22 again.

23 And Mr. Foucher, would you like to make a brief
24 final closing?

25 MR. FOUCHER: Certainly, Your Honor thank you.

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

CLOSING STATEMENT

MR. FOUCHER: This is John Foucher on behalf of Bark Em Pet Supplies, LLC, and Zena Carlson. And we have a situation here where, yeah, the CDTFA comes in and does an audit, and it's got very -- you know, it feels very strongly that the numbers say what they say, and it's hard to argue with that. And, yet at the same time, we have a good-faith storekeeper who does her best every day to try and collect the right amount of sales tax, and did her best to collect the right amount of sales tax.

And for reasons beyond her control, was not able to provide the documentation that showed what the correct amount of sales tax was allowing the CDTFA to come in and do a statistical audit. This is something I see fairly -- I've seen a few times, and it's highly frustrating to these store owners that when they workday and night running their store, and they try.

And they understand the need to keep sales tax and pay it, and then get audited and suddenly find out that, my gosh, I missed every other piece -- or the CDTFA is saying, I missed every other piece. I missed 100. You know, I have got to have my sales tax increase by 100 percent. And I mean, it's just very frustrating but she did what she did in good faith and tried to make sure she paid her sales tax, and she doesn't have the records

1 to show otherwise at this point.

2 And I hope that the Judges take her oral
3 testimony for what it is, as testimony and evidence, that
4 she had the right amount of sales tax every day collected
5 and turned over to the CDTFA.

6 Thank you.

7 JUDGE GEARY: Thank you, Mr. Foucher. This is
8 Judge Geary again. This concludes the argument. And
9 before we close, I need to turn to Respondent to find out
10 how much time it will need to do the adjustments that we
11 discussed and provide to the Appellant and to OTA some
12 kind of a summary showing what Respondent contends is the
13 amount of the adjustment that it will allow. How much
14 time do you think, Ms. Jimenez, you will need?

15 MS. JIMENEZ: Mr. Geary, this is Mariflor
16 Jimenez. We will need at least 30 days.

17 JUDGE GEARY: All right. Judge Geary again.
18 We'll say 30 days. I'm fairly confident you'll be able to
19 do it in that period of time, and I think the plan should
20 be -- I'm assuming you will provide some type of
21 explanation or spreadsheet with some type of narrative
22 explanation for what the adjustments were based upon what
23 I seen happen in other audits. And I anticipate it's
24 possible Mr. Foucher may want to respond to that.

25 Mr. Foucher, I will allow you an opportunity to

1 respond before closing the record also. And I have
2 allowed the Department -- I'm allowing the Department
3 30 days. I will allow you 30 days to respond to whatever
4 the Department provides to you and to the Office of Tax
5 appeals, bearing in mind that your response should, of
6 course, be focused on this additional information and the
7 adjustment that the Department is offering.

8 Is that acceptable to you, Mr. Foucher?

9 MR. FOUCHER: It is. Thank you very much.

10 JUDGE GEARY: All right. Let me check with my
11 Panel before closing. Judge Johnson, do you have any
12 questions or concerns you want to express?

13 JUDGE JOHNSON: This is Judge Johnson. No.
14 Thank you everyone.

15 JUDGE GEARY: Thank you.

16 And Judge Stanley, any questions or concerns?

17 JUDGE STANLEY: This is Judge Stanley. No.
18 Thank you to all of you and happy holidays.

19 JUDGE GEARY: Thank you.

20 And I want to thank everybody for participating,
21 including the little dog we've hearing on a regular basis
22 in the background.

23 MS. CARLSON: That's Milly.

24 JUDGE GEARY: I hope everybody has a safe,
25 healthy, and happy holiday season. And we at OTA will

1 look forward to receipt of your additional documentation,
2 Respondent, and then of course the response from
3 Mr. Foucher. With that I'm closing this hearing today.
4 We're going off the record.

5 I'll indicate to you, by the way, just for your
6 information, that once we receive Mr. Foucher's response
7 or some indication from him that he does not -- he chooses
8 not to make a response to the Department's further
9 submission, we will issue a written decision. The three
10 Judges will deliberate. The three of us together will
11 issue a written decision within 100 days of that date. I
12 will issue a short order indicating this is the date on
13 which we close the record. 100 days from that date, within
14 that time, you should receive our decision.

15 Again, thank you all very much. And this ends
16 the hearing. And my understanding is that this ends the
17 calendar day for OTA's hearings. And thanks very much.
18 Take care everybody.

19 (Proceedings adjourned at 3:07 p.m.)
20
21
22
23
24
25

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

HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 28th day
of January, 2021.

ERNALYN M. ALONZO
HEARING REPORTER