

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
CAMINO FOOD, INC.,) OTA NO. 18124037
LAWRENCE FOODS, INC.,) OTA NO. 18124039
)
APPELLANT.)
)
_____)

TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Wednesday, March 24, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Virtual Proceedings, taken
in the State of California, commencing at
1:08 p.m. and concluding at 3:58 p.m. on
Wednesday, March 24, 2021, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ SUZANNE BROWN

Panel Members: ALJ JOSHUA ALDRICH
ALJ ELLIOT SCOTT EWING

For the Appellant: SAMUEL BROTMAN
SAMUEL LEMON

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

CHAD BACCHUS
JASON PARKER
RAVINDER SHARMA

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-8 were received at page 10.)
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1 State of California; Wednesday, March 24, 2021

2 1:08 p.m.

3

4 THE COURT: We are now on the record for the
5 appeals of Camino Foods, Inc., and Lawrence Foods, Inc.
6 These are OTA Case Numbers 18124037 and 18124039. Today
7 is Wednesday, March 24th, 2021, and it is approximately
8 1:08 p.m. we're holding this hearing by video
9 correspondence but the location for the record is
10 technically Sacramento, California.

11 This hearing is before the Office of Tax Appeals.
12 OTA is an independent agency that is separate from the
13 California Department of Tax and Fee Administration. My
14 name is Suzanne Brown. I'm the lead Administrative Law
15 Judge who will be conducting the hearing for this case.
16 On today's panel, in addition to myself, we have
17 Judge Josh Aldrich and Judge Elliot Scott Ewing.

18 While I'm the lead ALJ for purposes of conducting
19 this hearing, my co-panelists and I are coequal decision
20 makers, and they may ask questions of either party during
21 the hearing at any time. And I may also ask questions.
22 Our panel of three ALJs will decide all of the issues
23 presented to us, and each of us will have an equal vote in
24 making those decisions.

25 Next, I will ask the parties to identify

1 themselves for the record. Please just state your name
2 and your role as an attorney or witness or whatever your
3 role is here today. And we'll start with the Appellants.

4 Mr. Brotman, could you start by identifying
5 yourself for the record.

6 MR. BROTMAN: Good morning or good afternoon,
7 Your Honors. Samuel Brotman here for the Appellant Camino
8 Foods and Lawrence Foods.

9 THE COURT: And Mr. Lemon.

10 MR. LEMON: Samuel Lemon, attorney for Camino
11 Foods and Lawrence Foods.

12 THE COURT: And can we have each of the witnesses
13 identify themselves as well. Mr. Ngo.

14 MR. NGO: Good afternoon, Your Honor. My name is
15 The Ngo. I'm a witness.

16 THE COURT: And Ms. Chiang.

17 MS. CHIANG: Good afternoon, Your Honors. My
18 name is Ann Chiang. I'm a CPA and a witness.

19 THE COURT: Thank you everyone. Can I please
20 have the representatives for CDTFA identify themselves.

21 MR. SHARMA: Ravinder --

22 THE COURT: Mr. Bacchus -- sorry.

23 Mr. Sharma, go ahead.

24 MR. SHARMA: That's okay. Ravinder Sharma,
25 Hearing Representative for CDTFA.

1 MR. BACCHUS: Chad Bacchus, representing the
2 legal department for CDTFA.

3 THE COURT: And Mr. Parker?

4 MR. BACCHUS: So I believe Mr. Parker is having
5 some -- this is Chad Bacchus -- some technical issues. I
6 think he's going to try to reconnect.

7 THE COURT: I can see him.

8 MR. BACCHUS: Right. I've been texting him. He
9 said he's having problems hearing everything. So I think
10 he's going to try to reconnect.

11 THE COURT: I will wait for a moment while we get
12 Mr. Parker back.

13 Mr. Parker are you there?

14 I'm going to pause for a minute while we -- I'll
15 say we'll go off the record for just a moment while we get
16 Mr. Parker back on the line.

17 (There is a pause in the proceedings.)

18 THE COURT: Let's go back on the record.

19 This is Judge Brown. I was in the process of
20 having everyone identify themselves for the record and,
21 Mr. Parker, you were next.

22 MR. PARKER: Okay. I kind of heard that part.
23 So Jason Parker, Chief of Headquarters, Operations Bureau.

24 THE COURT: Okay. Thank you everyone. And now
25 I'll just state on the record that in response to the

1 Covid-19 State of Emergency, the Office of Tax Appeals
2 will be conducting today's hearing electronically with the
3 agreement of all parties and participants. All
4 participants, including the ALJs, are video conferencing
5 into this hearing.

6 I'm going to move on and talk briefly about what
7 the -- confirm what the issues. I'm going to confirm and
8 admit the exhibits, and we'll confirm the witnesses. And
9 then we will talk about the time allocation, and then
10 we'll move onto the substance of the hearing.

11 First, as we confirmed during the prehearing
12 conference in this matter, the issues in this case are
13 whether any adjustments are warranted to the measure of
14 unreported taxable sales for Camino Foods for the audit
15 period of October 1st, 2010, through September 30th, 2013;
16 and whether any adjustments are warranted to the measure
17 of unreported taxable sales for Lawrence Foods for the
18 same audit period.

19 Appellants, can we confirm that's the issue, and
20 do you have any questions?

21 MR. LEMON: Yes, Your Honor, that's the issue,
22 and we have no questions.

23 THE COURT: And CDTEFA? Same?

24 MR. SHARMA: Yeah, that's correct. This is
25 Ravinder Sharma.

1 THE COURT: Okay. Thank you everyone. This is
2 Judge Brown, and next I'm going to move onto talking about
3 the documentary exhibits from both parties. Our
4 regulation requires that the proposed exhibits must be
5 submit at least 15 days in advance of the hearing, and
6 both parties submitted their evidence by that deadline.

7 First, I will address Appellant's Exhibits 1
8 through 8. Previously, CDTFA objected to the admission of
9 Exhibits 1 through 4, and in January 2021 I issued an
10 evidentiary ruling denying that objection.

11 CDTFA, other than the objections that are covered
12 in my January 20, 2021, ruling, are there any other
13 objections that you have to the admission of Appellant's
14 Exhibits 1 through 8 into evidence today?

15 MR. SHARMA: This is Ravinder Sharma. We have no
16 further objection.

17 THE COURT: Okay. Thank you.

18 And I will note -- I believe everyone should have
19 had access to the exhibit log that I prepared that lists
20 Exhibits 1 through 8. And I have an attachment that goes
21 through Exhibit 5 because there were portions of Exhibit 5
22 that Appellants withdrew in light of CDTFA's objection.
23 And I made a -- used a table to confirm which documents
24 are included and which are withdrawn. And I am just
25 confirming that all of that was correct, and no one has

1 raised any questions or objections to that -- the table
2 about what's part of Exhibit 5 and what is not.

3 Appellants, I'll just confirm with you that that
4 table is correct.

5 MR. LEMON: Yes, Your Honor. This is Samuel
6 Lemon.

7 THE COURT: Thank you. This is Judge Brown.

8 And, CDTFa, I'll just confirm also that the table
9 for Exhibit 5 is correct. I based it on -- actually, I
10 take it back. I'll just confirm with CDTFa that that
11 table is correct.

12 MR. SHARMA: This is Ravinder Sharma. That is
13 correct.

14 THE COURT: Okay. All right. Then if there's no
15 further objections I -- we're on the record as I said, and
16 I'm now admitting Appellant's Exhibits 1 through 8.

17 (Appellant's Exhibits 1-8 were received
18 in evidence by the Administrative Law Judge.)

19 THE COURT: Okay. Next, I'll move onto CDTFa's
20 exhibits, which are now labeled as Exhibits A through K.

21 Appellants, you previously indicated that you did
22 not have any objection to these documents being admitted
23 as exhibits in evidence. Is that correct that you still
24 have no objection.

25 MR. LEMON: This is Samuel Lemon. We still have

1 no objection.

2 THE COURT: Okay. Thank you.

3 And so now I will admit -- this is Judge Brown.
4 I will now admit CDTFA's exhibits A through K into
5 evidence.

6 (Department's Exhibits A-K were received in
7 evidence by the Administrative Law Judge.)

8 Next, I'm going to move on and just confirm our
9 witnesses who are going to be testifying today.

10 Appellants, which witness are you planning on
11 calling first?

12 MR. LEMON: This is Samuel Lemon The Ngo will be
13 testifying first and then Ann Chiang second.

14 THE COURT: Okay. Thank you.

15 And I will just discuss the witness' testimony in
16 terms of these -- as well the overall timeline that we're
17 looking at for conducting this hearing. I anticipate
18 it'll probably take about two-and-a-half hours give or
19 take. If anyone needs a break at some point during the
20 hearing, please say so. As we discussed in the prehearing
21 conference, and I confirmed in my prehearing conference
22 minutes and orders, the schedule of events that we have
23 today is that first we're going to be hearing Appellants'
24 opening presentations from the attorneys, and that should
25 take about 10 minutes.

1 And then we're going to hear Appellant's -- the
2 testimony for Appellants' first witness Mr. Ngo, and that
3 should take up to 45 minutes. And I'll confirm with
4 Appellants' attorneys, you indicated that Mr. Ngo would be
5 testifying in a narrative format.

6 MR. LEMON: Yes, Your Honor. Mr. Ngo needs to
7 testify via narrative.

8 THE COURT: Okay. And I will also note that we
9 received the witness' written statement that we discussed
10 at the prehearing conference is going to be just a guide
11 to his testimony, that this statement is what he intends
12 to testify to, and it's to help him testify and to help us
13 follow in his testimony.

14 Let me ask. CDTFA, did you receive this
15 statement as well?

16 MR. SHARMA: This is Ravinder Sharma. Yes, we
17 have received.

18 THE COURT: Very good. Thank you.

19 And then once we've completed the testimony of
20 the first witness, CDTFA may cross-examine the witness,
21 and the ALJs may also have questions for the witness.
22 We'll then follow the same procedure with Ms. Chiang, the
23 second witness, whose testimony will take up to
24 45 minutes. And then, again, CDTFA may ask questions, or
25 the ALJs may ask questions of the witness. When we've

1 completed Appellant's presentation, we will then hear
2 CDTFA's presentation, which I believe we indicated would
3 take up to about 30 minutes. After CDTFA has completed
4 its presentation, there may be questions from the ALJs.
5 And when CDTFA has completed, then Appellants they will
6 make their rebuttal, which I believe we said would take up
7 to 15 minutes.

8 Does anyone have any questions about the order of
9 events or anything that you want to bring to my attention?

10 MR. LEMON: This is Samuel Lemon for the
11 Appellant. The order of some of our arguments I'd like to
12 move around a little. I have a very short opening
13 statement, and then the witnesses -- Ann Chiang will
14 probably take the full amount of time, but The Ngo will
15 not. And so I would like to reserve some of that time to
16 make my arguments based on their testimony. So it will be
17 an opening statement that's very short, then go straight
18 into the testimony, then speak to the testimony and then
19 the arguments for the Appellant.

20 THE COURT: That's fine. This is Judge Brown.
21 You can reserve some of your time that you had originally
22 scheduled for the witness' testimony to complete your
23 argument at the end of your presentation. I did want to
24 emphasis to everyone, because we are hearing two cases
25 that have been consolidated, I want to remind everyone to

1 please make clear when you're speaking about both
2 businesses versus when you're speaking about only one or
3 the other. Because I don't want to be making any
4 assumptions if you're talking about only one business and
5 not the other one. So please make it clear in your
6 questions and your statements and your answers so that
7 there isn't any confusion along the way.

8 All right. Does anyone have any questions or
9 anything else that you would like to raise before we begin
10 the presentations? Okay. All right. If everyone is
11 ready -- this is Judge Brown. If everyone is ready, then
12 we can begin with Appellant's opening statements. And
13 when Appellants' have completed their opening statement,
14 then I will swear in the first witness.

15 Appellants, you may proceed.

16 MR. LEMON: Thank you, Your Honor.

17

18 OPENING STATEMENT

19 MR. LEMON: May it please the Panel, thank you
20 for being with us today. My name is Samuel Lemon, and I'm
21 an attorney with Brotman Law, and I'm accompanied by our
22 attorney Sam Brotman as well. I represent taxpayers
23 Camino Foods, Inc., and Lawrence Foods, Inc. We
24 appreciate the time and consideration the panel has set
25 aside for considering our appeal.

1 This is a tale of two audits. The most recent
2 examination covers the period from 2016 through 2018. The
3 audit under consideration by the panel today covers 2010
4 through 2013. In the second audit of this business, the
5 auditor found no variation between taxable and reported
6 measure. In the first audit, which is under consideration
7 today, the auditor's conclusion was that there were
8 millions of dollars in unreported taxable measure, all in
9 cash.

10 In the second most recent audit, there was plenty
11 of time to review direct evidence and compare that
12 evidence to audit samples. The auditor chose to perform
13 site tests to confirm daily sales. The auditor was
14 contemporaneously provided with additional sales data over
15 the course of 45 summer days. They were invited to verify
16 that data via secret purchases. They were given cash
17 reconciliations that accounted for daily cash receipts.
18 The reports given matched cash to both bank deposits and
19 purchase receipts.

20 The auditor was not pressed for time, and she
21 continued to receive information until she was satisfied
22 that she had a complete record. In the first audit, which
23 is at issue in this hearing, there was plenty of direct
24 evidence, but it was not reviewed in a meaningful way.
25 That evidence was discarded, and the credit card to cash

1 method was instead used to verify sales. Two days of site
2 test data was used instead of 45, and those two days were
3 sampled during the winter, a period of time where vendors
4 of hot soup have higher traffic. The proprietor was
5 plagued with merchant processor interruptions. And the
6 auditor, once she had the minimum data required to support
7 an assessment, completed her report in time to go on
8 maternity leave.

9 The second audit produced audited daily sales of
10 \$3,143 for Camino Foods. The first audit produced audited
11 daily sales of \$2,349. I'm sorry, the second audit. I
12 apologize. The first audit produced audited daily sales
13 of \$3,143. The second audit produced audited daily sales
14 of \$2,349. All for Camino Foods. The second audit found
15 average daily foot traffic of 153 persons per day by
16 observing the number of people who buy hot soup in the
17 late summer. The first audit found average daily foot
18 traffic of about 230 people by observing the number of
19 people who buy hot soup in the winter.

20 The first audit produced additional taxable
21 measure of \$1,661,743 and \$799,429 for Camino Foods and
22 Lawrence Foods respectively; all presumably in cash. The
23 first audit was closed -- the first audit was closed with
24 these recommended changes, but the second audit was closed
25 with no change. This, for a small restaurant whose

1 primary source of revenue has not changed in any
2 significant way for the last 10 years.

3 To paraphrase the iconic Charles Dickens, it was
4 the best of audits. It was the worse of audits. It was,
5 at least in our instance, not the spring but the summer of
6 hope, and it was quite literally the winter of our
7 despair.

8 You'll be hearing from the company vice
9 president, The Ngo. Mr. Ngo is the kind of model
10 immigrant that exemplifies the American spirit; hard
11 working and exuberant. But he struggles with the English
12 language and so must testify by written declaration.
13 Mr. Ngo managed the operations for the stores that were
14 being audited, Lawrence and Camino. He was at the center
15 of compiling the information for their CPA, Ms. Chiang and
16 has direct knowledge of business operations.

17 Furthermore, Mr. Ngo will speak to several
18 important key issues. First, in addition to compiling the
19 data during the audit period, he also compiled the data
20 for today's review, which supplements the credit card
21 ratio derived from the Department's two-day site test. He
22 will also explain the difficulties the company had with
23 the merchant processor during the fall of 2013. Finally,
24 he will discuss the uses of cash by the company and how we
25 reconciled that cash during the second audit.

1 You will also be hearing from Ann Chiang.
2 Ms. Chiang is a CPA and was the taxpayer's representative
3 during the audit at issue. Ms. Chiang will give you a
4 summary of what happened during that audit, including the
5 preparations of direct evidence she accumulated to present
6 to the auditor. She will explain how the tax returns were
7 prepared and how to trace the tax returns from the monthly
8 statements back to the Z-tapes and guest checks.
9 Furthermore, she will give insight as to the pace of the
10 audit. And finally, she will talk about the significance
11 of the cash-back policy and how to adjust the math the
12 Department is using to calculate gross sales.

13 I will summarize our analysis. The panel may
14 have noticed that we've uploaded a significant amount of
15 data. Rest assured, I will provide a summary of the key
16 items that complete our case. Most of the data is
17 uploaded and is merely presented as proof that we have the
18 substantiation for the lead sheets that we will be
19 discussing. I will be spending my time addressing the
20 summaries and also the Department's analysis. But anyone
21 with the inclination and the time to spare can go into the
22 record, recompile the background data, and prove the lead
23 sheets we've presented are accurate.

24 With the panel's permission, I will now proceed
25 with the direct examination of the company's vice

1 president, The Ngo.

2 THE COURT: This is Judge Brown. Thank you,
3 Mr. Lemon. I just need to swear in the witness. One
4 second.

5 Mr. Ngo, can you hear me?

6 MR. NGO: Yes, Your Honor.

7 THE COURT: Thank you. If you could please raise
8 your right hand, and I will ask --

9 MR. NGO: Yes.

10 THE COURT: Thank you. I will administer the
11 oath.

12 THE NGO,
13 produced as a witness, and having been first duly sworn by
14 the Administrative Law Judge, was examined and testified
15 as follows:

16
17 THE COURT: Thank you.

18 This is Judge Brown. Mr. Lemon or Mr. Brotman,
19 you may proceed with the witness' testimony.

20 MR. LEMON: Yes. As we spoke to -- the witness
21 will testify by declaration.

22 THE COURT: Well, this is Judge Brown. This
23 isn't a signed declaration. Well, it is signed, but it's
24 not signed under perjury. My understanding was that the
25 witness would be using this as a guide, that the witness

1 would speak to his statement. And we could use this to
2 help follow, and he can read it as well.

3 MR. BROTMAN: He can read it into the record.

4 MR. LEMON: Yeah.

5 THE COURT: He can read it into the record.

6 MR LEMON: And perhaps the best thing, just have
7 him read it into the record.

8 THE COURT: Okay. Mr. Ngo, you may proceed.

9

10 WITNESS TESTIMONY

11 MR. NGO: Good afternoon, Your Honor. My name is
12 The Ngo. I'm the vice president of Camino Foods and
13 Lawrence Foods, Inc. I immigrated to the United States
14 with my family in 1982. I made the best life I could with
15 them and decided with them to open our restaurant. We
16 sell specialty Vietnamese noodle soup. I work every day,
17 all day to please my customers, taking only Sundays off.

18 Every day I would take the guest checks, add them
19 up, and prepare a daily summary in the form of a Z-tape.
20 The Z-tape total was entered into a monthly spreadsheet,
21 and every month I would give that monthly spreadsheet to
22 Ann Chiang, our CPA. She would use these to prepare the
23 tax returns. I also added up the merchant receipts to
24 make sure they matched the deposits each month.

25 The first page of Exhibit 7 is taken from my

1 November 2013 monthly summary. The total sales listed
2 each day I found by adding up our guest checks. The
3 merchant deposits that are listed come from the daily
4 sales receipts each day. As an example, the first image
5 from Exhibit 7 is the sales receipts for November 6.

6 There are additional images in this exhibit, but
7 in the upper left-hand corner of this picture is the
8 summary of all these merchant sales. I have provided this
9 information in order to show that my merchant sales can be
10 confirmed. From this information I am able to show what
11 the credit card sales were for this month. I have also
12 produced the sales summaries and merchant summaries for
13 October and December in Exhibit 8.

14 The spreadsheet shows no data for November for
15 the first five days. This is because the merchant card
16 processing system was broken. The server was broken, and
17 so we couldn't take credit cards for nine days, from
18 October 28th through November 5th. During the audit
19 period we would offer cash back the same way that Costco
20 did. We thought that this would bring in more customers.
21 And also, it was a way to keep cash low in the store.
22 After Ann Chiang reviewed our records, she told us we were
23 being charged too much in merchant fees, and that it
24 wasn't worth it to provide cash back. So in 2014, we
25 stopped taking credit cards, and instead installed an ATM.

1 By the time we were examined on November 6th, we were no
2 longer offering cash back. We had stopped doing this
3 around October 2013.

4 We would also pay cash for groceries. Exhibit 3
5 includes our cash report for the second audit. Ann had
6 requested that we have better internal controls for the
7 cash. So we were able to provide this report to the
8 auditor, which shows how we were using the cash we had
9 collected. You can see from the daily reports that I
10 would record the daily amount of cash received, and then
11 report the cash used for purchases. Some cash was kept on
12 hand, and the rest was deposited. The auditor matched the
13 deposited cash to the report.

14 I also included receipts for the auditor to
15 examine so she could see what we were buying. We also
16 used cash to buy groceries during the audit period, but we
17 didn't have the same reports to offer the auditor. I
18 think if we could have given her a report of the cash, she
19 would have better understood how we use cash in our
20 business.

21 In 2014, we stopped take credit cards because we
22 had installed an ATM. During the second audit, the
23 auditor noted merchant deposits on her report, and we
24 explained to her that they were not credit card receipts
25 but that comes from the ATM. These ATMs are inside our

1 restaurant. We receive credit from the ATM operator for
2 depositing cash into the ATM, and that is what those
3 deposits are. ATM Link, Inc., is the company that manages
4 the ATM for us, and they deposit credit into our bank
5 account for the money we put into the ATM. Since we
6 always deposit \$20 bills, the deposits are always
7 divisible by 20. In this way, we increase our profit
8 because we didn't have to pay merchant fees anymore.

9 The weather was particularly cold in late 2013.
10 We are a restaurant chain that sells hot soup. So we had
11 more customers in November than we had in the summer.
12 This is normal for our business. The way that we get
13 customers hasn't changed.

14 We have done a better job with recordkeeping for
15 the cash, but the basic business model has always been the
16 same. The only change is replacing the credit cards with
17 the ATM, which was much cheaper in merchant fees. I was
18 very faithful in keeping track of daily sales. I do not
19 claim to have created perfect records, but I know I did
20 not underreport by millions of dollars. It is
21 unreasonable to claim that I hid millions of dollars of
22 cash, or that I misplaced it somehow. I always do my best
23 to report and pay the correct amount of tax.

24 I struggle with the English language, but I will
25 do my best to answer your questions. Thank you for your

1 consideration.

2 THE COURT: Thank you, Mr. Ngo.

3 This is Judge Brown, and I will now ask if CDTFA
4 has any questions for the witness.

5 MR. SHARMA: This is Ravinder Sharma. We have no
6 questions for the witness.

7 THE COURT: This is Judge Brown. Thank you,
8 Mr. Sharma.

9 And I will now ask my co-panelists if they have
10 any questions. Judge Aldrich, do you have any questions
11 for this witness?

12 JUDGE ALDRICH: Hi, this is Judge Aldrich. Yes,
13 I have a couple of questions for this witness.

14 Mr. Ngo, just as a point of clarification, you
15 talked about obtaining ATM machines in 2014. Was that for
16 both of the businesses, so Camino and Lawrence, that made
17 that policy change?

18 MR. NGO: Yes, Your Honor.

19 JUDGE ALDRICH: And with respect to cash back on
20 credit card transactions, my understanding is that started
21 prior to the audit period at issue? Or during? Or when
22 did that happen?

23 MR. NGO: I'm sorry. My -- my English is --
24 yeah. Could you repeat the question?

25 MR. ALDRICH: Yeah, not a problem. So when did

1 Camino and when did Lawrence begin offering cash back
2 transactions on credit card?

3 MR. NGO: Oh, we offer long time ago, before the
4 audit period.

5 JUDGE ALDRICH: Okay. Thank you. And you
6 indicated that your business was more busy during the
7 winter months when it was cold; is that correct?

8 MR. NGO: Yes, Your Honor.

9 JUDGE ALDRICH: So would there be a corresponding
10 increase to your cost? So did you have to buy more
11 groceries to make more sales during the winter?

12 MR. NGO: Yes. Normally -- normally, if -- yeah.
13 If the sales come up, we have to buy more. Yeah. We have
14 to buy more -- more stuff for food cost.

15 JUDGE ALDRICH: Okay. And then also, I was
16 wondering. Do you have a particularly busy time of day?
17 Is it evening busy? Lunch busy? When would be your
18 busiest point of the day?

19 MR. NGO: Oh, the busiest time of the day is
20 lunch time.

21 JUDGE ALDRICH: Lunch time. And is that true for
22 both locations --

23 MR. NGO: Yes, Your Honor.

24 JUDGE ALDRICH: -- Camino and Lawrence? Okay.

25 And then as far --

1 MR. NGO: Yes.

2 JUDGE ALDRICH: -- as a busy time of the week,
3 would you be busier on weekends or during the week?

4 MR. NGO: Oh, it depends on location.

5 JUDGE ALDRICH: Okay.

6 MR. NGO: Lawrence -- Lawrence is only -- only
7 weekdays. But Camino -- Camino it's, yeah. Somehow
8 weekends are a little bit busier --

9 JUDGE ALDRICH: Okay.

10 MR. NGO: -- because they are different
11 locations. Yeah.

12 JUDGE ALDRICH: And my next question, I don't
13 know if it's best to address it to you, or if Ms. Chiang
14 wants to respond to it. But I was curious about the
15 point-of-sale system. So in the exhibits there's
16 something called total reports. And if Counsel wants a
17 reference, it's in CDTFA's exhibit packet, and that's
18 page 274 in the PDF or Bates stamp 99. So there's a
19 series of total reports. And there's a column that says,
20 "Unadjusted Tips." So at some point in the hearing, I'd
21 like an answer as to what that means. What is that
22 logging there?

23 Mr. Ngo, you don't have to answer unless you feel
24 comfortable and/or know the answer, but just throwing that
25 out there. And I am done with my questions.

1 MR. NGO: Yeah --

2 THE COURT: This is Judge Brown. Go ahead
3 Mr. Ngo. Please, go ahead with what you're saying.

4 MR. NGO: Actually, I don't know.

5 JUDGE ALDRICH: Okay. Thank you.

6 MR. NGO: The question. Yeah.

7 THE COURT: Okay. This is Judge Brown. Thank
8 you.

9 And now I will ask Judge Ewing, do you have any
10 questions for this witness?

11 JUDGE EWING: I do not, Judge Brown. Thank you.

12 THE COURT: Okay. This is Judge Brown. Mr. Ngo,
13 let me ask one or two questions.

14 MR. NGO: Yeah. Sure, Your Honor.

15 THE COURT: Thank you.

16 MR. NGO: Yes, Your Honor.

17 THE COURT: My question is, is there any -- if
18 you know. Is there anywhere on the documents that shows
19 evidence that you gave cash back, like, on credit card
20 slips? Was there any kind of notation anywhere that
21 either restaurant was giving cash back to customers?

22 MR. NGO: All I do know is that we -- we offer
23 cash back.

24 THE COURT: But -- this Judge Brown.

25 MR. LEMON: Judge Brown?

1 THE COURT: Yes.

2 MR. LEMON: This is Samuel Lemon for Respondent.
3 Ann Chiang is a much better witness to discuss answers to
4 that question.

5 THE COURT: This is Judge Brown. Okay. Thank
6 you. I will save the question for the next witness then.

7 And then, Mr. Ngo --

8 MR. NGO: Yeah. Thank you, Your Honor.

9 THE COURT: Thank you, Mr. Ngo. This is
10 Judge Brown. I just want to confirm. So you indicated
11 that after the end of the audit period that we're talking
12 about here, sometime in 2014, you stopped taking credit
13 cards all together at both businesses, both Camino and
14 Lawrence; is that correct?

15 MR. NGO: Yes, Your Honor. We both installed ATM
16 machine.

17 THE COURT: All right. This is Judge Brown.
18 Thank you.

19 I don't have any further questions for this
20 witness. So since we are now done with Mr. Ngo's
21 testimony, I believe we are ready to move onto
22 Ms. Chiang's testimony. Appellants, unless you have
23 anything further, I will go ahead and swear in Ms. Chiang
24 as a witness.

25 MR. LEMON: Yes, Your Honor. Please swear in

1 Ms. Chiang.

2 THE COURT: Okay. Ms. Chiang can you hear me?

3 MS. CHIANG: Yes, Your Honor.

4 THE COURT: Can you please raise your right hand,
5 and I will administrator the oath.

6

7 ANN CHIANG,

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

11

12 THE COURT: Thank you.

13 Appellants, you may begin with this witness'
14 testimony.

15 MR. LEMON: Thank you, Your Honor.

16

17 DIRECT EXAMINATION

18 BY MR. LEMON:

19 Q Good morning, Ann.

20 A Good morning, Sam.

21 Q How are you?

22 A I am -- I'm fine. Thank you for all your time,
23 and thank you for being here today. I'm not sure how to
24 get my video working. I'm not sure if my face is showing
25 there or not. This is my first time using Webex. So do

1 you see my face or no?

2 Q No, we don't.

3 A Okay.

4 Q But we can hear your lovely voice.

5 A I have to get that worked out. This is my first
6 time doing Webex. So I have no idea. I'm all dressed up
7 in my suit and everything.

8 Q We -- we will note for the record that Ms. Chiang
9 looks splendid.

10 A Thank you.

11 Q Okay. So, Ms. Chiang, can you give us a little
12 bit about yourself and your qualifications?

13 A Yes. I am a CPA since 1993. I started with a
14 local firm in Whittier, California. And that firm was
15 started by an ex-partner from PWC. I was an auditor for
16 three years, but my third year I actually worked directly
17 with the partner and conducted business exit interviews.
18 And I also worked directly with the upper management.

19 Then I went to KPMG to do tax. And then after
20 that, I joined a spin-off called Resources Connection.
21 They basically took the big four alumnus and put them to
22 projects. So we do interim controllerships for companies
23 that may be someone's on maternity leave or absent, you
24 know, controller positions. So then we come in and
25 basically do kind -- those kinds of positions.

1 I was at the -- I was assistant group controller
2 for Wells Fargo in the Financial District in San Francisco
3 prior to going off on my own working in this industry. So
4 my background, basically, for all three areas of service
5 in the big four CPA firms from audit to tax to consulting.

6 Q And can you describe your relationship with
7 Camino Foods and Lawrence Food, Inc.?

8 A Yes. I began to service them as their CPA since
9 19 -- 2012. Sorry.

10 Q And so you were present for the first audit at
11 issue in this case?

12 A Yes, that is correct.

13 Q And can you describe your role as -- and your
14 interactions regarding that?

15 A Yes. I was retained as their representative.
16 Our practice at that point in 2012 was strictly tax
17 practice. So we do accounting for the businesses and
18 clients, individuals. We do the accounting, the payroll,
19 and then also file the tax return. So my practice is only
20 limited to tax practice. We don't do audits. We don't do
21 anything else.

22 Q And can you describe for the panel what -- how
23 you prepared for the first audit?

24 A So the first thing is that we brought the client
25 in to have the meeting, and I try to understand their A to

1 Z procedures from how they start with the guest checks, go
2 into the kitchen, prepare the menu. So, basically, we
3 have dialogue of how the operation works, and then they
4 provide the documents to step through as far as this is
5 what the guest checks look like. This is what the cash
6 receipt, and this is the -- how we prepare the Z-tape.
7 And then the Z-tape goes to the summary on the monthly
8 sales. And then that's -- the monthly sales report is
9 what I use to prepare the tax returns.

10 Q Okay. So can we get some clarification on that
11 process, just step by step starting with guest checks and
12 going all the way to the task return. What steps are
13 involved?

14 A So the first thing is the customer walked in.
15 The waiter would take the order. Then he wrote down on
16 the guest checks, and the guest check get placed in the
17 kitchen. Staff -- kitchen staff would prepare food. When
18 they brought out the food, the guest checks get brought
19 back with the food at the customer table. When the
20 customer is done, then they will bring the guest checks to
21 the cash register. And cash register, and the cash
22 register has two -- two screens; one side for the cash
23 register and the other side for the customer.

24 So as they punch in the item on the cash guests,
25 the customer can verify the price on the cash register.

1 And at that point they would pay either with cash, or they
2 would pay with credit card in the audit period.

3 Q And --

4 A And -- and that guest check, as The -- Mr. Ngo
5 mentioned earlier, he summarized those at the end of the
6 day with the Z-tape, and the Z-tape total get inputted
7 into the monthly sales number. And that get -- that is
8 sent to me monthly so I can pay the sales tax for them.
9 And that is used to prepare the tax return.

10 Q And I want to take you back to when the first
11 audit started and your meetings with the auditor at that
12 time.

13 A So I want to back up to meeting with the client
14 first.

15 Q Okay.

16 A So the audit was -- the letter was sent to the
17 client, and the client brought the letter into my office.
18 We had our first meeting. So we at that point in time,
19 the client mentioned to me -- told me that they paid the
20 cash back during the audit period. So at that point, then
21 I talked with the client to try to understand how the cash
22 back was working or how that was done.

23 So I was told in 2010 -- that's when the economy
24 was bad, and they decided to increase sale they -- the
25 company -- the shareholders decided to implement credit

1 card to increase sales. And their minimum requirement for
2 credit card charge was \$10. But I believe they missed a
3 step as far as the idea of getting the \$10 charged is,
4 like, if it's less than \$10, they don't take credit card.

5 So -- but by -- so with the policy of the \$10 or
6 more, the customer actually was charging but then they
7 want cash back for their total. So this is why it is
8 causing this cash back situation. But if we were
9 involved, we would say no. If it's more than \$10, you
10 take the credit card. If it's less than \$10, then you
11 don't take the credit card.

12 So then as we went through the -- the process of
13 looking at the guest checks to the cash receipts, then we
14 identify and -- at this point, try to get involved with
15 internal control, and told the client that the credit card
16 charge is too much. Then they're giving back the cash to
17 the customer, they're also charged on that amount. And so
18 when we gave them the analysis of what was costing them,
19 then that's when they made the decision to stop giving
20 cash back to the customers. And that was before the
21 audit -- before the auditor came to our office.

22 And by the time the auditor came to our office,
23 we -- the first day I told the auditor that during the
24 audit period the customers -- the client -- the restaurant
25 gave cash back to the customers. But since they brought

1 the letter to me and we had our meetings and our analysis
2 basically, we convinced them they cannot take -- give cash
3 back anymore. So by the time the auditor showed up the
4 cash back already ceased.

5 Q So just to clarify, the cash-back policy was
6 active during the audit period but not active during the
7 sample?

8 A That is correct.

9 Q I'd like to answer Judge Brown's question
10 regarding the cash back. And so I'd like to direct your
11 attention to the Department's exhibit, and I'm looking at
12 page 137. And this document is labeled "Camino Foods,
13 Inc., 25 September."

14 A I have that page.

15 Q Okay. Ann, do you recognize this document?

16 A Yes, I do.

17 Q How do you recognize it?

18 A This was prepared for the auditors. We
19 instructed the client to prepare five days of the receipts
20 with the -- from the guest checks, to the receipts, to the
21 summary. So these pages represent the five days that the
22 client prepared from September -- September 23rd through
23 September 26th, and those are the pages that you mentioned
24 now.

25 Q And --

1 A And that's reference page-- from -- sorry --
2 Q It's part of Exhibit 1. I think it starts --
3 A Right.
4 Q -- right around 130. I'd have to look.
5 A Page 131 through page -- at the bottom of the --
6 of the right-hand corner it says 131.
7 Q To I think it's 138?
8 A 138.
9 Q Or it's further than that?
10 A Yeah, further than that. It's 130 --
11 Q No. Actually, goes past 1 -- into the 40s.
12 A Right. So it's --
13 Q 147.
14 A 147.
15 Q It goes to 147.
16 A Yes. 147.
17 Q But the -- the information that we're discussing
18 is, I believe, on 137.
19 A Yes.
20 Q An what was the purpose for submitting these
21 documents to the Department?
22 A We were trying to explain to the auditor and
23 giving them the chance to see the -- how the summaries
24 were proved, and that the evidence would prove that they
25 were actually giving cash back to the customers. And by

1 providing the auditor with -- to provide the Department
2 with these data and the documents of the guest checks, to
3 the cash receipts, to the summary, then the auditor -- the
4 Department would be able to trace back to the individual
5 receipts, to the sales, to validate the cash back that the
6 client mentioned. And this is our proof to them that
7 these five days clearly show that the cash back was given
8 to the customers.

9 THE COURT: I'm sorry. This is Judge Brown. I
10 need to interrupt for just a minute. I'm not sure if we
11 lost Mr. Parker, or if he is still on the line.

12 MR. PARKER: Judge Brown, this is --

13 THE COURT: Mr. Parker?

14 MR. PARKER: Yeah. This is Jason Parker. I
15 called in. I was having computer issues again. So I
16 figured I'd do it over the phone.

17 THE COURT: Okay. So you're back on the line,
18 and so we can proceed. And I'm sorry for the
19 interruption. Oh, could I ask. Did you -- Mr. Parker,
20 did you miss anything? Do you need us to back up?

21 MR. PARKER: I did not. I heard everything. I'm
22 good. Thank you.

23 THE COURT: Thank you very much. This is
24 Judge Brown, and I apologize for the interpretation.

25 And Mr. Lemon and Ms. Chiang, you can proceed.

1 MR. LEMON: Thank you, Your Honor.

2 BY MR. LEMON:

3 Q So, Ms. Chiang, you mentioned that -- that you
4 were using these documents to show the Department the
5 cash-back policy?

6 A Yes.

7 Q Can you explain how these documents show that
8 policy?

9 A Yes. So if you were looking at page 137 from the
10 exhibits, line-item number 81. So on the exhibit it shows
11 September 25th, Camino Foods, Inc., and it showed the
12 transactions and the credit cards, the cash advance, and
13 the tips. So if you look at line-item number -- on
14 page 137, on line-item 81, there's an amount. The credit
15 card row show \$24.03. Under cash advance it shows \$15.
16 Tips, it shows \$3. And the sales without the tax is
17 \$8.30. Now, I want to direct you to the exhibit page 148.
18 It shows the guest check, and it shows the item -- the
19 total charge on the receipt.

20 Q And for clarification I just -- that guest check
21 is that line 81 transaction; is that right?

22 A That is correct. Yes. So this is page 149. The
23 Department -- at the bottom of the page, it show
24 Department page 148. So on there you will see an item
25 called Seafood 22, and there's a -- it's called

1 S-O-N-S-D-L. So the top is the food, and the bottom is
2 the drink. And if I would go to the menu on page 58 of
3 the exhibit, that is the menu. And if you go to line item
4 22, it show seafood noodles, and the item show \$6.35. On
5 the second --

6 Q So --

7 A Yeah. So the second item is the S-D -- what's
8 this item?

9 Q I think it says S-D-L or S-D-O or something like
10 that?

11 A Yeah. What did I --

12 Q Or S-D-N?

13 A S-D-L. It's actually supposed to be S-D-N. And
14 says Item Number 84 on the menu, and that's for \$1.95.
15 And if you add the \$1.95 to the --

16 Q Oh, Ann, sorry. Let's clarify for the panel --

17 A Yes.

18 Q -- that we're referring to -- the drinks are on
19 page Number 60.

20 A Yes.

21 Q And that item number for the drink is Item Number
22 84. It's a cold soybean milk.

23 A That is correct.

24 Q Okay.

25 A So if you follow the item -- I mean, the list on

1 this item, then we would have --

2 Q Yeah. It makes it a little difficult because
3 we're dancing around the exhibit, but --

4 A Yes, I know.

5 Q Yeah. The --

6 A So if you go back to that line item 81, add those
7 two items up. You would have -- this is the life of an
8 auditor, you know. We have a lot of documents in front of
9 us to try to kind of compile everything.

10 Q Right. So harkening back to page 137 of the
11 Department's exhibits --

12 A Yes.

13 Q -- on 925 and line-item Number 81 --

14 A Yes.

15 Q -- we have -- can you explain the significance of
16 column -- it looks like E?

17 A Yeah. So column E is basically the sales items.
18 It's those two items. It's the seafood and the drink
19 added up to \$8.30. So that's the total sales on that
20 ticket.

21 Q And then the credit card net Column D, what is
22 that?

23 A Column D is the -- the tax included in that
24 amount. So \$8.30 plus the tax is equal to the \$9.03.

25 Q And Column C?

1 A Column C is the tips that was given to that sale.

2 Q And then Column B, explain how we know what that
3 number is?

4 A So when I'm -- when you go back to guests check,
5 if you add the two items of the Seafood 22 and SDN, it's
6 giving us the \$8.30. And on the receipt -- on the receipt
7 that you see on there, it shows \$27.03 is the total charge
8 on the credit card.

9 Q And, you know, I would just note that coincides
10 insides with Column F --

11 A Yes.

12 Q On the -- right.

13 A Yes.

14 Q Yeah.

15 A Yes. So for the \$8.30 is the total sales on the
16 total items which is the seafood and the soy milk. So
17 that gives us the \$8.30. Adding the tax will give us the
18 \$9.03. And the tip is \$3, and the cash back is the \$15
19 that was given to the customer. So the total charge to
20 the credit card was \$27.03. And if you see the receipt on
21 that page, page 149 on the PDF or the bottom of the page
22 show 148, that is exactly what it shows. You see the tips
23 on there for \$3, and you see the total charge is \$27.03.

24 Q Thank you.

25 MR. LEMON: And, Judge Brown, I may want to pause

1 for a moment to ask if the panel has any questions just on
2 this discussion of the -- of Ann's spreadsheet.

3 THE COURT: This is Judge Brown. We can hold our
4 questions until the end in the interest of time. You can
5 proceed.

6 MR. LEMON: Okay.

7 THE COURT: Thank you.

8 MR. LEMON: Thank you, Your Honor.

9 BY MR. LEMON:

10 Q Ann, so tell me about your verification of these
11 reports?

12 A I had the client walk me through how the guest
13 checks and how that relates to the receipts for the few of
14 them when he brought them to my office. And we went
15 through and tried to identify the items on the guest
16 checks to the menu. And he actually provided the
17 Department the coding of the menu where the item show the
18 description of the item, the item number, and then the
19 abbreviation that was used on the guest checks. And those
20 were provided to the Department so then they can verify
21 the five days that were given to them from the 23 to 27
22 dates.

23 Q And how many of these transactions on your
24 spreadsheet did you verify?

25 A I went through at least 70 percent of them with

1 the one that -- especially, with the one with the guest
2 checks with the cash back.

3 Q And then --

4 A So I spot-checked them and went through and they,
5 basically, tied to the guest checks, to the receipts, and
6 to the number that was on the summary that's shown here.

7 Q And, ultimately, what did you find?

8 A I find the numbers were valid. That the guest
9 checks -- I mean the -- if you -- the way I kind of
10 opposed to this is that if I were to go buy anything, and
11 I'm verifying the total on my receipt to the items I'm
12 buying, from the customer perspective, I walked up with
13 this guest check, and I show them that I bought a seafood
14 and I bought a soy milk, they punch in the machine. And I
15 show, and I can verify that the item exactly what I think
16 they charge me, the \$6 --

17 Q You're referring to the line-item 81 on the --

18 A Yes, I'm referring to line-item 82. So if I'm
19 looking at this receipt, I bought the seafood for -- the
20 seafood and I bought the soy milk. So when they brought
21 me up the item and then the total, I was basically charged
22 \$8.30 before tax. And then with the tax the \$6.03 -- I
23 mean, \$9.03, and I gave them the \$3 tip, I want my \$15
24 cash back. And that gave me the total of \$27.03. That's
25 what they charged me. So --

1 Q And we can verify that charge on the merchant
2 receipt next to the guest check?

3 A That is correct. And you see exactly \$27.03. If
4 I was a customer at that point and if they charge me
5 \$27.03 without giving me \$15 back, I would be screaming,
6 right?

7 Q Right.

8 A Why would they be charging me \$27.03 when my
9 total purchase is only \$8.03. You see clearly on the
10 guest check.

11 Q Thank you. Ann, I want to direct your attention
12 to the ultimate conclusion from these documents. What
13 percentage would you -- did you determine was cash back on
14 the merchant receipts?

15 A It's between 20 to 25 percent.

16 Q In other words, 20 to 25 percent of the merchant
17 purchases were actually cash back?

18 A That is correct. And you can see that on page 63
19 for the September -- I'm sorry. It will go back to that
20 138. So on September 25th, if you go down to the bottom
21 of that page, which is Exhibit 1, page 13 of 21, and the
22 bottom of the page is 139, it shows 24.27 percent with the
23 cash back.

24 Q And you're comfortable having spot tested most of
25 these transactions, that is a correct percentage?

1 A That is correct. As an auditor, when I was an
2 auditor, we couldn't possibly do 100 percent of everything
3 when we audit. So we do spot checks to verify the
4 documents to make sure that the number is valid. And so
5 that's the same procedure I was using here. I kind of put
6 my hat on as an auditor and see the evidence and see how I
7 can trace it to the individual cash to the guest checks to
8 the receipts and to the summary, and I was convinced that
9 cash was given back at that point.

10 Because if I was looking at the guest check and
11 the total on the credit card charge, there's no way that
12 is possible. Because as a customer I wouldn't be allowing
13 them to charge me \$27.03 when my purchase is only \$8.30.

14 Q Thank you. And Ann, I want to direct your
15 attention to the Department's exhibit on page 50 -- I
16 believe it's -- hold on -- to page --

17 A 47?

18 Q 47, yeah. 46, 47. Because we need --

19 A Right. So.

20 Q Yeah. We need to apply what we know to the
21 auditor's data?

22 A Right. So if you look at page 47, or at the
23 bottom of the page it shows 46 from the Department's
24 exhibits, they imply, or they asserted that the client
25 overstated or understated their cash and then their sales.

1 And based on the analysis, you have to take at least
2 25 percent off from there because it's just not possible.
3 Because they disallowed the cash advance even though we
4 repeatedly showed them.

5 And even on these five days, we showed them the
6 documents. We showed them the guest checks. We showed
7 them the receipts. We walked through the items with them.
8 We showed them how to trace these items. The client
9 prepared the coding on the guest checks so that they can
10 follow and verify the document, and these were provided to
11 the Department.

12 Q And suffice it to say, the Department did not
13 agree with the evidence that you presented?

14 A That is correct. They deny that the cash back
15 was not given. But we tried to ask them how would they
16 come up with the \$27.03 amount if the cash back wasn't
17 given, giving this sample that we were looking at.

18 Q Okay. So in your professional opinion, based on
19 this page 47 -- I'm sorry -- 46 of the Department's notes,
20 what is the correct merchant sales in Column D, based off
21 of the deposits?

22 A Column D, you're talking about the total deposits
23 and payouts.

24 Q Yes.

25 A So we have to take at least 25 percent off from

1 that total because it's just grossly overstated.

2 Q And it's grossly overstated because of the
3 cash -- the cash-back policy?

4 A Right, because they based their two days of
5 examination. And then they extrapolated October 10th
6 through September 13th for the total that they came up
7 with. And that data is just not enough to extrapolate.
8 When you start with a wrong base you end up going to be
9 with -- with the wrong total.

10 Q There was a question regarding the Z-tapes?

11 A Yes.

12 Q I believe another judge on the panel asked that
13 question. Do you know the answer to that question?

14 A I'm sorry. What was the question about the
15 Z-tape?

16 MR. LEMON: It might be good Judge Brown, if we
17 can have that question repeated because I think Ann would
18 probably know and then get the citation to that page
19 number.

20 THE COURT: This is Judge Brown. I believe it
21 was a question by Judge Aldrich.

22 MS. CHIANG: Yes.

23 THE COURT: Judge Aldrich --

24 JUDGE ALDRICH: Hi, this is Judge Aldrich. So on
25 page 274 of the PDF or Bates stamp 99 --

1 MS. CHIANG: I'm sorry. What page, Judge? I
2 couldn't hear you.

3 JUDGE ALDRICH: It's Bates stamp 99 or 274 in the
4 PDF.

5 MS. CHIANG: Okay. Let me get to that page. I'm
6 sorry. I don't see 274. That's the -- were you looking
7 at -- I see 98.

8 JUDGE ALDRICH: So --

9 MS. CHIANG: 99? Are we looking at 99?

10 JUDGE ALDRICH: Are you talking about the Bates
11 stamp 99 or the PDF page?

12 MS. CHIANG: The PDF page I went to 274 --

13 JUDGE ALDRICH: Yeah.

14 MS. CHIANG: -- and I see the Bates stamp at the
15 bottom. It looks like 99. Is that -- are we talking
16 about that page?

17 JUDGE ALDRICH: Yes. Exactly.

18 MS. CHIANG: Okay. And --

19 JUDGE ALDRICH: And there's a series of totals
20 reports.

21 MS. CHIANG: Okay.

22 JUDGE ALDRICH: And then just below totals report
23 there's an unadjusted tips. What is the unadjusted tips
24 mean?

25 MS. CHIANG: Let me go back here. I'm trying to

1 read, and I'm trying to focus my page here. So this is
2 what was explained to me by the client. At the end of the
3 day what happens is when the machine is running to the
4 sale or taking the credit cards all day long, it just has
5 the total. Then, basically, at the end of the day Mr. Ngo
6 has to go to his guest checks from the receipt and then
7 input the tips from the receipts onto the program into the
8 cash register to -- to have the tips number separated out
9 from the Z-tape. Does that answer your question?

10 So during the day, like say the total was \$25,
11 they punch in 25, but the tip is not registered at that
12 point. So at the end of the day he has to manually, as
13 Mr. Ngo mentioned, at the end of the day, every day he has
14 to take the individual receipts to input the tips from the
15 receipt that was signed by the customers.

16 JUDGE ALDRICH: That answers my question. Thank
17 you.

18 MS. CHIANG: Okay.

19 THE COURT: This is Judge Brown. Mr. Lemon, you
20 can continue with your questioning of the witness.

21 MR. LEMON: Thank you. Thank you, Your Honor.

22 BY MR. LEMON:

23 Q Ann I wanted -- so how is this information
24 received by the Department, and how did it affect their
25 decision going forward?

1 A I believe with the auditor, when she was there,
2 her -- her decision not to deal with the receipts because
3 it was too many -- and it is odd to me that when we have,
4 you know, most of our clients have our records, but
5 there's some clients that don't have records. But when we
6 presented her with the evidence and the auditor basically
7 didn't -- ignored the -- the receipts because she was
8 short on time. And the same thing with the Department
9 when we presented these.

10 We even offered to walk with them and sit with
11 them and go through individual receipts and go through
12 every single receipt with them so that they can understand
13 how these things work. They didn't have to do any work.
14 We would just do all the work with them as they pull out
15 whatever -- which one that they wanted to see. The
16 Department refused to accept that these items are valid
17 because they would not sit down with us even though we
18 offered.

19 We also offered to the auditor the same situation
20 where we say, okay, here is the guest checks. Here is the
21 receipt, and here is how you trace these numbers. And
22 with the second auditor -- I mean, with the second audit
23 we did that, and the auditor was very receptive. And
24 they, basically, walked with us and sit with us because
25 they had the time -- or she has the time to go through

1 this.

2 Where the difference is with the first auditor,
3 is that she didn't have the time to do it because she was
4 on maternity leave. Originally, she was assigned to one
5 restaurant, which is Camino. And for some reason, they --
6 and Lawrence and Serra was added on, and she was given the
7 additional two restaurants even though her time was still
8 limited due to her maternity leave.

9 So she was just short on time, and she just does
10 not have the time to go through them -- or did not have
11 the time to go through them. And the Department, for some
12 reason, is not using the documents even though we provide
13 it to them.

14 MR. LEMON: Thank you, Ann.

15 I differ to the panel for questions from the
16 Department and from the panel.

17 THE COURT: This is Judge Brown. Thank you very
18 much. Now, I will ask CDTFA, do you have any questions
19 for this witness?

20 MR. SHARMA: This is Ravinder Sharma. We have no
21 questions.

22 THE COURT: Thank you very much.

23 And now I will ask my co-panelists. Judge Ewing,
24 do you have any questions for this witness?

25 JUDGE EWING: I do not have any questions,

1 Judge Brown.

2 THE COURT: Thank you.

3 Judge Aldrich, do you have any questions for this
4 witness.

5 JUDGE ALDRICH: No questions at this time.

6 Thanks.

7 THE COURT: Ms. Chiang, I may have a few
8 questions for you. What you just said a minute ago about
9 how the second audit the auditor was receptive and went
10 through the receipts. My question is, wasn't that a very
11 different audit, given that during the second audit period
12 there was no cash back involved and there were no credit
13 card transactions?

14 MS. CHIANG: We still have to prove the evidence
15 to the auditor that these records were valid. So she has
16 to substantiate the testing on the documents so that she
17 can verify the information on the summary is actually
18 traced back to the individual receipts. I think the
19 purpose was not necessarily to try to test the cash back
20 because that was not the issue. But we just try to show
21 her how the operation works, and how the guest checks went
22 from the customer -- I mean, from the waiter to the
23 kitchen out back to the customer, and the customer to pay
24 at the register.

25 And all along, the cash register has not changed

1 from the -- during the first audit and second audit where
2 the screen was still showing on one side to the cashier
3 and other side to the customer. So when they walked up
4 with their guest check, they knew exactly the items were
5 punched in of what they ordered to confirm the pricing on
6 the guest check and the total that they would pay.

7 MR. LEMON: And, Judge Brown, if I can add a
8 small bit of clarity to the second audit as well?

9 THE COURT: Go ahead.

10 MR. LEMON: We did provide also the cash
11 reconciliations that The Ngo testified to in Exhibit 3.
12 And in that exhibit, it shows -- if you just look at the
13 first few pages, they show a cash reconciliation report,
14 the cash that was received for the day, the cash that was
15 paid out towards purchases with the underlying receipts,
16 and then the cash that was deposited. And the auditor
17 accepted that information, verified it, and was able to
18 know what cash we were receiving and distributing.

19 THE COURT: This is Judge Brown. Mr. Lemon, can
20 you repeat which exhibit are you referring to in that?

21 MR. LEMON: I believe it's Exhibit 3. We'll have
22 to go pull it, but it's -- there are these one-page
23 reports. And they are a cash reconciliation that was done
24 during the second audit. So it shows at the top -- I'm
25 just working from memory -- it shows at the top the cash

1 that was received during the day.

2 It shows on the left-hand side. I believe it's
3 on the left-hand side. It's the payments that were made
4 out to various vendors in cash. And then it reconciles on
5 the right-hand side the cash that was paid out versus the
6 cash that was deposited.

7 MS. CHIANG: Judge Brown, may I add?

8 THE COURT: Yes. This is Judge Brown. Please go
9 ahead, Ms. Chiang.

10 MS. CHIANG: Yes. Judge Brown, basically, the
11 way it was explained to me by the clients is that the bank
12 charged them for the cash deposits. So they, basically,
13 use cash to pay their vendors when -- during the day when
14 they need to buy certain items and either the store got
15 brought -- the store brought them in -- the grocery store
16 brought in the items, or they send their employees out.
17 They use the cash to pay for those.

18 And then they also use the ATM machine to deposit
19 the cash. So then they basically recycle the cash, so the
20 net is what gets deposited into the bank. It depends on
21 when and how often and how much money is at the cash
22 register. And the officers are the ones that actually do
23 the depositing to the bank -- actual cash to the bank.

24 THE COURT: This is Judge Brown. Ms. Chiang, you
25 said that the clients told you that the bank charged them

1 for cash deposits; is that correct?

2 MS. CHIANG: Yes. That is the practice. So if
3 they -- the deposit has a certain amount. When it's above
4 the amount, the cash get -- they get charged for, you
5 know, for a certain percentage on the cash deposits. And
6 that's for all restaurants, actually. They're not any
7 special. So I think the idea of having the ATM machine
8 there was because of -- part of that. And also, they made
9 a small commission using the ATM machine. So they earned
10 money from the ATM machine for deposit -- for recycling
11 the cash into the ATM machine.

12 THE COURT: This is Judge Brown. I believe that
13 Judge Aldrich may have indicated -- you have another
14 question for this witness. You can go ahead.

15 JUDGE ALDRICH: Yeah. So regarding the CDTFA
16 exhibit, the Audit Schedule page 162. So it's 161,
17 actually. If you want to take a second to get there, it's
18 regarding Camino. Would you let me know when --

19 MS. CHIANG: On the page that shows 161?

20 JUDGE ALDRICH: Yes.

21 MS. CHIANG: Okay. I'm there.

22 JUDGE ALDRICH: All right. So there are
23 Schedules A through J and on columns -- sorry -- Columns A
24 through J and Column D is FITR purchases or federal income
25 tax return purchases. And --

1 MS. CHIANG: Okay. Just a second, please. Okay.
2 I'm there. So what column are we talking about? Column D
3 you said?

4 JUDGE ALDRICH: Column D, yes.

5 MS. CHIANG: Okay.

6 JUDGE ALDRICH: And so we heard testimony that
7 the business would increase during the winter months, so
8 the third quarter, fourth quarter. And corresponding
9 cost, so purchases of groceries and whatnot, would also
10 increase. But the FITR purchases in Column D, I don't see
11 any significant fluctuation. Is there a reason for that?

12 MS. CHIANG: I don't have an answer. The
13 purchases, basically, when we do the accounting for the
14 business, all the receipts would be provided to us. And
15 that's how we account for the total purchases. It's based
16 on their cash pay or the checks pay or credit card pays,
17 and that is the total cost of the -- the grocery. Sorry.

18 But if you look at the same question on
19 Column B -- yeah. If you look at Column B, the sales are
20 pretty much -- it's pretty close to -- I mean, they don't
21 fluctuate that much either. So that might explain why the
22 purchases are not changing that much.

23 JUDGE ALDRICH: Okay.

24 MR. LEMON: This is -- this is Samuel Lemon. I
25 think I can provide the explanation, Judge Aldrich.

1 JUDGE ALDRICH: Sure. Go for it.

2 MR. LEMON: The analysis done -- it looks like
3 Ms. Moss -- on this report is an annual analysis. These
4 are federal income tax returns, and so they're not going
5 to distinguish between quarters.

6 JUDGE ALDRICH: So it's possible it's amortized
7 over those quarters?

8 MR. LEMON: Well, I wouldn't call it
9 amortization. I would simply say that these -- this
10 analysis is done on an annual basis. So for 2010, they're
11 looking at purchases or cost of goods sold versus income.
12 I would also offer into evidence the Appellants' exhibit,
13 which has the same information from 2016 to 2018. And the
14 markups from 2016 to 2018 are the same as they are from
15 2010 to 2012, verifying that the book markups haven't
16 changed for the business in a number of years. And I can
17 find that reference for the panel in a moment.

18 JUDGE ALDRICH: Great.

19 MR. LEMON: But the short answer is --

20 JUDGE ALDRICH: I have no further questions.

21 MR. LEMON: Oh, thank you.

22 THE COURT: All right. This is Judge Brown.

23 Mr. Lemon, you can provide that exhibit reference when we
24 return to you in just a minute.

25 Ms. Chiang, I guess I just wanted to go back and

1 ask when you were walking us through the schedule -- I
2 guess -- hold on -- it was on when you were talking about
3 page 137 from September 25th, and you were showing us
4 line 81.

5 MS. CHIANG: Yes.

6 THE COURT: And you were comparing that to a
7 guest check on a later page. And I don't remember the
8 page number. Oh, page --

9 MS. CHIANG: That's page 149, Judge.

10 THE COURT: Yes, it's page 149. I guess my
11 question is, how do we know that those line up? Like, how
12 do we know that the receipt from page 149 refer -- how do
13 we know that lines up with line 81 on page 137?

14 MS. CHIANG: Yes, Judge. So the -- Mr. Ngo
15 basically went through all the receipts received by
16 receipts and organized them by the line items as based on
17 the transaction number. So the guest checks and the
18 receipts were organized by transactions. So you can
19 actually went through -- if you have a stack of guest
20 checks and cash and the receipts in front of you, you can
21 literally go through that item based on the summary to
22 trace it back to the individual guest check and the
23 receipt.

24 MR. LEMON: For clarification, Ann, are you
25 referring to the transaction number on the guest check?

1 MS. CHIANG: I am referring to the summary. If
2 we go back to page 138, on the left column, on the first
3 column, it shows transaction number. And that's how we
4 can identify the transaction number off that line to the
5 guest checks that actually has the same transaction
6 number.

7 I'm trying to see. These are very blurry. I'm
8 trying to see if I can read the transaction number on the
9 receipts because these are very, very old. If these -- if
10 these were perfect condition, you would see the
11 transaction number on here. But since they were scanned
12 in much later, the receipts -- I believe these receipts
13 are thermal paper, so they kind of fade over the days -- I
14 mean, over the years.

15 But this is basically when the owner -- when the
16 client bought these receipts in, they actually organized
17 it by transaction. And that's what he does at the end of
18 the day to organize them by transaction, and then matching
19 them up with the receipt. And that's how he input the
20 tips from the receipt into the cash register to the
21 machine to pull up the total tips.

22 THE COURT: This is Judge Brown. Okay. Thank
23 you.

24 MS. CHIANG: You're welcome.

25 THE COURT: Co-panelists, if you don't have any

1 further questions from the witness, I will excuse the
2 witness and say thank you for your testimony.

3 And I will turn back to Mr. Lemon who indicated
4 that he wanted to reserve his remaining time that we had
5 previously allocated to the examination of the first
6 witness in order to provide a -- complete his presentation
7 before we move onto CDTFA's presentation.

8 Mr. Lemon, you can proceed.

9 MR. LEMON: Thank you, Your Honor. I just wanted
10 to note and just make sure I'm under time. I think we're
11 at about an hour and 15 minutes, but I just wanted to
12 clarify. I don't want to go over.

13 THE COURT: We had a few interruptions because we
14 got a little bit of a late start. One second. We started
15 Ms. Chiang's testimony around 1:45. Anyway, you can
16 proceed. Will 10 minutes be enough?

17 MR. LEMON: I think it'll be slightly longer.

18 THE COURT: About 15. You have 15 minutes.

19 MR. LEMON: Okay. Thank you, Your Honor.

20 And thank you to the panel for the opportunity to
21 present our case.

22 I wanted to organize our evidence and arguments
23 by addressing the appeals decision, dated April 12th,
24 2018, which can be found on pages 116 to 126 of the
25 Department's exhibits. I think that's the easiest way to

1 go item by item. And so I'll be addressing my analysis
2 mostly towards Camino, but please consider that the same
3 analysis and arguments cover Lawrence Foods as well. And
4 the advantage that we have with Camino Foods particular in
5 this second audit, and it conducted in -- the information
6 from that audit can be used to supplement the first.

7 On page 116, the Department asserts that for
8 Camino Foods an additional \$1,546,187 of additional
9 taxable measure went unreported. The Department further
10 asserts that this entire amount was in cash collected by
11 the Appellant but un-deposited. The Department relies on
12 a two-day site test for this assertion. And their entire
13 case can be summarized on page 34 of their work papers.
14 It is from the credit card ratio that all of their other
15 assertions primarily rely.

16 So I want to note in the Appellants' decision two
17 instances where the Department found data that is fully
18 consistent with the taxpayer's reported sales. First, on
19 page 117 the Appeals Board notes petitioner provides for
20 examination federal income tax returns for the audit
21 years, bank statements, and the -- for the audit years,
22 bank statements, cash register Z-tapes, and credit card
23 summaries for the audit period. At all time during this
24 process, petitioner has made available all the source
25 documentation necessary to support our reported sales.

1 You heard Ms. Ann Chiang explain that the direct
2 evidence of sales was available to the Department, and
3 that the auditor moved past that information relatively
4 quickly in order to do the indirect test. One can at
5 least sympathize the sheer volume of this data is
6 enormous, comprising approximately 15 to 20 banker's boxes
7 of evidence for the audit period. But that being said,
8 the correct method for reviewing this data would have been
9 statistical sampling. Pressed for time, the auditor chose
10 to use the indirect method instead.

11 Second, the Department compared the federal
12 income tax returns to the sales tax returns filed by the
13 Appellant and found them to be in complete agreement. And
14 I note Judge Aldrich's question regarding the markups.
15 From the federal income tax returns, the Department made
16 comparisons of income to cost of goods sold. On the
17 bottom of page 117, we find the first analysis that
18 convinced the Department to use an indirect method of
19 testing. And it is here I wish to offer my first
20 rebuttal.

21 The Department took book markups they considered
22 to be too low. The Board -- the panel may note book
23 markups of 212, 218, and 226 percent for 2010, 2011, and
24 2012, respectively. To supplement their audit, the
25 Department offers into evidence recalculated markups

1 exceeding 475 percent, which they feel more closely
2 mirrors industry standards.

3 I offer into evidence the second audit conducted.
4 One can go to page 30 of Appellants' Exhibit 1, perform
5 the same exact analysis by taking the income and dividing
6 it by cost of goods sold. And on the second page of that
7 exhibit, that's exactly what it's done. And for tax years
8 2016, 2017, and 2018, we find verified markups of 198,
9 194, and 189 percent, respectively.

10 As in the first audit, the Department took these
11 markups as an indication that more testing was preferred.
12 But unlike the first audit, the second audit was closed
13 with no change, noting only a 1.26 percent variance
14 between audited and reported taxable measure. And you can
15 see that on page 13 of Appellants' Exhibit 1.

16 And let me pause for a moment to note that the
17 Department should be asked to explain a conundrum. By its
18 own logic, their testing methods are used to take a sample
19 and extrapolate that sample over a population of 12
20 quarters. In the present case backwards, the
21 November 2013 quarter four sample is being used to reveal
22 sales from quarter four 2010 through quarter three 2013.
23 However, if that is true, why can't it be used to project
24 sales forwards. If we do, then the Department must assert
25 that the audit is equally valid for tax periods quarter 1

1 2014 through quarter four 2016.

2 And here's their problem. Their second audit
3 also covers 2016 counting backwards from the sample they
4 took in quarter three 2019. If the first audit is true,
5 daily sales in 2016 should be in excess of \$3,143 noted on
6 their page 121, because businesses tend to grow overtime.
7 If the second audit is true, then daily sales for 2016
8 must be below \$2,349, again, because businesses grow over
9 time. And you can see that on Appellants' Exhibit 1,
10 page 16. Both assertions cannot be true.

11 Now, I know what the daily sales were in 2016.
12 They were \$1,922.50. I know they were this amount because
13 in the second audit, the bank statement deposits were
14 compared to the reported amounts and found to be reliable.
15 And that analysis can be derived from pages 26 and 27 of
16 our Exhibit 1. You simply have to take the reported
17 annual amounts and divide by 360 days. But I also know
18 that our daily sales number is more reliable. Because,
19 again, sitting in Ann's office are the guest checks,
20 Z-tapes, and monthly summaries used to deprive those
21 numbers.

22 Now, I'm not distressed of the Department being
23 skeptical of the book markups. They compared us to the
24 overall inventory, and they thought they needed to keep
25 looking. Fair enough. But it's worth circling back and

1 discovering why those book markups are so low.
2 Thankfully, the Department provided that information for
3 us, and I direct you towards their Exhibit E. I may get
4 into a little trouble here. What I'm about to reveal is
5 both an important litigation point but also possibly a
6 marketing blunder.

7 When you read the Yelp reviews, what you find is
8 people from one star to five stars saying pretty much the
9 exact same thing. The food is cheap. Quote, "This place
10 is nice and clean with fast service and reasonable price."
11 Quote, "Cheap, fast, and delicious." Quote, "Great
12 prices." Quote, "It is pretty cheap and okay but not my
13 preference." Quote, "I feel the broth is on the oily
14 side. However, the prices are cheap, and you will
15 definitely be filled, even with a small." Quote, "Oh, I
16 almost forgot. The prices can't be beat."

17 Cheap food has low markups. Over and over and
18 over again, Yelp reviewers are saying the same thing.
19 Some point to it as a positive. Some declare it a
20 negative, but they all say the food is affordable. You
21 can't really change the cost of food by much. So if
22 you're going to have low prices, your margins are going to
23 be low. And we have the second audit verifying that those
24 margins reasonable given our business model.

25 For Camino to be producing the kind of volume the

1 Department is asserting, they would have to be buying much
2 more product than is listed on their federal returns. And
3 that is true for both audits. The purchase records
4 provided to the Department in the second audit fully
5 reconcile the cash collected during that period. And
6 there were images of everything they were buying. If
7 there is some additional recipe for soup the Department is
8 looking for, it should have been picked up in the second
9 audit. It wasn't. The menus provided by the Department's
10 own exhibits are roughly the same, and the recipes haven't
11 changed.

12 On page 118, the Department also notes low cash
13 deposits. The cause of this is revealed in the second
14 audit and in The's testimony. He uses cash to make
15 purchases at Costco and in other places. In the second
16 audit we worked with the auditor to verify where the cash
17 was going by providing daily cash reconciliations that
18 tied out how much was being deposited and how much was
19 being used to buy inventory. And exemplar those
20 reconciliations is found in the Appellants' exhibits. I
21 believe, for reference, it's Exhibit 5. But it's the
22 first page of, I believe, Exhibit 5.

23 You heard The testify that he used this
24 reconciliation to control cash, and we found what we
25 expected to find. About 15 percent of the cash was being

1 used to buy fresh vegetables and other supplies. Compare
2 that number with the Department's assertion that 17
3 percent of reported sales was not being deposited; found
4 on Department's page 118 where they note 83.21 percent of
5 reported sales were deposited. It makes little sense to
6 deposit the cash you have on hand and withdraw it again,
7 especially, if the bank is charging you a fee.

8 Now, we turn to the heart of the Department's
9 case, the credit card ratio deprived from the two-day
10 test. There are a few problems with the test itself that
11 I'd like to highlight. Some have already been discussed
12 by direct testimony. But we are not asking the Board to
13 throw out the test or sample data provided by the
14 Department. We are merely asking them to complete the
15 test by supplementing it with Exhibit 7.

16 First, by its own reporting the taxpayer has
17 admitted that quarter four is a busier season than all
18 other quarters. Camino self-reported quarter four returns
19 are higher than any of the other three quarters. In some
20 cases, 90 percent or in other cases 75 percent difference.
21 In particular, in 2013 to 2014, I would like the panel to
22 take judicial notice of the cold front that was coming
23 into the northern United States. It was an especially
24 harsh winter.

25 Another key to understanding the differences in

1 the Department's site test is found in the Department's
2 own analysis on page 158 of their exhibit. The Department
3 is correct to compare reported versus audited transaction
4 averages. The only problem that we have with this
5 analysis is that they did not have access to the correct
6 amount of foot traffic for the population. In the second
7 audit we do. The second audit site test was conducted in
8 August, and they note the true number of transactions
9 during a non-holiday season.

10 Appellants' Exhibit 1 shows us on pages 21
11 through 25 a site test showing 153 transactions. If you
12 take the reported daily sales during the audit of \$1,711,
13 as reported on Department's page 121, and you divide by
14 153 transactions instead of 263, you get \$11.18, which is
15 about 80 to 85 percent of what the Department expected to
16 find of \$13.56. Their analysis is also in Department's
17 page 121. The point here is that the key to any site test
18 is foot traffic. How many people are coming in and buying
19 a bowl of soup, and how much are they paying.

20 In quarter four of each year, it's closer to 232
21 people, as noted in the Department's site test summarized
22 on their page 157. In other quarters it's closer to 153,
23 as summarized in Appellant's Exhibit 1 on pages 21 through
24 25, and the September data provided by Ms. Chiang in the
25 first audit. The percent change between that foot traffic

1 is 68 percent. I note for comparison that the Appellant
2 reported taxable sales in quarter four 2013 is \$210,031
3 and \$161,947 in quarter three. So quarter three reported
4 sales is 77 percent of quarter four. Pretty close.

5 The most rational explanation is the difference
6 in foot traffic on an average, as between quarter three
7 and quarter four. Quarter four is busier. And as a
8 busier quarter, a sample from that quarter will deviate
9 from the population of the audit period, where Appellant
10 is reporting consistent sales between quarters one through
11 three, and a jump in sales in quarter four during the
12 sample period. People buy warm soup on a cold day.

13 Test us in the winter, and you'll get more people
14 than if you test us in the summer. That's what happened.
15 Interpreting the data is as simple as pointing out that
16 November is colder than August. November of 2013
17 coincided with the North American Winter, and so it was an
18 extended period of very cold temperatures.

19 You also heard from The Ngo, the problems they
20 were having with the merchant processor. For nine days
21 the entire system was broken. Then the Department test
22 sales on November 6th, and cashiers were taking more cash
23 than credit cards. The November 6th test is not
24 representative of the credit card to cash ratio during the
25 audit period.

1 The November 15th test is closer. At least it's
2 closer to what we know from Exhibit 7. But I hope the
3 panel will consider the sheer variance between those two
4 credit card ratios. 37.93 as compared to 49.27 is a
5 75 percent difference. The difference in taxable measure
6 deprived by those two numbers is over a million dollars.
7 With that kind of possible difference in potential taxable
8 measure, and objective observer would have looked for
9 further testing.

10 The's testimony is fully supplemented by the
11 documents he provided. Our lead sheet in Exhibit 7
12 provided, is fully supplemented by the actual merchant
13 copies of the credit cards taken in November. Those
14 copies contain a summary in the upper left-hand corner
15 that foots the entire daily balance, so we know what our
16 merchant sales were. We can compare them to the daily
17 sales, and we can calculate a ratio. That weighted
18 average ratio is closer to what was sampled on
19 November 15th. On that day the Department asserts a
20 49 percent ratio.

21 For our part, we know from direct evidence that
22 the ratio is actually closer to 65 percent. In the
23 current Audit Manual Section 810.45 advice is given on
24 procedures for site tests. I know that the current Audit
25 Manual was updated from the one used by the Department

1 during the audit. But why was it changed? It was changed
2 so that the audit procedures could be improved upon and so
3 samples would be more reliable and projected onto the
4 population.

5 From the Audit Manual test days are supposed to
6 be reflective of an average sales day, and the auditor is
7 to avoid conducting the test immediately preceding or
8 following a holiday. In the present case, Veteran's Day
9 weekend was on the weekend of November 11th right in
10 between the two testing days. From the Audit Manual, one
11 day is permitted to be used as a preliminary examination,
12 but its purpose is to verify the adequacy and/or
13 reliability of records. In the present case, the
14 comparisons were omitted.

15 From the Audit Manual, when using a cash or
16 credit card ration, a minimum of three testing days is
17 required, referring specifically to the credit card ratio.
18 Quote, "The test cannot be used to project sales without
19 expanding the period to a full three days," unquote. In
20 the present case, only two days were tested. We
21 understand the Audit Manual was updated. But consider,
22 two points of data create a straight line. Three points
23 of data create a more accurate line, and 25 days of data
24 create a pattern.

25 From the Audit Manual, questions should be raised

1 such as, quote, "Have business operations changed during
2 the audit period?" And quote, "Have there been any
3 unusual circumstances during the audit period that would
4 affect sales?" In the present case, you heard Ann Chiang
5 testify that cash-back policy affected credit card sales
6 during the audit period by 20 to 25 percent. You heard
7 The Ngo testify that the merchant processor was having
8 extreme difficulties and that prior to the test day, the
9 entire system was offline.

10 From the Audit Manual, consideration should be
11 given to the seasonal nature of a business. In the
12 present case we know we sell more soup in the winter as
13 evidenced by the taxpayer's own reporting. We also have
14 the difference in foot traffic noted from the second audit
15 and from Ann Chiang's September data. In the first audit,
16 which verifies a lower number of transactions during the
17 summer as compared to the winter.

18 From the Audit Manual, the results of the test
19 should be reconciled to the taxpayer's records. The
20 differences are noted. The differences should be analyzed
21 and discussed with the taxpayer. If the results of the
22 tested days are determined to be inadequate or
23 inconclusive, the auditor may expand the test. All we are
24 asking of the panel is to expand the test. We have
25 presented Exhibit 7, which increases the sample size from

1 two days to 25 days. In addition, Exhibit 8 provides
2 another two months' worth of merchant data, which
3 supplements our credit card ratio.

4 Exhibit 7 is verified with actual credit card
5 receipts contemporaneously obtained the day they were
6 processed, and we have the guest checks to verify the
7 November sales date. If the panel will do so, they should
8 make two important findings. First, the merchant deposits
9 are not representative of actual merchant sales and need
10 to be discounted by 25 percent, correcting baseline
11 merchant sales from \$1,628,8979 to \$1,221,659.

12 Second, the credit card ratio to be applied is
13 65 percent. Dividing the former into the latter gives the
14 audited sales of the business for the audit period for
15 \$1,879,475. Petitioner Camino Foods reported \$1,848,331
16 in taxable sales for the audit period. The same analysis
17 is true of Lawrence Foods, producing credit card deposits
18 by 25 percent correcting baseline merchant sales from
19 \$911,022 to \$683,266.50.

20 Applying a credit card ratio of 65 percent and
21 dividing the former into the latter gives the audited
22 sales of Lawrence Foods as \$1,051,179. Lawrence Foods
23 reported \$1,070,593 over the audit period. See pages 64
24 and 65 of Department exhibits for Lawrence by way of
25 reference for these calculations.

1 The evidence is clear. Buy hot soup on a cold
2 day. We've shown the panel the difference in foot
3 traffic. We've shown the panel the cash back walk through
4 that was provided to the auditor. We've shown the panel
5 the existence of the -- of the sales as compared between
6 the first audit and second audit. We've shown the panel
7 the cost of goods markups. We've shown the panel a number
8 of items that lead to the conclusion that should be
9 obvious, two-million dollars' worth of cash sales were not
10 obfuscated or concealed by the taxpayer in tax years 2010
11 to 2013. It defies common sense, but it also is
12 contradicted by the evidence of the second audit and the
13 supplemental information that we've provided today.

14 I'm very grateful to the panel for considering
15 our evidence and differ to the panel for the CDTFA's
16 presentation.

17 THE COURT: Thank you, Mr. Lemon.

18 This is Judge Brown. Judge Aldrich, Judge Ewing,
19 unless you have questions for Appellants at this time, I
20 will move onto CDTFA's presentation.

21 All right. CDTFA, you indicated that you're not
22 calling any witnesses, but you will be making a
23 presentation and you can begin when you are ready.

24 ///

25 ///

PRESENTATION

MR. SHARMA: Thank you. This is Ravinder Sharma.

Appellant Camino Foods, Inc., has operated a restaurant since February 1, 2000, and Appellant Lawrence Foods, Inc., has operated a restaurant since October 1, 1999. Camino and Lawrence serve hot food and soups, hot food, and nonalcoholic beverage for dine-in and take-out in Sunnyvale, California. Business hours are 10:00 a.m. to 8:00 p.m. for Sunday through Tuesday and 10:00 a.m. to 9:00 p.m. for Friday and Saturday.

The Department performed an audit for the period of October 1, 2010, through September 30, 2013. Appellant maintains a single entry set of books and records and provided federal income tax returns by years 2010 through 2012, bank statements, cash register Z-tape summaries, guest checks, and credit card receipts per review. Appellant takes sales totals from daily cash register Z-tapes and enters into a monthly sales worksheet, which is used to prepare Appellants' quarterly sales and use tax returns.

The Department computed markup of cost using gross receipts and cost of goods sold amounts per Appellants' federal income tax returns. For Camino, the achieved markup was 290 percent for the years 2010 through 2012; Exhibit A. Page 47. For Lawrence, the

1 achieved markup was 215 percent for years 2010 to 2012;
2 Exhibit G, page 51. Because Appellant did not provide
3 purchase invoices and purchase journals, the Department
4 could not verify the accuracy of cost of goods sold.

5 The Department reviewed Appellants' bank
6 statements and noted the over \$1.8 million in deposits by
7 Camino, less than 1 percent or \$3,444 of the deposits were
8 cash. The over \$1 million in deposit for Lawrence, less
9 than 1 percent or \$7,644 deposits were cash. Out of
10 36 months for the audit period, the Department noted that
11 there were no cash deposits for 31 months for Camino and
12 29 months for Lawrence. For Camino, cash deposits were
13 noted only for five months, ranging from \$44 to \$1,400;
14 Exhibit A, page 46. For Lawrence, cash deposits were
15 noted only for seven months ranging from \$135 to \$2,492;
16 Exhibit D page 50.

17 This indicates that majority of the cash sales
18 were not deposited into the bank. The Department also
19 performed an analysis of bank deposits. Thereby, cash and
20 estimated tips were removed to calculate a credit card
21 percentage of 80.21 percent for Camino; Exhibit A,
22 page 46; and 69.77 percent for Lawrence; Exhibit H,
23 page 50. These percentages were considered high with
24 Department's experience with similar businesses.

25 Based on analysis of federal income tax returns

1 and bank statements, the Department determined that
2 Appellants' books and records were incomplete and not
3 reliable and decided to perform an indirect audit method
4 to verify the accuracy of reported amounts and compute
5 audited taxable sales. The Department performed two
6 separate observation tests of each restaurant on the same
7 days and at the same time.

8 The first test was conducted on Wednesday,
9 November 6, 2013, from 10:00 a.m. to 8:00 p.m.; Exhibit A,
10 pages 35 to 38 and Exhibit D, pages 234 to 40. The second
11 test was conducted on Friday, November 15, 2013, from
12 10:00 a.m. to 9:00 p.m.; Exhibit A, pages 39 to 45 and
13 Exhibit G, pages 41 to 49. The Department specifically
14 performed the site test to include a slower day midweek,
15 Wednesday, and a busier day, Friday, to obtain
16 representative results.

17 The Department transcribed every transaction,
18 including the method of payment and tax collected. No
19 take-outs were noted. No employ meals were rung up, and
20 no transaction with cash back were noted. The Department
21 used the results of the observation tests to calculate a
22 credit card ratio excluding tax and tips of 44.17 percent
23 for Camino and 44.46 percent for Lawrence and an average
24 tip percentage of 9.74 percent for Camino and 8.62 percent
25 for Lawrence Foods; Exhibit A, pages 34, and Exhibit D

1 pages 33.

2 For Camino, the Department applied credit card
3 tips ratio of 9.74 percent and credit card ratio of 44.17
4 percent to the adjusted credit card deposits of little
5 more than \$1.8 million to arrive at audited taxable sales
6 of approximately \$3.39 million. Camino reported around
7 \$1.84 in taxable sales resulting into an understated
8 taxable sales of approximately \$1.55 million for the audit
9 period; Exhibit A, page 32. For Lawrence, the Department
10 applied credit card tips ratio of 8.62 percent and credit
11 card ratio of 44.46 percent to the adjusted credit card
12 deposits of around \$997,000 to arrive at audited taxable
13 sales of approximately \$1.8 million.

14 Lawrence reported \$1.07 million in taxable sales
15 resulting into understated taxable sales of approximately
16 \$816,000 for the audit period; Exhibit D, page 31. The
17 Department's use of a credit card ratio method provides a
18 more reasonable audit result than other methods. For
19 example, with flat projection method, using the results of
20 two days of observation tests, Appellants estimated
21 taxable sale would be around \$3.9 million for Camino and
22 \$2.3 million for Lawrence. These results are more than
23 \$400,000 higher for each location than the current audit
24 approach.

25 During the appeals process, the Appellants

1 contends that cash advances were regularly processed by
2 their customers who paid by credit card. Appellants
3 submitted some limited documentation in support of its
4 position, such as guest checks and credit card receipts.
5 Appellants provided some low-dollar amount guest checks
6 and tried to match with the high-dollar credit card
7 receipts and claimed the difference as cash back. None of
8 the credit card receipts identified cash advance, which
9 could be traced to the documents; Exhibit B, pages 130 to
10 152; Exhibit H, pages 75 to 89.

11 Since there were no sales total on the guest
12 checks, the Department could not place any of the provided
13 guest checks to the credit card receipts and ultimately to
14 claimed cash back amount. The Department also noted that
15 there were 903 transactions, 534 for Camino and 369 for
16 Lawrence in the observation tests, and not even one
17 transaction was noted as having a cash advance; Exhibit A,
18 pages 35 to 45 and Exhibit G, pages 34 to 49.

19 Additionally, a review of yelp.com shows no
20 mention of Appellants offering cash back on credit card
21 transactions. Appellant has not provided any proof of its
22 claim that they offered cash advances. Due to high
23 merchant fees, it is unreasonable for a restaurant to
24 offer this service. In addition, this practice is
25 generally prohibited by the credit card merchant

1 processing companies.

2 Appellants' Exhibit 1 through 4 contain audit
3 working papers and related documents by the audit period
4 January 1, 2016, through December 31, 2018. These
5 exhibits are not relevant to either Camino or Lawrence as
6 the audits for these businesses are for the period
7 October 1, 2010, through September 30, 2013. Generally,
8 the introduction of an audit that is not at issue in the
9 appeal is only relevant as a means to request a relief of
10 tax pursuant to Revenue Taxation Code Section 6596.

11 In such a situation, the taxpayer must show that
12 it subsequently relied on the results of the prior number
13 of the same business. There is no provision for a
14 taxpayer to use the results of the subsequent audit as
15 evidence against the results of the prior audit.
16 Accordingly, Appellants' Exhibit 1 through 4 are not
17 relevant to this appeal.

18 Appellants' Exhibit 5 contains guest checks,
19 purchase invoices, and credit card receipts for the period
20 September 20, 2013, through September 27, 2013. There is
21 no specific information on any of these documents for the
22 Department to respond to. Additionally, there is no audit
23 trail from the guest checks to the credit card transaction
24 receipts. Guest checks are not dated. Guest checks are
25 not in any sequential order, and most importantly, there

1 is no sales total on most of the guest checks for Camino
2 that can be traced to credit card receipts or to any audit
3 schedule and exhibits.

4 Appellants' Exhibit 6 to 8 contain credit card
5 receipts, guest checks with cash register receipts
6 attached to it, daily sales summary reports, cash register
7 Z-tapes, and copies of quarterly sale and use tax returns
8 for both Camino and Lawrence. For Camino, Appellants
9 submitted guest checks with attached cash register
10 receipts for the month of November 2013. The Department
11 examined these documents and noted the following issues:

12 Guest checks shown in Exhibit 6 are not in any
13 sequential order, and there are a lot of missing serial
14 numbers. In Exhibit 8, Appellants submitted 208 guest
15 checks November 6, 2013, and 208 guest checks for
16 November 15, 2013. Guest checks for both days did not
17 have any cash register receipts attached. Both days were
18 part of the Department's observation test, and Appellants'
19 submission does not equal the total number of sales
20 observed on those days.

21 Guest checks for November 21st and 22nd provided
22 in Exhibit 6, show significant gaps in their numbering
23 with 419 missing serial numbers. The Department examined
24 all cash register receipts provided in Exhibit 6 and noted
25 that they are not rung up at the actual time of sale.

1 Instead, a view of these cash register receipts shows that
2 Appellant rung up these receipts within the last hour or
3 so from the close of business.

4 For example, on November 1, 2013, Exhibit 6 shows
5 a total of 217 sales transactions, and all got rung up
6 between 2:01 p.m. and 3:25 p.m., Despite the business
7 being open from 10:00 a.m. to 9:00 p.m. Moreover, a
8 review of the credit card receipts for the same day from
9 Exhibit 7 shows that sales occurred before 1:02 p.m. and
10 after 2:25 p.m. These same discrepancies were noted for
11 every day in November 2013.

12 For example, on November 27, 139 transactions are
13 rung up within 25 minutes from 7:36 p.m. to 8:00 p.m. On
14 November 28, 104 sales transactions are rung up within
15 22 minutes from 1:47 p.m. to 8:08 p.m. On November 30th,
16 136 transactions are rung up within 24 minutes from
17 8:41 p.m. to 9:08 p.m. To verify the accuracy of credit
18 card receipts and guest checks with attached cash register
19 receipts, the Department randomly selected November 13th
20 and November 27th -- November 13th and November 27th and
21 traced credit card receipts to the cash register receipts.

22 Documents provided in Exhibit 6 and 7 show that
23 on November 13th, only 11 credit card receipts totaling
24 \$240 out of total credit card sales of \$1,188 for that
25 day, match with the cash register receipts. Similarly, on

1 November 27th, only 22 credit card receipts totaling \$417
2 out of total credit card sales of \$1,988 for that day
3 match with cash register receipts. The Department noted
4 cash register Z-tape Number 2 for November 1st, and same
5 cash register Z-tape Number 2 two from November 2nd. Cash
6 register Z-tape Number 6 for November 5th and same cash
7 register Z-tape Number 6 for November 6th.

8 Finally, the Department also noted missing
9 merchant statements for the last four days of October
10 2013, plus five days of November 2013, and last 11 days of
11 December 2013; Exhibit 8. For Lawrence, Appellants
12 submitted merchant statements for 16 days of October 2013,
13 19 days of November 2013, and 16 days of December 2013.
14 Guest checks without any cash register receipts for
15 November 6 and cash register Z-tapes for the period from
16 October 2013 through December 2013.

17 A review of submitted cash register Z-tapes shows
18 significant number of cash register Z-tapes missing. For
19 example, Appellants submitted 29 cash register Z-tapes for
20 December 2013. The Department noted cash register Z-tape
21 Number 1 for December 1st and Z-tape Number 59 for
22 December 31st. Which means Appellants ran 59 cash
23 register Z-tapes for December 2013, resulting in 30
24 missing cash register Z-tapes for December 2013;
25 Exhibit 8. Based on the above review and analysis, the

1 Department believes Appellants' Exhibit 6 to 8 are
2 incomplete.

3 Appellants also submitted a worksheet for
4 November 2013 by Camino claiming credit card sales ratio
5 of approximately 65 percent to the total sales; Exhibit 7.
6 This ratio is based on the total sales and credit card
7 sales for the last 25 days of November 2013. That
8 included the two observation test cases. Appellants also
9 submitted guest checks with cash register receipts
10 attached and credit card receipts to support this
11 worksheet; Exhibit 8. The Department examined and
12 reviewed all documents and noted the following:

13 During the site test, the Department noted that
14 sales transactions are rung up at the time of sales with
15 the first sale transaction at 10:22 a.m., and the last
16 sale transaction at 8:21 p.m. on November 6th; Exhibit A,
17 pages 35 through 38. And first sale transaction at
18 10:23 a.m., and the last sales transaction at 8:55 p.m. on
19 November 15th; Exhibit A, pages 39 to 45. Appellants
20 submitted credit card receipts for 25 days of November
21 2013.

22 To verify the reasonableness and accuracy of
23 total sales for 23 days, not including two observation
24 test days, the Department placed credit card receipts to
25 the guest checks with attached cash register receipts and

1 noted that most of the credit card receipts are processed
2 between 10:00 a.m. and 9:00 p.m., whereas most cash
3 register receipts are rung up between 7:22 p.m. and
4 9:22 p.m., with the exception of November 1st.

5 The Department then examined the records in
6 Exhibits 6 and 7 for every day in November 2013 and noted
7 the same issue. The first credit card receipts were
8 processed between 10:00 a.m. and 11:40 a.m. And the first
9 cash register receipt is rung up between 7:22 p.m. and
10 8:41 p.m. Moreover, the documents appear to be
11 incomplete. During the two observation tests, the
12 Department noted 247 transactions for November 6th and 287
13 transactions for November 15th; Exhibit A, pages 31
14 through 45. Whereas the remaining 23 days in November,
15 Appellants' submissions have only two days with more than
16 200 transactions; Exhibit 7.

17 The Department also noted cash sales of \$1,991
18 for November 6th and \$1,992 for November 15th. That's
19 Exhibit A, pages 35 to 45. Whereas, for the remaining 23
20 days, there are only two days where the cash sales come
21 close to \$2,000; Exhibit 7. Average daily sales for the
22 remaining 21 days are only 870, which is less than half of
23 cash sales that was noted during the observation test.

24 Based on the above, it appears that Appellants
25 did not use the same method to keep books and records for

1 the 23 days in November as was done for the two
2 observation days test. Due to significant gaps between
3 actual time of sales and ring up of sales in the cash
4 registers, which is more than 9 hours or so, the
5 Department believes that the records are not reliable to
6 show that submitted documents represent actual sales for
7 the remaining 23 days of November 2013.

8 In the absence of all cash sales being accounted
9 for, total sales for the remaining 23 days might not be
10 accurate and reasonable. If some of the cash sales are
11 missing, then any credit card issue determined based on
12 the incorrect total sales might not be acceptable and
13 reasonable to include in the calculation of error rate.

14 Therefore, the Department's use of credit card
15 ratio method was reasonable, and Appellant have not shown
16 that any adjustment to the audit liabilities are
17 warranted. Accordingly, the Department request the appeal
18 be denied.

19 This concludes my presentation, and I'm available
20 to answer any questions you may have. Thank you.

21 THE COURT: This is Judge Brown. Thank you,
22 Mr. Sharma.

23 I will first begin with my co-panelists and ask
24 if they have any questions for CDTFA.

25 Judge Aldrich, do you have any questions for

1 CDTFA?

2 JUDGE ALDRICH: Not at this time.

3 THE COURT: This is Judge Brown. Judge Ewing, do
4 you have any questions for CDTFA?

5 JUDGE EWING: I do not have any questions at this
6 time, Judge Brown.

7 THE COURT: Okay. Thank you.

8 Then this is Judge Brown. I will proceed with
9 some of my questions. Mr. Sharma, I want to pick up with
10 something, actually, that I had noticed, and that
11 Appellants have pointed out in their argument. The
12 Department submitted Yelp reviews for both businesses.
13 And the Yelp reviews consistently commented that the
14 prices at both businesses -- at each of the businesses
15 being reviewed were, "Very low, pretty cheap, good value
16 for the money, generous portions, bang for your buck."

17 So my question is, when the Department is
18 considering the markup that Appellants likely imposed and
19 found, for example, a 542 percent markup when the
20 Department was anticipating expected -- or when the
21 Department expected between 300 and 500 percent markup,
22 does the fact that the reviews indicate that the prices
23 were low and the portions were generous, does that cause
24 any question as to why -- about why when the Department
25 finds that the markup is above what was expected? How do

1 we reconcile that?

2 MR. SHARMA: This is Ravinder Sharma. The reason
3 the mark -- because the Department did not pursue the
4 markup method, because we could not verify the actual
5 purchases, because the Appellant was using most of the
6 cash to buy purchases. And in the absence of the complete
7 amount of purchases, any markup method arrived at would
8 not be acceptable and reasonable. And all these exhibits
9 and schedules are done for the analysis purpose only to
10 determine whether we can pursue the markup method or not.
11 Since we were not able to determine the actual amount of
12 purchases, so the Department determined another approved
13 method which is the observation test, credit card ratio
14 method.

15 THE COURT: This is Judge Brown. Thank you. Let
16 me clarify. I understand that the Department did not use
17 a markup method. What I'm asking is when the Department
18 eventually found a mark -- I'm going to use the example of
19 the 542 percent markup after calculating the audited
20 taxable sales, does that raise any questions if the Yelp
21 reviews indicate that the prices were low? In other
22 words, if the Department's testing shows a markup above
23 the amount that even the Department expected, does that
24 raise any questions as to whether the Department's testing
25 resulted in an estimated taxable sales that were too high?

1 MR. SHARMA: This is Ravinder Sharma. Again,
2 those markups, of which is 400 percent or 500 percent, are
3 based on those cost of goods sold by income tax returns.
4 As mentioned in the decision reports and audit reports,
5 all these recorded amounts match with their reported
6 amounts. That was not the issue.

7 The issue was that the Department, based on its
8 initial find that a lot of cash sales were missing. And
9 Appellant admitted themselves that most of the cash was
10 used to make the purchases. And those purchases are not
11 fully accounted for. So any markup test being referred
12 to, if those purchases are not fully accounted for or
13 understated, that markup may not be acceptable or
14 reasonable or reliable.

15 THE COURT: All right. This is Judge Brown. Let
16 me ask on a different topic. The Department's audit
17 found, and you indicated as well, that the cash back on
18 the credit cards -- I forget how you indicated it, but --
19 how you described it -- but you believe that there wasn't
20 enough evidence to support it and that the credit card
21 companies prohibited that practice.

22 My question is, how do we know that the credit
23 card prohibited that practice? And how do we know that
24 the Appellants weren't giving cash advances, even if it
25 was prohibited?

1 MR. SHARMA: This is Ravinder Sharma. We are
2 making a general statement that these are generally
3 prohibited due to the high merchant processing fees. So
4 we're not sure. The Appellants submitted some
5 documentation during the appeal process, as I stated
6 earlier. The Department was not able to trace any of
7 these things. There was no cash back mentioned on any of
8 the guest slips. The guest slips were audited, and there
9 was no way to trace the cash back from any of the guest
10 slips to that credit card transaction receipt.

11 Because as stated earlier, some of those guest
12 checks, it states only some of the items purchased are
13 sold by the Appellant. But it doesn't give us any total.
14 How do we start with? If there is not a total to start
15 with, then we cannot trace those back to the credit card
16 fees to determine if there was any cash back or not.

17 THE COURT: All right. This is Judge Brown. I
18 think those are all the questions that I have for the
19 Department at this time. If my co-panelists don't have
20 anything further for -- any further questions for the
21 Department, then I will say that we are ready to move on
22 to Appellants' rebuttal. And I believe I indicated that
23 Appellants would have.

24 MR. BROTMAN: Appellants have to go to the
25 bathroom.

1 THE COURT: Oh, do you want -- do people want a
2 short a break?

3 MR. LEMON: Yeah. We were wondering if we could
4 have a short break before --

5 THE COURT: That's fine. Can we take --

6 MR. LEMON: -- we rebut.

7 THE COURT: Yeah. Can we take 10 minutes? And
8 we will --

9 MR. BROTMAN: Sounds great.

10 THE COURT: It's 3:33. We will resume on or
11 before 3:43, once I get everyone back.

12 We are off the record briefly.

13 (There is a pause in the proceedings.)

14 THE COURT: Good afternoon again. This is
15 Judge Brown. It is now 3:43 p.m. I can see virtually
16 everyone.

17 Mr. Lemon, are you back with us on the line?

18 MR. LEMON: Yes, Your Honor.

19 THE COURT: Okay. And Ms. Alonzo, I see that you
20 are back, and if you are ready to proceed, I will say that
21 we are back on the record after a short break. And we had
22 just completed CDTFA's presentation. And we can now, if
23 my co-panelists do not have any further questions for
24 CDTFA, then we can proceed with Appellants' rebuttal. And
25 we had an estimate that it would take about 15 minutes.

1 Mr. Lemon?

2 MR. LEMON: It may take a little bit shorter,
3 Your Honor. But we would like to respond to the
4 Department's claims by recalling Ann Chiang as a rebuttal
5 witness.

6 THE COURT: Does the Department have any
7 objection?

8 MR. SHARMA: This is Ravinder Sharma. Department
9 has no objection.

10 THE COURT: This is Judge Brown. If we can keep
11 it within the 15-minute window, then that's fine.

12 Ms. Chiang, are you on the line?

13 MS. CHIANG: Yes, Your Honor.

14 THE COURT: Okay. Ms. Chiang, I will --

15 MR. LEMON: Hi Ann. Sorry.

16 THE COURT: This is Judge Brown sorry for the
17 overlap. Ms. Chiang, I will just remind you that you are
18 still under oath.

19 And, Mr. Lemon, you can proceed with your
20 questioning. As I said you have 15 minutes total for your
21 rebuttal.

22

23 REDIRECT EXAMINATION

24 BY MR. LEMON:

25 Q Hi, Ann. How are you?

1 A Hi, Sam. I'm fine.

2 Q Ann, did you hear the argument made by the
3 Department?

4 A Yes.

5 Q Were purchase records provided to the Department
6 during the first audit?

7 A Yes.

8 Q And what did they do with those records?

9 A Nothing. It was not examined. She did not use
10 those records. All the boxes that were lay -- basically,
11 all around the office, and they were all lined up in a
12 row. And they were not used.

13 Q So at no time during your contact with the
14 Department did they review purchase records?

15 A That is correct.

16 Q Okay. The Department indicated that there is no
17 field to enter cash back -- or sorry -- that there was no
18 cash back entered in on the purchase receipts -- or
19 sorry -- on the credit card receipts?

20 A That is correct. On the credit card there is
21 only two amounts. I mean, you can only put in the tip
22 amount, and you can put in the total sales. But you don't
23 -- there's no third field to input the cash advance, cash
24 back.

25 Q And despite there being no field to enter cash

1 back, are you still confident in your analysis that the
2 cash back occurred?

3 A I am because I'm basing it on the guest checks
4 and to -- to explain about the guest checks, they are
5 safeguarded like check stocks. They are not being
6 monitored that way. The customer -- the waiters and the
7 waitresses basically grab whatever books is available.
8 And sometimes they take it home. They forgot in the back
9 pocket, and they come back grabbing the next thing. So
10 they're not using as like a guest check. I mean, they're
11 not using the check stock.

12 With check stocks, you actually look at the first
13 item, the first check number, and the last check number to
14 make sure they are all sequential. These guest checks are
15 just used in order to provide the kitchen to prepare the
16 food. They are not sequential, and they are not in any
17 particular order. They might grab -- the waiter might
18 grab that first book and used it, and then maybe walked
19 home with it, come back and may or may not brought the
20 same one until two months later. So they're not monitored
21 that way.

22 They're not monitored so that the guest checks
23 are actually, you know, sequential and it has to be
24 continuous. Because sometimes it depends on how busy the
25 restaurant is, they all cross train. So a cashier person

1 can be waiter, can be the kitchen staff. It depends on
2 what area need it the most. So then whoever take order
3 would just grab whatever book is available. So they are
4 not sequential. They never -- it's totally ever
5 sequential because of that practice.

6 Q And despite the books not being in sequential
7 order, remind us again how they were entered into and how
8 they support the adequacy of the records?

9 A At the end of the day Mr. Ngo, basically, take
10 the guest checks, and he also match -- there are two
11 staff. I mean, there's like a pinpoint at the cash
12 register. And when the guest check is being brought up by
13 the customer, they basically pin it into that, you know, I
14 don't know whether you call this stick or whatever. So
15 they basically pin it into the stick to hold the guest
16 checks.

17 And at the end of the day, Mr. Ngo basically take
18 those, and he bundled them by the day. And then the same
19 thing with the cash receipts. They are processed and I
20 believe he bundled them by the day. So they -- the day,
21 it may not be in order, but if you take the stack that was
22 provided by the auditor, they would all be there. If
23 there were 50 transactions, there will be 50 transactions
24 of the guest checks, and there would be 50 transactions of
25 the receipt, whether the credit card receipt or the cash

1 receipts.

2 Now, the cash register is a separate unit to the
3 credit card machine. So the cash register would bring up
4 all the sales in the cash register, but the credit card
5 machine would only process the credit card transaction,
6 and they're not linked at all.

7 Q And the Department mentioned that a number of
8 transactions were processed in quick succession in a short
9 period. Can you tell us why that is?

10 A During the busy time when the credit card -- when
11 the customer -- I mean, during the day. The customer come
12 up and pay their amount, and the amount is basically a
13 proof of total. Now if there's -- but to complete the
14 process or complete that transaction, Mr. Ngo basically at
15 the end of the day have to finish it out, mainly, during
16 not so busy time. That's when he grabbed them, and he
17 processed them.

18 But most of the time it's done at night when
19 he's-- when he's not busy, because during the day he's
20 either servicing the customer because someone is out sick,
21 so that he has to do the other task either, you know,
22 whenever is needed. So staff are basically moved around,
23 and they are all cross trained in all areas of service.

24 And the credit card transactions is actually
25 processed during that day at night when he has them as he

1 mentioned. Because if you look at individual receipt, it
2 has tips in it. He has to put the tips amount and -- then
3 that is added to the total on the credit card transaction.

4 Q So based on your review of the data, are the
5 sales lead sheets accurate?

6 A I believe they are.

7 Q The Department also mentioned that there were
8 changes in the continuity of how they were doing business.
9 Did you notice any changes?

10 A I don't believe so because we also process
11 payroll. All their employees are long term. There's
12 hardly any change out, and then there were some moving in
13 and out. But as far as there has been no change in the
14 business model. I asked about the food cost, and we -- he
15 mentioned that when they buy the products, what they do is
16 actually apply the labor rather than buy the better cuts
17 of meat. They would trim them to use the better part of
18 the meat.

19 So I think their cost is very low. So that's how
20 they can offer to the customers lower price. And they are
21 looking at volume sales rather than the high price. And
22 if you look at the menu, the price has always been lower
23 than everybody else in the area. And so to use the
24 industry standard for markup, it's not applied in this
25 situation. As you mentioned with the Yelp review and the

1 other is their prices are really low in compare. And they
2 have not made the decision to increase their price because
3 they want to continue with that business model.

4 Q Okay. Thank you, Ann. I'll go ahead and make
5 the rest of the rebuttal myself.

6 A Thank you.

7

8

CLOSING STATEMENT

9 MR. LEMON: If it please the panel, I can't hold
10 an audit inside of a rebuttal. So as the Department or as
11 the panel or as Judge Brown may recall, we did ask for
12 additional time to go through the data that we had
13 provided with the Department. In fact, we've been asking
14 the Department to go through this data since the
15 beginning. And the fact that the Department did not go
16 through the data that was provided as testified to by
17 Ms. Chiang is the reason why we're here.

18 That being said, the sufficiency of the data is
19 very good. I -- I don't claim that the data is perfect,
20 but there are rational explanations for some of the
21 concerns the Department has of which they could have asked
22 either The Ngo or Ann Chiang in cross-examination. The
23 Department did not provide a witness that would speak to
24 the sufficiency of our data. But we don't need a witness
25 as to that sufficiency because the documents are there.

1 In Exhibit 7, there are the merchant receipts
2 adding up to the daily merchant sales. And the lead
3 sheets were verified by Ann Chiang contemporaneously as
4 she was preparing the tax returns and going through the
5 taxpayer's records. So we're comfortable that we've
6 provided sufficient evidence and sufficient records for
7 the Department to see a credit card ratio that is much
8 higher when all the information is taken into account and
9 not just the short two-day site test.

10 I note that the Department did not speak at all
11 to the winter season, which clearly should have affected
12 sales during the period of sampling and would have
13 projected onto the population a very different result.
14 And in particular, I note that the Department did not
15 speak to the winter cold front that was coming through
16 from late 2013 to early 2014. That is a matter of
17 historical record.

18 And so I don't know there's much else that I need
19 to rebut as far as the Department's case but refer the
20 panel back to the arguments that were originally made,
21 including the many different analyses that were performed,
22 including the cost of goods sold, continuity that we have
23 provided in the first and second audit. I disagree with
24 the Department that the second audit is not relevant.

25 The second audit shows business' practices remain

1 inconsistent, and shows an audit that shows no change.
2 The sales practices were the same. The purchases
3 practices were the same. Everything is continuous between
4 the first and the second audit, except for some
5 recordkeeping and a change in policy from the credit cards
6 to an ATM.

7 Our data ultimately is verified by the
8 Department. The Department is in the uncomfortable
9 position of having to argue against their own audit in the
10 form of the second audit. And those two audits overlap
11 for the period of 2016. And so on the one hand in this
12 hearing, the Department is arguing against the Department
13 in the form of their second audit.

14 And with that I -- I hope that the panel will see
15 that the taxpayer did not misreport \$2 million worth of
16 cash, that they will find that defies common sense, and
17 that they will look at the evidence provided by us today
18 and make a finding that the taxpayer reported accurately
19 in the first audit.

20 Thank you.

21 THE COURT: This is Judge Brown. Thank you. I
22 will turn back to my co-panelists and ask if they have any
23 questions on follow up to Ms. Chiang or to Appellants'
24 attorneys.

25 Judge Aldrich, do you have anything further?

1 JUDGE ALDRICH: Nothing further. Thank you.

2 THE COURT: Judge Ewing, do you have any further
3 questions?

4 JUDGE EWING: Nothing further, Judge Brown.

5 THE COURT: Okay. Then if I have heard
6 everyone's arguments, I believe I can say that this
7 concludes the hearing. And the record is closed, and the
8 case is submitted today.

9 The judges will meet and decide the case based on
10 the evidence, the arguments, and the applicable law. We
11 will send both parties our written decisions no later than
12 100 days from today. So the hearing is now adjourned.

13 And also, this concludes OTA's hearing for the
14 month of March 2021. I thank you all very much for your
15 time, and we are off the record.

16 (Proceedings adjourned at 3:58 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 7th day of April, 2021.

ERNALYN M. ALONZO
HEARING REPORTER