

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
CULTURE SHOCK YOGURT, INC.,) OTA NO. 20096666
)
 APPELLANT.)
)
)

TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Wednesday, August 18, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Virtual Proceedings,
taken in the State of California, commencing
at 1:00 p.m. and concluding at 2:47 p.m. on
Wednesday, August 18, 2021, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ TERESA STANLEY

Panel Members: ALJ JOSHUA ALDRICH
ALJ AMANDA VASSIGH

For the Appellant: JOANNE GIUDICELLI
MIKE GIUDICELLI

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

NALAN SAMARAWICKREMA
CHRISTOPHER BROOKS
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-10 were received at page 7.)

(Department's Exhibits A-H were received at page 7.)

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California; Wednesday, August 18, 2021

1:00 p.m.

JUDGE STANLEY: Okay. Let's go on the record then.

We're hearing the Appeal of Culture Shock Yogurt, Inc., Case Number 20096666. The date and time is August 18, 2021, and it is pretty close to 1:00 p.m. This meeting was scheduled for Cerritos, California, but is being conducted remotely due to Covid-19.

Once again, I'm Teresa Stanley, and my panel members are Judge Josh Aldrich and Judge Amanda Vassigh. I will conduct the hearing, but the panel will equally deliberate and prepare a written decision.

Starting with the Appellant, I'm going to ask you that identify yourself for the record.

MS. GIUDICELLI: Hi. I'm Bobbi Giudicelli.

JUDGE STANLEY: And for Mr. Giudicelli, you want you to identify yourself too?

MR. GIUDICELLI: Yes. I'm Michael Giudicelli.

JUDGE STANLEY: Okay. And CDTFA, please.

MR. SAMARAWICKREMA: This is Nalan Samarawickrema, Hearing Representative for the Department.

MR. PARKER: Jason Parker, Chief of Headquarters Operations Bureau.

1 MR. BROOKS: Christopher Brooks, Tax Counsel for
2 CDTFA.

3 THE STENOGRAPHER: Judge Stanley, I couldn't hear
4 you. Either you're muted or the mic was too far, but I
5 haven't heard anything you've said.

6 JUDGE STANLEY: Do I need to start from the top?
7 Can you hear me now?

8 THE STENOGRAPHER: Barely.

9 JUDGE STANLEY: So you're not able to hear me at
10 all?

11 THE STENOGRAPHER: I'm able to now.

12 JUDGE STANLEY: So if I lean in and get closer to
13 the microphone, can you hear me better now?

14 THE STENOGRAPHER: Yes, Judge, I can hear you
15 better. Thank you.

16 JUDGE STANLEY: Better but not great. All right.
17 I'll try to stay closer to the microphone and see if that
18 helps.

19 So do I need to start from the beginning, Lynne?

20 THE STENOGRAPHER: Yes. At this point, go ahead
21 and just start from after the introductions were made.

22 JUDGE STANLEY: Okay. At the prehearing
23 conference, there were no objections to any of the
24 exhibits that were presented. So at this point, we are
25 going admit into evidence Appellant's Exhibits 1 through

1 10 and CDTFA's Exhibits A through H.

2 (Appellant's Exhibits 1-10 were received
3 in evidence by the Administrative Law Judge.)

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

6 The issue today -- sorry. The issue today is
7 whether the Appellant has shown that there should be an
8 adjustment to unreported taxable sales, which is based on
9 a taxable sales percentage using observation tests and
10 sales reports; and the second issue is whether Appellant
11 has established that the negligence penalty should be
12 deleted.

13 Ms. Giudicelli, do you agree that those are the
14 issues today?

15 MS. GIUDICELLI: This is Bobbi Giudicelli. Yes,
16 I do.

17 JUDGE STANLEY: Thank you.

18 And Mr. Samarawickrema, do you agree?

19 MR. SAMARAWICKREMA: Yes.

20 JUDGE STANLEY: Okay. Great. Okay. In this
21 case we also decided at the prehearing conference that
22 there would be no opening statements and that the two
23 representatives for the corporation would be testifying as
24 witnesses.

25 And I also understand, Ms. Giudicelli, that you

1 want to refer to specific exhibits. The Judges each have
2 a copy, and so does CDTFA, of all the exhibits. So if
3 you -- when you reference an exhibit, if you just let us
4 know which exhibit it is and on what page, if you want to
5 be page specific, then give us a couple of seconds to get
6 there. We should all be good and be able to follow along
7 with you. Are you ready to proceed at this point,
8 Ms. Giudicelli?

9 MS. GIUDICELLI: Yes, we are.

10 JUDGE STANLEY: Okay. Are you or Mr. Giudicelli
11 planning to testify first?

12 MS. GIUDICELLI: I am.

13 JUDGE STANLEY: Okay. Then let me ask you to
14 please raise your right hand.

15
16 J. GIUDICELLI,
17 produced as a witness, and having been first duly sworn by
18 the Administrative Law Judge, was examined and testified
19 as follows:

20
21 JUDGE STANLEY: Thank you. You can proceed.

22 MS. GIUDICELLI: Okay. And I need to announce
23 who I am each time?

24 JUDGE STANLEY: Just so we know who is testifying
25 do, that first and then only if you speak again later.

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1 environment than what was the norm for these neighborhood
2 shops. My employees are well known by many of the regular
3 customers. Specifically, each of them that was working
4 the day that the on-site audit was occurring, there was
5 concern. There was real concern. A number of customers
6 approached the employees and said, "Are you uncomfortable
7 with this guy? Who is this guy? Why is he sitting in the
8 shop?"

9 I mean, you have to understand. These are
10 neighborhood shops. They are regular customers who come
11 in all the time. They get to know the employees. And a
12 lot of them were concerned that my employees did not -- I
13 have one -- I had one female employee working at any given
14 time. And I have to believe there were people who stayed
15 at the shop -- customers who stayed at the shop just for
16 her comfort to make sure that she was okay. I got that
17 feedback from both of the shops, and I wasn't willing to
18 go through this exercise two more days at each shop.

19 The other concern I had was because of the
20 volatility and unpredictability of traffic and sales
21 patterns in each shop, I knew that it was risky to have
22 the percentage of taxable sales be determined by three
23 visits within a short time frame. It just wasn't going to
24 give us a reliable calculation of what the percentage of
25 sales that were dine-in sales. So that's why I opted not

1 to do that. And I offered, instead, to be able to provide
2 the sales receipts of legitimately finding out which
3 customers were dining in over a period of time. And so
4 that's the way we went.

5 So now, I -- so all right. So here's where it's
6 going to get a little dicey. I have page numbers on the
7 exhibit document, and I can give you the exhibit that's on
8 the bottom of the page. But, meanwhile, assuming we're
9 all on the same latest one that you sent out, the latest
10 binder that we received, I'm now looking at page -- let's
11 start at pages 397, which is Exhibit 3, page 1 of 38. And
12 one of the things that -- is everyone there? Yes. Okay.
13 Sorry. I have to go back and forth between this screen
14 where I see you all and the exhibits.

15 What this shows and, actually, for the next
16 40-some pages, what you're going to see is the records of
17 the sales patterns monthly in the first three pages. So
18 scroll down to page 397, 398, and 399 will show it by
19 month for each of the three years in question. And then
20 if you look beyond that you'll see every month broken out
21 where these are records that I kept every single day. And
22 if you look -- just let's go to page 400, for example,
23 which is Exhibit 3, page 4 of 38.

24 What you're going to see there is each of the
25 three shops in 2015 for January. And you can go across

1 and look at where it says, "Gross Under Mill, Gross Under
2 Bronze, and Gross Under Auburn." And if you go across,
3 you can see a huge disparity in, you know, the sales
4 receipts for the day by as much as 50, 60, 70 percent. So
5 the amount of traffic and the amount of sales for any
6 given day is not predictable.

7 And then if we go to page 499, we're now
8 looking -- nope. That's not the right page. Oh, wait.
9 Sorry. Yup. Nope. The page just got -- sorry. There
10 is -- okay. All right. I might not be on the right --
11 oh, wait.

12 JUDGE STANLEY: Ms. Giudicelli, this is Judge
13 Stanley. Actually, you can just direct us to the
14 exhibits.

15 MS. GIUDICELLI: Yeah, now it just changed. Oh,
16 wait, wait, wait, wait. Okay. I got it. 449. There we
17 go. Sorry about that. Okay. Go to page 449, which is
18 Exhibit 7, page of 1 of 1, and the following page, it
19 would be 1 of -- Exhibit 8, 1 of 2. These are the graphs
20 of the volatility of traffic. This was in 2019 when I was
21 on a digital register that tracks everything. So you can
22 see in both of these graphs. One is for the Grass Valley
23 shop. One is for the Auburn shop. You can see the
24 volatility.

25 And my concern was we're picking random days at a

1 time, you know, out of a single month or two or whatever.
2 Make sense? Okay. Okay. So these exhibits I'm using to
3 support my argument that we should be using the 10 months
4 of 2019 that were recorded by the digital registers when
5 we were asking and recording every customer that came in
6 that was opting to dine in versus take to go. Okay.

7 There was another -- there was another point that
8 the CDTFA brought up that I had argued. The gift card
9 purchases were not to be considered because they shouldn't
10 be taxed. And they weren't being considered in the
11 disparity of some months where a huge portion, December
12 for example, the gift card purchases were a huge portion
13 of the revenue for that month. And so the amount of sales
14 tax that would be charged in, say, December or a month
15 when -- when gift card sales were high should -- should be
16 considered separately.

17 If you go back to 397, this happens to be the
18 information that I captured. So this would be for 2015.
19 Again, we're back to Exhibit 3, page 1 of 38. And if you
20 go down -- okay. If you go down almost to the bottom of
21 that spreadsheet where it says "Gift Card" in big letters.
22 And then you go a couple rows below that, and it says,
23 "Dollars sold," you can see that in January we sold \$630
24 in gift cards.

25 And then the next month \$1,119. And then we go

1 down later in the year we have in November \$523 sold in
2 gift cards. And the month after that \$1,959, which is a
3 huge percentage of December sales. So, you know, there
4 is -- the gift card issue was a real issue, and I do -- I
5 do show what our gift card sales were every month for the
6 three years in question. And then -- dah, dah, dah.

7 Okay. Now, if we go to 4th -- page 435, now
8 we're looking at Exhibit 4, page -- this is page 1 of 11.
9 We may go further into it. But what this is is that same
10 spreadsheet that I was recording everything for all the
11 years that I've had the shops, and then I shared with you
12 for 2015 to 2017. This is now the spreadsheet that I
13 added the information of tracking taxable sales and the
14 percentage of sales that were taxable sales on any given
15 day. Actually, here it is by month for the first couple
16 of pages, and then after that it's by day.

17 And the disparity in the spread of -- of sales --
18 of taxable sales is huge on any given day. So let's go
19 to -- I'm sorry. Page 1 is going to be the annual. So it
20 shows every month taxable percent of total sales that were
21 taxable. At the bottom of that spreadsheet you have sales
22 tax and then three lines down these are all the Sutton
23 shop numbers. January was 9.6. February was 5.79. We
24 have as high as 8 percent, as high as 9 percent in
25 December.

1 And then in Auburn we have as low as February
2 being 1.94 percent of the sales were taxable, up to in
3 October 11.7 percent of the sales were taxable. This is
4 all recorded in our digital register for all of 2019. We
5 did not acquire the digital register -- we were using a
6 manual register until -- until January 1 of 2019.

7 The next issue that I want to discuss is the Mill
8 Street location. So the Mill Street was our first
9 location. It was down -- it was located in Downtown Grass
10 Valley as our first shop. 106 Mill Street, which was our
11 address, is dead center of the Downtown area. The
12 customer space in this shop is half of the customer space
13 in the Sutton shop, possible even less than half. More,
14 importantly, this is a destination spot. People come here
15 when they are coming Downtown for other reasons, or they
16 are visiting as tourists.

17 We did most of our business when there were
18 events Downtown, like the car show, Thursday night market
19 in the summer, Cornish Christmas in December, et cetera.
20 They had a lot of Downtown events. Culture Shock shop was
21 a place the customers would come in to grab a yogurt and
22 continue walking around town to do their shopping or
23 participate in the event going on in the streets. There
24 was very little dine-in traffic. I don't know how many --
25 how much there was, and there's no way to calculate it

1 now, but we had less chairs there.

2 And, in fact, to satisfy the city for the lack of
3 customer bathroom -- which was the article that is
4 included in the exhibits -- in 2013, we took out most of
5 the original eight seats we had in there. Whatever taxes
6 we filed in those years, I feel very confident, covered
7 the taxable sales for Mill Street. It's a completely
8 different environment from the other two shops that are in
9 a shopping strip mall like area. I did include exhibits
10 on page 510 to 516. These pictures looked a lot better
11 when I sent them. I'm sorry. But it's actually a
12 Downtown area with shops and galleries and wineries.

13 And, you know, Culture Shock was a tiny little
14 storefront that really people were -- it was a
15 grab-and-go, and it was setup more to be a grab-and-go to
16 be in town. So that -- I'm sorry. That was exhibit --
17 that's Exhibit A, pages -- page 40, and it goes to at
18 least -- yeah -- to page 46. So those are all the
19 pictures of the Downtown area taken right off of Google
20 satellite pictures. Okay.

21 The other thing I wanted to address is the union
22 article that CDTFA pulled up. That's on page 559. Okay.
23 They pulled that up, and they highlighted -- and they
24 highlighted something that the Union, the local newspaper,
25 reported that I said. It is not a quote. I don't believe

1 I stated it. It says in the article that, "Culture Shock
2 owner Bob Giudicelli said she is frustrated by the
3 required because 85 percent of her customers take their
4 yogurt to go."

5 So I've been interviewed by the newspaper several
6 times and enough to know it can be -- what they report can
7 be inaccurate. And I don't believe that I said that. But
8 if I did pull a figure out of the air, it was to make a
9 point that I don't believe I should have been forced to
10 have a customer bathroom after I had already been
11 permitted and operating the business without a customer
12 bathroom for four years.

13 If you need other examples of how inaccurate we
14 can all be when under pressure, in this document alone, on
15 page 478, the CDTFA states that the Auburn shop had 6
16 tables and 13 stools. That's inaccurate. That in fact is
17 the Grass Valley Sutton shop. The CDTFA, on page 478,
18 also stated that the Grass Valley shop has 1 table. That
19 in fact is inaccurate. That is a description of the
20 Auburn shop. The CDTFA, on page 478, states the hours of
21 operation of Culture Shock Yogurt. That's inaccurate
22 because the hours of operation changes seasonally, and
23 sometimes within the season based on traffic.

24 And lastly -- not lastly. On page 480,
25 paragraph 2, said that, quote -- said that I said that our

1 traffic changes based on weather, month, and season. In
2 fact, that what I said was there is a great disparity from
3 day-to-day as I've already demonstrated in my exhibits.
4 Lastly, they marked something as Mills Station. That's
5 never been published anywhere, and that -- I just don't
6 know what to say. So my point here is not to make the
7 CDTFA look like they've made a bunch of mistakes. That's
8 not the point, and I'm not contending that. What I am
9 doing is pointing out that if they want to take a local
10 newspaper article and pull something out of there that I
11 said and use any of their -- any of their reasoning to
12 decide how much sales tax I have or haven't paid, it --
13 it's just -- it's not the place that I would look for that
14 information.

15 Okay. So to conclude Issue One, I have on page
16 447 -- so this is all the information taken directly from
17 the 2019 sales for the 10 months that we owned the shops
18 in 2019. It's taken from the digital Square register, as
19 well as my spreadsheet, which the figures match up. So go
20 down. This is Exhibit 5. If you take a look at the
21 summary on Exhibit 6, which breaks it out into each shop.
22 Exhibit 6 on page 447, page 1 of 2, I look at the gross
23 sales, and I look at the taxable. By my calculation the
24 taxable -- sorry -- taxable sales of 6.88 percent for
25 Grass Valley and the taxable sales of 7.3 percent for

1 Auburn.

2 And I believe and it is my contention that we
3 should be using those figures to calculate unpaid sales
4 tax, which I believe I did calculate. Yeah. So I
5 believe -- go back to page 446, Exhibit 5, page 1 of 1.
6 And by my calculations, I should have paid unpaid sales
7 tax of \$6,781. So that takes care of Issue One.

8 Issue Two was the negligence penalty. So when I
9 opened the Mill Street shop in 2009, the City of Grass
10 Valley and my contractor, who obtained all of our permits,
11 explained to me that if I had less than 10 seats, it was
12 considered a to-go establishment. I operated under that
13 assumption and proceeded to open the next two shops; the
14 Sutton shop and the Auburn shop.

15 Shortly after I opened Auburn sometime in 2011 or
16 2012, a woman from the Franchise Tax Board, which was the
17 predecessor to CDTFA I assume, visited the shop. It was a
18 random visit. I happened to be there, which I wasn't
19 always there. I happened to be there when she came in.
20 She gave me her card and told me that I needed to get a
21 new seller's permit and that I needed to file a sales tax
22 return. She did explain that I need to pay sales tax on
23 all dine-in sales. I told her it wasn't that much and
24 asked if I can estimate it, and she said yes as long as I
25 file my taxes.

1 So the CT -- CDTFA on page -- if you'll go to
2 page 40 -- 4 -- I'm sorry -- 480. Go down to staff's
3 position. This is Exhibit A, page 10 of 60. Go down to
4 the staff's position. And in there it says, "If the
5 Department finds that a person's failure," don't need to
6 read this all to you. But in here it says, "If the -- if
7 the person's failure to make timely return or payment is
8 due, the person's reasonable reliance on written advice
9 from the Department, the person may be relieved of the
10 taxes imposed," et cetera, et cetera.

11 My contention is whose responsibility is it to
12 write it down? This woman from the Franchise Tax Board
13 came into my shop, was face to face with me, offered me
14 nothing in writing, had this conversation with me and
15 left. Why would I even think that there was anything more
16 that I needed to do. So yes, I didn't have anything in
17 writing, and I understand that seems to have become a big
18 deal in this audit process, but that was completely out of
19 ignorance.

20 I didn't know I needed to have something in
21 writing. She should have given me something in writing.
22 Or that when it changed from the Franchise Tax Board to
23 the CDTFA, maybe things changed. I don't know. But it's,
24 you know, I had a full-time job to run this business. And
25 I had no reason to -- for it to even dawn on me or occur

1 to me that I -- that I was doing anything differently than
2 what I should do.

3 Continue down Staff Position to now page 11 of
4 60. And in paragraph 3, this is where they bring up the
5 observation test. During the observation test sales of
6 gift cards were netted from total sales and were not
7 included in the taxable sales presented calculations.
8 There's a whole thing about the gift cards, and I have
9 already addressed that. But for that to come out as an
10 argument about negligence, I -- I don't -- I'm not sure I
11 really understand why it is there.

12 They never asked me for any numbers on the sales
13 card -- on the gift card sales and -- but yet, I have
14 provided them in the -- in the spreadsheets that I have
15 shared with you. And then on page 506 -- okay. So I like
16 this one. So I guess they think that I received this
17 letter, that there was a program started in 2018, I guess,
18 with this statewide compliance and outreach program.
19 Which I'm guessing the acronym is pronounced SCOP.

20 In any case, it looks like outreach to the
21 business community. I should have gotten a visit from
22 somebody. I did not. I should have received this letter.
23 I did not. The CDTFA does know that my mailing address is
24 different from the physical shop address. This is the
25 physical shop address. I did not receive this letter. It

1 is not where I receive mail and I definitely -- and from
2 what I know, nothing was received at the Auburn shop
3 either. And I know for a fact that our mailing address in
4 Grass Valley, which is different, I did not receive
5 anything. So -- and besides it was in 2018. So that
6 doesn't change anything for what happened between 2015 and
7 2017, which is the years in question.

8 And finally, the CDTFA claim that I did not keep
9 records because I did not have the Z-tapes to supply them
10 and, therefore, I only had partial recordkeeping. First
11 of all, I keep impeccable records bordering on OCD.
12 Exhibits 2, 3, and 4, which we have looked at those
13 spreadsheets, and I welcome to please go back and look at
14 them again. I compulsively keep records. Everything that
15 shows up on the Z-tapes and showed up on the Z-tapes
16 during those three years is captured, and more is captured
17 on my spreadsheets. So this is not a -- a -- an example
18 of somebody that just doesn't keep records.

19 I didn't have the -- the -- also -- I'm sorry.
20 Exhibit 2 is the check register. You will see in the
21 check register that every single night I updated what the
22 cash deposits were, what the credit card sales were, that
23 were going to be put in the account. I mean, I'm talking
24 about a compulsive person. Exhibit 3 has the same
25 information as the check register. That's the

1 spreadsheets plus a whole lot more, including everything
2 you would see on the Z-tapes. My ultra-organized OCD-like
3 behavior could stand having the rolls and rolls of
4 Z-tapes, which would amount to a thousand a year when you
5 have three shops for eight -- for eight-plus years.

6 I mean, where do people even store 8,000 rolls of
7 register tape? That -- that's just not the way I do
8 things. I'm ultra-organized. And every bit of
9 information on the Z-tape and then some was recorded on my
10 spreadsheets. I supplied CDTFA with everything they asked
11 for; tax returns, bank statements, et cetera, within less
12 than a week when they first reached out to me to let me
13 know I was being audited. This is not a case of someone
14 who keeps shoddy records.

15 My same business -- this same business was
16 audited by the IRS in 2015. I supplied all the records
17 they requested upon demand. After 18 months of review, I
18 owed them less than \$1,000 I was only able to get through
19 this because of my compulsive recordkeeping. This was a
20 case of ignorance, not negligence. And -- and, I mean, I
21 can't -- I'm the most transparent person, and I do things
22 always on the up and up. It's just -- it's just not
23 something I would do.

24 There are a few -- just a couple of other points
25 that I want to make that don't really relate specifically

1 to one or the other of the two issues. One is on
2 page 464. At the bottom of this -- this is the -- I'm
3 sorry. This is Exhibit A, page 24 of 33. On 7/23/2018
4 Carlos' entry in here this is -- this is a record, I
5 guess, of all the contacts he had with me. Carlos'
6 contention here is, "Met with taxpayer July 23rd at 1:30."
7 Gives the address. And then he says, "Taxpayer stated
8 that she would disagree with the audit regardless of the
9 results."

10 I actually resent that, and I'll tell you why.
11 This is completely taken out of context. I was stating
12 that the methodology yields inaccurate results, and I was
13 disagreeing with the methodology. I was also disagreeing
14 that Mill Street should be considered comparable to the
15 Sutton Street shop for all the reasons stated above. But
16 I resent that the allegation and the inaccuracy of that
17 statement.

18 On page 466, which is Exhibit A, page 26 of 33.
19 Let me get to where I was. Okay. Okay. So I don't
20 understand this at all. I think it's saying something
21 that is completely inaccurate, but actually don't even
22 understand it. Under Staff's Position, it's talking
23 about, taxpayer's previously applying a taxable percentage
24 of 2 percent to the total sales of their store locations
25 to determine the taxable amount. Her visits to the store

1 locations and the observation tests conducted by the
2 auditor, it was determined that two percent estimation by
3 the taxpayer was not accurate. I get that.

4 Then it says, "The taxpayer has been informed
5 that cold food consumed on the premises of the taxpayer,
6 including seating provided by the lessor and included in
7 the taxpayer's lease agreement, should be taxed." I
8 honestly don't even understand why the -- my lease or
9 landlord or whatever is being brought up. But I just want
10 it on record, there's nothing to do with anything that has
11 to do with my lease or sales of -- or taxable sales or any
12 of that. So I just wanted that on record.

13 And then -- and then also, the next paragraph
14 where -- and this was mentioned a few times in other
15 exhibits. But the auditor conducted observation tests of
16 the business locations, which resulted in an overall
17 taxable percentage of blah, blah, blah. And then it says
18 after these two tests were conducted the taxpayer -- no.
19 I'm sorry. That is not the paragraph. My bad.

20 The next paragraph talks about the weighted
21 percentage. So that they got to the new weighted
22 percentage using the observation, the in-person
23 observation figures of 41 percent and 29 percent combined
24 with what I supplied them from May to June as far as
25 actual sales. And I just want to understand how was it

1 weighted. Like, how much weight did the -- did the
2 in-person observation 41 percent and 29.8 percent, how
3 much of that was in the weighted calculation.

4 I don't need an answer, but I know that I -- it
5 also led to a much higher than reality of 25.54 percent
6 and 16.72 percent. And, again, points to, I think, that
7 using the real, real, real numbers of 10 months of 2019 is
8 probably -- makes a lot more sense to me as the accurate
9 figures to use.

10 And I think that is done. I think I'm done.
11 That is it, except for my closing statement.

12 JUDGE STANLEY: Ms. Giudicelli, this is
13 Judge Stanley again.

14 Can you hear me now, Lynne? Can you hear me?

15 THE STENOGRAPHER: Yes, but you're -- I can
16 barely hear you. I can hear you, though.

17 JUDGE STANLEY: Okay. I'm sorry that I don't
18 know what's going on, but I'll try to just keep my voice
19 up instead of trying to figure it out while we have a
20 hearing.

21 I wanted to ask Mr. Samarawickrema if CDTFA has
22 any questions for this witness?

23 MR. SAMARAWICKREMA: This is Nalan
24 Samarawickrema. We don't have any questions for the
25 witness. Thank you.

1 JUDGE STANLEY: Thank you. This is
2 Judge Stanley. Judge Aldrich, do you have any questions?
3 Judge Aldrich, did you hear me? Your microphone is not
4 on.

5 JUDGE ALDRICH: How about now? All right. Thank
6 you. I don't have any questions at this time. Thank you
7 very much.

8 JUDGE STANLEY: Judge Vassigh, do you have any
9 questions of the witness?

10 JUDGE VASSIGH: I do have a question. I'm
11 looking at your Exhibit 5, and I'm wondering if you can
12 clarify how you came to the estimates for 2015 to 2017?
13 If you can just quickly clarify your methodology there.

14 MS. GIUDICELLI: Can you give me a page number?

15 JUDGE VASSIGH: Sure. It is page 446 in the
16 exhibit log.

17 MS. GIUDICELLI: Yeah. Okay. Okay. So -- so
18 you're asking how I came to the percentage that should --
19 that was taxable of 7.3 and 6.8?

20 JUDGE VASSIGH: Yes. I realize you relied
21 somewhat on the 2019. I'm just wondering if you can
22 expand on that a little bit.

23 MS. GIUDICELLI: Absolutely. So if you -- so
24 let's go to -- I have to find what page it is. So in
25 2019 -- 2019, I -- so I tracked 436 -- okay. Let me see

1 if it's where I think it should be. Okay. So if we just
2 go right above that, starting on page 430 -- Exhibit 4.
3 Go to Exhibit 4. So that is the same spreadsheet, and if
4 you look down -- okay. If you go to page -- Exhibit 4,
5 page 2 of 11. So that's January. I have a page for every
6 month, January to October. And if you look -- sorry.
7 It's really small on my screen.

8 If you -- if you go down to sales tax. Okay. So
9 if you go down -- you see on the left side where it says
10 "Sales Tax" and it says, "Sutton EN, Sutton Tax, Auburn
11 EN," and "Auburn Tax." So what I did is I actually
12 tracked -- since I owned the shops in 2009, I tracked the
13 number of transactions in the shop and the amount of every
14 single transaction. So that's part of the information
15 that's captured on all of these spreadsheets. Well, this
16 is 2019. So because we were a digital register, I
17 actually knew how many or how much, what the actual sales
18 figures were for dine-in because we were asking every
19 customer.

20 And you look at the -- \$40 was dine in out of --
21 if you go up to Sutton or Brunswick -- it's called
22 Brunswick -- up top. If you go up there, the gross sales
23 for that day is \$413. So \$40 of the \$413 is the -- is the
24 revenue that was taxable revenue. And if you go down to
25 where it says, "Percent of Total Sales," you'll see 9.7

1 percent, which is, in fact, \$40 out of a \$417 revenue.

2 So I tracked that for every day, and then I took
3 an average every month. And I will be really honest with
4 you. I don't recall if I took the monthly average and
5 averaged across 10 months, or if I took every single day
6 of the 10 months and did an average across there. But
7 that's how I came to the percentages that were taxable
8 sales in each shop.

9 Does that make sense?

10 JUDGE VASSIGH: Thank you.

11 JUDGE STANLEY: This is Judge Stanley. Is this
12 any better for hearing me? Okay. Great. Must be my
13 microphone.

14 I did have a couple of questions, Ms. Giudicelli.
15 With the Mill Street location, you had said that during
16 the issue with the restroom and not having one, that you
17 took out most of the chairs. Did you leave some inside
18 then?

19 MS. GIUDICELLI: We did. We do have -- you know,
20 we had people come in, like, with young children and the
21 mom would want the kids to sit and wait for them to get
22 their yogurt. We had older people that came in. I'm
23 really sorry. We had older people that came in. And, you
24 know, we needed to have a few stools in there for people
25 to sit.

1 It wasn't impossible to come in and sit and have
2 your yogurt. We probably left four stools in there. But,
3 you know, it was to accommodate, at that time, not to, you
4 know, not to reduce the amount of eat-in sales -- our
5 dine-in sales. But it was to accommodate the city's
6 wishes to become, you know, for them to relieve me of the
7 obligation to have a customer restroom.

8 JUDGE STANLEY: Okay. And you said that those
9 were taken out in 2013; correct?

10 MS. GIUDICELLI: It was during -- shortly after
11 this whole -- yeah, the whole question about the restroom.

12 JUDGE STANLEY: And did they remain out of there
13 during the audit period, or did you ever put them back in?

14 MS. GIUDICELLI: The problem is that the -- oh,
15 during the 2015 to 2017, they did not go back in. One of
16 the reasons that -- and I'm not sure if this is the
17 question that you're asking, but I know that the CDTFA, as
18 part of their exhibits, they had pictures from our
19 website. And that's one of the reasons that I so count on
20 partner, Mike, to be here because he takes care of all of
21 our technical stuff. So if that is the question you're
22 asking and you want some explanation of that, you -- he is
23 here to offer that.

24 JUDGE STANLEY: Okay. This is Judge Stanley.
25 I'll wait for his testimony and see if some of those

1 questions are answered. I just -- I have another one
2 about the Mill Street location, though. Are you proposing
3 that we apply zero percent taxable sales to that location?

4 MS. GIUDICELLI: I'm -- I'm proposing that only
5 because I did file and pay for taxes for that -- for those
6 years. I did file and pay between 1 and 2 percent for a
7 total revenue in each of the shops.

8 JUDGE STANLEY: Okay. And it's your position --
9 is it your position that the 1 or 2 percent that you paid
10 was adequate -- an adequate percentage for that location?

11 MS. GIUDICELLI: I would propose more than.

12 JUDGE STANLEY: Okay. And I was just wondering
13 with the respect to the person who visited your location,
14 did you get a business card or anything that would show
15 that you talked to somebody who gave you advice?

16 MS. GIUDICELLI: I did, and I have no idea where
17 it is. It's not something -- I mean, from, you know,
18 eight years ago, it's just not something I would have hung
19 onto. I knew what I needed to do, and -- and I did it. I
20 got my sellers permit or resale license, whatever it is,
21 and I got -- and I started filing the taxes.

22 JUDGE STANLEY: Okay. Thank you. With no
23 further questions, do you want to have Mr. Giudicelli
24 testify now? Is that the plan?

25 MS. GIUDICELLI: You know, honestly, I don't

1 know. Only if there's a question about the pictures on
2 there.

3 I guess -- I guess, Mike, why don't you discuss
4 the pictures.

5 MR. GIUDICELLI: Yeah, I can --

6 JUDGE STANLEY: Hang on one second,
7 Mr. Giudicelli. I need to swear you in. You want to
8 raise your right hand?

9
10 M. GIUDICELLI,
11 produced as a witness, and having been first duly sworn by
12 the Administrative Law Judge, was examined and testified
13 as follows:

14
15 JUDGE STANLEY: Thank you. You may proceed.

16
17 WITNESS TESTIMONY

18 MR. GIUDICELLI: The only piece of information I
19 have to add is in regard to Exhibit G, pages 2 and 4. And
20 those relate to the archive screen captures of our
21 cultureshockyogurt.com website. Specifically, in regard
22 to the pictures that are of our interior spaces of the
23 shop. Unfortunately, I don't have a time or date stamp on
24 those photos, but those pictures were taken -- if I had to
25 guess, I don't know the exact date, but very soon after

1 each shop was opened, just so we can put them up on our
2 website.

3 Now, it wasn't common practice for us to update
4 our website, especially, in the event of removing seating
5 or tables from the any of the locations. Really, the only
6 use of our website was for a web presence. So if someone
7 Googled Culture Shock Yogurt, they would be presented with
8 our website. And, in fact, from there we urged customers
9 to go to Facebook for any updated-relevant information.

10 So that's why you'll have two different date
11 stamps on those archives; one from 2015 and one from 2017,
12 just because those were legacy pictures that we just
13 hadn't updated.

14 JUDGE STANLEY: Thank you.

15 Mr. Samarawickrema, do you have any questions for
16 Mr. Giudicelli?

17 MR. SAMARAWICKREMA: This is Nalan
18 Samarawickrema. No, we don't have any questions for the
19 witness. Thank you.

20 JUDGE STANLEY: Okay. Judge Aldrich, do you have
21 a question?

22 JUDGE ALDRICH: I don't have any questions for
23 Mr. Giudicelli.

24 JUDGE STANLEY: And Judge Vassigh, do you have
25 any questions for Mr. Giudicelli?

1 JUDGE VASSIGH: I do not.

2 JUDGE STANLEY: Okay. There was a question
3 raised for Ms. Giudicelli about whether when you applied
4 for the seller's permit, did you receive any brochure or
5 information that would explain how sales and use tax
6 works?

7 MS. GIUDICELLI: I do not recall.

8 JUDGE STANLEY: Okay. Thank you. All right. Do
9 you have anything further to present, Ms. Giudicelli?

10 MS. GIUDICELLI: Just a closing statement.

11 JUDGE STANLEY: Okay. Then we'll turn it over to
12 Mr. Samarawickrema to present CDTFA's case.

13 MR. SAMARAWICKREMA: Thank you.

14

15 PRESENTATION

16 MR. SAMARAWICKREMA: This is Nalan
17 Samarawickrema.

18 Appellant is a California corporation that
19 operated three frozen yogurt shops during the audit
20 period, with one store located on Bell Road in Auburn,
21 California and two stores in Grass Valley, California,
22 located Sutton Way and Mill Street location -- Mill
23 Street.

24 The Mill Street location closed toward the end of
25 the audit period on September 8th, 2017. The Bell Road

1 provided seating facilities on the business premises,
2 which included 3 tables and seating for 12 customers. The
3 Sutton Way location provided seating facilities on the
4 business premises, which included 3 tables with seating
5 for 6 customers. The Mill Street location also had 3
6 tables with seating for 6 customers. And that will be on
7 your Exhibit A, pages 50 through 54, and Exhibit G.
8 Appellant also sold frozen yogurt for resale, and it
9 occasionally sold yogurt at various events.

10 The Department audited Appellant's business for
11 the period of January 1st, 2015, there
12 December 31st, 2017. The Department started the audit
13 field work in February 2018 and completed the audit field
14 work on October 16, 2018. On October 28, 2019, Appellant
15 sold the two locations. During the audit period,
16 Appellant reported around \$2.2 million as total sales and
17 claimed around \$850,000 as nontaxable sales for resales,
18 around \$1.4 million as nontaxable food sales, and around
19 \$7,000 as nontaxable labor, resulting in reported taxable
20 sales of around \$23,000. And that will be on your
21 Exhibit A, pages 17 and 18.

22 Appellant did not provide complete sales
23 documents of original entry, such as cash register Z-tapes
24 or guests receipts to identify taxable and nontaxable
25 sales for the audit period. The Department rejected

1 Appellant's reported taxable sales due to lack of complete
2 records and low reported taxable percentage. It was also
3 determined that Appellant's records were such that taxable
4 sales could not be verified by a direct audit approach.
5 Therefore, the Department estimated taxable sales based on
6 site observations and available sales record for this
7 Appellant.

8 During my presentation I will explain why the
9 Department rejected Appellant's reported taxable sales.
10 Why the Department used an indirect audit approach, how
11 the Department estimated Appellant's unreported taxable
12 sales for the audit period, and why the Department
13 recommended a negligence penalty for this Appellant. The
14 Department completed two verification methods to verify
15 the reasonableness of Appellant's reported total taxable
16 and nontaxable sales.

17 First, the Department compared Appellant's
18 reported total sales with sales reflected on Appellant's
19 2015 and 2016 federal income tax returns. No differences
20 were noted. And that will be on your Exhibit A, page 32.
21 The Department also compared reported total sales of
22 around \$1.5 million to the purchases of around \$450,000
23 reflected on Appellant's 2015 and 2016 federal income tax
24 returns and calculated an overall markup of 327 percent.
25 And that will be on Exhibit A, page 32. Accordingly, the

1 Department considered this reported markup as reasonable
2 for Appellant's type of business. Therefore, the
3 Department accepted Appellant's reported total sales for
4 the audit period.

5 Second, Appellant indicated that it calculated
6 its taxable sales by applying a 2 percent taxable sales
7 ratio to recorded total sales to estimate taxable sales
8 for the audit period. And that will be on your Exhibit E,
9 page 9, line 13 and line 14. However, according to the
10 reported taxable sales of around \$23,000, Appellant only
11 reported 1 percent of total sales as taxable sales for the
12 audit period. And that will be on your Exhibit A,
13 page 33.

14 Appellant has not provided any documentation for
15 the audit period to support reported taxable sales.
16 Further, during the audit and appeal process, Appellant
17 acknowledged that it is unable to estimate taxable sales
18 percentage from its own records because it did not record
19 dine-in sale of frozen yogurt. And that will be on your
20 Exhibit E, page 12, line 24 through line 26. Therefore,
21 the Department rejected Appellant's reported taxable
22 sales.

23 To verify the taxable sales ratios, the
24 Department chose to conduct an observation test at the
25 active business locations. The Mill Street location had

1 closed prior to this audit field work. So the Department
2 was not able to observe sales activities at that location.
3 Per Appellant's permission, the Department visited the
4 Bell Road location on Thursday, March 8, 2018, and visited
5 the Sutton Way location on Tuesday, April 10th, 2018.

6 During the two site observations, the Department
7 observed that Appellant's cashiers did not ask from its
8 customer whether the item was purchased for dine in or to
9 go, and that Appellant failed to charge sales tax
10 reimbursement on its sales of yogurt consumed on the
11 premises. Based on these observation tests, the
12 Department observed a taxable sales ratio of 41.24 percent
13 for Bell Road location and 29.88 percent for Sutton Way
14 location. And that will be on your Exhibit A, pages 24
15 through 27.

16 However, before the Department could perform
17 additional observations at these sites, Appellant refused
18 to allow additional observation tests. And that will be
19 on your Exhibit A, page 9, 14, and 23. This obstructed
20 the Department's ability to gather additional complete
21 facts about how Appellant actually conducted daily sales
22 at each active location. It also prevented the Department
23 from determining any potential variance in Appellant's
24 actual taxable sales or different days and times of the
25 week.

1 After rejecting the additional site observations,
2 Appellant provided the Department with sales information
3 for each location for the period of May 7, 2018, through
4 May 23rd, 2018, and June 1st, 2018, through June 30th,
5 2018, a period outside of the audit period. And that will
6 be on your Exhibit A, pages 28 and 29.

7 The analysis of this May and June 2018 record
8 shows a computed taxable sales ratio of 20.26 percent,
9 ranging from as low as 2.83 percent to as -- high as 44.51
10 percent for Bell Road location, and 16.57 percent ranging
11 from as low as 5.53 percent to as high as 38.71 percent
12 for Sutton Way location. And that will be on your
13 Exhibit A, pages 23, 28, and 29.

14 Based on the observation test, Bell Road location
15 has a 41.24 percent taxable sales ratio while the recorded
16 taxable sales ratio is only 20.26 percent. And that will
17 be on your Exhibit A, page 23. Similarly, based on the
18 observation test, Sutton Way location has a 29.88 percent
19 taxable sales ratio, while the recorded taxable sales
20 ratio is only 16.57 percent. And that will be on your
21 Exhibit A, page 23.

22 These figures show that the May and June recorded
23 taxable sales ratios was significantly lower than the
24 taxable sales ratios which the Department actually
25 observed. The Department also noted that the May and

1 June 2018 records reflect the recorded taxable sales
2 ratios for those days at the Bell Road location is
3 significantly lower than the taxable sales ratio observed.
4 And that will be on your Exhibit A page 28 and 29.

5 Appellant was unable to explain the reason for
6 the taxable sales ratio variances, and the Appellant
7 refused to allow additional observation tests to determine
8 any potential variance in Appellant's actual taxable sales
9 for different days and times of the week. Even though the
10 Department was unable to verify the taxable sales ratios
11 on the May and June 2018 sales records, the Department
12 combined the site observation test results with May and
13 June 2018 sales records outside the audit period to
14 compute audited taxable sales ratio of 20.54 percent for
15 Bell Road location and 16.72 percent for Sutton Way
16 location, which benefit the Appellant. And that will be
17 on your Exhibit A, page 23.

18 In order to estimate the taxable sales for the
19 closed Mill Street location, the Department used the best
20 information available. The Department considered the Mill
21 Street location having a similar taxable sales ratio as
22 the Sutton Way location, which benefit the Appellant
23 because Sutton Way location's audited taxable sales ratio
24 of 16.72 percent was lower than the Bell Road location's
25 audited taxable sales ratio of 20.54 percent. Also, Mill

1 Street and Sutton Way locations were both in Grass Valley
2 and had the same seating capacity. These two stores had
3 the same or similar menus.

4 Finally, the Department estimate audited taxable
5 sales of \$247,501 for three locations using the total
6 store sales of \$1,383,577 reflected on Appellant's profit
7 and loss statement and the audited taxable sales ratios
8 for the audit period. And that will be on your Exhibit A,
9 page 22 and 31. Audited taxable sales were compared with
10 reported taxable sale of \$22,680 to compute unreported
11 taxable sale of \$224,821 for the audit period. And that
12 will be on your Exhibit A, page 21.

13 The Department then compared the unreported
14 taxable sales with the reported taxable sale of \$22,680 to
15 compute the error rate of 991.27 percent; and that will
16 let us know 91.27 percent. And that will be on your
17 Exhibit A, page 34. Appellant claims that the audited
18 taxable sales using the audit are not accurate and are not
19 represented. They claim the Department should have
20 examined at least a one-year sample period to determine
21 the proper taxable sales ratios. And that will be on
22 your Exhibit E, page 10, line 8 and line 9.

23 Appellant claimed that it installed a new point
24 of sale system for both active locations on
25 December 25th, 2018. This is after the Department

1 completed its audit field work. Appellant also indicated
2 it reviewed its point of sales report from its newly
3 installed point of sale system for Bell Road and Sutton
4 Way location for the period January 1st, 2019, through
5 October 27, 2019, and calculated taxable sales ratio of
6 7.31 percent for Bell Road location and 6.88 percent for
7 Sutton Way location. And that will be on your Exhibit A,
8 pages 38 and 39.

9 The Department reviewed and analyzed this POS
10 sales record and ultimately rejected them. The POS
11 records only summarized gross sales, returns, discounts
12 and comps, net sales, tax, tips, total collected, fees and
13 net total. And that will be on your Exhibit A, pages 38
14 and 39. Upon examination of Appellant's 2019 POS sales
15 record, the Department noted that Appellant did not
16 provide any source document or POS download or folders to
17 collaborate the figures listed in the POS sales records.

18 Moreover, Appellant sold both stores on
19 October 28, 2019, but failed to provide any of these sales
20 records until April 28, 2020. Therefore, the Department
21 did not have the opportunity to verify Appellant's newly
22 installed POS system for programming and record keeping
23 accuracies. The Department reviewed the spreadsheet for
24 2019 sales information for both locations. They're
25 located on Exhibit 4.

1 These figures show that the recorded taxable
2 sales ratios for May and June 2019 were significantly
3 lower than the recorded taxable sales ratios from
4 Appellant's own records for May and June 2018. And that
5 will be on your Exhibit 4, pages 6 and 7, and Exhibit A,
6 page 23. They are far lower than the taxable sales ratios
7 witnessed during the observation test. Therefore, the
8 Department finds that the observation tests in May 2018
9 and June 2018 sales reports are more reliable and accurate
10 than the 2019 POS sales reports and continues to find that
11 no adjustments are warranted for the audited taxable sales
12 ratios computed in this audit.

13 According to the minutes and orders of prehearing
14 conference, your panel requested to discuss whether the
15 Department considered the size of the stores, its seating
16 capacity, and the weather condition when estimating the
17 taxable sales ratio for Mill Street location. The
18 Department accepted the reported total sales for all three
19 locations. And the Department did not estimate additional
20 total sales for this Appellant. Therefore, it is not
21 necessary to consider the size of the store when
22 estimating taxable sales ratio.

23 The Department noted both Sutton Way and Mill
24 Street locations have the same seating capacity, which
25 included three tables and six stools for six customers.

1 And therefore, it was not necessary to make any adjustment
2 for seating capacity. And that will be on Exhibit A,
3 page 50 and 54, and Exhibit G, page 2 and 4.

4 Appellant did not provide complete sales
5 information and continues to claim that there are no
6 taxable sales from the Mill Street location. Therefore,
7 determining the audited taxable sales ratio for the Mill
8 Street location, the Department properly relied upon the
9 16.72 percent ratio from the Sutton Way location because
10 both locations had the same seating capacity, and both
11 locations had a similar menu during the audit period.

12 Appellant did not provide outdoor seating for
13 Sutton Way or Mill Street location. Appellant only
14 provided outdoor seating for Bell Road location. And that
15 will be on your Exhibit A, page 53. It is not necessary
16 to consider the Appellant's outdoor seating arrangements
17 during summer months when estimating taxable sales ratio
18 for Bell Road location because the Department used the
19 audited taxable ratio of 20.54 percent, instead of
20 observed taxable ratio of 41.24 percent to give a benefit
21 to the Appellant.

22 The Department agreed that the total sales on
23 summer months may be greater than non-summer months. It
24 is the Department's experience, however, the dine-in sales
25 for frozen yogurt sellers like Appellant are high in

1 non-summer months than summer months. Because during
2 summer months, customers tend to purchase their frozen
3 yogurt to go and walk in the area while consuming their
4 frozen yogurt. But during poor weather in non-summer
5 months, customers tend to prefer to sit inside the store
6 and enjoy their frozen yogurt.

7 Appellant has not provided any verifiable
8 documentary evidence to support its taxable sales ratios
9 were higher in summer months than the non-summer months.
10 Therefore, the Department find it is reasonable and
11 rational to estimate taxable sales ratios based on best
12 information available. As mentioned earlier, the
13 Department did not use sales observation results alone to
14 estimate unreported taxable sales for this Appellant, even
15 though Appellant refused to allow additional observation
16 tests.

17 If the Department had used taxable sales ratios
18 derived from observation tests alone in order to estimate
19 unreported taxable sales for the audit period, then the
20 unreported taxable sales would be increased from \$224,821
21 to \$438,806. And that will be on your Exhibit A, pages 21
22 and 22. But by combining the results of the observation
23 tests and the May and June 2018 results, the Department,
24 thus, establish additional taxable sale of \$224,821 to
25 give a benefit of \$213,985 for Appellant. And that will

1 be on your Exhibit A, page 21 and 22.

2 The audit calculation of unreported taxable sales
3 was reasonable and was in Appellant's favor since it was
4 the lowest of the difference computed. Ultimately, the
5 Department decided to use an audit method which yield the
6 lowest deficiency measure to give a benefit to the
7 Appellant.

8 Finally, the Department impose a negligence
9 penalty based upon its determination that Appellant's
10 books and records were incomplete and inaccurate for sales
11 and use tax purposes, and because Appellant failed to
12 accurately report its taxable sales. Specifically, the
13 Department noted that Appellant provided a limited record
14 for the audit period, and Appellant failed to provide
15 documents of original entry to support its reported sales
16 tax liability. As a result, the Department had to compute
17 Appellant's taxable sales based upon observation tests and
18 the application of audited taxable sales ratios.

19 In addition, the audit examination disclosed
20 unreported taxable sales of \$224,821, which when compared
21 with reported taxable sale of \$22,680 for the audit period
22 resulted in an error rate of 991.27 percent. This
23 exceptionally high error rate is additional evidence of
24 negligence. Appellant has not provided any reasonable
25 documentation or evidence supporting an adjustment to the

1 audit finding. Therefore, the Department request the
2 appeal be denied.

3 This concludes my presentation, and I'm available
4 to answer any question the panel may have.

5 Thank you.

6 JUDGE STANLEY: This is Judge Stanley. Thank
7 you, Mr. Samarawickrema.

8 Judge Aldrich, do you have any questions for
9 CDTFA?

10 JUDGE ALDRICH: No questions. Thank you.

11 JUDGE STANLEY: Judge Vassigh, do you have any
12 questions for CDTFA?

13 JUDGE VASSIGH: I do not thank you.

14 JUDGE STANLEY: Okay. And I also do not have any
15 questions.

16 So, Ms. Giudicelli, I'm going to turn it over to
17 you to make your closing remarks whenever you're ready.

18 Excuse me. You're muted, I believe.

19 MS. GIUDICELLI: Sorry about that. I was asking
20 is this a response to what he said, or is this my closing
21 statement?

22 JUDGE STANLEY: This is Judge Stanley. Why don't
23 you go ahead and incorporate your responses to what they
24 had to say in with your closing. You can do both of them
25 at the same time. You are under oath, so any new facts

1 that you testify to can still be a part of the record.

2 MS. GIUDICELLI: Okay. Thank you.

3

4 CLOSING STATEMENT

5 MS. GIUDICELLI: Okay. So first in response to
6 what he said. I did want to also include that I did
7 research prior to opening these yogurt shops. A lot of
8 the research was going to yogurt shops, literally, all
9 over the country and definitely all over California. I
10 can tell you that I never once was asked if my purchase
11 was to dine in or to take to go.

12 And whenever I have started previous businesses,
13 my research is what teaches me how to operate my business,
14 so I -- I had no idea. I had never experienced anybody
15 asking me. And, obviously, only if you ask a customer if
16 they're dining in or taking it to go, are you going to get
17 accurate numbers as to the percentage that dine in versus
18 to go. So that, again, goes more to my ignorance in not
19 knowing.

20 Secondly, that was completely inaccurate about
21 the number of seats. And in their documentation, it was
22 documented a different number of seats in each of the
23 three shops. So in the shops that they visited -- even
24 though they swapped them, and they were mentioned, kind
25 of, as the other one -- but the number seats in -- inside

1 the store at Auburn was eight with an additional six seats
2 outside. The Sutton store had 13 chairs with the 6 tables
3 and because of the layout and because it was a much, much
4 larger store. And the Mill Street location, during that
5 period, had 4 seats. So it's completely inaccurate that
6 we had the same number of seating within each shop.

7 Also, the theory about the sales of dine in or
8 the percentage of dine in sales in the cooler months is
9 much higher is completely dispelled by my numbers. And
10 the three years of 2015 to 2017 plus all of 2019, if you
11 look across each year, the number of dine-in sales --
12 well, you only have the information in my records for
13 2019. But if you go across the years, it is absolutely
14 not dependent on season. It is really dependent on
15 something else. But there is no consistency across any
16 single month or across the year to make it predictable
17 with the -- with season or the weather.

18 And lastly, they mentioned that it was an
19 extremely high error rate. They're -- they're saying it
20 was a high error rate as -- as -- as support that I was
21 negligent. The high error rate is based on their number
22 not the true numbers or the more accurate numbers that are
23 presented that I have presented here in this -- in this --

24 JUDGE STANLEY: Ms. Giudicelli. I'm sorry to
25 interrupt you. It looks like we've lost one of our panel

1 members.

2 MS. GIUDICELLI: Okay.

3 JUDGE STANLEY: So we'll pause for a second and
4 see how far you have to back up.

5 MS. GIUDICELLI: Okay.

6 JUDGE STANLEY: Okay. I'm going to recess for
7 about five minutes to figure out how to fix Judge Vassigh.
8 Thank you.

9 (There was a pause in the proceedings.)

10 JUDGE STANLEY: If you'll start with whatever you
11 were saying when you were talking about the seats or just
12 thereafter, Ms. Giudicelli.

13 MS. GIUDICELLI: Sure.

14 JUDGE STANLEY: You may proceed again.

15 MS. GIUDICELLI: Okay. So what I was saying
16 about the seating is that the CDTFA's contention was that
17 the seating is exactly the same and across all three
18 shops, and in, reality, that's not true. The Auburn shop
19 had eight in-door seats and six outdoor seats. The Sutton
20 shop while, yes it did have the 3 tables, it had 13 seats
21 because the configuration of the tables was quite
22 different, and the floor space is at least twice as large.

23 So there were 13 seats there. And those 3, yes
24 while it did have the six tables, it only had four seats.
25 And it had a very small floor space, so very little room

1 for people to be in there.

2 The next point was that his contention was that
3 the sales -- or what they're theory is the sales in cold
4 months have a higher percentage of dine-in customers and
5 my spread -- all of my spreadsheets and numbers, point of
6 sale system numbers, dispel that theory. So the disparity
7 from day-to-day continued whether you were in warm months
8 or cold months.

9 Number Five, the Department stated that the high
10 error rate is their argument for why they believe I was
11 negligent. That extremely high error rate that he quotes
12 is based on their numbers of a higher percentage of
13 in-dining sales.

14 And then lastly, he mentioned that I didn't even
15 present them my point of sale numbers from 2019 until
16 April of 2020. That's -- I -- I don't even know what to
17 say because I so many times offered other numbers. When I
18 gave him the May to June numbers because May 7th or
19 whatever that day is, is the day I started asking
20 customers and tracking who was dining in and who was
21 taking to go. And I tracked those numbers from that day
22 early in May through when we sold the shops in 20 --
23 May of 2018 through October 28th of 2019.

24 I offered up the spreadsheets where I was
25 tracking that prior to getting the point of sale systems

1 in place as well as the point of sale numbers. I had
2 offered that a number of times, and the answer was always,
3 no, we're done. We -- we've got the information that
4 we're going to use, and we're pretty much done. Anything
5 else that you want to say is going to go through an appeal
6 process. And so, I mean, I was pretty much shut down for
7 any further discussion.

8 That was my response. That's my response to what
9 we just heard from the Department. In my closing
10 statement, you actually have a copy of this in my request
11 for redetermination. But I would like to really, you
12 know, read it in this forum. The reason is I really think
13 it supports very well getting into this situation
14 unnecessarily and purely on my part out of ignorance.

15 So I would like to suggest that the IRS and the
16 state Franchise Tax Board, which is now the CDTFA, take a
17 look at the impact of an audit on small businesses and
18 owners of small businesses. Big businesses have experts
19 in each functional area. As small business -- as a small
20 business owner, we need to have expertise in every
21 functional area ourselves; operations, finance,
22 accounting, marketing, human resources, legal, taxes,
23 technology, purchasing, logistics, et cetera.

24 Culture Shock Yogurt is certainly not --

25 JUDGE STANLEY: Ms. Giudicelli.

1 MS. GIUDICELLI: Yes.

2 JUDGE STANLEY: I'm sorry to interrupt again.
3 This is Judge Stanley. Our stenographer is asking that
4 you slow down a little bit.

5 MS. GIUDICELLI: No problem. Do you want me to
6 go back at all?

7 JUDGE STANLEY: Ms. Alonzo, do you need to go
8 back?

9 THE STENOGRAPHER: No. That's not necessary.

10 MS. GIUDICELLI: Thank you.

11 THE STENOGRAPHER: Go ahead from where you're at.
12 Thank you.

13 MS. GIUDICELLI: Okay. As a small business
14 owner, we need to have expertise in every functional area;
15 operations, finance, accounting, marketing, human
16 resources, legal, taxes, technology, purchasing,
17 logistics, et cetera. Culture Shock Yogurt is not the
18 first business and probably not the last business that I
19 have started.

20 When I went into the frozen yogurt business, I
21 sought out experts in different areas and needed to become
22 fully responsible and knowledgeable. I needed to learn
23 about running a retail shop, about handling frozen
24 products, about building a clean room, et cetera. I had
25 some Departments reaching out to me, and that is how I

1 learned certain things. Other things that were obvious to
2 me that I needed to learn, I researched and networked to
3 get educated.

4 When the IRS audited me, while nothing was bound
5 to be out of sorts, it was a learning experience as I do
6 my books myself, even better than before. This audit with
7 the CDTFA has taught me about sales tax, and I obviously
8 needed to learn this. Why I am suggesting that these
9 government tax organizations could be more productive if
10 the process was more proactive than punitive is follows:

11 Just receiving notification of an audit puts an
12 undue amount of stress on a small business owner, even the
13 most honest and transparent of us. Sometimes it is
14 paramount to PTSD. Should I count the sleepless nights I
15 have had over these audits? If I were managing the
16 governmental tax organizations, this is how I would
17 structure it.

18 I would require a 30-minute consultation with
19 every new business when they apply for their resale
20 permit. In that 30-minute consultation, the auditor,
21 which should be a consultant, would explain about sales
22 tax and any other taxes that that Department is
23 responsible to collect and, specifically, relevant to the
24 business being started.

25 The Franchise Tax Board, or CDTFA in this case,

1 would make more money and collect taxes for the life of
2 the business, and the business owner would know their
3 options before they make certain decisions about how they
4 will run their business.

5 So rather than creating an adversarial
6 relationship with your customers, we the taxpayer, you
7 would have a supportive relationship. Revenue would go up
8 and expenses of these audits would go down, and any
9 ignorance of the tax laws would have been resolved.

10 JUDGE STANLEY: Ms. Giudicelli, does that
11 complete your statement?

12 MS. GIUDICELLI: Yes, it does.

13 JUDGE STANLEY: Okay. This is Judge Stanley.
14 There was just one additional question for you that was
15 raised and that is whether the configuration that you were
16 talking about in the seating was -- are you talking about
17 during the audit period or during the observation?

18 MS. GIUDICELLI: During for the audit period.
19 And for the two shops that were open, it was that same
20 during the observation.

21 JUDGE STANLEY: Okay. Seeing no further
22 questions from my co-panelists, I'm going to close the
23 record. And we will meet and deliberate and issue our
24 written opinion within 100 days. So you'll have our
25 decision, you know, at least within 100 days.

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And since we have no further hearings today, I'm going to adjourn this meeting. Thank you all for your participation and your patience with our technical issues.

(Proceedings adjourned at 2:47 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
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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 8th day
of September, 2021.

ERNALYN M. ALONZO
HEARING REPORTER