

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
FIVE FIVE ASSOCIATES, LLC, ) OTA NO. 18083612  
)  
APPELLANT. )  
)  
\_\_\_\_\_ )

TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Wednesday, September 29, 2021

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Virtual Proceedings,  
taken in the State of California, commencing  
at 12:01 p.m. and concluding at 12:27 p.m. on  
Wednesday, September 29, 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 SHERIENE RIDENOUR  
ALJ ANDREW WONG

For the Appellant: WARREN NEMIROFF

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

RANDY SUAZO  
KEVIN SMITH  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-7 were received at page 8.)

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

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

	<u>P A G E</u>
By Mr. Nemiroff	10
By Mr. Suazo	11

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California; Wednesday, September 29, 2021

12:01 p.m.

JUDGE BROWN: All right. Now, we are on the record in the Appeal of Five Five Associates, LLC, OTA Case Number 18083612. We will start by asking the representatives to identify themselves for the record.

I'll start with the CDTFA representatives. If you can each please state your name for the record.

MR. SUAZO: This is Randy Suazo, Hearing Representative.

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

MR. SMITH: Kevin Smith, from the CDTFA Legal Department.

JUDGE BROWN: Thank you.

And now Appellant's representative, if you can identify yourself for the record.

MR. NEMIROFF: Warren Nemiroff.

JUDGE BROWN: Thank you very much.

As I said my name is Suzanne Brown. I am the lead ALJ on this panel, and I am joined today by Judges Andrew Wong and Sheriene Ridenour. I will just cover a few brief things, and then we will move onto hearing the parties make their presentations.

1 I will remind everyone that the Office of Tax  
2 Appeals is an independent agency that is separate and  
3 distinct from the California Department of Tax and Fee  
4 Administration. So arguments and evidence heard before  
5 CDTFA are not necessarily part of the record that we have  
6 here before OTA. OTA's written opinion will be based upon  
7 the briefs that the parties have submitted to OTA, the  
8 exhibits that will be admitted into evidence today, and  
9 the arguments presented at the hearing today. And we do  
10 not engage in ex parte communications.

11 First, I will confirm the issue for the hearing  
12 as indicated in the prehearing conference minutes and  
13 orders that I issued on both May 5th, 2021, and  
14 September 9th, 2021. The issue in this case is whether  
15 any adjustments to the liability are warranted for the  
16 period at issue of November 27th, 2012, through  
17 April 30th, 2014.

18 Mr. Nemiroff, can you confirm that is the issue  
19 today.

20 MR. NEMIROFF: That is the issue.

21 JUDGE BROWN: And CDTFA, can you confirm that is  
22 your understanding of the issue as well.

23 MR. SUAZO: Yeah. This is Randy Suazo. That's  
24 the issue.

25 JUDGE BROWN: Okay. Thank you.

1           Next, we have documentary exhibits to be  
2 considered for admission into evidence. OTA's regulations  
3 require that the proposed exhibits must be submitted at  
4 least 15 days in advance of the hearing. We have received  
5 exhibits from both participants, and my office compiled  
6 these exhibits into a hearing binder and sent both parties  
7 a link to an electronic copy of this binder.

8           I will confirm what the exhibits are, and then  
9 I'm going to ask each party whether they have an objection  
10 to admission of exhibits into evidence. For context, I  
11 will explain that the exhibits are just what the panel may  
12 consider when we are reaching our findings in this case.  
13 By acknowledging you don't have any objections, you're not  
14 necessarily conceding that everything in the exhibit is  
15 accurate and that you agree with it. You're simply  
16 agreeing that it can be part of the record that the panel  
17 considers.

18           I'm going to start with Appellant's exhibits. We  
19 received -- I've marked Appellant's exhibits as Exhibits 1  
20 through 7, and we discussed these during the most recent  
21 prehearing conference that we had.

22           And CDTF, I'm going to ask whether, at this  
23 time, the agency has any objection to the admission of  
24 Appellant's Exhibits 1 through 7 being admitted into  
25 evidence?

1 MR. SUAZO: This is Randy Suazo. We have no  
2 objections.

3 JUDGE BROWN: Okay. Then Appellant's Exhibits 1  
4 through 7 are admitted into the record.

5 (Appellant's Exhibits 1-7 were received  
6 in evidence by the Administrative Law Judge.)

7 Next, I will address CDTFA's exhibits. Those are  
8 Exhibits A through F.

9 And Mr. Nemiroff, I believe you have already --

10 MR. NEMIROFF: I have no objection, Your Honor.

11 JUDGE BROWN: Okay. Thank you. And so CDTFA's  
12 Exhibits A through F are admitted into the record.

13 (Department's Exhibits A-F were received in  
14 evidence by the Administrative Law Judge.)

15 JUDGE BROWN: I'll just confirm that neither  
16 party has indicated that they're calling any witnesses  
17 today and, therefore, we will not be hearing any  
18 witnesses. We will just be hearing arguments from both  
19 parties. As we discussed during the last prehearing  
20 conference, and I confirmed during my prehearing  
21 conference minutes and orders, we anticipate that  
22 Appellant's presentation will take between 10 and  
23 15 minutes.

24 Mr. Nemiroff, is that correct?

25 MR. NEMIROFF: That's correct. I may be shorter



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than that.

JUDGE BROWN: Okay. I'll just say up to 15 minutes.

MR. NEMIROFF: Okay.

JUDGE BROWN: And then there's no minimum required time.

MR. NEMIROFF: Okay.

JUDGE BROWN: And then next, CDTFA's presentation will take between 15 to 20 minutes.

Is that correct, Mr. Suazo?

MR. SUAZO: That is correct.

JUDGE BROWN: And then following that, Appellant will have a brief rebuttal of up to five minutes. And I will remind the participants that during these presentations the ALJs may ask questions at any time.

Does anyone have any questions about anything before we begin this proceeding?

MR. NEMIROFF: No, Your Honor.

JUDGE BROWN: CDTFA, no questions?

MR. SUAZO: This is Randy Suazo. No questions.

JUDGE BROWN: Okay. In that case, I will say that we are ready to begin.

And, Mr. Nemiroff, you can begin Appellant's presentation. You have up to 15 minutes.

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PRESENTATION

MR. NEMIROFF: I will make this very short.

An audit was conducted at my office that included some of the periods involved in this case. That audit reached the conclusion that, for the issues in question, that the client owed \$73,000, roughly. Now, since that time, the client has paid \$180,000. And there is no dispute that the client owes no money.

The issue is whether there's a refund due because of the fact that there's a slight difference between 73 and 180. It is my contention in this state, that based upon the fulsome note of that audit, that the total liability for the years at issue or the quarters in issue was as correctly determined by the auditor to be \$73,000. Now, there's an additional amount that was not considered in that audit. If such is the case, there's a refund due between the 180 and 73.

That's the extent of my argument. The State apparently contends that there was additional tax due and that the 180 is a fulsome payment. I will go on the basis of the fact the audit was very well done, was done from inception covered a lot of everything, was meant to be a full audit, and there now is a legitimate refund due to the taxpayer.

That's it. Did everyone hear that?

1 JUDGE BROWN: All right. This is Judge Brown.  
2 Thank you very much, Mr. Nemiroff. That's --

3 MR. NEMIROFF: My pleasure.

4 JUDGE BROWN: That concludes your presentation at  
5 this time?

6 MR. NEMIROFF: Yes.

7 JUDGE BROWN: Your opening?

8 MR. NEMIROFF: Yes.

9 JUDGE BROWN: Okay. I will ask my co-panelists  
10 if they have any questions. Judge Wong?

11 JUDGE WONG: This is Judge Wong. No questions.  
12 Thank you.

13 JUDGE BROWN: Judge Ridenour?

14 JUDGE RIDENOUR: Judge Ridenour here. No  
15 questions at this time. Thank you very much.

16 JUDGE BROWN: Thank you.

17 Then and if there are no -- and I don't have any  
18 questions at this time. So we can move onto hearing  
19 CDTFA's presentation.

20 And, Mr. Suazo, whenever you are ready, you have  
21 up to 20 minutes.

22 MR. SUAZO: Okay. Thank you.

23

24 PRESENTATION

25 MR. SUAZO: The Appellant was a limited liability

1 corporation and operated a sit-down restaurant names Coco  
2 Laurent, located in downtown Los Angeles serving  
3 French-style food, alcoholic beverages, and beer and wine.  
4 The seller's permit was obtained on November 27t, 2012.

5 The Appellant disagrees with the demand made to  
6 its escrow company of one \$181,018.30; Exhibit E, page 5.  
7 This demand was made to recover past tax liabilities in  
8 addition to the liability established in the audit  
9 findings. Past liabilities were based on self-reporting  
10 of \$109,214.48, which included sales tax reported but not  
11 remitted of \$76,850.70, penalties of \$18,841.42, past  
12 recovery fees of \$3,230, and interest originally of  
13 \$10,292.36, which is on Exhibit E, page 15, but was later  
14 reduced to \$7,908.43 on Exhibit F, page 8 -- page 4 --  
15 Exhibit F, page 4. In addition, an audit disclosed a  
16 liability of \$71,803.82, which consisted of additional  
17 sales tax due of \$63,098.90, plus interest of \$8,704.92,  
18 which was later reduced to \$8,249.66; Exhibit F, page 5.

19 The Appellant believes that the Department has  
20 collected more than the amount due. An audit was  
21 conducted for the audit period from November 27, 2012,  
22 start date of the permit, through April 30th, 2014. The  
23 restaurant was opened daily, and all sales were considered  
24 taxable. The only item provided by the Appellant for the  
25 audit was a 2013 federal income return. Appellant did not

1 provide general ledgers, point of sale system reports,  
2 cash register tapes, guest sales receipts, purchase  
3 invoices, or bank statements.

4 The Department obtained 1099-K credit card  
5 information for 2013 from the Franchise Tax Board. Since  
6 the restaurant was closed during the audit, no site test  
7 could be conduct. A review of guest checks or cash  
8 register tapes could not be performed as no records were  
9 provided. No markup of menu items using purchase invoices  
10 could be done either. Review of transcripts of the sales  
11 and use tax returns, which included amended return amounts  
12 for the audit period, show that the Appellant had reported  
13 all sales taxable; Exhibit D page 15.

14 The 2013 federal income return was scheduled and  
15 compared to reported sales, and a difference of over  
16 \$400,000 was disclosed; Exhibit D, page 23. In markup  
17 analysis using cost of goods sold per income tax returns  
18 to reported sales, disclosed a markup of 121 percent;  
19 Exhibit D, page 22. The industry average markup on cost  
20 of goods sold for a restaurant without a full bar is  
21 typically 200 percent. This restaurant did have a full  
22 bar, so the expected markup would be even higher.

23 Review of the 1099-K data for 2013 disclose a  
24 difference of over \$500,000 for the year when compared to  
25 reported taxable sales; Exhibit D, page 20. Based on the

1 Department's analysis through reported taxable sales could  
2 not be relied upon, and the Department turned to  
3 alternative methods to determine taxable sales. The  
4 1099-K report from 2013 was used as a basis to determine  
5 audited sales; Exhibit D, page 20.

6 The credit card revenue was adjusted for tips and  
7 sales tax to arrive at the amount of sales paid with  
8 credit cards. Because the Appellant did not provide  
9 records to determine the cash to credit card ratio on  
10 sales, an estimated percentage of 85 percent credit card  
11 to 15 percent cash was used. Per audit comments, a review  
12 of similar restaurants with the same characteristics  
13 showed that the estimated credit card ratio was in line  
14 with industry average.

15 The 85 percent credit card ration was applied to  
16 the adjusted credit card sales and ex tax audited sales of  
17 almost \$1,965,000 was computed. When compared to the  
18 \$1,521,000 reported for the same period, a difference of  
19 \$444,000 was disclosed and a percent of 29.19 percent of  
20 error -- percentage of error was derived; Exhibit D,  
21 page 19. Since no 1099-Ks were available for periods  
22 before and after 2013, the 29.19 percentage of error was  
23 applied to the reported sales to arrive at the audited  
24 sales for those periods. Additional taxable sales for the  
25 audit period amounted to \$652,578; Exhibit D, page 18.

1           To review for reasonableness, the audited sales  
2           of 2013 was compared to the recorded cost of goods sold  
3           for the federal income tax returns, and the audited sales  
4           markup of 185 percent was computed. This was considered  
5           low for a business, considering that it was a restaurant  
6           with a full bar. Based on this analysis, the assessment  
7           developed in the audit is reasonable and even  
8           conservative.

9           The Appellant has not provided any documentation  
10          to support a reduction of the liability, and during the  
11          appeals process has not disagreed to the audit findings.  
12          The Department was notified that the Appellant sold the  
13          business through a local escrow company. As stated  
14          previously, the Department issued a demand to the escrow  
15          company for payment to cover all the Appellant's  
16          outstanding liabilities in the amount of, again,  
17          \$181,018.30, again, on Exhibit E, page 5.

18          The Appellant disagrees to the escrow demand of  
19          \$181,000 being used to collect for both the liability  
20          assessed in the audit and for the collection of  
21          self-reported sales and use tax returns that were in  
22          arrears. It appears that the Appellant believes that the  
23          audit assessment was all inclusive of prior debts to the  
24          State and that the \$106,830 or a portion of it has been  
25          over collected.

1           The Appellant's entire payment history was  
2 reviewed to determine if additional money should be  
3 refunded to Appellant; Exhibit F, pages 1 through 10.  
4 Analysis disclose that no further refund is due to the  
5 Appellant. A refund had been given to the Appellant  
6 earlier for the remaining balance of \$2,839.19. The  
7 audited assessment did not remove any of the liabilities  
8 previously incurred in the self-reporting process.

9           The liability assessed in the audit is for a  
10 separate issue. It is for additional taxes due based on  
11 taxable sales that the Appellant failed to report. This  
12 is separate from the monies and arrears, penalties, fees,  
13 and interest that the Appellant accumulated by not paying  
14 sales tax due. Self-reported amounts and liabilities due  
15 for those self-reported amounts are still due. Payment of  
16 the audit liability does not absolve the prior  
17 liabilities. \$106,130 is for self-assessed liabilities  
18 that the Appellant did not appeal. And no claim for  
19 refund was filed for any payments made. The statute of  
20 limitations to make any adjustments to self-assessed  
21 liabilities has passed, and no further adjustment can be  
22 made for this portion.

23           In preparing for this audit, we reviewed the sale  
24 of the fixtures and equipment. Originally the auditor had  
25 computed that the sale occurred in the second quarter of



1 2014. Looking at the contract that was signed, it appears  
2 that the sale was actually made in January of 2015. So we  
3 believe that there should be a reduction of \$50,000 in  
4 measure eliminating the sale of fixed assets as it was  
5 improperly billed.

6 This concludes my presentation. I'm available to  
7 answer any answer any questions you may have.

8 JUDGE BROWN: This is Judge Brown. Thank you,  
9 Mr. Suazo.

10 Judge Wong, do you have any questions?

11 JUDGE WONG: This is Judge Wong. I just had one  
12 question for CDTFA. You had mentioned the markup  
13 percentage CDTFA expected for a restaurant and bar. Was  
14 that 200 percent?

15 MR. SUAZO: 200 percent is for a restaurant on  
16 its own, normally between 200 to 233. A bar is between,  
17 normally, 300 to 400. So when you combine the two, it  
18 should be well in excess of 200 percent. The recorded  
19 markup was 120, I believe. And then after we did the  
20 audit, the findings only showed 185. So it's still well  
21 below expectations.

22 JUDGE WONG: Thank you.

23 JUDGE BROWN: This is Judge Brown.

24 Judge Ridenour, do you have any questions?

25 JUDGE RIDENOUR: I do not. Thank you very much.

1 JUDGE BROWN: This is Judge Brown. I don't think  
2 I have any questions for CDTFA at this time. So if CDTFA  
3 has concluded its presentation --

4 MR. NEMIROFF: I -- I'm --

5 JUDGE BROWN: Yes. Mr. --

6 MR. NEMIROFF: The phone connection is going out,  
7 Your Honor.

8 JUDGE BROWN: Oh, this is Judge Brown.  
9 Mr. Nemiroff, can you hear me?

10 MR. NEMIROFF: Hello?

11 JUDGE BROWN: Yes. This is Judge Brown. Can you  
12 hear me?

13 MR. NEMIROFF: I -- I can't hear you.

14 JUDGE BROWN: You cannot hear me?

15 All right. Let's take a short break, five  
16 minutes and -- while Mr. Nemiroff can reconnect. It is  
17 12:22. And we will reconvene in five minutes, once we  
18 have everyone back on the line.

19 (There is a pause in the proceedings.)

20 JUDGE BROWN: I will say that we can go back on  
21 the record in the hearing for the Appeal of Five Five  
22 Associates, LLC. We took a short break so that all the  
23 participants could reconnect, and I believe I have  
24 everybody back on the line now.

25 Mr. Nemiroff, you are on the line?

1 MR. NEMIROFF: Hello.

2 JUDGE BROWN: Hello. Mr. Nemiroff, are you on  
3 the line?

4 MR. NEMIROFF: I -- it's going in and out again.  
5 I have nothing to add, Your Honor.

6 JUDGE BROWN: All right. This is Judge Brown.  
7 If you have nothing to add, you don't have any rebuttal to  
8 give, then I will wrap up the hearing so that we can  
9 complete with everyone still listening and available.

10 CDTFA, you don't have anything further?

11 MR. SUAZO: This is Randy Suazo. Nothing  
12 further.

13 JUDGE BROWN: Okay. In that case, I will say  
14 that this concludes the hearing. The record is closed.

15 MR. NEMIROFF: Thank you, Your Honor.

16 JUDGE BROWN: Okay. The record is closed, and  
17 the case is submitted today, September 29th, 2021. The  
18 judges will meet and decide the case based on the  
19 evidence, arguments, and applicable law. And we will mail  
20 both parties our written decision no later than 100 days  
21 from today.

22 The hearing is now adjourned. Thank, you,  
23 everyone.

24 MR. NEMIROFF: Thank you, Your Honor.

25 JUDGE BROWN: Thank you.

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MR. SUAZO: Thank you.

JUDGE BROWN: There are hearings for the  
afternoon calendar that will begin at the scheduled time.

We are off the record.

(Proceedings adjourned at 12:27 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 27th day of October, 2021.

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