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APPEARANCES:

Panel Lead: ALJ DANIEL CHO

Panel Members: ALJ KEITH LONG
ALJ RICHARD TAY

For the Appellant: CARLOS CHAIT
R. GOMEZ
J. DAVILA

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

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 1-2 were received at page 7.)

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

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California; Tuesday, September 28, 2021

11:20 a.m.

JUDGE CHO: Let's go on the record then.

This is the Appeal of Emiliano's Restaurant, Inc., OTA Case Number 20036004. Today is September 28, 2021, and the time is approximately 11:20 a.m.

We're holding this hearing electronically with the agreement of all the parties. My name is Daniel Cho, and I will be the lead Administrative Law Judge for this appeal. With me are Administrative Law Judges Keith Long and Richard Tay.

Can the parties please identify yourselves by stating your name for the record, beginning with Appellant. So, Mr. Chait, would you mind just stating your name for the record?

MR. CHAIT: Carlos Chait.

JUDGE CHO: Thank you.

MR. DAVILA: Jose Davila.

JUDGE CHO: Thank you.

Department?

MR. SAMARAWICKREMA: Nalan Samarawickrema, Hearing Representative.

MR. PARKER: Jason Parker, Chief of Headquarters,

1 Operation Bureau.

2 MR. BROOKS: Christopher Brooks, Staff Counsel
3 for CDTFA.

4 JUDGE CHO: Thank you.

5 It's my understanding that the issue in this
6 appeal is whether any further adjustments are warranted to
7 the determined measure of tax.

8 Mr. Chait, is that your understanding as well?

9 MR. CHAIT: Yes, it is.

10 JUDGE CHO: Okay. Thank you, Mr. Chait.

11 And just as a reminder, I know it's kind of
12 strange, but please say you're name before you speak.

13 MR. CHAIT: Again, okay. Carlos Chait. Okay. I
14 understand.

15 JUDGE CHO: Thank you. This is Judge Cho, and I
16 apologize. I guess I haven't been doing it either. This
17 is Judge Cho. Thank you very much.

18 Department, is that your understanding as well?

19 MR. SAMARAWICKREMA: This is Nalan
20 Samarawickrema. Yes, that is our understanding.

21 JUDGE CHO: Okay. Thank you.

22 This is Judge Cho. Did you want to say
23 something, Mr. Chait?

24 MR. CHAIT: Yes. I didn't understand at all what
25 the last guy said.

1 JUDGE CHO: Department, this is Judge Cho.
2 Department, would you mind just restating what you said.

3 MR. SAMARAWICKREMA: This is Nalan
4 Samarawickrema. That's our understanding.

5 MR. CHAIT: What's he's saying?

6 JUDGE CHO: This is Judge Cho.
7 Mr. Samarawickrema was just stating his name, and saying
8 that's his understanding as well.

9 Mr. Chait, did you have any other questions?

10 MR. CHAIT: No.

11 JUDGE CHO: Okay. Great. Thank you.

12 This is Judge Cho. With respect to the
13 evidentiary record, CDTFA has provided Exhibits A through
14 F, and Appellant has not objected to the admissibility of
15 these exhibits. Therefore, these exhibits are entered
16 into the record.

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

19 With respect to Appellant's exhibits, Appellant
20 has provided Exhibits 1 and 2. CDTFA has not objected to
21 the admissibility of these exhibits. And, therefore,
22 these exhibits are entered into the record.

23 (Appellant's Exhibits 1-2 were received
24 in evidence by the administrative Law Judge.)

25 Do you have any questions at this, Mr. Chait,

1 before we begin the presentations?

2 MR. CHAIT: No. No. That's okay. Carlos Chait.
3 Not at all.

4 JUDGE CHO: Thank you very much, Mr. Chait.

5 Department, do you have any questions or is
6 that -- is there anything else incorrect with respect to
7 evidentiary exhibits?

8 MR. SAMARAWICKREMA: This is Nalan
9 Samarawickrema. Yeah, it's correct.

10 JUDGE CHO: Thank you. This is Judge Cho.

11 Mr. Chait, so I can see that Mr. Gomez is not
12 there to testify today. Will Mr. Davila be testifying, or
13 will he just be presenting arguments?

14 MR. CHAIT: Let me ask Mr. Davila.

15 JUDGE CHO: So this is Judge Cho. The difference
16 between testifying or presenting arguments is if you want
17 to have your testimony introduced as facts, if you're
18 going to be testifying as to facts, then you can testify.
19 But if you're just going to be presenting your argument
20 saying why the measure of tax should be adjusted without
21 presenting any factual allegations, there's no need to
22 swear you in as a witness. Does that help?

23 MR. CHAIT: Yes. I think Mr. Davila is going to
24 testify only.

25 JUDGE CHO: Okay. This is Judge Cho. So

1 Mr. Davila will testify for about five minutes. That's
2 what Mr. Gomez was going to do. So I'm assuming that
3 Mr. Davila taking his place. Would that be an accurate
4 statement?

5 MR. DAVILA: Correct. Mr. Davila here.

6 JUDGE CHO: Okay. And, Mr. Davila, will you be
7 testifying first, or would Mr. Chait be presenting his
8 case first?

9 MR. CHAIT: I will present the case first.
10 Carlos Chait first.

11 JUDGE CHO: All right. This is Judge Cho. Then,
12 Mr. Chait, you have 10 minutes for your presentation.

13 Afterwards, Mr. Davila, you'll be given five
14 minutes for your testimony. I will swear you in, in
15 accordance with OTA's regulations. So, actually, why
16 don't I just swear you in right now, and then you can
17 testify after Mr. Chait is done.

18 Would you please raise your right hand.

19 Oh, Mr. Chait, not you just Mr. Davila. Thank
20 you.

21

22 J. DAVILA,

23 produced as a witness, and having been first duly sworn by
24 the Administrative Law Judge, was examined and testified
25 as follows:

1 JUDGE CHO: Thank you.

2 Mr. Chait, you have 10 minutes for your
3 presentation. Please begin when you're ready.

4 MR. CHAIT: Okay. I'm ready.

5

6 PRESENTATION

7 MR. CHAIT: This is Carlos Chait. I send to the
8 California Tax and Fee Administration an estimate a few
9 days ago -- it's in there in the record right now --
10 stating that in the California Department of Tax and Fee
11 Administration will have any other better figures to
12 determinate the percentage of past sales regarding credit
13 card sales are estimated studies like many -- a division
14 stated that really the percentage for this kind of
15 restaurant, that is dine-in restaurant, is much higher
16 than the Department of California Department of Tax and
17 Fee use for the audit.

18 I really don't understand why they, the
19 California Department of Tax and Fee Administration, with
20 all their resource and the human resource they have, they
21 don't have any good study about the relation between
22 credit card and cash. And they use general right there in
23 the area, anybody in the are or -- or some kind of very
24 vague situation about how they determinate the rate used
25 for their computation. And --

1 JUDGE CHO: I'm sorry. This is Judge Cho.

2 MR. CHAIT: Yes.

3 JUDGE CHO: Mr. Chait, would you mind try talking
4 a little slower and just a little clearer. I'm having a
5 little bit of a difficult time understanding what you're
6 saying. But if you don't mind, it's probably just the
7 connection that we're having. That's all. But if you
8 don't mind just talking a little slower and clearer.

9 MR. CHAIT: Okay.

10 JUDGE CHO: Thank you. Sorry to interrupt you.
11 I'm very sorry.

12 MR. CHAIT: No. No problem. This -- this -- I'm
13 going to go straight to the -- I'm going to go straight to
14 the very -- I'm going to go straight to the point. I see
15 the use for the California Department of Tax and Fee
16 Administration related with the -- between credit card and
17 cash sales there is no -- have no merit. There is no
18 study, nothing to establish the record. I don't know why
19 the Department has not conducted any further analysis in
20 the California or in the area. I don't -- I didn't find
21 any study from the California related with the -- that
22 matter.

23 Because I use another investigation, and I said
24 to you it's incorporated in the record showing that the
25 analysis for use the credit card and debit card for

1 dine-in restaurant is much, much higher than they use for
2 the board. That's my main point of my presentation in a
3 few words.

4 Furthermore, I sent some information related with
5 2017 that practically was not used or ignored by the
6 Department at the time of the audit. They used 2016 and
7 two quarter of '17, and I send all this information
8 showing that 2017 the figures first and second quarter are
9 practically the same that the California Department of Tax
10 and Fee Administration is assessing to my client.

11 That's it.

12 JUDGE CHO: This is Judge Cho. Thank you,
13 Mr. Chait.

14 Mr. Davila, would you like to present your
15 testimony at this point in time?

16 MR. DAVILA: Of course, yes.

17

18 WITNESS TESTIMONY

19 MR. DAVILA: Based on all the information
20 presented to us by the client directly, the figures that
21 we use is directly from the reports and materials that the
22 client provides to us. And so those numbers are the ones
23 that are a little bit derived from the records of the
24 client as presented to us.

25 JUDGE CHO: This is Judge Cho. Thank you very

1 much, Mr. Davila. Did you want to testify as to anything
2 else?

3 MR. DAVILA: As far as the ratio, that is one
4 used. Also, in relationship with the credit cards and the
5 cash based on the information presented to us, that's the
6 client also confirmed that is too high of the ratio that
7 way.

8 JUDGE CHO: This is Judge Cho. Does that
9 conclude your testimony, Mr. Davila? Or would you like to
10 testify to anything else?

11 MR. DAVILA: No, I'm -- I'm -- it's concluded.
12 Thank you.

13 JUDGE CHO: This is Judge Cho. Thank you very
14 much. Because you are testifying, I do have to give the
15 Department an opportunity to cross-examine you.

16 Department, would you like to cross-examine
17 Mr. Davila as a witness?

18 MR. SAMARAWICKREMA: This is Nalan
19 Samarawickrema. No, we're not going to cross-examine the
20 witness.

21 JUDGE CHO: This is Judge Cho. Thank you very
22 much.

23 Panel members, would you like to ask any
24 questions of the witness at this time? I'll start with
25 Judge Long.

1 JUDGE LONG: This is Judge Long. I do not have
2 any questions. Thank you.

3 JUDGE CHO: This is Judge Cho. Thank you.

4 Judge Tay, do you have any questions for the
5 witness?

6 JUDGE TAY: Not at this time. Thank you. This
7 is Judge Tay.

8 JUDGE CHO: This is Judge Cho. Thank you very
9 much, Mr. Davila. I don't have any questions either.

10 So why don't we move on to the Department's
11 presentation.

12 Department, you'll have 20 minutes for your
13 presentation. Please begin whenever you're ready.

14 MR. SAMARAWICKREMA: Thank you.

15

16 PRESENTATION

17 MR. SAMARAWICKREMA: This is Nalan
18 Samarawickrema.

19 Appellant is a California corporation that
20 operates a dine-in restaurant in Pomona, California,
21 serving food and alcoholic beverages such as beer, wine,
22 and cocktails. The restaurant has a seating capacity for
23 approximately 80 to 100 customers. Appellant sells
24 breakfast, lunch, and dinner and offers take-outs and
25 delivery services. Appellant also holds special events,

1 such as live performances and karaoke.

2 The Department audited Appellant's business for
3 the period January 1st, 2015, through June 30th, 2017.
4 During the audit period, Appellant reported total sale of
5 around \$682,000 and claimed sales tax of around \$56,000
6 included in the reported total sales resulting in reported
7 taxable sales of around \$626,000. And that will be on
8 your Exhibit A, pages 30 and 32. The audit result found
9 that Appellant had over half a million dollars of
10 unreported sales and a sales tax liability of around
11 \$50,000. And that will be on your Exhibit A, pages 1 and
12 4.

13 During my presentation, I will explain why the
14 Department rejected Appellant's reported taxable sales;
15 why the Department used indirect audit approach; and how
16 the Department estimated Appellant's unreported sales tax
17 for the audit period for this Appellant.

18 During the audit, Appellant failed to provide
19 complete sales records. Appellant did not provide
20 complete documents of original entry, such as cash
21 register Z-tapes or guest receipts for the audit period.
22 In addition, Appellant failed to provide complete purchase
23 information or purchase journal for the audit period.
24 Appellant was unable to explain how it reported its sales
25 on its sales and use tax returns. Appellant was also

1 unable to explain what sources it relied upon to file its
2 tax and use tax returns.

3 Therefore, the Department did not accept
4 Appellant's reported taxable sales, and determined that
5 Appellant's record was such that sales could not be
6 verified by a direct audit approach. The Department
7 completed three verification methods to evaluate the
8 reasonableness of Appellant's reported taxable sales.

9 First, the Department compared reported taxable
10 sales of around \$490,000 for the purchases of around
11 \$190,000 reflected on Appellant's 2015 and 2016 federal
12 income tax returns and calculated an overall reported
13 markup of 157 percent. And that will be on your Exhibit
14 B, page 102. However, based on the items sold, menu
15 prices, customer base, services provided, and the location
16 of the restaurant, the Department expected to see a book
17 markup of 200 percent to 250 percent for this Appellant.
18 And that will be on your Exhibit E, page 171, line 18 and
19 line 19.

20 Appellant's low reported book markup raised
21 questions of whether Appellant reported all its sales and
22 sales and use tax returns. Second, the Department
23 compared reported taxable sales of around\$490,000 to the
24 rent of \$77,000 reflected on Appellant's 2015 and 2016
25 federal income tax returns and calculated overall rent

1 ratio of 16 percent. And that will be on your Exhibit B,
2 pages 92 and 103.

3 Appellant's high rent ratio further raised
4 questions of whether Appellant reported all its sales and
5 its sales and use tax returns. However, based on the
6 audited sales, the overall rent ratio was 8.36 percent.
7 And that will be on your Exhibit B, pages 92 and 103.
8 Third, the Department obtained Appellant's credit card
9 sales for the period January 1st, 2015, through
10 December 31, 2016, from its internal sources. That will
11 be on your Exhibit B, page 95.

12 The Department compared the reported total sales
13 to credit card sales and calculated an overall credit card
14 sales ratio of 92 percent for this period. And that will
15 be on your Exhibit B, page 94. The Department viewed this
16 as a very high credit card sales ratio for a restaurant
17 selling alcoholic beverages and providing entertainment.
18 However, based on the three-day observation test, the
19 actual credit card sales ratio was 48.99 percent. And
20 that will be on your Exhibit A, page 41.

21 Appellant was unable to explain for low reported
22 book markup, high rent ratio, and high reported credit
23 card sales ratio. Therefore, the Department chose to
24 conduct three site observations. With Appellant's
25 permission, the Department visited Appellant's restaurant

1 on Monday, August 14th, 2017, Thursday, August 17, 2017,
2 and Sunday, August 27, 2017. Based on these observation
3 tests, the Department computed an audited credit card
4 sales ratio of 48.99 percent. That will be on your
5 Exhibit B, pages 84 through 88.

6 Appellant did not provide any evidence to suggest
7 that the condition in August 2017 was significantly
8 different than the condition during the audit period. In
9 fact, the three-day observation was performed within two
10 months at the end of the audit period. Appellant failed
11 to provide credit card merchant statements or 1099-K forms
12 to establish credit card sales for the audit period.
13 Therefore, the Department obtained Appellant's credit card
14 sales information for the period January 1st, 2015,
15 through December 31, 2016, from its internal sources. And
16 that will be on your Exhibit B, page 95.

17 Then the Department divided the total credit card
18 sale of around \$450,000, for years 2015 and 2016, by the
19 audited credit card sales ratio to estimate audited
20 taxable sales of around \$920,000. And that will be on
21 your Exhibit A, page 40. The Department then compared the
22 audited taxable sales for years 2015 and 2016 to reported
23 taxable sales of around \$490,000 to compute unreported
24 taxable sales of around \$430,000. And that will be on
25 your Exhibit A, page 40.

1 At the time of the audit, the Department did not
2 have the credit card sales for the first and second
3 quarters of 2017. The Department computed the average
4 quarterly sale of little over \$107,000 using third quarter
5 2016 and fourth quarter 2016 audited sales instead of
6 two-year quarterly average sale of around \$115,000 to give
7 an average benefit of \$8,000 to the Appellant. And that
8 will be on your Exhibit A, page 38 and 40.

9 Then the Department compared those audited
10 quarterly sales to reported taxable sales over \$136,000 to
11 compute the unreported taxable sales of around \$78,000 for
12 the first and second quarter of 2017. And that will be on
13 your Exhibit A, page 38. In total the Department
14 established unreported taxable sales of over
15 half-a-million dollars for the audit period and that will
16 be on your Exhibit A, pages 35 and 36. The Department
17 then compared the unreported taxable sales with reported
18 taxable sales of around \$626,000 to compute the error rate
19 of 81.73 percent. And that will be on your Exhibit, A,
20 page 36.

21 Appellant did not agree with the audit finding
22 for the audit period. According to the decision,
23 Appellant claimed that if the Department developed average
24 daily sales based on observation tests performed, then the
25 audited taxable sales would have been computed to be less

1 than reported taxable sales for the audit period.
2 Appellant claim that the combined total sales during the
3 observation test was \$2,517, which mean the average daily
4 sales were \$839. And that will be on your Exhibit A,
5 page 41. Appellant argues that using average daily sales
6 of \$839 would result in no additional taxable sales for
7 the audit period for this Appellant.

8 The Department did not agree with the way
9 Appellant computed the average daily sale of \$839.
10 Appellant's restaurant is open seven days per week. Since
11 the observation test was performed on two weekdays and one
12 weekend day, your panel can see that the daily weekend
13 sales are much higher than weekday sales. And that will
14 be on your Exhibit A, page 41.

15 The fact shows Monday sales are not the same as
16 Sunday sales. And the internet information shows Monday
17 activities are not the same as Sunday activities. Sunday
18 sales made up to 61 percent of total sales during the
19 three-day test. And that will be on your Exhibit A,
20 page 41. On weekends the daily sales can approach \$3,000.
21 And that will be on your Exhibit E, page 174, footnote 11.

22 During the audit, Appellant provided only its
23 2015 and 2016 federal income returns and sales receipt for
24 the observation test period. Appellant did not provide
25 any of the documents of original entry, such as Z-tapes,

1 guest checks, purchase invoice, wage information,
2 insurance information, utility bills, and other expense
3 details for the audit period. Therefore, to compute
4 average daily business expenses for this Appellant, the
5 Department relied on reported expenses on Appellant's
6 federal income returns. And that will be on your Exhibit
7 B, page 103.

8 The Department reviewed Appellant's 2015, 2016
9 and newly provided 2017 federal income returns and found
10 Appellant did not report enough daily sales to cover its
11 daily expenses. In 2015 the ratio of daily expenses to
12 report daily sales was 96 percent; in 2016, 101 percent;
13 in 2017, 110 percent. And that will be on your Exhibit B,
14 page 103, Exhibit 1, page 1, and Exhibit A, pages 30 and
15 36. This clearly indicates that Appellant did not report
16 all of its sales on its sales and use tax returns for the
17 audit period. The Department also noted insurance
18 expenses, wages, and wage-related expenses were not
19 accurately reflected in Appellant's federal income return.
20 And that will be on your Exhibit B, page 103 and
21 Exhibit 1, page 1.

22 A similar analysis was made comparing daily
23 expenses to average audited daily sales. In 2015 the
24 ratio of daily expenses to audited daily sales was
25 49 percent; in 2016, 56 percent; in 2017, 70 percent. And

1 that will be on your Exhibit B, page 103, Exhibit 1,
2 page 1, and Exhibit A, page 36.

3 Based on this analysis, the Department concluded
4 that the audited taxable sales was reasonable. Therefore,
5 the Department rejected Appellant's argument. According
6 to the minutes and orders of the prehearing conference,
7 the Appellant also requested to discuss whether the
8 Department considered using a straight average for the
9 credit card sales ratio as opposed to a weighted average
10 because of low volume of sales during the observation test
11 period.

12 The panel also requested to discuss the net
13 effect using newly available credit card sales information
14 for the period January 1st, 2017, through June 30th, 2017,
15 and the formula of the audited credit card sales ratio
16 using this audit. Appellant's restaurant is open every
17 day, and the weekend sales are much higher than weekdays.
18 According to the observation test, Monday sales are not
19 the same as Sunday sales. And the internet information
20 shows Mondays and Tuesdays are not the same as Sunday
21 activities.

22 Therefore, the Department did not use a straight
23 average to calculate projected sales in a week because
24 that would be an inaccurate computation. Such a process
25 would assume that the sales on Mondays are equal to sales

1 on every other day of the week. The Department used
2 weighted average method because it is a more accurate
3 method to compute the audited credit card sales ratio for
4 this Appellant because Appellant sales are not consistent
5 during the weekdays and weekends. Also, Appellant's
6 business activities are different on weekdays than it is
7 on weekends.

8 It is the Department experience, however, that
9 sales for restaurants like Appellant's are higher on
10 weekends than the weekdays because during weekends the
11 Appellant provides entertainment. Such entertainment
12 activities are likely to bring in more customers to the
13 restaurant and drive-up sales on those days. Looking at
14 the days during the observation test, the Appellant can
15 see that Appellant's Sunday sales made up 61 percent of
16 total sales. And, therefore, the Department correctly
17 estimate the accurate credit card sales ratio for this
18 Appellant using the weighted average method. And that
19 will be on your Exhibit A, page 41.

20 The Department subsequently obtained Appellant's
21 Form 1099-K for year 2017, which reflected the monthly
22 credit card sales figure for 2017, and analyzed this new
23 information. And that will be on your Exhibit 1, page 3
24 through page 5. The Department compiled credit card sale
25 of \$117,117 for the period January 1st, 2017, through

1 June 30th, 2017. And that will be on your Exhibit B,
2 page 97 through 99. If the Department --

3 JUDGE CHO: This is Judge Cho. I'm sorry to
4 interrupt you, Mr. Samarawickrema, your time is
5 expiring -- well, expired. But you can have a little bit
6 longer. Would you mind just trying to wrap up your
7 presentation.

8 MR. SAMARAWICKREMA: Okay.

9 JUDGE CHO: Thank you very much.

10 MR. SAMARAWICKREMA: The Department included the
11 \$117,117 of credit card sales, this would increase the
12 additional taxable sales by \$24,399 from \$78,032 to
13 \$102,431 for this period. And that will be on your
14 Exhibit B, page 96. The Department will not perform a
15 reaudit to account for the additional taxable sale of
16 \$24,399. However, if the final disposition of this appeal
17 includes any additional adjustment to the audit finding,
18 the Department request to use the 2017 credit card sales
19 information to be concluded.

20 Therefore, the Department finds that the
21 estimated amount, as in this audit for this period, is
22 reasonable and benefits the Appellant. And that will be
23 on your Exhibit B, page 96. As requested by Appellant,
24 the Department registered his audited credit card sales
25 ratio of 48.99 percent and discovered that the adjuster

1 did not use the conventional method to compute the audited
2 credit card sales ratio in this audit. And that will be
3 on your Exhibit A, page 41.

4 The Department compared the gross credit card
5 sales, including sales tax and credit card tips with total
6 sales, excluding sales tax and tips to compute the audited
7 credit card sales ratio to estimate a lower additional
8 taxable sales for the period January 1st, 2015, through
9 December 31st, 2016. And that will be on your Exhibit A,
10 pages 41 through 44.

11 To confirm the accuracy of this computation
12 method, the Department recomputed the unreported taxable
13 sales of \$435,866 for the period January 1st, 2015,
14 through December 31st, 2016, ex-tax of credit card sales
15 ratio of 42.33 percent, credit card tips ratio of
16 5.59 percent, and applicable sales tax rate factor. And
17 that will be on your Exhibit B, pages 100 and 101.

18 If the Department had used the conventional
19 methods to compute the unreported taxable sales for the
20 period January 1st, 2015, through December 31, 2016, the
21 unreported taxable sales would increase from \$433,661 to
22 \$435,866. And that will be on your Exhibit B, page 100.
23 The audited credit card sales ratio using this audit
24 established a lower additional taxable sales of \$433,661
25 to give a benefit of \$2,205 for Appellant. And that will

1 be on your Exhibit B, page 100.

2 Therefore, the Department finds that the
3 observation test credit card sales information constitutes
4 the best available information to determine the unreported
5 sales tax for the audit period. The audit calculation of
6 unreported taxable sale was reasonable and was in
7 Appellant's favor, since it was the lowest of the
8 differences computed. Ultimately, the Department decided
9 to use an audit method which yield the lowest deficiency
10 measure to give a benefit to the Appellant.

11 Appellant has not provided any reasonable
12 documentation or evidence to support an adjustment to the
13 audit finding. Therefore, the Department request the
14 appeal be denied.

15 This concludes my presentation, and I'm available
16 to answer any questions the panel may have. Thank you.

17 JUDGE CHO: This is Judge Cho. Thank you very
18 much.

19 Panel members, do you have any questions for any
20 of the parties at this point in time? I'll start with
21 Judge Long.

22 JUDGE LONG: This is Judge Long. I had a
23 question for CDTFA regarding the credit card ratio. I
24 know that the review of the bank deposits show that the
25 credit card deposits were approximately 84 percent of

1 reported sales and that the observation test found less.
2 Typically, when reviewing bank deposits, what is the
3 acceptable range for bank deposits? What range is CDTFA
4 looking for?

5 MR. SAMARAWICKREMA: This is Nalan
6 Samarawickrema. Based on the location and based on the
7 items sold and based on the services provided, the typical
8 credit card ratio for that location is 40 percent.

9 JUDGE LONG: Thank you. This is Judge Long
10 again. I just -- so then to be clear, in either case,
11 whether using the method of the audit actually used or
12 whether using the standard credit card ratio method,
13 CDTFA's credit card ratio for this audit would have been
14 higher than the acceptable or the standard amount for this
15 type of business in this type of location?

16 MR. SAMARAWICKREMA: Yes. So generally based on
17 the items sold and based on the location is 40 percent.
18 But in this case, we apply 43 -- the extra credit card
19 ratio of 43 percent or the credit card ratio that we use
20 is 48.99 percent. And, like, if I go back to Appellant's
21 article regarding the Exhibit 2, Tracking Payment
22 Fundamentals for 2017, in the bottom of the page it
23 specifically says, "2017 U.S. consumer payment study.
24 This is an national average."

25 And if we -- the Department did observation and

1 got the actual credit card ratio based on the observation,
2 and that's the local -- that's a specific credit card
3 ration for that location for that taxpayer. But the
4 article is a national average.

5 JUDGE LONG: This is Judge Long. Thank you. I
6 have no more questions.

7 JUDGE CHO: This is Judge Cho. Thank you.

8 Judge Tay, do you have any questions for either
9 party at this point in time?

10 JUDGE TAY: This is Judge Tay. Just a question
11 for the Department. I noticed that there were a couple of
12 aberrations to the Sunday observation. One of the cash
13 registers seems to be broken. And the other finding, I
14 guess, which was a little bit of a departure from the
15 other days, was that the credit card ratio was much lower.

16 And so I was wondering if there was a
17 relationship between the fact that the cash register was
18 down and the accuracy of the recording of cash register
19 sale -- or sorry -- credit card sales.

20 MR. SAMARAWICKREMA: For all these three, the
21 Appellant did not provide any complete data sales
22 information for the audit period, and that was the reason
23 the Department completed three observation tests. And the
24 auditor -- audit staff observed Monday, Thursday, and a
25 Sunday. And those are the credit card ratios we observed.

1 The reason the Sunday credit card sales or the sales are
2 high because during the weekends, the Appellant provided
3 entertainment. And he -- and during the audit, the
4 Department concluded, you know, some Fridays and Sundays
5 the daily average sale is very close to \$3,000. That is
6 according to Exhibit E, page 174, footnote 11.

7 JUDGE TAY: Yeah. I'm not necessarily asking how
8 you were able to get an average of daily sales based on
9 Yelp, which is a little confusing to me. But I'm asking
10 more about how the auditor was able to tell between a
11 credit card sale and a cash sale on a handwritten receipt.

12 MR. SAMARAWICKREMA: Oh, the --

13 JUDGE TAY: Because the question is not so much
14 that the sales over the weekend were higher, but why the
15 credit card ratio -- the amount of credit card sales were
16 lower, significantly so.

17 MR. SAMARAWICKREMA: Yeah. This is Nalan
18 Samarawickrema. And if you go to Exhibit B, pages --
19 pages 85 to 88, it listed each transaction. Like, for
20 example, page 85, that's the number of transactions that
21 happened on August 14th. And even the cash register is
22 broken, the auditor was able to obtain the guest receipt
23 and identify the actual cash sales and the credit card
24 sales for that day.

25 And if you go to the next page, page 86, the

1 auditor did the same exercise for August 17, 2017, and
2 identify the actual sales and segregated the cash and the
3 credit card. And for pages 87 and 88, he identified each
4 guest check under Column D and identified the cash and the
5 credit card sales and compute the credit card ratio.

6 JUDGE TAY: Right. I see the schedule that
7 you're pointing to. Do you know how the auditor received
8 that information? Was it on the check that it was credit
9 card versus cash? Do you have copies of the source
10 documents?

11 MR. SAMARAWICKREMA: Yeah. This is Nalan
12 Samarawickrema. You know, the -- typically when the
13 Department -- when the audit staff is observing the --
14 during the observation, you know, we -- the Department
15 generally request the guest checks and the method of
16 payment, you know. And if it is a credit card
17 transaction, the Appellant print the credit card receipt
18 and it was -- it was given to the auditor. And based on
19 looking at exhibit -- page 87, it lists the guest check
20 numbers, meaning that the Department received the guest
21 checks and a related credit card receipt with that guest
22 check to segregate cash from credit card sales.

23 Meaning -- according to the audit folder, because
24 this is a real observation test and we -- the Department
25 took the numbers from the -- the taxpayer provided guest

1 checks and the credit card receipts, and it's not
2 necessary to take copies of the -- and, you know, it was
3 not feasible for us to get a photocopy because that's the
4 only report that the Appellant was maintaining. And this
5 is a real three-day observation.

6 JUDGE TAY: Follow up question for the
7 department. So do you know that that's the case, or is
8 that just standard operating procedure?

9 MR. SAMARAWICKREMA: This is Nalan
10 Samarawickrema. Based on the -- based on the detailed
11 schedule it appears, you know, the audit staff obtained
12 the guess checks. That's the reason they listed the guest
13 check number, and it list the exact total sales, and also,
14 the tax collected. And those numbers came from the actual
15 guest receipt of -- that's provided to the audit staff at
16 the time of the observation.

17 JUDGE TAY: Okay. Maybe I'll turn to the
18 Appellant the taxpayer on this. If the cash register is
19 down, is it possible to take credit card sales? Like is
20 it possible for credit card transactions to happen? Do
21 you know, Mr. Chait or Mr. Davila?

22 I'm sorry. You're muted Mr. Davila. Mr. Davila,
23 I apologize for interrupting, but you're muted. So we
24 can't hear you.

25 MR. DAVILA: Can you hear me now?

1 JUDGE CHO: Yes, we can hear you. Thank you.

2 MR. DAVILA: This is Mr. Davila. My
3 understanding is they are able to run credit card payments
4 on that -- separate from that cash register. Thank you.

5 JUDGE TAY: Okay. Thank you. And is it a
6 separate machine that you would get a separate receipt
7 from?

8 MR. DAVILA: That's my understanding, correct.
9 This is Jose Davila.

10 JUDGE TAY: Okay. Thank you. I think that
11 clarifies for me.

12 Judge Cho, I have no further question.

13 JUDGE CHO: This is Judge Cho. Thank you.

14 I don't have any questions either. Department,
15 you have answered all my questions.

16 At this point we'll turn it back over to
17 Mr. Chait.

18 And Mr. Chait, the Department did go a little
19 over their allotted timeframe. So I will give you a
20 little bit of extra time as well. We had originally
21 agreed to 5 minutes for your last rebuttal. How about
22 like 10 minutes? Take as much time as you need, but up
23 to, like, 10 minutes. Does that sound okay to you,
24 Mr. Chait?

25 MR. CHAIT: Okay. Perfect. Can you hear me?

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JUDGE CHO: Yes, I can. Thank you.

CLOSING STATEMENT

MR. CHAIT: Okay. As the Board or the California Department of Tax and Fee Administration point in their own papers, we provide all the information that they request; bank statement, tax return, 1099-K that the IRS report the credit card sales, and all the information that I provided to the auditor. The problem is they change the auditor of three times during the process.

First there was a lady, Vanessa, then another guy, Guillermo, and then everything. And then all, finally, came to the test that we believe was very unreliable. And now the California is talking about 40 percent above the ratio. I didn't find any information, study, analysis or something that corroborates this amount. It's something they had in mind that they have figured out from the air, 40 percent or whatever.

I can't rely on the study that they send you. And the California Department of Tax and Fee Administration had mentioned that probably with this kind of return is 75 percent, at least when it is dine-in. This is not a fast-food restaurant. It's dine-in where the average price of the food \$20, \$30, \$40 and not less. Because at night 75 percent of the time pay with debit

1 card or credit card. We know, especially, now with the --
2 when the time has been changed. We're talking about 2017
3 but -- the information.

4 The own word the Board of Tax Administration say
5 they didn't find any -- any discrepancy between sales tax,
6 the -- the tax return, the bank statement regarding the
7 figures. Our figures, the only difference was they decide
8 there was not enough report related with the tax sales.
9 That's the reason they did the assessment for three days.
10 It's only three days in August. Nobody is going to use
11 three days for a three-year period. It's not satisfactory
12 that nothing happens.

13 The situation happens, change day-to-day. We
14 know that the economy does nothing -- is being permit.
15 And three days totally -- totally ridiculous amount of
16 time to test a business. We have a report of a -- the
17 same time showing that during '15, '16 and '17 the rate is
18 around 70 percent; 65 percent for 2017. I hope they look
19 at this report. It shows the income tax, sales tax,
20 1099-K. Also, they did not include in the figures the
21 10 percent tips that should be taken -- deduct from
22 that -- from the credit card figures.

23 And let me see. That's basically -- I mean, I
24 don't want to stand over the many mistakes done by the
25 analysis. I want to make sure it's only concentrated on

1 one thing, that the figures for the ratio are unjustified.
2 There is no truth. The guy from the Board says something
3 the figure in the area, on the restaurant, something very
4 vague. But there is no study. Time to say, okay. In the
5 morning, okay, we analyze 50, 100 restaurants, and this
6 should be the percentage. There is nothing. Why the
7 Board do not spend time or money or human resource and do
8 analysis, economic analysis, critical analysis, something
9 like that, and explore over the right figures and not take
10 figures from the air?

11 That's all my point. Finished. Carlos Chait.

12 JUDGE CHO: This is Judge Cho. Thank you very
13 much. I'm just going to check with my panel to see if
14 there's any last-minute questions before we conclude this
15 hearing.

16 Judge Long, do you have any last-minute
17 questions?

18 JUDGE LONG: This is Judge Long. I don't have
19 any questions at this time. Thanks.

20 JUDGE CHO: This is Judge Cho. Thank you.
21 Judge Tay, do you have any last-minute questions?

22 JUDGE TAY: This is Judge Tay. No further
23 questions. Thank you.

24 JUDGE CHO: This is Judge Cho. I don't have any
25 further questions either.

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So this concludes the hearing. We will meet and decide the case based on the documents and testimony presented. We will issue our written decision no later than 100 days from today. This case is submitted, and the record is now closed.

(Proceedings adjourned at 12:15 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 14th day of October, 2021.

ERNALYN M. ALONZO
HEARING REPORTER