

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
N. BAIAMONTE,) OTA NO. 20076408
)
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 APPELLANT.)
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Tuesday, December 14, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 1:00 p.m. and concluding at 1:48 p.m. on
Tuesday, December 14, 2021, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ KEITH LONG

Panel Members: ALJ TERESA STANLEY
ALJ NATASHA RALSTON

For the Appellant: ROBERT TRACY

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

RAVINDER SHARMA
CHAD BACCHUS
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant did not submit exhibits.)

(Department's Exhibits A-E were received at page 6.)

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

	<u>PAGE</u>
By Mr. Tracy	7
By Mr. Sharma	12

CLOSING STATEMENT

	<u>PAGE</u>
By Mr. Tracy	19

1
2
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California; Tuesday, December 14, 2021

1:00 p.m.

JUDGE LONG: We are now going on the record.

This hearing is for the Appeal of Nicholas Michael Baiamonte, OTA Case Number 20076408. The date is Tuesday, December 14th, 2021, and it is approximately 1:00 p.m. This appeal was intended to be heard in Sacramento, California.

I am the lead Administrative Law Judge Keith Long, and with me today is Judge Natasha Ralston and Judge Teresa Stanley. We will be hearing the matter this morning. I am the lead ALJ, meaning I will be conducting the proceedings, but my co-panelists and I are equal participants and we will all be reviewing the evidence, asking questions, and reaching a determination in this case.

Parties, can you please state your name and who you represent, for the record.

Mr. Tracy?

MR. TRACY: My name is Robert Tracy.

JUDGE LONG: Thank you. And, again, actually something happened with your microphone there. So you went from real loud and clear to real quiet again.

And CDTFAs, can you please state your names and

1 who you represent, for the record.

2 MR. SHARMA: This is Ravinder Sharma, Hearing
3 Representative for CDTFA.

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

6 MR. BACCHUS: This is Chad Bacchus with the Legal
7 Division for CDTFA.

8 JUDGE LONG: Thank you. This is Judge Long. We
9 have three issues in front of us today. First, is whether
10 further adjustments are warranted to the audited
11 understatement of taxable sales; and second, whether
12 further adjustments are warranted to the audited
13 understatement of purchases subject to use tax; and third,
14 whether Appellant was neglect.

15 CDTFA has submitted Exhibits A through E, which
16 are admitted into evidence with no objections.

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

19 JUDGE LONG: We will begin with Appellant's
20 opening presentation.

21 Mr. Tracy, you have up to 10 minutes, and you may
22 begin whenever you are ready.

23 MR. TRACY: I'm concerned about the sound.
24 Please stop me if I need to call in.

25 JUDGE LONG: You are very quiet, Mr. Tracy.

1 Maybe calling in would be a good idea.

2 MR. TRACY: Okay. One moment please.

3 JUDGE LONG: Mr. Tracy, at the bottom of your
4 screen you should see three dots that look like ellipses.
5 If you click "switch audio" and then have -- and then
6 you'll see "call me" and then "phone number", and then the
7 system will call you.

8 We will take five minutes to make sure that our
9 audio issues are resolved, and we will go off the record
10 for the moment.

11 (There is a pause in the proceedings.)

12 JUDGE LONG: We are ready to go back on the
13 record.

14 Ms. Alonzo, are you ready to go back on the
15 record? Okay.

16 Mr. Tracy, you have 10 minutes, and you may begin
17 when you are ready.

18

19 PRESENTATION

20 MR. TRACY: Okay. So I'm just going to be
21 responding to the notice for the Appellant. The Appellant
22 Nicholas Baiamonte is responding, basically, to the first
23 issue, which is what makes the merchandise unsalable, and
24 he basically stated that the fashion went out. He could
25 see that the fabric that he had purchased were things that

1 were not in style at the time, and so for that reason he
2 was not able to sell them.

3 And then the other statement is, additionally,
4 please be prepared to answer whether there are any
5 provisions in the law which exempt an item from use tax if
6 it has been withdrawn from inventory as unsalable. And
7 what I'm going to state here is that the -- in
8 Section 6008, 6009, and 6009.1, it basically states
9 that -- that if the items are for sale that it is not a
10 use and, therefore, not subject to a use tax. And in this
11 particular instance, he had items that were for sale, but
12 they were never sold. So under the provisions of the law,
13 there's no accommodation for sales or a use tax. And
14 that's what I'm using as the basis for which the use tax
15 is not seen appropriate or cannot be applied.

16 The next point was that during the audit
17 Appellant claimed to have two sales of suits. This fact
18 has been stipulated to. Otherwise Appellant claims to
19 have made no sales during the audit period. Nevertheless,
20 Appellant's bank deposit reflects credit card transactions
21 of \$37,140. Please provide an explanation as to the
22 origins of these transactions. So I have a statement here
23 that was made by Nicholas. And recall, actually, this
24 happening because we were, at the time, doing the books
25 for the Appellant.

1 He had used his credit cards, including credit
2 cards of his parents, to provide funding for his business
3 and at the same time in order to prevent merchant services
4 company from closing the account for non-activity. So we
5 told him, after he did this, not to do this. But that
6 was, of course, after it had happened. So these were not
7 sales. They were actually money that he was running
8 through the merchant account in order to keep the merchant
9 account from closing the -- from closing that -- to
10 prevent the merchant provider -- services provider from
11 closing the account. That was the reason those sales we
12 went through, although they were not in fact sales.

13 And his -- as far as -- he also stated that the
14 money that he was running through the account that was
15 related to his parent's credit cards were basically --
16 those funds were actually a loan from his parents to keep
17 his business afloat. So he's responsible for paying that
18 money back to his parent. This is just another thing that
19 he had done, which is totally inappropriate. Most
20 businesspeople would never do something like this. And
21 that's my own personal experience from having numerous
22 business clients.

23 But, again, he is not -- he was not in the
24 business for a very long period of time, and he had not
25 had the business -- had not made good business decisions.

1 And for that reason he created a larger problem that
2 really wasn't a problem initially. And so that is the
3 answer to that question having to do with why these credit
4 transactions occurred in the amounts that it shows there,
5 \$37,140. They do not reflect true sales.

6 That concludes my presentation.

7 JUDGE LONG: This is Judge Long. Thank you,
8 Mr. Tracy. At this time I would like to ask my panelist
9 if they have any questions. I'll start with
10 Judge Ralston.

11 Do you have any questions?

12 JUDGE RALSTON: This is Judge Ralston. No
13 questions at this time.

14 JUDGE LONG: Thank you.

15 This is Judge Long. Judge Stanley, do you have
16 any question?

17 JUDGE STANLEY: This is Judge Stanley. I don't
18 have any questions either. Thank you.

19 JUDGE LONG: Thank you, Judge Stanley.

20 This is Judge Long again. I do have just one
21 question regarding the use tax. So initially under the
22 audit that the Notice of Determination was based on, the
23 measure of use tax was \$219 -- about \$200,000. And then
24 as we noted earlier, CDTFA's Exhibit E reduces that
25 measure. The notes in the audit work papers say that they

1 are individually identified as items that were withdrawn
2 for Appellant's personal use.

3 It's my understanding that your position,
4 Mr. Tracy, those items were actually still for sale
5 throughout the entire time, the remaining \$14,000 or so?

6 MR. TRACY: This is Robert Tracy. Yes, that is
7 correct, Judge.

8 JUDGE LONG: Okay. Thank you. And with respect
9 to the credit card transactions that were made via
10 Appellant and Appellant's parents' credit cards, is there
11 any evidence of that that those were not sales and those
12 were, in fact, made by Appellant?

13 MR. TRACY: In terms of actually having a
14 merchant account statement indicating that these charges
15 were related to -- for that purpose, I would have to go
16 back to -- keep in mind this is many years later now.
17 This occurred some time ago. I would have to go back to
18 the Appellant, Nicholas Baiamonte, to ask him if he has
19 any receipts that show that would be helpful to
20 substantiate his statement or his claim. So that --
21 that's my response to that, that specific question.

22 JUDGE LONG: Okay. Thank you.

23 I have no further questions at this time. We
24 will move onto CDTFA's presentation.

25 CDTFA, you have 20 minutes, and you may begin

1 when you are ready.

2 MR. SHARMA: Thank you.

3

4 PRESENTATION

5 MR. SHARMA: This is Ravinder Sharma.

6 Appellant is sole proprietorship, operated a
7 repair store for custom tailored suits and shirts in Palo
8 Alto in 2013, and from his apartment in Santa Clara in
9 2014 and 2015. The Department performed an audit
10 examination for the period January 1, 2013, through
11 December 31st, 2015. Appellant reported total sales of
12 approximately \$11,000, claimed total deductions of around
13 \$900 for sales tax resulting into reported taxable sales
14 of \$10,000 for the audit period.

15 Appellant also reported ex tax purchases of
16 \$1,600 for 2013. Records available for the audit, federal
17 income tax returns and bank statements for years 2013 to
18 2015. Profit and loss statement and sales report for
19 belts for 2015, some purchase invoices and two sales
20 invoices. Appellant did not provide any purchase
21 journals, sales journals, or sales invoices for the audit
22 period. For reporting purchases, Appellant provides sales
23 figure to the bookkeeper who prepares and files sales and
24 use tax returns on calendar year basis.

25 The Department reviewed federal income tax

1 returns and noted negative total sales of a little more
2 than \$2,000 and total purchases of approximately \$332,000
3 for the audit period; Exhibit E, page 6914. The
4 Department reviewed available bank statements and noted
5 significant unexplained differences between reported total
6 sales and total deposits.

7 Further analysis of bank deposit show credit card
8 deposits of little more than \$37,000, which are
9 approximately \$27,000 more than reported taxable sales of
10 around \$10,000 for the audit period. Based on federal
11 income tax returns and bank deposit analysis, the
12 Department determined that submitted books and records
13 were incomplete, unreliable, and did not support the
14 reported amounts. In the absence of complete and reliable
15 books and records, the Department decided to use an
16 indirect audit method to verify the accuracy of reported
17 amounts and to determine potential understatement of
18 taxable sales.

19 Based on available information from Appellant's
20 vendors and tailors, the Department determined that the
21 ending inventory included suits and shirts for
22 approximately \$15,000 that were purchased for Appellant's
23 own use; Exhibit E, page 675. The Department assessed use
24 tax on this amount; Exhibit E, page 699. Review of
25 federal income tax returns data shows that Appellant

1 claimed significant amount as a certain development, the
2 Department reviewed available purchase invoices and
3 depreciation schedules attached to federal income tax
4 returns for 2015 to determine an unreported cost of
5 taxable merchandise used for samples, research and
6 development of approximately \$169,000; page 687,
7 Exhibit E.

8 During this process, Appellant conceded that he
9 owed tax on this amount. Due to incomplete books and
10 records, the Department used markup method to determine
11 unreported taxable sales. During the audit process,
12 Appellant informed the Department that he had significant
13 amount of unsold purchases for each year that were not
14 claimed as ending inventory on his federal income tax
15 returns. The Department looked at all items and reviewed
16 them with available documents, such as purchase invoices
17 and other details, and calculated ending inventory of
18 little more than \$17,000 for 2013, approximately \$119,000
19 for 2014, and a little more than \$234,000 for 2015.

20 The Department used federal income tax return
21 purchases, opening inventory, and ending inventory for
22 each year and determined audited cost of goods sold are
23 approximately \$179,000 for 2013, \$14,000 for 2014, and
24 \$20,000 for 2015; Exhibit E, page 666. The Department
25 used available sale price and purchase price to calculate

1 a markup of approximately 36 percent; Exhibit E, page 680.

2 The Department use markup of approximately
3 36 percent and audited cost of goods sold to arrive at
4 audited taxable sales of approximately \$243,000 for 2013,
5 \$19,000 for 2014, and \$28,000 for 2015, for a total of
6 little more than \$289,000 for the audit period; Exhibit,
7 E, page 666. The Department added belt sales of little
8 more than \$1,000 to determine audited taxable sales of
9 little more than \$290,000 for the audit period. Appellant
10 reported taxable sales of around \$10,000 resulting into
11 unreported taxable sales of little more than \$280,000 for
12 the audit period; Exhibit E, page 665.

13 To show that the audit results were reasonable,
14 the Department performed a bank deposit analysis which
15 showed bank deposits of over \$323,000. After accounting
16 for Appellant's reported of \$10,000 in taxable sales, the
17 remaining \$313,000 in unaccounted for bank deposits is
18 much higher than \$280,000 found using the markup method.
19 Accordingly, the Department's use of markup method is
20 reasonable and benefits Appellant. Based on the above all
21 procedures, the Department determined unreported taxable
22 measures of around \$464,000 consisting of \$15,000 in
23 purchases for personal use and \$169,000 in build draws of
24 inventory for samples give away and used for a certain
25 development, and \$280,000 for unreported taxable sales for

1 the audit period; Exhibit E, page 640.

2 Ten percent negligence penalty has been added to
3 the total assessment. Appellant failed to maintain and
4 provide books and records as required and mandated by
5 Revenue & Taxation Code 7053 and Regulation 1698.
6 Understatement is more than 2000 percentage of the
7 reported taxable measure, which is due to negligence in
8 keeping the required books and records and reporting
9 correct amounts of sales and use tax to the Department.
10 Appellant contends that markup of approximately 36 percent
11 is too high.

12 In response, the Department submits that
13 Appellant provided only two sales invoices. And the
14 Department used the sale price and available purchase
15 price to arrive at markup of approximately 36 percentage.
16 Despite various requests, Appellant has not provided
17 complete sets of sales invoices and purchase invoices to
18 show the lower markup. For this industry the Department
19 would expect to see a markup of between 100 percent to
20 200 percent, which is significantly higher than
21 approximately 36 percent used by the Department.

22 During the prehearing conference, Office of Tax
23 Appeals asked the Department to provide answers to the
24 following question. How does CDTFA reconcile credit card
25 sales of \$37,140 to the measure of unreported taxable

1 sales of nearly \$300,000 for this type of business? Is
2 this type of business expected to have a high percentage
3 of cash sale? In response, we note that the Department
4 used Appellant's available books and records, which were
5 not complete, to determine the audit liability.

6 The Department would normally expect this type of
7 business to have a higher percentage of credit card sales.
8 However, the records Appellant provided showed a lower
9 percentage of credit card sales. For example, the
10 Department's analysis of Appellant's bank deposit showed
11 deposits of over \$323,000, and Appellant has not been able
12 to prove that those deposits were not sales of tangible
13 personal property.

14 Based on the above, the Department has fully
15 explained the basis for the deficiency and proved that the
16 determination was reasonable based on the available books
17 and records. Further, the Department has used approved
18 audit methods to determine the deficiency and issued a
19 Notice of Determination to the correct entity. Therefore,
20 based on the evidence presented, the Department requests
21 that the Appellant's appeal be denied.

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

24 JUDGE LONG: This is Judge Long. Thank you.

25 Judge Ralston, do you have any questions for

1 CDTFA?

2 JUDGE RALSTON: This is Judge Ralston. Not at
3 this time.

4 JUDGE LONG: Thank you.

5 And Judge Stanley, do you have any questions for
6 CDTFA?

7 JUDGE STANLEY: This is Judge Stanley. I don't
8 have any questions for CDTFA. Thank you.

9 JUDGE LONG: Thank you.

10 This is Judge Long. I do have a question
11 regarding Exhibit E, the revised audit. When CDTFA was
12 looking at the items withdrawn for personal use and made
13 its reduction, how was it determined that the remaining
14 amounts were actually withdrawn for personal use?

15 MR. SHARMA: This is Ravinder Sharma. Based on
16 the invoices, the invoices which we selected for personal
17 use, they have Appellant's name printed on the invoice
18 itself. So that means those suits and shirts were
19 purchased for his own use. Because if Appellant's name
20 was printed on those, those would be not for resale.

21 JUDGE LONG: Thank you. So in that case, were
22 other customers' names printed on invoice by that vendor?

23 MR. SHARMA: This is Ravinder Sharma. No.
24 Department has not noted any other customers' names.

25 JUDGE LONG: Thank you. I have no further

1 questions.

2 Mr. Tracy, you had asked for 10 minutes for
3 rebuttal, and you may begin whenever you're ready. Thank
4 you.

5

6 CLOSING STATEMENT

7 MR. TRACY: Yes. This is Robert Tracy.

8 I'm really surprised at how this -- the CDTFA
9 representative can come to a conclusion based upon --
10 based upon sort of an extrapolation of no evidence to
11 prove otherwise. So for example, the statement about
12 deposits that were made, there's no proof to show they
13 were not sales. That is one of the most ridiculous
14 statements I have ever heard. The fact that you have a
15 deposit in a bank account does not mean that it is
16 necessarily sales or not sales. It just means it's a
17 deposit.

18 I've already stated that the -- the Appellant
19 has -- I mean, he is a full professor of philosophy. He
20 has no background business experience. He was trying to
21 keep his passion of having a business in retail store
22 having to do with tailoring suits and such and funding it
23 to keep afloat by every means he could see possible. He
24 took money from his parents. He ran credit card
25 statements through credit card accounts, again, just to

1 bring in capitol to keep the merchant account open.

2 And any auditor that's going to be doing an audit
3 for sales needs to actually see the money come in to show
4 that they are, in fact, sales. Whenever you put capitol
5 into a bank account and you're being audited, all you have
6 to do is just look at the paper trail. Where does the
7 money come from? He has gifts from his parent. The money
8 comes in. Loans from his parents, that is the bulk of
9 where the money is coming from. And they, of course, are
10 going to be deposited into the account.

11 We have told him when we did the books, whenever
12 the money is coming in make sure you make note of it. If
13 it's coming from your personal or it's coming from some
14 other account, you know, it's going to get deposited into
15 his business account. And we carefully exclude that money
16 as being taxable income. It's a loan. It's money coming
17 in. So the statement that is -- that representative from
18 the CDTFA says that there's no proof that they were not
19 sales, to me is -- it just falls in the face of evidence.
20 You need to prove that sales or show evidence that the
21 money is coming in from other non-sale sources. So that
22 was one of the biggest statements that I felt strongly I
23 needed to make a comment on.

24 As far as the inventory is concerned and the
25 treatment of inventory as an expense and no ending

1 inventory, as I stated earlier, and it's referenced in the
2 code section, is that you can have inventory available for
3 sale and not use it, if the intent of sales is not subject
4 to sales tax or use tax. And those are the sections that
5 I quoted, 6008, 6009, 609.1. So, again -- and the other
6 thing relevant to inventory is that Nicholas Baiamonte had
7 invited a representative to do the inventory, and it took
8 him a couple of years to actually come out to his -- his
9 location, which his location was his apartment.

10 He had the inventory there, and it took -- I
11 think it was over a year before he actually got a response
12 back that somebody was going to be sent out. And then
13 finally when it was -- that person was sent out, it was
14 somebody that was unrelated to the actual audit that was
15 conducted. But the inventory was there. So, again, I
16 just felt that the information that was just now presented
17 by the representative from CDTEFA, I just think that it's
18 using a bunch of formulas to derive a sales number or an
19 inventory number when you don't have evidence
20 substantiating that claim. I think it begs the question
21 of whether the legitimacy of there being any sales or use
22 tax due in the amounts that was previously stated.

23 That's my response.

24 JUDGE LONG: Thank you.

25 And Judge Stanley, do you have any questions?

1 JUDGE STANLEY: This is Judge Stanley. I do not.

2 JUDGE LONG: Thank you, Judge Stanley.

3 Judge Ralston, do you have any questions?

4 JUDGE RALSTON: This is Judge Ralston I do not at
5 this time.

6 JUDGE LONG: Thank you.

7 I do have just one question. Again, regarding
8 any loans from Appellant's parents or from Appellant to
9 the business, there's -- my understanding is that you,
10 Mr. Tracy, advised Appellant to make notation of any loans
11 that were received, but there's no evidence that has been
12 submitted to date that those -- those loans were received
13 and --

14 MR. TRACY: Well, there's evidence. There was --
15 there was -- I'm sorry. I didn't -- I thought you had
16 finished your sentence.

17 JUDGE LONG: No it's -- sorry. Thank you. I was
18 just trying to catch my thought. And no evidence has been
19 submitted that I'm aware of. Can you point to something
20 in the exhibits showing that loan evidence was submitted?

21 MR. TRACY: Oh, I think that -- that was part of
22 the correspondence that was going back between the auditor
23 and the Appellant that money was being provided by his
24 parents. There is a record of that in -- in the course of
25 doing the audit. And in fact, let me just see something

1 here. I believe it was the actual auditor who did the
2 audit. Mr. Ravinder was not -- did not actually do the
3 audit. He's not the representative who was actually doing
4 the audit on behalf of the State Taxing Authority.

5 I believe it was Jennifer, but I'm not -- maybe
6 Jennifer McMaster. But she was the one who was
7 communicating the fact that the money was coming from
8 his -- the money that was deposited was not, in fact,
9 sales. It was, in fact, money that came from his family
10 that was loaned to the business.

11 JUDGE LONG: Thank you. And my understanding --
12 I received a message that -- from one of my co-panelists
13 that page 62 shows the auditor gave credit for \$76,000
14 worth of loans from the parents. Were the -- you're
15 saying that the full \$300,000, essentially, were loans
16 from the parent or from Mr. -- from Appellant to the
17 business?

18 MR. TRACY: Correct.

19 JUDGE LONG: Okay. Thank you. I have no further
20 questions.

21 CDTFA, do you have any closing remarks?

22 MR. SHARMA: This is Ravinder Sharma. Mr. Long,
23 we have no closing remarks, and I think we rest the case.

24 JUDGE LONG: Thank you.

25 Mr. Tracy, we now have your evidence and

1 information that you provided today. Is there anything
2 else you would like to tell us before we conclude the
3 case?

4 MR. TRACY: This is Robert Tracy. No. No
5 further information, Judge.

6 JUDGE LONG: Thank you.

7 And are my co-panelists ready to conclude today's
8 case?

9 Judge Ralston?

10 This concludes the hearing. The judges will meet
11 and decide the case based on the documents and testimony
12 presented and admitted as evidence today. We will send
13 both parties our written decision no later than 100 days
14 from today. Thank you for your participation. The case
15 is submitted, and the record is closed.

16 The hearing is now adjourned.

17 Thank you.

18 (Proceedings adjourned at 1:48 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 7th day of January, 2022.

ERNALYN M. ALONZO
HEARING REPORTER