

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
C BY KARINA, INC.,) OTA NO. 21078257
)
APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Tuesday, March 22, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:30 a.m. and concluding at 10:52 a.m. on
Tuesday, March 22, 2022, 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 ANDREW KWEE
ALJ SUZANNE BROWN

For the Appellant: KARINA LEIGH
JASON LEIGH

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

AMANDA JACOBS
SCOTT CLAREMON
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-5 were received at page 10.)

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

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California; Tuesday, March 22, 2022

9:30 a.m.

JUDGE STANLEY: Okay. We're on the record in the Appeal of C by Karina. It's Office of Tax Appeals Case Number 21078257. The date is March 22nd, 2022, and it is 9:30 a.m.

I have a panel of judges today. I'm Judge Teresa Stanley. I have Judge Andrew Kwee and Judge Suzanne Brown. I'll be conducting the hearing, but all three of the panel members will equally deliberate and decide the appeal.

I'm going to ask the parties to identify themselves on the record, and I'll start with Appellants.

MRS. LEIGH: Okay. I'm Karina Leigh.

MR. LEIGH: And Justin Leigh.

JUDGE STANLEY: Okay. And can I ask -- this is Judge Stanley again. Can I ask the CDTFA to identify their participants.

MS. JACOBS: I'm Amanda Jacobs, Tax Counsel with the CDTFA.

MR. CLAREMON: Scott Claremon with the CDTFA.

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

JUDGE STANLEY: Okay. Thank you. Just another

1 housekeeping matter for the Appellants' benefit and for
2 the benefit for observers of this hearing. The Office of
3 Tax Appeals is independent of the California Department of
4 Tax and Fee Administration, that I refer to as CDTFA, and
5 any other tax agency. We're not a court, but we're an
6 independent hearing appeals agency staffed by our own tax
7 experts.

8 Because we're separate, the only evidence that we
9 have in our file and our record is what the parties have
10 presented to us in this appeal. We don't have anything
11 that's gone on before with your interactions between with
12 each other. So that's something you should know.

13 We have three issues today: Number One, whether
14 Appellant has shown that an adjustment to the measure of
15 unreported taxable sales is warranted, more specifically,
16 Appellant claims that it did not collect sales tax and
17 that Respondent's position does not reflect the spirit of
18 the law. Number Two, is whether Appellant established
19 that the deduction for tax paid purchases resold should be
20 increased; and Number Three, actually, is more of a
21 concession than an issue. We determined at the prehearing
22 conference that Appellant does not dispute the measure or
23 calculation of the unreported taxable sales.

24 Mrs. Leigh, are you going to be the
25 representative for the two of you or Mr. Leigh?

1 MRS. LEIGH: Mr. Leigh.

2 JUDGE STANLEY: Okay. Mr. Leigh, do you agree
3 that those are the issues today?

4 MR. LEIGH: Yes.

5 JUDGE STANLEY: Okay. And Ms. Jacobs?

6 MS. JACOBS: Yes.

7 JUDGE STANLEY: Okay. Let's move onto exhibits.
8 I don't have any exhibits from Appellants, and
9 Respondent's Exhibits A through E will be entered into the
10 record and admitted into the record without objection. We
11 did discuss these at the prehearing conference, and there
12 were no objections.

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

15 So we're not going to have any opening statements
16 since the Appellants' representative are the principals of
17 the company. So what I would like to do is swear in both
18 Mr. and Mrs. Leigh at this time because I understand that
19 Mr. Leigh is going to be the primary witness, but
20 Mrs. Leigh may want to interject or supplement his
21 testimony. So I'll just make sure that we do have
22 everything on the record.

23 You have a question, Mr. Leigh?

24 MR. LEIGH: Yeah. Sorry. We did submit some
25 exhibits. We submitted some of the information online

1 that was part of, like, sort of our case that we want to
2 present. Did you guys not get the email? We emailed that
3 over, maybe five exhibits that we sent through.

4 JUDGE STANLEY: When did you email them?

5 MR. LEIGH: Before the due date, before the 17th.
6 I believe we --

7 MRS. LEIGH: I think the 16th.

8 MR. LEIGH: The 15th or the 16th.

9 JUDGE STANLEY: Okay. You know what email
10 address you used?

11 MR. LEIGH: No, but I confirmed it with Desiree
12 from the CDTFA. Is that where she's at?

13 MRS. LEIGH: No. OTA.

14 MR. LEIGH: Oh, OTA. Sorry. The OTA. And she
15 actually had -- we wanted to make sure we were sending it
16 to the right place, so she sent it to us right before.
17 It's not, like, completely detrimental in my, you know, in
18 my -- the story that I'm going to tell you. It kind of
19 explains. It's basically us take -- grabbing screen shots
20 online --

21 JUDGE STANLEY: Okay. Wait. I don't want you to
22 start presenting.

23 MR. LEIGH: Okay.

24 JUDGE STANLEY: I think it might be helpful to
25 take a quick break and see if we can find the email.

1 MR. LEIGH: Okay.

2 JUDGE STANLEY: Because we do know who Desiree
3 is, so we can talk to her. Let me --

4 MR. LEIGH: We look right now on our phone.
5 She -- Karina will quickly look right now to see what
6 email address it was sent to. We can find that for you
7 right now. Hold on. Is that it? Oh, that's from
8 Desiree.

9 MRS. LEIGH: Yeah. One second. One second.

10 JUDGE STANLEY: Well, if Desiree responded --
11 let's go off the record, Lynne.

12 (There is a pause in the proceedings.)

13 JUDGE STANLEY: This is Judge Stanley. We're
14 reconvening the meeting.

15 And our stenographer has asked Mr. and Mrs. Leigh
16 to be careful not to speak over one another or speak at
17 the same time so she doesn't have to space out her words
18 for one sentence.

19 We are going to go back on the record now, and we
20 wanted to confirm that everyone now has the exhibits and
21 has had an opportunity to review them. We did follow up
22 at the Office of Tax Appeals, and it looks like the email
23 you're referring to, Mr. and Mrs. Leigh, was an email that
24 was sent to request the email address to send it to. And
25 so it looks like you didn't follow-up and send it to the

1 evidence box instead of to Desiree. But that's all
2 cleared up now.

3 We all have the exhibits, and so we'll go back to
4 the part where we were talking about exhibits. And I will
5 mark -- we'll mark the Appellants' Exhibits 1 to 5.

6 And, Ms. Jacobs, do you have any objections to
7 those exhibits?

8 MS. JACOBS: Amanda Jacobs. We do not.

9 JUDGE STANLEY: Okay. Great. Then we're back to
10 the part where we're going to have the Appellants'
11 presentation, and you can feel free to refer to the
12 exhibits because we all have them now. We're admitting
13 Exhibits 1 through 5 into evidence.

14 (Appellants' Exhibits 1-5 were received
15 in evidence by the Administrative Law Judge.)

16 So Mr. and Mrs. Leigh, can you please raise your
17 right hand.

18
19 KARINA LEIGH,
20 produced as a witness, and having been first duly sworn by
21 the Administrative Law Judge, was examined and testified
22 as follows:

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JUSTIN LEIGH,

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

JUDGE STANLEY: Okay. Thank you.

Just for the public's benefit, I'm indicating -- I note that I'm only swearing in the Appellants' witnesses. That's because you, Mr. and Mrs. Leigh, will be testifying to actual facts. When it come to the CDTFA's presentation, I will not be swearing them in because they're only arguing and applying the evidence to the law. They won't be making any factual statements that are not in our records.

So when you are ready to proceed, Mr. Leigh, you can do so.

PRESENTATION

MR. LEIGH: Okay. Please forgive me. I'm going to read it because I have my notes here. It's going to be about eight minutes that I'm going to sort of go through the story of everything. And any questions, you know, just let me know.

So this whole case is about a registration that anybody can get. You do not need credentials. You just

1 need to register and get what is called a Registered
2 Dispensing Optician's Registration. We do not think that
3 this has ever happened before, as there are no case
4 studies on this that we can find anywhere.

5 As result of the stress and confusion of this
6 audit, Karina ended up closing her business, C by Karina.
7 Karina is a women-owned business. Her store was her
8 everything for over 25 years working six days a week
9 dedicated to her business and sacrificing time with her
10 family. As I go through the facts of this audit, you will
11 see that no money was exchanged. And all of this is due
12 to a registration that is \$150 to get that anyone can get.
13 You do not have to have any specific credentials to get
14 it.

15 To us this does not represent the spirit of what
16 the registration is actually there for. I believe this
17 registration is so non-professional people who decide they
18 want to sell prescription eyewear and are not qualified,
19 cannot and should not do so. But it should not be
20 reserved for well-known very professional well-established
21 brick and mortar stores such as C by Karina. As I go
22 through the timeline, hopefully you will see the situation
23 as a flaw in the system and understand our passion and
24 understand why we think it's so important for you to hear
25 Karina's side of the story.

1 The CDTFA came to C by Karina months before the
2 audit took place to check if C by Karina had all the
3 licenses required for her business; her business license
4 and all the other things you need, et cetera. At that
5 time, the person who came to check on her store never said
6 that Karina was missing anything. They just came and went
7 and gave her the impression that everything was fine. A
8 few months later is when the CDTFA sent her the letter
9 stating she was going to be audited.

10 At no time was Karina worried about this audit as
11 she'd always been on time and above board on everything,
12 from her taxes, to keeping organized books, et cetera. So
13 much so that Karina let the CDTFA spend hours and weeks on
14 her computer in her store looking through her financials
15 during business hours. But the whole time Karina just
16 wanted to be compliant and help the CDTFA with the audit
17 and let them see that everything was up to par.

18 In Karina's 25 years of business, she was never
19 late on taxes and always paid everything on time. That is
20 the frustrating part about this. Karina is being
21 penalized for not charging her clients sales tax on
22 prescription lenses and frames when she already prepays
23 the sales tax when she purchases the frames and lenses
24 from her wholesalers. Let me repeat that. Karina is
25 being penalized for not charging her clients sales tax on

1 prescription lenses and frames when she already prepaid
2 sales tax when she purchases the frames and lenses from
3 her wholesalers.

4 And if you know the law stated on the IRS website
5 and the Board of Optometry website, et cetera, you are
6 never allowed to charge sales tax to patients for
7 prescription lenses or frames as it is considered to be a
8 medical device and is exempt from the patient paying sales
9 tax. The system is flawed. Karina was so confused when
10 she found out about this registration that she nor none of
11 her colleagues had heard of.

12 She knew that she had to research it further.
13 How could she have not known about this? So Karina
14 decided to call the California Board of Optometry. She
15 got a representative on the phone to ask how is this
16 possible. And this was their response. Karina's question
17 was, "How is one supposed to know or get the information
18 that this registration is required when somebody goes to
19 optician school? Do they provide you with a checklist of
20 some sort?"

21 The representative's answer was, "All the
22 information is available online at the California Board of
23 Optometry's website."

24 Karina asked, "Well, what happens if you study to
25 be an optician 27 years ago and there was no internet at

1 that time, so thus unable to check online?"

2 Slightly thrown off the representative responded
3 saying, "Well the information is available at the public
4 library."

5 And Karina was a little perplexed by this and
6 said, "Where?"

7 And they replied, "The California Codes book."

8 So Karina replied, "So we're supposed to go look
9 in a book, find a code for we don't know what we're
10 looking for, then look up for a registration that we don't
11 know that we're supposed to have?"

12 And so you see how Karina was very confused by
13 this. The information is not readily available and very
14 difficult to find, that you need to need this registration
15 to sell prescription eyewear. We strongly believe that
16 the punishment is not in line with the circumstances. For
17 the CDTFA to ask Karina to pay the amount back, the CDTFA
18 was never collected from her patients nor exchanged in the
19 first place, is quite frankly a little bit over the top.
20 It's 100 percent understandable if money was collected,
21 but it wasn't, and the fact that it's common knowledge
22 that you cannot charge tax on prescription frames and
23 lenses.

24 In closing, this was an honest mistake and this
25 punishment is not fair. Why not have her pay the fee of

1 \$150 for the missing registration? This specific part of
2 the system is flawed. And having this register or not
3 having registration does not represent the spirit of the
4 law. I would also, like, want to point out as mentioned
5 in the beginning, Karina had to close her doors to her
6 business of over 20 years as a result of this audit, the
7 stress, and the confusion of it.

8 We really felt it was important for her to tell
9 her story and not leave her legacy on this down note that
10 she may have done something wrong intentionally. We are
11 aware and understand the Sales Tax and Use law Section
12 6829. As a corporate officer Karina is not liable. And
13 as specifically noted in Section D, quote, "For the
14 purpose of this section willfully fails to pay or cause to
15 be paid mean that the failure was the result of
16 intentional, conscience, and voluntary course of action."

17 As you can see, this has all been a
18 misunderstanding. And I thank you all very much for your
19 time and listening to my wife's story. And I just want to
20 go through just a quick recap of everything I just said
21 and some bullet points. Registration is very hard to
22 find, you know, when Karina went to school. There's no
23 internet in 1995, 27 years ago. Information was not
24 readily available. She spoke to the California Board of
25 Optometry, and 27 years ago they said that the information

1 was available at the California public library. Only
2 method of getting the information regarding the
3 registration.

4 Karina prepaid this tax on all her frames and
5 lenses to the wholesalers, and it is not legal to charge
6 patients sales tax on prescription lenses and frames. The
7 Board of Optometry is to blame for this mistake, and
8 there's definitely a flaw in the system.

9 Thank you so much.

10 JUDGE STANLEY: This is Judge Stanley. Thank
11 you, Mr. Leigh.

12 Mrs. Leigh, do you have anything to add?

13 Mrs. Leigh indicated she does not.

14 MRS. LEIGH: No. Sorry.

15 JUDGE STANLEY: Okay. Ms. Jacobs, do you have
16 any questions for the witness?

17 MS. JACOBS: This is Amanda Jacobs. No. No
18 questions.

19 JUDGE STANLEY: This is Judge Stanley.
20 Judge Kwee, do you have questions for the witness?

21 JUDGE KWEE: Hi. This is Judge Kwee. Yes, I do.
22 Thank you. So as I'm understanding it, the main issue was
23 that Ms. Leigh did not have a Registered Dispensing
24 Optician license. But I understand that she did have a --

25 MR. LEIGH: It's not a license.

1 JUDGE KWEE: Oh, go ahead.

2 MR. LEIGH: Sorry. It's not a license. It's
3 just a registration. It's not a license.

4 JUDGE KWEE: Oh, okay. Registration. But I
5 understand she was registered as an optician or either
6 that or a spectacle lens dispenser or contact lens
7 dispenser. Can you clarify what her license was?

8 MRS. LEIGH: I'm registered with the American
9 Board of Optometry -- I'm sorry -- American Board of
10 Opticianry.

11 JUDGE KWEE: Okay. So is that considered a --
12 like a spectacle lens dispenser or contact lens dispenser,
13 or is that something different from those types of
14 registrations?

15 MRS. LEIGH: It's different. It's different.
16 It's not with the Board of Optometry.

17 JUDGE KWEE: Okay.

18 MR. LEIGH: And just to understand. And just to
19 understand, like, about that specific because I know it's
20 confusing. Trust me. We were confused about it too.
21 Anybody can get this dispensing optician -- what is it?

22 MRS. LEIGH: Registered --

23 MR. LEIGH: Registered Optician registration.
24 Anybody can get it. You don't have to have any
25 credentials to get. Anybody -- it's not -- there's no

1 requirements that you have to have to get it.

2 JUDGE KWEE: Okay. So I guess the reason I was
3 asking is because I was looking at the definition of a
4 Registered Dispensing Optician, and it says it means any
5 of the following individuals that are registered with the
6 Board. And then one is a spectacle lens dispenser.
7 Another is a contact lens dispenser. And then another is
8 a registered dispensing ophthalmic business, and I just
9 wasn't fully understanding. So you don't -- you didn't
10 fit in those definitions -- either of those definitions?

11 MRS. LEIGH: No. Because I was aware that I had
12 to in order for myself to have the business and be exempt
13 from sales tax, that I had to register with the American
14 Board of Optometry and -- because it didn't have anything
15 really to do with what I was doing as an optician. Nobody
16 ever, like, told me, educated me that I have to
17 register -- to get all these registrations.

18 JUDGE KWEE: Okay. I see. Okay. Thank you.

19 MR. LEIGH: Thank you.

20 JUDGE STANLEY: This is Judge Stanley.
21 Judge Brown, do you have any questions of the witness?

22 JUDGE BROWN: I do not have any questions at this
23 time. Thank you.

24 JUDGE STANLEY: This is Judge Stanley.
25 Mr. Leigh, you talked about tax-paid purchases where

1 you -- where the business paid tax on -- to the
2 wholesalers that sold the equipment to you. Did you ever
3 provide any evidence of that to CDTFA?

4 MR. LEIGH: Of course. Yes.

5 MRS. LEIGH: Yes.

6 MR. LEIGH: They have everything. They saw all
7 that. They went through the books, and they saw
8 everything. That's why we're confused by this because the
9 part of the tax that they were -- that the CDTFA was
10 charging back to Karina had never been exchanged, nor was
11 it able to. It's illegal to charge patients for
12 prescription lenses and frames. She would have gotten in
13 trouble were she to have charged taxes on a medical device
14 that is exempt from being charged tax.

15 That's why it's -- that's why, you know, our
16 position in this whole thing is there is a flaw in the
17 system. It doesn't -- the right hand is not talking to
18 the left. And it's just for this piece of paper. So to
19 charge -- to go back and charge -- and understanding the
20 CDTFA's laws and stuff, you know, in conjunction with the
21 Board of Optometry, we understand that there's -- you
22 know, kind of like, it goes into a system and it, kind of,
23 spits out a number, and that's what it is.

24 But it doesn't make sense that Karina, literally,
25 would have gotten in trouble if she were to have charged

1 her patients for tax on something that's not taxable.
2 But, yet, she's being penalized to pay the tax that would
3 have been illegal for her to pay. And she prepaid the tax
4 on the frames and lenses prior to this. So that's
5 where -- it's just like a -- it's like a gray weird area
6 in the middle that doesn't make sense.

7 JUDGE STANLEY: This is Judge Stanley. Thank
8 you, Mr. Leigh. I'm sure that CDTFA can address that
9 further in their presentation, and I don't have any other
10 questions.

11 So, Ms. Jacobs, you can proceed when you're
12 ready.

13 MS. JACOBS: Amanda Jacobs.

14 JUDGE STANLEY: This is Judge Stanley.
15 Ms. Jacobs, we cannot hear you.

16 MS. JACOBS: Can you hear me now?

17 JUDGE STANLEY: Yes. Now we can.

18 MS. JACOBS: All right.

19 JUDGE STANLEY: This is Judge Stanley. No. We
20 can hear a word every now and then, but there's something
21 wrong with your audio.

22 MS. JACOBS: Can you hear me now? Yes. Okay. I
23 apologize my presentation is lost. If you can just give
24 me a moment, I will find it and come back on.

25 JUDGE STANLEY: This is Judge Stanley.

1 Ms. Jacobs, you want to take a five-minute recess.

2 MS. JACOBS: That would be great. Thank you.
3 I'm sorry for dragging this on.

4 JUDGE STANLEY: That's okay. Let's go ahead and
5 give you a five-minute recess. We'll see you around
6 10:30.

7 (There is a pause in the proceedings.)

8 JUDGE STANLEY: Okay. This is Judge Stanley
9 again. We're reconvening the Appeal of C by Karina, and
10 we'll go back on the record.

11 And, Ms. Jacobs, you can proceed if you're ready
12 this time.

13 MS. JACOBS: Thank you I appreciate that.

14

15 PRESENTATION

16 MS. JACOBS: Okay. This is Amanda Jacobs.

17 Appellant operated a store in Beverly Hills,
18 California, selling prescription ophthalmic materials,
19 including eyeglasses, frames, and lenses, and other
20 non-prescription frames and lenses. Appellant held a
21 sellers permanent with the CDTFA since February 15, 2011,
22 but was not registered with any state agency to be engaged
23 in the business of dispensing prescription ophthalmic
24 materials until after the period at issue, when Ms. Leigh
25 became a Registered Spectacle Lens Dispenser on

1 March 19th, 2018, and Appellant became a Registered
2 Dispensing Optician with the California State Board of
3 Optometry, SBO on June 1st, 2018.

4 For the period of July 1st, 2014, through
5 December 31st, 2017, the Department determined that while
6 Appellant paid tax on the retail sale on non-prescription
7 frames and lenses, Appellant failed to pay tax on its
8 sales of prescription ophthalmic materials. Accordingly,
9 staff determined a measure of disallowed claimed
10 nontaxable sales of \$687,238.

11 Appellant's failure to tax was based on its
12 mistaken belief that it was a Registered Dispensing
13 Optician and, therefore, the consumer of prescription
14 ophthalmic materials. As such, Appellant paid tax
15 reimbursement on purchasing some of the materials and the
16 Department also determined that Appellant was entitled to
17 tax-paid purchase re -- a tax-paid purchases resold
18 deduction of \$120,766.

19 The issues in this appeal are whether Appellant
20 is entitled one, adjustments to disallowed claimed
21 nontaxable sales and two, further adjustments to allow
22 credits for tax erroneously paid on property purchased for
23 resale.

24 Regarding the first issue, no adjustment is
25 warranted to the measure of disallowed claimed nontaxable

1 sales or audit Items 1 and 2. As you know, California
2 imposes sales tax on a retailer's retail sales of tangible
3 personal property or TPP in this state unless the sale is
4 specifically exempt or excluded from taxation by statute;
5 Revenue & Taxation Code Section 6051. All of the
6 retailer's gross receipts are presumed to be taxable
7 unless the retailer can prove otherwise; Section 6091.

8 We first note that the Business and Professions
9 Code or BPC sections related to Register Dispensing
10 Opticians have been amended since the liability period,
11 most recently in 2021 by Assembly Bill 1534. And as we
12 refer to BPC sections, we refer to the former versions of
13 those statutes that were operative during the liability
14 period.

15 A Registered Dispensing Optician is the consumer,
16 not retailer of ophthalmic materials, including
17 eyeglasses, frames, and lenses dispensed pursuant to a
18 prescription prepared by a physician, surgeon, or
19 optometrist and tax apply with respect to the sale of such
20 materials to the Registered Dispensing Optician; Revenue &
21 Taxation Code Section 6018 and Regulation 1592(b)(1).

22 In all other instances, as is relevant in this
23 case, the optician is the retailer, not the consumer of
24 prescription materials. And tax applies to their gross
25 receipts from such sales; Regulation 1592(b)(3) and Sales

1 and Use Tax Annotation 225.0115. Registered Dispensing
2 Optician has a specific meaning that is clearly defined
3 under the BPC. BPC Section 2550 states, as it's relevant
4 here, "Individuals, corporations, and firms engaged in the
5 business of filling prescriptions for prescription lenses
6 and kindred products shall be known as dispensing
7 opticians and shall not engage in that business unless
8 registered with the State Board Optometry."

9 It is unlawful to engage in business as a
10 dispensing optician prior to applying for registration and
11 being issued a certificate of registration by the SBO.
12 That's Business and Profession Code Sections 2551 and
13 2553. Any person who holds themselves out as a Registered
14 Dispensing Optician without having a valid unrevoked
15 certificate is guilty of a misdemeanor. That's Business
16 and Profession Code Section 2556.5.

17 Here Appellant was not recommended with any state
18 agency to dispense ophthalmic materials and was
19 specifically not registered with the SBO as a Registered
20 Dispensing Optician until after the liability period.
21 Consequently, Appellant was not a Registered Dispensing
22 Optician and, therefore, not a statutory consumer and tax
23 applied to its retail sales of prescription materials.

24 Appellant argues it was a consumer of the
25 prescription materials that it purchased for resale since

1 it paid tax on those purchases. However, simply paying
2 tax on purchases as if one is a consumer does not change
3 the application of tax. Tax applies to all retail sales,
4 unless a specific exception or exclusion applies, whether
5 or not the retailer paid tax or tax reimbursement upon
6 purchase. Although, a retailer may be entitled to a
7 credit for the tax of tax reimbursement it erroneously
8 paid as I discuss later.

9 Appellant has held a sellers permit since 2011.
10 And according to an article featuring Mrs. Leigh,
11 Exhibit B, Mrs. Leigh is Appellant's chief executive
12 officer, Mrs. Leigh has been an optician for many years.
13 We also heard testimony about that today. Appellant
14 argues that it did not know it was required to register
15 and that it was never informed of the requirement. And
16 while that is unfortunate, taxpayers are charged with
17 knowledge of the law, and ignorance of the law is no
18 defense. See Mc Farley versus Department of Alcoholic
19 Beverages Control 51 CAL 2d 84 pincite 90.

20 There's no provision in the sales and use tax
21 laws relieving a taxpayer from liability based on
22 ignorance. Appellant also argues that during the January
23 2017 field inspection, the Department did not request it
24 verify its registration or otherwise indicate that it was
25 out of compliance with its sales and use tax obligations.

1 However, the evidence includes records from the field
2 inspection indicating that the Department attempted, but
3 was unable to identify whether Appellant was a Registered
4 Dispensing Optician and, thus, recommended the audit.
5 That's Exhibit A, pages 14 through 23.

6 Furthermore, pursuant to Revenue & Taxation Code
7 Section 6596, only a person's reasonable reliance on
8 written advice from the Department may form the basis for
9 relief under certain specified conditions. Appellant did
10 not receive and has not presented evidence of written
11 advice from the Department in this matter. In sum,
12 Appellant was not registered with any state agency to
13 dispense ophthalmic materials during the liability period
14 as required. Therefore, Appellant was the retailer, not
15 consumer of the TPP, and tax applies to its gross receipts
16 from such sales.

17 Regarding the second issue. No further
18 adjustments to allowed credits for tax erroneously paid
19 with respect to purchases, audit Items 3 and 4 are
20 warranted. Generally, gross receipts include the total
21 amount of the sales price without any deduction accounting
22 for the cost of property sold. Revenue & Taxation Code
23 Sections 6051 and 6012(a). However, a retailer who
24 resales TPP before use may take a deduction of the
25 purchase price if it has reimbursed its vendor for sales

1 tax or has paid use tax; Revenue & Taxation Code
2 Section 6012(a)(1) and Regulation 1701(a).

3 Based on the belief that it was a statutory
4 consumer of prescription materials, Appellant paid sales
5 tax reimbursement to its vendors on its purchases. In
6 audit, Appellants provided purchase invoices and reported
7 purchases subject to use tax indicating that Appellant
8 paid sales tax reimbursement for use tax on its purchases
9 for resale amounting to \$120,766. Appellant did not claim
10 any tax paid purchases resold deductions on its returns.
11 Accordingly, the Department allowed credits for tax
12 erroneously paid on purchases of \$120,766 for the
13 liability period.

14 Appellant has argued that further credits are
15 warranted but has not provided any evidence to support
16 that argument. Thus, Appellant has failed to meet its
17 burden of proof that any adjustments are warranted to
18 allow for additional credits for tax erroneously paid on
19 purchases. We also note that should the OTA find in favor
20 of the Appellant on the first issue, Appellant would no
21 longer be entitled to credits that have been allowed with
22 regards to the second issue.

23 In summary, Appellant was not properly registered
24 with the state agency during the liability period and was,
25 therefore, a retailer, not a consumer of the prescription

1 materials under Section 6018. Furthermore, no additional
2 adjustments are warranted to allow credits for tax
3 erroneously paid with respect to purchases. Since
4 Appellants have not otherwise disputed the audit
5 methodology or the audited measure, no adjustments to
6 Department's timely issued audit determination are
7 warranted. For these reasons we request that the appeal
8 be denied.

9 Thank you.

10 JUDGE STANLEY: Thank you, Ms. Jacobs.

11 This is Judge Stanley. Judge Kwee, do you have
12 any questions for the Department?

13 JUDGE KWEE: This is Judge Kwee. Sure. Just to
14 get a quick clarification because the Appellants had also
15 raised the argument of personal liability under Section
16 6829. My understanding is the entity before us is the
17 corporation not the individuals; is that correct?

18 MS. JACOBS: That's correct.

19 JUDGE KWEE: Okay. So Mrs. Leigh is not being
20 held personally responsible in this appeal for the
21 liabilities at issue? It's just the corporation?

22 MS. JACOBS: That's correct.

23 JUDGE KWEE: Okay. Thank you for clarifying
24 that. And one other question just to clarify the
25 registration that's -- there's no ability to have a

1 retroactive registration with the CSBO? It's from the
2 date of the application forward. There's no way they
3 could have applied to make it retroactive to the date of
4 the start of sales or dispensing. Is that you're
5 understanding?

6 MS. JACOBS: I'm not aware of if they have the
7 ability to make it retroactive, but I do know that the
8 date of issuance was June of 2018. And so if there was
9 that ability, they did not -- that is not what they did.

10 JUDGE KWEE: Okay. Thank you.

11 I don't have any further questions. So I'll turn
12 it back to the lead judge, Judge Stanley. Thank you.

13 JUDGE STANLEY: This is Judge Stanley.
14 Judge Brown, do you have any questions for the Department?

15 JUDGE BROWN: This is Judge Brown. I'll just say
16 briefly, CDTFA, do you want to address Appellants'
17 argument about the IRS rules regarding the medical excise
18 tax versus the sales tax that we are discussing here?

19 MS. JACOBS: Are you going to address it, Scott,
20 or would you like me to address?

21 We were not aware that Appellants were making
22 arguments related to the IRS, you know, IRS related
23 arguments, and so we're not prepared to discuss that
24 today. But if you would like us to address that, we would
25 be happy to do that in post-hearing briefing if you think

1 that's relevant.

2 JUDGE BROWN: I guess I just wanted to confirm
3 that CDTFA doesn't have any involvement directly with the
4 medical excise tax at the IRS -- at the federal level?

5 MR. CLAREMON: This is Scott Claremon. Yes,
6 that's correct. You know, we're not authorities on the
7 IRS medical excise tax, but that wouldn't be something
8 that has a bearing on the application of California sales
9 and use tax. That's correct, Judge Brown.

10 JUDGE BROWN: Okay. Thank you. I don't have
11 anything further.

12 JUDGE STANLEY: This is Judge Stanley. I don't
13 have any questions. So I would like to give Mr. Leigh an
14 opportunity to wrap things up and address any of CDTFA's
15 presentation that you wish to at this time.

16

17 CLOSING STATEMENT

18 MR. LEIGH: Sure. No. I definitely appreciate
19 everything and thank you so much. I mean, it was -- you
20 know, it still stands. You know, it gets a little bit
21 confusing with all the codes and all that stuff, you know,
22 from our, you know, sort of lamest level, you know, from
23 where we sit with all this stuff. But, you know, to me
24 it's kind of clear-cut and dry. There's definitely seems
25 to be sort of a little gap in this situation here where

1 Karina, you know, C by Karina is being penalized.

2 Meanwhile it was illegal for her to charge taxes
3 to her patients on a medical device that is exempt from
4 paying taxes. And, you know, I understand it's -- it
5 makes sense from what you're saying, but then once this
6 element is put into the mix that it's literally illegal.
7 Like, she -- you can't charge tax on medical devices, and
8 that shows everywhere. And that information is very
9 readily and easily available.

10 And just from our, you know, own little research
11 that we did and the few exhibits that we submitted, it
12 just shows that everywhere you go online, it shows in all
13 the different states and everywhere around the country
14 that clearly, you know, you are not allowed to charge tax
15 on medical devices. So she would never even think she was
16 able to.

17 And I definitely appreciate the what the judge
18 had said about the retroactive -- the getting the
19 registration retroactive, which is what makes sense.
20 Because to be charged for something that no money was ever
21 exchanged, you're not allowed to charge taxes on that, it
22 doesn't make sense. We would be happy to do a
23 retroactive -- you know, have a retroactive registration,
24 which totally make sense under the circumstances that it's
25 very difficult to find this registration, to know.

1 She did everything compliant. As she said 27
2 years ago when we called up. We called them now and said,
3 you know, how would someone find this information out?
4 It's not easily and readily available. And I also want to
5 point out, again -- and again, thank you, Judge, for
6 pointing this out, is we're not liable.

7 You know, as a result of this, you know, you
8 know, kind of a sad situation, my wife closed her store in
9 2019. You know, it's something that she was really
10 passionate about. She was very well-known in the
11 business. And, you know, unfortunately the stress of this
12 while she was figuring this all out, you know, kind of
13 like having that laying over her head until we kind of did
14 our own research and said, well, this is not fair.

15 It's a sad thing that, you know, there was a
16 loss. And I don't think that this is what this piece of
17 paper, this \$150 piece of paper registration represents
18 the spirit of somebody -- a woman-owned business because
19 of the stress of that, you know, in 2019. So, you know, I
20 do appreciate -- I never even -- I don't think you can --
21 you cannot -- to answer your question, there is no -- you
22 cannot retroactive the registration. It's not possible.

23 And Karina got the registration the minute that
24 she found out, and she was still operating in business.
25 The minute she found out that she needed that registration

1 once informed about that, you know, way after the audit
2 and after they were telling us everything and kind of,
3 you're putting all the pieces together. She made a phone
4 call and got it immediately.

5 And then from that moment forward, she had the
6 registration. So to retroact it would be a great thing.
7 And then an ending, I just want to say as well. You know,
8 again, we're doing this. We're take the time and doing
9 this and talking about this. You know, we don't have to.
10 We're not -- she's not personally liable for this. The
11 business has been closed now unfortunately and, you know,
12 we would rather the business be open and, you know, kind
13 of deal with this. But by Karina is now not liable.

14 We thought important to bring this up and to
15 bring justice to the situation that is really kind of
16 unfair, and there's no case studies on this before.
17 Whether someone had gone through this and didn't kind of
18 find the angles that we found, that it's just not fair and
19 doesn't make sense. So I just wanted to be clear that we
20 know we're not -- you know, she's not liable for this.
21 The business has been closed, and that ship has sailed.

22 But this is not a fair situation. You cannot
23 charge tax to the patient on a medical device. And Karina
24 is being penalized to pay that tax that was never
25 collected, never charged, was not able to be charged. So

1 that's kind of our take on it.

2 Thank you very much, everyone.

3 JUDGE STANLEY: Okay. This is Judge Stanley.

4 Mr. and Mrs. Leigh, is that all that you want the panel to
5 know for today?

6 MRS. LEIGH: Yes.

7 MR. LEIGH: Yes. Thank you so much.

8 JUDGE STANLEY: Okay. Judge Kwee, do you have
9 any follow-up questions?

10 JUDGE KWEЕ: This is Judge Kwee. No, I don't
11 have any follow-up questions. Thank you.

12 JUDGE STANLEY: And, Judge Brown, do you have any
13 follow-up questions.

14 JUDGE BROWN: This is Judge Brown. And, no, I do
15 not. Thank you.

16 JUDGE STANLEY: Okay. This is Judge Stanley. I
17 should probably ask Ms. Jacobs if she has any follow-up
18 questions. I think you -- if I am lipreading correctly,
19 you said no, that I don't. I can't hear you.

20 MS. JACOBS: This is Amanda Jacobs. Can you hear
21 me?

22 JUDGE STANLEY: Yes.

23 MS. JACOBS: No questions. Thank you.

24 JUDGE STANLEY: Okay. Thank you.

25 Thank you, Mr. and Mrs. Leigh, for participating

1 and presenting your appeal.

2 I thank all the participants for being here and
3 putting up with all the technical issues that we had
4 today.

5 Just one last question. What kind of plant is
6 that behind you guys?

7 MR. LEIGH: It's a moss tree. It's like a, you
8 know, a man-made kind of moss bonsai tree.

9 JUDGE STANLEY: Yeah. I thought it looked like
10 something out of Dr. Seuss.

11 MRS. LEIGH: Yeah.

12 MR. LEIGH: You're right, actually. Like yes.
13 You're right. It does.

14 JUDGE STANLEY: Okay. Well, thank you all.
15 We'll go off the record.

16 (Proceedings adjourned at 10:52 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

I have hereunto subscribed my name this 1st day
of April, 2022.

ERNALYN M. ALONZO
HEARING REPORTER