

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
YOGURT TIME, LLC,) OTA NO. 18011830
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) APPELLANT.)
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TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, June 21, 2022

Reported by:

SARAH M. TUMAN, RPR
HEARING REPORTER

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14 Transcript of Proceedings, taken at
15 400 R Street, Sacramento, California, 95811,
16 commencing at 9:30 a.m. and concluding at
17 12:04 p.m., on Tuesday, June 21, 2022, reported
18 by Sarah M. Tuman, RPR, Hearing Reporter, in and
19 for the State of California.

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APPEARANCES:

Panel Lead: ALJ TERESA STANLEY

Panel Members: ALJ JOSHUA LAMBERT
ALJ KEITH LONG

For the Appellant: MR. AMIN KAZEMINI
MR. HASSAN KAZEMINI
MR. REZA KAZEMINI

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

RAVINDER SHARMA
JASON PARKER
CARY HUXSOLL

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WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
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(Further direct)	26			
Reza Kazemini	33			

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E X H I B I T S

(Appellant's Exhibits 1-72 were received at page 10.)

(Department's Exhibits A-K were received at page 9.)

1 Sacramento, California; Tuesday, June 21, 2022

2 9:30 a.m.

3
4
5 ADMINISTRATIVE LAW JUDGE STANLEY: So we're going
6 to go on the record -- I don't know your name.

7 (Reporter responds.)

8 ADMINISTRATIVE LAW JUDGE STANLEY: And Ms. Tuman,
9 are you ready to go on the record?

10 (Reporter responds.)

11 ADMINISTRATIVE LAW JUDGE STANLEY: Then we'll go
12 on the record. And, again, this is the appeal of Yogurt
13 Time, LLC. I should say, "appeals of." There are two
14 case numbers: 18011830 and 18012048.

15 The date is June 21st, and the time is 9:30 a.m.
16 We're in Sacramento, California. And the Panel Judges are
17 myself -- Judge Teresa Stanley -- and Judge Josh Lambert
18 and Judge Keith Long.

19 I'm going to ask the parties to identify
20 themselves on the record. We'll start with Appellant.

21 MR. A. KAZEMINI: Amin Kazemini, legal
22 representative for Taxpayer.

23 MR. H. KAZEMINI: Hassan Kazemini, owner of
24 Yogurt Time.

25 MR. R. KAZEMINI: Reza Kazemini, manager.

1 ADMINISTRATIVE LAW JUDGE STANLEY: Thank you.

2 MR. SHARMA: Ravinder Sharma, hearing
3 representative for CDTFA.

4 MR. PARKER: Jason Parker, chief of Headquarters
5 Operations Bureau for CDTFA. We also have Cary Huxsoll in
6 the audience from our Legal Division.

7 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Thank
8 you.

9 Once again, I'm going to welcome everybody to the
10 Office of Tax Appeals. But to let everybody know,
11 including the viewing public, that the OTA is independent
12 of CDTFA and any other tax agency. The Office of Tax
13 Appeals is not a court but is an independent appeals
14 agency staffed with its own tax experts. The only
15 evidence in OTA's record will be what was submitted during
16 the appeal.

17 These proceedings are being live-streamed on
18 YouTube, and the stenographer is recording the proceeding.

19 The issues in this case are for -- there are two
20 different audit periods: For the audit period January 1,
21 2008, through March 31, 2011 -- which is Office of Tax
22 Appeals Case Number 18012048 -- whether further reductions
23 to the measure of disallowed claimed exempt food sales
24 that were recommended in the third supplemental decision
25 warranted.

1 And -- sorry -- and a second issue for that audit
2 period is whether a reduction to the measure of unreported
3 taxable food sales is warranted.

4 And the third issue for that audit period is
5 whether relief from interest is warranted.

6 For audit period July 1, 2011, through June 30,
7 2014, which is Office of Tax Appeals Case Number 18018130.
8 The issue is whether further reductions to the measure of
9 disallowed claimed exempt food sales are warranted.

10 At the prehearing conference, participants also
11 confirmed that the audit period from January 1, 2008,
12 through March 31, 2011, CDTFA's third supplemental
13 decision deleted both the use tax audit item and the
14 negligence penalty.

15 And also, for audit period 2011 through June 30,
16 2014, CDTFA deleted the negligence penalty in the
17 August 28, 2015, re-audit.

18 Mr. Kazemini, are those the issues as you
19 understand them?

20 MR. A. KAZEMINI: Yes, Judge Stanley.

21 In addition, I would also add relief of interest
22 warranted for the second audit period as well. I'm not
23 sure of the issues, as outlined, when we identified the
24 relief of interest for the first audit period or for both
25 periods.

1 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

2 And Mr. -- Mr. Sharma, do you agree with the
3 issues plus the additional one that the Appellant just
4 stated?

5 MR. SHARMA: We agree with the issues.

6 But one thing I want to clarify -- in the first
7 audit, with the item listed on these minutes, the
8 reduction and to the matter of unreported taxable sales --
9 food sales -- \$33,080. That is -- needs to be corrected.
10 Actually, the Department has already reduced that amount
11 to 30,839. Issue is correct, but the amount is 30,839.

12 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

13 MR. SHARMA: And for the issue as to relief of
14 interest for the second audit, Department objects to that
15 because that's something new. We need an opportunity to
16 look at that one and then determine.

17 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Well,
18 there's a likelihood we'll be keeping the record open in
19 this case anyway because of the late submission of a lot
20 of documents -- which we'll go over in a minute.

21 But we can allow the Department to brief that if
22 they want to after the hearing. We'll go ahead and let
23 Appellant address it today, and then we can give the
24 Department an opportunity to respond.

25 MR. SHARMA: Thank you.

1 ADMINISTRATIVE LAW JUDGE STANLEY: But speaking
2 of numbers, I wanted to go ahead and confirm that for the
3 first -- for the first audit period, the disallowed
4 claimed exempt food sales are currently at \$448,470.

5 MR. SHARMA: That is correct.

6 ADMINISTRATIVE LAW JUDGE STANLEY: And for the
7 second audit period, the disallowed exempt food sales are
8 308,757?

9 MR. SHARMA: That is correct. Thank you.

10 ADMINISTRATIVE LAW JUDGE STANLEY: Is that your
11 understanding too, Mr. Kazemini?

12 MR. A. KAZEMINI: Yes, it is. Thank you.

13 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

14 So the exhibits. We need to deal with that
15 because we got -- significant amount of exhibits following
16 the prehearing conference.

17 The ones that were already in the record there
18 were no objections to, including CDTFA's exhibits. So
19 we're going to -- we're going to admit all of CDTFA's
20 exhibits into evidence without objection.

21 (Department's Exhibits A-K were received in
22 evidence by the Administrative Law Judge.)

23 ADMINISTRATIVE LAW JUDGE STANLEY: And,
24 Mr. Sharma, what is the Department's response to the 72
25 documents submitted?

1 MR. SHARMA: The Department has no objection to
2 those.

3 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

4 So we'll admit Exhibits 1 through 72 of Appellant
5 into evidence without objection.

6 (Appellant's Exhibit Nos. 1-72 were received in
7 evidence by the Administrative Law Judge.)

8 ADMINISTRATIVE LAW JUDGE STANLEY: So let's move
9 on then to opening statements.

10 Appellant had requested five minutes to make an
11 opening statement. You may proceed when you're ready.

12 MR. A. KAZEMINI: Thank you.

13

14 OPENING STATEMENT

15 BY MR. A. KAZEMINI:

16 Thank you, ladies and gentlemen of the panel, and
17 thank you for the opportunity today to present Appellant's
18 oral arguments as to why we contend that the Department
19 has continued to make mistake after mistake in assessing a
20 penalty tax assessment against penalty -- against the
21 Appellant. Excuse me.

22 Before I continue, can everyone hear me? Does
23 this sound good? Okay. Thank you.

24 The hearing today is 11 years in the making.
25 Appellant has been fighting with the Department to

1 recognize its mistakes for 11 years now. And since it has
2 been 11 years, I'd like to take a brief moment to outline
3 where we started and where we are today.

4 On April 29, 2011, Mr. Scott Yokel, auditor of
5 the Department of Tax and Fee Administration, contacted
6 Appellant to inform the Appellant that he was to commence
7 an audit on Appellant -- on Appellant's business.

8 On June 2, 2011, and on June 13, 2011, auditor,
9 Mr. Yokel, performed two observation tests at two separate
10 locations of Appellant's businesses. Based solely on
11 these observation tests, the Department issued a Notice of
12 Determination on July 23, 2012. Issuing for the audit --
13 for -- for the audit period January 1, 2008, to March 31,
14 2011 -- which I'll refer to throughout this hearing as
15 "audit period one" -- alleging Appellant owed \$82,730.19
16 in tax and a 10 percent negligence penalty of \$8273.07.

17 (Reporter interrupted.)

18 MR. A. KAZEMINI: \$82,730.19 in tax and a 10 percent
19 negligence penalty of \$8,273.07.

20 (Reporter interrupted.)

21 MR. A. KAZEMINI: The NOD was based primarily on two
22 items: One being the alleged disallowed claimed exempt
23 food sales, which measured to \$723,700, and an unreported
24 ex-tax purchase of fixed assets subject to use tax
25 measuring \$223,500 -- excuse me -- \$223,535. Totaling a

1 total deficiency for the first notice of determination of
2 \$947,235.

3 So, now, where are we today? As Judge Stanley
4 just briefed us, the current disallowed claimed exempt
5 food sales that the Department alleges is now \$448,470.
6 The difference of \$223,500 that the Department originally
7 claimed was deficient. That's a 38 percent reduction.

8 In addition, the audit -- the first audit
9 period's negligent penalty was a hundred percent removed.
10 In addition, the use tax audit of fixed assets was a
11 hundred percent removed. So from the time that the
12 Department issued their original notice of determination
13 against Appellant to 11 years later -- to today -- the --
14 the total amount the Department claimed has been reduced
15 by 52 percent. 52 percent.

16 For the second audit period, which is July 1,
17 2011, to June 30, 2014 -- which throughout this hearing
18 I'll refer to "audit period two" -- the original
19 Department Notice of Determination from April 23, 2015,
20 issued \$378,370 in alleged disallowed claimed exempt food
21 sales.

22 Now, again, today, as Judge Stanley pointed out,
23 the current alleged disallowed claimed exempt food sales
24 that the Department claims is \$308,757. Again, a
25 reduction of 18 percent from what they were -- the

1 Department originally claimed.

2 In addition, the negligent penalty has been
3 reduced by 100 percent.

4 So the categories that Appellant would like the
5 panel to observe and focus on during this hearing are --
6 we are going to discuss the first audit period and the
7 flawed observation test and the multiple, multiple
8 mistakes the Department made in making a determination.

9 We will discuss the second audit period and the
10 baseless determination by the Department to ignore certain
11 sales reports but then to accept certain sales reports and
12 the contradiction they made originally when determining
13 certain sales reports were reasonable for the first audit
14 period but unreasonable for the second audit period --
15 which they later had to correct.

16 We will discuss the taxability of frozen yogurt
17 and what the Department's advice that they gave Appellant
18 directly prior to Appellant opening his business.

19 We'll discuss the reasons why we believe the
20 request for relief is appropriate. And we will discuss
21 the unfair process and procedure that Appellant feels that
22 the appeals process has taken as we are now 11 years in
23 this appeal process.

24 And lastly, we will -- we will discuss the
25 inaccuracies and misrepresentations that the Department

1 still maintains today that the Appellant has been trying
2 for years to correct.

3 Thank you.

4 ADMINISTRATIVE LAW JUDGE STANLEY: Thank you,
5 Mr. Kazemini. Thank you.

6 Next, we're going to go on to Appellant's
7 presentation. So we'll have witness testimony.

8 Now, I -- are these the two people that were on
9 my list?

10 MR. A. KAZEMINI: Correct.

11 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. So I'm
12 going to ask the two witnesses to stand so I can swear you
13 in. Raise your -- raise your hand. You don't have to
14 stand.

15
16 MR. R. KAZEMINI,
17 called as a witness on behalf of the Appellant, having
18 first been duly sworn by the Administrative Law Judge, was
19 examined and testified as follows:

20
21 MR. H. KAZEMINI,
22 called as a witness on behalf of the Appellant, having
23 first been duly sworn by the Administrative Law Judge, was
24 examined and testified as follows:

25

1 MR. R. KAZEMINI: I do.

2 MR. H. KAZEMINI: I do.

3 ADMINISTRATIVE LAW JUDGE STANLEY: Thank you.

4 Okay. Mr. Kazemini, you can ask for a narrative
5 from your witnesses or do question and answer. However
6 you want to proceed.

7 MR. A. KAZEMINI: Thank you.

8

9 PRESENTATION

10 BY MR. A. KAZEMINI:

11 So what I'd like to do is -- I'm going to call
12 Hassan Kazemini as my first witness and go through a
13 conversation with him. And, afterwards -- after
14 Mr. Kazemini's done with his discussion, I'm going to do a
15 little narration argument and then introduce Reza Kazemini
16 to provide some more -- further information.

17 So here we have Hassan Kazemini.

18

19 DIRECT EXAMINATION

20 BY MR. A. KAZEMINI:

21 Q Mr. Kazemini are you the majority share --
22 shareholder of Yogurt Time, LLC?

23 A I do.

24 Q Can you get a little closer?

25 A I do.

1 Q I believe you mean to say you are.

2 A Yes, I am.

3 Q Thank you. And when did Yogurt Time start its
4 business?

5 A 2008.

6 Q And prior to Yogurt Time, what was your primary
7 occupation?

8 A Self-employee. I have my own business.

9 Q And what kind of business is that, please?

10 A Selling Persian rugs -- Unique Oriental Rugs. I
11 still have it.

12 Q How long -- was that your occupation prior to
13 opening Yogurt Time?

14 A Around 30 years.

15 Q So is it fair to say prior to Yogurt Time
16 operating its new business, this was a new industry for
17 you. You had never worked in the food sales industry
18 before. Is that fair to say?

19 A Yes.

20 ADMINISTRATIVE LAW JUDGE STANLEY: Excuse me for
21 a minute. Can we ask the witness to speak up just a
22 little bit? I'm having trouble hearing all of what you're
23 saying.

24 THE WITNESS: Sure.

25 BY MR. A. KAZEMINI:

1 Q Prior to opening -- prior to Yogurt Time opening
2 for business, did you visit the Department of Sales and
3 Tax Santa Rosa District Office to inquire about the
4 taxability of frozen yogurt?

5 A Yes, I did.

6 Q And what did the Department staff inform you and
7 recommend to you?

8 A Before I open the Yogurt Time, I went in there
9 and ask them for the Use Permit. And they indicate to me
10 that you don't need use permits.

11 I -- they asked me what I'm selling. I said it's
12 only frozen yogurt. Anything else? I said no. They even
13 asked do I sell -- do I sell bottle of water. I said no.
14 Just yogurt -- Yogurt Time -- out of the machine.

15 So they indicate to me that you do not need no
16 sales permits, and I walk out.

17 Q So when did you learn that it was -- it would be
18 probably appropriate for Yogurt Time to obtain a seller's
19 permit?

20 A The State Board called me -- asked me to come in
21 the office. I went in there, and we sit down. And they
22 said, "You should have a permit."

23 Q And -- and when you say "the State Board," just
24 to be clear, do you mean the State Board of Equalization;
25 correct?

1 A That's correct, yes.

2 Q Thank you. So after the -- after the Board of
3 Equalization contacted you, what did you do next?

4 A Then on the same time that we were in the office,
5 they fill out the applications, and they issue me the Use
6 Permit.

7 Q So when you had the conversation with the
8 employee of the Board of Equalization, they identified to
9 you that you should fill out a seller's permit; is that
10 correct?

11 A That's correct.

12 Q And who filled out that seller's permit?

13 A They did.

14 Q And who -- by "they," who do you mean?

15 A The State Board of Equalization employee filled
16 out the applications for me. Asking my driver's
17 license -- I give him my driver's license. And he had my
18 other cell number -- user -- use permits. He pulled that
19 one out, got the same information out of that one, and
20 they issue me another one with a different name of Yogurt
21 Time, LLC.

22 Q So if I understand correctly, the Department
23 employee completed with -- with the information you
24 provided, filled out the seller's permit, and you
25 acknowledged it; is that correct?

1 A That's correct.

2 Q And what did the employee indicate to you that
3 they believed would be a reasonable estimation of taxable
4 sales for your business?

5 A After we fill out the permits, I left. I believe
6 it was a week or two later that he called, and I went back
7 into the office. And he said that you're not paying sales
8 tax.

9 I said, "You told me I don't have to pay any
10 sales tax."

11 He said, "Doesn't work like that."

12 I said, "Okay." I said, "I do not charge no
13 sales per -- no sales tax. None of the customers pay any
14 sales tax, period."

15 He said, "Okay."

16 So what we -- I said, "What do you want to do?"

17 So he figured it out. He did it himself in his
18 office through his computer -- fill up the form -- and he
19 said, "The common things to do is 3 to 5 percent of your
20 sale."

21 I said, "Perfect. Do it."

22 So he did it right in the office -- right in the
23 State Board office. He fill up the applications. He --
24 because he had all the sales -- I provide him with all the
25 sales. He come up with the number. He give me the form.

1 And I went back to the office and cut him a check and send
2 it to them.

3 Q And what -- and this conversation -- this took
4 place when? Was this 2009?

5 A That was 2000 -- end of -- almost end of 2009,
6 yes.

7 Q Okay.

8 A After a year and plus that we were open.

9 Q So in 2009 you were informed that Yogurt Time
10 should have a seller's permit. And you filled out the
11 seller's permit and you made a first payment for that.

12 What in -- did you retroactively submit payment
13 for 2008?

14 A He calculate everything, and he did 3 to 5
15 percent -- percentage and come up with the number.

16 Q So for the sales tax that Yogurt Time was to pay
17 in 2008, you paid in 2009 once you learned that it was
18 appropriate to have a seller's permit. Is that -- is that
19 accurate?

20 A Yes.

21 Q And from 2009 to present, has Yogurt Time been
22 making timely sales tax payments?

23 A Every -- every single time, yes.

24 Q Every quarter; correct?

25 A Every quarter, yes.

1 Q And -- so for how long did Yogurt Time estimate
2 three to five percent of their gross sales to be taxable
3 sales?

4 A Until they come back, and they said that you
5 should pay more tax. And I asked, "Why do we have to pay
6 more tax? We're not collecting no sales tax. We paying
7 everything out of the pocket. Why do we pay more?"

8 They said, "You have table inside. And because
9 you have table inside and the people get their yogurt and
10 they sit down on the table, those people that sit down on
11 the table -- they have to pay sales tax."

12 I said, "Hey. If we go to the supermarket, we
13 pick up a cold sandwich and come outside -- we not -- or
14 pick it up out of the deli, and we eat inside. We not
15 paying no sales tax."

16 The gentleman said, "Hey. Yogurt Time is cold --
17 it's -- frozen yogurt is on gray area. We don't know what
18 to do with it. This is what the rule is. You are --
19 we're going to count you as a restaurant. And when these
20 people sitting on the table, they got to pay tax."

21 So they calculate -- we calculate that
22 number down. So then, what we did -- we fix our computer
23 to ask it from that day on -- we said, "Okay. We're going
24 to charge the customers sales tax."

25 So from day on, we asked the customers, "Are you

1 going to eat inside? Or are you going to eat outside?"

2 The one that were going to sit inside, we charged
3 them sales tax. And this is hundred percent accurate with
4 our computers. We provide that to the State Board. And
5 the guy comes in and says, "No. This is not right."

6 I said, "Okay. Why this is not right?"

7 He said, "Because more people sitting inside."

8 My computer doesn't show that. He said my count
9 is short. So that's the difference that we have.

10 Q So to clarify quickly, because I think you may
11 have misspoken, you -- the computer system didn't ask if
12 you were sitting "inside" or "outside." It would ask if
13 you are eating "for here" or "to go"; is that correct?

14 A That's correct. Yes.

15 Q And then when they answered "for here," that was
16 Yogurt Time's way of knowing that the food that they were
17 creating for themselves -- because it's a self-serve
18 frozen yogurt shop -- that they were eating at Yogurt
19 Time's premises; is that correct?

20 A That's correct.

21 Q And for those transactions, they were taxed?

22 A Yes.

23 Q Okay. So back to my original question -- when
24 did you -- when did Yogurt Time stop -- approximately what
25 date did Yogurt Time stop averaging 3 to 5 percent of

1 gross sales as taxable? You mentioned it's when the
2 Department came back and contacted you. Are you referring
3 to when they commenced their audit on Yogurt Time?

4 A Yes.

5 Q So that was sometime in 2011. When -- when would
6 you say the system was upgraded so that it was a
7 requirement of the Yogurt Time employees to request when
8 the customers were eating to go or for here?

9 A After that, I -- discussion that I had with the
10 State Board, I figured that makes it -- makes things go
11 very smooth. We should change the computer and ask the
12 people and start charging sales tax.

13 Q So is it reasonable to state that the first
14 quarter of 2012 -- that Yogurt Time stopped estimating 3
15 to 5 percent of gross sales and changed their computer
16 system per the instruction you had just mentioned?

17 A Yes. For the first four years, we never charged
18 no customers sales tax. Period. Everything that we paid,
19 I paid out of pocket.

20 Q And at any time during your -- during your
21 conversations with Department employees or Board of
22 Equalization employees, did they tell you not to rely on
23 their advice?

24 A Never said that.

25 Q Did they ever tell you to only rely on advice if

1 it's in writing?

2 A Never said that.

3 Q Did you know that only advice in writing by a
4 Department employee or a board employee, can be relied
5 upon by a business? Otherwise the Department will not
6 consider the advice to be given?

7 A I didn't know that.

8 Q And if you did know that advice had to be in
9 writing in order to be relied upon, would you have asked
10 for that advice to be in writing?

11 A Yes, I would. Of course.

12 Q So from 2009 until now, Yogurt Time has made
13 timely tax payments; correct?

14 A Yes.

15 Q And as you mentioned, from 2008 through the first
16 quarter of 2012, Yogurt Time did not charge sales tax on
17 its customers; is that correct?

18 A That's correct.

19 Q So the 3 to 5 percent you were paying from 2008
20 to the first quarter of 2012, of gross sales -- that was
21 coming out of Yogurt Time's profits; is that correct?

22 A Yes.

23 Q So why would you do that? Why would you not
24 charge sales tax on the customers for those four years and
25 pay 3 to 5 percent to the Department?

1 A I honestly felt that it's not legal to charge the
2 customers sales tax because the State Board was agreed
3 with me. Because he was saying it's a gray area.

4 So I didn't want to create a problem. I said,
5 "Hey. 3 to 5 percent? What the hell. I'll do it. I'll
6 pay out of pocket."

7 Q And then once you -- once the Department
8 initiated their audit and were claiming a substantially
9 higher percentage of taxable sales -- that's when you
10 decided you could not afford to pay this out of your own
11 pocket, or Yogurt Time's own pockets, and you had to start
12 charging sales tax on the customers; is that correct?

13 A Yes, it is.

14 Q Okay.

15 A And many unhappy customers.

16 MR. A. KAZEMINI: Thank you.

17 That's -- that's all the questions I have for
18 Mr. Kazemini at this time.

19 I'd like to point out, in addition, that Sales
20 Tax Regulation 1603 states that food products furnished,
21 prepared, or served for consumption at table, chairs, or
22 counters --

23 I'm sorry. My apologizes. I -- I misread the
24 wrong rule.

25 Per Revenue Taxation Section 6359 Subdivision (b)

1 Subsection (2), "food products" is defined as milk and
2 milk products, milkshakes, malted milks, and other similar
3 type beverages which are composed at least in part of milk
4 or milk product that require the use of milk or milk
5 product in preparation.

6 And, in addition, Revenue Taxation Section 6359
7 Subdivision (b), (3), further defines food products as all
8 fruit juices; vegetable juices; and other beverages,
9 whether liquid or frozen, including bottled water; but
10 excluding spirituous, malt, or vinous liquors, or
11 carbonated beverages.

12
13 FURTHER DIRECT EXAMINATION

14 BY MR. A. KAZEMINI:

15 Q Mr. Kazemini, frozen yogurt is made out of --
16 consists of milk; is that correct?

17 A Yes, it is.

18 Q Does all of your machines contain frozen yogurt?

19 A No.

20 Q What -- how many machines are within each of your
21 location businesses?

22 A Each -- we have five machines on each locations.

23 Q And how many of those machines contain frozen
24 yogurt?

25 A I believe four of them, sometimes. And three and

1 a half, sometimes, or three of them, sometimes.

2 Q And the other machine -- what does that contain?

3 A Sorbet.

4 Q And does sorbet contain any milk product?

5 A Absolutely not.

6 Q And does sorbet contain fruit juices, vegetable
7 juices, or any other item that I just read off?

8 A No.

9 MR. A. KAZEMINI: So as we have mentioned to the
10 Department on multiple occasions, 20 percent of the
11 product that the Appellant sells is not taxable -- is not
12 a food product as defined by the Revenue Taxation Code.

13 So that was not something that was considered
14 when reviewing -- reviewing the sales reports and during
15 the observation tests, which was greatly flawed.

16 And speaking of the observation test, that's
17 where I'd like to take our attention now, please.

18 So for the first audit period -- so to give a
19 little, brief, understanding of Appellant's business -- at
20 the time of the first audit period, Appellant had four
21 locations: A Farmers Lane location, a Mark West location,
22 a Summer Field location, and a Healdsburg location. All
23 the locations had two tables inside consisting of three
24 chairs each.

25 So indoors there's two tables of six chairs total

1 for occupancy. Outside there were chairs provided by the
2 landlord as common areas that were used by all the tenants
3 in the area. And those tables were provided by landlord
4 which Appellants would pay through Common Area Maintenance
5 Charges, or CAM Charges -- part of the lease agreement.

6 Based on informal observations -- informal
7 observations meaning, on -- Department staff that are not
8 on duty would drive by Appellant's businesses and
9 determine that they felt the Appellant's sales were
10 unreasonable. So based on these observations, the
11 Department decided to implement an audit on Appellant's
12 business.

13 Appellant was contacted by Mr. Yokel, as
14 mentioned earlier, and two observation tests were
15 performed: One on June 2, 2011, at the Farmers Lane and
16 one on June 13, 2011, at the Healdsburg location.

17 The Farmers Lane location observation test
18 resulted in a taxable sales ratio of 35.14 percent. The
19 Healdsburg observation test resulted in a taxable sales
20 ratio of 12 percent. However, the Department did not only
21 use -- excuse me -- only used the Farmers Lane location
22 observation test when analyzing the other two business
23 locations that did not have observation tests performed on
24 them.

25 So therefore, the Summer Field location and the

1 Mark West location -- they only implemented the 35.14
2 percent observation test against it, as opposed to
3 considering the 12 percent observation test against it.
4 Their rationale being that the Farmers Lane location was
5 of comparable size to the other locations. That's why it
6 was reasonable.

7 However, that still doesn't make sense because
8 the Farmers Lane location was a -- is a thousand square
9 feet; the Healdsburg location is a thousand square feet;
10 the Summer Field location is 800 square feet; and, at the
11 time of the audit, the Mark West location was 600 square
12 feet. Since then, the Appellant was able to add 400
13 square feet to it, so it's now a thousand square feet.
14 But during the first audit period, it was only 600 square
15 feet.

16 So the comparable size argument of the Department
17 placed on the observation test does not make any sense and
18 does not have any validity as to why the 12 percent
19 observation test would be ignored when considering the
20 other two locations that didn't have observation tests
21 performed on them.

22 Additionally, within the supplemental decision
23 and recommendation, the Department -- the Department
24 states that, based on their experience -- that auditing
25 similar businesses to Appellant's taxable sales -- that

1 sales should be roughly -- taxable sales should be roughly
2 20 percent. Yet they ignore the 12 percent observation
3 test and only use the 35.14 percent observation test.

4 So we have conflicting advice. First, we're told
5 that 3 to 5 percent is reasonable. Then the Department
6 claims 20 percent is reasonable. Now, it's claiming
7 12 percent is not reasonable but 35.14 is.

8 Mr. Corin Saxton, who's the tax counsel for the
9 State Board of Equalization, recommended a re-audit in
10 order for the Department to form an additional observation
11 test in accordance to the Audits Manual because he found
12 that the observation tests were not performed in
13 accordance with the Audits Manual.

14 First, Mr. Saxton states that the observation
15 test should occur over multiple days, which neither one
16 took -- that -- of the Department's observation tests did.
17 They only took place over one day at two different
18 locations. According to Mr. Saxton, they should have
19 taken over multiple days at multiple locations, which the
20 Department did not do.

21 Second, according to Audit Manual Section
22 0810.30, the Department is supposed to pick a day that
23 most represents average sales days. Which means they are
24 to review cash register tapes, sales tickets, and/or have
25 a discussion with the taxpayer to make a determination of

1 when is an appropriate average sales day to determine
2 taxable sales against Appellant.

3 That did not happen here. The Department claims
4 Appellant picked the observation test days. That's simply
5 not true. The Department provided a small range of dates
6 that the Appellant must have chosen from in order for the
7 observation test to be performed. The Appellant requested
8 that the observation not be performed in June or the
9 summer because the summer was the busiest time of year for
10 Appellant.

11 Appellant is a frozen yogurt parlor -- a shop.
12 It is very, very reasonable to conclude that when the
13 weather is hot, it's -- he's going to be busier. When the
14 weather is cold, he's not going to be as busy. Okay?

15 Yet the Department disagreed. The Department
16 thought the faster the observation test could be done, the
17 better. So the Department had an observation test on June
18 2, 2011.

19 Another requirement of Section 0810.03 of
20 the Audit Manual states an observation test should not
21 occur right after a holiday. Well, on March -- May 31,
22 2011, it was Memorial Day. Yet two days later, the
23 Department found it was reasonable to conduct an
24 observation test, even though the Audit Manual states
25 that's not how it should happen.

1 In addition, that is the week that school got
2 out. Again, this type of business -- these type of issues
3 factor how busy they are. School getting out and school
4 getting out at half days -- parents will take their kids
5 at 1:00 o'clock on a hot day to get frozen yogurt. That
6 might not happen in November. That might not happen in
7 March or at any other month that's not a hundred degrees
8 outside.

9 But yet the Department did not consider these
10 issues when conducting the observation tests. They relied
11 on the results of these observation tests for years until
12 2016, when the State Board of Equalization finally
13 concluded, no, they made errors and that this had to be
14 redone.

15 So once -- once they determined the observation
16 test was not valid, they decided to turn to the second
17 audit period sales reports for Yogurt Time and to use
18 those sales reports to implement against the first audit
19 period.

20 But before I get further into that, I'd like to
21 introduce Reza Kazemini and have him speak on a few
22 issues. And then we'll delve into the second audit period
23 in more depth and detail.

24 ///

25 ///

1 ///
2

3 MR. R. KAZEMINI,
4 having been called as a witness on behalf of the Appellant
5 and previously sworn by the Administrative Law Judge, was
6 examined and testified as follows:
7

8 DIRECT EXAMINATION

9 BY MR. A. KAZEMINI:

10 Q Mr. Kazemini, what is your role with Yogurt Time,
11 LLC?

12 A I'm the manager. I take care of all the
13 day-to-day activities: Hiring, firing, training, product
14 management, basically everything that goes into running
15 the store.

16 Q Pardon me. And do you handle the day-to-day
17 bookkeeping as well?

18 A Yes, I do.

19 Q And prior to the Department initiating an audit
20 in 2011, how did Yogurt Time ring up its customers?

21 A Real simple system. I mean, I'm sure everyone
22 here has been to a self-serve frozen yogurt shop. You
23 make your own yogurt, make your way to the counter,
24 there's a scale there. Everything in the store is by
25 weight. They would just hit a button that would process
 the weight to the dollar per pound, and that would be your

1 total.

2 Q And after the Department issued their
3 determination that Yogurt Time was not accurately
4 reporting sales tax in 2012, how did Yogurt Time's
5 employees ring up its customers? How was -- how did the
6 transaction recording change?

7 A We ran a -- we had to modify the POS system to be
8 calculating two different items. One item was a "for
9 here" item, and one item was -- we would ask the customer
10 if it was "for here" or "to go" -- and there was two
11 separate buttons for that.

12 The "for here" item would calculate sales tax
13 onto the item. So we had to do a little retraining of
14 what -- of the staff and the stores to make sure they were
15 addressing the customers properly -- asking them if it was
16 going to be "for here" or "to go" -- asking if they needed
17 spoons or lids as they were on their way out.

18 Q And a customer would respond "for here" -- that
19 was Yogurt Time's way of understanding that that food was
20 going to be consumed on their premises; is that correct?

21 A Yeah. That's correct.

22 Q And so, when a customer would answer "to go,"
23 that's Yogurt Time's way of understanding that the food
24 product was to be eaten off premises; is that correct?

25 A Correct.

1 Q So was -- was it ever a -- did it ever become
2 apparent where customers would start saying, "to go," but
3 then take their food and sit outside and eat at -- eat at
4 the tables provided?

5 A No. It was not really a major issue. It was
6 pretty clear cut. Well, you know, it was -- it was pretty
7 simple. There wasn't -- there wasn't a lot to it.

8 So it was either "for here," or "to go." And
9 then, generally, the customers that were getting it "to
10 go" would get lids, take it in their cars, and take it
11 home; so --

12 Q Perfect. And then -- so if -- if a customer, for
13 example, at the Healdsburg location -- if the customer
14 were to order if -- to state "to go," and then to go down
15 the shopping center and sit at a Starbucks table -- would
16 that be considered taxable sales in Yogurt Time's mind?

17 A I can't imagine why that would be my issue at
18 that point.

19 Are -- are -- we've asked if it was "for here" or
20 "to go." They said, "to go"; decide to leave, what I
21 would consider, Yogurt Time's premises; and then decide to
22 eat somewhere else. I can't imagine how that would be on
23 us for a dine-in.

24 Q So would a -- would -- would a Yogurt Time
25 employee be able to finalize a transaction -- meaning

1 accept payment from a customer -- prior to answering the
2 "for here or to go" answer [sic]?

3 A No, you can't. To initiate the transaction, they
4 had to ask, "for here or to go?" to weigh in the
5 transaction in the proper category.

6 Q Okay. So in order for a customer to be able to
7 get their yogurt and make payment for it, they had to --
8 they -- it had to be answered -- asked -- asked and
9 answered. And it had to be fully understood whether that
10 product was for here or to go -- deciding whether that
11 item would be taxed or not; is that correct?

12 A That is correct.

13 Q Okay. So when -- when was -- when was the POS
14 system updated to make these requirements?

15 A After the audit was being done and we got a
16 notification that the processes that Yogurt Time was doing
17 was not satisfactory to the State Department or Board of
18 Equalization, we got together; and we decided that we
19 should update our system until this whole thing got sorted
20 out.

21 And that was 11 years ago, now. And we're still
22 sorting it out; so --

23 Q And so at that time -- starting at that time --
24 that's when Yogurt Time started collecting and charging
25 sales tax amongst its customers?

1 A That's correct, yes.

2 Q And every single penny that Yogurt Time collected
3 in sales tax from its customers, it paid to the
4 Department; is that correct?

5 A Absolutely.

6 Q So essentially, once you made these changes, the
7 POS system made it impossible for a transaction to
8 be ring -- ringed up incorrectly per the Department's
9 standards.

10 Is that fair to say?

11 A That's correct. The computer system calculates
12 everything, puts everything in categories -- for here or
13 to go, total sales, dine-in, take out -- everything's
14 broken down. Everything can be seen remotely from the
15 office for -- for when I'm doing sales tax reporting to
16 input everything. It's to the penny.

17 Q So from the time that the POS system was upgraded
18 in 2012 to today, June 21, 2022, has there been any
19 changes in the POS system and the transaction process
20 between Yogurt Time employees and its customers?

21 A No. Just continued training on -- on all the new
22 employees on exactly what they got to do. And the
23 reporting's pulled quarterly for submittal to the Board
24 of -- or CDTFA, now.

25 Q So for the last ten years, the transactions have

1 all been the same?

2 A Correct.

3 Q Okay. Let's talk about the auditor, Mr. Yokel,
4 for a bit. Did Mr. Yokel ask to review Yogurt Time's
5 daily sales reports prior to choosing an observation date?

6 A No, he didn't.

7 Q Did Mr. Yokel ask you what day or days would be
8 most appropriate to conduct an observation date?

9 A He didn't give me an option to make a choice.

10 Q Did you request Mr. Yokel to -- excuse me -- to
11 conduct the observation test -- to not conduct the
12 observation test during the summer when it's Yogurt --
13 Yogurt Time's busiest time of the year?

14 A I asked him if we could move it to a more
15 reasonable time.

16 Q And what was his response to that request?

17 A He was adamant about getting this done as soon as
18 possible. He seemed like he was on a time crunch to get
19 this done or something.

20 Q So it's fair to say Yogurt Time had no say when
21 collect -- when selecting the date of the observation
22 test.

23 A We had no choice.

24 Q Is any of the four business locations identified
25 in the first audit period substantially different than any

1 other?

2 A No. And to clarify, as you said earlier,
3 regarding the square footages, the front -- the front --
4 the dining rooms of the stores are all the same size.
5 Even the added space to the location we have now was just
6 for storage space. It has nothing to do with seating or
7 anything like that for the front.

8 They're all set up exactly the same. So one
9 would be completely -- we -- the models just continued on
10 going forward. They're all -- they're all the same.

11 Q So one -- one wouldn't be bigger than the other,
12 substantially?

13 A Not at all.

14 Q And like you just mentioned, they all have the
15 same amount of tables and chairs; correct?

16 A Correct.

17 Q And they all had the same amount of frozen yogurt
18 or sorbet machines; is that correct?

19 A They're all the same.

20 Q And -- and they all had the same toppings;
21 correct?

22 A Correct.

23 Q So all four of the locations are nearly
24 identical. And you did this intentionally; isn't that
25 correct?

1 A That's correct. That's the business model.

2 Q Okay. So is there any reason why the Department
3 would ignore the Healdsburg observation test and only
4 implement the Farmers Lane observation test using the
5 Summer Field and Mark West location for the first audit
6 period?

7 A It didn't make sense. It doesn't make sense,
8 now. And there wasn't really an answer -- a substantial
9 answer when we asked the question before.

10 Q So since the implementation -- or since the
11 upgrade of the POS system in 2012, are all of Yogurt
12 Time's transactions compliant with the sales and use tax
13 requirements?

14 A Yes, they are.

15 Q Did Yogurt Time charge sales tax to its customers
16 prior to the implemented -- prior to the upgrading of the
17 POS system in 2012?

18 A No. No sales tax was collected by any customers.

19 Q Okay. Thank you.

20 A Thank you.

21 MR. A. KAZEMINI: So the main issue with the second
22 audit period now comes -- is that originally the
23 Department would review the sales reports for the second
24 audit period and only determined the last three quarters
25 of the second audit period were reasonable.

1 They averaged out the last three quarters of
2 those three periods and then implemented that rate amongst
3 every single quarter in the first audit and the remaining
4 quarters of the second audit period.

5 Now, this was deemed to be unreasonable. And
6 thankfully, the Board of Equalization finally made that
7 determination. Because, if you look at the reports, the
8 3Q13 -- which the Department deemed was unreasonable --
9 was a sales tax ratio of 22.6 percent, I believe. Let me
10 get the exact number so we're accurate. 22.06 percent.
11 Pardon me.

12 However, they claimed that -- so the taxable rate
13 in 4Q13 was 22.06, which they accepted and deemed
14 reasonable. However, in 3Q13 one year -- or one quarter
15 before, the taxable ratio was 25.68 percent per
16 Appellant's reports that were provided. And they deemed
17 that to be unreasonable.

18 How and why? It made no sense. And if you look
19 at the reports of all of Appellant's sales for the second
20 audit period, they are consistent and have gradual growth
21 that you will see in a normal business. However, the
22 Department utilizes certain marks without justification.

23 They claim only a 10 percent variation would be
24 deemed appropriate in the sales report. So they take the
25 highest percentage, subtract it by ten, and anything below

1 that is deemed unreasonable, which is simply not fair.

2 And especially when they considered that those
3 same quarters were originally unreasonable for the second
4 audit, but then deemed them to be reasonable for the
5 first. It doesn't make sense.

6 Secondly, once you take into consideration that
7 the POS system makes it impossible to complete a
8 transaction without asking the required questions in order
9 to satisfy the Department's rules and regulations as to
10 the sales tax, it doesn't make any sense as to why the
11 Department would not accept all of those reportings.

12 In fact, the Department, nowhere -- in any of
13 their arguments, in any of their briefs, or any of the
14 conversations with Appellant or the Board of
15 Equalization -- accepts the fact that the POS system was
16 upgraded for these measures.

17 They don't identify the POS system refrains
18 from -- the Appellant from being able to mischaracterize a
19 transaction. All they state is "over time, the
20 transaction -- the reporting has improved."

21 But yet, even when they stated that, they were
22 still issuing negligence penalties against Appellant for
23 audit periods. And not until years later of fighting with
24 them did they finally realize that those negligence
25 penalties were unjustified. And it was because of a Board

1 Summary Hearing that the State Board of Equalization
2 issued in December of 2016 identifying this.

3 And I'd like to read that for a moment because I
4 think it's important as to how the Board of Equalization
5 Administrative Panel deemed Appellant's actions.

6 The Board Administrative Panel during the revised
7 Board hearing summary that was supposed to take place
8 December 14, 2016, but was deferred by the Department
9 which we'll get into in a little bit. It states next upon
10 further review of the negligence penalty we first observed
11 this is Appellant's first audit.

12 Second, we note that the audit work paper stated
13 that Appellant did not charge sales tax reimbursement on
14 any of its yogurt sales, which strongly suggests Appellant
15 genuinely misunderstood the law regarding the taxability
16 of his yogurt sales.

17 And there is no evidence to establish that
18 Appellant could not have had a good faith, reasonable
19 belief that it was substantially compliant with its
20 reporting obligations. We have recommended the deletion
21 of the negligence penalty.

22 This was in December of 2016 -- okay? -- five
23 years after the notice of determination. Five years after
24 the Department issued a negligence penalty -- that's when
25 the Department finally realized the negligence penalty was

1 unreasonable.

2 And when you consider all the facts, you consider
3 the practice changes that the Department -- the Appellant
4 instituted during this -- to correct the mistakes the
5 Department presented to them -- is unreasonable. For
6 years and years and years -- that Appellant has to
7 continue fighting negligence penalties and continue
8 fighting arguments that are unsubstantiated by the
9 Department.

10 The Department relied for years that only three
11 quarters of the second audit period were reasonable for
12 the second audit period, but that eight quarters of the
13 second audit period were reasonable for the first audit
14 period. For years they relied on that argument. And not
15 until countless, countless arguments by Appellant did they
16 finally change that position. And that's because the
17 Board of Equalization recommended for them to change that
18 position.

19 So now let's talk about general errors that took
20 place in both audit periods. So the Department didn't
21 comply with the Audit Manual when conducting its audits.
22 The California Sales and Use Tax regulation 1698.5 sets
23 forth comprehensive procedures for Sales and Use Tax
24 Audits and have been approved by the California
25 administrative -- excuse me -- California Office of

1 Administrative Law.

2 According to these regulations, they were
3 necessary to establish taxpayers and staff
4 responsibilities and duties during the audit process in
5 order to ensure that staff completes audit -- audits in a
6 timely and efficient manner to help taxpayers better
7 understand and avoid confusion of the audit process.

8 So, first, audit one was held in abeyance in
9 violation of Sales and Tax Regulation 1698.5 Subsection
10 (c)(4), which states, "A Board will not hold in abeyance
11 the start of an audit pending the conclusion of an audit
12 prior pendings [sic] or pending completion of appeal of a
13 prior audit currently in the Board's appeal process. In
14 cases where the prior audit is under appeal and the audit
15 for the subsequent periods is not held in abeyance, the
16 Board will begin the current audit by examining errors
17 that are not effected by the outcome."

18 The Board -- the Department did not hold audit
19 period two in abeyance, but they did hold audit period one
20 in abeyance. And it's undisputable.

21 The first audit period, we received a Notice of
22 Determination in 2011, or -- excuse me -- 2012 was the
23 Notice of Determination. That same year, we asked for
24 oral hearing. And oral hearing was issued April 29, 2015,
25 which was later postponed by the Department because they

1 determined they needed more time to review.

2 It was then moved to December 14, 2016. Which,
3 six days prior to the hearing date, the Department
4 postponed because they claimed they needed to further
5 review the ratio of taxable sales to nontaxable sales.

6 Now, the Department requested for that deferral
7 end of -- on December 8, 2016. From December 8, 2016, to
8 now, the Department has not changed its position on the
9 first audit period. They have not changed anything of
10 their determination for the first audit period.

11 Everything that they stated in their November 14, 2016,
12 opening brief for that December 2016 Board hearing remains
13 true today.

14 So when they postponed a hearing in December 6,
15 2016, for them to review more information to come to
16 further conclusions and then take no additional
17 measures -- they didn't issue any supplemental Notice of
18 Determination. They didn't issue any additional decision
19 or recommendation. They didn't present a new re-audit of
20 documents for the first audit period.

21 The first audit period, nothing has changed since
22 December of 2016 -- in fact, since January 28, 2016. And
23 that was when Mr. Saxton last issued his supplemental
24 decision recommendation. Since that day, nothing has
25 changed.

1 And no -- at no point did Appellant request that
2 the first audit period be on hold. At no point did the
3 audit -- Appellant request that the first audit period be
4 in abeyance to allow the second audit period to
5 essentially wind its way through the process to catch up.

6 It seems all of this is because the Department
7 didn't want to have two oral hearings; they only wanted to
8 have one oral hearing. So instead of having an oral
9 hearing in 2015 or 2016, it's now 2022. And we're doing
10 this 11 years later.

11 Secondly, Sales and Tax Regulation 1698.5
12 Subsection (c)(7) states an audit plan is required on all
13 audits. These are requirements. These aren't suggestions
14 or recommendations. These are requirements.

15 "An audit plan is required on all audits. The
16 audit plan shall be discussed, with a copy provided to the
17 taxpayer, at the opening conference, or when it's
18 necessary for the auditor to first review the taxpayer
19 records, within 30 days of the opening conference. The
20 audit plan should be signed by the auditor and either the
21 taxpayer or the taxpayer's representative to show
22 commitment by both parties that audit will be conducted as
23 described in the audit plan to allow for a timely
24 completion of the audit. The audit plan is considered a
25 guideline for conducting the audit and may be amended

1 throughout the audit process as warranted. If the
2 original audit plan is amended, the auditor shall provide
3 the taxpayer with a copy of the amended plan."

4 There is no audit plan for the second audit
5 period. None. And for the first audit period, there is
6 an audit plan. That audit plan was executed by Mr. Scott
7 Yokel on August 26, 2011. And the first time Appellant
8 received that audit plan was when the Department provided
9 the -- a submission of files to the Office of Tax Appeals
10 on February 21, 2019.

11 Prior to February 21, 2019, the Department did
12 not provide an audit plan to the taxpayer, did not review
13 the audit plan with the taxpayer, did not explain the
14 process and procedures of the audit plan to the taxpayers,
15 nor did they ask the taxpayer to sign it, nor did the
16 auditor sign it. So now the auditor -- there is an audit
17 plan, but they didn't provide it. They didn't sign it.
18 They didn't ask the taxpayer to review or to sign it.

19 And, again, these are requirements. These aren't
20 recommendations or, you know, soft guidelines that the
21 Department must follow. These are requirements.

22 Again, Section -- Sales and Tax Regulation 1698.5
23 Subsection (c) Subsection (11) states that the Department
24 shall be -- shall invite taxpayers and encourage them to
25 attend exit conferences. And whether or not the taxpayers

1 authorize a party to represent them, during an exit
2 conference, the items discussed include but are not
3 limited to: an explanation of the audit findings, the
4 audit schedules, the review process, and how to prepare a
5 liability, and the Board's appeal process.

6 Appellant was never invited to an exit conference
7 for either audit period -- for either one. The Department
8 did not discuss in person their findings, did not discuss
9 schedules, did not discuss the review process -- none of
10 this took place -- okay?

11 Sales and Tax Regulation 1698.5(c) provides 11
12 rules and procedures the Department must follow in
13 conducting an audit. Three of those rules were (1), (2),
14 and (3) -- were not applicable in Appellant's cases. They
15 had to do with other matters.

16 So there was eight rules within the guideline --
17 or this rule -- excuse me -- that the audit -- the
18 Department must comply with while conducting an audit.
19 Three of them they did not. So three of the eight rules
20 in -- that they were -- procedures they were to follow
21 they did not comply with.

22 Oops. Pardon me.

23 So now, I'd like to discuss Appellant's request
24 for relief of interest and the reasons why -- for that
25 relief.

1 Again, as just mentioned, the first audit period
2 was held in abeyance by the Department. There was no
3 justification for it. Again, since January 28, 2016,
4 nothing has changed for the first audit period. There
5 hasn't been any changes in the Department's arguments and
6 the Department's positions and the Department's claim for
7 disallowed exempt food sales.

8 To further illustrate this delay, I'm going to go
9 through quickly a list of dates to kind of illustrate to
10 the panel how we've gotten to this point.

11 So on July 23, 2012, the Department issued a
12 Notice of Determination on the first audit period. On
13 July 31, 2012, Appellant files a timely petition and at
14 this time requested an oral hearing. On December 19,
15 2013, Appellant attends a conference with Board of
16 Equalization employee, Ms. Emily Vena, at the Department
17 Santa Rosa District Office.

18 On July 11, 2014, Appellant filed a timely
19 request of consideration and, again, requested an oral
20 hearing. On August 21, 2014, the Board scheduled a
21 hearing -- and when I say Board -- excuse me -- Board of
22 Equalization scheduled a hearing for April 29, 2015.

23 On March -- excuse me -- on February 17, 2015,
24 Appellant submits a timely opening brief for the April 29,
25 2015, hearing date. On March 10, 2015, Appellant submits

1 as time -- oh, excuse me -- pardon me.

2 On February 17, 2015, Appellant submits a timely
3 response to the notice of board hearing indicating
4 Appellant will be present in person. On March 10, 2015,
5 Appellant submits a timely 18-page opening brief for this
6 hearing date.

7 On March 23, 2015, Appellant receives a letter
8 from Ms. Mary Cichetti-Brennan -- who, at the time, worked
9 at the Board of Equalization, but now works for the Office
10 of Tax Appeals -- indicating that the Board hearing had
11 been postponed. At this time, no explanation was provided
12 as for the postponement.

13 On April 7, 2015, after inquiry, Appellant
14 receives a letter from Ms. Mary Cichetti-Brennan
15 indicating Appellant's board hearing was postponed to
16 allow Departments to review transportation charges.
17 Again, at this time, the Department still believed that
18 the Use Tax penalty against Appellant was reasonable.

19 Appellant requested additional information and
20 explanation; but none was provided. And Appellant was
21 informed that interest would continue to accrue even
22 though it was the Department that requested the deferral
23 and postponements.

24 October 5, 2016, a board hearing was scheduled
25 for December 14, 2016. Appellant submits a timely notice

1 of Board hearing indicating Appellant will be in
2 attendance in person.

3 On October 26 of 2016, Appellant submits a timely
4 22-page opening brief for that hearing. Then on
5 November 14, 2016, the Department submits an opening brief
6 for that hearing as well.

7 On December 8, 2016, eight days or -- excuse
8 me -- six days prior to our hearing date, Appellant
9 received an email from Ms. Mary Cichetti-Brennan
10 indicating in quote, "Business and Taxes and Fee
11 Department has requested that your matter be deferred from
12 the December 14, 2016, oral hearing calendar for further
13 review and to review further figures to establish the
14 ratio on taxable to nontaxable sales."

15 Again, Appellant was informed, due to
16 Department's delay, interest would continue to accrue.
17 From December 8, 2016, until March 30, 2018, when the OTA
18 sent the Appellant a letter indicating this is a new
19 appeal in a new Department, Appellant did not receive a
20 hearing date, nor a supplemental decision recommendation,
21 even though Department claimed they needed further time to
22 review Appellant's sales.

23 The Department postponed the December 2016
24 hearing and then subsequently took no action on the first
25 audit period. And in fact, they continued to send 90-day

1 deferral letters. We received one in December of 2016
2 indicating the hearing was postponed for 90 days. We were
3 to have the hearing in March of 2017.

4 And then in March of 2017, we received another
5 90-day deferral letter. And then in July, we received
6 another 90-day deferral letter.

7 July 3, 2018, again -- excuse me -- on March 30,
8 2018, Appellants received a letter from Office of Tax
9 Appeals indicating that this -- this appeal for both
10 audits have been moved from the State Board of
11 Equalization into the Office of Tax Appeals.

12 On July 3, 2018, Appellant requests an oral
13 hearing with the OTA by responding to the OTA's June 11,
14 2018, letter. On August 30, of 2021 the OTA providing a
15 hearing date September 21, 2021. Appellant informed the
16 OTA that they had scheduling conflict for that month and
17 requested that the hearing be scheduled for the proceeding
18 month.

19 The OTA granted Appellant's request and sent the
20 letter indicating that Appellant's hearing would be
21 scheduled for the November 16/17, 2021, calendar.
22 However, the OTA did not re-schedule Appellant's hearing
23 for that month. Instead, we received a hearing date of
24 today, June 22, 2022.

25 So to summarize, they took five years for the

1 Department to -- to remove an improper assessment of Use
2 Tax penalty on purchase of fixed assets because the
3 Department continued to ignore the simple fact that
4 Appellant purchased fixed assets from a California
5 business in California.

6 It took them five years for them to acknowledge
7 that. It took another -- and it also took five years for
8 the Department to acknowledge that their negligence
9 penalty was unjustified.

10 It took another two years for Appellant to
11 convince the Board of Equalization that the Department did
12 not comply with the Audit Manual and the audit procedures
13 when conducting the observation tests when they
14 recommended a new observation test to be performed in a
15 re-audit.

16 The audit period one was held in abeyance to
17 allow the second audit period to wind its way through the
18 process. Seemingly, the only reason why is to allow the
19 Department to accrue as much interest as possible against
20 the Appellant. No other justification seems reasonable,
21 as they are the ones that continue to defer this hearing
22 date yet provide no supplemental response.

23 We strongly contend that these delays have been
24 intentional. There doesn't seem to be any justification
25 as to "they need more time to review documents." As

1 evidence by their briefs to the OTA, they have provided no
2 new information to the OTA. All the same briefs that they
3 provided the OTA are identical to the briefs that they
4 provided to the State Board of Equalization prior to this
5 matter being moved here.

6 So now, I'd like to move our attention to -- as
7 to why we believe this appeal process has been unfair to
8 Appellant and why it has greatly prejudiced Appellant's
9 ability.

10 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. I'm
11 going to just ask you to kind of do -- do your final
12 summary because you're closing in on an hour.

13 MR. A. KAZEMINI: Will I have time for a closing?

14 ADMINISTRATIVE LAW JUDGE STANLEY: Yes.

15 MR. A. KAZEMINI: Okay. So -- okay. Thank you.
16 Okay. I'll -- I'll try to be as quick as possible.

17 The OTA provided the Department different
18 policies and procedures to follow than the Appellant in
19 this appeal process. The OTA allowed the Department to
20 create their own timelines as to when to provide
21 information yet required the Appellant to be on strict
22 guidelines and timeframes when providing information to
23 the OTA.

24 On March 30, 2018, Appellant receives a letter
25 from the OTA indicating strict guidelines in which the

1 Appellant must provide their opening brief within 30 days.
2 Now, this opening brief must contain every single document
3 that Appellant has submitted either to the Department or
4 to the State Board of Equalization in the last seven
5 years; otherwise, that document would not be considered.

6 When Appellant first responded to the OTA's
7 request, the Appellant informed them that they would
8 incorporate in the letter all documents that was presented
9 to the State Board of Equalization and the Department from
10 2011 to 2018.

11 That request was denied by the OTA. They stated
12 that you must submit every single document. If you do
13 not, that document would not be considered. So then the
14 Appellant had to submit hundreds and hundreds -- almost
15 thousands of pages -- to the OTA again. Because, even
16 though the same people that are working for the OTA, now,
17 were working for the State Board of Equalization then.
18 And the same people that Appellant was providing those
19 communications to, now work for the OTA.

20 So Appellant was providing communications to
21 Ms. Mary Cichetti-Brennan of the State for Board of
22 Equalization and Ms. Claudia Lopez of the State Board of
23 Equalization. Once this appeal moved to the Office of Tax
24 Appeals, the Office of Tax Appeals indicated all those
25 communications were no longer within the record. Yet they

1 asked all new communications to be given to Ms. Mary
2 Cichetti-Brennan of the OTA and Ms. Claudia Lopez of the
3 OTA.

4 So all the communications that were provided to
5 those two individuals years before were no longer within
6 purview but were -- needed to be resubmitted to the same
7 two people seven years later in order to be within record.

8 It doesn't -- it's not fair. It's just not fair.

9 In addition, when you consider on May -- on
10 April 28, 2018, Appellant's opening brief was sent to both
11 OTA and the Department. On May 8, 2018 -- and that's
12 because -- let me go back for a second.

13 On the OTA's March 18, 2018, letter it indicates
14 specifically, any communication to the OTA must go to all
15 parties. There's no ex parte communication. So Appellant
16 sends something to -- pardon me -- to the OTA, it must be
17 sent to Department as well.

18 On May 8, 2018, Ms. Cichetti-Brennan acknowledged
19 a timely submission of Appellant's opening brief and
20 provided the Department 30 days until June 7, 2018, to
21 submit a response brief. On June 6, 2018, the Department
22 did submit a response brief with several enclosures.

23 On July 12, 2018, Appellant received a
24 correspondence from OTA indicating briefing is now
25 complete for this appeal. On the -- therefore, it came to

1 a complete surprise to Appellant when, in January of 2019,
2 the Department made a request to the OTA without --
3 without incorporating a communication to Appellant -- to
4 submit hundreds and hundreds, almost thousands, of pages
5 in addition to what they had submitted on June 6, 2018.

6 They provide a CD-ROM to the OTA with a request
7 that more information be submitted to the OTA without any
8 communication to Appellant. The OTA communicated that to
9 Appellant. And the OTA notified Appellant of the
10 Department's request and provided a copy of that CD to
11 Appellant, not the Department -- okay?

12 When the Appellant objected to this --
13 indicating, "Why does Appellant only have 30 days and
14 strict guidelines of having to communicate to everyone?
15 Not to communicate ex parte -- but the Department doesn't
16 have the same rules and regulations?"

17 The OTA rejected Appellant's arguments and
18 allowed the OTA to submit this CD of information.

19 Now, it's important to consider that the CD of
20 the documents that the OTA -- excuse me -- the Department
21 submitted had no new information that wasn't in their
22 possession prior to the June 6, 2018, opening brief they
23 submitted.

24 All of the information they submitted were from
25 the file of the appeal and the State Board of Equalization

1 file. Meaning, they had all those informations. But they
2 waited an additional seven months to provide that to the
3 OTA -- to provide that to the Appellant -- which, in turn,
4 delayed, again, an oral hearing for Appellant.

5 Because, I'm sure, once the OTA receives
6 thousands of pages of new file information, that has to be
7 reviewed. That takes time. These delays and procedures
8 the Department follows that are not the same as Appellant.

9 Appellant requested -- prior to this hearing
10 date -- requested a brief phone call with Susan Seyller
11 just to outline some clarity as to how the Board
12 proceedings would take place. No issues were going to be
13 asked as to the actual issues of this matter.

14 Yet that brief phone call request was denied
15 because it was told to us that it would be inappropriate
16 to have that conversation without the Department's
17 presence. Yet the Department's allowed to make requests
18 to the OTA, without Appellant's knowledge, until after the
19 OTA accepts information.

20 Lastly -- and I know I'm short on time; so I'll
21 be quick.

22 The burden of proof on these matters is
23 completely unconstitutional. The Department's burden of
24 proof as they indicate by -- by -- where is it? -- by
25 referencing Riley B's Inc. v. State Board of Equalization,

1 claimed all they needed to do is to make a reasonable
2 allegation against Appellant.

3 If -- and who makes that determination? Of
4 course, the Department makes that determination. So once
5 the Department made the determination that their arguments
6 against the Appellant are reasonable for the first audit
7 and second audit period, the burden shifts to Appellant to
8 have to prove by preponderance of evidence -- a much
9 stricter burden -- that what they're saying is not true.

10 And it's taken 11 years, but in those 11 years,
11 Appellant has been successful. Successful enough where
12 they've reduced audit period one by 52 percent, removing
13 the negligence penalty a hundred percent, by reducing the
14 second audit period by 18 percent, by removing the
15 negligence penalty a hundred percent.

16 In fact, they're -- the Department's standards of
17 reasonableness is, frankly, outrageous -- okay? -- when
18 you consider that for five years -- for five years -- the
19 Department's position was that Appellant was -- tried to
20 deceive by not paying Use Tax on fixed assets purchased.

21 And now, quickly, I'm going to read to you what
22 Corin Saxton, Tax Counsel for the State Board of
23 Equalization, deemed in reference to the fixed assets:

24 "Superior Quality is a distributor of Electro
25 Freeze machinery. And we note that the D&R and SD&R both

1 fail to mention the fact that Superior Quality is a
2 California "corporated" located -- excuse me -- California
3 corporation located in Corona California. And that is
4 currently registered with the Board. And that Superior
5 Quality recorded approximately 200,000 to 550,000 gross
6 sales per quarter to the Board during the audit period.

7 This is significant given that Appellant
8 submitted credit card statements indicating payments of
9 \$124,289 to Electro Freeze district Corona, as well as a
10 copy of Mr. Levine's business card which indicates that he
11 was a general manager of Superior Quality.

12 The foregoing suggests that the title to the
13 fixed assets at issue may have passed in California with
14 participation transaction by local place of business,
15 Superior Quality, and that were -- if such were the case,
16 then transactions at issue would constitute sales
17 transactions and not use transactions."

18 This is what Appellant tried to tell the
19 Department for five years. Yet the Department would not
20 believe credit card receipts, business cards, and other
21 documents that Appellant was buying fixed assets from a
22 California business in the state of California.

23 Those transactions are subject to sales tax, not
24 use tax.

25 And I know I'm short on time, so I'll end there.

1 Thank you.

2 ADMINISTRATIVE LAW JUDGE STANLEY: All right.

3 Thank you, Mr. Kazemini.

4 Mr. Sharma, does -- does the Department have any
5 questions for any of the witnesses?

6 MR. SHARMA: The Department doesn't have any
7 questions for any of the witnesses. Thank you.

8 ADMINISTRATIVE LAW JUDGE STANLEY: Judge Lambert,
9 do you have any questions?

10 ADMINISTRATIVE LAW JUDGE LAMBERT: I just had
11 maybe one question.

12 I think -- whoa -- it was stated that the sorbet
13 has no fruit juice. But then, in the brief, it was stated
14 it has, like, a tiny amount. So I just want to confirm
15 that there's some flavoring that maybe uses fruit juice --
16 but maybe it's a small amount -- in the sorbet.

17 MR. A. KAZEMINI: So -- thank you for that question.

18 So that's artificial flavoring. So that's
19 why it's not a fruit, as defined by the Revenue Tax --
20 Taxation Code. It specifically states "fruit juices and
21 vegetable juices," meaning fruit juices and vegetable
22 juices not artificial flavoring. And the sorbets within
23 Appellant's business -- they are artificial flavoring.

24 I mean, you may be able to speak better to it.
25 But it's artificial flavoring mixed with, essentially,

1 frozen ice, and -- but he'll be able to speak better to
2 it.

3 MR. R. KAZEMINI: Yeah. There's no fruit juices in
4 it. In fact, it's a -- all the sorbets and non-dairies --
5 they're all powdered mixes and aren't even required to be
6 refrigerated.

7 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thanks.
8 That's it.

9 ADMINISTRATIVE LAW JUDGE STANLEY: Judge Long, do
10 you have any questions?

11 ADMINISTRATIVE LAW JUDGE LONG: Yes. With
12 respect to the 2009 conversation, regarding the estimated
13 taxable sales of 3 to 5 percent, what was the basis for --
14 for that 3 to 5 percent?

15 MR. H. KAZEMINI: It was no basis. He made a
16 decision that that's the 3 to 5 percents. I had no idea
17 whatsoever. That was all the State Board of
18 Equalization's employee creating that 3 or 5 percent. I
19 didn't have nothing to say regarding that.

20 ADMINISTRATIVE LAW JUDGE LONG: And with respect
21 to the advice in 2008 that you didn't need a seller's
22 permit, that was oral not written; is that correct?

23 MR. H. KAZEMINI: That's correct, yes.

24 ADMINISTRATIVE LAW JUDGE LONG: And then, with
25 respect to the 3 to 5 percent did he provide that in -- in

1 writing or -- or anything?

2 MR. H. KAZEMINI: Well, he did the form with the
3 first sales report that we did for Yogurt Time -- that's
4 out of the State Board of Equalization computer -- State
5 Board of Equalization paper printed out. And I took it
6 out, I came to the office, and pay for it.

7 ADMINISTRATIVE LAW JUDGE LONG: And with respect
8 to the time after that, you continued to report at an
9 estimated amount?

10 MR. H. KAZEMINI: That's correct, Yes.

11 MR. A. KAZEMINI: To clarify -- until the first
12 quarter of 2012.

13 ADMINISTRATIVE LAW JUDGE LONG: Okay. And
14 then -- but that was -- you didn't know why you were
15 reporting that amount?

16 MR. A. KAZEMINI: The -- the 3 to 5 percent?

17 ADMINISTRATIVE LAW JUDGE LONG: Right. I -- I
18 mean, other than a person in an office told you?

19 MR. A. KAZEMINI: So -- right. So, again, in 2008,
20 they were -- Appellant was originally notified that the
21 Department felt he didn't need a seller's permit; so he
22 didn't have his seller's permit in 2008.

23 In 2009, he was contacted saying a seller's
24 permit would be appropriate. So that's when he went into
25 the office and had the conversation. And that's when it

1 was recommended at 3 to 5 percent estimation of gross
2 sales would be appropriate for taxable.

3 Now, Appellant still feels that the sales tax was
4 inappropriate. So we were in the process of appealing the
5 first audit period while this was all happening.

6 ADMINISTRATIVE LAW JUDGE LONG: I'm -- I'm sorry.
7 Wait. I'm -- I'm -- I'm sorry to interrupt, but -- when
8 did this happen then? Because my understanding was that
9 this 3 to 5 percent was told to you in 2009 based on the
10 testimony.

11 MR. A. KAZEMINI: Correct.

12 ADMINISTRATIVE LAW JUDGE LONG: So that would not
13 have been when you were appealing situation?

14 MR. A. KAZEMINI: No, it is. It is, Judge Long,
15 because the first audit -- for the first audit period of
16 2008 to 2011, that audit didn't commence until April of
17 2011. And Notice of Determination for that period didn't
18 be issued until 2012.

19 ADMINISTRATIVE LAW JUDGE LONG: Mm-hmm.

20 MR. A. KAZEMINI: So we have been -- Appellant has
21 been appealing the first audit period from, essentially,
22 middle of 2011 until now. So in 20- -- first quarter of
23 2012, that's when practices changed. Because from April
24 2011 to the first quarter of 2012, that's when the
25 Department in, you know, more strict terms was saying,

1 "No. You've got to perform this."

2 ADMINISTRATIVE LAW JUDGE LONG: Right. But
3 before -- prior to the audit, though, 3 to 5 percent --
4 not sure what, if anything, actually was taxable? Is that
5 my understanding?

6 MR. A. KAZEMINI: Right. So, again, yes. In 2009,
7 the Appellant was unclear as to if frozen yogurt was
8 taxable or not. He was notified, subsequently, in 2009
9 that he should have a seller's permit and was recommended
10 to estimate 3 to 5 percent.

11 Now, Appellant believed that was not appropriate.
12 And for 3 to 5 percent, he made the determination that he
13 was able to pay that to satisfy the Department but, also,
14 didn't want to charge customers because he didn't feel it
15 was appropriate at the time.

16 Now, in -- from -- from the time the Department
17 made it clear to Appellant that you need to ask "to go,"
18 you need to ask "for here," and other procedures -- that's
19 when Appellant changed their POS system to reflect
20 accordingly.

21 And from that time, it -- it would be too costly
22 for Appellant to pay that out of pocket and needed to
23 start charging sales tax amongst the customers.

24 ADMINISTRATIVE LAW JUDGE LONG: Okay. And then
25 moving on to the second observation test -- the one that

1 didn't take place in June -- that would have been because
2 it was the busiest time of year?

3 MR. A. KAZEMINI: It wouldn't -- the second
4 observation place -- it did take place on June 13, 2011,
5 at a second location.

6 ADMINISTRATIVE LAW JUDGE LONG: No. I -- I mean
7 for the re-audit.

8 MR. A. KAZEMINI: Oh, yeah.

9 ADMINISTRATIVE LAW JUDGE LONG: Because that's
10 the busiest time of year -- would that be -- your
11 assertion, then, would be that during the busiest time of
12 year, you'd have greater taxable sales because more people
13 would stay?

14 MR. A. KAZEMINI: Well, yeah. I mean, simply put,
15 yes.

16 I mean, when the weather's nice out and, especially
17 in California, we have great weather in the summer. And
18 people can get their yogurt, they'll sit outside --
19 sometimes they -- they won't even sit at a table. They'll
20 sit on a curb or something that can resemble somewhere
21 where they can sit.

22 ADMINISTRATIVE LAW JUDGE LONG: Okay.

23 MR. A. KAZEMINI: And they'll -- they'll, you know,
24 after school in June, you get a lot of kids. And those
25 kids they -- they hang out. And they eat.

1 ADMINISTRATIVE LAW JUDGE LONG: Okay. And then,
2 with respect to the second audit period, as to the
3 quarters that were initially react -- rejected with
4 respect to the 10 percent variance -- you were saying that
5 in 3Q14, one of the sales reports was rejected because it
6 was 25 percent which was greater than ten percent variance
7 and less than the -- the following quarter?

8 MR. A. KAZEMINI: No. So that 10 percent variance
9 changed. That -- I -- originally, there was no 10 percent
10 variance that was accepted.

11 Originally, the Department deemed that only the
12 last three quarters were accepted and reasonable. And
13 every quarter before that, regardless of a variance, was
14 unreasonable and not accepted.

15 ADMINISTRATIVE LAW JUDGE LONG: Mm-hmm.

16 MR. A. KAZEMINI: So that variance changed after the
17 Board of Equalization recognized the contradiction and the
18 Department's determination that certain audit periods were
19 deemed reasonable for audit period one, but not reasonable
20 for audit period two.

21 ADMINISTRATIVE LAW JUDGE LONG: Okay. Thank you.
22 I don't have any more questions.

23 ADMINISTRATIVE LAW JUDGE STANLEY: I have a -- I
24 have just a couple of questions. But first, I wanted to
25 clarify something because you made a point of saying that

1 you had to resubmit documents to the Office of Tax Appeals
2 that had already been submitted to the Department.

3 As I said in the beginning, we're an independent
4 agency; so we don't have any connectivity with the
5 Department outside of what's presented in our appeals.
6 Which is why employees that used to work for the
7 Department, but now work for the Office of Tax Appeals,
8 didn't have any way to access the information that was
9 submitted previously.

10 MR. A. KAZEMINI: Can I -- can I make a comment,
11 please?

12 So it wasn't employees from the Department. It
13 was employees from the State Board of Equalization. And
14 the appeal was removed from the State Board of
15 Equalization to Office of Tax Appeals. And the Office of
16 Tax Appeals notified Appellant that the communications to
17 those individuals, as part of the BOE, needed to be
18 re-submitted --

19 ADMINISTRATIVE LAW JUDGE STANLEY: Right.

20 MR. A. KAZEMINI: -- to the same people, but now
21 under a new title.

22 It wasn't employees from the Department moved to
23 the OTA. I understand what you're saying in that regard.

24 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. I just
25 wanted to make it clear that we had, you know -- unless

1 the parties submit things to us, we have no way of
2 accessing it; so --

3 MR. A. KAZEMINI: I -- and I understand that.

4 ADMINISTRATIVE LAW JUDGE STANLEY: And I -- I
5 think I had part of my question answered by Mr. Long's
6 questions.

7 But for the -- for the second audit period, are
8 you proposing a different percentage than the Department
9 used?

10 MR. A. KAZEMINI: Well, yeah. The -- the -- we're
11 proposing that the reports be deemed accurate. Because
12 the POS system makes it impossible for the Appellant to
13 incorrectly record taxable sales in those transactions.

14 Once the POS system was retrofitted to comply
15 with the Department standards, there's no reason not to
16 accept those reports.

17 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. So that
18 would -- you would be proposing using the actual records
19 following the upgrade of the POS system?

20 MR. A. KAZEMINI: Absolutely.

21 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. And for
22 the -- for the interest waiver, you went through a lot of
23 dates. For how much of that are you proposing to get
24 relief from interest?

25 MR. A. KAZEMINI: The entirety.

1 ADMINISTRATIVE LAW JUDGE STANLEY: Not just from
2 January -- what was it January 2016 to January -- --

3 MR. A. KAZEMINI: No.

4 ADMINISTRATIVE LAW JUDGE STANLEY: -- 2018?

5 MR. A. KAZEMINI: No, Judge Stanley.

6 ADMINISTRATIVE LAW JUDGE STANLEY: Nothing
7 happened in between?

8 MR. A. KAZEMINI: No. Because the Appellant
9 strongly feels that the Department has made outrageous
10 accusations and hid behind this burden of proof that all
11 they had to do is deem it to be reasonable in order for
12 Appellant to have to fight tooth and nail in order to get
13 these accusations removed.

14 And slowly but surely -- and it has been very
15 slow -- but slowly but surely, Appellant has been
16 succeeding. And -- but for Appellant fighting it,
17 that the interest would have continued to accrue.

18 Appellant feels the delays and the deferrals and
19 the Department's lack of reasonableness and when
20 considering arguments from the Appellant -- it seemed like
21 whatever the Appellant said to the Department, for years,
22 would just be ignored. And they will only change their
23 mind once the State Board of Equalization said the same
24 things Appellant was saying.

25 And for years, that was the case. And that's why

1 we feel the interest is -- that has been accruing is
2 unjustified.

3 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Thank
4 you.

5 MR. H. KAZEMINI: May I say something? May I add
6 something, please?

7 ADMINISTRATIVE LAW JUDGE STANLEY: Sure.

8 MR. H. KAZEMINI: I've been in business since
9 1978. And if I felt that I'm wrong on this -- this
10 situation that we are in, believe me, Judge. I would have
11 take care of it day one, not let it go for ten years plus
12 cost the attorney fee -- all that cost that I am going
13 through.

14 If I felt that I'm 1 percent wrong, I would have
15 take care of it right on the spot.

16 Thank you.

17 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Thank
18 you.

19 Does that include your presentation?

20 MR. A. KAZEMINI: Minus the conclusion, yes.

21 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

22 What I'd like to do right now, then, is take a
23 15-minute break before we turn it over for the
24 Department's presentation. 15-minute recess.

25 So we'll go off the record. Thank you.

1 MR. A. KAZEMINI: Thank you.

2 (Off the record.)

3 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Let's
4 go back on the record.

5 And it's time, now, for the Department to make
6 their presentation. So you can proceed when you're ready.

7
8 PRESENTATION

9 BY MR. SHARMA:

10 Thank you.

11 Appellant, Yogurt Time, LLC, obtained a seller
12 permit on January 1, 2008. During the audit period,
13 Appellant operated three frozen yogurt shops in Santa Rosa
14 and one shop in Healdsburg.

15 Appellant provided cups, utensils, tables, and
16 chairs to customers for consumption of yogurt items at
17 each of the four locations.

18 The Department performed two audits. First audit
19 from January 1, 2008, to March 31, 2011. And the second
20 audit from July 1, 2011, to June 30, 2014.

21 Appellant provided federal income tax returns for
22 years 2008, 2009, and 2011 to 2013; quarterly sales and
23 other sales reports for both the audit periods; bank
24 statements for January 2010 to June 2010.

25 Appellant did not provide any cash register

1 tapes, sales receipts, sales summary reports segregating
2 taxable and nontaxable sales for the audit period.

3 Reporting method -- Appellant reported total
4 sales from sales summary reports for each location.
5 Appellant did not maintain a separate register key to
6 identify whether sales were to go or consumed at business
7 location until 2012. Appellant estimated taxable sales
8 during the first audit period and the earlier part of
9 second audit.

10 For the first audit, Appellant reported total
11 sales of approximately \$2.4 million, claimed full
12 exemption of little more than \$2.3 million, resulting in
13 reported taxable sales of little more than \$79,000.
14 That's Exhibit A, page 12.

15 For the second audit, Appellant reported total
16 sales of approximately \$3.6 million, claimed food
17 exemption of around \$3 million, resulting in taxable sales
18 of little more than \$657,000. Exhibit H, page 285.

19 A review of reported amount shows that Appellant
20 did not keep detailed sales record to segregate taxable
21 sales from nontaxable sales. Based on the available
22 information, Appellant started using separate register key
23 for taxable and nontaxable sales in 2012.

24 Further review of report amount showed that
25 Appellant estimated and reported taxable sales of 5

1 percent for 2008, 3 percent for 2009 to 2011. Exhibit A,
2 page 12. Exhibit H, page 285.

3 Since Appellant did not provide any detailed
4 sales records to support the reported amounts, the
5 Department conducted an observation test to verify the
6 accuracy of reported amount.

7 Appellant agreed to only two observation tests
8 without any access to the cash register during the
9 observation tests. The Department performed two tests
10 observing customers while sitting in the car in the
11 parking lot.

12 The first test was conducted on Thursday, June 2,
13 2011, from 11:30 a.m. to 9:30 p.m. at Vine Street location
14 in Healdsburg. The second test was conducted on Monday,
15 June 13, 2011, from 11:00 a.m. to 11:00 p.m. at Farmer
16 Lane location in Santa Rosa.

17 For June 2nd test, the Department noted total
18 sales of \$578 for 107 customers. Out of 107 customers, 12
19 customers consumed the yogurt items at the business
20 location for taxable sales of \$70 resulting in taxable
21 sales ratio of approximately 12 percent. Exhibit A, page
22 22 to 25.

23 For June 13 test, the Department noted total
24 sales of \$980 for 154 customers. Out of 154 customers, 48
25 customers consumed the yogurt items at the business

1 location for taxable sales of \$348 resulting in taxable
2 sales ratio of approximately 35 percent. Exhibit A, pages
3 28 to 31.

4 During the audit and appeals process, the
5 Department sought Appellant's permission to conduct more
6 than one observation test at each location. That would
7 have included one-day test during the weekend. But
8 Appellant denied the Department's request, claiming
9 statute of limitations had already expired for any
10 observation test for the first audit.

11 Due to Appellant's denial to allow the Department
12 to conduct any additional observation test, the Department
13 used Appellant's quarterly sales summary records from the
14 second audit to determine the taxable sales ratio.

15 For Summer Field road location, the Department
16 accepted reported total sales and taxable sales for first
17 quarter 2013 to second quarter 2014 and used the same to
18 determine taxable sales ratio of 36 percent and audited
19 taxable sales of around \$461,000 for the second audit and
20 \$31,000 for the first audit. Exhibit H, page 299 and
21 Exhibit A, page 36.

22 For Farmer Lane location, the Department accepted
23 total sales and reported taxable sales for second quarter,
24 2012 to second quarter 2014 and used the same to determine
25 taxable sales ratio of 26 percent and audited taxable

1 sales of around \$224,000 for the second audit and \$236,000
2 for the first audit. Exhibit H, page 298 and Exhibit A,
3 page 27.

4 For Mark West Spring Road location, the
5 Department accepted reported total sales and taxable sales
6 for fourth quarter 2013 to second quarter 2014, and used
7 the same to determine taxable sales ratio of 23 percent
8 and audited taxable sales of around \$255,000 for the
9 second audit and \$267,000 for the first audit. Exhibit H,
10 page 296 and Exhibit A, page 27.

11 For Vine Street location, the Department accepted
12 reported total sales and taxable sales for first quarter
13 2012 to November 27, 2013, and used the same to determine
14 taxable sales ratio of 7 percent and audited taxable sales
15 of around \$26,000 for the second audit and \$35,000 for the
16 first audit. Exhibit H, page 294 and Exhibit A, page 21.

17 Above audit procedures resulted in audited
18 taxable sales of approximately \$528,000 for the first
19 audit and little more than \$967- -- 66,000 for the second
20 audit.

21 These amounts were reduced by the amounts
22 Appellant reported, resulting in unreported taxable sales
23 of \$479,000 for the first audit and \$309,000 for the
24 second audit. Exhibit A, page 18 and Exhibit H, page 290.

25 The results of the audit testing are reasonable.

1 Appellant allowed the Department to conduct only two
2 observation tests without any access to the cash register.
3 All three locations in Santa Rosa were similar in business
4 activities and customer traffic.

5 If the Department uses taxable ratio determined
6 during the observation test of 35 percent for all Santa
7 Rosa locations and 12 percent for Healdsburg location,
8 disallowed claimed exempt sales and unreported taxable
9 sales for the first audit would be approximately \$721,000,
10 which is significantly higher than \$479,000 assessed in
11 the first audit.

12 Similarly, disallowed claimed exempt sales for
13 the second audit would be \$532,000 which is, again, higher
14 than \$309,000 as determined by the audit findings.

15 Department also shows that audit findings for
16 both the audits are reasonable and actually benefit
17 Appellant.

18 Appellant contends that observation tests
19 performed by the Department did not comply with
20 departmental policies and procedures. However, Appellant
21 allowed the Department to conduct only two tests on
22 specific dates in June 2011 but with no access to the cash
23 register.

24 During the audit and appeals procedure,
25 Department sought Appellant's permission to perform

1 several additional observation tests, but Appellant did
2 not allow the Department to perform any additional
3 observation tests.

4 Appellant's contention that the Department
5 improperly projected one observation test to the other
6 locations ignores the audit procedures. Unreported
7 taxable sales and disallowed claimed exempt food sales are
8 not based on any observation test.

9 In fact, audit findings are based on Appellant's
10 own books and records. The Department reviewed and
11 analyzed sales records for each location and developed and
12 audited taxable sales to total sales ratio for each
13 location which was then applied to the reported total
14 sales for the same location to determine disallowed
15 claimed exempt sales and unreported taxable sales.

16 Appellant contends that the Department did not
17 consider all of Appellant's store locations sales reports
18 when making determination.

19 In response, the Department submits that, as
20 explained earlier, it did consider sales records for every
21 location to determine unreported taxable sales and
22 disallowed claimed food sales. And audit findings are
23 based on taxable sales ratio for each location.

24 Appellant contends that the taxability of
25 self-serve frozen yogurt sales is ambiguous and unclear.

1 However, the Department has consistently determined that
2 frozen yogurt qualifies as a food product exempt from
3 sales tax when sold on -- on a to go basis. And the sale
4 of food products are not exempt from sales tax when
5 furnished, prepared, served for consumption at tables,
6 chairs, or counters, or from trays, glasses, dishes, or
7 other tableware at business premises.

8 Appellant contends its -- in its testimony during
9 opening statement, that it visited Santa Rosa location in
10 2009 when a Department employee told Appellant that 3
11 percent to 5 percent estimation of its taxable sales
12 seemed reasonable.

13 But, according to an entry on the Department's
14 automated compliance management system, which is ACMS
15 system dated August 18, 2009, Department's staff informed
16 Appellant that its estimate of 5 percent of its sales --
17 total sales to be taxable seemed very low judging from the
18 number of individuals consuming frozen yogurt on its
19 premises.

20 Department's staff further report -- informed
21 Appellant on the same day that based on the past visits to
22 its stores, Department believed that at least 30 percent
23 of Appellant's self-serve frozen yogurt sales should be
24 taxable. Then, again, on the next day, the Department
25 notified Appellant that 5 percent taxable sales is too

1 low.

2 Appellant contends the statute of limitations for
3 the first audit had expired. In response, the Department
4 submits that a Notice of Determination for both of the
5 audits were timely issued pursuant to Revenue Taxation
6 Code 6481 under properly executed and signed waiver of
7 limitations.

8 Appellant filed a timely petition for
9 re-determination and the Department followed all policies
10 and procedures related to the appeal process.

11 Appellant contends that that it's eligible for
12 relief of interest under Revenue Taxation Code 6593.5.
13 The Department has considered this contention and
14 submitted its response to the Office of Tax Appeals on
15 January 8, 2020, agreeing to relief of interest of \$2,230
16 for the period April 1, 2017, to December 31, 2017,
17 subject to Appellant's signing of a CDTFA 735 form.

18 Appellant contends that it's eligible for relief
19 of tax and interest under Revenue Taxation Code 6596,
20 claiming that Appellant was provided wrong advice as to
21 the taxability of yogurt sales. However, Appellant does
22 not meet the criteria of Revenue Taxation Code 6596, as
23 any advice Appellant allegedly relied upon was not in
24 writing.

25 Therefore, based on the evidence presented, the

1 Department has fully explained the basis for deficiency
2 and proved that the determinations were reasonable based
3 on available books and records.

4 Since Appellant did not provide any acceptable
5 access to the documents to refute the other findings, the
6 Department requests that Appellant's appeals be denied.

7 This concludes my presentation, and I'm available
8 to answer any question you may have.

9 Thank you.

10 ADMINISTRATIVE LAW JUDGE STANLEY: Thank you.

11 And just for the Appellant's information, and for
12 the public, I did not swear in any representatives from
13 the Department because they did not testify. They were
14 only arguing.

15 Judge Lambert, do you have any questions?

16 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah.

17 I was wondering, in terms of the arguments
18 Appellant's making about the sorbet and whether it has
19 fruit or not -- if it's a cold food and it's served --
20 served at the restaurant and not to go, it -- it seems
21 like the regulations say it's taxable, regardless, maybe,
22 of whether it has fruit or not? Because it's a cold food?

23 MR. SHARMA: That's correct. Anything consumed
24 on the business premises is taxable, whether it's a food
25 item or not.

1 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank
2 you.

3 MR. SHARMA: Thank you.

4 ADMINISTRATIVE LAW JUDGE STANLEY: Judge Long, do
5 you have any questions?

6 ADMINISTRATIVE LAW JUDGE LONG: Yes.

7 With regard to the interest relief, I understand
8 that CDTFA is -- has agreed to relieve the interest
9 beginning April 1, 2017. What -- what was the delay --
10 not -- sorry -- let me reword that.

11 What was the reason for the -- the -- what was
12 going on between the December postponement and April 1,
13 2017, exactly?

14 MR. SHARMA: I'm sorry. December of what year?

15 ADMINISTRATIVE LAW JUDGE LONG: December 2016
16 is my understanding -- was the request from the Department
17 to postpone the BOE hearing; right? So there's a
18 four-month period there between that postponement and the
19 agreed interest relief.

20 And so I was just curious what was going on
21 during that period.

22 MR. SHARMA: Based on the Department's review, I
23 think, which we submitted a letter dated January 8, 2020.
24 The date line shows over here both of these decision --
25 December 15, 2016 -- oral hearing was scheduled.

1 And then on January 12, 2017, they deferred the
2 hearing for further review because there was some
3 additional information which the Department wanted to
4 consider because of the two audits going at the same time.
5 That's why they wanted to defer it for 90 days.

6 Generally, that's what the Board's standard
7 procedure is. Whenever they find certain things before
8 the Board's proceeding, they think some adjustment needs
9 to be made. But it's not always must. Whether we make
10 the adjustment or not, we wanted to review it to make sure
11 that everything is done right.

12 ADMINISTRATIVE LAW JUDGE LONG: Okay. Thank you.
13 No further questions.

14 MR. SHARMA: Thanks.

15 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

16 I don't have any questions at this time; so we'll
17 move to Mr. Kazemini's --

18 MR. HUXSOLL: Ms. Stanley?

19 ADMINISTRATIVE LAW JUDGE STANLEY: -- closing.

20 MR. HUXSOLL: Oh, sorry. May I address Mr.
21 Lamberts question from earlier --

22 ADMINISTRATIVE LAW JUDGE STANLEY: Oh, certainly.
23 I'm sorry.

24 MR. HUXSOLL: -- about whether the sorbet is a
25 food product?

1 Just noting that Regulation 1602 Subdivision
2 (a)(1) talks about flavored ice products being food
3 products to the extent Appellant was successful in its
4 argument that this is not a food product.

5 It would be a sale of tangible personal property
6 not subject to exemption for any other reason. Because,
7 if it were not a food -- cold food sold -- it would not be
8 cold food sold to go whose sale was exempt from tax; so
9 all sales of sorbet would be subject to tax.

10 It's the Department's position that, consistent
11 with the regulation, it is a food product. However, a
12 portion of the sales were sold for consumption on the
13 premises; so they are subject tax.

14 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thank
15 you. Appreciate it.

16 ADMINISTRATIVE LAW JUDGE STANLEY: Thank you.

17 There being no other questions at this time, we
18 can move to your closing presentation.

19 MR. A. KAZEMINI: Judge Stanley, before I get to my
20 closing, I just wanted to comment on a few things Mr.
21 Sharma just said -- stated in his arguments that are not
22 correct.

23 One, he misidentified the observation test. He
24 identified the Healdsburg observation test for June 2,
25 2011. That's not accurate. The June 2, 2011, observation

1 test was at the Farmers Lane location. Which is important
2 to distinguish because that is right after the Memorial
3 Day weekend, which, according to the Audit Manual, they're
4 not supposed to perform observation tests preceding or
5 right after a -- a legal holiday.

6 And that is the result -- that observation test
7 resulted in a greatly higher taxable percentage rate than
8 the Healdsburg observation test, which was on June 13,
9 2011. He got those dates backwards.

10 Secondly, again, the Department is incorrect in
11 stating that the Appellant only allowed for two
12 observation tests. When Corin Saxton, Tax Counsel for the
13 State Board of Equalization, identified that the
14 observation test was flawed and needed to be reperformed,
15 we had notified the Department that they are allowed, and
16 with full cooperation, the Appellant will allow
17 observations tests for the second audit period.

18 Because, at that time, they were requesting
19 observation tests for both audit periods. And, again,
20 this is in 2017, now, or 2016 -- pardon me -- in 2016.

21 So observation tests -- the main reason Appellant
22 denied the request for observation tests to perform the
23 audit period one is because in 2016, one, the statute of
24 limitations of three years had passed for the first audit
25 period. And, second, an observation test performed eight

1 years after the time it's trying to perform a test for is
2 inappropriate.

3 The business -- Yogurt Time was a brand-new
4 business in 2008 -- had no prior history. So it's fair to
5 assess that the reports, their sales, and transactions for
6 the first few years would be different than an established
7 business with multiple locations over time.

8 In 2008, Appellant only had one location. Not
9 until 2010 did he have another location. So to estimate a
10 2016 observation test back to 2008. The Appellant deemed
11 would be inappropriate and would, again, grossly
12 miscalculate as to the results.

13 So the fact that the Department is claiming that
14 Appellant refused to allow only -- more than two
15 observation tests is simply not true. We, on multiple
16 occasions, provided them opportunity to provide an
17 observation test for audit period two but were very clear
18 that those results would not be allowed to apply to audit
19 period one.

20 And because of that, the Department deemed they
21 would not conduct an observation test. That's regarding
22 the observation test.

23 Secondly, he mentioned that -- Mr. Sharma
24 mentioned that the Department requested to perform
25 multiple observation tests over a period of multiple days

1 at each location.

2 I would request Mr. Sharma to provide where they
3 made that request. Because Appellant never received a
4 request for the Department to perform multiple observation
5 tests over a course of -- period of multiple days,
6 including a weekend, for all the locations. That simply
7 was not requested upon the Appellant. And Appellant would
8 have agreed to that to cover the second audit period.

9 Lastly -- or, not lastly -- excuse me.

10 Mr. Sharma stated that the Santa Rosa locations were --
11 that the Farmers Lane observation test was used for the
12 remaining Santa Rosa locations because the Santa Rosa
13 locations have similar business activity and customer
14 activity as the other locations in Santa Rosa.

15 That is the first time the Department has made
16 that argument for the first audit period observation test.
17 And no document in their arguments prior to today and to
18 the State Board of Equalization was that argument the
19 Department made.

20 The only argument the Department made was the
21 reason for the observation test for the Farmers Lane to be
22 used at the Santa Rosa location is because they were of
23 similar size -- okay? -- so that's a key distinction.

24 And, lastly, Mr. Sharma just admitted that the
25 first audit period was held in abeyance to allow the

1 second audit period to catch up.

2 You asked -- Judge Long just asked what was the
3 point of the delay from December 2, 2016, to April 1,
4 2017. And Mr. Sharma just stated in January, they felt
5 that they were -- had two audit periods in the review, and
6 they wanted to analyze a second audit period prior to the
7 hearing today of the first audit period.

8 And I'd like to point out that the December 2016
9 hearing was not the original hearing date for the first
10 audit period. That was April 29, 2015, which the
11 Department deferred as well.

12 So the old post -- original hearing should have
13 taken place April of 2015, not December 2016. Yet the
14 Department made countless, countless, countless requests
15 for deferral to continue to review, continue to review,
16 continue to review and still made no changes.

17 Like I mentioned, from the January 28, 2016,
18 Mr. Saxton supplemental -- the second supplemental
19 decision recommendation, nothing has changed since then.

20 So those are my comments as to what Mr. Sharma
21 just stated.

22 And now, I'm -- I will move to closing.

23 MR. R. KAZEMINI: Can I just --

24 MR. A. KAZEMINI: Go ahead.

25 MR. R. KAZEMINI: I've got -- I've got two

1 questions.

2 You referred to using the audit from the Farmers
3 Lane location -- to using the Santa Rosa locations but not
4 using the Healdsburg location, which is ten miles down the
5 road. And you seem like you're using that as if people --
6 people's characteristics ten miles down the road are to go
7 eat at home and not eat in the store as -- as if it makes
8 a significant difference.

9 I'm just curious to know how you can take one
10 location and then another location and completely
11 characterize an entire county's population as to how they
12 eat their frozen yogurt as the way you're determining the
13 sales tax in that situation.

14 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Let
15 me -- let me reserve that. And if the CDTFB wants to
16 respond to that after the closing --

17 MR. R. KAZEMINI: Okay.

18 ADMINISTRATIVE LAW JUDGE STANLEY: -- I'll give
19 them --

20 MR. R. KAZEMINI: Next question.

21 ADMINISTRATIVE LAW JUDGE STANLEY: -- an
22 opportunity to do that.

23 MR. R. KAZEMINI: I -- I do have one more question.

24 Is -- Mr. Sharma also made it sound like there's
25 some sort of documentation that the City of Santa -- that

1 the Santa Rosa office has regarding our visit in 2008 --
2 that we never got a copy of -- that he is referring to.

3 ADMINISTRATIVE LAW JUDGE STANLEY: Well, unless
4 it's in our record, it doesn't exist to us either; so that
5 won't matter.

6 MR. R. KAZEMINI: Okay.

7 ADMINISTRATIVE LAW JUDGE STANLEY: You can
8 proceed.

9

10 CLOSING ARGUMENT

11 BY MR. A. KAZEMINI:

12 Thank you.

13 In conclusion, Panel Members, we strongly feel
14 Appellant's right to a speedy and timely appeal has been
15 greatly denied.

16 Again, we're on year 11 of this since this all
17 began. And according to the Audit Manual, this should be
18 resolved within two years. Now, it's not a strict
19 two-year timeframe, but that is the recommendation as to
20 how long these procedures take place. It allows for a
21 shorter timeframe and allows for a longer timeframe.

22 But a key reason to have an audit plan for every
23 audit is so that the Appellant is aware of how long this
24 might take. At no time did Appellant think this would
25 take 11 years.

1 Simply put, once Appellant was notified that
2 their transactions were questionable according to the
3 Department's policies, the Appellant implemented rules and
4 softwares so the POS system would require Appellant to
5 comply with these rules.

6 Once the POS system was updated, no transaction
7 could be completed prior to the Appellant's employee
8 answering the question, "For here or to go?" Which,
9 according to Mr. Sharma's argument, would resolve all of
10 the issues as to the deficiencies of Appellant's reporting
11 techniques.

12 We are here today because my client received bad
13 advice.

14 ADMINISTRATIVE LAW JUDGE LAMBERT: Excuse me.

15 I'm being told that we're having a hard time
16 getting audio on the livestream. Is your microphone on?

17 MR. A. KAZEMINI: I -- you're right. I'm on -- I
18 apologize. Is it better now?

19 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah. Maybe
20 move it a little closer.

21 MR. A. KAZEMINI: Yeah.

22 ADMINISTRATIVE LAW JUDGE LAMBERT: Good. Thanks.

23 MR. A. KAZEMINI: Okay. Sorry about that.

24 ADMINISTRATIVE LAW JUDGE LAMBERT: And maybe,
25 if -- if they missed what you said before, you could

1 maybe, quickly --

2 MR. A. KAZEMINI: Should I repeat?

3 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah.

4 MR. A. KAZEMINI: Okay. It'll -- it'll be brief.

5 So in conclusion, we strongly feel that
6 Appellant's right to a speedy and timely appeal has been
7 greatly denied. The Audit Manual indicates that the
8 process of these matters should take roughly two years.
9 Now, it's not a strict two-year timeline. It could be
10 faster; it could be longer.

11 But that is the importance of an audit plan for
12 each audit -- so that the taxpayer is aware of the process
13 and procedure and can understand why this might take as
14 long as it has.

15 But I would be strong to contend that, even if an
16 audit plan was presented to Appellant, that that audit
17 plan would not have shown an 11-year appeal.

18 Simply put, once Appellant was notified that
19 their transaction practices were questioned, rules and
20 software were put into place that made it impossible for
21 Appellant not to be compliant with what the Department
22 wanted.

23 The Department wanted to make sure that each
24 transaction was questioned, "for here or to go." Because,
25 according to the Department, any item purchased for here

1 is taxable, any item to go is nontax.

2 So once Appellant made the software upgrades to
3 the POS system, that was a requirement for every
4 transaction. A transaction could not be completed --
5 meaning a customer could not take a cup of yogurt, nor
6 could pay for it, until that transaction was answered and
7 completed accordingly.

8 We are here today because my client received bad
9 advice. In 2008, my client received advice that -- excuse
10 me -- that the taxability of frozen yogurt is a gray area
11 and that it didn't seem necessary to have a seller's
12 permit.

13 Therefore, in 2008, he did not have his seller's
14 permit. In 2009, they were notified that a seller's
15 permit may be needed and that a rough estimation of 3 to
16 5 percent would be reasonable. And that's what Appellant
17 relied upon.

18 Now, the Department claims that, in their
19 personalized note taking system, that indicates otherwise.
20 Well, those notes weren't provided to Appellant in 2009,
21 in 2010, in 2011, in 2012. Those notes weren't provided
22 to Appellant for years -- years later. And we would have
23 to double check to confirm when they were received, in
24 fact.

25 Had Appellant known that he had to have this

1 advice in writing, I can promise you he would have
2 requested it. If that meant avoiding this 11-year appeal,
3 I can promise you he would have requested it.

4 But throughout this entire appeal, it is
5 important to note that the Administrative Panel of the
6 State Board of Equalization deemed that Appellant was
7 acting, one, in -- in genuine belief, in good faith
8 belief, and what they deemed to be reasonable.

9 That is why all the negligence penalties were
10 removed. That is why the -- the State Board of
11 Equalization made the determination to reduce the amount
12 of disallowed claim by the Department substantially.

13 So when you consider, first, Mr. Saxton
14 acknowledges the observation tests were not conducted in
15 accordance with the Audits Manual. That's why we asked
16 for a new observation test.

17 Second, Mr. Saxton determines my client was right
18 in regards to the fixed use tax issue.

19 Third, the Sales and Use Department conducted
20 another audit -- although, we strongly claim these audits
21 are still inflated -- which lower the taxable rate by
22 \$275,230 -- a 38 percent reduction.

23 Fourth, the negligence penalty was removed
24 because it was determined when you examined my client's
25 actions and intentions that he acted as a reasonable

1 person and business would act.

2 It's unfortunate it has taken this Department
3 years to come to these realizations and only confirms that
4 Appellant has only been trying to follow the rules and be
5 a compliant business throughout the time of the initiation
6 of his business.

7 If -- with that being said, the OTA's decisions
8 today could have significant impact on the future of
9 Appellant's business because the OTA is trying to assess
10 whether or not Appellant should pay taxes on sales tax
11 that Appellant did not collect.

12 Appellant did not charge sales tax and pocket the
13 money and not pay the Department. That is not what
14 happened here. The Appellant did not charge sales tax and
15 for four years paid out of pocket in order to remain
16 compliant with the Department. Because that's what they
17 were told by the Department to do.

18 And then, once Department notified them, "No.
19 You guys need to take more action." They took that
20 action, and they made the necessary changes in order to
21 better their business to comply with the rules and
22 procedures that the Department required.

23 And from 2012 to today -- ten years -- the
24 Appellant's policies and procedures have remained the
25 same.

1 My client did not collect a penny from its
2 customers. And if the OTA decides, after review of the
3 hearing today, to assess this penalty against Appellant,
4 it will be -- it will act as a punitive damage. Because
5 punitive damage is to punish Appellants.

6 It's not compensatory damages. Compensatory
7 damages would be damages that Appellant unfairly gained.
8 That did not happen here.

9 As State Board of Equalization admits, Appellant
10 had the genuine belief that they were acting in good faith
11 and reasonable. Therefore, they didn't charge -- if they
12 charged their customers sales tax and didn't pay this, you
13 would -- the Department would be 100 percent right.

14 But to issue a penalty against the Appellant for
15 not collecting sales tax, by now being told you have to
16 pay that sales tax, that is a punitive damage. And you're
17 punishing the defendant -- or Appellant for acting in good
18 faith.

19 Now, the main issue Appellant has here, now, is
20 how do we hold the Department accountable? The Department
21 claims that a variance of 10 percent is reasonable and
22 would be accepted when analyzing sales report. And if
23 reports are within that 10 percent variance, those would
24 be accepted. And those without the 10 percent would not
25 be accepted.

1 Now, let's ask what is accepted of the
2 Department? The Department's numbers -- the Department
3 relied on misrepresentations and unjustified reasoning to
4 balloon the amount owed -- amount claimed by over
5 52 percent for the first audit period. The first audit
6 period was reduced by 52 percent, and that doesn't include
7 the negligence penalty that was removed.

8 Now, if it's only reasonable that Appellant's
9 sales reports are reasonable within a 10 percent variance,
10 what do we call the Department's 52 percent variance for
11 the first audit period? What do we call the Department's
12 18 percent variance for the second audit period?

13 Why is it that it takes the Appellant 11 years of
14 fighting tooth and nail for the Department to slowly,
15 slowly, slowly come to realize their positions are
16 unsubstantiated?

17 Why does it take five years for the Department to
18 finally recognize, after reviewing credit card statements
19 that Appellant provided and other business documents, that
20 they purchased fixed assets from a California business in
21 California?

22 It doesn't add up. Their actions have been
23 unfair, and they should be held by the same standard as
24 Appellant should be standard.

25 If Appellant should be standard to a 10 percent

1 variance, then how come the Department can issue a
2 ballooned Notice of Determination, claim it's reasonable,
3 shift the burden upon the Appellant, and force the
4 Appellant to fight years in order to have that amount
5 reduced?

6 And each time the Department doesn't take
7 Appellant's legal reasoning and arguments. They wait
8 until the State Board of Equalization recommends it to
9 them, and that's when they change. That is the only time
10 when the Department changes -- is when the State Board of
11 Equalization tells them that they're wrong.

12 But for that, they would still be claiming that
13 the fixed asset purchased by the Appellant was improper
14 and use tax is owed. They would still be claiming that
15 negligence penalties. They would still be claiming all of
16 that.

17 ADMINISTRATIVE LAW JUDGE STANLEY: Are you
18 nearing a summary?

19 MR. A. KAZEMINI: Almost. Almost. Thank you.

20 I hope the panel today considers the totality of
21 the circumstances and the totality of the facts in its
22 entirety when it reaches its outcome that Appellant is not
23 liable for the claimed disallowed sales tax.

24 When you consider the bad advice that was
25 received; the countless flaws in the observation test; the

1 irrational reasoning by the Department to only use the
2 Farmers location, as opposed to both observation tests;
3 the Department's claim that frozen yogurt is not seasonal;
4 the Department's false claim that Appellant chose the
5 observation test; the Department's false claim that
6 Appellant wouldn't allow additional observation tests; the
7 extreme duration that this has taken to finally obtain an
8 oral hearing; the fact that my client did not accept any
9 tax from its customers; and the Appellant -- for the
10 period that it's being claimed -- and the Appellant's
11 complete cooperation throughout the duration of this audit
12 appeal --

13 I'm sure the panel can sense my frustration.
14 This is frustrating. It's been immensely frustrating for
15 Appellant because we asked for a oral hearing in 2012. We
16 received an oral hearing date in 2015; they delayed that.
17 We received a oral hearing date in 2016; they delayed
18 that.

19 And nothing changed. They didn't change their
20 position since 2016. So how come they continued to delay
21 when Mr. Sharma just stated because they wanted audit
22 period two to catch up? There was issues in audit period
23 two that needed to be analyzed in order for the audit
24 period one to be finalized. That's a direct violation of
25 the Audit Manual.

1 I've identified numerous times how the Department
2 has come to recognize by the State Bard of Equalization's
3 recommendations that to modify their responses -- to
4 modify their positions -- and we pray that you take the
5 totality of our arguments today, the totality of the
6 information presented to the panel to rule in Appellant's
7 favor and to relieve us of the claimed disallowed taxes
8 that the Department claims.

9 I thank you for your time.

10 ADMINISTRATIVE LAW JUDGE STANLEY: Thank you,
11 Mr. Kazemini.

12 I did give the Department an optional five
13 minutes if they wanted to respond to what has just been
14 presented.

15 MR. HUXSOLL: I just want to make a statement for
16 the record that the ACMS notes Mr. Sharma read from are
17 part of the record. They were in the Appellant's
18 Exhibits, page 313. So -- just so that there was no
19 confusion for the panel, those notes are part of the
20 record.

21 ADMINISTRATIVE LAW JUDGE STANLEY: Okay. Since
22 the Department's not making a -- an additional statement,
23 then I'll waive an -- an additional five minutes.

24 I do want to know, Mr. Sharma, though, I had left
25 it open at the prehearing conference if the Department

1 chose to have some extra time to hold the record open to
2 review the documents that were recently submitted. Would
3 you like that opportunity?

4 MR. SHARMA: I -- I don't think there's anything
5 we have to submit in response to Exhibit 1 to 72. But if
6 the panel wants us to review the relief of interest for
7 the second audit, then we would like to review it and
8 submit a letter subject to Appellant's finding -- signing
9 a CDTFA 735.

10 Other than that, 1 to 72 -- I think those are
11 mostly communication between the Department. And we don't
12 have anything else to add on that one.

13 ADMINISTRATIVE LAW JUDGE STANLEY: Okay.

14 Then I will hold the record open for the sole
15 purpose of doing additional briefing with respect to the
16 issue of interest for the second audit period. Because we
17 didn't discuss that at the -- at the prehearing
18 conference. It didn't come up as an issue, then.

19 So I think it's fair to give the Department time
20 to brief that. Would 30 days work?

21 MR. SHARMA: Yeah. That should be enough.

22 ADMINISTRATIVE LAW JUDGE STANLEY: And then,
23 Mr. Kazemini, we always give Appellant time to respond to
24 additional briefing. So the record will be held open for
25 approximately 60 days.

1 After the record is closed, the panel will
2 deliberate and submit a decision -- or an opinion within a
3 hundred days.

4 So hopefully we can stop whatever interest is
5 running a little quicker than ten years.

6 So I'm going to -- this concludes the hearing.
7 The record's going to remain open for approximately
8 60 days.

9 And we're going to recess and reconvene at
10 1:00 p.m. this afternoon.

11 Thank you.

12 MR. SHARMA: Thank you.

13 MR. R. KAZEMINI: Thank you.

14 MR. H. KAZEMINI: Thank you.

15 MR. A. KAZEMINI: Thank you, all.

16 (Proceeding concludes at 12:04 p.m.)
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1 REPORTER'S CERTIFICATION

2
3 I, the undersigned, a Registered
4 Professional Reporter of the State of California, do
5 hereby certify:

6 That the foregoing proceedings were taken before
7 me at the time and place herein set forth; that any
8 witnesses in the foregoing proceedings, prior to
9 testifying, were duly sworn; that a record of the
10 proceedings was made by me using machine shorthand, which
11 was thereafter transcribed under my direction; that the
12 foregoing transcript is a true record of the testimony
13 given.

14 Further, that if the foregoing pertains to the
15 original transcript of a deposition in a federal case,
16 before completion of the proceedings, review of the
17 transcript [] was [x] was not requested.

18 I further certify I am neither financially
19 interested in the action nor a relative or employee of any
20 attorney or party to this action.

21 IN WITNESS WHEREOF, I have this date subscribed
22 my name.

23 Dated: July 12, 2022

24 *Sarah Tuman*
25

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