

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
ACHAMAK TRADING, INC.,) OTA NO. 19054810
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, July 12, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken
at 12900 Park Plaza Dr., Suite 300, Cerritos,
California, 91401, commencing at 1:06 p.m.
and concluding at 2:04 p.m. on Tuesday,
July 12, 2022, reported by Ernalyn M. Alonzo,
Hearing Reporter, in and for the State of
California.

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APPEARANCES:

Panel Lead: ALJ ANDREW WONG

Panel Members: ALJ RICHARD TAY
ALJ TERESA STANLEY

For the Appellant: MARC BRANDEIS

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

NALAN SAMARAWICKREMA
CARY HUXSOLL
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received at page 6.)
(Department's Exhibits A-H were received at page 7.)

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Cerritos, California; Tuesday, July 12, 2022

1:06 p.m.

JUDGE WONG: We are now going on the record.

We're opening the record in the Appeal of Achamak Trading, Incorporated, before the Office of Tax Appeals. This is OTA Case Number 19054810. Today is Tuesday July 12th, 2022. The time is 1:06 p.m. We're holding this hearing in person in Cerritos, California.

I am lead Administrative Law Judge Andrew Wong, and with me today are Judges Richard Tay and Teresa Stanley. We are the panel hearing and deciding this case.

Individuals representing the Appellant, the taxpayer, please identify yourselves.

MR. BRANDEIS: Mark Brandeis, CPA for the Appellant.

JUDGE WONG: Thank you.

And individuals representing the California Department of Tax and Fee Administration, which I'll refer to as CDTFA, please identify yourselves.

MR. SAMARAWICKREMA: Nalan Samarawickrema, Hearing Representative.

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

MR. HUXSOLL: Cary Huxsoll, Legal Department.

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JUDGE WONG: Thank you.

We are considering one issue today, whether a further reduction to the amount of unreported taxable gasoline sales is warranted.

Correct, Mr. Brandeis?

MR. BRANDEIS: That's correct.

JUDGE WONG: Correct, CDTFA?

MR. SAMARAWICKREMA: Yes.

JUDGE WONG: Thank you.

Appellant has identified and submitted proposed Exhibits 1 through 2 as evidence and has no other exhibits to offer as evidence, and CDTFA had no objections to them.

Is that correct, CDTFA?

MR. SAMARAWICKREMA: Yes.

JUDGE WONG: Okay. Therefore, Appellant's Exhibits 1 through 2 will be admitted into the record as evidence.

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

CDTFA has identified and submitted proposed Exhibits A through H as evidence, has no other exhibit to offer as evidence, and Appellant has no objections to them.

Is that correct, Mr. Brandeis?

MR. BRANDEIS: That's correct.

1 JUDGE WONG: Okay. Therefore, CDTFA's Exhibits A
2 through H will be admitted into the record as evidence.

3 (Department's Exhibits A-H were received in
4 evidence by the Administrative Law Judge.)

5 And Appellant has no witnesses and CDTFA has no
6 witnesses. All right. Okay. We'll start with
7 Appellant's presentation.

8 Mr. Brandeis, you have 20 minutes.

9

10 PRESENTATION

11 MR. BRANDEIS: Okay. The taxpayer in this case
12 is basically a mom-and-pop type gas station with a food
13 market located at 605 North H. Street, San Bernardino,
14 California. During the periods in question, they had
15 three separate sales and use tax audits covering the
16 periods -- the first audit covered the period first
17 quarter 2005 through fourth quarter 2007. They had a
18 subsequent audit covering the period fourth quarter 2008
19 through -- I'm sorry -- third quarter -- no, I'm sorry --
20 fourth quarter 2008 through fourth quarter 2011. And then
21 they had a third audit covering the period, third quarter
22 2012 through second quarter 2015.

23 The first audit the taxpayer did not maintain
24 adequate records. The records were deemed unacceptable
25 and were impeached by the field auditor. And the audit

1 was based upon the U.S. Department of Energy report for
2 selling prices for gasoline and the amount of fuel
3 purchased, which the CDTFA has an accurate amount based on
4 the Schedule Gs that are filed by fuel sellers.

5 They use that information to determine
6 underreported sales. And, essentially, what it appears is
7 that there was a small amount of underreported sales of
8 gasoline but it was probably -- most of it looked like it
9 came from the food mart. The food mart sells both taxable
10 and nontaxable items. The second audit -- so three
11 quarters later they were selected again. Now, the first
12 audit took quite a while.

13 So the second audit had begun when I believe they
14 were still wrapping up the first audit, And the taxpayer
15 had made significant improvements in their reporting. The
16 result of the second audit is that the -- for half the
17 audit period, the auditor accepted recorded amounts and --
18 but, again, because when the second audit started, they
19 still hadn't completed the first, they hadn't made
20 improvements that the auditor had noted in the deficiency
21 in their records. The first half of the second audit, the
22 records were still deemed to be inadequate.

23 The Department, however, used the same analysis.
24 They used the U.S. Department of Energy reports, and they
25 compared that to the reported amounts and there was a

1 slight difference, about 5 percent. The Department of
2 Energy reports came out about 5 percent higher than
3 recorded. Department accepted, therefore, the recorded
4 amounts, and used that information to develop a percentage
5 of error that they projected back into the first half of
6 the audit period. I'll get back to that in a second.

7 They also had a third audit. The third audit the
8 Department accepted the reported fuel amounts, and the
9 deficiency that existed solely consisted of sales at the
10 food mart, the mini mart. So what we could see here is
11 that the taxpayer took to heart the findings of the
12 auditor in the first audit, made the improvements, and the
13 result is in the second audit -- at least halfway through
14 because first audit took so long -- the Department
15 accepted recorded amounts, and they accepted recorded
16 amounts in the subsequent audit to that.

17 Interestingly enough they used the same approach
18 in the first and the second audit, the U.S. Department of
19 Energy, and it came up with the information they had in
20 the second audit their estimate using U.S. Department
21 Energy was about 5 percent higher than the amounts they
22 accepted. It's, therefore, reasonable to assume that the
23 same estimated method that they used in the first audit is
24 also 5 percent higher than it should have been.

25 The Department has made the claim, so I

1 understand, that -- that you can't use the information in
2 the second audit to -- to make a conclusion in the first
3 audit, and I would disagree with that. First of all, if
4 you read Revenue & Taxation Code 6481, Deficiency
5 Determinations, that section states in part that the
6 Department may base their audit findings on any
7 information within its position or that may come into its
8 possession, including future information.

9 And that's what's happened here. We got better
10 information in the second audit, and that information
11 could then be used to make -- draw conclusions on a
12 previous audit, especially, when the audit approaches are
13 the same. The other thing that I find somewhat troubling
14 is it seems that the Department is taking a bias in
15 deficiencies, and they stand against refunds when they
16 appear to be reasonable. And if you go back to the Audit
17 Manual Chapter 1, Section 0101.20, it clearly states in
18 there that an auditor should be just as willing to
19 recommend a refund of an overpayment as they are to
20 propose a deficiency determination.

21 So in my opinion, they're taking a bias stance
22 against issuing a refund and, instead, they're just
23 looking at -- from this as a pro-deficiency matter, which
24 I don't think is consistent with the policies as set forth
25 in the Audit Manual. This really is not a complicated

1 case. If you look at Exhibit 2 that we provided, we used
2 the information from the second audit. It shows that it's
3 overstated by 5 percent based on U.S. Department of Energy
4 approach. And when you then take that amount and you
5 apply it back, it results in about a \$40,000 difference in
6 tax.

7 It's not very much, which is a little surprising
8 to me as why the Department would conclude that -- that a
9 refund is not due. I mean, we're really talking about a
10 taxpayer -- the underreporting that occurred in general is
11 not very much in relation to what they did report. This
12 is a taxpayer that, like I said, it's a mom and pop. They
13 are not CPAs. They are not accountants. They should have
14 done a better job in record keeping. They clearly made
15 improvements. That's reflected in the second and the
16 third audits.

17 And so it's our opinion that the Department is
18 taking on reasonable bias against issuing a refund in this
19 case, and that's all I have.

20 JUDGE WONG: Thank you, Mr. Brandeis. Did you
21 want to address the issue of res judicata? It's the
22 subject we discussed at the prehearing conference.

23 MR. BRANDEIS: Well, I looked at res judicata.
24 I'm not a lawyer, but my understanding is res judicata
25 says that you're not to relitigate an issue that's already

1 been litigated and -- well, it uses the word in a court
2 setting. These are not court settings. But this is not
3 an issue that's been litigated. They had a prior
4 representative, and the prior representative -- and I
5 don't know them, and I'm not going to be overly critical
6 of them -- but they never raised this issue.

7 There was an issue that did result in reaudit,
8 but that was based on some differences in gasoline
9 purchases. But the issue of the audit methodologies used
10 was never raised. And, furthermore, we timely filed a
11 claim for refund, and so I don't believe res judicata
12 applies here. This is a new issue, and the issue is
13 raised in accordance with sales and use tax law and
14 regulations. We timely filed that claim, and it should be
15 considered.

16 JUDGE WONG: Thank you, Mr. Brandeis.

17 I'll turn to my panel now for questions they may
18 have for you, starting with Judge Tay.

19 JUDGE TAY: I have no questions. Thank you.

20 JUDGE WONG: Thank you.

21 Judge Stanley, any questions?

22 JUDGE STANLEY: I don't have any questions at
23 this time.

24 JUDGE WONG: Thank you.

25 I do have one question regarding your argument on

1 the audit issue, which you refer to -- regarding to what
2 you refer to as the Department of Energy method. Was the
3 method exactly applied the same in the first audit and the
4 second audit? I know there was like -- they didn't use
5 the Department of Energy information straight. They made
6 some adjustments to that information, what they refer to
7 as a price differential. In the first audit it was about
8 12 percent per -- 12 cents per gallon, and in the second
9 audit it was, like, 16 cents per gallon. And I was
10 wondering if that variable fact would affect the 5 percent
11 adjustment you're asking for?

12 MR. BRANDEIS: The only reason that they would
13 make an adjustment is because it appeared that the report
14 that they used was for the Los Angeles County area, and
15 this taxpayer is in San Bernardino County. So I would
16 assume that average selling prices of gasoline in
17 Los Angeles are probably a little higher than San
18 Bernardino. But there would be no other reason to bring
19 in this information and use it differently, so I see no
20 difference between the two.

21 JUDGE WONG: Thank you. Also, my understanding
22 was that the Department of Energy information was derived
23 from the Los Angeles metropolitan area, including
24 surrounding counties. It wasn't specifically -- I mean,
25 it included L.A. County, but it also included various

1 counties surrounding it, including San Bernardino County.
2 I think that was in the decision and recommendation -- one
3 of the decisions and recommendations that's on appeal
4 right now.

5 MR. BRANDEIS: What I read is that it was
6 based -- the information was based on Los Angeles County
7 sales information.

8 JUDGE WONG: Okay. Thank you very much. I have
9 no further questions at this time.

10 Okay. All right. Now, we will turn to CDTFA.

11 You have 30 minutes for your presentation.
12 Please proceed.

13

14 PRESENTATION

15 MR. SAMARAWICKREMA: Thank you.

16 Appellant is a California corporation that
17 operated an independent gasoline station with a mini-mart
18 in San Bernardino California.

19 JUDGE WONG: I'm sorry to interrupt. Can you
20 pull the microphone closer to your mouth, please. I'm
21 just having a little trouble hearing you. Thank you.

22 MR. SAMARAWICKREMA: Appellant is a California
23 corporation that operated an independent gasoline station
24 with a mini-mart in San Bernardino California. Appellant
25 did not sell diesel fuel. Appellant mini-mart taxable

1 sales include hot prepared food, beer, wine, cigarettes,
2 carbonated beverages, and miscellaneous taxable items.

3 The Department audited Appellant's business for
4 the period of January 1st, 2005, to December 31st, 2007.
5 During the audit period, Appellant reported around
6 \$9.8 million as total sales and claimed various types of
7 deductions resulting in reported taxable sale of around
8 \$9.3 million. And that will be on your Exhibit A,
9 page 42. Appellant also claim prepaid sales tax on
10 purchases of gasoline of around \$558,000 for the audit
11 period. And that will be on your Exhibit A page 44.

12 During my presentation, I will explain why the
13 Department rejected Appellant's reported taxable sales,
14 why the Department used an indirect audit approach, and
15 how the Department determined Appellant's unreported sales
16 tax for the audit period. During the audit, Appellant
17 failed to provide complete sales records. Appellant did
18 not provide complete sales documents of original entry,
19 such as POS sales information or cash register tapes for
20 the audit period. Appellant did not provide sales
21 journals for the audit period.

22 In addition, Appellant failed to provide complete
23 gasoline and merchandise purchase information or purchase
24 journals for the audit period. Appellant was unable to
25 explain how it reported its sales on its sales and use tax

1 returns. Appellant was also unable to explain what
2 sources he relied upon to complete its sales and use tax
3 returns.

4 The Department did not accept Appellant's
5 reported taxable sale due to lack of reliable records. It
6 was also determined that Appellant's record was such that
7 taxable sales could not be verified by a direct audit
8 approach. Therefore, the Department determined taxable
9 sales based on the number of gasoline gallons purchased,
10 and the U.S. Department of Energy published average
11 gasoline sales prices in the Los Angeles region for this
12 Appellant.

13 The Department completed two verification methods
14 to verify the reasonableness of Appellant's reported
15 taxable sales. First, the Department compared Appellant's
16 claimed prepared sales tax of around \$558,000 with prepaid
17 sales tax of around \$551,00 that Appellant's gasoline
18 vendors reported to have collected from Appellant and
19 calculated a difference of around \$7,000. And that will
20 be on your Exhibit A, page 44.

21 Second, the Department compared the prepaid sales
22 tax of around \$551,000 that Appellant's gasoline vendors
23 reported to have collected from Appellant with gas
24 prepayment tax rate per gallon and determined total number
25 of gallons purchased for the audit period. And that will

1 be on your Exhibit A, page 46. Based on the prepaid sales
2 tax of around \$551,000, Appellant purchased around
3 4.1 million gallons during the audit period. And that
4 will be on your Exhibit A, page 46.

5 The Department compared the reported taxable
6 sales for the audit period of around \$9.3 million with
7 total number of gallons to determine overall selling price
8 of a gallon of \$2.26 ranging from as low as \$1.98 to as
9 high as \$2.70. And that will be on your Exhibit A,
10 page 70. These computed average gasoline prices also
11 include Appellant's mini-mart taxable sales because
12 Appellant did not provide any sales information to support
13 Appellant's reported mini-mart taxable sales for the audit
14 period.

15 Therefore, the Department was not able to exclude
16 the mini-mart taxable sales from Appellant's reported
17 taxable sales to calculate Appellant's reported gasoline
18 sales for the audit period. However, based on the audited
19 net weighted ex tax price per gallon, per field
20 observation, range from as low as \$1.92 to as high as
21 \$2.99 for the audit period. And that will be on your
22 Exhibit A, page 71.

23 Appellant was unable to explain the reason for
24 the prepaid sales tax differences and low reported average
25 selling prices of a gallon. Therefore, the Department

1 conducted further investigation by analyzing gasoline
2 selling prices using the Department of Energy's weekly
3 published selling prices and Appellant's prepaid sales tax
4 because prepaid sales tax that Appellant's gasoline
5 vendors reported to have collected from Appellant provided
6 of verifiable source of information.

7 The Department of Energy is a federal agency that
8 provides independent statistics and analysis of fuel
9 selling prices. It accomplished these activities
10 through the Energy Information Administration, one of the
11 numerous entities within that agency. This administration
12 is responsible for collecting and analyzing energy
13 information.

14 Because Appellant did not provide complete sales
15 records, the Department obtained the average weekly
16 selling prices in the Los Angeles region for each grade of
17 gasoline from the weekly gasoline selling price database
18 published by the Energy Information Administration for the
19 audit period. And that will be on your Exhibit A, pages
20 48 through 53.

21 Counties included in the Los Angeles region data
22 are Los Angeles County, Orange County, Riverside County,
23 San Bernardino County, and Ventura County. This
24 administration service gasoline stations in various areas
25 one day each week and determines an average selling price

1 for that week, which the Department will refer to here as
2 at average weekly prices. Based on the Energy
3 Administration annual gasoline sales volume for
4 California, the Department determined the sales ratio of
5 each grade of gasoline for each year. And that will be on
6 your Exhibit A, pages 48 through 53.

7 Using the corresponding sales ratios, the
8 Department determined a weighted average selling price for
9 gasoline for each weekly period in the audit. For each
10 quarter period in the audit, these weekly weighted average
11 selling prices were averaged to determine an average
12 quarterly selling price for gasoline. And that will be on
13 your Exhibit A, pages 48 through 53. To determine the
14 price differential between the Energy Information
15 Administration weekly weighted average selling prices and
16 Appellant's listed selling prices, the Department
17 conducted site visits.

18 The Department visited the Appellant's business
19 location on Monday, October 6, 2008, Monday,
20 December 1st, 2008, Monday, December 22nd, 2008, Monday,
21 January 5th, 2009, and recorded the selling prices for
22 each grade of gasoline. And that will be on your
23 Exhibit A, page 59. Using the energy administration sales
24 ratios of each grade of gasoline sales percentage for each
25 grade for year 2008, the Department determined a weighted

1 price differential for each day.

2 For the four days combined, the Department
3 determined an average price differential of 12.6 cents.
4 In other words, Appellant's gasoline selling prices were
5 12.6 cents less than the weighted average gallon selling
6 prices for Los Angeles region. And that will be on your
7 Exhibit A, page 59. The Department deducted the weighted
8 average energy administration quarterly selling prices by
9 the price differential of 12.6 cents to determine the
10 audited selling price per gallon of gasoline for each
11 quarterly period for the audit period.

12 The Department then divided the prepayment sales
13 tax of around \$551,000 reported by Appellant's gasoline
14 vendors by the respective sales tax prepayment rate to
15 determine audited gallons of gasoline purchased of around
16 4.1 million gallons for the audit period. And that will
17 be on your Exhibit A, page 46. The Department multiplied
18 the audited number of gallons of gasoline purchased by the
19 respective audited selling price per gallon of gasoline to
20 determine audited gasoline sale of around \$11 million for
21 the audit period. And that will be on your Exhibit A,
22 page 46.

23 The Department then divided audited gasoline
24 sales for each quarterly period by the applicable sales
25 tax rate factors to determine the ex tax gasoline sale of

1 around \$10 million for the audit period. And that will be
2 on your Exhibit A, page 46. In addition to audited
3 gasoline sales, the Department also determined audited
4 mini-mart taxable sales of around \$1.9 million for the
5 audit period. And that will be on your Exhibit A,
6 page 61.

7 The Department recomputed the reported gasoline
8 selling price of a gallon by adjusting the reported
9 taxable sales of around \$9.3 million with audited
10 mini-mart taxable sale of around \$1.9 million for the
11 audit period. The Department noted an overall reported
12 selling price of a gallon of \$1.80 ranging from as low as
13 \$1.64 to as high as \$2.24. And that will be on your
14 Exhibit A, page 70.

15 As mentioned earlier, because of low reported
16 average gasoline selling prices, the Department rejected
17 Appellant's reported taxable sales for the audit period.
18 The Department combined audited taxable gasoline sale of
19 around \$10 million and audited mini-mart taxable sales of
20 around \$1.9 million to determine audited taxable sales for
21 the audit period of around \$12 million. And that will be
22 on your Exhibit A, page 45.

23 The audited taxable sales were compared with
24 reported taxable sales of \$9.3 million to determine
25 unreported taxable sales of around \$2.7 million for the

1 audit period. And that will be on your Exhibit A,
2 page 45. The Department then compared the unreported
3 taxable sales with the reported taxable sales of
4 \$9.3 million to compute the error rate of 28.94 percent.
5 And that will be on Exhibit A, page 45.

6 To verify the reasonableness of the audit
7 finding, the Department analyzed Appellant's available
8 sales and business expense information. During the audit,
9 Appellant provided its federal income taxes returns for
10 the audit period. Appellant did not provide complete
11 documents of original entry, such as POS receipts or cash
12 register tapes, credit card sales receipts, purchase
13 invoices, wage information, insurance information, utility
14 bills, and other business expense detail for the audit
15 period. Therefore, to compute average daily business
16 expenses, the Department relied on reported expenses on
17 Appellant's federal income tax returns. And that will be
18 on your Exhibit A, page 72.

19 The Department reviewed Appellant's federal
20 income tax returns and noted that Appellant's rent
21 expenses, wages, and wage-related expenses were not
22 accurately reflected in Appellant's federal income tax
23 returns. And that will be on your Exhibit A, page 72.
24 The Department also found Appellant did not report enough
25 daily sales to cover its actual daily expenses. For the

1 audit period, the ratio of recorded daily expense to
2 reported daily sales was 98 percent. And that will be on
3 your Exhibit A, page 72. This shows that Appellant's
4 reported daily sales are not sufficient to cover its
5 actual daily expenses for the audit period. This is
6 another indication that Appellant did not report all its
7 sales on its sales and use tax return for the audit
8 period.

9 A similar analysis was made comparing daily
10 recorded expenses to average audited daily sales. In 2005
11 and 2006, the ratio of daily recorded expenses to audited
12 daily sales was 75 percent. And in 2007 it was
13 73 percent. Based on these analyses, the Department
14 determined that the audited taxable sales were reasonable.
15 And that will be on Exhibit A, page 72.

16 Appellant claimed that the audited sale of
17 gasoline should be reduced by around 5 percent.
18 Specifically, Appellant states that in the subsequent
19 audit, the Department's initial calculation of gasoline
20 sales for the period July 1st, 2010, through
21 December 31st, 2011, using the Energy Administration data
22 and Appellant's claimed prepaid sales tax resulted in an
23 overstatement of around 5 percent when compared to the
24 gasoline sales the Department combined using Appellant's
25 POS report for the same period. And that will be on your

1 Exhibit 1.

2 Appellant claimed that it is within reason to
3 assume that Appellant's audited gasoline sales in this
4 audit was similarly overstated. The Department analyzed
5 this argument and ultimately rejected it. Appellant has
6 not provided any evidence showing that the energy
7 information administration data in this audit would have
8 resulted in a similar overstatement. In particular,
9 Appellant has not provided POS report or other source of
10 documents for any part of the audit period to demonstrate
11 such an overstatement or to disprove the Department's
12 calculation of audited gasoline sale for this audit
13 period.

14 Furthermore, Appellant claim prepaid sales tax on
15 purchases of gasoline of around \$558,000 for this audit
16 period and \$249,000 for the subsequent audit period. And
17 that will be on your Exhibit A, page 44 and Exhibit G,
18 page 835. Based on the amount of prepaid sales tax,
19 Appellant purchase of gasoline decreased of around
20 4.1 million gallons in this audit period to 2.4 million
21 gallons in the subsequent audit period. And that will be
22 on your Exhibit A, page 46 and Exhibit G, page 791.

23 This notable decrease indicates that Appellant's
24 gasoline sales were not consistent between audit periods,
25 even though the period were only nine months apart. As

1 such, POS report from the subsequent audit periods are not
2 likely representative of Appellant's gasoline sales during
3 this audit period. The Department also compared the
4 unreported taxable sales of around \$800,000 with the
5 reported taxable sales of around \$2.7 million to compute
6 the overall error rate of 29.39 percent for the period
7 July 1st, 2010, through December 31st, 2011.

8 This overall error rate of 29.39 percent was
9 close to the overall error rate of 28.94 percent
10 calculated for this audit period. And that will be on
11 your Exhibit A, page 45 and Exhibit G, page 777. Based on
12 this analysis, the Department determined that the overall
13 audited taxable sales for this audit period was
14 reasonable. Appellant also claimed that the Department
15 did not apply the sales and use tax law uniformly in
16 conducting this audit and subsequent audit.

17 There's no requirement to employ the same audit
18 method across audits. Rather, under Section 6481, the
19 Department may compute and determine the amount of tax
20 required to be paid on the basis of any information within
21 its possession, or that may come into its position.
22 Appellant provided different types of records in its
23 audit. The Department used an audit method consistent
24 with the method of reporting and the record Appellant
25 provided in each audit. Accordingly, the Department was

1 justified in its decision to use separate audit methods to
2 determine the taxable sales in each audit.

3 Appellant has not provided any reasonable
4 documentation or evidence to support an adjustment to the
5 audit finding. Additionally, as discussed in the
6 April 22nd, 2019, decision, Exhibit B, page 630, Appellant
7 has previously appealed the amount at issue in this case.
8 On November 4th, 2014, the Appeals Bureau issued a
9 decision on the matter, which was upheld by the Board of
10 Equalization on March 29, 2016. And that will be on your
11 Exhibit F. First Section 7176, the appeal should be
12 denied. Therefore, for all of these reasons, the
13 Department request the appeal be denied.

14 This concludes our presentation, and we are
15 available to answer any questions the panel may have.
16 Thank you.

17 JUDGE WONG: Thank you. I was wondering if you
18 could address the res judicata issue a little bit more.

19 MR. HUXSOLL: Well, under section 7176, the
20 doctrine of res judicata is applicable to any -- if the
21 liability involved in this case is for the same quarterly
22 period as was involved in another case previously
23 determined. The Board of Equalization on
24 March 29th, 2016, upheld the determination in this case as
25 to the price per gallon and the amount of gallons

1 purchased by Appellant and the taxable measure. A final
2 decision was made by the Board. The doctrine of res
3 judicata applies to the Board's decision, and is
4 applicable in this case.

5 JUDGE WONG: Thank you.

6 I'll now turn to my co-panelists to see if they
7 have any questions for CDTFA, starting with Judge Tay.

8 JUDGE TAY: Just one -- maybe one question. Then
9 how do you explain the grant of appeal rights after the
10 claim for refund was denied if res judicata applies?

11 MR. HUXSOLL: The grant of appeal rights at which
12 point after the -- are we talking about the initial claim
13 for refund or are we talking about going through the
14 appeals procedure here?

15 JUDGE TATE: In this current -- for this current
16 appeal.

17 MR. HUXSOLL: I was not involved in the decision
18 to hold the appeals conference. I noted in the decision
19 they said that it should not have continued at that point,
20 though, because an appeals conference had already been
21 held. I don't think there's any point -- I don't think
22 there's anything to stop that process once the appeals
23 conference has been held, but I cannot speak to that. I
24 would have to provide briefing to handle that issue. But
25 I just know that at that point the conference holder noted

1 in the decision that the -- basically the appeal shouldn't
2 have been there.

3 JUDGE TAY: Okay. If I can ask one more
4 question? What is the standard that would apply to a
5 taxpayer if a taxpayer disagrees with the audit
6 methodology that CDTFA uses to calculate -- excuse me --
7 calculates the tax?

8 MR. SAMARAWICKREMA: It's up to the taxpayer to
9 support that the Department's estimate is not reasonable
10 by providing documentary support to show that the
11 Department estimate was unreasonable. And in this case,
12 we use multiple methods to support that the audit findings
13 were reasonable, including the subsequent audit. The
14 overall percentage from the subsequent audit, the
15 percentage error from the audit is more than the
16 percentage we computed for the current audit.

17 And also the expense ratios to the audited sale
18 will support that the audit findings were reasonable.
19 And the -- and also the -- the -- comparing the
20 Los Angeles region selling prices to -- to the prices the
21 Department observed support that the taxpayer
22 underreported its overall taxable liability.

23 JUDGE TAY: So would it include the Department's
24 determination that taxpayers alternative methodology was
25 not reasonable? Is that required or --

1 MR. SAMARAWICKREMA: The taxpayer's alternating
2 method of not reasonable and -- is because for the current
3 audit period, we were not provided any source of
4 documents, including POS report or any kind of sales
5 journals to see whether there should be further
6 adjustments to the U.S. Energy Department's prices.
7 Before the subsequent audit, Appellant provided the last
8 six quarters of the audit period.

9 And according to the audit notes in 836, it
10 specifically says taxpayer installed a new POS system in
11 July of that particular year. So the taxpayer never had
12 any sort -- you know, any kind of reporting system for the
13 current audit period plus the first six quarters of the
14 subsequent audit period.

15 And also, the Appellant brought up they have a
16 third audit. In the third audit, the POS sales recorded
17 in the taxpayer's POS system is more than the amount
18 estimated using the U.S. Department of Energy prices.

19 JUDGE TAY: Okay. I think you answered my
20 questions. Thank you. I have no further questions.

21 JUDGE WONG: Thank you.

22 Judge Stanley, do you have any questions for
23 CDTFA?

24 JUDGE STANLEY: Yes. Actually, I have follow-up
25 questions to both of Judge Tay's questions. With respect

1 to the 5 percent difference between the U.S. Department of
2 Energy study and the second and third audits in the first
3 one, the Department often does use data that it obtains
4 from -- usually a prior year or a prior audit. Why does
5 it seem unreasonable if it has verifiable knowledge that
6 in subsequent audits it was 5 percent lower than what
7 showed up in the Department of Energy? Why is it not
8 reasonable for the Department to use the subsequent audit
9 information that it obtained?

10 MR. SAMARAWICKREMA: The sales were inconsistent.
11 We will -- the Department will use that kind of approach.
12 But for this particular audit, we have three different
13 audit periods. The estimated sales were based on number
14 of gallons. For the first audit period, the number of
15 gallons is 4.1 million; for the second audit period,
16 2.3 million; and third audit period, 1.8 million.

17 And if you review the audit working papers,
18 prepayment first audit period \$551,000; second audit
19 period, \$243,000; and third audit period, \$124,000. So
20 the sales were not consistent. And the reason we didn't
21 use 5 percent because sales were inconsistent, and the
22 method of reporting were unknown, and the records were --
23 provided was different.

24 We never -- the Department never received any
25 source documents for the first audit period except federal

1 income tax returns, sales tax working -- I mean, the sales
2 tax returns and some purchase information, not complete.
3 And based on the sales volume, based on the prepayment
4 fluctuations and also the number of gallons purchased,
5 it's not representative for the first audit.

6 JUDGE STANLEY: Thank you. And then one question
7 on the issue of res judicata. Section -- Revenue &
8 Taxation Code Section 7176 talks about the rule of res
9 judicata, which is encompassed in other code sections, and
10 has certain components. So what is the Department's
11 position on whether this claim for refund constitutes the
12 same claim of action as a protest of a -- or asking for
13 redetermination of a notice of determination?

14 MR. HUXSOLL: The specific issue of Appellant's
15 taxable measure was addressed in the Board of Equalization
16 decision. The volume of gasoline sold, the price the
17 gasoline sold, the -- that specific issue was before the
18 Board. The price per gallon of gas was before the Board.
19 I believe it's on page 673 of Respondent's exhibits that
20 that was an issue, and the Board made a final
21 determination that this -- that tax applied in accordance
22 with the recommendation of the decision in that case. And
23 so that has previously been addressed in that
24 administrative proceeding.

25 JUDGE STANLEY: Thank you. I have no further

1 questions.

2 JUDGE WONG: Thank you.

3 I just have one question. So just to clarify,
4 the taxpayer actually did not show up at the Board
5 meeting; is that correct? They were noticed but they
6 didn't appear?

7 MR. HUXSOLL: My understanding is yes. It was on
8 the nonappearance calendar, and that's reflected in
9 Respondent's Exhibit F.

10 JUDGE WONG: Will that make a difference, or no?

11 MR. HUXSOLL: It's the Department's position that
12 does not make a difference in this case.

13 JUDGE WONG: Thank you. I have no questions for
14 CDTFA.

15 I will now turn to Appellant, Mr. Brandeis, for
16 your rebuttal and closing. You have 10 minutes.

17

18 CLOSING STATEMENT

19 MR. BRANDEIS: On the issue of res judicata, I
20 would agree with the Department that if we were making the
21 exact same argument that the taxpayer or the taxpayer's
22 representative had previously made, but we're not. We
23 have new information, and the claim for refund is based on
24 new information. It's not the same argument.

25 Further, I don't have the Board's decision in

1 front of me, but my hunch is that decision occurred before
2 the second audit was completed. So there's no way that
3 the Board, when they made their decision, had the
4 information that we're basing this claim for refund on,
5 which is based on the second audit.

6 So the issue of res judicata, this is a new
7 issue. And there's nobody -- no way that you can tell me
8 that if the shoe were on the other foot and the Board had
9 come up with new information, that they wouldn't reopen
10 the case as long as the periods were still in statute. So
11 they are just trying to come up with a reason that I don't
12 think applies here because, again, I believe there's an
13 anti-taxpayer bias.

14 Regarding the standard of proof, you asked the
15 Department earlier what standard of proof they would hold
16 the taxpayer to. They really -- they couldn't answer the
17 question correctly. I'll answer it correctly. Chapter 1
18 says the standard of proof is the preponderance of
19 evidence standard of proof, what is more likely to have
20 happened. And so when you look at the information in the
21 second audit -- and, again, this is -- the findings are
22 based upon POS data for the second half of the audit that
23 they did accept, and using the same Department of Energy
24 analysis that they did, their findings are that the
25 Department of Energy findings were about 5 percent too

1 high.

2 They applied that same -- they calculated a
3 percentage of error based on the reported amounts, not the
4 Department of Energy. So they accounted for that 5
5 percent higher figure with the Department of Energy and
6 projected that back into the first half of the audit, the
7 second audit that is. There's only nine quarters between
8 the two, and the first audit is based on the same
9 Department of Energy findings. The preponderance of the
10 evidence would suggest that the first audit was
11 overstated.

12 One other thing I'd like to point out is he keeps
13 mentioning the food mart. We're not disputing the food
14 mart. This is just to look at the gasoline sales. We're
15 looking at Schedule G purchases, which come from the
16 suppliers. This is -- in auditing this would be
17 considered far more reliable information than information
18 of the taxpayer's own books and records because it's
19 coming from an independent third party.

20 And then we're using the Department of Energy to
21 come up with prices. So it's basically -- I mean, to
22 simplify the calculation is basically taking purchase of
23 gallons of gasoline from a third party -- independent
24 third party, and then coming up with audited sales based
25 on Department of Energy. So it's really not even using

1 the taxpayer's records. When they do that calculation for
2 the second half of the second audit, it's about 5 percent
3 too high.

4 On the issue of -- he mentioned earlier the third
5 audit, the third audit they accepted the gasoline sales.
6 The third audit is based entirely underreported sales at
7 the mini-mart, which we're not questioning.

8 And the last thing I would say is -- I'm just
9 going to highlight again, is the evidential matter. The
10 taxpayer cannot fudge gallons of gasoline purchased. That
11 information is coming from the gasoline supplier
12 themselves, is provided to CDTFA on a Schedule G. It's a
13 known number. And then the other would be the Department
14 of Energy. That's -- again, the parties agree that's a
15 reasonable estimate of the average selling price per
16 gallon of gas over a certain period of time. And that
17 evidential matter shows that the record -- where they're
18 accepting recorded sales it was about 5 percent too high.

19 That's all I have.

20 JUDGE WONG: Thank you.

21 And now I'll turn back to my panel for any final
22 questions for either Appellant or CDTFA, starting with
23 Judge Tay.

24 JUDGE TAY: I have no further questions.

25 JUDGE WONG: Thank you.

1 Judge Stanley?

2 JUDGE STANLEY: I just have one more follow-up
3 question. So you heard the response, Mr. Brandeis, from
4 the Department about the fact that it doesn't appear that
5 sales volumes were consistent between audit periods, and
6 that without books and records they don't have any reason
7 to make that assumption that the first audit had similar
8 gas price discrepancies that they found in the second and
9 third. Do you have any answer to that?

10 MR. BRANDEIS: The first audit covers the period
11 first quarter 2005 through fourth quarter 2007. There's a
12 three-quarter gap. And then the second audit starts on
13 fourth quarter 2008 through the end of 2011. The Great
14 Recession began in fourth quarter 2008, the recession that
15 nearly brought us to a Great Depression and crashed the
16 worldwide economy. I would expect gasoline sales to
17 decline during that period.

18 JUDGE STANLEY: Thank you. I don't have any more
19 questions.

20 JUDGE WONG: Thank you, Judge Stanley.

21 I also had no further questions. So that will
22 conclude this hearing. The record is closed, and we're
23 going to submit the case today for decision. The judges
24 will meet and decide the case based on the exhibits
25 presented and admitted as evidence, and we will send both

1 parties a written decision no later than 100 days from
2 today.

3 This oral hearing is now adjourned.

4 (Proceedings adjourned at 2:04 p.m.)
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I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

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

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

I have hereunto subscribed my name this 21st day of July, 2022.

ERNALYN M. ALONZO
HEARING REPORTER