

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
B & L FOODS, INC.,) OTA NO. 18083593
LUTHRA FOODS, INC.,) 18083592
)
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 2:11 p.m.
and concluding at 3:01 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 MICHAEL GEARY

Panel Members: ALJ ANDREW KWEE
ALJ RICHARD TAY

For the Appellant: MARC BRANDEIS

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

KIMBERLY WILSON
STEPHEN SMITH

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-7 were received at page 7.)

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

OPENING STATEMENT

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Cerritos, California; Tuesday, July 12, 2022

2:15 p.m.

JUDGE GEARY: Let's go on the record.

Thank you, Ms. Alonzo.

Will the parties identify themselves by stating their names and who they representative, starting will Appellant.

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

JUDGE GEARY: Welcome, Mr. Brandeis.

MS. WILSON: Kim Wilson for CDTFA.

MR. SMITH: Stephen Smith with CDTFA's legal department.

JUDGE GEARY: Thank you. Welcome.

I understand that there's not going to be any witnesses testifying in today's hearing, Mr. Brandeis; is that correct?

MR. BRANDEIS: That's correct.

JUDGE GEARY: And, Ms. Wilson, is that also correct from your perspective?

MS. WILSON: Yes.

JUDGE GEARY: Thank you.

The exhibits have been marked for identification in this appeal, and they consist of Appellant's Exhibits

1 marked 1 through 7 for identification, consisting of
2 37 pages and Respondent's Exhibits marked A through K for
3 identification, consisting of 42 pages. The parties
4 provided copies of those exhibits to each other and to
5 OTA, and OTA staff incorporated all proposed exhibits into
6 an electronic hearing binder, which should be in the
7 possession of the parties.

8 Mr. Brandeis, have you confirmed that the
9 Appellant's exhibits incorporated into that binder are
10 complete and as legible as the ones you submitted?

11 MR. BRANDEIS: I agree.

12 JUDGE GEARY: Thank you.

13 And, Ms. Wilson, have you also confirmed that?

14 MS. WILSON: Yes.

15 JUDGE GEARY: Thank you.

16 The parties were instructed to state objections
17 to the proposed evidence in writing, and neither party has
18 done that, nor has any party indicated that there are any
19 problems with the exhibits as they appear in the binder.

20 Ms. Wilson, am I correct that Respondent has no
21 objection to the admission of Appellant's Exhibits 1
22 through 7?

23 MS. WILSON: Yes.

24 JUDGE GEARY: And, Mr. Brandeis, am I correct
25 that Appellant has no objection to the admission of

1 Respondent's Exhibits A through K?

2 MR. BRANDEIS: That is correct.

3 JUDGE GEARY: Thank you.

4 All those exhibits are admitted.

5 (Appellant's Exhibits 1-7 were received
6 in evidence by the Administrative Law Judge.)

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

9 The first issue to be decided in this appeal --
10 in these consolidated appeals is whether OTA has the
11 authority to compel Respondent to take payments already
12 applied to the account of a taxpayer who is not a party to
13 these Appeal and, instead, apply those payments to the
14 account of Appellant, Luthra Foods, Inc. If, and only if,
15 it's decided that OTA has such authority, OTA will decide
16 whether payments already applied to an account not
17 belonging to one of the Appellants must be, instead, be
18 applied to the account of Luthra Foods, Inc.

19 Mr. Brandeis, have I correctly identified the
20 issues?

21 MR. BRANDEIS: Yes.

22 JUDGE GEARY: Thank you.

23 And, Ms. Wilson, have I correctly identified the
24 issues?

25 MS. WILSON: Yes.

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JUDGE GEARY: Thank you.

Mr. Brandeis, Appellant, B & L Foods, Inc.,
conceded in its most recent brief that it seeks no remedy.
Will that Appellant withdraw its appeal?

MR. BRANDEIS: Yes.

JUDGE GEARY: And can you do so now on the record
stating that that appeal is withdrawn?

MR. BRANDEIS: Yes, that appeal is withdrawn.

JUDGE GEARY: Thank you. I appreciate that.
We had discussed time estimates. The parties
asked for and were given or will be given 20 minutes for
each of their primary arguments. Appellant will go first.
We'll have the 20 minutes for Appellants' opening
argument. I guess I should now Appellant, singular. And
Respondent will have 20 minutes for its only argument,
after which, Mr. Brandeis will have an optional five
minutes, roughly, for a final closing, if he chooses to
take that time.

My questions, Mr. Brandeis, before we begin?

MR. BRANDEIS: No questions.

JUDGE GEARY: Ms. Wilson, any questions before we
begin?

MS. WILSON: No questions.

JUDGE GEARY: Great.

Mr. Brandeis, you may proceed with your first

1 argument when you're ready.

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PRESENTATION

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MR. BRANDEIS: First, I want to give some background information. The taxpayer -- well, the corporate officer underlying these seven taxpayers, as we've identified in Exhibit 7, is the primary corporate officer for all these entities. And with the exception of B & L, he's the sole responsible person.

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The Board conducted an audit on these seven entities and made a determination against all of them. We're not here to dispute the amounts owed. We're not here to dispute the penalties. What we're here to dispute is that certain payments made were not applied correctly. Why is that relevant? Well, it results in an overstated -- an overstatement of liabilities, specifically, the interest and how the CDTFA calculates interest.

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In Exhibit 7 the amount in question that we're asking to be reapplied is from Luthra Group, Inc., and Luthra Enterprises, Inc., entities I have identified as Number 3 and 4 on that exhibit. We're asking that the interest and penalty for those two entities, which has been paid in full, be reapplied to entity Number 6, Luthra Foods, Inc.

1 It is not a trivial matter that we ask for this
2 to be done, because the amounts in question that we're
3 asking to be moved, \$119,742, given the CDTFA's interest
4 rates, would amount to approximately 8 to \$9,000 a year in
5 additional interest if it were applied to tax instead of
6 interest and penalty. That's based on the peculiarity of
7 the way that the Board calculates interest on
8 underpayments, which they don't apply to interest and
9 penalty.

10 Because there is such a dollar amount of
11 liability here in tax, which this taxpayer will probably
12 be paying for the rest of his natural life, we could be
13 talking about an additional liability of between \$300,000
14 or \$400,000 over 25 to 30-year period which he will be
15 paying this. So it's not a trivial amount. It's a large
16 amount. And the only way he can hope to get out from
17 under it before he is no longer on this earth, is to have
18 payments applied in the most beneficial manner.

19 On that issue, it's the Board's policy to apply
20 payments in a beneficial manner. And the Department has
21 stated, "Well, we can't do that." That's not true.
22 There's a mechanism for reapplying payments. Mr. Luthra,
23 the corporate officer for all these entities, made the
24 payments. Mr. Luthra has asked for them to be reapplied,
25 and there's no reason -- no compelling reason that I can

1 determine why the Department would refuse to do so.

2 The only reason I can think of is that they want
3 to exact more punishment from this taxpayer, which I just
4 find bizarre. But they have not provided a reason as to
5 why. They keep stating we can't do it, but that's not
6 true. There are mechanisms. It's described in the Audit
7 Manual. I've identified those Audit Manual sections that
8 refer to reapplying payments from one related entity or
9 even one account to another. It is possible. It happens
10 all the time.

11 On the issue of jurisdiction, so we noted
12 regulation -- OTA Regulation 30103(b) subsection (1).
13 That section provides OTA has the jurisdiction to decide
14 cases where the Appeals Bureau of the CDTFA issues a
15 decision that's adverse to the taxpayer in whole or in
16 part. Further, the Respondent -- so this decision to not
17 move the payment clearly is detrimental to the taxpayer.
18 Clearly.

19 We've asked the Department what specifically in
20 enumerated sections of OTA's regulation would have barred
21 their jurisdiction of this matter. They haven't provided
22 me with any subsection or any section that would support
23 their assertion. I believe that OTA does not exceed its
24 authority to hear this matter or to issue a decision on
25 the remedy that's sought by the Appellant.

1 Further, when the remedy sought is for the
2 agency's or the Respondent's actual or alleged violation
3 of any substandard or procedural right due -- to due
4 process under the law where the violation affects adequacy
5 of a notice or -- and this is key -- the amount at issue
6 in the appeal, the OTA's limitation on jurisdiction does
7 not apply. And that is Section 30104. That issue here is
8 whether the Respondent's failure to reapply certain
9 payments may affect the liability amounts in question.
10 Clearly, they do.

11 That's all I have.

12 JUDGE GEARY: Thank you. I think I'm going to --
13 before I have the Department give its argument, I'm going
14 to see if my co-panelists have any questions for you
15 because it might provide some assistance to both parties
16 and the remainder of the arguments that we're going to
17 hear.

18 Judge Kwee, do you have any questions?

19 JUDGE KWEE: This is Judge Kwee. Yes, I did have
20 a couple of questions. Just I wanted to understand --
21 sorry. This is a little loud. I'm going to move it back.

22 -- what's going on here because I think you're
23 mentioning Mr. Luthra made the payments. So are these
24 terminated entities, or are these still active entities, I
25 guess is the first question I have?

1 MR. BRANDEIS: All the entities are terminated
2 with the exception of Luthra Foods, Inc.

3 JUDGE KWEE: Okay. So when Mr. Luthra was making
4 the payments, was the payments made in response to, like,
5 a responsible person billing or proposed billing? Or are
6 you guys making payments under the actual account number
7 for the entity?

8 MR. BRANDEIS: There has never been a dual
9 determination responsible person liability. So he's
10 making these payments, and I don't have record of where.
11 Did those payments come from his personal account? Did
12 they come from the business accounts? Specifically, I
13 don't have record of that, but they are directed by him.

14 JUDGE KWEE: Okay. And one more question. With
15 respect to the contention that they weren't applied
16 correctly, was there any direction made at the time they
17 were paid that it should be made towards, you know, this
18 account number or that account number, and then CDTFA just
19 happened to apply it differently? Or was there no
20 notation made? Like, do you know anything any evidence
21 how that was worked out?

22 MR. BRANDEIS: I wasn't involved. I didn't
23 become involved in this case until much, much later. So I
24 wasn't a party to how the payments were applied, what
25 instructions were given as far as how they should be

1 applied. But it happens all the time where if a taxpayer
2 makes a payment and then they realize, you know, hey, I
3 should have done it this way.

4 Most taxpayers don't do this because they're
5 unaware of CDTFA calculates interest, and they're unaware
6 that -- they're unaware that if things were applied a
7 different way it could be beneficial to them. So my hunch
8 is he was just unaware. But if you look at how the CDTFA
9 applies payments in general, they always apply the
10 payments to tax first, which is the most beneficial method
11 to the taxpayer.

12 That's been their longstanding policy. They've
13 always done that. And it is not -- I don't know how
14 common it is, but it is not an unheard-of thing where
15 payments are moved between related entities.

16 JUDGE KWEE: This is Judge Kwee. Thank you. And
17 I get that. The only twist that I was trying to
18 understand here was the aspect that these were different
19 corporations, or so for sales and use tax purposes,
20 different taxpayers. And I was trying -- and I understand
21 that the payment application, you know, as with the
22 policies.

23 But I guess I was trying to understand how that
24 interplayed with the fact that you have different -- you
25 have a taxpayer asking to reapply a payment from a

1 different entity as opposed to just a different payment
2 that they made, you know, reapplied to a different quarter
3 under the same account. It seems like one more step
4 removed because, you know, for example, Luthra Group and
5 Luthra Enterprises, I don't think that they are before us.

6 So then that was what I was asking about. You
7 know, if you're Mr. Luthra, Rick Luthra, made the payments
8 how that turned out, whether or not it was a dually
9 payment, but it seems like it wasn't. So that was what I
10 was thinking, and I think you've clarified that a bit for
11 me. Thank you.

12 JUDGE GEARY: Judge Tay, do you have any
13 questions?

14 JUDGE TAY: I have no questions at this time.

15 JUDGE GEARY: I do. Mr. Brandeis, I do have a
16 couple of questions. I was perplexed in reviewing the
17 file and wondered why Respondent was considering this
18 application of payments issues in the appeals process.
19 Rule 35005 of the Respondent's rules for tax appeals
20 states -- and I'll quote it. It says that, quote it in
21 part, "A person who disagrees with an item included in a
22 Notice of Determination issued to that person may file a
23 petition for redetermination requesting Respondent to
24 reconsider the Notice of Determination."

25 Now, it's my understanding that payments and

1 applications of payment would not have been reflected on
2 the Notices of Determination issued to any of these
3 related entities; is that correct?

4 MR. BRANDEIS: I disagree. Because if a payment,
5 for example, we had issues -- we knew for a fact that when
6 we filed these petitions, some payments weren't reflected
7 at all. So the Notice of Determinations were overstated
8 because these payments were not applied. And those issues
9 have subsequently been resolved. Payments that were held
10 in suspense have since been reapplied, but that does
11 affect the amount of the Notice of Determination. And the
12 only remedy that a taxpayer would have would be to file an
13 appeal. If a payment that you made was not applied, your
14 only remedy that I know of -- I've been doing this 23
15 years -- would be to file a petition.

16 JUDGE GEARY: Are you saying that the payments
17 made to the accounts of the entities from which Luther
18 Foods, Inc., would like the payments transferred that
19 NODs, Notices of Determination issued to those entities
20 reflected some or all of the payments that Luthra Foods,
21 Inc., now wants transferred?

22 MR. BRANDEIS: Well, the account in question that
23 we're saying the payments should have been applied to --
24 there were other accounts, but like I said earlier, those
25 amounts have since been resolved, but there were unapplied

1 payments. But payments in excess of the tax portion, the
2 taxpayers asked that those payments be reapplied. They
3 weren't, and the result was for Luthra foods Entity
4 Number 6 is that that entity had a higher liability than
5 they otherwise would have had those payments been
6 reapplied.

7 These are all related entities. I know that
8 under the sales and use tax law they are looked at as
9 separate persons. But the fact of the matter is they are
10 related entities, and they are controlled by the same
11 person.

12 JUDGE GEARY: If the panel were to decide that
13 these payments were not reflected on an NOD issued to any
14 party that's before us, and if we were to decide that that
15 issue was never properly before the Respondent's Appeals
16 Bureau, how, in your opinion, would that effect our
17 authority to go forward?

18 MR. BRANDEIS: Well, we timely filed an appeal,
19 and a petition it valid when it's timely filed. We filed
20 the petition because the amount -- the liability on the
21 NOD was overstated, in our opinion, for reasons we've
22 already discussed. And so we believe that is all what's
23 necessary to satisfy a valid petition. And even looking
24 at OTA's own regulations, again, this is reading from
25 regulation section -- OTA Regulation Section 30103

1 subsection(b) (1).

2 Further, when the remedy sought is for the
3 agency's actual alleged violation of any substantive or
4 procedural right to due process under the law, where the
5 violation effects the adequacy of the notice or the amount
6 at issue in appeal. The OTA's limitation on jurisdiction
7 does not apply. And so here it is, the amount at issue
8 under appeal. The NOD was overstated.

9 JUDGE GEARY: Okay. Thank you. I have no other
10 questions.

11 Anything else from you, Judge Kwee?

12 JUDGE KWEE: No. I do not have any questions.

13 Thank you.

14 JUDGE GEARY: Judge Tay? Thank you.

15 Ms. Wilson, are you ready to give Respondent's
16 argument?

17 MS. WILSON: Yes.

18 JUDGE GEARY: You may proceed.

19

20 PRESENTATION

21 MS. WILSON: Okay. The first issue in this
22 appeal is whether the OTA has the authority to compel the
23 Department to take --

24 THE STENOGRAPHER: May I ask you to please pull
25 the mic closer to you?

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MS. WILSON: Sure.

The first issue in this appeal is whether OTA has the authority to compel the Department to take payments already applied to taxpayer's account and instead apply those payments to a different account. As you know, pursuant to Regulation 30103, OTA generally has jurisdiction to hear and decide an appeal that has been timely submitted if an Appeals Bureau addition is averse to taxpayer in whole or in part.

OTA does not have jurisdiction to consider whether the Appellant is entitled to a remedy for an agency's actual or alleged violation of any substantive or procedural right unless the violation affects adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal before -- per Regulation 30104 subdivision (d).

The issue in this appeal does not involve a dispute as to a tax liability. Instead, the Appellant asserts that the Department should take payments applied to the account or accounts of other taxpayers for which Mr. Rick Luthra is president and sole or majority shareholder, and apply those payments to Appellant's record -- I'm sorry -- account.

This argument does not affect the adequacy of a Notice of Determination, the validity of an action from

1 which a timely appeal was made, or the amount at issue in
2 the appeal. In fact, there's no dispute in this appeal as
3 to the tax liability amounts and the person responsible
4 for the tax. The sole issue in this appeal relates to the
5 Department's payment application policies, an issue
6 outside OTA's jurisdiction.

7 Because OTA lacks jurisdiction to hear this
8 matter, the appeal should be dismissed. In the event that
9 OTA finds that it has jurisdiction to hear this appeal,
10 the next issue is whether the Department must take
11 payments already applied to an account not belonging to
12 the Appellant and, instead, apply those payments to
13 Appellant's account.

14 Rick Luthra is sole corporate officer and owner
15 of Luthra Foods, Inc., Appellant. During the audit period
16 of January 1st, 2003, to March 31st, 2011, Mr. Luthra was
17 involved with seven corporations as the president or
18 secretary of the corporations. The Department issued
19 Notices of Determination to all seven corporations:
20 Luthra Corp., R & B Group, Luthra Group, Luthra
21 Enterprises, R & S Foods, B & L Foods, and Luthra Foods.

22 In its supplemental brief dated July 1st, 2022,
23 Appellant stated that it seeks to have \$119,742.13 in
24 payment amounts applied to interest and penalties owed by
25 Luthra Group and Luthra Enterprises reapplied to tax owed

1 by Appellant. Luthra Group can Luthra Enterprises entered
2 into installment payment agreements, IPAs, pursuant to
3 Revenue & Tax Code Section 6832. Exhibit F is a signed
4 IPA between the Department and Luthra Group in which Rick
5 Luthra agreed to the terms outlined in the IPA.

6 The Payments made by Luthra Group pursuant to the
7 IPA are shown on pages 35 to 39 of Exhibit H, and the IPA
8 for Luthra Group was completed on 9/27/19. Exhibit G is a
9 letter to Luthra Enterprises notifying the taxpayer that
10 the request for an IPA had been approved and the terms of
11 the payments. The payments made by Luthra Enterprises
12 pursuant to the IPA are shown on pages 34 of Exhibit H,
13 and the IPA for Luthra Enterprises was completed on
14 5/9/16. Luthra Groups' payments were properly applied to
15 the Luthra Groups' account, and now Luthra Group has no
16 outstanding liabilities.

17 Similarly, Luthra Enterprises' payments were
18 properly applied to Luthra Enterprises' account and now
19 Luthra Enterprises has no outstanding liabilities. No
20 authority requires the Department to take payments
21 properly applied to one taxpayer's account and reapply
22 them to the account of the taxpayer that did not make the
23 payment in question. The Department will not reapply such
24 payments simply because Appellant would find it beneficial
25 to receive credit for payments made by another taxpayer.

1 For all these reasons, the appeal should be
2 denied.

3 I also wanted to address Judge Kwee's question.

4 You had asked if they were all active
5 corporations. I do note that Luthra Group, Inc., is still
6 an active corporation. Luthra Group -- Luthra Enterprises
7 is terminated with the Secretary of State, and we did
8 close out their permit in 2016.

9 I'm available for any questions you may have.

10 JUDGE GEARY: Thank you, Ms. Wilson.

11 Judge Kwee, do you have questions?

12 JUDGE KWEE: This is Judge Kwee. No. I'll turn
13 it back to you. Thank you.

14 JUDGE GEARY: Judge Tay, do you have questions?

15 JUDGE TAY: Yes, I do. For Respondent, is it
16 your position that OTA had jurisdiction over the \$20,000
17 payment that was not applied immediately? The \$20,000
18 payment that I realize is not at issue currently, but that
19 it was mistakenly not applied in some way.

20 MR. SMITH: That's not an issue in this appeal.
21 We're not prepared to answer that.

22 JUDGE TAY: Okay. So you have no answer about
23 the jurisdiction over whether a payment that was allegedly
24 misapplied or not received, whether or not OTA has
25 jurisdiction over that?

1 MR. SMITH: Are you talking about something that
2 was an issue at the time of BOE's Appeals conference but
3 was resolved then and --

4 JUDGE TAY: Yeah.

5 MR. SMITH: Well, that wasn't appealed to OTA, so
6 no.

7 JUDGE TAY: Would it have been?

8 MR. SMITH: We're not prepared to engage in a
9 hypothetical.

10 JUDGE TAY: Okay. Maybe I'll wait to turn to
11 Appellant after his rebuttal.

12 JUDGE GEARY: Thank you, Judge Tay.

13 Ms. Wilson or Mr. Smith, let me ask you similar
14 questions. I'm still wondering about what appear to be a
15 limit -- what appears to be a limitation in your
16 Rule 35005 where the appeal has to be limited,
17 essentially, to the face of the NOD. But in this case,
18 your appeal process heard and issued a decision on what
19 was then these two appeals. Is it -- has it been the
20 policy of Respondent to allow disputes regarding
21 applications of payments to be processed through its
22 internal appeals process?

23 MR. SMITH: Certainly under our CPPM, our
24 Compliance Policy and Procedure Manual, we will reapply
25 payments from one account to another account when the

1 payment was erroneously applied to the wrong account in
2 the first instance. I think what you're honing in on is
3 maybe not super vigilant gatekeeping, at the front
4 instance. But also at the time that this appeal -- this
5 petition was getting ready for the Appeals conference,
6 there were other issues involved in the appeal that have
7 since been resolved.

8 So I guess relating it back to Judge Tay's
9 question, I would say that 20 -- if I understand
10 correctly, I don't think the issue of that \$20,000 payment
11 would have been right for OTA because it wasn't adverse to
12 Appellant. Appellant, I think, got credit for that
13 payment. So, you know, they would have nothing to appeal
14 because they prevailed on that argument.

15 But my point is just that, you know, there were
16 other issues. You know, they were also arguing at the
17 time of the Appeals conference that the installment
18 payment agreement should be cancelled because the
19 installment agreement, you know -- but that's moot now
20 because those were completed three years ago.

21 JUDGE GEARY: An installment payment agreement
22 would also be something that's not reflected on the face
23 of a Notice of Determination --

24 MR. SMITH: That's correct.

25 JUDGE GEARY: -- and I'm -- because -- I ask

1 these questions because on one side we have a fairly clear
2 direction on that when there's an adverse decision issued
3 by the Appeals Bureau of CDTFA, a decision adverse to the
4 taxpayer, that is a matter over which OTA has
5 jurisdiction. And I'm trying to balance that against the
6 possibility that there -- this may be a time where CDTFA
7 actually went beyond its Appeals Division. At least your
8 Appeals Bureau went beyond where it normally should have
9 gone to address issues outside the face of the NOD.

10 So my main question to you was, is the policy
11 different than what I read in -- the policy of CDTFA
12 different than what I read in Rule 35005? Is it really
13 the policy of CDTFA to allow taxpayers to adjudicate
14 disputes regarding payment application in its internal
15 appeals process, if you know?

16 MR. SMITH: I don't think it's our policy to
17 accept that. I think what happened is there wasn't
18 vigilant -- you know, there's a presumption of accepting
19 every petition that's timely filed, and think that there
20 wasn't adequate gatekeeping at the time. But our policy
21 is to only reapply payments from one account to another
22 when they were erroneously applied to the wrong account in
23 the first instance.

24 JUDGE GEARY: Thank you. I think this will be my
25 last question. If a CDTFA Respondent disagrees with a

1 request that a taxpayer makes to reapply funds from one
2 account, over which that taxpayer does have control, to
3 another account, over which that taxpayer has control, is
4 there a remedy -- are you aware of a remedy that taxpayer
5 has outside of the process of appealing to OTA?

6 MR. SMITH: They could -- I guess, they could
7 file a claim for refund and take it to court.

8 JUDGE GEARY: Okay. Thank you. Those are all
9 the questions that I have.

10 Mr. Brandeis, would you like to give a rebuttal?

11 JUDGE KWEE: Judge Geary, just before you turn to
12 that, I did have one question for CDTFA.

13 JUDGE GEARY: Of course, Judge Kwee.

14 JUDGE KWEE: So I know you came back to me.
15 Sorry. I did have one question after listening to this.
16 And I think, if I recall correctly, the Board of
17 Equalization when they were in our -- before they split up
18 into three agencies, that CPPM reallocations, you know,
19 was something that can -- will consider at hearings. And
20 I'm wondering if CDTFA has a position on that, and if that
21 would impact whether or not we have jurisdiction if we
22 stand in the shoes of BOE in making decision in cases, you
23 know, D&Rs that address CPPM allocations?

24 MR. SMITH: Yeah. I mean, I think that's a
25 complex question. There were things that the Board would

1 hear in Board hearings. Of course, they were at the time
2 the elected members who oversaw the agency whose appeals
3 they were deciding. I think that, for example, they would
4 often wait frequently weigh in on whether a bankruptcy had
5 extinguished a tax liability. And, you know, ultimately
6 OTA is going to decide what jurisdiction OTA thinks it
7 has.

8 And our read -- we're just reading your rules of
9 practice. And our read of your rules of practice is that
10 you would prefer to not get involved in cases where
11 there's no tax in dispute. The only thing, you know,
12 what's in dispute is CDTFA's internal policies and when
13 the taxpayer does have a remedy of taking it to court.
14 But, you know, if OTA decides that they do have
15 jurisdiction over this, of course, then we move on to the
16 second issue.

17 JUDGE KWEE: Thank you. I don't have any further
18 questions, so I'll turn it back to Judge Geary.

19 JUDGE GEARY: Thank you, Judge Kwee.

20 Mr. Brandeis, please go ahead.

21

22 CLOSING STATEMENT

23 MR. BRANDEIS: First, I'd like to address the
24 issue regarding transfer of amounts between accounts, and
25 this is looking at CPPM Section 335.000. Actually, I'm

1 looking at a subsection of that 355.020.

2 So Mr. Smith only indicated that the reason to
3 transfer amounts between one account and another was when
4 there was an error made. But if you look at that
5 Section 335.020, I'm going to read it to you. It says,
6 "The situations below," there's bullet points A through F,
7 "may result from one or a combination of circumstances
8 that are not meant to be all inclusive but will illustrate
9 the common types of situations requiring the preparation
10 of the form.

11 The first one, A, describes an error in a payment
12 erroneously applied to one account versus another. The
13 second one, B, to transfer a difference from one account
14 to another. C, transfer a return and/or payment filed
15 from one period to the correct period under the same
16 account. D, split a return between accounts. E, split a
17 return between periods on the same account. And F,
18 transfer payment periods from one account to another
19 and/or another period. In other words -- and this list is
20 not all inclusive. It happens. Payments -- taxpayers
21 say, "I want this applied here, but it doesn't necessarily
22 have to be erroneous. The list is not all inclusive.

23 Second, on the issue of whether a payment affects
24 the face amount of an NOD, it does. Take, for example, a
25 taxpayer -- I'm going to present a hypothetical situation.

1 Let's say I had an audit, and it's determined that I owe a
2 million dollars in tax, some penalty, and some interest.
3 And let's say I was of the means, and I was able to write
4 a check for \$1 million in tax prior to the audit being
5 determined. And the reason I would do that is because I
6 want to stop the further accumulation of interest.

7 Then at some point the audit gets determined.
8 And let's say, for whatever reason, my million-dollar
9 payment does not show up. What remedy do I have? You
10 would immediately file an NOD, because the only -- if you
11 let it go final, your only other remedy is to pay it again
12 and then file a claim for refund, which could be denied
13 and then you have to go the court and hire attorneys at 5
14 or \$600 an hour. So absolutely, payments affect the face
15 amount. And if I had a client come to me and say, "Hey I
16 made a payment on an audit that was not yet billed. The
17 payment doesn't show up on the NOD. What do we do?" We
18 file a petition.

19 I had a case. This only happened once, but it
20 did happen when the crossover from IRIS to CROSS happened.
21 CROSS was not calculating interest correctly. In this
22 particular case, we had an interest calculator. There's
23 one on the Board's website. We ran the interest
24 calculation, and the interest on the NOD was three times
25 higher than the interest on the interest calculator. What

1 did I do? I had no choice. I had to file a petition.

2 We didn't -- we're not disputing the tax. And I
3 don't remember whether there was a penalty. We're not
4 disputing that, but the interest was wrong. And so our
5 only remedy -- unless we're going to go the much more
6 expensive method of potentially going to court -- would be
7 to file a petition and have it heard in the administrative
8 appeals process.

9 I mean, I would argue I have had hundreds of
10 clients that I've represented. Most of them are small
11 business. And if there were some problems with the
12 payment and it was a large enough payment amount, they
13 would not have the resources to go to court. It's very,
14 very expensive. And the reality is most small businesses
15 are really just shut out from that process. It has to be
16 heard here in the administrative appeals process.

17 That's all I have.

18 JUDGE GEARY: Thank you, Mr. Brandeis.

19 Judge Tay, you indicated you may have some
20 additional questions.

21 JUDGE TAY: My questions are answered. Thank
22 you. I have no further questions.

23 JUDGE GEARY: Thank you.

24 Anything further?

25 JUDGE KWEE: This is Judge Kwee. I don't have

1 any further questions. Thank you.

2 JUDGE GEARY: All right. Bear with me a moment.
3 Okay.

4 Mr. Brandeis, do you submit the matter for
5 decision?

6 MR. BRANDEIS: I do.

7 JUDGE GEARY: And, Ms. Wilson, do you submit the
8 matter for decision?

9 MS. WILSON: Yes.

10 JUDGE GEARY: This case is submitted on
11 July 12th, 2022, at 3:00 p.m. The record in this hearing
12 is closed.

13 Thank you everyone for participating.

14 In the coming weeks this panel will meet to
15 consider the matter, and OTA will send you a written
16 opinion within 100 days of today's date.

17 Today's hearing in the -- in what is now the
18 Appeal of Luthra Foods, Inc., is now adjourned, and this
19 conclude OTA's hearings for today.

20 Again, thank you all for your participation and
21 assistance. Goodbye.

22 (Proceedings adjourned at 3:01 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

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

ERNALYN M. ALONZO
HEARING REPORTER