

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF: )  
 )  
K. MARACCINI, ) OTA NO. 18103866  
 )  
 ) APPELLANT. )  
 )  
\_\_\_\_\_ )

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Wednesday, July 20, 2022

Reported by:

SARAH M. TUMAN, RPR  
Hearing Reporter

Job No.:  
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APPEARANCES :

Panel Lead: ALJ KEITH LONG

Panel Members: ALJ JOSHUA ALDRICH  
ALJ TERESA STANLEY

For the Appellant: K. MARACCINI

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND FEE  
ADMINISTRATION  
  
JARRETT NOBLE  
STEPHEN SMITH  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-4 were received at page 9)

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

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1 Sacramento, California; Wednesday, July 20, 2022

2 11:00 a.m.

3  
4 JUDGE LONG: Then we're ready to go on the record  
5 now.

6 We are opening the record in the Appeal of  
7 K. Maraccini, OTA Case 18103866. This matter is being  
8 held before Office of Tax Appeals. Today's date  
9 July 20th, 2022, and the time is 11:00 a.m. This hearing  
10 is being convened in Sacramento, California.

11 Today's hearing is being heard by a panel of  
12 three Administrative Law Judges. My name is Keith Long,  
13 and I will be the lead Administrative Law Judge. Judge  
14 Teresa Stanley and Judge Josh Aldrich are the other  
15 members of this Tax Appeals Panel. All three Judges will  
16 meet after this hearing and produce a decision as equal  
17 participants.

18 Although the lead Judge will conduct the hearing,  
19 any Judge on this panel may ask questions or otherwise  
20 participate to ensure that we have all the information  
21 needed to decide this Appeal.

22 For the record, will the parties please state  
23 their names, starting with Mr. Maraccini.

24 MR. MARACCINI: Kenneth B. Maraccini.

25 JUDGE LONG: And CDTFA?

1 MR. NOBLE: Jarrett Noble.

2 MR. PARKER: I'm Jason Parker, and we have also  
3 have Stephen Smith in the audience with us.

4 JUDGE LONG: Thank you.

5 The exhibits for this appeal consist of CDTFA  
6 Exhibits A through H. On June 30th, 2022, CDTFA emailed a  
7 copy of Exhibits A through G to Appellant. On July 14th,  
8 2022, CDTFA submitted Exhibit H, a copy of the revised  
9 audit work papers.

10 Mr. Maraccini, at the prehearing conference, we  
11 requested that you review the exhibits. And now, I ask if  
12 there are any objections to the exhibits.

13 MR. MARACCINI: No, sir.

14 JUDGE LONG: Thank you. Then they are admitted  
15 without objection.

16 (Department's Exhibit Nos. A-H were received in  
17 evidence by the Administrative Law Judge.)

18 JUDGE LONG: Additionally, in Appellant's Exhibit  
19 Index, Appellant submit -- identified Exhibits 1 through  
20 5. CDTFA did not previously raise any objections to  
21 Exhibits 1 through 3. In the July 21st, 2022, minutes and  
22 orders, it was explained that none of the Appellant's  
23 submissions could be identified as Exhibit 4, Mr. Luchin's  
24 criminal record.

25 We provided time for Appellant to submit this

1 exhibit, and it was received timely. Additionally, the  
2 first page of Appellant's Exhibit 1 was inadvertently  
3 excluded from the hearing binder. Copies of these  
4 exhibits were distributed to the panel members and to  
5 CDTFA.

6 Does CDTFA need any time to review these  
7 exhibits?

8 MR. NOBLE: We do not need any further time to  
9 review the exhibits. However, we did have an objection to  
10 one of the exhibits that was provided today.

11 JUDGE LONG: And what is the objection?

12 MR. NOBLE: The first page of the packet that was  
13 provided today -- there's no official name of the  
14 document, but it starts off with the following is a list  
15 of forms required for transfer of the restaurant.

16 The CDTFA has concerns with the authenticity of  
17 the signature on this document. The signature on this  
18 document appears to be a photocopy of the signature on the  
19 June 21, 2013, bill of sale, which is Appellant's Exhibit  
20 1. There are fade marks where the pen did not fully  
21 contact with the paper, when the signature was  
22 being signed, that are identical.

23 In comparison, if you look at CDTFA's Exhibit B,  
24 which is the Lease Transfer Agreement signed by the  
25 purchaser, and CDTFA's Exhibit C, which is the alcoholic

1 beverage transfer application. You can tell that the  
2 purchaser's signature, Mr. Valentino -- it does not have  
3 the same fade marks on the "V," the "A," or the "L."

4 Although we're not handwriting experts, we have  
5 concerns with the first page of the exhibits that were  
6 provided this morning.

7 Thank you.

8 JUDGE LONG: Thank you.

9 Your concerns are noted and will be considered in  
10 the opinion. However, I am going to accept page 1 of the  
11 exhibit as it is relevant to the appeal.

12 Next -- next, Appellant's Exhibit Index  
13 identified Exhibit 5 as the business's sales and use tax  
14 returns for the purpose of showing that he did not sign or  
15 file these returns. The sales and use tax returns were  
16 not submitted by either party and are not included as  
17 exhibits. However, in our July 1st minutes and orders, we  
18 requested that CDTFA review their Appeals Bureau decision  
19 and determine whether the question of Appellant preparing  
20 and filing returns was in dispute.

21 Can CDTFA confirm whether this is the case?

22 MR. NOBLE: Yes. It's not in dispute. We  
23 stipulate we did not sign any of the sales and use tax  
24 returns during the period in issue.

25 JUDGE LONG: Thank you.



1           So Appellant's -- or CDTFA's Exhibits A through H  
2 are admitted without objection. Appellant's Exhibits  
3 are -- numbered 1 through 4 are admitted.

4           (Appellant's Exhibit Nos. 1-4 were received in  
5 evidence by the Administrative Law Judge.)

6           JUDGE LONG: We officially note CDTFA's objection  
7 with respect to page 1 of Exhibit 1, which was reviewed  
8 today.

9           CDTFA, is the summary of the exhibits I just  
10 provided accurate?

11          MR. NOBLE: Yes, sir.

12          JUDGE LONG: And, Mr. Maraccini, is the summary  
13 of the exhibits that I just provided accurate?

14          MR. MARACCINI: Yes, your Honor, it is. I have a  
15 question, however.

16          JUDGE LONG: Go ahead.

17          MR. MARACCINI: I -- I do have an objection to  
18 one of the items, which is the Assignment of Lease.

19          JUDGE LONG: Okay. Go ahead.

20          MR. MARACCINI: I never signed this document,  
21 ever. I have never even seen this document until they  
22 submitted it to me.

23           And there's some -- again, if they're going to  
24 talk discrepancies, there's some discrepancies in  
25 signatures -- how my name is printed on one of the

1 documents, which is not -- not any way that I print  
2 anything. And again, I was never present at the time this  
3 thing was signed. I had no idea that it even existed  
4 until I got this, a package, from them after our June --  
5 July 1st meeting.

6 JUDGE LONG: Oh, okay. Similar to CDTFA's  
7 objection, we're going to take that under advisement.  
8 That will be considered in the opinion. If you'd like to  
9 discuss it in your presentation, you may; however, I am  
10 going to admit the Exhibit as it is relevant to this  
11 appeal.

12 MR. MARACCINI: Thank you, sir.

13 JUDGE LONG: Today -- today, we are hearing three  
14 issues in this appeal. They are, one, whether Appellant  
15 is liable for the tax arising from unreported taxable  
16 sales; two, whether any reduction to the measure of  
17 unreported taxable sales is warranted; and three, whether  
18 the negligence penalty is warranted.

19 Mr. Maraccini, you requested approximately  
20 30 minutes for your opening presentation, and you may  
21 begin when you are ready.

22 MR. MARACCINI: Thank you, sir.

23 ///

24 ///

25 ///

1 PRESENTATION

2  
3 MR. MARACCINI: The first thing is, I sold this  
4 business to Mr. And Mrs. Luchin on January 1st of 2013. I  
5 have nothing to do with the business. I had no  
6 involvement in the business for -- from then on.

7 I did present them with a bill of sale. I  
8 presented them with a promissory note. One of the  
9 comments that they gave me was that there was no mention  
10 on the note regarding its connection with the bill of  
11 sale. However, directly on the bill of sale, it reads,  
12 "The purchase price is \$100,000 and will be paid for with  
13 a note in that amount at a rate of 3 and a half percent  
14 for 60 months."

15 Again, the transfer of the liquor license -- you  
16 have before you the notice that I have been requesting it.  
17 But it actually wasn't transferred until 2015, when I  
18 received a notice from a gentleman who wished to purchase  
19 it from me. At which point, I said, "I don't own it, I  
20 sold it with the business."

21 He sent me some more paperwork, which you can  
22 read, that states that the liquor license was given -- was  
23 assigned with a lien against it -- was given to a  
24 gentleman who had previously sued Mr. And Mrs. Luchin for  
25 nonpayment of their wages.

1           The assignment of lease, as I stated before, I  
2 see -- I have two problems with it: Number one, unless  
3 they have proof that Mr. Luchin purchased the business  
4 from me, as it was my business, why would they not  
5 question an assignment of the lease in 2014 if he didn't  
6 own the business? He couldn't transfer the lease into his  
7 name unless he owned the business.

8           Lastly, on the -- I was taken to court -- to the  
9 Bureau of Labor Commissions on a suit from an employee.  
10 The judgment was in my favor. And one of the comments was  
11 that there's no -- they -- they accept the bill of sale.

12           "It's undisputed that Maraccini sold the business  
13 to the Luchin's, effective January 1st, 2013. Submitted  
14 into evidence, the promissory note, the bill of sale, and  
15 judgment filed against the Luchins, asserted that no  
16 employer-employee relationship with the plaintiff did  
17 not -- and to control his working conditions."

18           And lastly, I'm not disputing their amounts  
19 because I don't know that. Because I can't tell control  
20 of the paperwork or anything to do with the business after  
21 January 1st.

22           However, the gentleman on this, regarding  
23 Mr. Luchin's arrest record -- the gentleman who they --  
24 word they took that, no, he did not buy the  
25 business was -- admitted to a bank robbery in Marinda,

1 California. It was published in several papers.

2 And lastly, I have several items from  
3 Mr. Luchin's personal -- let's see -- Facebook page, a  
4 number of other things, which you have, where he states  
5 that he's chef and owner of Ottavio Osteria restaurant.  
6 And some of these articles go back to 2010, when we opened  
7 the restaurant.

8 And lastly, their assumption, apparently, when we  
9 had the hearing -- the prehearing hearing, was that  
10 Mrs. Luchin -- Michelle Luchin was my bookkeeper. Well,  
11 she kept books for the restaurant, that's true. But  
12 Mrs. Luchin had no authority to sign my signature or my  
13 name to any legal document. She did not have a power of  
14 attorney.

15 And I'm -- I'm at fault for not understanding the  
16 rules in regards to sales tax filings. But I never  
17 submitted any inaccurate or untruthful information because  
18 I never saw them, and I never signed them.

19 As far as the -- as far as the complaint that --  
20 excuse me, your Honor, I have to turn that off -- that --  
21 I have no -- I have no dispute with their figures because  
22 I had no way of knowing what those figures were to begin  
23 with.

24 All check statements were sent to Mr. And Mrs.  
25 Luchin's home address. And at the time I owned it, I did

1 nothing more than -- than monthly, I would check the bank  
2 statements online to make sure there was no unauthorized  
3 or excessively large checks written. And if there were, I  
4 could go and see who those checks were written to. But  
5 the statements never came to me.

6 And when we changed the account over on the, I  
7 think, January 3rd -- that paperwork disappeared because  
8 by the time I was notified I needed it, all the employees  
9 at Wells Fargo Bank had changed, and somehow or other,  
10 they had no record of the change in checking accounts.

11 So again, I'm not disputing their numbers. I'm  
12 disputing the fact that in any way, shape, or form I'm  
13 responsible for them.

14 Thank you.

15 JUDGE LONG: Thank you Mr. Luchin -- I'm sorry --  
16 Mr. Maraccini.

17 I do have a few questions regarding the sale of  
18 the liquor license.

19 MR. MARACCINI: Yes, sir?

20 JUDGE LONG: So first, the briefing states you  
21 transferred the liquor license to the Luchin's on  
22 January 1st, 2013; however, the transfer -- or the intent  
23 to transfer, which was recorded with the County, wasn't  
24 until 2014. And then additional exhibits that you  
25 submitted indicate that the liquor license may have been

1 sold in 2015.

2 Can you walk me through the history of the sale  
3 of a liquor license? Explain that a little bit to me?

4 MR. MARACCINI: Yes, sir.

5 As it states on the bill of sale, "Purchase  
6 price -- the sale's to include all food and liquor  
7 inventory, all equipment, as well as current cash on hand,  
8 receivables. The sellers are responsible for contacting  
9 all -- all State and County agencies in change of  
10 ownership as well as State Liquor Control Board and Wells  
11 Fargo Bank."

12 To my knowledge, until I was informed -- I was  
13 called -- I think it was in April or March or April of  
14 2015 -- a gentleman called and asked me if I would be  
15 willing to sell the liquor license. I told the gentleman  
16 I don't own the liquor license. I assigned -- I signed an  
17 assignment of the liquor license to Mr. and Mrs. Luchin on  
18 January 1st of 2013. That was the last I heard from him.

19 Then I got another call from him saying that Mr.  
20 and Mrs. Luchin had attempted to file the change in liquor  
21 license -- to change the liquor license and had been  
22 notified that the liquor license was -- has been held up  
23 on a lien to the gentleman whose name appears on the  
24 paperwork.

25 He told me that, because there was lien --

1           JUDGE LONG: Mr. Maraccini -- Mr. Maraccini, I'm  
2 sorry to interrupt. We just want to make sure that --  
3 that the questions that you're answering are not  
4 testimony. If you'd like -- or argument instead of  
5 testimony. If you'd like to present them as testimony, we  
6 can swear you in as a witness and give you the opportunity  
7 to present them as testimony as -- as opposed to -- to  
8 simply argument.

9           However, that also does allow CDTFA the  
10 opportunity to ask you questions, also.

11           MR. MARACCINI: I'm sorry, sir. You asked me to  
12 explain.

13           JUDGE LONG: I -- I know. However, I want to  
14 make sure that I'm clear that this explanation, as it is  
15 now, is presented -- or is accepted as argument as opposed  
16 to fact. And if you would like us to consider your  
17 testimony as evidence, we can do so -- or your answer as  
18 evidence, we can do so. However, we have to swear you in  
19 as a witness.

20           MR. MARACCINI: No, sir. It's all -- all the  
21 paperwork I provided explains the situation, how -- how  
22 the liquor license got transferred, and what the object of  
23 that was.

24           JUDGE LONG: Okay. Thank you. Then you may  
25 proceed.



1 MR. MARACCINI: I misunderstood your question.

2 JUDGE LONG: No problem.

3 MR. MARACCINI: Okay.

4 JUDGE LONG: And the -- my next question with  
5 respect, then, to the Liquor License Intent to Transfer,  
6 which was signed 2014, as well as the lease transfer -- is  
7 it your contention that those signatures are not your own?

8 MR. MARACCINI: No, sir. I never signed a form  
9 on the date indicated. I signed one request for transfer  
10 of liquor license on January 1st of 2013. That's the only  
11 request for a transfer that I signed, personally.

12 Whether or not somehow or another this is not --  
13 this is the same form, but changed -- the date changes, I  
14 cannot say. I don't know. But no, sir. I did not sign  
15 this form on the date indicated.

16 JUDGE LONG: Okay. Thank you.

17 I would like to allow my panel -- co-panel  
18 members to have the opportunity to ask questions as well.

19 And we'll start with Judge Stanley.

20 JUDGE STANLEY: Good morning, Mr. Maraccini.

21 I just have a quick question about the latest  
22 exhibit, the one-page exhibit that you submitted this  
23 morning.

24 MR. MARACCINI: Yes, ma'am?

25 JUDGE STANLEY: Do you happen to have any of the

1 responsive documents? 1 through 5? Did the Luchins ever  
2 provide you with any of these documents.

3 MR. MARACCINI: No, ma'am. I just simply gave it  
4 to them and had them sign for it. So they knew it was,  
5 really, just for them to know what's necessary for them to  
6 change ownership of the business over. That's all it was  
7 for.

8 JUDGE STANLEY: Thank you.

9 MR. MARACCINI: You're welcome.

10 JUDGE LONG: Judge Aldrich, do you have any  
11 questions?

12 JUDGE ALDRICH: Hi. This is Judge Aldrich.

13 Mr. Maraccini, I just had a quick clarifying  
14 question regarding the -- today's submission, the  
15 one-pager or the same thing that --

16 MR. MARACCINI: Yes, sir?

17 JUDGE ALDRICH: -- Judge Stanley was asking you  
18 about.

19 So the other -- I noted that the other pages --  
20 page numbers -- so it's 1 through 4 on Exhibit 1. Does  
21 this purport to be an addendum to Exhibit --

22 MR. MARACCINI: No, sir. I must have  
23 misunderstood.

24 But again, it was nothing more than Mr. and  
25 Mrs. -- or Mr. Luchin because Mrs. Luchin did not sign

1 it -- but to Mr. Luchin. This is what you need to do to  
2 transfer ownership. And I signed a Transfer of Liquor  
3 License with that and gave that paper and the original --  
4 that on to him -- to he and his wife on the 1st.

5 JUDGE ALDRICH: Okay. Thank you.

6 MR. MARACCINI: You're welcome, sir.

7 JUDGE LONG: Thank you, Mr. Maraccini.

8 CDTFA, you may begin your presentation.

9 MR. NOBLE: Thank you.

10  
11 PRESENTATION

12  
13 MR. NOBLE: Appellant operated an Italian  
14 restaurant that was audited for the period of April 1st,  
15 2012, through September 30th, 2014, which disclosed a  
16 deficiency measure of \$395,689 for underreported taxable  
17 sales as well as a 10 percent negligence penalty.

18 The issues in this case are the date when  
19 Appellant sold the restaurant, whether adjustments are  
20 warranted to the deficiency measure, and whether the  
21 Appellant negligent --

22 JUDGE LONG: Excuse me. Can you please speak a  
23 little closer to the microphone?

24 MR. NOBLE: Apologies. Did you need me to  
25 read -- restate the first paragraph?

1 JUDGE LONG: Sure.

2 MR. NOBLE: Appellant operated an Italian  
3 restaurant that was audited for the period April 1st,  
4 2011, through September 30th, 2014, which disclosed a  
5 deficiency measure of \$395,689 for underreported taxable  
6 sales as well as a ten percent negligence penalty.

7 The issues in this case are the date that  
8 Appellant sold the restaurant, whether adjustments are  
9 warranted to the deficiency measure, and whether the  
10 Appellant was negligent.

11 With respect to the date the business was sold,  
12 according to purchase documents provided by Appellant as  
13 Exhibit 1 on January 1st, 2013, Appellant and the  
14 purchaser signed a bill of sale which transferred the  
15 inventory, equipment, cash, account receivables, and good  
16 will of the business for \$100,000, which was secured for a  
17 promissory note to be paid out over the course of  
18 60 months. The bill of sale also stated that the sellers  
19 are also responsible for contacting all state agencies  
20 about the sale as well as the Liquor Control Board and  
21 Wells Fargo Bank.

22 According to Exhibit C, on April 10th, 2010,  
23 Appellant signed a notice of intent to transfer the  
24 restaurant's liquor license, and the liquor license was  
25 later sold in August of 2015. According to a lease

1 transfer agreement, which has been provided as Exhibit B,  
2 on April 29th, 2014, the lease of the business premises  
3 was transferred to the purchasers.

4 Merchant credit card sales information, which has  
5 been provided as Exhibit D, indicates that Appellant was  
6 account payee through August 2014. And according to -- to  
7 Exhibit E, the business continued to make payments to the  
8 Department from the same Wells Fargo checking account  
9 throughout the periods at issue.

10 Revenue and Taxation Code Section 6072 provides  
11 that a sellers permit must be held only by a persons  
12 actively engaging in or conducting business as a seller of  
13 tangible personal property, and any person not so-engaged  
14 must surrender their permit.

15 Section 6071.1 also provides that anyone who  
16 fails to surrender his or her seller's permit upon  
17 transfer of a business is liable for any tax, interest,  
18 and penalty. If the permit holder has actual or  
19 constructive knowledge that transferee is using the permit  
20 in any manner, including filing sales and use tax returns  
21 under the permit number, the liability is limited to the  
22 quarter in which the business is transferred into three  
23 subsequent quarters.

24 In addition, business tax is logged by Annotation  
25 535.0090 provides that a sale of a business occurs when a

1 purchaser acquires all the sellers rights to engage in a  
2 business at the given location.

3 While the January 1, 2013, bill of sale and  
4 promissory note establishes that there was an agreement to  
5 sell the business, as of this date, there's substantial  
6 evidence that the sale of the business was not complete  
7 until well after this time. In particular, the lease to  
8 the business location was not transferred to the  
9 purchasers until April 29, 2014.

10 The date of the transfer of the lease is  
11 compelling evidence that Appellant did not relinquish all  
12 his rights to engage in business when the bill of sale was  
13 signed on January 1, of 2013. In addition, there's other  
14 evidence indicating that the sale of the business was not  
15 completed at that time.

16 The paperwork to transfer the liquor license was  
17 not submitted until April of 2014, and according to  
18 Section 23300 Chapter 3 Division 9 of the Business and  
19 Professions Code, no person can use a liquor license  
20 unless they are authorized to do so by the license itself.  
21 Thus Appellant was the only person legally permitted to  
22 sell alcohol during this time.

23 Lastly, the funds from all the credit card  
24 payments continued to be paid in Appellant's name through  
25 August of 2014, and payments were made from the same

1 checking account throughout the periods at issue.

2 Appellant's continuing with receipt and control  
3 of money from the restaurant sales of tangible personal  
4 property is also compelling evidence that there was not a  
5 complete transfer of the business on January 1st of 2013.

6 With respect to the documents that were recently  
7 provided, Mr. Luchin, the purchaser, did identify himself  
8 as the owner of the business as early as 2010. However,  
9 his claims that he was an owner of the business in 2010 do  
10 not establish one way or the other that the business was  
11 transferred as of January 1, 2013.

12 I understand that there are now contentions with  
13 regard to the signature on the lease -- assignment of the  
14 lease as well as the Alcohol Transfer Agreement. The  
15 signatures, to us, appear to be uniform.

16 However, regardless of whether or not the seller  
17 signed these documents, there's no dispute that the access  
18 to the lease was not transferred on January 1st of 2013,  
19 the liquor license was not transferred on January 1st of  
20 2013, and neither were the bank accounts where the funds  
21 from credit card transactions.

22 As such, I do not think the documents that were  
23 provided today establish Mr. Maraccini's contentions in  
24 this appeal. Accordingly, based on the available  
25 evidence, the earliest the business could have transferred

1 was on or -- on or about April 29, 2014, when the lease  
2 was assigned to the purchasers.

3 As such, Appellant is directly liable for the tax  
4 deficiencies determined for the period April 1st of 2012  
5 through April 29th of 2014.

6 Furthermore, there is no evidence that Appellant  
7 closed his sellers permit with the Department and there's  
8 no dispute that the successor continued to file sales and  
9 use tax returns under Appellant's permit number after the  
10 transfer occurred; thus Appellant had constructive notice  
11 that the purchasers were using his sellers permit.

12 Therefore, Appellant is a predecessor of the  
13 business pursuant to Section 6071.1 and is liable for any  
14 tax, interest, and penalty incurred by the successor  
15 limited to the quarter in which the business was  
16 transferred and the three subsequent quarters. This would  
17 include the second quarter of 2014 through the first  
18 quarter of 2015. Accordingly, Appellant is liable for any  
19 tax, interest, and penalty incurred during the -- the  
20 entire audit period.

21 With respect to the measure of tax, inadequate  
22 records were provided upon audit. As a result, the  
23 Department estimated Appellant's taxable sales by using  
24 the restaurant's credit card receipts, which were obtained  
25 from merchant Credit card processors.



1           The Department found total credit card sales for  
2 the audit period of just over \$1.1 million. And based on  
3 audits of similar businesses, the Department estimated  
4 that the credit card sales represented 90 percent of the  
5 restaurant sales, and the remainder was in cash. The  
6 Department divided the credit card sales by 90 percent  
7 resulting in an audited total sales of approximately  
8 \$1.2 million.

9           Next, the Department estimated that 20 percent of  
10 the audited sales represented amounts not subject to tax  
11 such as optional tips and nontaxable transactions. The  
12 Department multiplied audited gross sales of approximately  
13 \$1.2 million by 80 percent, resulting in audited taxable  
14 sales of \$987,896.

15           The Department compared audited taxable sales to  
16 Appellant's reported taxable sales for the audit period  
17 and calculated a difference of \$395,677. This was split  
18 up into amounts of \$160,060 for the second quarter of 2012  
19 through the fourth quarter of 2012. A \$138,565 difference  
20 for 2013 and \$97,052 difference for the portions of 2014  
21 included in the audit period.

22           The Department calculated error rates for the  
23 liability period by dividing these differences by  
24 Appellant's reported taxable sales for the same period  
25 resulting in the measure for under reported taxable sales

1 of \$395,689.

2 Revenue and Taxation Code Section 6051 imposes  
3 sales tax on a retailer's retail sales of tangible  
4 personal property in this state measured by the retailer's  
5 gross receipts; and thus the sale is specifically exempt  
6 or excluded from taxation by statute. Section 6091  
7 provides that all of a retailer's gross receipts are  
8 presumed subject to tax unless the retailer can prove  
9 otherwise.

10 Section 6481 provides that, when the Department  
11 is not satisfied with the accuracy of returns, it may base  
12 its determination of the tax upon the facts contained in  
13 the return or upon any information that comes within its  
14 possession.

15 When a taxpayer challenges a determination, the  
16 Department has the initial burden to explain the basis for  
17 the deficiency. When that explanation is reasonable, the  
18 burden of proof shifts to the taxpayer to establish that  
19 the asserted deficiency is not valid. The taxpayer must  
20 establish, by documentation or other evidence, that the  
21 circumstances it asserts are more likely than not correct.

22 Limited records were provided during the audit,  
23 and as a result, the Department had to use a credit card  
24 sales ratio to audit the restaurant's sales. Pursuant to  
25 Audit Manual Section 810.12, a credit card sales ratio is

1 an effective means to establish taxable sales,  
2 particularly for restaurants.

3 Furthermore, despite a lack of documentation, the  
4 Department estimated that 20 percent of audited total  
5 sales consisted of amounts that were not subject to tax  
6 such as optional tips and non-taxable transactions.  
7 Therefore, the deficiency measure represents the best  
8 available evidence of Appellant's underreported taxable  
9 sales during the liability period; and thus the  
10 determination is reasonable.

11 Accordingly, the burden shifts to Appellant to  
12 establish by a preponderance of the evidence that the  
13 measure is overstated. Appellant has not provided any  
14 evidence establishing that the measure is overstated; and  
15 thus there is no basis to make adjustments.

16 As for the negligence penalty, under the Sales  
17 and Use Tax Law, taxpayers are required to maintain and  
18 make available for examination all records necessary to  
19 determine the correct tax liability and all records  
20 necessary for proper completion of the sales and use tax  
21 returns.

22 "Negligence" is generally defined as a failure to  
23 exercise the care that a reasonably prudent person would  
24 exercise under similar circumstance. The negligence  
25 penalty it is applicable where a taxpayer is found to be

1 negligent in keeping records or is found to be negligent  
2 in preparing returns or both.

3           Generally, a negligence penalty should not be  
4 recommended when a taxpayer has not been previously  
5 audited, but there are circumstances where a penalty in a  
6 first audit is appropriate. For example, a negligence  
7 penalty should be upheld in a first audit if the  
8 understatement could not be attributed to a bona fide and  
9 reasonable belief that the bookkeeping and reporting  
10 practices were compliant with the requirements of the  
11 sales and use tax law.

12           We note that Appellant's records were inadequate  
13 for sales and use tax purposes. For example, upon audit,  
14 Appellant only provided bank statements for January 2012  
15 through January 2013 and a personal federal income tax  
16 return for 2014. The incomplete records Appellant  
17 provided to substantiate the businesses reported taxable  
18 sales is evidence of negligence.

19           Furthermore, the evidence in this appeal shows  
20 that Appellant underreported his taxable sales by  
21 approximately 67 percent when compared to reported taxable  
22 sales of \$583,000. Appellant's failure to report  
23 67 percent of taxable sales is compelling evidence of  
24 negligence.

25           Lastly, while this is Appellant's first audit,

1 inadequate records were provided. And the credit card  
2 sales information shows that the business received total  
3 credit card payments of approximately \$1.1 million during  
4 the audit period, yet only reported approximately \$580,000  
5 in taxable sales, or 52 percent, of all credit card  
6 transactions. This indicates that numerous taxable sales  
7 were not reported during the liability periods at issue.

8 Therefore, the significant understatement,  
9 including the failure to report half of the credit card  
10 transactions as well as the lack of records, established  
11 that Appellant was negligent and that the understatement  
12 could not be attributed to a bona fide and reasonable  
13 belief that the business was compliant with the sales and  
14 use tax law.

15 Accordingly, the negligence penalty was properly  
16 imposed. For all of the aforementioned reasons, this  
17 appeal should be denied.

18 Thank you.

19 JUDGE LONG: Thank you.

20 I had a question Regarding Appellant Exhibit 3,  
21 the labor commissioner's order, which states that  
22 Appellant sold the business and that was not in dispute in  
23 that case. How does CDTFA reconcile its position with the  
24 labor commissioner's order -- finding?

25 MR. NOBLE: There is no evidence that the

1 purchasers, the Luchins, were -- I believe the  
2 commissioner order says that they did not appear. So  
3 while the order itself says it's undisputed that the  
4 business was transferred as of January 1, 2013, from the  
5 available documentation, it doesn't ever say -- it doesn't  
6 seem like anyone was ever there present to confirm or deny  
7 whether this transfer actually occurred at that time.

8 JUDGE LONG: Thank you. Thank you.

9 I'd like to open up the floor for my panel  
10 members to ask questions.

11 Judge Stanley, do you have any questions?

12 JUDGE STANLEY: No, I do not. Thank you.

13 JUDGE LONG: Judge Aldrich, do you have any  
14 questions?

15 JUDGE ALDRICH: Hi. This is Judge Aldrich.

16 Yeah. I have a couple of questions for  
17 Department.

18 The percentages that you were referencing in your  
19 presentation -- were they in reference to the original  
20 audit or the revised audit?

21 MR. NOBLE: They're in reference to the revised  
22 audit. I believe, from my review of the decision -- I  
23 think the numbers are mostly correct, although they might  
24 have, in error, repeated a series of numbers instead of  
25 moving forward.

1           But the percentages that are listed in the  
2 decision are correct. And I actually have them right here  
3 in front of me, too, if you'd like them -- the actual  
4 percentage of error.

5           JUDGE ALDRICH: Okay.

6           MR. NOBLE: The percentage of error was -- it was  
7 73.47 percent for the portions of 2012, 63.56 for 2013,  
8 and 65.87 for the remainder of 2014.

9           JUDGE ALDRICH: Thank you.

10          So Appellant put in dispute the -- the signature,  
11 I think, on the lease. Could you tell me, is there  
12 anywhere in the evidence the -- how CDTFA came to obtain a  
13 copy of the lease? The lease transfer agreement?

14          MR. NOBLE: I don't -- there's no indication in  
15 the files. I have where they obtained it from. However,  
16 they might have received these documents from the  
17 purchasers or the landlord. I could try and find out.

18          JUDGE ALDRICH: So -- one second. If I could  
19 direct your attention to Exhibit 2, page 3, first  
20 paragraph.

21          MR. NOBLE: Could you tell me the title of the  
22 document? Is that the bill of sale?

23          JUDGE ALDRICH: Exhibit 2. Let's see. Exhibit 2  
24 consists of the liquor license information.

25          MR. NOBLE: Apologies. And what page was it?

1 JUDGE ALDRICH: Yeah. So that would be Exhibit  
2 2, page 3, first paragraph. So there's a reference to a  
3 Board of Equalization lien through -- I believe, through a  
4 bankruptcy filing through the subsequent owner or the --  
5 yeah.

6 So I guess what I was wondering is, do we know if  
7 anything was collected through the bankruptcy that would  
8 have impacted the liability for -- the liability period at  
9 issue?

10 MR. NOBLE: I'm not aware of any collections  
11 through the bankruptcy. I do know that we received funds  
12 through the sale of the liquor license, and those were  
13 applied to the portions of this liability that already  
14 went final.

15 JUDGE ALDRICH: Okay. That's what I was after.  
16 Thank you. No further questions from me.

17 JUDGE LONG: Thank you.

18 Mr. Maraccini, you had asked for ten minutes to  
19 make a closing statement. You may begin when you're  
20 ready.

21 MR. MARACCINI: All right. Thank you, your  
22 Honor.

23 ///

24 ///

25 ///



1 CLOSING ARGUMENT

2  
3 MR. MARACCINI: I -- Mr. Luchin had worked for me  
4 from 20 -- 2010 and opened the restaurant. It's under my  
5 name, but nobody's going to come to a restaurant opened by  
6 a laboratory owner. Mr. Luchin was the face of the  
7 restaurant. He's the one they did all the articles about,  
8 he was a well-known chef, et cetera, et cetera.

9 When I sold the business to him on the 1st of  
10 January, I should have probably gone through a -- a trust  
11 company. But I had known Mr. Luchin. I had no problem  
12 with selling him the business. And I gave him the list of  
13 what was required of him to transfer ownership.

14 I never received anything further from any of  
15 those organizations regarding whether I had received or  
16 hadn't received it. And I went about my life and my other  
17 existing business.

18 Again, I never filed anything with anybody  
19 regarding sales taxes. I was unfamiliar with that because  
20 I -- my other business was a service business, and no  
21 sales tax was required.

22 And Mr. Luchin had a new system put into the  
23 computer before I got -- he -- it told me that the  
24 computer system kept track of all the -- all the charges,  
25 all the business maintained the inventory, and -- and

1 computed the sales tax, and put that sales tax in a  
2 separate account and was paid to them -- paid to you.

3 I had no reason to question it, and I had never  
4 done it. But I do know that, again, Mrs. Luchin submitted  
5 all of the forms. She had no authority to sign my name or  
6 to sign for me in any of those forms at all. The only  
7 thing they had authority to sign were checks so they could  
8 operate the business.

9 I can supply them with only records for 11, 12 --  
10 11 and 12 because that's all the records I had personally.  
11 All the other records were with Mr. and Mrs. Luchin, and I  
12 explained that in the letter to them at the beginning.

13 Again, as I said in one of the forms I received,  
14 they didn't -- they designated that they accepted the bill  
15 of sale. But in two or three -- I mean, coming from them.  
16 And then they said, well, a sale didn't exist, or the sale  
17 wasn't complete.

18 I have no way in -- they say that the transfer of  
19 the lease was in 2014. They -- the liquor license was  
20 2014. Mr. Luchin stopped payment on -- stopped paying me  
21 on the note on June of 2014. It just seems like a  
22 horrible coincidence that he decided to do all that just  
23 before he ceased to make payments to me.

24 And it's proof of the note I received from the  
25 Superior Court. I received a lien against Mr. and Mrs.

1 Luchin for the balance due on the note, which was \$73,000.  
2 The rest of it -- his -- his figure and everything -- I  
3 can't dispute because I don't have any -- I never had any  
4 of those records.

5 To -- to say it was negligent, it possibly was.  
6 I knew nothing about how this -- how the forms were filled  
7 or what was done. However, I do know that I filed the  
8 last federal and state tax return for 2012 and no longer  
9 claimed any income or anything from the restaurant.

10 And again, if they don't like -- if it's  
11 something they don't understand, they have the -- the  
12 records -- the checkbook records for 2013 to 2014. It  
13 would take ten minutes to go over those checking  
14 statements and find the fact that Mr. and Mrs. -- or Mr.  
15 and Mrs. Luchin paid me the amount required on the note  
16 for -- until June -- January of 2013 through June of 2014.

17 Now, why would they make payments on a business  
18 they don't own? It makes -- it makes no logical sense.  
19 And the fact that Mr. Luchin filed bankruptcy and listed  
20 the note on his bankruptcy file -- Mr. Luchin didn't  
21 recognize that he owed the money.

22 I have nothing else to say. I provided you with  
23 all the information I have regarding the sale. The fact  
24 that I did not contact any of the people who were supposed  
25 to contact -- and I'll say, yes, it's true. I didn't

1 contact them, but I had no reason to believe that Mr. and  
2 Mrs. Luchin would not have followed through since they  
3 were so anxious to buy the business.

4 Thank you.

5 JUDGE LONG: Thank you, Mr. Maraccini.

6 And CDTFA, did you want to make any final  
7 statement?

8 MR. NOBLE: No. Thank you.

9 JUDGE LONG: Okay. Before we adjourn, I want to  
10 make sure. Do my co-panelists have any questions?

11 Judge Stanley?

12 JUDGE STANLEY: No, I don't. Thank you.

13 JUDGE LONG: Judge Aldrich?

14 JUDGE ALDRICH: No questions. Thanks.

15 JUDGE LONG: Thank you for -- thank you to  
16 everyone for coming in today.

17 The record is now closed. The Judges will meet  
18 and decide your case later on. And we will send you a  
19 written decision within 100 days of today.

20 Today's hearing in the Appeal of K. Maraccini is  
21 now adjourned. The next hearing will resume at  
22 1:00 o'clock.

23 Thank you.

24 MR. MARACCINI: Thank you, sir.

25 (Proceedings concluded at 11:50 a.m.)

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: August 8, 2022

24 *Sarah Tuman*  
25

<hr/> <b>\$</b> <hr/>	<hr/> <b>2</b> <hr/>	<hr/> <b>4</b> <hr/>	<hr/> <b>A</b> <hr/>
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