

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,	)	
	)	
CORONA MOTORS, INC.,	)	OTA NO. 19034467
A. JAFARI (CORONA MOTORS),	)	19034469
A. JAFARI (FIRST AUTO CENTERS),	)	19034470
	)	
APPELLANT.	)	
	)	
_____	)	

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, October 11, 2022

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,	)	
	)	
CORONA MOTORS, INC.,	)	OTA NO. 19034467
A. JAFARI (CORONA MOTORS),	)	19034469
A. JAFARI (FIRST AUTO CENTERS),	)	19034470
	)	
APPELLANT.	)	
	)	
_____	)	

Transcript of Proceedings,  
taken at 12900 Park Plaza Dr., Cerritos,  
California, 91401, commencing at 1:27 p.m.  
and concluding at 4:09 on Tuesday,  
October 11, 2022, reported by Ernalyn M.  
Alonzo, Hearing Reporter, in and for the  
State of California.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES:

Panel Lead: ALJ MICHAEL GEARY

Panel Members: ALJ TERESA STANLEY  
ALJ SUZANNE BROWN

For the Appellant: JOSEPH VINATERIA

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

JOSEPH BONIWELL  
STEPHEN SMITH  
KIMBERLY WILSON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-34 were received at page 11.)  
(Department's Exhibits A-FF were received at page 11.)

OPENING STATEMENT

	<u>PAGE</u>
By Mr. Vinatieri	14
By Mr. Boniwell	56

APPELLANT'S  
WITNESSES:

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Mr. Downey	33			

CLOSING STATEMENT

	<u>PAGE</u>
By Ms. Verdugo	83
By Mr. Vinatieri	85

1 Cerritos, California; Tuesday, October 11, 2022

2 1:27 a.m.

3  
4 JUDGE GEARY: Let's go on the record.

5 Will the parties please identify themselves by  
6 stating their names and who they represent, beginning with  
7 Appellants.

8 MS. VERDUGO: Patricia Verdugo for Appellant.

9 MR. VINATIERI: Joe Vinatieri, Bewley, Lassleben  
10 and Miller, on behalf of Appellant.

11 JUDGE GEARY: Mr. Vinatieri, would you make  
12 sure -- your microphone is on? Would you make sure you're  
13 fairly close to it. If it won't be too intrusive, just  
14 try to get as close as you can. They don't pick up as  
15 well as we would like.

16 MR. VINATIERI: One, two, three, four, five.

17 JUDGE GEARY: Thank you. That's better.

18 MR. VINATIERI: It's resonating in the box here.  
19 So --

20 JUDGE GEARY: Sorry about that. Will the  
21 Department please identify the representatives who are  
22 present.

23 MR. BONIWELL: Oh, yes. Joseph Boniwell.

24 MR. SMITH: Stephen Smith.

25 MS. WILSON: Kim Wilson.

1 JUDGE GEARY: Thank you, everybody.

2 It's my understanding that Appellants will be  
3 calling a witness, CPA Mr. Wade Downey, to testify today;  
4 is that correct?

5 MR. VINATIERI: That's correct.

6 JUDGE GEARY: And, Respondent, will you have any  
7 witnesses to testify today?

8 MR. BONIWELL: No.

9 JUDGE GEARY: The exhibits marked for  
10 identification in this appeal consists of Appellants'  
11 exhibits marked 1 through 34, Exhibit 34 being a four-page  
12 document provided today and appears to be portions of  
13 Respondent's Audit Manual.

14 Let me first ask if Respondent has a copy of that  
15 document?

16 MR. BONIWELL: Yes, we do.

17 JUDGE GEARY: Thank you.

18 We also have Respondent's exhibits marked for  
19 identification A through FF. That's double F, as in  
20 Frank. The parties provided copies of these copies to  
21 each other and to OTA, and OTA staff incorporated all  
22 proposed exhibits, except Appellants' Exhibit 34, into an  
23 electronic hearing binder, which should be in the  
24 possession of the parties.

25 I know that Appellants have concerns about

1 confidential taxpayer information that is contained in the  
2 exhibits that are part of the electronic binder now, and  
3 they have requested that information be redacted. I can  
4 assure Appellants that those exhibits are not available to  
5 the public absent a Public Records Act request, and that  
6 if there's a Public Records Act request to OTA, all of  
7 that information will be redacted.

8 Will that adequately address Appellants' concerns  
9 about confidentiality?

10 MR. VINATIERI: So let me ask -- inquire. You  
11 know what the information is that --

12 JUDGE GEARY: I saw. I looked at a few of the  
13 pages and saw what you were referring to in your letter,  
14 yes.

15 MR. VINATIERI: Right. And we -- there was one  
16 document from a long time ago in ours that had that  
17 information in it. There's a whole number of documents in  
18 the CDTFA exhibits that have that information. And to be  
19 candid with you, I'm just not comfortable with that  
20 because of what that information is. So I'm -- I'm -- I  
21 hear what you're saying, but I'm concerned that -- I'm  
22 concerned that once this proceeding is over then there's  
23 really no accountability, except someone in the agency  
24 here if a PRA comes up.

25 Is there some other way we could do something to

1       redact that right now so it's on the record? And perhaps  
2       the CDTFA would make a representation that they could  
3       provide a set of exhibits that are the same, only redact  
4       that information? That would -- I think that would take  
5       care of our situation.

6               JUDGE GEARY: Honestly, I don't know that there's  
7       anything we can do right now. What I would suggest we do,  
8       though, is that you, Mr. Vinatieri, take that matter up  
9       with our Chief Counsel perhaps after this hearing, and  
10       maybe some arrangements can be made for redaction of our  
11       file before a Records Acts request or anticipation of  
12       Records Act request.

13              It sounds like what you want is for all the  
14       information to be redacted so that OTA's file does not  
15       contain any of the confidential information, and all I can  
16       suggest is I don't have any authority to do anything other  
17       than what I just offered you. However, it's possible that  
18       a discussion with the Chief Counsel for OTA might lead to  
19       some different solution that you find more palatable.

20              MR. VINATIERI: So let me make a representation.  
21       I think we all understand that information, if it were to  
22       be public, would be -- could very well be harmful to our  
23       client, and none of us would like to have that information  
24       public. So that's why this is a matter of serious concern  
25       for us.



1           Is it possible that we get the Panel to make a  
2       recommendation to the Chief Counsel or whoever the power  
3       behind the curtain is relative to this issue and ask them  
4       to say, "This is what we would like to see, and this is  
5       what we recommend happens." And that would give me -- I  
6       think if I knew you were doing this because you know what  
7       the issue is, that would give me a little more solace,  
8       candidly.

9           JUDGE GEARY: Maybe we should take a brief recess  
10      and discuss this matter off the record or perhaps give you  
11      an opportunity to discuss this matter off the record with  
12      the Chief Counsel who is present, and perhaps we can reach  
13      some kind of solution. So will that be satisfactory?

14          MR. VINATIERI: Yes, let's do that. I just want  
15      to take care of that before we proceed. Yes.

16          JUDGE GEARY: Okay. Then let's do that. Let's  
17      take a brief -- it's 1:34. Let's say we're going to  
18      recess for ten minutes and see if we can figure out what  
19      we can do that would be satisfactory to you.

20          MR. VINATIERI: That would work.

21          JUDGE GEARY: All right.

22          MR. VINATIERI: Thank you.

23               (There is a pause in the proceedings.)

24          JUDGE GEARY: Okay. We're back on the record,  
25      please.

1           Mr. Vinatieri, I think my understanding is that  
2     you had a discussion with Chief Counsel, and that you may  
3     not agree, but you understand there's nothing more that I  
4     can do relative to the redaction -- requested redaction;  
5     is that correct?

6           MR. VINATIERI: That's correct.

7           JUDGE GEARY: Thank you.

8           Has Respondent confirmed that the exhibits  
9     incorporated into the electronic binder are complete and  
10    legible -- and as legible as the one it submitted so your  
11    own exhibits are all okay as reflected in the electronic  
12    binder?

13          MR. BONIWELL: Yes.

14          JUDGE GEARY: All right. Does Respondent have  
15    any objection to the admission of Appellants' Exhibits 1  
16    through 34, that is including the exhibit provided today?

17          MR. BONIWELL: We object to Exhibit 34 on the  
18    basis that it was untimely, but otherwise recognize that  
19    it's a publicly available document.

20          JUDGE GEARY: All right. Does Appellant have any  
21    objections to -- do Appellants have any objections to the  
22    admission of the Respondent's Exhibits A through FF?

23          MR. VINATIERI: We do not.

24          JUDGE GEARY: All right. All of those exhibits,  
25    Appellants Exhibits 1 through 34 are admitted over the

1       stated objection by Respondent, and Respondent's exhibits  
2       A through FF are also admitted.

3               (Appellant's Exhibits 1-34 were received  
4               in evidence by the Administrative Law Judge.)

5               (Department's Exhibits A-FF were received in  
6               evidence by the Administrative Law Judge.)

7       Regarding the issues of the identification of the  
8       issues that will be addressed by OTA has been well  
9       documented in OTA's written record. The only disagreement  
10      has been about whether OTA has the jurisdiction to  
11      determine whether Respondent violated Appellants' right to  
12      due process and to provide a remedy for such violation or  
13      violations, if any. Appellants argue that OTA has such  
14      authority, and Respondent argued that OTA does not have  
15      that authority.

16             OTA decided and issued an order to the effect  
17             that it does not have jurisdiction to decide the issue  
18             regarding alleged due process violations and to provide a  
19             remedy for those violations. So we will not be revisiting  
20             that question today. Instead, I'm going to summarize the  
21             issues that OTA will be addressing today and, in its  
22             opinion or opinions, that will ultimately be issued.

23             It's OTA's understanding that it is undisputed  
24             that the Notice of Determination issued to these three  
25             Appellants were not issued within the general three-year

1 statute of limitations.

2 Respondent, is that correct?

3 MR. BONIWELL: That's correct.

4 JUDGE GEARY: And Respondent contends that all  
5 Appellants are guilty of fraud or intent to evade the  
6 payment of taxes, and if Respondent is able to prove that  
7 contention or those contentions by clear and convincing  
8 evidence, the statute of limitations will not bar  
9 Respondent's determinations.

10 In addition to the fraud issue, each Appellant  
11 contests their respective tax liability as determined by  
12 Respondent. I'm not going to go into the details because  
13 those are also set forth clearly in OTA's written records.  
14 But those are the issues that OTA will be addressing in  
15 its opinion or opinions.

16 As discussed in our prehearing conference, it was  
17 agreed that Appellants will have 30 minutes for its  
18 opening argument and approximately 15 minutes to examine  
19 their witness. Appellants have indicated they plan to  
20 first give their opening argument and then present the  
21 witness.

22 Mr. Vinatieri, is that still the plan?

23 MR. VINATIERI: Yes, sir.

24 JUDGE GEARY: If you will let me know when you're  
25 done with your opening argument and ready to examine your

1 witness, I will administer an oath or affirmation to  
2 the witness. And at the conclusion of the witness'  
3 testimony, which may include -- which will include an  
4 opportunity for the Respondent to ask questions and also  
5 for the Panel to ask questions when we're through with all  
6 of that, Respondent will have 20 minutes -- I believe that  
7 time is accurate -- for its only argument.

8 Is that how much time you need, or do you need  
9 more?

10 MR. BONIWELL: If I could beg an extra ten  
11 minutes, please.

12 JUDGE GEARY: Let's say 30 minutes allows you  
13 whatever that 30 minutes you will need.

14 MR. BONIWELL: Thank you.

15 JUDGE GEARY: And at the conclusion of  
16 Respondent's only argument, Appellants have requested, and  
17 OTA is allowing, approximately 20 minutes for their  
18 rebuttal argument. Again, if Mr. Vinatieri or  
19 Ms. Verdugo, whoever gives that part of the argument needs  
20 some additional time, I suspect we will be able to  
21 accommodate since we have no other hearings on calendar  
22 this afternoon. All right. I think we're ready to  
23 proceed, unless there's any questions.

24 Mr. Vinatieri, any questions?

25 MR. VINATIERI: No.

1 JUDGE GEARY: Respondent, any questions?

2 MR. BONIWELL: No, thank you.

3 JUDGE GEARY: All right.

4 Then, Mr. Vinatieri, you can begin with your  
5 opening argument when you are ready.

6 MR. VINATIERI: Thank you.

7

8 PRESENTATION

9 MR. VINATIERI: So good afternoon. We appreciate  
10 the opportunity to present our case.

11 And we did receive the further order issues  
12 yesterday afternoon, and we continue to have concerns with  
13 the decision made relative to the issues in the way it's  
14 been stated in that document. But we're going to take  
15 this opportunity to discuss the adequacy of the  
16 investigation as it was put forth in that document  
17 yesterday; the audit, the adequacy and accuracy of the  
18 audit and the determinations there from. And we reassert  
19 our view point as we previously stated in our  
20 correspondence and our briefing.

21 We don't typically handle fraud matters, our law  
22 firm. However, this case goes back to the early 2000s.  
23 And candidly, when we were presented with it, I had  
24 numerous problems and concerns with the way the Board of  
25 Equalization Investigations Division handled this matter.

1 I come from the Board of Equalization. I know how things  
2 are done at the Board of Equalization. It might have been  
3 a couple of years ago, but I know how well they're handled  
4 and how professionally, and I had real concerns about  
5 this, what I saw.

6 This related to withholding of information by the  
7 Board, the failure to follow the Board's own Audit  
8 Manual -- the Audit Manual, which is the bible -- and the  
9 Investigation Division's what I saw to be a cavalier  
10 attitude towards the taxpayer, among several items. As  
11 you know this matter was under investigation by the  
12 Attorney General's office, which ended in determination  
13 not to prosecute in the interest of justice.

14 So let me reiterate. After five years of  
15 criminal investigation, the A.G. decided not to file.  
16 Within eight months of that decision, the Board commenced  
17 this action for alleged civil fraud. This case is all  
18 about the burden of proof to prove fraud, which is clearly  
19 on the Department by clear and convincing evidence. And  
20 you're going to hear from us a number of times today  
21 reference once again to the Department's own Audit Manual.

22 So let's start with the first section of that  
23 Audit Manual. And it's Section 0509.30 which states, as a  
24 matter of law, fraud is never presumed but must be proven,  
25 and the burden of proof is on the CDTF. Instead, the

1 standard proof in civil fraud cases is clear and  
2 convincing evidence. Clear and convincing evidence  
3 requires evidence so clear as to leave no substantial  
4 doubt -- no substantial doubt as to the truth of an  
5 assertion of fraud.

6 That is, there's a high probability that the  
7 assertion of fraud is true. It's right here out of the  
8 manual. So here the Department has failed to follow its  
9 own Audit Manual, and its prosecution of this matter has  
10 left substantial doubt. And there is no high probability  
11 as to the assertion of fraud under these unique  
12 circumstances, and I'm aware that you had a number of  
13 fraud cases. This is a different situation. It's not  
14 your garden variety fraud.

15 And candidly from our viewpoint, the Department  
16 just hasn't done their job to prove clear and convincing  
17 the probability and substantial nature. So this all  
18 began -- and I got this back behind me, this chart. This  
19 all begin when Mr. Jafari had previous involvement with  
20 Fiesta Motors beginning in 1994. Mr. Jafari wanted to  
21 start his own business to support his family. However,  
22 Mr. Jafari was convinced by Mr. Kamran Bagherdai to join  
23 his business Fiesta Motors instead of starting his own  
24 competing used car dealership.

25 And at the time Mr. Jafari joined Mr. Bagherdai



1 at Fiesta Motors, Mr. Bagherdai was using an individual,  
2 Mr. Kenneth Walsh as his CPA, Kenneth Walsh. Fiesta  
3 Motors and other used car dealerships in the Ontario area  
4 were tangled up in investigations and one thing in common,  
5 their accountant CPA Mr. Kenneth Walsh. Mr. Walsh had  
6 previously handled audits for Fiesta Motors resulting in  
7 no change.

8 However, once Mr. Jafari realized the differences  
9 of opinion that he had with Mr. Bagherdai, he left, and  
10 Mr. Jafari was only involved with Fiesta Motors for four  
11 years. And on December 24th, 1998, he sold his interest  
12 in that business. Although Mr. Jafari disassociated  
13 himself from Fiesta Motors in 1998, he was still listed on  
14 the sales tax permit and was not removed for eight years,  
15 even though he should have been removed. Mr. Jafari was  
16 unaware that his name had to be removed from the sales and  
17 use tax permit. He assumed the sale of his interest was  
18 the end of his involvement and any ties with Fiesta  
19 Motors.

20 Mr. Walsh who handled the accounting for Fiesta  
21 and, therefore, Mr. Jafari's businesses never informed  
22 Mr. Jafari that he should remove his name from Fiesta in  
23 spite of knowing better, and later affirmed in an  
24 interview that he had attempted to remove Mr. Jafari from  
25 the permit, allegedly. So shortly after leaving Fiesta,

1 Mr. Jafari started a competing business as a sole  
2 proprietorship DBA Corona Motors in May 1999. You'll see  
3 up here as the next slide.

4 This new used car dealership was started down the  
5 street from Fiesta Motors, and Mr. Jafari retained and  
6 continued to use Mr. Walsh to provide tax and accounting  
7 services for his new enterprise since he did not have any  
8 prior issues with him, and Mr. Walsh had successfully  
9 managed previous audits for other used car dealerships.  
10 Mr. Walsh was a trusted contact who provided accounting  
11 services to many in Mr. Jafari's ethnic community.

12 Mr. Jafari was unaware until after the audit of  
13 Corona Motors that Mr. Walsh had been subject to  
14 disciplinary action from the California Board of  
15 Accountancy based on various violations. And his CPA  
16 license expired on July 31st, 2003, and he was  
17 subsequently revoked. This is Exhibit 16 that talks about  
18 the revocation of Mr. Walsh. And it's very important that  
19 this took place in 2003 when he was revoked. You'll see  
20 why.

21 JUDGE GEARY: Mr. Vinatieri. Let me just -- just  
22 for a second. Can you slow it down just a little bit.  
23 The court reporter has indicated she may need you to speak  
24 a little slower.

25 MR. VINATIERI: I'm happy to do that. I just

1 don't want to blow my time.

2 JUDGE GEARY: Thank you.

3 MR. VINATIERI: So Mr. Walsh incorporated --  
4 assisted Mr. Jafari in the incorporation of Corona Motors  
5 to Corona Motors, Inc., in January of 2000, and is listed  
6 as a corporation's agent for service, a process in Corona  
7 Motors, Inc.'s Articles of Incorporation. So as the  
8 Department's own evidence shows -- and this is Exhibit Q,  
9 it's from the Department. This is titled "Application For  
10 Seller's Permit and Registration As a Retailer."

11 And down here on question 7, Full Name,  
12 Residence, et cetera, it says, "Present/Past Employer."  
13 Past employer, Fiesta Motors. And what's the address, 220  
14 West Boulevard in Ontario. So this was done -- the date  
15 down here -- where did it go? Well, I don't see it real  
16 quickly. I thought I had it. But in any event, this was  
17 done right in 1999. So the Department has this document,  
18 and we actually got this -- we hadn't seen this before.  
19 We got it out of their exhibits that they gave to us.

20 So the Department had record notice of  
21 Mr. Jafari's noninvolvement and departure from Fiesta as  
22 Fiesta was listed as a past employer on the application  
23 for a Seller's Permit for Corona Motors. And as I said,  
24 this was 1999. So Department knew. They were on notice  
25 as of 1999 that he was no longer involved in Fiesta.

1           So typically at Mr. Jafari's dealerships, the  
2 managers complete -- sign the records of sale.  
3 Secretaries input those records. Mr. Jafari was  
4 constantly away from his business as his main function was  
5 to procure inventory for the dealership. Mr. Walsh would  
6 come to the dealership, takes the sales records from the  
7 business for his accounting services, including  
8 calculating sales tax payments.

9           In addition to financial statements and income  
10 tax preparation, Mr. Walsh would also look at the sales  
11 records, calculate the amount of tax, inform Mr. Jafari  
12 how much sales tax was owed. The Department conceded in  
13 Exhibit 15 that Mr. Walsh provided sales tax advice to  
14 Mr. Jafari and then later changed -- the Department later  
15 changed its position after revealing its 2005 interview  
16 with Mr. Walsh. So in Exhibit 15 you will see in there --  
17 and I can pull it up, but it's there -- basically, they  
18 admit that Mr. Walsh was giving sales tax advise but  
19 changed their minds at a later point.

20           The Department continually -- and this is one of  
21 our problems -- gives Mr. Walsh a revoked certified public  
22 accountant, whose expertise is in taxes, the benefit of a  
23 doubt but to refuses to give any benefit of the doubt to  
24 Mr. Jafari, who is a little bit less experienced in tax  
25 matters, for the used car dealership industry. So based

1 on the amount Mr. Walsh told him to pay, Mr. Jafari would  
2 fill out the sales tax return.

3 And Mr. Walsh explained the basis for his sales  
4 tax calculations to Mr. Jafari by expressing that there  
5 were deductions common in the industry available to claim  
6 as offsets during any audit, if necessary. Including  
7 deductions for buy backs, repoes, bad debt, et cetera. So  
8 Mr. Jafari relied on Mr. Walsh's expertise considering  
9 that he had previously handled audits for all of these  
10 other used car dealership and reasonably believed that the  
11 industry reported sales tax on a net basis with allowances  
12 for entitled deductions. And the BOE's own audit approach  
13 focuses on line 12 -- as we all know -- taxable sales  
14 versus verification or an audit of each deduction line of  
15 the return.

16 So we're going to hear later from our expert  
17 witness, Mr. Wade Downey, that reporting sales tax on a  
18 net basis is a reasonable practice for the used car  
19 dealership industry and is found actually in the CDTFA  
20 Audit Manual. Mr. Walsh suggested to Mr. Jafari that he  
21 should purchase First Auto Center from Hammad  
22 Debuji [sic]. Mr. Walsh was also the accountant providing  
23 service for First Auto Center.

24 Mr. Jafari purchased First Auto Center in  
25 November 2003, and it's up here on the timeline. On the

1 original sales tax permit and registration for First Auto  
2 Center, after Mr. Jafari's purchase of the business,  
3 Mr. Kenneth Walsh is listed as the person who is  
4 maintaining the records for the business. It's in the  
5 documents.

6 Also, interestingly, November 2003 a DMV  
7 investigator a Mr. Lopez and SBE ISOD Investigator Emma  
8 Reyas conducted a DMV compliance inspection at Fiesta  
9 Motors. By this time, Mr. Jafari had not been involved  
10 with Fiesta Motors for more than five years. Mr. Jafari's  
11 only connection to Fiesta was the improper and continued  
12 use of his name on Fiesta's sales tax permits  
13 notwithstanding the fact that the Board was aware that he  
14 had left. So Mr. Jafari's only connection was that basic  
15 improper use on the sales tax permit.

16 So based on the prior inspection, an  
17 investigation of Fiesta on or about April 19th, 2004, a  
18 new ISOD Investigator, Charles Spaeth, began his  
19 investigation of Mr. Jafari. And a supplemental search  
20 warrant was signed on October 19th and shortly,  
21 thereafter, for records. So due to the audit of Fiesta,  
22 and subsequent to that audit, the Department began  
23 investigating any related accounts to Fiesta Motors, which  
24 incorrectly then captured Mr. Jafari's businesses.

25 Thereafter, an audit of Corona began and was

1 handled by Mr. Jafari's accountant, Mr. Walsh. And some  
2 dispute that Mr. Walsh was the sole person, the sole party  
3 managing and working that audit with the State Board at  
4 that time. And he documents any records, including  
5 federal income tax returns were provided solely by  
6 Mr. Walsh. ISOD investigator Charles Spaeth detailed  
7 narrative -- it's CDTFA's Exhibit W. It's in the records.  
8 It's their Exhibit W -- of the case continually states  
9 that the records were provided by Mr. Walsh. And it's  
10 very clear -- very clear from that narrative that  
11 Mr. Jafari was not involved in the audit whatsoever. It  
12 was all Mr. Walsh, and it's Mr. Spaeth's write-up that  
13 says that.

14 So based on the prior inspection of once again  
15 Fiesta Motors, multiple criminal search warrants were  
16 served on January 21st, 2005, to Fiesta Motors and its  
17 related accounts. Despite Mr. Jafari no longer having a  
18 connection or interest in Fiesta Motors, the warrants  
19 inappropriately included the business owned and operated  
20 by Mr. Jafari. And once, again, Mr. Jafari was swept up,  
21 caught in this investigation's net because of Fiesta  
22 Motors and Mr. Kenneth Walsh.

23 During the execution of these warrants, officers  
24 searched Mr. Jafari. Mr. and Mrs. Jafari were handcuffed  
25 in front of their neighbors and children, and that's CDTFA

1 Exhibit H. And I'm going to read it right now because you  
2 all need to hear this. This is very upsetting to me. I  
3 told you earlier I saw things that happened that were not  
4 appropriate.

5 This is from Tony Price who is the investigator  
6 from ISOD. Memorandum of Interview/Contact: CHP  
7 handcuffed Amin and Monica upon entry securing the  
8 premises for the search. Prior to beginning the  
9 interview, CHP took the handcuffs off both Amin and  
10 Monica. Before beginning the interview, I explained that  
11 this was a criminal investigation for possible felony  
12 sales tax violations relating to the operation of Fiesta  
13 Motors and Corona Motors. We were executing a search  
14 warrant signed by the judge looking for books and records  
15 related to sales of the business.

16 Amin stated that he probably needs to talk to a  
17 lawyer. I told him that he probably will want to consult  
18 a lawyer, but that I cannot let him call one during the  
19 search warrant execution. I further explained to Amin  
20 that I would like to ask him background questions about  
21 the operation of the business and asked them if that would  
22 be okay. I also told Amin he was under no obligation to  
23 answer any of the questions asked. He could answer some  
24 and not answer others. Amin agreed to let me ask the  
25 questions.



1           So he was told this was a criminal investigation.  
2       Mr. Jafari was told that he would like to talk to -- he  
3       needs to talk to a lawyer. And this comes right from  
4       Mr. Price. And, yet, the interview kept going on, and  
5       Mr. Jafari continued to speak. Very, very disturbing. We  
6       all know that when a potential criminal person is involved  
7       in a search and that they ask for an attorney -- I know  
8       there's a lot of cases -- that interrogation should stop.

9           JUDGE GEARY: Mr. Vinatieri, before you begin,  
10      did you say -- identify that document as Exhibit H?

11           MR. VINATIERI: Yes, Exhibit H. It is -- there  
12      are three fraud memos. Each fraud memo has this document  
13      attached thereto. We just used Exhibit H. It's H and --  
14      is it I also?

15           JUDGE GEARY: Thank you.

16           MR. VINATIERI: Yeah. It's -- you have it. So a  
17      month later -- now that was January '05. Now we're in  
18      February of '05. ISOD Investigator Charles Spaeth  
19      interviewed Mr. Kenneth Walsh the central figure in the  
20      investigation. As previously mentioned, Mr. Walsh was the  
21      accountant for Fiesta Motors and a number of other  
22      dealerships in the area. Despite IPA request by us, this  
23      interview was not disclosed to us until March 13th, 2014,  
24      appeals conference, many years later, more than nine years  
25      after the original interview had taken place and despite

1       our previous IPA requests.

2               During the interview, which is Exhibit 14 -- it's  
3       Exhibit 14. I don't -- I'm just taking selected exhibits.  
4       I'm not putting them all up. But during that particular  
5       interview, Mr. Walsh stated there was a previous request  
6       to remove Mr. Jafari from Fiesta Motors' permit. He  
7       admitted to preparing income tax returns for Mr. Jafari  
8       and his businesses. And remember, Mr. Walsh not only  
9       prepared these tax returns, but also was the sole  
10      individual who provided these records to the auditors.

11             After this interview, it should have been evident  
12      to Department that Mr. Jafari had no ties to Fiesta Motors  
13      and had not for quite some time. In fact, I'm thinking I  
14      want -- I don't have it right here. I want to show you  
15      the document because you'll see -- you'll see in that  
16      interview it's got four different taxpayers, apparently.  
17      All are, on our document, are redacted except for one that  
18      relates to us. So this was -- this was -- remember  
19      Mr. Spaeth -- I'm just going to put it up here. Here it  
20      is.

21             JUDGE GEARY: We have that in front of us too.

22             MR. VINATIERI: Okay. And you'll see, spoke to  
23      Mr. Kenneth Walsh CPA, Redondo Beach, spoke to him about  
24      four car dealerships. Remember I said earlier there were  
25      investigations going on. New blank, blank, blank, blank,

1 Amin Jafari for a long period of time. So what's he say?  
2 We don't know what the other three are. Presumably, if it  
3 was Corona Motors or one of the -- or First Auto or  
4 somebody else, we got the Corona Motors, but we don't have  
5 the other ones.

6 So I'm assuming it's redacted, and these are  
7 non-related to Mr. Jafari. Corona Motors, does the  
8 general ledger, corporate and personal returns. Paid \$250  
9 a month for the canceled checks and bank statements REC.  
10 No sales tax returns prepared. Claims he didn't know  
11 anything was wrong with the audit. He said they did a  
12 request to remove Amin from Fiesta Motors. Last work was  
13 May, June income tax for '03 prepared without First Auto  
14 Sales for November, December.

15 So -- so here's Mr. Walsh who is at the center of  
16 everything that's going on, and this is all we got. And  
17 this was only gotten what, eight years after the fact,  
18 that well after we asked under IPA for it. We didn't find  
19 out about it until we finally had our appeals conference  
20 at BOE. This is what I'm concerned about again.  
21 Undeterred, ISOD was determined to press forward with this  
22 civil fraud proceeding. And eight months after, the  
23 A.G.'s office decline to press charges, FBO's, field  
24 billing orders, along with fraud penalty recommendations  
25 were issued.

1           This Department had a strong incentive to claim  
2     fraud in order to have any hope of continuing the case  
3     against Mr. Jafari since the statute of limitations had  
4     run. So they're going through this criminal  
5     investigation, and the A.G. decides not to prosecute. And  
6     uh-oh, we have a three-year because they're filing statute  
7     to file the returns. Oh, the statute, it's gone. I'm  
8     being a little jaundice. I understand that, but that's  
9     what it's smelling like to this veteran tax attorney.

10           The field billing orders reflect 1,500 hours of  
11    audit time, which does not include any time by ISOD  
12    Investigator Emma Reyes or Charles Spaeth. Despite the  
13    significant amount of time spent on the audit, there were  
14    no allowances -- get this -- no allowances given for any  
15    potential deductions for bad debts, et cetera. Our expert  
16    witness will attest that this is completely unreasonable  
17    and an incomplete audit procedure. It doesn't follow the  
18    Audit Manual. The audit staff, once again, did not do its  
19    job and cannot meet its burden here today.

20           Notices of Determination were soon issued on  
21    December 10th and 13th, 2010. Although the request was  
22    made for all correspondences be sent to Mr. Jafari's  
23    counsel Attorney Russell Briesacker. The First Auto  
24    Center NOD was not sent to counsel. And the petition was  
25    filed one day late, and collection ensued shortly

1       thereafter. I had to jump in at that point because it was  
2       now civil, and we had to ask that this matter be set as an  
3       administrative protest, which they finally agreed to even  
4       after they had started tax collection, even though there's  
5       two others that were timely filed.

6               The Department later accepted its fault in not  
7       sending the Notice of Determination to counsel. This  
8       petition was accepted as an administrative protest.  
9       Finally, in March 2011 the Department eventually abandoned  
10      pursuing Mr. Jafari in connection with the Notice of  
11      Determination for Fiesta Motors. March 2011. A  
12      March 1st, 2011, letter from Department staff Gina Fong  
13      conceded that Mr. Jafari was not involved with Fiesta  
14      Motors as of the fourth quarter of 1998, notwithstanding  
15      everything else.

16             Finally, Mr. Jafari is not part of Fiesta Motors.  
17      But by this point in time, all the damage, the handcuffs,  
18      and everything else had taken place. So December 28th,  
19      2010, counsel specifically requested a complete copy of  
20      all documents and records pertaining to this case pursuant  
21      to the California Information Practices Act. This  
22      information was specifically requested in order to assist  
23      in the taxpayer's defense.

24             However, nowhere in the records provided was  
25      there any reference to, let alone a document detailing an

1 interview of Mr. Walsh in 2005. And, again, this  
2 information was not disclosed to the taxpayer or counsel  
3 until the 2014 appeals conference. Sometime in 2012, the  
4 fraud memo for Corona Motors was, quote, "Superseded."  
5 And it's in your documents. I have it here. You can see  
6 it. The Department has asserted that it has provided all  
7 documents relating to this appeal.

8 Counsel has still not provided with a superseding  
9 fraud memo for Corona Motors, Inc. Thus, presumably,  
10 there is no superseding fraud memo for Corona Motors, Inc.  
11 According to Department's own Audit Manual, once again,  
12 Section 0509.75, when an audit recommends an evasion  
13 penalty, a memorandum is required from the administrator  
14 to the Chief Headquarters Operation Bureau and the Chief  
15 Audit Carry Bureau for special taxes and fees.

16 So without the superseding fraud memo, any fraud  
17 determination against Corona Motors is ineffective. And  
18 as far as we're concerned, they've conceded that point,  
19 and the Department has never responded to this issue. And  
20 we've raised this in our briefing time after time. It's  
21 in all the documents that you have. We've never heard  
22 anything in response. We believe that's a concession.

23 An Appeals conference is held, March 13th, 2014.  
24 Over a year later a D&R, Decision and Recommendation was  
25 issued on April 22, 2015, which was later amended pursuant

1 to a supplemental D&R dated October 8, 2018, for  
2 conditional refund -- refund finality penalty.

3 As previously mentioned, the taxpayer and counsel  
4 were only informed of the interview with central figure  
5 Mr. Walsh after this 2014 appeals conference years after  
6 the investigation, initiation of the appeals process, and  
7 the IPA request. The taxpayer disagreed with the D&R,  
8 requested a hearing before the Board, and leading us to  
9 where we are here today.

10 So what are the takeaways? What are the  
11 takeaways here? This all started because the  
12 investigation into Fiesta Motors. Mr. Jafari was not  
13 involved with Fiesta Motors since December 1998. The  
14 Department knew that Mr. Jafari was not involved with  
15 Fiesta Motors -- piece of paper here -- yet, still  
16 continued to pursue him for liabilities associated with  
17 Fiesta Motors. The Department had the time and the  
18 resources to do a full and complete audit but failed to do  
19 so. The Department had all the records that it had  
20 seized, and they held those records for years. And they  
21 could have calculated a full audit, including any offsets,  
22 any bad debts, et cetera.

23 They could have done it. They had -- they had  
24 the records. We didn't even have the records. But for  
25 whatever reason they chose not to do that. They didn't

1 follow the manual. The Department conceded that  
2 Mr. Kenneth Walsh, CPA, who has since lost his license,  
3 was the one who handled the audit of Corona Motors. They  
4 agreed with that. He handled that -- not Mr. Jafari --  
5 and provided the documents to the auditors while still  
6 pursuing Mr. Jafari with this knowledge of Mr. Walsh's  
7 intimate involvement.

8 And after five years the A.G.'s office declined  
9 to pursue the criminal charges yet, the Department  
10 continued to persist with the civil fraud proceeding. The  
11 Department failed to provide all the documents for the IPA  
12 request, disclose the interview with central figure Mr.  
13 Walsh. No superseding fraud memo has been provided. The  
14 Department is now stuck with its fraud argument because  
15 the three-year statute of limitations has run.

16 Department failed to meet its Audit Manual  
17 Section 0509.30, burden of clear and convincing evidence  
18 of fraud with no substantial doubt of fraud. There it is.  
19 Candidly, the Department has not done their job.

20 At this time I want to call our expert Mr. Wade  
21 Downey.

22 JUDGE GEARY: Thank you, Mr. Vinatieri. You're  
23 at about 26 minutes. So that's a good estimate.

24 MR. VINATIERI: I did good.

25 JUDGE GEARY: You did. Bear with me for a



1 moment.

2 Are you ready, Mr. Downey?

3 MR. DOWNEY: I am.

4 JUDGE GEARY: You ready?

5 MR. DOWNEY: Yes.

6 JUDGE GEARY: All right. If you raise your right  
7 hand, I want to administer an oath or affirmation.

8

9 W. DOWNEY,

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

13

14 JUDGE GEARY: Thank you.

15 Before you begin, Mr. Vinatieri, in your  
16 disclosure of Mr. Downey as an expert witness, you state  
17 that he would testify on potential topics, including  
18 evaluation of audit procedures performed by CDTFA, audit  
19 staff procedures not performed, and impact on accuracy of  
20 overall report. Are there any other areas you plan to  
21 cover today?

22 MR. VINATIERI: Yes, I think that's accurate.

23 JUDGE GEARY: Thank you. All right. You may  
24 proceed.

25 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Q Mr. Downey, would you please state your name and business address for the record?

Q And Mr. Downey, what's your current occupation?

Q And if you would please, give us your education and work experience?

I joined Deloitte Touche Multistate Tax Services Group where I provided sales and use tax controversy, recovery, and audit representation services for five years

1 as a senior manager. Finally, in 2002 I formed Downey  
2 Smith & Fier, and we've been providing state and local tax  
3 services for the last 20 years. I have experience with  
4 auto dealerships, prime and subprime financing, and  
5 California bad debts.

6 Q So what is your relationship to this case?

7 A Yeah. So I was engaged in 2005 by the former  
8 criminal attorney to assess the books and records that had  
9 been seized by the Board of Equalization, and evaluate the  
10 sales and use tax reporting methods used by the Appellant  
11 companies. The BOE was asserting that they were a  
12 duplicate set of records, and that there was intentional  
13 understatement of taxable measure.

14 Q So did you review those records?

15 A Yes. So I reviewed the records on two occasions.  
16 First in 2005 I visited the Board of Equalization's  
17 Riverside Investigation Office and sat with the records at  
18 that location, which included sales journals, computerized  
19 sales journals, manual sales journals, inventory reports,  
20 vehicle jackets, financing agreements, reserved reports,  
21 lost reports, expenses, bank statements, as well as DMV  
22 information.

23 And then secondary, after the issuance of the  
24 Notice of Determination, I reviewed the audit procedures,  
25 verification of comments, schedules, and supporting

1 documents included therein with the fraud recommendations.

2 Q So after reviewing these documents information,  
3 what was your conclusion?

4 A So based on review of the records in 2005, I  
5 sought no evidence of duplicate set of records. It was  
6 clear that the sales and use tax returns that were filed  
7 represented a subset of the total sales. I found the  
8 records actually to be complete and in good status. They  
9 were meticulously maintained. They were supported by  
10 source documents. The books and records were consistent  
11 with the financial results of the company, the  
12 computerized sales journals, and the federal income tax  
13 returns, the books and records.

14 There were no differences between the manual  
15 journals, the manual records, and the computerized  
16 records. There were no errors or no material errors in  
17 recording manual transactions within the documents. They  
18 were actually in very good -- very good order and very  
19 complete.

20 Q So what would you expect a duplicate set of  
21 records to include?

22 A Yeah. So when I was with the State Board of  
23 Equalization back in the day, we had a situation where  
24 there was a set of sales journals that was presented to  
25 the auditor and reconciliations were done, et cetera. And

1       then on a revisit there's a set of sales journals that  
2       looked the same. When you open it up, all the numbers are  
3       different.

4               So I would expect that a duplicate set of records  
5       would include multiple sales journals with inconsistent  
6       recording of transactional information. For instance, a  
7       sale of a vehicle recorded at \$10,000. In a second  
8       journal that same vehicle is recorded with all the same  
9       details at \$5,000. Or you would have a vehicle jacket  
10      where there's information supporting the \$10,000  
11      transaction and an equal jacket supporting the \$5,000.

12              I saw no such thing. So that's what I would  
13      consider a duplicate set of books and records is that the  
14      same transaction is recorded differently.

15              Q     So what was your conclusion, then, with respect  
16      to those sales and use tax returns?

17              A     Yeah. So as I stated earlier, based on review of  
18      the records, the sales reported appeared to be on a  
19      taxable measure basis on the return with exemptions and  
20      deductions netted from those returns.

21              Q     Netted. So why did you conclude that the returns  
22      were filed then on a net basis?

23              A     Well, first there was no deductions on any of the  
24      returns that were filed. This business in the records, in  
25      the schedules, had a significant amount of resales. That

1 would appear on line 3 of the return as a deduction for  
2 sales for resale. In addition, this business was a used  
3 car dealership.

4 They sold vehicles in the range of, you know, \$5  
5 to \$15,000. A large percentage, 90-plus percentage of  
6 their business involved financed loans, financed vehicles.  
7 And most of those in the subprime market and subprime  
8 loans with a high cost with customers that have lower  
9 credit scores, have no credit, or no other means to  
10 purchase or secure a vehicle without some of this  
11 financing.

12 And so I would have expected or did expect, in my  
13 initial examination in 2005, that we would see a bad debt  
14 deduction on the return. In addition, the books and  
15 records included expense information. It was fuel  
16 purchased that's usually on a tax-paid purchase. That  
17 fuel includes sales tax when it's resold with the vehicle.  
18 There's a tax-paid purchase resold deduction that's  
19 afforded on the ten lines of the return. So I would have  
20 expected to see those deductions also.

21 And then, finally, consistent with, kind of, the  
22 BOE audit approach is that they do taxable measure audits.  
23 We look at line 12, and we look at the taxable sales, and  
24 that is the determination of the audit, not a total sales  
25 audit, where you're examining each of the lines on the

1 returns, et cetera.

2 Q So you talked -- just talked about a netting  
3 methodology. Where in the Audit Manual do you find  
4 support for netting?

5 A Yeah. So Audit Manual Section 0405.10 provides  
6 audits on a taxable measure basis. And let me read the  
7 first couple of paragraphs of this. An audit made on a  
8 taxable measure basis generally places emphasis on  
9 verification or accumulation of taxable differences. As  
10 compared to an audit performed on a total sales basis and  
11 claimed deduction basis using individual lead schedules.

12 The use of the taxable measure basis should in no  
13 way be construed to relieve the auditor of his  
14 responsibility to verify all sources of revenue and  
15 deductions of examined or of written verification comments  
16 therefore. So this section addresses that, you know, the  
17 Board of Equalization recognize -- and its common -- for  
18 taxpayers to report on a taxable measure basis.

19 MR. VINATIERI: So members of the Panel, this is  
20 the Exhibit 34 that we just added.

21 BY MR. VINATIERI:

22 Q So we find it here in the Audit Manual. Was the  
23 auditor required to take these deductions and exemptions  
24 into consideration? Why or why not?

25 A Yeah. So Audit Manual 0401. -- hang on one

1 second. Yeah. 0401.05 discusses audits, and in this --  
2 and let me read this. It says the primary purpose --

3 Q This is identified -- this is the last paragraph  
4 of page that has 0401.05; correct?

5 A Yes. Yes, correct. So I'm reading from the  
6 Audit Manual. So a primary purpose of the CDTFA's audit  
7 program is to determine -- is to provide reasonable  
8 assurances that the taxpayer pays neither more or less tax  
9 than required by the law. So their responsibility is to  
10 determine the proper and correct amount of tax, which  
11 would require an audit of not only taxable sales but also  
12 deductions.

13 The audit involved a single procedure largely of  
14 reconciling the recorded gross sales to the sales tax  
15 returns without considering any other deductions.

16 Q So without a review of these offsets as set forth  
17 here about credits and refunds, is it possible to know  
18 what the true taxable measure is?

19 A I think, unless you do a complete audit and  
20 understand what impact you would have on the recorded  
21 sales, it would be hard to make a determination or  
22 conclusive determination without considering those items.  
23 And financing was a significant part of why this business  
24 was able to sell vehicles to the customers that they sold  
25 vehicles to.



1           Q    So in their audit, did the Department allow  
2           applicable deductions or exemptions in determining the  
3           taxable measure?

4           A    No.  As I stated the audit was reconciling gross  
5           sales to the sales tax returns.  In the CDTFA's Exhibit J,  
6           page 2 -- in page 2 this is the audit program for the  
7           audit.  It's audit program, audit period 01/01/2000.

8           Q    I'm sorry, Mr. Downey.  You're referring to  
9           Exhibit J --

10          A    Yes.

11          Q    -- and you said audit program.  What's the audit  
12          program?  Who proffers?  Who puts together that audit  
13          program?

14          A    This was prepared by the assigned auditor.

15          Q    Okay.  So it's the auditor who actually put this  
16          audit program together; is that correct?

17          A    Correct.

18          Q    Okay.  Thank you.  I'm sorry I jumped in on you.

19          A    Oh, no.  No problem.  So the audit program for  
20          audit period 01/01/00 to 6/30/04, provide investigator one  
21          quarter per year block test of jackets verified against  
22          sales journals, provide information on how repoes, bad  
23          debts, and dealer financing was recorded in the books and  
24          journals.  And so there was -- there was a, you know, I  
25          think the CDTFA also, or BOE at the time, had an

1 expectation of a bad deduction or a bad debt or a portion  
2 of these loans going bad.

3 Q So let me just -- this is on the second page of  
4 Exhibit J, and I just want to make sure that we're all  
5 clear on this. This is the auditor's own audit program.  
6 And specifically indicates, provide investigator one  
7 quarter per year block test of jackets verified against  
8 sales journal, provided information on how repoes, bad  
9 debts, dealer financing was recorded into books and  
10 journals. So it's their own program.

11 JUDGE GEARY: Mr. Vinatieri, I want to point  
12 out -- I may be missing something, but Exhibit J is the  
13 Notice of Determination. Is that what you're making  
14 reference to?

15 MR. DOWNEY: Yeah. The last two pages of that  
16 document, I think you get down to the 80s. It's at  
17 85-page document.

18 JUDGE GEARY: Thank you.

19 MR. VINATIERI: Actually, thank you for  
20 interjecting because --

21 JUDGE GEARY: Excuse me. The J that is in the  
22 electronic hearing binder I believe is a two-page document  
23 that is the Notice of Determination. Is that what you're  
24 looking at?

25 MR. DOWNEY: Okay. No.

1 JUDGE GEARY: I didn't think so. And I think  
2 there's been other references in this hearing to exhibit  
3 designations that are inaccurate. So we'll try to guide  
4 ourselves with the descriptions that the counsel gave and  
5 that the witness gave. But I think you're making  
6 incorrect references to exhibits.

7 MR. VINATIERI: So, Judge Geary, I want to make  
8 sure if there is a -- if we're not getting these documents  
9 accurate, I want to make sure for the record we're doing  
10 them accurately because you need to look at these  
11 documents. I want to make sure you can find them. So  
12 let's look at this document entitled, "Audit Program".  
13 We're looking for it right now on the electronic --

14 MR. BONIWELL: Mr. Geary, for reference they're  
15 on page 848 of the hearing binder.

16 MR. DOWNEY: And what exhibit is that? Is that  
17 not J?

18 MR. BONIWELL: It's exhibit I, I believe, in the  
19 hearing binder.

20 MR. DOWNEY: Okay.

21 JUDGE GEARY: And these binders were provided to  
22 the parties, and I asked at the beginning of the hearing  
23 if the parties had an opportunity to review them, and  
24 apparently somebody has been looking at something else.

25 MS. VERDUGO: At the bottom where it should say

1 the exhibit number. It says --

2 JUDGE GEARY: Your voice is not picking up.

3 MS. VERDUGO: I think the confusion is at the  
4 bottom where it has page numbers, it's supposed to say the  
5 exhibit number and it just says exhibit, at least in the  
6 ones we downloaded.

7 JUDGE GEARY: That's correct because it shouldn't  
8 say exhibit at all. That is simply a Bates stamping of  
9 the entire package. There's a log that I created that  
10 contains information that was in the party's submission of  
11 indexes. And there are bookmarks that will allow you to  
12 jump to every exhibit, and Exhibit J is not the document  
13 that the witness is making reference to. It's Exhibit I  
14 according to the log and according to the numbering or the  
15 lettering system used by the Department.

16 MR. VINATIERI: Okay. So everyone has it in  
17 front of them. It's Exhibit I, and we apologize for that.

18 MR. DOWNEY: Yeah. I apologize. I had  
19 downloaded the documents and opened it up and pulled it  
20 out. I think this exists in a number of documents. So I  
21 apologize about that. There must have been a renumbering  
22 and --

23 BY MR. VINATIERI:

24 Q So Mr. Downey, what deductions or exemptions did  
25 the auditors fail to include?

1           A    So I would have expected -- in 2005 when I  
2   reviewed the records, I provided an assessment on the  
3   duplicate nature or any duplicate nature of the records as  
4   well as an assessment of the sales tax returns. At that  
5   time, I noted that based on the financial information, the  
6   financing reserve statements that were included, the  
7   recourse nature of loans, the documents that were included  
8   within the books and records that I would expect that a  
9   bad debt deduction would be included or calculated as part  
10  of the audit work papers.

11                So I would have expected that there would have  
12  been a bad debt deduction. At that time, there were no  
13  findings by the Department. I was reviewing records that  
14  were in the possession of the Department. Okay. And then  
15  I also observed, you know, fuel purchases and those types  
16  of items. I believe the audit was limited to the areas of  
17  the criminal investigation, so the examination of other  
18  records that could give rise to deductions like expenses.  
19  There were purchases of fuel at a volume that, you know,  
20  would seem like it would -- was used by the business that  
21  would give rise to a tax-paid purpose resold deduction.

22                It was common -- or it's common for me to see  
23  that these types of dealerships would hold back and not  
24  claim that deduction on their original return. If they  
25  were audited, they would present the supporting

1 information, document the credit in the audit, try to  
2 minimize the impact of the differential between interest  
3 rates.

4 So an interest rate for an understatement is  
5 12 percent. Interest on credit was zero for a long time.  
6 It's now a very small percentage. And so it was not  
7 uncommon that these deductions would be held back. I  
8 would have expected to see that, as well as things related  
9 to repairs of vehicles, et cetera, to the extent that they  
10 bought some at auction that wasn't salable at the time.

11 Q So just wrapping up, Mr. Downey, did the auditor  
12 fail to follow the Audit Manual and the audit program  
13 here?

14 A Yes.

15 Q And was it reasonable for the taxpayer to believe  
16 that the sales tax returns were on a netted basis,  
17 deductions, exemptions were netted in the reported amount?  
18 Was it reasonable for the taxpayer to believe that?

19 A I think it was reasonable to believe that there  
20 was a deduction for bad debts that was not stated on the  
21 return. So I think that was reasonable, yes.

22 MR. VINATIERI: I have no further questions.

23 JUDGE GEARY: Thank you. Mr. Vinatieri and  
24 Mr. Downey.

25 Does Respondent wish to ask questions of

1 Mr. Downey?

2 MR. BONIWELL: No, thank you.

3 JUDGE GEARY: And my colleagues, Judge Brown, do  
4 you have any questions for Mr. Downey?

5 JUDGE BROWN: Not at this time, no.

6 JUDGE GEARY: Judge Stanley, questions?

7 JUDGE STANLEY: I just have one. Thank you. You  
8 had said, Mr. Downey, that the records constituted a  
9 subset of the ones that you reviewed. Could that not be  
10 considered a duplicate set of records?

11 MR. DOWNEY: So I think you're referring to --  
12 you're specifically referring to my comments relative to  
13 the sales tax returns; correct?

14 JUDGE STANLEY: I'm referring to the set of  
15 records that was originally provided by Mr. Walsh versus  
16 the documents that were obtained under subpoena.

17 MR. DOWNEY: So -- so I don't believe -- there  
18 was an income tax return and sales tax returns that were  
19 presented by Mr. Walsh. Mr. Walsh was the provider of  
20 this -- of the -- and prepared the federal income tax  
21 returns. Mr. Walsh signed the returns that were filed  
22 with the federal IRS and included communications relative  
23 to his work. Those returns included gross sales.

24 So if -- I think there's a significant question  
25 in my mind relative to the actions of the CPA, and any

1 information that was presented in initial audit hearing or  
2 audit meeting relative to having a sales amount different  
3 than the return that was filed by Mr. Jafari with the IRS.

4 So in addition to that, I think that the CDTFA  
5 has acknowledged or has -- has stated -- or they fail to  
6 acknowledge that the CPA prepared the original returns  
7 with the IRS that included total sales, prepared or  
8 participated in the sales tax returns, and participated as  
9 a key element in the original investigation when this --  
10 this information or submitting information that -- that  
11 wasn't in the records that I was reviewing.

12 The records that I reviewed at the Board of  
13 Equalization's office were complete, comprehensive, and  
14 include tax returns with total sales -- or federal income  
15 tax returns with total sales. Does that help?

16 JUDGE STANLEY: Sort of.

17 THE WITNESS: Sorry. I tried my best.

18 JUDGE GEARY: I believe Judge Brown may have a  
19 question or two now.

20 JUDGE BROWN: Yes. Thank you.

21 MR. DOWNEY: Yes.

22 JUDGE BROWN: Mr. Downey, you testified a minute  
23 ago that you said that Mr. Walsh participated in the sales  
24 tax returns. Is it your understanding that he prepared  
25 the sales and use tax returns or less than -- was his



1 participation less than that?

2 MR. DOWNEY: I say participate because I'm not  
3 certain, and I don't want to assume something relative to  
4 the preparation. But at the time that he participated in  
5 the key elements of this audit, he had the sales tax  
6 returns, and he had a federal income tax return that  
7 didn't match the federal income tax return that was filed  
8 with the IRS and signed by Mr. Jafari. So that -- or  
9 that was prepared by Mr. Walsh.

10 So from that standpoint, I think he was aware or  
11 seems reasonable that he would be aware of the sales tax  
12 returns that were prepared and the work sheets attached  
13 that had a listing of transactions that were recorded.

14 JUDGE BROWN: Is there any evidence that  
15 Mr. Walsh actually prepared the sale and use tax returns?

16 MR. DOWNEY: I did not observe any direct  
17 evidence.

18 JUDGE BROWN: All right. Because typically a  
19 paid preparer will sign on the line on the return that  
20 says "Paid Preparer." And from what I'd seen in the  
21 evidence, that did not happen for these returns; correct?

22 MR. DOWNEY: I think I would agree with that.  
23 Yes. Yeah.

24 JUDGE BROWN: So if a paid preparer didn't sign  
25 the paid preparer's line on the tax returns, do we infer

1       that that tax professional did not prepare the returns?

2               MR. DOWNEY: I think the challenge that I have  
3       here is that the initial audit meetings presented  
4       information, income tax return and a sales tax return,  
5       right, that were consistent. So why was there an income  
6       tax return supporting the sales tax returns that he was  
7       submitting in the key elements of this audit that he was  
8       handling. That's a huge question to me. And the  
9       methodology that was included in those returns is also  
10      unclear. I could not decipher the methodology that was  
11      used there except that deductions were netted from those  
12      returns.

13             JUDGE BROWN: Right. But Mr. Walsh, as far as we  
14      know, there's no evidence that he prepared the sales and  
15      use tax returns?

16             MR. DOWNEY: I did not see evidence.

17             JUDGE BROWN: Okay. Thank you.

18             MR. DOWNEY: So, yeah.

19             JUDGE GEARY: Thank you, Judge Brown.

20             I have a couple of questions. Did you prepare a  
21      report for the criminal defense attorney that originally  
22      retained you?

23             MR. DOWNEY: I prepared -- I prepared a report  
24      for him initially in 2005.

25             JUDGE GEARY: Okay. Was there a subsequent

1 report also prepared for that individual?

2 MR. DOWNEY: No.

3 JUDGE GEARY: Was there a report prepared for  
4 Mr. Vinatieri?

5 MR. DOWNEY: No.

6 JUDGE GEARY: The written report that you  
7 prepared for the criminal defense attorney in 2005, do you  
8 know whether it's part of our record?

9 MR. DOWNEY: It is not part of your record.

10 JUDGE GEARY: Does that report specifically  
11 identify every document that you reviewed in coming to  
12 your opinions and conclusions?

13 MR. DOWNEY: It does document the records that we  
14 reviewed.

15 JUDGE GEARY: Can you tell me off the top of your  
16 head what federal income tax returns you reviewed?

17 MR. DOWNEY: I cannot. I -- I don't know. There  
18 are tabs for the federal income tax returns. I wouldn't  
19 want to state a date or a year.

20 JUDGE GEARY: Did you review every sale and use  
21 tax returns for the -- that was filed by all the  
22 Appellants for the entire periods that are at issue in  
23 these consolidate appeals?

24 MR. DOWNEY: I don't know that I can state that I  
25 reviewed every one. I know we reviewed a significant

1     portion of all the years. So I wouldn't want to say that  
2     I reviewed every one.

3             JUDGE GEARY: When you say "we", who is the  
4     other -- who else is part of that we besides you?

5             MR. DOWNEY: I had a manager who was working for  
6     me at the time.

7             JUDGE GEARY: All right. Let me see if I  
8     understand at least one of your opinions correctly. Are  
9     you testifying that the returns that were filed on behalf  
10    of these Appellants were all accurate?

11            MR. DOWNEY: No. Let me -- can I clarify that?

12            JUDGE GEARY: Of course.

13            MR. DOWNEY: I don't know if they were accurate  
14    because you have to do a comprehensive audit to determine  
15    what the amount, you know, net of bad debts that were  
16    incurred by the taxpayer and then compare that to the  
17    taxable measure that was reported on those returns.

18            JUDGE GEARY: And you did not do that?

19            MR. DOWNEY: I did not do that. I was not  
20    engaged to do that. I was engaged by the criminal  
21    attorney to assess the records before there was any  
22    finding in 2005.

23            JUDGE GEARY: Have you done that for  
24    Mr. Vinatieri?

25            MR. DOWNEY: I have not done that.

1 JUDGE GEARY: Do you --

2 MR. VINATIERI: Let me interject. I think you  
3 asked the question if Mr. Downey had done something for  
4 me.

5 And, Mr. Downey, I'm looking at the March 12,  
6 2014. Did with we for the appeals conference -- yeah,  
7 there's a report as I recall for the appeals conference.

8 MR. DOWNEY: Did we --

9 MR. VINATIERI: It was a small --

10 JUDGE GEARY: Exhibit 30 according to OTA's  
11 evidence log appears to be a March 12, 2014 report.

12 MR. DOWNEY: Right.

13 MR. VINATIERI: Yeah.

14 MR. DOWNEY: Yeah. Okay.

15 MR. VINATIERI: That was what I recalled.

16 JUDGE GEARY: That's your report?

17 MR. DOWNEY: Yes.

18 JUDGE GEARY: Do you know whether that report  
19 identifies every document you've reviewed and upon which  
20 you relied in reaching your conclusions?

21 MR. DOWNEY: I think it identifies all seized  
22 records by the BOE. So it's not specific to the  
23 documents -- to the records in terms of, you know, vehicle  
24 jackets, inventory reports manual. It's not specific to  
25 the -- to those documents. It refers to seized records.

1 JUDGE GEARY: Did you review all of those seized  
2 records?

3 MR. DOWNEY: We went through most of the seized  
4 records, yes.

5 JUDGE GEARY: And was there sufficient  
6 information in those records to calculate, for example,  
7 the bad debt deductions that you believe one or more of  
8 these Appellants might have been entitled to?

9 MR. DOWNEY: Yes. I think there was sufficient  
10 records within the vehicle jackets to document a bad debt.

11 JUDGE GEARY: Did you do that?

12 MR. DOWNEY: I did not do that. I was not  
13 engaged to do that.

14 JUDGE GEARY: Did you want to continue? I didn't  
15 want to cut you off.

16 MR. DOWNEY: No, no, no.

17 JUDGE GEARY: All right. Do you know whether any  
18 of these Appellants deducted bad debts on any of the  
19 federal income tax returns filed for periods that included  
20 the periods that are at issue in this appeal?

21 MR. DOWNEY: I don't believe -- I don't believe  
22 that there was a bad debt claimed on the federal return.

23 JUDGE GEARY: Those are all the questions that I  
24 have to ask, and I'm going to return it to Mr. Vinatieri.

25 But first let me check and make sure the judges

1       have no further questions.

2               JUDGE BROWN:   Not at this time.

3               JUDGE STANLEY:   Can I just add one thing,  
4       Mr. Downey?

5               MR. DOWNEY:    Yes.

6               JUDGE STANLEY:   I can point you to that  
7       Exhibit 30 right after the line that you read where it  
8       says that you reviewed all the seized records.   It says  
9       after that, and there's a whole list of other things that  
10      you say that you reviewed.   So the answer to Mr. -- to my  
11      fellow Judge Geary's question would be that there are  
12      apparently a substantial number of documents that you  
13      subsequently did review as well?

14              MR. DOWNEY:    Correct.   And these were probably --  
15      these documents were probably part of the audit schedules  
16      and audit reports as supporting documents to the audits.

17              JUDGE GEARY:   All right.   Mr. Vinatieri, I'm  
18      going to open it back up to you if you had any follow-up  
19      questions for your witness.

20              MR. VINATIERI:   I don't think so.   I think that  
21      pretty much covers it.

22              JUDGE GEARY:   All right.

23              Department?

24              MR. BONIWELL:   Ready to go?

25              JUDGE GEARY:   Yeah.   You have no follow-up

1 questions?

2 MR. BONIWELL: Oh, no. We don't have any  
3 questions. No thank you.

4 JUDGE GEARY: All right. Yes, if the witness  
5 testimony is done. Thank you. I appreciate you being  
6 here, Mr. Downey.

7 And CDTFA, you can begin your argument when you  
8 are ready.

9 MR. BONIWELL: Thank you.

10

11 PRESENTATION

12 MR. BONIWELL: So this hearing as we're all aware  
13 concerns the consolidated appeals of three used automobile  
14 dealerships: Amin Jafari doing business as Corona Motors,  
15 Corona Motors, Incorporated, and Amin Jafari doing  
16 business as First Auto Center. I'll generally refer to  
17 all three taxpayers as the Appellants, and I'll  
18 specifically identify the taxpayers as necessary  
19 throughout my argument.

20 There are three Notices of Determination at issue  
21 in this appeal. The first was issued December 10th, 2010,  
22 to Mr. Jafari doing business as First Auto Center for the  
23 period of November 5th, 2003, through December 31st, 2004.  
24 It was for over \$400,000 in tax plus interest and a fraud  
25 penalty of just over \$100,000, as well as a finality



1 penalty.

2 The Notice of Determination was based on a  
3 January 10th, 2007, field billing order, which found  
4 unreported taxable sales based upon differences between  
5 recorded and reported taxable sales measuring over  
6 \$5 million. On December 13th, 2010, the Department issued  
7 a Notice of Determination to Mr. Jafari doing business as  
8 Corona Motors for the period of July 1st, 1999, through  
9 January 31st, 2000, for just over \$209,000 plus interest  
10 in a fraud penalty totaling \$52,351.

11 The Notice of Determination was based on an  
12 August 20th, 2008, report of field audit, which found an  
13 aggregate deficiency measure of over \$2.6 million  
14 consisting of unreported taxable sales and excess sales  
15 tax reimbursement that was not reported. And finally on  
16 December 13th, 2010, the Department issued a Notice of  
17 Determination to Corona Motors Incorporated for the period  
18 of February 1st, 2000, through June 30th, 2004, for over  
19 \$1.6 million in tax plus interest, and a fraud penalty  
20 totaling \$415,204.

21 The Notice of Determination was based on a  
22 June 11th, 2008, field billing order which found an  
23 aggregate deficiency measure of over \$21 million  
24 consisting of unreported taxable sales based on  
25 differences in sales tax recorded and reported measuring

1 over \$19 million, unreported taxable sales based on  
2 unrecorded taxable sales measuring over \$1.5 million, and  
3 excess sales tax reimbursement not reported measuring  
4 \$14,681.

5 There was a computational error which resulted in  
6 a timely increase of audit Item 2 to just over \$1.8  
7 million, and an increase to audit Item 3 to \$14,882, as  
8 well as an increase to the fraud penalty of \$420,928. Per  
9 the prehearing conference order, there are three primary  
10 issues for each Appellant in this hearing. The first  
11 issue I will address concerns whether the Department  
12 proved by clear and convincing evidence that Appellants'  
13 deficiency determinations were the result of fraud.

14 The second related. If the Department did not  
15 sufficiently prove fraud, whether the Notices of  
16 Determinations are barred by the statute of limitations.  
17 And the third I'll address concerns whether any  
18 adjustments are warranted to the Department's  
19 determinations. So the Department maintains its position  
20 that it established by clear and convincing evidence that  
21 the Appellant's deficiency determinations were the result  
22 of the fraud.

23 In the case of deficiency determination, pursuant  
24 to Revenue & Taxation Code Section 6485, a penalty of  
25 25 percent of the amount of the determination applies if

1 any part of the deficiency is due to fraud or an intent to  
2 evade the sales and use tax law or authorized rules and  
3 regulations. The expressed language of Section 6485, it  
4 makes clear that a fraud penalty shall be imposed on the  
5 entire deficiency if any part of that deficiency  
6 determination is due to fraud. And it's the Department's  
7 burden to prove fraud and intent to evade by clear and  
8 convincing evidence.

9 The Revenue & Taxation Code does not define  
10 fraud, but there are many federal precedents that provide  
11 guidance. Fraud is intentional wrongdoing on the part of  
12 the taxpayer with the specific intent to avoid a tax that  
13 is known to be owing. Fraud or intent to evade can be  
14 proven by circumstantial evidence, which includes but is  
15 not limited to substantial discrepancies between recorded  
16 amounts and reported amounts that cannot be explained.  
17 The indication that a deficiency is due to intent to evade  
18 increases in direct proportion to the understatement.

19 Other examples include when sales tax or sales  
20 tax reimbursement is properly charged evidencing knowledge  
21 of the requirements of the law but not reported,  
22 inadequate records, failure to cooperate with tax  
23 authorities, failure to file tax returns, and the lack of  
24 credibility in the taxpayer's testimony. Specifically,  
25 federal courts have found that while the mere omission of

1 reportable income is not in and of itself sufficient to  
2 warrant a finding of fraud, repeated understatements in  
3 successive years when coupled with other circumstances  
4 showing an intent to conceal or misstate taxable income  
5 presents the basis for inferring fraud.

6 And here, there are several factors present that  
7 when taken together clearly and convincingly establish  
8 that Appellants' tax liabilities were the result of fraud  
9 or an intent to evade the law. To start, the Appellants'  
10 principal, Mr. Jafari, had extensive history in the used  
11 car industry in California and understood his obligation  
12 to collect sales tax reimbursement on sales of used cars,  
13 such that he knew how to properly report and remit sales  
14 and use taxes.

15 Mr. Jafari was issued his first California sales  
16 permit in 1988 when he sold used cars as part of his gas  
17 station business. He was later issued a Seller's Permits  
18 in 1999 for the Corona Motors sole proprietorship, in 2000  
19 for Corona Motors, Inc., and in 2003 for First Auto  
20 Center. Those are contained in Exhibit P. And  
21 information concerning Mr. Jafari's former businesses are  
22 included in Exhibit D.

23 As detailed on the permit applications, each time  
24 he received the Seller's Permit, he was provided industry  
25 specific CDTFA publications and copies of governing

1 regulations, which imparted to him his rights and  
2 responsibilities as a permit holder. Notably, the  
3 responsibility and procedure on how to accurately report  
4 sales and use taxes. His understanding of this  
5 responsibility is evidenced by vehicle sales contracts and  
6 sales and use tax returns that were filed for the  
7 liability periods.

8 A sampling of used vehicle sales contracts are  
9 provided in Exhibit BB on page 1357 of the hearing binder.  
10 And these demonstrate the Appellants' practices of  
11 charging customer sales tax reimbursement on their  
12 purchases of used vehicles. Also, Exhibits DD and EE on  
13 pages 1390 and 1447, these contain sales and use tax  
14 returns for the Appellants from the liability periods, all  
15 signed by Mr. Jafari demonstrating his understanding of  
16 his responsibility to remit and report sales tax  
17 reimbursement to the Department.

18 So the evidence I've discussed thus far  
19 demonstrates that Mr. Jafari was a sophisticated retailer  
20 with over 30 years of experience, most of it in the used  
21 vehicle industry. But he received publications and  
22 regulations in response to his Seller's Permit  
23 applications, which imparted to him an understanding of  
24 his obligations under the sales and use tax law that he  
25 knew he was obligated to charge customers sales tax

1 reimbursement on their used vehicle purchases, and that he  
2 knew he was obligated to file sales and use tax returns  
3 and remit sales tax reimbursement to the Department.

4           However, despite understanding these obligations,  
5 the reporting practices for his three businesses resulted  
6 in repeated and significant understatements of taxable  
7 sales. While operating Corona Motors as a sole  
8 proprietorship, Mr. Jafari signed returns that  
9 underreported over \$2.6 million in taxable sales  
10 representing an error rate in reporting of 700 percent.

11           With regard to Corona Motors Incorporated, Mr.  
12 Jafari signed returns that underreported taxable sales by  
13 over \$21 million representing an error rate of 463  
14 percent. And for First Auto Center, Mr. Jafari signed  
15 returns that failed to report over \$5 million in taxable  
16 sales representing an error rate of 317 percent. It is  
17 not disputed by Appellants that Mr. Jafari was aware of  
18 the underreporting when he signed Appellants' tax returns.

19           A key element of Appellant's defense is that  
20 Mr. Jafari believed the tax returns were filed on a net  
21 basis, such that something like sales for resale were  
22 netted against total sales. But we know Mr. Jafari  
23 maintained records of all the sales he made at his  
24 dealerships, including sales made for resale. And you  
25 could see notations of those in the inventory record that

1 is included in the Appellants' Exhibit 30.

2 As such, he would have known that netting  
3 nontaxable sales would not reduce the Appellants'  
4 liabilities or rather reduce the Appellants' taxable sales  
5 to the unbelievable levels that were reported on the tax  
6 returns. Mr. Jafari's fraudulent reporting practices were  
7 coupled with circumstances showing an intent to conceal  
8 true taxable sales, including the failure to provide the  
9 Department all of the relevant records in his possession  
10 at the time of audit.

11 When Corona Motors was first audited, Mr. Jafari  
12 directed the Department to Mr. Walsh who only provided the  
13 Department with the false subset of records that supported  
14 the understated returns and contained no supporting  
15 nontaxable sales that were netted from total sales. It  
16 wasn't until the Department executed search warrants for  
17 Corona Motors and First Auto Center that it obtained  
18 complete records that were located at Mr. Jafari's  
19 businesses. Mr. Jafari's failure to provide the  
20 Department all relevant records in his possession at the  
21 time they were requested by the Department is additional  
22 evidence of intent to evade tax.

23 Further, copies of sales tax returns that were  
24 found during the execution of the search warrant had false  
25 sales tax worksheets attached in the form of calculator

1 tapes. These are shown in the Department's Exhibits AA  
2 and CC. Not only did Appellant severely understate  
3 taxable sales on the returns, but they maintained false  
4 sales tax worksheets to support the false returns.

5 The intent was to evade tax by convincing a  
6 person reviewing the tapes that Appellants were only  
7 making the sales that were reflected on the tapes. There  
8 was no evidence of taxable sales that were not being  
9 reported for netting purposes.

10 The totality of the evidence supports in position  
11 of a fraud penalty because it demonstrates one, that  
12 Mr. Jafari had knowledge of the sales and use tax law and  
13 the reporting requirements for the Appellants but,  
14 nonetheless, consistently and knowingly underreported  
15 Appellant's taxable sales throughout the liability periods  
16 with no plausible explanation.

17 And two, that Mr. Jafari failed to provide all  
18 relevant records in his possession to the Department and,  
19 in fact, maintained a false subset of records with false  
20 sales tax worksheets with the intent to evade tax by  
21 concealing the Appellant's practices of underreporting.

22 Now, in Appellant's briefing, they contend here  
23 that if fraud was perpetrated, it was done solely by  
24 Appellant's then CPA Mr. Walsh, who provided documents to  
25 the Department during the audit. By pointing the finger



1 at Mr. Walsh, Appellant's want us to believe that  
2 Mr. Walsh acted alone with respect to Appellant's  
3 reporting, and that Mr. Jafari had no involvement in -- or  
4 limited knowledge of the fraudulent underreporting.

5 But this contention is not consistent with the  
6 evidence. While it's undisputed that Mr. Walsh provided  
7 the Department auditors with the subset of Corona Motors  
8 understated records, this does not demonstrate that Mr.  
9 Jafari was unaware that amounts reported on the  
10 Appellants' returns were substantially and intentionally  
11 understated.

12 As the person with three years of experience  
13 selling used cars in California, that did all the  
14 purchasing for his dealerships, that engaged in vehicle  
15 sales at his dealerships, that signed every sales and use  
16 tax return for the liability periods, Mr. Jafari was both  
17 aware of the sales volume at his businesses and the volume  
18 of sales that was not being reported on the Appellants'  
19 sales and use tax returns. And despite this awareness, he  
20 directed the Department auditors to the false records in  
21 Mr. Walsh's possession while withholding the true records  
22 of taxable sales.

23 Furthermore, the evidence casts doubt on the  
24 level of Mr. Walsh's involvement in the preparation of  
25 Appellants' sales and use tax returns. Exhibit Y on

1 page 1300 contains the billing summary for charges that  
2 were invoiced by Mr. Walsh to Mr. Jafari for accounting  
3 services rendered only regarding Corona Motors dating from  
4 January 2000 through June 2004.

5 The billing summary shows that Mr. Walsh charged  
6 Corona Motors for services related to preparing monthly  
7 financial statements, personal income tax returns, and  
8 corporate income tax returns. There were no charges  
9 recorded indicating that Mr. Walsh prepared sales and use  
10 tax returns. Given the specificity of this document, if  
11 Mr. Walsh was preparing quarterly sales and use tax  
12 returns for Corona Motors, we would expect to see a  
13 corresponding quarterly charge, or perhaps monthly charges  
14 if he was preparing prepayment forms.

15 And these invoices are consistent with the fact  
16 that Mr. Walsh did not sign the returns as a paid  
17 preparer, and they are consistent with notes recorded in  
18 Exhibit T on page 1189 of the hearing binder. This is an  
19 investigation summary report by the Department  
20 investigator when he spoke with Mr. Walsh on February 9th,  
21 2005.

22 These notes indicate that Mr. Walsh spoke with  
23 the investigator concerning Corona Motors and First Auto  
24 Center that he prepared the general ledger, corporate and  
25 personal income tax returns for that business -- for the

1 businesses, and that Mr. Walsh did not prepare sales and  
2 use tax returns.

3 Additionally, Exhibit Z on page 1306, this is a  
4 July 29th, 2004, letter from Mr. Walsh to Mr. Jafari  
5 concerning the preparation of a Corona Motors' California  
6 income tax return. The letter states that the income tax  
7 return was prepared based on information provided by his  
8 client, Mr. Jafari, and requests that his client review  
9 the returns prior to filing them with the Franchise Tax  
10 Board. It appears it was Mr. Walsh's practice to base his  
11 return preparation to the extent he did prepare returns on  
12 information provided by his clients, and that he directed  
13 his clients to review the returns before filing them.

14 Also Appellants' counsel stated during its  
15 argument that Mr. Jafari filled out all of the sales and  
16 use tax returns. He was responsible for completely  
17 filling out all of the handwritten sales and use tax  
18 returns for his businesses. And Mr. Jafari signed every  
19 return for every Appellant during the liability periods  
20 certifying that the returns had been examined by him and  
21 to the best of his knowledge and believed were true and  
22 correct complete returns.

23 So taken together, this evidence demonstrates  
24 that Mr. Walsh was not the sole person responsible for the  
25 Appellants' sales and use tax reporting obligations and

1 the Appellants' fraudulent behavior. To the extent that  
2 Appellants received advice from Mr. Walsh concerning sales  
3 and use tax reporting, that does not overcome Mr. Jafari's  
4 experience in the used vehicle sales and industry, his  
5 knowledge of sales and use tax obligations, his awareness  
6 of Appellants' sales volumes and, thus, his understanding  
7 of the volume of sales not being reported and his apparent  
8 involvement or specific involvement in the preparation of  
9 the handwritten sales and use tax returns.

10 Now, in the event that it is determined that the  
11 fraud in this case was -- is attributable to Mr. Walsh,  
12 then the fraud of Mr. Walsh as Appellants' agent would be  
13 imputed to the Appellants. As stated in Section 0509.40  
14 of the Department's Audit Manual, when a taxpayer's agent  
15 has acted with the intent to evade tax payment, even  
16 though the attempted evasion occurred without the  
17 taxpayer's knowledge or consent, the evasion penalty will  
18 apply because fraud of the agent is imputed to the  
19 principal, except when the principal is defrauded by the  
20 agent or employee.

21 Now, given the dearth of relevant case law as it  
22 applies to Revenue and Taxation Code Section 6485, the  
23 Office of Tax Appeals has analogized the standards that  
24 apply under Internal Revenue Code Section 6663, the  
25 federal income tax fraud penalty statute. Under that

1 standard, the relevant question is whether the Appellants'  
2 agent was acting on behalf of and not against the  
3 businesses with the result that the businesses benefited  
4 from the agent's fraudulent acts. If so, the fraud of the  
5 agent may be imputed to the businesses.

6 The record here shows that Appellants all  
7 received a direct benefit from the substantial  
8 understatement of taxable sales. As previously discussed,  
9 records show that sales tax reimbursement was collected on  
10 used vehicle sales during the liability periods, but only  
11 a portion of it was remitted to the Department. At the  
12 appeals conference when asked what happened to the sales  
13 tax reimbursement that was collected but not remitted,  
14 Mr. Jafari stated that it would have been used in his  
15 First Auto Center and Corona Motors business operations.  
16 This is on 19, line 17 through 20 of Exhibit O.

17 There is no evidence that Mr. Walsh benefited  
18 from the understatement, and there is no evidence that  
19 Mr. Walsh misappropriated funds or that Appellants'  
20 reported Mr. Walsh to the authorities or otherwise pursued  
21 legal action against him. Under these circumstances in  
22 the event that it's determined that Mr. Walsh perpetrated  
23 the fraud in these cases, Appellants each received a  
24 direct benefit from the substantial understatement of  
25 reported taxable sales. Appellants are responsible for

1 the acts of their agent and the fraud of Mr. Walsh is  
2 imputed to Appellants.

3 With that being said, the Department maintains  
4 its position that Appellants' principal, Mr. Jafari, was  
5 aware of the intentional understatement of taxable sales,  
6 intimately involved in the preparation of the sales and  
7 use tax returns for his businesses, and personally acted  
8 with the intent to evade the sales tax obligations on  
9 Appellants' taxable sales.

10 As it relates to the second issue, it concerns  
11 whether Notices of Determination issued to the Appellants  
12 were timely for each liability period. Whether the  
13 Notices of Determination were timely depends on a finding  
14 of fraud or intent to evade. If the Office of Tax Appeals  
15 sustains the Department's finding of fraud, then no  
16 statute of limitations would apply in these cases, and the  
17 Notices of Determination would have been timely issued  
18 with respect to all periods at issue.

19 Absent a finding of fraud, the Notices of  
20 Determination would have been untimely with respect to the  
21 liability periods because the three-year statute of  
22 limitations period would then apply to those periods  
23 pursuant to Revenue and Taxation Code Section 6487  
24 subdivision (a). Given that it's the Department's  
25 position that it has demonstrated clear and convincingly

1       that fraud was perpetrated in these cases, it's also the  
2       Department's position that the Notices of Determination  
3       were timely issued.

4               The third issue, primary issue broadly concerns  
5       whether the measures of unreported taxable sales,  
6       unrecorded taxable sales, or excess tax reimbursement are  
7       overstated. The Department maintains its position that  
8       Appellants' arguments that the measures are overstated  
9       lack substantiation and that Appellants have not met their  
10      burden of proof in demonstrating that they're entitled to  
11      reduced measures.

12             When a taxpayer challenges a Notice of  
13      Determination, the Department has the burden to explain  
14      the basis for the deficiency. But whether Department's  
15      explanation appears reasonable, the burden of proof shifts  
16      to the taxpayer to explain why the deficiency is not  
17      valid. The applicable burden of proof is by a  
18      preponderance of the evidence. Here, for each Appellant  
19      the Department relied on the Appellants' own records in  
20      determining the respective measures.

21             Specifically, the Department relied on  
22      Appellants' computerized sales journals, which showed that  
23      the Appellants' reported taxable sales far exceeded the  
24      taxable sales reported on their returns. The sales  
25      journals were corroborated by the report of sale records

1       that were obtained from the Department of Motor Vehicles  
2       and the sales contracts seized during the execution of the  
3       search warrants. There's no dispute that the documents  
4       Mr. Walsh presented to the Department for audit in support  
5       of the Appellants' sales and use tax returns are  
6       inaccurate and unreliable.

7               Let me correct that. Mr. Walsh presented  
8       documents concerning Corona Motors only. And the  
9       Appellants have presented no evidence demonstrating that  
10      the information relied upon by the Department is  
11      inaccurate, unreliable, or unreasonable. As such, the  
12      Department used the best evidence available, and its audit  
13      method was reasonable, and the burden shifts to the  
14      Appellants to prove why the Department's deficiency  
15      measures are overstated.

16             Appellants' general position that the measures  
17      are overstated appears to be based in Mr. Downey's  
18      analysis that returns were filed on a net basis, and that  
19      it is common for used auto dealerships to hold back  
20      unclaimed deductions when filing quarterly sales and use  
21      tax returns and then wait to present those deductions upon  
22      audit. So to the extent that the Department's Audit  
23      Manual permits amounts to be netted from total sales, such  
24      amounts must be supported as valid exclusions from taxable  
25      sales.



1           For example, in these cases the Department  
2           allowed amounts totaling over \$5.8 million for nontaxable  
3           sales for resale and out of state sales where there was  
4           support. But the taxpayer has the burden of proving its  
5           right to an exemption or exclusion from its tax  
6           obligations and must establish that right with evidence  
7           specified in the sales and use tax law.

8           Now, the practice of holding back or unclaiming  
9           deductions when filing returns is not consistent with the  
10          requirement of the sales and use tax law. And it remains  
11          unclear why the taxpayer would pay more than what's  
12          actually due in hopes that it will be audited and given an  
13          opportunity to later claim back deductions that it held  
14          back. Overall, Appellants have failed to present any  
15          additional evidence that sufficiently demonstrates an  
16          entitlement to a reduction of any of the measures.

17          Now, the only evidence that was submitted relates  
18          to the liability period for the Corona Motors sole  
19          proprietorship. The Appellant submitted -- this Appellant  
20          submitted fuel receipts for the fourth quarter of 1999 in  
21          support of its position that it's entitled to a deduction  
22          for tax-paid purchases of fuel that were resold -- that  
23          was resold with the vehicles.

24          Pursuant to Regulation 1701, a tax-paid purpose  
25          purchases resold deduction may be taken by the retailer

1       where through error sales tax reimbursement or use tax is  
2       paid by the retailer with respect to the purchase price of  
3       property purchased for resale in the regular course of  
4       business.

5               Appellant submitted receipts for fuel purchases  
6       that occurred, like I said, in the second half of 1999.  
7       However, the receipts alone do not indicate whether the  
8       fuel was consumed by Appellant, like, for example, for  
9       test drives or whether it was resold with the vehicles.  
10      And there's no evidence that the Appellant actually resold  
11      the fuel with the vehicles that the fuel would have been  
12      put into.

13             As such, Appellant has not met its burden in  
14      demonstrating that it is entitled to a reduction related  
15      to these tax-paid purchases of fuel that was resold.  
16      Appellant also submitted a copy of a July 12th, 1999  
17      dealer agreement with CID Financial in support of its  
18      contention that it's entitled to a deduction for unclaimed  
19      bad debts.

20             The agreement contains a recourse provision which  
21      remained in effect until three full payments were made by  
22      the vehicle purchaser, which then required Corona Motors  
23      to buy back the financing contracts that it sold to CID in  
24      the event of default of the purchaser within the initial  
25      three months of the loan.

1           Regulation 1642 subdivision (e) explains that in  
2 support of deductions or claims for credits with bad  
3 debts, a retailer must make adequate and complete records  
4 showing specific pieces of information regarding each  
5 worthless account. Here, Appellant has provided that  
6 documentation that's required by the regulation.

7 Appellant has not presented any return checks or canceled  
8 contracts to demonstrate that it had unclaimed bad debts.

9           And with regard to the recourse loans, Appellant  
10 has submitted no evidence demonstrating that any  
11 transactions during the audit period actually became bad  
12 debts under any recourse loan provisions that may exist in  
13 contracts that this Appellant had with financial  
14 institutions. Appellant has not met its burden in  
15 demonstrating that it's entitled to a reduction for  
16 unclaimed bad debts.

17           This Appellant, the Corona Motors sole  
18 proprietorship has otherwise submitted no evidence  
19 indicating that it's entitled to a reduction of the  
20 measures of unreported taxable sales or excess sales tax  
21 reimbursement for its liability period. With regard to  
22 Corona Motors, Inc., no evidence was submitted  
23 demonstrating that it is entitled to a reduction of the  
24 deficiency measures of unreported taxable sales or  
25 unrecorded taxable sales or excess tax reimbursement for

1 the liability period.

2 And similarly, no evidence was submitted  
3 demonstrating that First Auto Center is entitled to a  
4 reduction of its measure of unreported taxable sales for  
5 its liability period. Based on the foregoing, no  
6 adjustments to the measures determined in each Appellants'  
7 case are warranted, and the Appellants' appeals should be  
8 denied because the Department has demonstrated that its  
9 Notices of Determination were timely issued because the  
10 deficiencies determined were the result of fraudulent  
11 conduct, namely, severe and intentional underreporting of  
12 taxable sales perpetrated by the Appellants' principal,  
13 Mr. Jafari.

14 If I can have a couple of minutes, I wouldn't  
15 mind addressing a few extra issues, if that's okay?

16 An argument that was made here today concerns  
17 Mr. Walsh's punishment by the Accountancy Board. Per  
18 documents that were submitted as part of Appellants'  
19 Exhibit 30, Mr. Walsh's CPA certificate was revoked  
20 effective February 23rd, 2005, which is after the  
21 liability periods at issue in these cases.

22 The revocation was the result of Mr. Walsh having  
23 prepared an audit for an unrelated client on  
24 February 27th, 2002, after his license had expired on  
25 August 1st, 2001, and before it had been renewed on

1 May 16th, 2002. So it appears that Mr. Walsh repeatedly  
2 failed to respond to inquiry requests from the California  
3 Board of Accountancy. And his failures resulted in the  
4 eventual revocation of his CPA license.

5 With regard to the Appellants, it appears that  
6 Mr. Walsh's CPA license was only not active from  
7 August 1st, 2001, until it was renewed May 16th, 2002, the  
8 Board revocation was, again, not effective until February  
9 2005. There's no evidence showing that Mr. Walsh  
10 misrepresented his license to Appellants during the period  
11 of August 2001 through May 2002. And there's no evidence  
12 demonstrating that Mr. Walsh's licensure as a CPA was a  
13 requisite for providing the professional services he  
14 allegedly rendered to Appellants during these periods.

15 And finally, I want to address the issue of the  
16 superseded fraud memo. You know, in the Department's  
17 Exhibit D, it's been there for a long time. There is the  
18 memo that was marked superseded in error and was corrected  
19 on October 12, 2012.

20 Thank you.

21 JUDGE GEARY: Thank you.

22 Mr. Vinatieri, are you ready for your closing  
23 argument?

24 MR. VINATIERI: No questions by the Panel of  
25 Counsel, I'm assuming?

1 JUDGE GEARY: I don't have any questions.

2 Judge Brown, did you have any questions?

3 Judge Brown is thinking. I will ask

4 Judge Stanley.

5 JUDGE STANLEY: For the record, I do not. Thank  
6 you.

7 JUDGE BROWN: Yeah. I think I do not have any  
8 questions at this time. Thank you.

9 JUDGE STANLEY: Apparently there are no question  
10 pending for Respondent.

11 MR. VINATIERI: Can with have a couple minutes,  
12 please?

13 JUDGE GEARY: Yes. How long do you need?

14 MR. VINATIERI: Five minutes.

15 JUDGE GEARY: Five minutes. Let's take a recess  
16 for five minutes, please.

17 (There is a pause in the proceedings.)

18 MR. VINATIERI: We're ready to proceed.

19 JUDGE GEARY: Before we do, we do have one  
20 question for Respondent. I believe Judge Brown has a  
21 question.

22 JUDGE BROWN: Okay. Yes. My question for CDTFA  
23 concerns the final part of your argument regarding the  
24 superseded fraud memo that you referenced, and that's  
25 Exhibit D. And I understand you indicated that initially

1       it was marked as superseded and then that was corrected.  
2       I just want to confirm, when you say that it was  
3       corrected, is that just the -- it looks like a pencil  
4       notation on the first page of Exhibit D that says -- well,  
5       it says something like, "This was marked superseded in  
6       error," and initial -- someone's initials. And then it  
7       says something -- looks like a date in October of 2012.  
8       Is that the correction you're talking about?

9               MR. BONIWELL: Yes, that was the correction I was  
10       pointing to that demonstrates that the person who  
11       superseded it did this, did so in error and that it was  
12       subsequently un-superseded. And there's a notation and an  
13       initial of the person who removed the superseded notation  
14       and the date of that.

15              JUDGE BROWN: Okay. But we don't know who wrote  
16       "superseded", and we don't know who wrote the notation  
17       that that was an error?

18              MR. BONIWELL: I think we do, and I'll defer to  
19       Ms. Wilson.

20              JUDGE BROWN: Okay.

21              MS. WILSON: Okay. So the person who did the  
22       re-audit was when petitioners ordered an adjustment. A  
23       re-audit was performed. And so the auditor performing the  
24       re-audit superseded the fraud memo in error. And so the  
25       initials are for the audit reviewer who caught the error.

1 Do you need their names or --

2 JUDGE BROWN: If you know them offhand, sure.

3 MS. WILSON: Yes. So the auditor was Allison  
4 Debauch [sic], and the reviewer was Timothy Munds [sic].

5 JUDGE BROWN: Okay. Because I see -- yeah. That  
6 looks like "T.M.".

7 MS. WILSON: Okay. That was my question. Thank  
8 you.

9 JUDGE GEARY: Mr. Vinatieri, whenever you're  
10 ready.

11 MS. VERDUGO: I'll follow up the question for the  
12 superseded fraud memo, that from the very beginning we've  
13 asked them to explain the superseded memo. And to my  
14 recollection, in none of the briefing, in none of the back  
15 and forth -- and this has been going on for quite a  
16 while -- did anybody even try to explain it to us. I  
17 mean, I don't recall if there's something in the record  
18 where you explained this before. I mean, that would be  
19 great. But it's not until now that we're told even this  
20 much, but I still question.

21 I mean, once it's superseded, it's gone. And  
22 usually superseded means it's replaced with something  
23 else. So where is this other document that replaced it?  
24 So even if it was in error, it would have been superseded  
25 with something else, replaced with something else. That's



1        what superseded generally means. And then how do we know  
2        that was incorrect and it was -- the error was actually  
3        when they unsuperseded the superseded?

4                So I still question that document. And, again,  
5        it's not until now that we get an explanation despite, you  
6        know, this whole time. So I still say that fraud memo was  
7        invalidated on the date it was superseded. So that's one  
8        question. I don't know where in the record you guys have  
9        responded to it before. In terms of what --

10               JUDGE GEARY: Ms. Verdugo, before --

11               MS. VERDUGO: Yes.

12               JUDGE GEARY: Are you about to start the closing  
13        argument?

14               MS. VERDUGO: Yes.

15               JUDGE GEARY: Okay. I just wanted to ask you --

16               MS. VERDUGO: Sure.

17               JUDGE GEARY: -- one question of you about the  
18        comment you just made.

19               MS. VERDUGO: Yeah.

20               JUDGE GEARY: Do you have the Exhibit D? I know  
21        you have it in your binder because we put it there. My  
22        office put it in there, but did you have Exhibit D with  
23        that handwritten notation on it before you got it when the  
24        Respondent submitted their exhibits?

25               MS. VERDUGO: We did receive it at some point but

1 with no explanation. And my copy actually, I couldn't --  
2 I mean, you barely could read. I could barely read it.  
3 And I still didn't know whose initials those were. We did  
4 see the initials superseding on superseding. And, again,  
5 in our briefing we kept bringing up the fact that we still  
6 don't believe that this is superseding, and there's no  
7 explanation.

8 We would get a briefing back with no mention of  
9 the memo. And so we kept saying, okay, are you conceding  
10 that it's superseded? Because you have said nothing.  
11 Yes, I've seen it before but until now we didn't know who  
12 had done it, why they had done it, whether if it was even  
13 valid.

14 JUDGE GEARY: Okay. Thank you. You may proceed  
15 whenever you're ready.

16 MS. VERDUGO: I did want to follow up in our  
17 closing --

18 MR. VINATIERI: I'm sorry. We're not closing.  
19 We're involved in rebuttal right now. We have the right  
20 to rebut what's been said. So that's what we're doing,  
21 then we'll do our closing.

22 MS. VERDUGO: So I just wanted to point -- I'm  
23 sorry. Go ahead.

24 JUDGE GEARY: Excuse me. You can call it  
25 anything you want, Mr. Vinatieri. It can be called a

1 closing argument, and that could also be used for  
2 rebuttal. Generally, it's used to rebut information  
3 brought up in the argument. Use the time however you  
4 want.

5 MR. VINATIERI: Thank you.

6 MS. VERDUGO: Thank you, Judge Geary.

7 JUDGE GEARY: Yes.

8

9 CLOSING STATEMENT

10 MS. VERDUGO: So I just wanted to point out that  
11 in their preparation, the Department continually mentions  
12 the difference between the gross numbers and, you know,  
13 the big difference is there. But they ignore our  
14 entire -- for the past hour or so -- we have been telling  
15 them that it needed to be netted, that it's a net number.  
16 So when you're talking about the differences, you're not  
17 really looking at the taxable measure in the same with  
18 apples and oranges. So you can't really compare those two  
19 numbers and say, oh, there's this big difference.

20 Offsets and deductions needed to be taken into  
21 account, and they failed to take that into account. And  
22 it's even more insulting that they say, well -- really,  
23 they haven't presented any direct evidence. So they say  
24 well, we can do it under circumstantial evidence, under  
25 federal rules, et cetera. And the bigger the difference

1 the more likely the fraud.

2 Well, it's interesting that they overinflate the  
3 numbers. So, of course, you're going to see this big  
4 difference. And so it increases the probability of fraud.  
5 So by ignoring netting, by ignoring possible deductions,  
6 by ignoring the reasonableness of a net number, they then  
7 overinflate the number, and that proves the fraud. So  
8 it's circular. And I just wanted to point that out  
9 because I think it's very disingenuous.

10 And also, throughout this whole process they keep  
11 saying, well, you prove this. You prove this. You prove  
12 he didn't do this. You prove that this number, but it is  
13 their initial burden. It's not the low threshold of, hey,  
14 we'll just come up with a number and then it switches over  
15 to the taxpayer to -- the burden of proof then switches  
16 over to the taxpayer. That is true in a regular case.  
17 But here, you first have to prove your burden which is by  
18 clear and convincing evidence, and that includes the  
19 amount.

20 You cannot say, oh, we met some minimal  
21 threshold. We came up with some sales. Now, here we kick  
22 it when you have the burden. No. Your own manual says  
23 that you have to take both sides, including offsets and  
24 deductions. That is in your own manual. You have not met  
25 your own burden. You cannot then push it to us to -- for

1       it to be our burden before you have met ours. And you  
2       have not met yours. And that is just the things I wanted  
3       to point out.

4               Mr. Vinatieri will take it from there.

5               MR. VINATIERI: Thank you. So there are a couple  
6       of other comments that were made and I thank you, because  
7       it's very poignant.

8               And let's be candid here. In the good old days  
9       at the Board of Equalization, the larger the difference,  
10      the more fraud it must be. And once you got to a certain  
11      amount of difference, then well it has to be fraud.  
12      Intuitively there's some sense to that, but you know what,  
13      if you haven't done -- as Patricia just indicated -- and  
14      done a complete audit, you don't know how big that is.  
15      That's the issue -- one of the issues in front of that you  
16      need to opine on.

17              So there's a statement made about direct evidence  
18      of knowledge. I heard no direct evidence of knowledge  
19      here. Mr. Spaeth himself in his report said that all his  
20      interactions were with Mr. Walsh, that the records -- it  
21      was clear that Mr. Walsh was involved in doing all the  
22      procedures, and that Mr. Walsh was the one who presented  
23      the records to the auditor. That has not been  
24      contradicted, controverted, one way or the other. It was  
25      Mr. Walsh. It was not Mr. Jafari.

1           So there's also a major question here about  
2   Mr. Walsh, and I heard counsel talk about Mr. Walsh when  
3   he was revoked, et cetera. So let me point something  
4   out to you.

5           And I'm going to need help, Ms. Verdugo, with  
6   this.

7           MR. VINATIERI: This is --this document is --  
8   this was the applicant's on the appeals conference.

9           Do we have a number on it? Because I want the  
10   Panel to see this.

11           So we had showed you previously the revocation of  
12   Mr. Walsh's license. And, this I think, was a document  
13   that was put together by the Department.

14           Do we have the number on it?

15           MS. VERDUGO: I think it's in Exhibit 16 where we  
16   have our appeals conference submission. I think that's  
17   correct, Exhibit 16. And in Exhibit 3 within that  
18   Exhibit 16.

19           MR. VINATIERI: Is everybody there?

20           MR. BONIWELL: No.

21           JUDGE GEARY: If the document that you're  
22   referring to says "Kenneth Walsh CPA," and then a list  
23   under that --

24           MS. VERDUGO: That's correct.

25           JUDGE GEARY: -- with active license, license

1 expired.

2 MR. VINATIERI: Yes.

3 JUDGE GEARY: Okay. We have that.

4 MR. VINATIERI: If you are not there --

5 JUDGE GEARY: It's on, by the way, just -- sorry.

6 I'll just need to indicate page 183 of the PDF document.

7 MR. VINATIERI: So at the bottom of the first  
8 section says, "No fee. CPA Compliance missing unknown  
9 from 5/17/02 through 7/31/03. Expired. No renewal 8/1/03  
10 through 1/24/05." You see his was license expired.  
11 License revoked 1/25/05. And then you go to the bottom of  
12 the page and it says order to revoke license 1/25/04. Do  
13 you see that?

14 Now, Counsel talked about documents that related  
15 to CPA billing summary, and it's his Exhibit Z, as in  
16 Zorro. Let's look at the first page of the statement he  
17 has there. See where it says Kenneth E. Walsh CPA 1739  
18 Lomita, California -- PCH, Lomita, California? See the  
19 date on there? It's 6/30/04.

20 Are we -- are we all there?

21 JUDGE GEARY: Describe the document again because  
22 Exhibit Z is Mr. Walsh's letter to Corona. Is that what  
23 you want to be looking at?

24 MR. VINATIERI: No it's a statement. There's a  
25 series of statements here. Bills from Mr. Walsh to Corona

1       Motors.

2               JUDGE GEARY:   It's Exhibit Y.

3               MR. VINATIERI:   Right.   I'm sorry.

4               JUDGE GEARY:   We have it.

5               MR. VINATIERI:   Okay.   Do you see the date there,  
6       the statement 6/30/04?   And Mr. Walsh is indicating that  
7       he's a CPA at the top left corner there.   And yet, this  
8       document, which is page 183, says he's revoked as of this  
9       date.   Do you see that?   So there's an inconsistency here.  
10      And this just goes to what we've been trying to say all  
11      along.   And Counsel is saying well, these statements  
12      say -- they don't say anything about sales tax  
13      preparation, personal income tax.   They say October  
14      accounting, et cetera.

15              There's this whole series of documents of  
16      statements that just because it doesn't say sales tax  
17      consulting, therefore, must not be sales tax consulting.  
18      It's all supposition on their part.   And here's the  
19      problem.   You're dealing with someone who is making  
20      representation he's a CPA, and you have evidence -- direct  
21      evidence in front you from the same Department that he's  
22      revoked.   So how much credibility -- how much should you  
23      give this in the way of weight relative to Mr. Walsh?

24              You know, in a court of law -- and we do this  
25      when we do Assessment Appeals Board Matters for property



1 tax. There's a jury instruction that I've used --  
2 although I wasn't a jury -- that basically says if  
3 somebody -- if you find someone to not have told the truth  
4 the first time, then you can make an assumption relative  
5 to the veracity of any statements made thereafter.

6 You have direct evidence here that Mr. Walsh was  
7 not telling the truth with these documents that they're  
8 utilizing against Mr. Jafari. So I think it's very  
9 important that you keep that in mind because there has  
10 been no direct evidence made or given relative to  
11 Mr. Jafari. All that's been done is, oh, it's this big  
12 so, therefore, it must be true. It's fraud. And  
13 Ms. Verdugo just said it very clearly, that's not how you  
14 prove fraud.

15 Let me go to another point that was made. A  
16 statement was made by Counsel regarding First Auto Center,  
17 and this came down to the investigator's report on  
18 Mr. Walsh. Remember, I think this is Exhibit 14. I'm not  
19 sure what page it is. But look at this closely. Here it  
20 is, 2/9/05. So where's he at on 2/9/05? Oh, at 2/9/05  
21 he's revoked, isn't he. There it is again. He's revoked.

22 And look at what it says, "2/9/05 spoke to  
23 Kenneth Walsh CPA." This is their own investigator. This  
24 is upsetting to me because they're using this to impugn my  
25 client relative to something that is incorrect, and

1 candidly their investigation is shoddy. It's not right.  
2 And look at what else. How many others are on here. He's  
3 got blanked out at the top, then Corona Motors, then  
4 blanked out and blanked out.

5 So record of investigation activity, here it is.  
6 And what does it say with Corona Motors? He says no sales  
7 tax returns prepared. Well, yeah. The reality is he  
8 didn't do it, do returns, but he told Mr. Jafari what the  
9 numbers were, and Mr. Jafari wrote them in and sent it in.  
10 That's how it worked. Ask he didn't say it -- Counsel  
11 didn't say it, but behind those returns you'll see some  
12 tapes. I'm informed that those tapes were put together by  
13 Mr. Walsh. So he was involved in doing the sales tax.

14 He just didn't do the return, per se, and sign  
15 it, but he gave the numbers. And Mr. Spaeth and the  
16 others in the documents say that he was involved in the  
17 sales tax situation, or situation with sales tax  
18 reporting, and that's uncontroverted again. So here we  
19 have Mr. Walsh again. Doesn't this start to smell?  
20 There's something wrong here.

21 Let's go to another one. Counsel talked evasion  
22 by agent. He says, "Even if it turns out that Mr. Jafari  
23 was not committing fraud, but it's Mr. Walsh, well the  
24 acts of the agent are attributable to the principal."  
25 That's what -- and candidly, there it is. It's in the

1     Audit Manual just like we've been talking about. So I'm  
2     glad we're going to the Audit Manual because that is the  
3     bible. And whether the bible wasn't followed in this  
4     case, which it has not, we've shown you that.

5             So the fact of the matter is, invasion -- evasion  
6     by agent, 0509.40, he's saying that somehow that what --  
7     if Mr. Walsh is the one who is preparer. He was the one  
8     that was doing it, unless Mr. Jafari was detrimented by  
9     it, then no, it goes to Mr. Jafari. Well, here's the  
10    problem with that. We don't know, nor do they know. But  
11    we do know that this CPA Walsh was under investigation for  
12    not only Corona Motors, but we know -- I'm sure one of  
13    these Fiesta Motors. And there's two others that we don't  
14    even know.

15            So there's something going on. I don't want to  
16    use the word conspiracy, but maybe there's something going  
17    on here that maybe there's other reasons why somebody  
18    would report the way they're doing it for maybe  
19    consistency purposes. But that's supposition on my part,  
20    and I shouldn't be arguing that. But it's not. We have  
21    to be very carefully about saying that well somehow,  
22    it's -- even if he did do it, it's back on Mr. Jafari.

23            And the one last thing that I want to say  
24    relative to the rebuttal, is that the fact of the matter  
25    is the statement was made by Counsel that well, holding

1 back that's inconsistent with an audit. Something -- the  
2 statement was along those lines. And the fact of the  
3 matter is, the word netting is used in the Audit Manual,  
4 and in this industry. And Mr. Downey said it, and he's  
5 been involved in it. Not everybody when they do their  
6 reports take all their deductions because at some point in  
7 time, they figure they're going to be audited. That's  
8 what -- and that's what he said.

9 And it's understood because it says right here in  
10 the Audit Manual, it is important that deductions claimed  
11 or netted be tested to the extent that the audit auditor  
12 satisfied that they are allowable. There's the net word.  
13 0405.10. It's actually the second page of what Mr. Downey  
14 showed you. He just said the first page. He didn't get  
15 to the second page. But turn the page over in the Audit  
16 Manual and you'll see the word net.

17 So here's the problem. Again, netting -- netting  
18 is discussed in here. And for them to say -- and I don't  
19 want to again with what Patricia was saying. But for them  
20 to say that somehow, we have to come up with the amount of  
21 the deductions, et cetera, et cetera, et cetera, when they  
22 had the records for over five years. We didn't even have  
23 them. They had them.

24 Guys, they didn't do their job. And you can't  
25 say oh, there's such a large doubt delta there, therefore

1     it must be fraud. You don't know what the delta is until  
2     they've done a complete audit, and they did not do a  
3     complete audit, and it's clear in the Audit Manual they  
4     did not.

5             So I just want to say one last thing. It comes  
6     back to what we said in the beginning. What does the  
7     manual say? It says standard proof, clear and convincing  
8     evidence on CDTFA. Clear and convincing evidence requires  
9     evidence so clear as to leave no substantial doubt -- no  
10    substantial doubt as to the truth of an assertion of  
11    fraud. When you do this, you haven't met your burden.  
12    You have to figure out what the numbers are, and then you  
13    can determine if you have no substantial doubt. And that  
14    is, there's a high probability that the assertion of fraud  
15    is true. It goes right back to the very beginning of what  
16    I said at the beginning of this case.

17            And just one last item I want you to ponder.  
18    You've had a number of fraud cases. We've read them all.  
19    Different set of facts, very much different than anything  
20    you've heard here. I want to encourage you to ponder  
21    because of the unique troubling facts of this case, to the  
22    extent in my view that you uphold what the Department has  
23    done here or has not done here, you count as incomplete  
24    and to some extent bad behavior in terms of following the  
25    Audit Manual bible. The failure of the Department to

1 follow its own precepts.

2 So to the extent that you go ahead and you say,  
3 hey, there's fraud here and you have to do whatever, then  
4 you are, in essence, saying that failure to turn documents  
5 over, it's very clear under I.P.A.; Failure to do a  
6 complete audit according to what the book says. That's  
7 shoddy nontransparent audit practice. And I would just  
8 indicate to you, the OTA, you are our last line of  
9 administrative hope. We've been through a lot on this,  
10 over many years. And there's a reason the Attorney  
11 General chose not to file and prosecute.

12 There's a reason, and I would indicate to you  
13 there needs to be a reason that this, what you've seen  
14 take place here from a civil standpoint, should be upheld.  
15 It comes down to the burden of proof that they have and  
16 substantial doubt. We appreciate your time. I know it's  
17 been a long day for not only us right here, but I know for  
18 you also. So thank you very much.

19 JUDGE GEARY: Thank you, Mr. Vinatieri.  
20 Mr. Vinatieri, do your clients submit the matter?

21 MR. VINATIERI: Yes.

22 JUDGE GEARY: Respondent, matter submitted?

23 MR. BONIWELL: Yes.

24 JUDGE GEARY: All right. These consolidated  
25 appeals are submitted on October 11th, 2022, at 4:09 p.m.

1       The record in these consolidated appeals is closed. This  
2       hearing is now concluded. Thank you everyone who has  
3       participated today.

4               In the coming weeks, the Panel will meet to  
5       consider the matter, and OTA will send you a written  
6       opinion or opinions within 100 days. This also concludes  
7       OTA's afternoon calendar for today. So the stream can  
8       stop, and you all can drive safely home, I hope. Thank  
9       you.

10              Off the record.

11              (Proceedings adjourned at 4:09 p.m.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 26th day  
of October, 2022.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER