

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
RICK'S PATIO, INC., ) OTA NO. 20096679  
 )  
 APPELLANT. )  
 )  
 )

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, October 12, 2022

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
12900 Park Plaza Dr., Cerritos, California,  
91401, commencing at 11:10 a.m. and concluding  
at 12:37 p.m. on Wednesday, October 12, 2022,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ TERESA STANLEY

Panel Members: ALJ DANIEL CHO  
ALJ OVSEP AKOPCHIKYAN

For the Appellant: ROBERT B. ROSENSTEIN  
R. COLOSIMO

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

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-9 were received at page 14.)  
(Department's Exhibits A-F were received at page 15.)

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WITNESSES:

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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1 Cerritos, California; Wednesday, October 12, 2022

2 11:10 a.m.

3  
4 JUDGE STANLEY: This is the appeal of Rick's  
5 Patio, Inc., D.B.A. Rick's Pool and Spa. Case Number is  
6 20096679. The date is October 12th, 2022, and the time is  
7 11:10 a.m. And we're in Cerritos, California.

8 Once again on the record, I'm Judge Teresa  
9 Stanley, and Judge Daniel Cho and Judge Ovsep Akopchikyan  
10 are on the panel today. Neither party objected at the  
11 prehearing conference to the substitution of Judge  
12 Akopchikyan in place of Judge Long. I will conduct the  
13 hearing, but the Panel will equally deliberate and issue a  
14 written opinion within 100 days after the record closes.

15 So I'm going to have the parties identify  
16 themselves, and we'll start with the Appellant.

17 MR. ROSENSTEIN: My name is Robert Rosenstein of  
18 Rosenstein & Associates. I represent the Appellant.

19 MR. COLOSIMO: I'm Richard Colosimo.

20 MR. NOBLE: Jarrett Noble with CDTFA.

21 MR. BACCHUS: Chad Bacchus from the Legal  
22 Division.

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

25 JUDGE STANLEY: Thank you.

1           Just the first order of business I want to state  
2           on the record that the Office of Tax Appeals is  
3           independent of the California Department of Tax and Fee  
4           Administration and any other tax agency. The Office of  
5           Tax Appeals is not a court, but we're an independent  
6           appeals agency staffed with our own tax experts. The only  
7           evidence that we have in our record is what was submitted  
8           during this appeal. The proceedings are being live  
9           streamed on YouTube, and our stenographer, Ms. Alonzo, is  
10          recording the proceeding.

11           The issues that we discussed at the prehearing  
12          conference, there were two of them. One is whether an  
13          adjustment to the measure of unreported taxable sales for  
14          unreported taxable delivery charges is warranted, and  
15          whether adjustments to the measure for unreported taxable  
16          sales are warranted.

17           Mr. Rosenstein, is that how you understand the  
18          issues?

19           MR. ROSENSTEIN: There's also a legal issue  
20          that --

21           JUDGE STANLEY: Can you get closer to your  
22          microphone, please.

23           MR. ROSENSTEIN: Sure. I'm sorry.

24           There's also a legal issue that just dovetails  
25          with both of those is the rate of interest to be charged.

1       This was a Chapter 11, and this was subject to a plan of  
2       reorganization. So it's the -- so instead of the standard  
3       interest rate it needs to be charged pursuant to the  
4       bankruptcy code. So that's the third issue that's part of  
5       the same dispute.

6               JUDGE STANLEY: And Mr. Noble, has that issue  
7       been raised with CDTFA at all?

8               MR. NOBLE: No. This is the first time we've  
9       heard of it. So we would request time post-hearing to  
10      respond. We have a bankruptcy section that would be  
11      knowledgeable on this. So we don't have response to it  
12      today.

13              JUDGE STANLEY: Okay. And with respect to the  
14      other two issues, does that reflect what you understand  
15      the issues to be?

16              MR. NOBLE: Yes, it does.

17              JUDGE STANLEY: Okay.

18              Then what we'll do is I'll allow you to go ahead  
19      and address that in your presentation, Mr. Rosenstein.  
20      And then I'll confirm whether CDTFA wants an opportunity  
21      after you're done. Well, at the end of the hearing, I'll  
22      ask if they want to hold the record open for additional  
23      briefing on that issue.

24              MR. ROSENSTEIN: Thank you.

25              JUDGE STANLEY: All right. We have Appellant's

1 exhibits that we've marked 1 through 4. And on  
2 September 21st, Mr. Rosenstein, you submitted three  
3 additional exhibits, but it looks like they are duplicates  
4 of Exhibits 2, 3, and 4. Is that accurate?

5 MR. ROSENSTEIN: I believe so.

6 JUDGE STANLEY: Okay. So we don't have any new  
7 exhibits to address?

8 MR. ROSENSTEIN: Other than what may be presented  
9 today.

10 JUDGE STANLEY: Are you planning to present new  
11 exhibits today?

12 MR. ROSENSTEIN: There are -- as set forth when  
13 we responded, there were some recaps and some additional  
14 documents. And we have spoken, and we decided to go forth  
15 with the hearing. We had a conversation, and part of that  
16 information will be subject to verification. And if  
17 it's -- if the verification shows to be correct, then I  
18 think we will have an adjustment. So we had a discussion.  
19 We realize we needed to go through with the hearing.

20 We are going to concede one of the two points,  
21 and the other point is just -- it's a very factual issue,  
22 that we have a worksheet and information behind it. And  
23 then the CDTEFA is going to ask us or provide us some  
24 information if they -- what they want to have us -- so we  
25 can verify the information on the delivery charges and --



1 JUDGE STANLEY: Okay. So can I just confirm. Do  
2 you have copies of the documentation that you intend to  
3 submit, or are you --

4 MR. ROSENSTEIN: Yes, I do. We we're instructed  
5 that if we had anything more that we wanted to submit  
6 today to bring six copies with us, which we have done.

7 JUDGE STANLEY: Okay. Okay.

8 MR. ROSENSTEIN: That was the written  
9 instructions we received yesterday or the day before.

10 JUDGE STANLEY: Did anybody on our staff ask you  
11 if you had those copies before you came in here?

12 MR. ROSENSTEIN: No.

13 JUDGE STANLEY: Oh, okay. So we may need to take  
14 a short recess to pass those out and give the parties an  
15 opportunity to take a look at what's being submitted. So  
16 I'm going to take a five-minute recess.

17 (There is a pause in the proceedings.)

18 JUDGE STANLEY: Okay. Let's go back on the  
19 record in the matter of the Appeal of Rick's Patio, Inc.

20 So Mr. Noble, have you had an opportunity to  
21 review the documents that were just submitted?

22 MR. NOBLE: Yes, I have. Thank you.

23 JUDGE STANLEY: And first of all, I'm going to  
24 ask Mr. Rosenstein why these would not have been presented  
25 by the September 21st date that was set out?

1           MR. ROSENSTEIN: Because some of the documents  
2        didn't exist. They had to be -- they had to be created  
3        from the computer system. It was the -- we had to get an  
4        outside person to do it. In addition, the attorney in my  
5        office working that was working on this, that would have  
6        possibly have gotten it done before, was off three weeks  
7        with Covid. That was Mr. Evanson. So Mr. Evanson was not  
8        able to participate and help get all of this stuff ready.  
9        Unfortunately, it's the fact of life, and Mr. Evanson had  
10       Covid.

11           The other was a spreadsheet which just recapped  
12        everything once the report we got --

13           JUDGE STANLEY: Excuse me for a second. You're  
14        talking really softly. I can barely hear you.

15           MR. ROSENSTEIN: Okay. I apologize. I'm used to  
16        speaking into the microphone then it gets too loud.

17           As I explained also the CDTFA, we talked about  
18        the procedure of how to deal with it. Once we got the  
19        extra stuff done and we try to get it to the CDTFA, we  
20        were told -- and it was just procedural and something we  
21        didn't understand. There was no way to get to them so  
22        that it could be reviewed before today. We were told  
23        nobody could accept it, and we now found out that there's  
24        a methodology for that, which they shared with me today.

25           As far as the legal argument is concerned, that's

1 the legal argument that's what we're doing for today. So  
2 I mean, there's -- we presented the interest rate, and we  
3 needed to get the interest rate through today. That's  
4 just a statutory interest rate. And as far as the CDTFA  
5 manual, we were looking to see if that was updated. This  
6 was the only manual that existed, so we pulled that off  
7 the internet.

8 JUDGE STANLEY: Okay. Mr. Noble, what is the  
9 Department's position on these exhibits?

10 MR. NOBLE: Based on the orders that were  
11 provided in the deadline submission for evidence, we would  
12 object on that basis. But I understand that they're  
13 probably going to be put in, and we would just request  
14 time post-hearing to be able to evaluate this. There was  
15 also some discussions with the representative and the  
16 taxpayer regarding proof, like document corroborating  
17 documentation for the delivery dates that are listed in  
18 some of the evidence that was provided to you today.

19 JUDGE STANLEY: So the Department is asking if  
20 these are admitted into the record that it be given  
21 substantial amount of time to be able to review and  
22 respond, not only to the bankruptcy issue -- bankruptcy  
23 and interest issue but to these newly submitted documents.  
24 And you would be -- the Department will be also expecting  
25 that supporting documentation for the tables, and these

1 exhibits would be presented?

2 MR. NOBLE: Yes.

3 MR. ROSENSTEIN: And we have no objection to  
4 that. That's what we discussed off the record.

5 JUDGE STANLEY: Okay. Then I need to go through  
6 these and mark them as exhibits. On the first one,  
7 Mr. Rosenstein, it looks like a duplicate of Respondent's  
8 Exhibit B, the audit working papers; is that correct?

9 MR. ROSENSTEIN: The key portion of that is the  
10 email cover sheet that reduced the amount that was in  
11 dispute, which I think is -- no one argues with that, that  
12 the amount of dispute is substantially less than what was  
13 put on the petition. That was the purpose of that.

14 JUDGE STANLEY: Okay. But is it substantially  
15 the same as Exhibit B, just a printout of the audit  
16 working papers? That's what it looks like to me.

17 MR. ROSENSTEIN: Well, the attachment --

18 JUDGE STANLEY: Oh, the attachment. Yes.

19 MR. ROSENSTEIN: That's correct, but the email at  
20 the top I don't believe is part of Exhibit B.

21 JUDGE STANLEY: Okay. I'm going --

22 MR. ROSENSTEIN: What we we're trying to deal  
23 with is that the amount that's now in dispute is \$101,507  
24 for the delivery charges, and \$490,354 for the unreported  
25 taxable sales.

1 JUDGE STANLEY: Okay. I don't need you to state  
2 your case right now. I just need to get --

3 MR. ROSENSTEIN: That -- that was the difference.  
4 We provided the entire email, and that's why that was  
5 submitted.

6 JUDGE STANLEY: Okay. So we'll mark that first  
7 pack as Exhibit 5.

8 And then the second one that says "Sales for 2013  
9 through 2014," actually has records for 2013, 2014, and  
10 2015. I would mark that as Exhibit 6.

11 And then there is a corresponding list that looks  
12 like it is just a one-line summarization of Exhibit 6,  
13 which I'll mark as Exhibit 7.

14 Wells Fargo financial information, I'll mark as  
15 Exhibit 8. The next one-page document, Mr. Rosenstein, I  
16 think that was already submitted to us. Is that correct?  
17 I believe this is one of your earlier exhibits, Exhibit 3.  
18 Is this the spread sheet of payments made prior to  
19 delivery?

20 MR. ROSENSTEIN: I apologize. You are correct.

21 JUDGE STANLEY: Okay. So I'll exclude that one.  
22 And with respect to the next one, that is not evidence as  
23 you said. It's just statements of law, and we will not  
24 mark that as an exhibit.

25 MR. ROSENSTEIN: Are you talking about the

1 collection reference manual?

2 JUDGE STANLEY: Yes, the County Collectors Tax  
3 Reference Manual. That's a statement of law. So that  
4 does --

5 MR. ROSENSTEIN: The handbook is given by the --  
6 the relevancy is it's issued by the Controller of the  
7 State of California. It says what procedure to follow.

8 JUDGE STANLEY: I'm not saying it's irrelevant.  
9 I'm saying that it's not evidence; so we don't need to  
10 admit it into the record. You can argue it and, you know,  
11 it'll considered when we have the post-hearing briefing.  
12 And the judges all know how to do their legal research, so  
13 we won't mark that one in as an exhibit. And we'll wait  
14 for the post-hearing briefing and research what we need to  
15 after that.

16 Next one is post-judgment interest rates. That  
17 one is not a statement of the law, so I'll mark that as  
18 Exhibit 9. And that's all I have. So without an  
19 objection, except for the basis that it was not timely  
20 submitted, I'll admit Exhibits 5 through 9 into the  
21 record, and we'll give CDTFA additional time to brief  
22 those new records along with the new issue. Okay.

23 (Appellant's Exhibits 1-9 were received  
24 in evidence by the Administrative Law Judge.)

25 MR. ROSENSTEIN: Thank you.

1 JUDGE STANLEY: Okay. And CDTFA submitted an  
2 exhibit index, and we discussed Exhibits A through F at  
3 the prehearing conference. Appellant did not object, and  
4 those exhibits will be admitted without objection.

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

7 So let's proceed with the hearing.

8 Mr. Rosenstein, you'd asked for a five-minute opening  
9 statement. So you can start when you're ready.

10 MR. ROSENSTEIN: Thank you very much. I hope not  
11 to take the full five minutes.

12  
13 PRESENTATION

14 MR. ROSENSTEIN: As we discussed briefly, there  
15 are three issues that need to be addressed. One issue is  
16 what is the correct amount of the delivery charges that  
17 there should be interest charged -- excuse me -- taxes  
18 charged on? The law provides -- and we know through the  
19 whole audit process in a previous audit -- that there is  
20 sales tax to be charged if the delivery fee or the fee for  
21 the spas were delivered after or at that time as the spa  
22 was delivered the finances was correct -- collected.

23 Now there's the final bill. Even though, let's  
24 say they paid 90 percent and there was a 10 percent hold  
25 back if it was delivered at the time or following the

1 payment, then the delivery charge would be subject to tax.  
2 There's no dispute on that. And so the issue is how much  
3 is there to be actually taxed? And the CDTFA has said  
4 that it's \$101,507. We have demonstrations to show that  
5 it's only \$33,730.

6 The second issue is the other sales, the  
7 measurement of sales. The CDTFA has the -- the reduction  
8 is down to \$490,354. We believe that it needs to be  
9 reduced by \$63,233. So the correct amount should be  
10 \$427,120. We'll demonstrate that. And that comes from  
11 what we believe is the sales -- the sales were reported in  
12 a subsequent year, 2016. And they're reported, by our  
13 calculation or our review by \$2,015, based upon the  
14 reports as we read them. CDTFA told us that's something  
15 different. We'll going to see that.

16 The final issue as we said is to the deal with  
17 the tax rate that is to be charged. This was a Chapter 11  
18 bankruptcy reorganization that was subject to an approved  
19 plan by the United States Bankruptcy Court. This was not  
20 the -- this is an unsecured tax debt. This was not a  
21 secured tax debt. The Bankruptcy Code is very clear of  
22 what gets charged in the State of California.

23 In other documents, particularly as issued by the  
24 State Controller's Office is that it is to be following  
25 the Bankruptcy Code. The Bankruptcy Code provides that it



1 is the judgment interest, and we have provided which  
2 will -- an argument I'll deal with. We have provided a  
3 copy of what the judgment interest is, and that should be  
4 the rate that's included.

5 That's really, and it's going to be a very, I  
6 believe, brief hearing. I spent more time getting ready  
7 to go into it than we are going to be spending on the  
8 hearing itself. That's my opening statement.

9 JUDGE STANLEY: Okay. And can I follow that up  
10 with a clarification question? Are you conceding delivery  
11 charges of \$33,730?

12 MR. ROSENSTEIN: Correct.

13 JUDGE STANLEY: Okay. And are you conceding  
14 unreported taxable sales of \$427,140 -- \$427,120?

15 MR. ROSENSTEIN: Yes, we are. And that's based  
16 on the fact we couldn't find other documentation going  
17 back that -- as far back as -- this audit takes care of.

18 JUDGE STANLEY: Okay. Thank you. You are going  
19 to have your witness testify now?

20 MR. ROSENSTEIN: I am, and I do have one other  
21 item real quick. There's only one witness that's  
22 testifying. That's going to be Mr. Colosimo. There's  
23 nobody scheduled from the CDTFA to provide any testimony  
24 today.

25 JUDGE STANLEY: Correct. I have that from the

1 prehearing conference that Mr. Colosimo will be the only  
2 witness and, thus, will be the only person that I will  
3 swear in under oath or affirmation. So the rest of you  
4 are doing argument and will not be sworn in.

5 So Mr. Colosimo, will you raise your right hand  
6 please.

7  
8 R. COLOSIMO,  
9 produced as a witness, and having been first duly sworn by  
10 the Administrative Law Judge, was examined and testified  
11 as follows:

12  
13 JUDGE STANLEY: Thank you.

14 Okay. You may proceed, Mr. Rosenstein.

15 MR. ROSENSTEIN: Thank you.

16  
17 DIRECT EXAMINATION

18 BY MR. ROSENSTEIN:

19 Q Mr. Colosimo, are you associated with Rick's  
20 Patio?

21 A Yes.

22 Q What's your role?

23 A President, C.F.O.

24 Q When it comes to the books and records of Rick's  
25 Patio, are you -- who is in charge of overseeing all the

1 books and records?

2 A I am.

3 Q Are you responsible for seeing that all sales tax  
4 returns are filed?

5 A Yes.

6 Q And are you also responsible for providing  
7 information for preparation of all tax returns, including  
8 sales tax, income tax, and other taxes that may be due?

9 A Yes.

10 Q And do you handle the policy as it relates to  
11 delivery of goods?

12 A Yes.

13 Q And is there a policy, generally, that deals with  
14 the delivery of goods as far as collecting payment before  
15 goods are delivered, or are they collected afterward?

16 A Now, we get to collect everything up front or get  
17 100 percent financing approved before anything is done.

18 Q And did you -- was that the general policy that  
19 existed from 2013 to present?

20 A No.

21 Q Okay. And that changed when?

22 A I'd be guessing probably 2019-ish, somewhere  
23 around there.

24 Q I'm going to show you Exhibit 6, which is a  
25 computer worksheet -- excuse me -- documents that were

1 generated. Did you cause those documents to be generated?

2 A Yes, I did.

3 Q How were they generated?

4 A From a computer database based upon the files and  
5 the information put in for the sale, the sale date,  
6 delivery date, and all the payment dates.

7 Q And did you use a third party to prepare that  
8 document?

9 A For the document, yeah, I did.

10 Q And did you review and check to make sure it was  
11 accurate?

12 A Yes, I did.

13 Q Does this reflect the date -- the first column,  
14 does it -- well, the first column -- the first and second  
15 column they have names. Do you see that?

16 A Yes, I do.

17 Q And what does that reflect?

18 A Customers' last name and first name.

19 Q The next column says "Purchase Date." What's  
20 that?

21 A The date they came in to write-up the purchase  
22 order, the sale.

23 Q The next column reads, "Delivery Date." What is  
24 that?

25 A It's the date once they accept the delivery of

1       their hot tub.

2               Q     And the next column says payment date.

3               A     That was the date or dates that they gave us a  
4       credit card or a check or whatever they were going to do  
5       to pay for the spa or finance. And back then we would  
6       take down payments and have payments at the balance.  
7       After another audit, we decided let's just get all the  
8       money up front or don't sell the spa. Just make it simple  
9       and tax everything and corrected all that stuff for  
10      1920 [sic] and '21.

11              Q     So when it has duplicate payment dates, the last  
12      date of payment would be the date that it would have been  
13      considered paid in full; correct?

14              A     Correct.

15              Q     Now you mentioned financing. Are there sometimes  
16      these are financed?

17              A     Yes.

18              Q     And then are they considered paid in full when  
19      they fill out the application for the financing and it's  
20      approved?

21              A     Yeah. We get approvals and authorization codes.  
22      So we consider it, but we don't always -- we don't get  
23      paid immediately.

24              Q     Sometimes the financing company doesn't deliver  
25      the check?

1           A    Oh, yeah. Yeah. Or digital now with electronic.

2           Q    But back then you considered it paid in full at  
3 the time you got financing approval?

4           A    Yeah. Yeah, we do.

5           Q    Okay. And then the next item shows the taxable  
6 sales tax rate. Do you see that?

7           A    Yes, I do.

8           Q    And on some of these they are -- you show some  
9 small delivery or dates that deal with delivering. What  
10 was the average delivery cost?

11          A    Back then \$399 was the typical delivery fee.

12          Q    Okay. Now, I'm going to show you Exhibit 7,  
13 which is an Excel spreadsheet that I believe you had our  
14 office prepare; correct?

15          A    Yes.

16          Q    And this reflects all the sales and everything  
17 that corresponds to the computer-generated report from  
18 your office; correct? Exhibit 5 and 6?

19          A    Yes.

20          Q    And the \$399 as shown here shows the delivery  
21 charges; correct?

22          A    Correct.

23          Q    And where it says Y, does that show that those  
24 were financed?

25          A    Yes, the financing. Yes.

1           Q    On the very last page there's a summary that  
2           shows \$33,730.25. Does that reflect the amount of  
3           delivery charges that were -- that --

4           A    Financed.

5           Q    -- for spas that were delivered after -- excuse  
6           me. Does that reflect the delivery charges that were  
7           collected after or at the time of delivery?

8           A    Yes, it does.

9           Q    So the \$33,730.25 is the amount that you did not  
10          include as taxable sales; correct?

11          A    Correct.

12          Q    Exhibit 3. Do you recognize this document?

13          A    Yes, I do.

14          Q    Did you cause this document to be created?

15          A    Yes.

16          Q    And what does this document reflect?

17          A    Orders that were taken in 2015 but were delivered  
18          in 2016. And at the time we were reporting sales tax for  
19          delivered sales there.

20          Q    So this amount --

21          A    We paid it in 2016.

22          Q    So this -- the amount on here, even though it  
23          shows 2015 as the order date, you consider totally the  
24          sale to be completed in these cases when they were  
25          shipped?

1           A    At the time that's what I thought from previous  
2           audits was that the transfer of ownership took place when  
3           they accepted the delivery of goods.  Later we decided to  
4           do something different.  So now we just do the sale, sale  
5           date.  It gets recorded and paid sometimes months before  
6           they ever get their spa.  So --

7           Q    So the --

8           A    -- it stays clean.

9           Q    So the \$63,233.99, that's the total of all these?

10          A    Yes.

11          Q    Give me one moment, please.  I'm going to show  
12          you another document, which at the top it says Wells Fargo  
13          bank.  Do you see that Wells Fargo?

14          A    Yes.

15          Q    And what do these reflect?

16          A    It's the paperwork I get back.  Well, this was  
17          showing that the payment was made and the dates.

18          Q    But these also reflect the financing ones?

19          A    Financing one, yeah.

20          Q    And those correspond to the ones you have the Y  
21          or the yes on the worksheet --

22          A    Yes.  Correct.

23          Q    -- prepared by our office.

24          A    Just to show where I got the figures from.

25                THE STENOGRAPHER:  Please do not speak over each



1 other. I'm unable to get the full answers and questions.

2 MR. ROSENSTEIN: We apologize.

3 THE STENOGRAPHER: Thank you. Can I please have  
4 you repeat your answer.

5 MR. COLOSIMO: Yes. This is a reflection from  
6 Wells Fargo in this case when the amount and the amount  
7 that was settled and the date and the ones where when they  
8 signed it, they actually sign the sales slip, the financed  
9 sales slip, and it matches up with the list that I  
10 provided. Yes.

11 BY MR. ROSENSTEIN:

12 Q Okay. And those were all done before delivery  
13 date?

14 A Yes.

15 MR. ROSENSTEIN: I have nothing further.

16 JUDGE STANLEY: Okay. Thank you.

17 Mr. Noble, does the Department have any questions  
18 for the witness?

19 MR. NOBLE: I believe Mr. Jason Parker has some  
20 questions for the witness.

21 MR. PARKER: Yes. Thank you.

22

23 CROSS-EXAMINATION

24 BY MR. PARKER:

25 Q With regard to Exhibit 7, which is the listing of

1 all the transactions with the delivery fees that has the  
2 total of \$33,730.25, how is it determined which  
3 transactions on this listing are the taxable ones?

4 A Taxables were the ones that weren't financed. If  
5 I'm correct, the taxable ones were the ones not financed.  
6 For the ones I got the letter "Y" for yes, they were for  
7 financed -- do I have that backwards?

8 MR. ROSENSTEIN: May I be of assistance?

9 THE WITNESS: Yes.

10 JUDGE STANLEY: Can you guys be careful not to  
11 talk over one another. Thank you.

12 MR. ROSENSTEIN: The amount that was not included  
13 as being delivered be -- the funds being collected before  
14 delivery, those are the ones that we used to add up to the  
15 \$33,000; is that correct?

16 MR. COLOSIMO: Funds before the delivery? Yeah.  
17 It's just kind of confusing to be honest with you. A lot  
18 of pressure here.

19 JUDGE STANLEY: Mr. Colosimo, when you turn your  
20 head, you're not speaking into the microphone.

21 MR. COLOSIMO: Sorry.

22 JUDGE STANLEY: Sorry.

23 MR. ROSENSTEIN: Exhibit 6 shows every delivery,  
24 correct, and the date of delivery?

25 MR. COLOSIMO: Yes.

1           MR. ROSENSTEIN: So the ones that are on the  
2 worksheet that add up to the \$33,000 are the funds that  
3 we've collected after the delivery date; is that correct?

4           MR. COLOSIMO: Yes, the financed amount just like  
5 we said earlier.

6           MR. ROSENSTEIN: Is there an Excel spreadsheet or  
7 anything that could be provided to show all of the  
8 transactions for this? It looks like an Excel  
9 spreadsheet?

10          MR. COLOSIMO: That right there.

11          MR. ROSENSTEIN: That's correct, and we'll be  
12 happy to provide you the electronic form.

13          MR. NOBLE: Okay. Thank you. No further  
14 questions.

15          JUDGE STANLEY: Thank you.

16          Judge Cho, do you have any questions?

17          JUDGE CHO: I don't have any questions at this  
18 time but may have some later. Thank you.

19          JUDGE STANLEY: Judge Akopchikyan, do you have  
20 any questions?

21          JUDGE AKOPCHIKYAN: Yes, I have one question.  
22 Can you please help me understand Exhibit 8, and  
23 specifically tie it to a transaction on -- does it tie to  
24 a transaction on Exhibit 6 or Exhibit 7?

25          MR. ROSENSTEIN: Are you talking about the Wells

1 Fargo?

2 JUDGE AKOPCHIKYAN: Yes.

3 MR. ROSENSTEIN: If you take a look at the first  
4 page, you'll see that this is for Sabol. If you take a  
5 look about halfway down it says transaction date 1/5/2013,  
6 and then it has the name Mark Sabol. If you go --

7 JUDGE AKOPCHIKYAN: First page of what?

8 MR. ROSENSTEIN: The first page of the exhibit?

9 JUDGE AKOPCHIKYAN: Exhibit 8?

10 MR. ROSENSTEIN: Yes.

11 JUDGE AKOPCHIKYAN: Okay.

12 MR. ROSENSTEIN: If you go ahead and you go down  
13 and you see -- you'll see Mark Sabol.

14 JUDGE AKOPCHIKYAN: I see that.

15 MR. ROSENSTEIN: And the differential here is the  
16 two payment dates, and then it subtracts out the sales  
17 tax. This was -- because otherwise you'd be paying sales  
18 tax on sales tax. But when it's financing, it includes  
19 financing the sales tax as well. So every one of these  
20 will tie on the date to the date that's on the Exhibit 6  
21 and also which carries into the spreadsheet of Exhibit 7.

22 JUDGE AKOPCHIKYAN: Sorry. I'm just looking over  
23 the exhibit trying to get my thoughts together. So I  
24 guess, can you explain to me the relevance of Exhibit 8?  
25 What is it trying to establish?

MR. ROSENSTEIN: Exhibit 8 is to show that the payment date since -- the payment -- they sign a promissory note as it would be, or they sign a payment with the finance company. On that date, it's paid as far as Rick's Patio is concerned. The check from the finance company may not have arrived because of its processing time. It's like a credit card. You pay your credit card the day before. It doesn't get deposited into the account until four days later, but the sale took place.

These are like credit cards. So even though the check didn't arrive, this is to show that it was fully paid for. So that's why it was not included in the computation as sales or payments made after the delivery date. It's actually made beforehand even though it was received afterwards because that process is through a charge card system.

JUDGE AKOPCHIKYAN: I understand. Thank you. No further questions. Thank you.

JUDGE STANLEY: Okay. Thank you.

I don't have any questions at this time. So we're going to move to CDTEFA's presentation.

Mr. Noble, you can proceed when ready.

## PRESENTATION

MR. NOBLE: The Department audited Appellant for

1 the period January 1st, 2013, through December 31st, 2015,  
2 resulted in aggregate deficiency measure of just over  
3 \$998,000 based upon three audit items: That was  
4 unreported delivery charges of approximately \$436,000;  
5 unreported taxable sales based on a difference between  
6 federal income tax returns and sales and use tax returns  
7 for 2013 and 2014 of \$519,000; and unreported taxable  
8 service income of \$43,000.

9 After several reaudits and preparation for the  
10 appeals hearing -- the OTA hearing, the Department has  
11 reduced aggregate measure to around \$591,000, which is  
12 unreported sales of \$490,354 and delivery charges of  
13 \$101,507. The measure of taxable service income was  
14 removed in its entirety. The issues remaining in this  
15 appeal are whether further reductions are warranted to the  
16 measures of unreported taxable delivery charges,  
17 unreported taxable sales, and the third issue brought up  
18 today, the interest rates while the bankruptcy was going  
19 on.

20 While it doesn't appear that the law is any  
21 longer in dispute when it comes to the transportation  
22 charges, I would note that Regulation 1628 subdivision  
23 (b) (2) provides that when transportation is by facilities  
24 of the retailer, tax applies to the charges for  
25 transportation to the purchaser unless three conditions

1       are met.

2               One, the charges must be separately stated. That  
3       is not at issue. Two, the transportation is from the  
4       retailer's place of business or other point from which  
5       shipment is made directly to the purchaser. That element  
6       is also not at issue. The third element, the  
7       transportation occurs after the sale of the property is  
8       made to the purchaser is where we've ran into some issues.

9               When the Department conducted the reaudit, and we  
10       looked at the invoices that we did have, and available  
11       payment receipts, and we -- initially, when he could look  
12       at the invoice, and we saw that the payment was received  
13       in full basically the day the invoice was written up. We  
14       were able to conclude it was more likely than not that  
15       everything was paid for before the transportation  
16       occurred.

17              For the remaining items in the sample population,  
18       it was a matter of any proof of the actual delivery date  
19       and the payment dates. Subsequently, some credit card  
20       receipts were provided, and there was more reductions that  
21       occurred. But with everything that remains in the measure  
22       now, it's a matter of being able to verify the  
23       spreadsheets that have been provided to us by the  
24       taxpayer, in particular, the date of delivery and then any  
25       secondary payments. So that's what -- is what we need to

1 look at post-hearing in order to confirm the amounts  
2 they're providing today.

3 Sorry. Things have changed from this morning, so  
4 I'm kind of editing on the fly here. With respect to the  
5 measure for unreported taxable sales, Revenue & Taxation  
6 Code Section 6051, imposes sales tax on a retailer's  
7 retail sales of tangible personal property in this state  
8 measured by the retailer's gross receipts, unless the sale  
9 is specifically exempt or excluded from taxation. When a  
10 taxpayer challenges a determination, the Department has  
11 the initial burden to explain the basis of the deficiency.  
12 Where that explanation is reasonable, the burden of proof  
13 shifts to the taxpayer to establish by a preponderance of  
14 the evidence that reductions are warranted.

15 I'm going to send a copy of the audit work papers  
16 and the verification comments to taxpayer after the  
17 hearing. I know they wanted confirmation that there was  
18 no differences assessed for the year 2015. For our  
19 purposes of the hearing today, I would just note that the  
20 Department compared amounts reported on the federal income  
21 tax returns for 2013 and 2014 only, and compared those  
22 amounts to what was reported on Appellant's sales and use  
23 tax returns for the same years and provided differences.

24 We didn't assess a difference for 2015. So the  
25 documentation provided today with respect to the \$63,000



1       and the \$2,015 that were carried over to 2016 aren't  
2       relevant. And I would direct OTA that reaudit Schedule  
3       R112E-1 shows the differences that were assessed, and it's  
4       pretty clear from the schedule that it's just the first  
5       quarter of 2013 through the fourth quarter 2014.

6               And we'll respond to the bankruptcy interest rate  
7       issue when we've had time to confer.

8               Thank you. That concludes my presentation.

9               JUDGE STANLEY: Thank you, Mr. Noble.

10              Judge Cho, do you have any questions?

11              JUDGE CHO: Yeah, just a couple of quick  
12       follow-up question. So to the Department, I just wanted  
13       to confirm, though. So the way that the Department  
14       calculated the taxable delivery charges was through a  
15       sampling of a certain time period, and then you determined  
16       an error rate, and then projected that error rate to the  
17       entire taxable delivery charges amount; is that correct?

18              MR. NOBLE: That's correct. We weren't --  
19       minimal records were provided initially. And then they  
20       were able to provide invoices -- a selection of invoices  
21       from 2015. I'm sorry. I have the actual number. We  
22       looked at approximately 52 invoices showing transportation  
23       charges of about \$30,000. And this is from August of 2015  
24       to the end of November of 2015.

25              From that amount, the Department found that

1       \$22,860 were not subject to tax, and that \$6,948 were  
2       subject to tax or, alternately, 23.38 percent of the  
3       sample population was taxable. The Department took those  
4       numbers and projected it to the remainder of the audit  
5       period.

6               JUDGE CHO: Okay. Thank you.

7               So I guess my question then goes to the  
8       Appellant. Out of all this new information that you  
9       provided today, can you tie-in any of these transactions  
10      to the samples -- to the sample in Schedule R2-12A-1A? I  
11      believe that's the schedule at issue here.

12              MR. ROSENSTEIN: Well, those 52 samples as it  
13      would be are included in Exhibit 6 and Exhibit 7. It's  
14      actually in there. What the problem is from our  
15      standpoint is they didn't do a complete sampling. They  
16      didn't come to the office. We have an example of a box of  
17      all the deliveries and all the invoices and everything for  
18      the year 2013. Nobody came and did that. They took a  
19      sampling, which was provided.

20              I don't have anybody here from the CDTFA that  
21      conducted the audit, so I can ask the questions about what  
22      was done at the audit. There is no representative here  
23      that did the sampling. But that's -- but now we have  
24      100 percent of all sales all delivery dates and all the  
25      payments. So the sampling using this 23 percent is a

1 false sampling. It's a mathematical sampling that was in  
2 error.

3 We have agreed that, based upon whatever is asked  
4 and if they need to have an auditor come -- or I guess we  
5 can deliver all the years of boxes like this, as long as  
6 we get a receipt for it -- we have all the information.  
7 We could provide the computed back up for the information.  
8 So we now have 100 percent of the sampling. No longer are  
9 we using a statistical sampling.

10 JUDGE CHO: Okay. Thank you. So let's just take  
11 a quick look at the first one. The invoice date  
12 9/26/2015. Do you know where that transaction is?

13 MR. ROSENSTEIN: What's the date, please?

14 JUDGE CHO: 9/26/2015. So it appears that  
15 there's --

16 MR. ROSENSTEIN: Is that Gregory Hitchler?

17 JUDGE CHO: That's what it looks on my --

18 MR. ROSENSTEIN: Okay. If you look at page 48 on  
19 Exhibit 6.

20 JUDGE CHO: There doesn't appear to be any page  
21 numbers on the thing that I have, but it's line 815.

22 MR. ROSENSTEIN: No, no. I'm talking about --  
23 you asked --

24 JUDGE CHO: All right. So I'm there. I'm on  
25 page 48, Gregory Hitchler. And how does this -- how do

1       these documents show that the delivery charges -- I mean  
2       that the payments were made prior to delivery?

3               MR. ROSENSTEIN: Give me one second, please.

4               JUDGE CHO: Sure. Unfortunately, the Excel  
5       spreadsheet doesn't have pages on it. But the \$499 for  
6       the delivery it's on -- Item 815 that shows that they  
7       included that in that \$32,000 -- I'm sorry. The exact  
8       amount?

9               MR. COLOSIMO: It's got it broken down.

10              MR. ROSENSTEIN: That was included in the sales  
11       tax that needed to be paid on the \$499.

12              JUDGE CHO: Okay. So then all the transactions  
13       listed in the spreadsheets -- I forgot the exact exhibit  
14       number -- but so these are the transactions in which they  
15       are taxable; is that correct?

16              MR. ROSENSTEIN: No. That one would have been  
17       added as far as -- to be included in the 33. What  
18       happened was when the spreadsheet was done, if you went  
19       ahead -- let me give you an example. Give me one moment,  
20       please.

21              Like if you just -- let's start with the first  
22       one on the spreadsheet. And the counsel for the other --  
23       and we told them we would give them the Excel spreadsheet  
24       that added up so that they can see each of the individual  
25       line items.

1           The very first one, it was purchased 1/2. Paid  
2           was on 1/2, and the delivery date was on 1/18. That would  
3           not be included. So when we went through and we did the  
4           summary, we only -- as an add sign, which is what we're  
5           going to give Counsel, which they asked for, we only added  
6           those that the payment date was on or after the delivery  
7           date. When the payment date was before the delivery date,  
8           it was not included as a sale that was subject to tax,  
9           which we've all agreed is the way it works.

10           So we're going to give them the -- basically,  
11           what they're going to want to see along with the proof of  
12           the dates, they want to see our line 907. They want to  
13           see the 907 that shows each sale that was included as a  
14           taxable sale, which we're going to provide to them.

15           JUDGE CHO: Just a reminder, Mr. Rosenstein, is  
16           that we're a completely separate and independent agency.  
17           Whatever you provide to CDTEFA, we won't be privy to. And,  
18           therefore, when we make our decision, we're only going to  
19           be having these documents in front of us.

20           MR. ROSENSTEIN: Okay.

21           JUDGE CHO: So for me to try to go through this  
22           and figure out, all right, how this delivery date -- how  
23           does this documentation show to me that the other  
24           transactions here that were listed qualifies as taxable or  
25           nontaxable without the extra document you provide, I'm

1 going to have a very difficult time making that  
2 determination, and it's your burden of proof here. So my  
3 question to you is --

4 MR. ROSENSTEIN: Well, we've --

5 JUDGE CHO: -- how do these documents show me  
6 that these are nontaxable transactions --

7 MR. ROSENSTEIN: Okay. We have --

8 JUDGE STANLEY: -- on this case.

9 MR. ROSENSTEIN: We have provided it to you on  
10 the face. The face shows the date of delivery. It shows  
11 the date of payment and the date of sale. There's a  
12 summary of the total. We, based upon the request that was  
13 just made, we don't expect or desire that this Panel go  
14 through each one and have to -- I mean, hypothetically,  
15 we've given the proof. The testimony is there, and you'd  
16 have to look at each individual line. We have a testimony  
17 of what it adds up to. We've given you that information.

18 If the Panel would like, when we provide that  
19 listing that make up of 907, which each of these -- which  
20 sale makes up the 907, if the Panel will permit us, we'll  
21 supply a copy of that sale breakdown to the Panel so that  
22 they can follow it through conveniently for the Panel.  
23 The testimony is there. The testimony has already been  
24 given.

25 I understand that this -- and I don't intend --

1 and I apologize to create a burden for this Panel. So we  
2 can provide the same information we're giving to them that  
3 they have requested, which is the spreadsheet. Right now  
4 they just asked for it when we offered to give the Excel  
5 spreadsheet to show the breakdown. We can provide that to  
6 the Panel as well as a supplemental extra page to this  
7 exhibit.

8 JUDGE CHO: Thank you. I'll leave that up to the  
9 lead in terms of how much evidence you provide to us. I  
10 do have another follow-up question. With respect to the  
11 unreported taxable sales based on the federal income  
12 returns, the Department pointed us to Schedule R112E-1,  
13 which shows that there were no transactions picked up for  
14 2015. I was wondering if you had a response? Or did you  
15 want your rebuttal for that response? I just wanted to  
16 hear what you had to say for that -- that point.

17 MR. ROSENSTEIN: If the Panel recalls, we had  
18 meet outside. We made our presentation. When we got  
19 through the process, we were going to concede that issue.

20 JUDGE CHO: I believe you said that there is  
21 still a couple --

22 MR. ROSENSTEIN: We went through the  
23 presentation. And I'm saying is we had met outside and  
24 the decision was to put on our full case. We both talked  
25 about that, and I -- I'm going to withdraw that item as

1 part of my closing as it would be. So that \$63,000 will  
2 actually not be an issue at this point.

3 JUDGE STANLEY: Okay. So that will not be an  
4 issue anymore. All right. Well, that's the only  
5 questions that I had. Thank you very much.

6 MR. ROSENSTEIN: Thank you.

7 JUDGE STANLEY: Thank you.

8 Judge Akopchikyan, do you have any questions?

9 JUDGE AKOPCHIKYAN: No questions here. Thank  
10 you.

11 JUDGE STANLEY: Okay.

12 And I only have some follow-up documentation  
13 questions and organizational, so I'm going to go ahead and  
14 let you wrap up. You had requested ten minutes,  
15 Mr. Rosenstein, to close out. So you can proceed with  
16 that.

17

18 CLOSING STATEMENT

19 MR. ROSENSTEIN: Okay. First of all, I want to  
20 make a note. While I appreciate it and I don't question  
21 Counsel's presentation, again, there is no testimony that  
22 was given as to the procedure that was taken, the  
23 methodology, what was provided, and how it was sought to  
24 be provided by the CDTFA because there's no competent  
25 witness here, which is where part of the problem was. I



1 don't have the opportunity to examine anybody that  
2 prepared any of these reports. I just want to make that  
3 as a general comment. I'm not -- I'm leaving it up to the  
4 Panel to deal with the credibility of that statement, not  
5 the credibility of Counsel. I'm talking about the CDTFA's  
6 presentation.

7 It's very, very clear, and we have the summary  
8 page that we can give, is that the \$33,000 is all that  
9 should be taxed as it relates to the delivery charges.  
10 The sampling is flawed, and I don't have the ability to  
11 question the person who did the sampling. I don't have  
12 the ability to question the person that used the  
13 percentage and why they didn't look at more records than  
14 they looked at. They're not here.

15 So in order for -- but what's here before this  
16 Panel is a 100 percent sampling, 100 percent date  
17 delivery, 100 percent payment date, and Mr. Colosimo has  
18 testified to it. He has also testified to the effect and  
19 the total amount is only \$33,000, approximately. We have  
20 agreed to allow the CDTFA to conduct further investigation  
21 to see if they dispute it. And if they find an error,  
22 we'll be happy to stipulate that was an error. So that's  
23 one.

24 The other item that is more important as it would  
25 be -- well, I shouldn't say it's more important. That's a

1 large adjustment. But then once the adjustment is agreed  
2 to -- and as I said, we're withdrawing our objection or  
3 our claim for the \$63,233. And that's based upon the  
4 conversation that we had prior to the presentation stating  
5 that I had to go through the process to get there.

6 The next item that's important is the dealing  
7 with the sales tax -- excuse me -- the interest rate. The  
8 County Tax Manual or the Tax Manual that was prepared by  
9 Betty Yee, who at the time was the State Controller, at  
10 page 5 -- and this is from 2021. On page 5, Item  
11 Number 2, at the very bottom section -- it's the 110205,  
12 and it gives the citations, and it also gives the rules,  
13 when this is an unsecured -- I'm not talking about  
14 priority -- but if this is an unsecured debt that was  
15 subject to a plan of reorganization, then the Code  
16 Section 1129(a)(c)(9)(C) of the 11 USC, that's the  
17 bankruptcy section, provides specifically what the  
18 interest rate needs to be.

19 In the summary that was provided, they're using  
20 the standard interest rate, not taking into account the  
21 bankruptcy. And I just want to be clear, and I apologize.

22 Mr. Colosimo, the Rick's Patio went through a  
23 Chapter 11; correct?

24 MR. COLOSIMO: Yes.

25 MR. ROSENSTEIN: And it had an approved plan of

1 reorganization?

2 MR. COLOSIMO: Yes.

3 MR. ROSENSTEIN: And any payment to the CDTFA for  
4 these sales tax are subject to that plan of  
5 reorganization?

6 MR. COLOSIMO: Yes.

7 MR. ROSENSTEIN: Thank you.

8 So the other thing that we did is when they need  
9 to be directed, when they're computing the interest  
10 charged, they have to use the code. And the code provides  
11 that it's the post judgment rate of interest on federal  
12 obligations, and it changes so often. And it's a -- it's  
13 very important because at times this was only a 1 -- like,  
14 1 percent interest rate as compared to what is now  
15 10 percent. So this would have a major effect on the  
16 amount of money that is owed.

17 Now, I understand they've asked for and they are  
18 going to brief their position on this. No problem with  
19 that. But the code is black and white. When I say the  
20 code, the United States Bankruptcy Code is black and white  
21 on it. And the State Controller acknowledges that. This  
22 is the only document that exists that we were able to find  
23 from dealing with any representative, which is the State  
24 Controller that's in charge of all taxable collections.

25 Thank you very much.

1 JUDGE STANLEY: Okay. Thank you, Mr. Rosenstein.  
2 Judge Cho, do you have any follow-up questions?  
3 JUDGE CHO: No follow-up questions. Thank you  
4 very much.  
5 JUDGE STANLEY: Judge Akopchikyan, do you any  
6 follow-up questions?  
7 JUDGE AKOPCHIKYAN: I have a quick question about  
8 the bankruptcy proceeding. Do you remember when the  
9 bankruptcy was filed?  
10 MR. ROSENSTEIN: Do you remember the year?  
11 MR. COLOSIMO: I don't remember off the top of my  
12 head, but it was 2015, '16.  
13 JUDGE AKOPCHIKYAN: And do you know if CDTFA  
14 filed a proof of claim for --  
15 JUDGE STANLEY: Did you hear the answer?  
16 JUDGE AKOPCHIKYAN: I heard.  
17 JUDGE STANLEY: Can you have him repeat it.  
18 JUDGE AKOPCHIKYAN: Can you repeat the answer,  
19 please, to the first question. Do you remember when the  
20 bankruptcy was filed?  
21 MR. COLOSIMO: I don't remember off the top of my  
22 head, but it was 2015, '16.  
23 JUDGE AKOPCHIKYAN: And did CDTFA file a proof of  
24 claim for the tax of that issue here?  
25 MR. ROSENSTEIN: For this issue it did.

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JUDGE AKOPCHIKYAN: It did.

MR. ROSENSTEIN: There was another part of it they failed to file a proof of claim, and that was handled within the bankruptcy court.

JUDGE AKOPCHIKYAN: Okay. No further questions.

JUDGE STANLEY: Okay. Thank you.

You were referring to 907s. What are those because I don't know what an Item 7 is. I can't hear you.

MR. ROSENSTEIN: I apologize. I meant to turn that off silent. I have a daughter that has an illness issue, a mental illness, and she dialed me. I apologize.

JUDGE STANLEY: So can you just explain to me what a 907 is? You said you were going to provide 907s to the Department. I think that's the --

MR. ROSENSTEIN: No. I'm going to provide the sales that shows which -- which sales were used that equaled the \$33,000.

JUDGE STANLEY: Okay. All right.

Then, Mr. Noble, does CDTFA have any additional response to the closing?

CLOSING STATEMENT

MR. NOBLE: Just to note, that we're probably going to take a look at the sample period compared to the spreadsheets they gave us and look at the documentation

1       that confirms and corroborates. I would note that the  
2       flawed sample, as he keeps referring to it, that was based  
3       upon the only invoices they gave us at the time.

4               I know there's an issue with cross-examination,  
5       but the reaudit schedules clearly say what the auditor  
6       looked at, why they didn't allow certain sales and why  
7       they did. And I think the Department's position would be  
8       that testimony alone without the corroborating  
9       documentation does not meet a preponderance of the  
10      evidence.

11             That's it. Thank you.

12             MR. ROSENSTEIN: May I respond?

13             JUDGE STANLEY: Yes, briefly.

14             MR. ROSENSTEIN: The documents that were provided  
15      for the audit was what was requested. Testimony that is  
16      not -- without contrary testimony, it is considered to be  
17      absolute testimony, and is to be accepted. So saying that  
18      they don't have -- unless somebody wants to say that  
19      Mr. Colosimo is committing perjury here, his testimony is  
20      to be accepted under the law.

21             Thank you.

22             JUDGE STANLEY: Okay. Thank you.

23             Just a few then clean up closing issues.

24             Mr. Noble, you mentioned you were going to send  
25      verification comments to Appellant, and will you be

1 sending those to the Office of Tax Appeals as well?

2 MR. NOBLE: Well, it's just going to be -- I'll  
3 either send, or I'd just refer him back to the exhibit  
4 that has the audit work papers just so he can confirm that  
5 2015 was not included in the assessment.

6 JUDGE STANLEY: Okay. Then there are additional  
7 documents. And first, I did want to credit the CDTFA with  
8 being open to considering new supporting documentations at  
9 this late point in the process. And it makes -- it only  
10 makes sense to have that provided to CDTFA and to the  
11 Office of Tax Appeals before we require a response of any  
12 sort from CDTFA.

13 So how long do you think you need to get the --  
14 whatever supporting documentation to them do you need.

15 MR. ROSENSTEIN: Give me one moment, please. We  
16 can have the boxes delivered to the CDTFA within two weeks  
17 along with -- they already have the computer printout of  
18 when everything was paid. I don't know what else we can  
19 provide. I guess say two weeks, three weeks.

20 JUDGE STANLEY: And Mr. Noble or Mr. Parker, was  
21 that what you were expecting to receive, boxes?

22 MR. PARKER: First off, we would want -- we want  
23 the Excel spreadsheet to try to determine what they  
24 counted as the taxable transactions that they came up  
25 with, the \$33,720 or whatever that amount was.

1           MR. ROSENSTEIN: That can be delivered by -- I'm  
2 here today, but that can be sent by an email tomorrow.

3           JUDGE STANLEY: Okay. Just hold off on  
4 responding because I think he said first thing. So --

5           MR. PARKER: Yeah. And so just to kind of back  
6 up just a little bit. Generally, with any testing we do  
7 in an audit, we either try to do a statistical sample, or  
8 we do a block sampling. We generally do not do a complete  
9 look at all records of an audit. We usually test a  
10 certain period. So we tested a period in this audit. And  
11 so what we would generally be wanting to see is any  
12 transactions that should be adjusted that we've already  
13 tested.

14           Sometimes if that block sample is not correct  
15 based on additional information, that maybe we got a  
16 period that was outside the norm. Taxpayers can generally  
17 go through and provide an actual basis of the records.  
18 And then we can spot test the work that they did to  
19 determine that those transactions were not taxable. So in  
20 this situation we would need to see all of the line items,  
21 and we could test certain transactions just to see that  
22 they did the test accurately.

23           But we would need to see documentation showing  
24 that the payment date that shows up on here is an actual  
25 date prior to the delivery date. So we can accept that



1 the work that they did was correct. I know they have the  
2 financing dates on here, and they provided the financing  
3 documents. So that's helpful as well. But we would also  
4 need to verify that what they determined was not taxable  
5 is truly not taxable.

6 So, typically, we don't go through all boxes of  
7 records again after an audit after we've done block  
8 sampling, but we would be willing to at least look at  
9 additional documentation to test the actual basis test  
10 that they did to determine its accuracy. We generally do  
11 not want to see boxes and boxes of records. We would  
12 prefer to see records in a PDF format that can be easily  
13 searched and found. You know, similar to the documents we  
14 have in the record already where we have the invoices.

15 JUDGE STANLEY: Okay. Thank you. So what you're  
16 looking for is not boxes for the whole audit period.  
17 You're looking specifically for transactions that  
18 Appellant believes are in error during the sampling  
19 period -- that four-month sampling period; is that  
20 correct?

21 MR. PARKER: We would prefer to see just the  
22 sample, but he's indicated that doing an actual basis  
23 test, which is what they provided here, that that is a  
24 lower amount than our block sample came up with. If  
25 that's the true and accurate number for the audit, then we

1       have -- we can review documentation to see that -- that  
2       whatever test that they did is correct, we would accept  
3       those numbers. But we would need to see documentation for  
4       the complete actual basis test that they have indicated  
5       only comes up to \$33,000.

6               JUDGE STANLEY: And you're seeking something in  
7       PDF format, not a box of anything?

8               MR. PARKER: That's what we would prefer to be  
9       able to -- it's easier to for us to examine PDF documents,  
10      than it is to go dig through records again, since we --  
11      this audit has been going on, you know, seven years or so.  
12      Records could have been provided at that time.

13              JUDGE STANLEY: Okay. And do you understand what  
14      the Department is looking for, Mr. Rosenstein?

15              MR. ROSENSTEIN: What they're asking for, if I  
16      understand, is an impossibility. They want 905  
17      transactions to be scanned and put into a PDF form.  
18      That's an impossibility from a practical financial  
19      standpoint. If they want to take the listing that we gave  
20      and ask for a sampling from the 905 names and select which  
21      ones they want through different years, we'll be happy to  
22      take some sampling that's reasonable and provide those by  
23      PDF. But --

24              JUDGE STANLEY: Can I stop you for a minute  
25      because I don't want to have a negotiation.

1           MR. ROSENSTEIN: No. I'm just saying --

2           JUDGE STANLEY: We're here to decide the appeal,  
3           and they're open to receiving documents, but they are not  
4           going to do a reaudit at this point in the process. So if  
5           you want to limit it to certain transactions that are  
6           scannable, maybe focus on the sampling period and provide  
7           supporting documentation for a different error rate that  
8           was projected upon the whole audit period, you can do  
9           that. If you don't think you're going to be able to  
10          submit something to the Office of Tax Appeals and to the  
11          CDTFA in an electronic format, I'm going to -- I don't  
12          want to see those.

13          MR. ROSENSTEIN: I was trying to see how thick  
14          they were to get somebody to come in and scan all these.

15          JUDGE STANLEY: Well, that's not what we're going  
16          to deal with right now. I will give you an opportunity to  
17          provide them the documentation. I'll give you 30 days to  
18          do that, if you can provide supporting documentation in an  
19          electronic format. And if you can't, then they'll just  
20          respond to the other issues that were raised this morning.  
21          Okay. And so I'll have you -- I'll give you time to see  
22          what you can put together for 30 days.

23          And then after that, Mr. Noble, how long do you  
24          think the CDTFA needs to respond to these new documents --  
25          possible new documents that will be submitted after the

1 hearing and the new issue?

2 MR. NOBLE: 30 days, please.

3 JUDGE STANLEY: Okay. And there is -- I will  
4 note that there is a substantial amount of records and  
5 information here, and if you receive more and need more  
6 than the 30 days, please request an extension before the  
7 time period expires.

8 Another issue that I want to make clear on the  
9 record, was that I admitted Appellant's Exhibits 1  
10 through 9 and not just 5 through 9. I can't recall.

11 So this concludes the hearing, and the record  
12 will be held open for the additional briefing as  
13 discussed. And once that information is received, the  
14 Panel of judges will meet to jointly deliberate and decide  
15 the appeal and will issue a written opinion no later than  
16 100 days after the record is closed. Okay.

17 So we're going to adjourn -- I'm sorry we're  
18 going to recess today, not adjourn because we have more  
19 hearings at 1:00 p.m.

20 Thank you for coming and presenting, and I'll  
21 issue an order after the hearing with respect to the  
22 briefing.

23 (Proceedings adjourned at 12:37 p.m.)  
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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was  
taken before me at the time and place set forth, that the  
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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 31st day  
of October, 2022.

\_\_\_\_\_  
ERNALYN M. ALONZO  
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