

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
R. FALCHE,) OTA NO. 19115516
)
 Appellant.)
)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

SACRAMENTO, CALIFORNIA

WEDNESDAY, SEPTEMBER 21, 2022

Reported by:

SARAH M. TUMAN, RPR
CSR No. 14463

Job No. :
38487 OTA(A)

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15 TRANSCRIPT OF PROCEEDINGS, taken at
16 400 R Street, Sacramento, California,
17 commencing at 9:30 a.m. and concluding
18 at 12:05 p.m. on Wednesday, September 21, 2022,
19 reported by Sarah M. Tuman, RPR, CSR No. 14463,
20 a Certified Shorthand Reporter in and for
21 the State of California.

1 APPEARANCES:

2
3 Panel Lead: ALJ JOSHUA ALDRICH

4
5 Panel Members: ALJ ANDREW KWEE
6 ALJ MICHAEL GEARY

7
8 For the Appellant: R. FALCHE

9
10 For the Respondent: STATE OF CALIFORNIA
11 DEPARTMENT OF TAX AND FEE
12 ADMINISTRATION
13 JARRETT NOBEL
14 SCOTT CLAREMON
15 JASON PARKER
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I N D E X

E X H I B I T S

(Department's Exhibits A-H were received at page 8)

(Appellant's Exhibits 1-35 were received at page 8)

P R E S E N T A T I O N

PAGE

BY MR. FALCHE

10

BY MR. NOBEL

68

1 Sacramento, California; Wednesday, September 21, 2022

2 9:30 a.m.

3 -- oOo --

4 JUDGE ALDRICH: This is Judge Aldrich. We're
5 opening the record in the Appeal of R. Falche before the
6 Office of Tax Appeals, OTA Case Number 19115516.

7 Today's date is Wednesday, September 21, 2022,
8 and it is approximately 9:30 a.m. This hearing is being
9 conducted in Sacramento, California, and it is also being
10 livestreamed on OTA's YouTube channel.

11 This hearing is being heard by a panel of three
12 Administrative Law Judges. My name is Josh Aldrich. I'm
13 the lead judge for purposes of conducting the hearing.
14 I'm joined by Judges Andrew Kwee and Michael Geary.

15 During the hearing, panel members may ask
16 questions or otherwise participate to ensure we have all
17 the information needed to decide this appeal. After the
18 conclusion of the hearing, we three will deliberate and
19 decide the issues presented.

20 As a reminder, the Office of Tax Appeals is not a
21 court; it is an independent appeals body. The panel does
22 not engage in ex parte communications with either party.
23 Our opinion will be based on the parties' arguments,
24 admitted evidence, and the relevant law.

25 And we have read the party submissions and are

1 looking forward to hearing your arguments today.

2 Who is present for the Appellant?

3 MR. FALCHE: Robert Falche.

4 JUDGE ALDRICH: Thank you.

5 And who's present for the Respondent or the
6 Department?

7 MR. NOBEL: Jarrett Nobel with CDTFA.

8 MR. CLAREMON: Scott Claremon with CDTFA.

9 MR. PARKER: And Jason Parker with CDTFA.

10 JUDGE ALDRICH: Great. Welcome, again, everyone.

11 The issues to be decided -- so the September 6,
12 2022 minutes and orders, as distributed to the parties,
13 listed five issues. In the interest of time, I'm not
14 going to be restating the issues and related sub-issues.

15 However, I wanted to ask that both parties --
16 whether the issues summarized on the minutes and orders of
17 the prehearing conference are correctly summarized and
18 there are no objections to those summaries.

19 I'll start with the Appellant.

20 MR. FALCHE: There would be one objection.

21 JUDGE ALDRICH: Okay.

22 MR. FALCHE: There's a statement that -- that I
23 conceded that I was the person responsible for the sales
24 tax compliance during the liability period. However, what
25 my statement was is that I was responsible up until the

1 filing of the bankruptcy.

2 JUDGE ALDRICH: Okay. And that's -- that's fine.
3 We can make -- so the issue statements are subject to
4 revision based off of the parties' arguments. Does that
5 work?

6 MR. FALCHE: Yes.

7 JUDGE ALDRICH: Okay.

8 And, Department, are you okay with that?

9 MR. NOBEL: Yes, we are.

10 JUDGE ALDRICH: Thank you.

11 Any other comments or on the issue statements?

12 MR. FALCHE: Not at this time.

13 JUDGE ALDRICH: And, Department?

14 MR. NOBEL: Not at this time.

15 JUDGE ALDRICH: Thank you.

16 Next, we'll address the exhibits. For the
17 Department, the Department's exhibits are identified
18 alphabetically as Exhibits A through K. A through H were
19 submitted during the briefing process, and I through K
20 were submitted on September 9, 2022.

21 Appellant, do you have any objections to the
22 admission of Department's proposed exhibits?

23 MR. FALCHE: No.

24 JUDGE ALDRICH: Okay. And Appellant's Exhibits
25 were identified numerically as Exhibits 1 through 35.

1 Exhibits 1 through 27 were submitted during the briefing
2 process, and Exhibits 28 through 35 were submitted on
3 September 9, 2022.

4 Department, did you have any objections to the --

5 MR. NOBEL: No, sir. Thank you.

6 JUDGE ALDRICH: Okay. Hearing no objections to
7 the parties' proposed exhibits, they're admitted into the
8 record.

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

11 (Appellant's Exhibit Nos. 1-35 were received in
12 evidence by the Administrative Law Judge.)

13 JUDGE ALDRICH: So we talked about this during
14 the prehearing conference, but we planned for the hearing
15 to proceed as follows:

16 Appellant's opening statement and witness
17 testimony, which we estimated at 60 minutes. Next, the
18 Department will present a combined opening and closing for
19 approximately 30 minutes.

20 And then the panel will have about 20 minutes to
21 ask questions for either party. And Appellant will have 5
22 to 10 minutes for a closing or rebuttal.

23 Okay?

24 MR. FALCHE: Yes, sir.

25 JUDGE ALDRICH: And like I said during the

1 prehearing conference, these are time estimates for
2 calendaring purposes. If you need a little extra time,
3 please ask for it. If you don't need your time, feel
4 free -- you can waive it. Just let us know how you would
5 like to adjust that on the fly.

6 All right. And so, since it's going to be
7 witness testimony, I was wondering if I could swear you
8 in?

9 MR. FALCHE: Yes.

10 JUDGE ALDRICH: Okay. Would you raise your right
11 hand?

12 Thank you.

13
14 ROBERT FALCHE,
15 called as a witness on behalf of the Appellant, having
16 first been duly sworn by the Administrative Law Judge, was
17 examined and testified as follows:

18
19 THE WITNESS: I do.

20 JUDGE ALDRICH: Thank you, sir.

21 Before moving to opening presentations, are there
22 any questions, Mr. Falche?

23 MR. FALCHE: No questions.

24 JUDGE ALDRICH: Department?

25 MR. NOBEL: No questions.

1 JUDGE ALDRICH: Great.

2 So Mr. Falche, we're ready to proceed with your
3 presentation and testimony.

4
5 PRESENTATION

6 MR. FALCHE: Good morning, gentlemen. And thank
7 you for the opportunity to address you today.

8 I would like to use my time to summarize the
9 history of this matter and the facts and evidence that
10 should be considered in reaching your decision.

11 During the course of my presentation, I will try
12 to refer to all actions by Respondent in this matter,
13 whether it was done by the State Board of Equalization,
14 the Appeals Bureau, or the California Department of Tax
15 and Fee Administration as CDTFA.

16 I will also refer to the corporation in this
17 matter, International Marine Fuels Group, Inc., San
18 Francisco Petroleum as IMFG.

19 Let me begin by stating that I do not believe I
20 am liable for any of the alleged unpaid sales tax
21 liability of IMFG.

22 The evidence in this matter shows that the
23 statute of limitations had expired prior to the issuance
24 of the Notice of Determination on June 25, 2015; and, even
25 if it had not expired, the long, unreasonable delay by the

1 CDTFA in asserting its claim via its Notice of
2 Determination issuance severely prejudiced my defense,
3 resulting in the applicability of laches and/or an
4 estoppel against CDTFA's Notice of Determination claim.

5 CDTFA has also failed to meet its burden of proof
6 as to the elements for Revenue and Taxation Code 6829
7 liability as it cannot prove beyond a reasonable doubt
8 that had -- that I had actual knowledge, at the time the
9 taxes were due, of the asserted re-audit liability and
10 that, when actual knowledge may have existed after the
11 re-audit of November 23, 2011, I did not have the
12 authority or the ability to pay the alleged sales tax
13 liability.

14 In addition, CDTFA has failed to meet its burden
15 of proof as to the alleged re-audit liability due to the
16 point-of-sale source documents' failure to verify the
17 re-audit computations.

18 Finally, I believe that CT -- CDTFA's alleged
19 liability and actions in this matter have created a
20 violation of the Excessive Fines Clause and have violated
21 the Due Process Clause of the U.S. and California
22 Constitutions.

23 I'm going to begin with a history of this matter:

24 This action was brought against me on June 25,
25 2015, under Revenue and Taxation 6829 as the responsible

1 person at IMFG. However, it actually commenced in
2 December of 2020 -- 2010, when a request for documentation
3 to audit International Marine Fuels Group 2008 through
4 2010 sales tax return was made.

5 At the time this audit request was made, IMFG was
6 in the process of moving its oil warehouse and office
7 headquarters from San Francisco to Santa Rosa, California
8 and had recently terminated its controller and was unable
9 to provide the audit documents in the time frame requested
10 by CDTFA.

11 CDTFA's late commencement of its audit request
12 meant it did not have sufficient time to complete its
13 audit before expiration of the limitations period for the
14 first quarter, 2008.

15 Therefore, on March 8th of 2011, CDTFA requested
16 an extension of the limitations period from IMFG. When
17 this request was legally refused by IMFG, CDTFA issued a
18 Notice of Determination on April 13, 2011.

19 This Notice of Determination, without any
20 evidence, disallowed all exempt sales of IMFG and bad
21 debts and alleged unpaid sales tax of \$495,000 and a total
22 liability of \$533,000.

23 CDTFA understood that issuance of this
24 unsubstantiated liability would unlawfully coerce IMFG to
25 pay the tax alleged or to file a motion for

1 reconsideration -- either of which would extend the
2 limitations period for CDTFA's audit period.

3 It should be noted that, in its re-audit, no
4 exempt sales of IMFG were disallowed by CDTFA clearly
5 reflecting the misuse of its audit powers.

6 On July 14, 2011, IMFG filed a chapter 13 [sic]
7 bankruptcy reorganization. In this bankruptcy action,
8 CDTFA's deficiency claim of \$533,000 was listed as a
9 disputed creditor's claim. And CDTFA was listed on the
10 creditor's notice list and as one of the top 20 unsecured
11 creditors.

12 On November 23, 2011, CDTFA concluded its
13 so-called re-audit of the Notice of Determination of April
14 13, 2011, and increased its alleged audit claim for unpaid
15 sales taxes by IMFG to \$894,000 and a total liability of
16 \$1,066,961 plus interest and penalties, increasing the
17 alleged liability to over \$1.7 million.

18 Noticeably, as previously stated, the re-audit
19 did not disallow any of IMFG's exempt sales, which had
20 previously been the source for the alleged unpaid sales
21 tax in the Notice of Determination of April 13, 2011.

22 On March 13th, the U.S. Bankruptcy Trustee moved
23 to convert IMFG's chapter 13 [sic] bankruptcy to chapter 7
24 insolvency based on the existence of continuing loss with
25 no prospect of reorganization.

1 On April 12, 2012, IMFG was converted to chapter
2 7 bankruptcy and all the assets of IMFG were assumed by
3 the U.S. Trustee.

4 More than three years later, on May 23, 2015,
5 CDTFA issued a Notice of Proposed Determination to me as
6 the responsible person under Revenue and Taxation Code
7 6829 for the alleged unpaid sales tax liability of IMFG.

8 On June 25, 2015, CDTFA issued a Notice of
9 Determination to me for the alleged IMFG unpaid sales tax
10 liability of \$1.7 million.

11 As previously stated, CDTFA's Notice of
12 Determination was issued after the expiration of the
13 statute of limitations. IMFG filed a chapter 13 [sic]
14 bankruptcy reorganization on July 14, 2011.

15 In that bankruptcy filing, the California State
16 Board of Equalization was listed as an unsecured priority
17 claim creditor on Bankruptcy Schedule E.

18 The Board of Equalization was also listed as one
19 of the 20 largest unsecured creditors in the amount of the
20 Notice of Determination of April 13, 2011. And as a
21 creditor, CDTFA was included as one of IMFG's notice
22 recipients. These items I included in my Exhibit 28.

23 The items contained in Exhibit 28, just
24 described, reflect the fact that CDTFA, as a listed
25 creditor and notice recipient, was notified of IMFG's

1 bankruptcy filing shortly after July 14, 2011.

2 As one of the 20 largest unsecured creditors,
3 CDTFA was also provided the opportunity to join the
4 creditors' committee and could have filed a request for
5 special notice.

6 In addition, as a California government entity,
7 it had access via PACER to all filings in all of IMFG's
8 bankruptcy.

9 The timeliness of CDTFA's Notice of Determination
10 to any person -- responsible person is dependent on the
11 date of knowledge by the Department of the determination
12 of the corporation's business -- in this case,
13 determination of IMFG's business.

14 To determine this date, CPPM, the Policies and
15 Procedures Manual, 764.100 provides, "Staff cannot rely
16 solely on the closeout date or closeout process date as
17 shown in the Board of Equalization's electronic records as
18 the date that the BOE obtained actual knowledge of
19 determination, dissolution, or abandonment of the entity's
20 business activities.

21 The following sources, although not exhausted,
22 should be reviewed in order to determine the Board of
23 Equalization's date of knowledge of the closeout."

24 And Item 6 says, "PACER and IRIS should be looked
25 at for any relevant bankruptcy or legal filings of the

1 entity where the Board of Equalization was properly
2 noticed as a creditor. The statute of limitations can be
3 determined once the date of knowledge of the closeout is
4 determined."

5 CPPM 764.120 requires that, and I quote, "The
6 Department must establish that the entity's business has
7 been terminated, dissolved, or abandoned. Termination of
8 an entity's business includes discontinuance or cessation
9 of business activities.

10 Business activities refers to the activities for
11 which the entity was required to hold a seller's permit or
12 certificate of registration. There is no requirement that
13 the entity itself ceased to exist or even ceased doing
14 business in some other manner or in some other state."

15 Let me repeat this: There was no requirement
16 that the entity itself cease to exist or even cease --
17 cease doing business in some other manner.

18 The CCPPM [sic] goes on to provide, "Various
19 sources should be used to verify that the entity's
20 business activities have been terminated, dissolved, or
21 abandoned. Generally, more than one piece of evidence
22 will be necessary to establish this element; therefore,
23 all available evidence should be considered."

24 Now, you have to remember that CDTFA was aware of
25 IMFG's bankruptcy filing. It was listed as a creditor and

1 had access to PACER. Yet there is no mention of the
2 available bankruptcy evidence in its Revenue and Taxation
3 Code 6829 investigation as to the date of its knowledge of
4 IMFG's termination of business.

5 If CDTFA had abided by its own policies and
6 procedures and considered all available evidence and any
7 relevant bankruptcy filings -- filings by IMFG, it would
8 have discovered that IMFG had filed a chapter 11
9 reorganization in July 2011.

10 The bankruptcy documents indicated that IMFG's
11 franchiser, Pacific Pride, was opposing continuation of
12 its relationship in the bankruptcy court and rejecting TAB
13 bank's post-petition lending agreement.

14 It would have noticed that IMFG had lost all of
15 its fuel sites to foreclosure or lease termination. That
16 TK reports -- that's underground storage tank
17 fees reports -- from IMFG's only active site indicated
18 that no fuel was put into the underground storage tanks in
19 2012.

20 And it would have known that IMFG had no funds in
21 2012 as reported by the Trustee -- which to continue
22 business.

23 And finally, that the Bankruptcy Trustee filed a
24 motion for conversion to chapter 7 insolvency on March 14,
25 2012.

1 These other indicators ignored by CDTFA clearly
2 show that IMFG had ceased business prior to April 12,
3 2012. These indicators prove that IMFG had no funds to
4 buy fuel, was not buying fuel, and had no fuel to sell,
5 and had thus ceased the activities of selling fuel for
6 which it was required to hold a seller's permit.

7 CDTFA's status as a bankruptcy creditor, its
8 ability to do be on the creditor's committee or request
9 special notice, and its access to PACER would have and
10 should have allowed it to see all the evidence seen by the
11 U.S. Trustee indicating that the termination of IMFG's
12 business have -- had occurred prior to the Trustee's
13 motion to convert or dismiss of March 13, 2012.

14 All available evidence in IMFG's bankruptcy, if
15 utilized as required by the CPPM, would have proven that
16 IMFG had terminated its business of selling fuel prior to
17 the end of the first quarter of 2012.

18 As the U.S. Trustee stated in its memorandum
19 points in authority, in support -- support of the motion
20 to convert or dismiss there is a continuing loss -- I
21 quote, "There is a continuing loss with no likelihood of
22 rehabilitation."

23 The item cited by the U.S. Trustee in its
24 memorandum established the cessation of business
25 activities by IMFG. And I quote:

1 "Based on Debtor's December operating report, the
2 debtor has \$2,975 of cash on hand, which is not adequate
3 to pay its ongoing expenses.

4 Debtor's monthly operating reports demonstrates
5 the Debtor has maintained a negative cash flow position
6 since the petition was filed, continues to operate at
7 loss, and the debtor does not have enough cash on hand to
8 pay its administrative expenses or purchase fuel."

9 The listing of BOE as a disputed creditor
10 definitely impacted the date -- the date CDTFA must have
11 obtained actual knowledge that IMFG's business had
12 terminated.

13 By its own policies and procedures, IMFG's date
14 of termination would have and should have been no later
15 than March 13, 2012. The statute of limitations would,
16 therefore, have expired by April 30th, 2015.

17 The timeliness of the NOD to me, however, is not
18 only affected by the determination of the statute of
19 limitations. But it's also impacted by the related issues
20 created by the long delay of CDTFA in commencing action
21 against me, constituting laches and/or creating an
22 estoppel against CDTFA's Notice of Determination.

23 The Notice of Determination is how the CDTFA
24 institutes litigation on its claim against the responsible
25 person. As such, the question becomes was CDTFA's delay

1 in commencing action on its claim unreasonable, resulting
2 in prejudice to me?

3 As discussed more fully -- fully in my appeal and
4 exhibits, delay is measured from the period when the CDTFA
5 knew or should have known about its potential claim.

6 The evidence clearly shows that CDTFA knew IMFG
7 owed the alleged re-audit on unpaid sales tax on
8 November 23, 2011.

9 It knew of IMFG's termination of business in
10 March or April of 2012. It had identified me as a
11 responsible person as early as September 2009.

12 And it had in its re-audit documents IMFG's
13 payables and receivables in April of 2011, which would
14 have provided the information as to the elements necessary
15 for it to claim it established willfulness.

16 CDTFA should have known of its potential claim no
17 later than April of 2012. Therefore, there's no question
18 that CDTFA's Notice of Determination to me was issued more
19 than three years after termination of IMFG's business
20 regardless of which termination date -- March or April --
21 is utilized -- utilized. And it thus was substantially
22 delayed.

23 The real question is whether CDTFA's delay was
24 reasonable. Courts have determined that -- the
25 reasonableness of delay by looking to the cause of the

1 delay.

2 In this regard, it should be noted that all of
3 the delay in CDTFA's commencement of litigation was caused
4 by CDTFA itself and not myself.

5 CDTFA's Appeals Bureau offer -- officer
6 specifically held that there was unreasonable delay by
7 CDTFA -- CDTFA when it held in its decision at page 48.
8 We find -- and I quote:

9 "We find the 14 months it took Petitions to
10 process the case and complete the February 6, 2013 summary
11 analysis to -- to be unduly lengthy. And Petitions has
12 provided no explanation for this long delay," close
13 quotes.

14 In addition to this delay, it should be added
15 another unexplained delay. CDTFA did not begin its
16 investigation to dual me until June of 2014 as provided in
17 their Exhibit 5.

18 This is an additional delay of 17 months. So we
19 have 31 months of unexplained delays, and these clearly
20 are unreasonable.

21 This unreasonable delay by CDTFA in commencing
22 action clearly created prejudice to my defense. The long
23 delay resulted in the loss and unavailability of IMFG's
24 records, demonstrating an evidentiary prejudice.

25 The long delay in prosecution by CDTFA

1 additionally changed circumstances for me in a way that
2 would not have occurred had CDTFA issued its Notice of
3 Determination earlier, creating an expectations-based
4 prejudice.

5 It should be clear that CDTFA's June 25, 2015
6 Notice of Determination was not issued timely, either
7 because it was issued after expiration of the statute of
8 limitations and/or because it was unreasonably delayed to
9 my extreme prejudice.

10 In either case, the Notice of Determination
11 should be dismissed.

12 I'll discuss now the liability of the Revenue and
13 Taxation Code 6829 and its elements.

14 In discussing the elements required to prove RTC
15 6829 liability, Regulation 1702.5 requires the CTTFA [sic]
16 to prove the requirements of personal liability of the
17 responsible person under the preponderance of the evidence
18 standard of proof.

19 CDTFA is required to prove that -- and I quote:

20 "On or after the date the taxes came due, the
21 responsible person had actual knowledge that the taxes
22 were due but not being paid."

23 CDTFA must further prove that, when the
24 responsible person had actual knowledge, the responsible
25 person had the ability to pay the taxes but chose not to

1 do so. All of these elements must be established in order
2 for the CDTFA to issue a Notice of Determination.

3 None of these elements have been addressed, let
4 alone proven by a preponderance of the evidence, in
5 CDTFA's dual determination request.

6 CDTFA's evidence of a -- Appellant's personal
7 liability under R&TC 6829 Dual Liability Statute is
8 contained in its memorandum "Request For Dual
9 Determination" -- my Exhibit 5.

10 The evidence presented by CDTFA in its memorandum
11 mainly discusses the issue already admitted by me -- that
12 I had the authority to pay taxes or cause them to be paid
13 prior to IMFG's bankruptcy filing of July 14, 2011.

14 However, no evidence is presented by CDTFA's
15 memorandum with respect to when I, the responsible person,
16 learned of the alleged tax liability -- the required
17 actual knowledge of the responsible person that such
18 amount of taxes was due -- that such amount of taxes have
19 not been paid, or there -- or of the responsible person's
20 authority and ability to pay when they learned of the
21 underpaid taxes.

22 In discussing the element of actual knowledge,
23 CDTFA's evidence on two periods of time have to be
24 examined, i.e., knowledge when the original returns were
25 filed and knowledge after the returns were filed.

1 The memorandum, in discussing its knowledge
2 evidence acknowledges that, I quote, "The liability
3 consists of an audit for additional taxable sales," close
4 quotes.

5 This statement is an admission that the taxes
6 came due after the original returns were due and filed.
7 This statement is a recognition by CDTFA that actual
8 knowledge that taxes are unpaid or underreported may not
9 occur at the time the tax reports are due or prepared.

10 It confirms the position of CPPPM [sic] 764.140,
11 which, when discussing unpaid tax liability, states, "Such
12 liabilities may arise from unpaid or partially paid sales
13 and use tax returns or prepayments, audits, and compliance
14 assessments."

15 In its formal issue papers 16-01, the Board of
16 Equalization further states, and I quote:

17 "For example, a month after the due date of the
18 return, a responsible person learns that taxes were due
19 but not paid.

20 In order to meet the authority component of the
21 willfulness, the responsible person must have had the
22 authority to pay the taxes on the day the taxes were due
23 and the month later when the person learned that the taxes
24 were due but not paid," close quotes.

25 CDTFA can be seen that it recognizes that actual

1 knowledge that taxes are unpaid or underreported may not
2 occur at the time the tax reports are prepared where the
3 liability arises from an audit.

4 CDTFA in discussing the issue regarding the
5 timing of when a responsible person must know the unpaid
6 tax liability to be held -- held liable stated, quotation:

7 "Such a person may not acquire actual knowledge
8 of the liability until after the taxes are due. For --
9 for example, a person may not acquire actual or
10 constructive knowledge of an unpaid use tax liability
11 until completion of an audit or the issues of billing
12 order, which always occurs after the due date of the
13 applicable tax."

14 The facts in this matter are that the alleged
15 unpaid liability of IMFG, in excess of \$1.7 million, did
16 not exist until November 23, 2011, after CDTFA completed
17 its audit and not before.

18 Prior to this -- this date, as discussed above, I
19 had no actual knowledge that IMFG had an unpaid tax
20 liability of over -- over \$1.7 million.

21 CD- -- CDTFA's evidence of actual knowledge, its
22 memorandum to dual, presents no evidence with respect to
23 whether I had actual knowledge of this re-audit liability
24 amount when the original returns were filed.

25 The memorandum appears to speculate such

1 knowledge existed because of the availability and possible
2 access to me -- to the point-of-sale reports used in the
3 re-audit.

4 However, the memorandum presents no evidence that
5 I prepared the sales/use tax reports in 2008 or 2009 prior
6 to termination of IMFG's controller. There is absolutely
7 no evidence presented that I saw or reviewed the
8 point-of-sale reports during this 2008 or 2009 period.

9 There is only evidence that the amounts in the
10 sales tax reports for 2000 to -- 2008 through 2009 were
11 paid and that -- and that I authorized such payment.

12 Therefore, there is absolutely no evidence I had
13 actual knowledge that IMFG in 2008 or 2009 owed more taxes
14 each quarter than it -- than it was reporting in its sales
15 tax reports at the time those taxes became due.

16 Now, it's true that a corporation can be found to
17 be responsible for the acts of its employees, agents, and
18 officers and, therefore, be held to know what is reflected
19 in its records. But the reverse is not always true.

20 An officer of a corporation is not held to know
21 everything that is reflected in a corporation's records.
22 An officer of a corporation is not answerable for every
23 act of a corporation but only for those in which he is
24 personally a participant.

25 Control without knowledge is not sufficient to

1 invoke liability, especially when, by this statute, the
2 corporate officer's actions must be intentional,
3 conscious, and reflect a voluntary course of action.

4 My actual knowledge extends only to the amount
5 reflected on the sales tax reports filed by MFG -- IMFG
6 and not the re-audit liability ascended -- asserted
7 November 23, 2011, years after the sales tax returns were
8 filed.

9 As stated above, contrary to CDTFA's memorandum,
10 I did not prepare all of IMFG's sales tax reports during
11 the liability period.

12 Therefore, the fact that IMFG had point-of-sale
13 records and used them is not evidence that I had actual
14 knowledge that IMFG owed more taxes each quarter than it
15 was reporting in sales tax returns at the time those taxes
16 became due.

17 Actual knowledge requires more than speculation
18 or possibility. Actual knowledge must be intentional,
19 conscious, and voluntary, and proven by a preponderance of
20 the evidence standard of proof.

21 CDTFA's Memorandum to Dual and its document
22 present no evidence of actual knowledge. CDTFA attempts
23 to impute actual knowledge from the availability of IMFG's
24 point-of-sale data to me.

25 However, actual knowledge is not theoretical or

1 possible or constructive or speculative. Yet this is the
2 only evidence presented by CDTFA of actual knowledge that
3 the unpaid taxes alleged in the re-audit were known by me
4 at the time the returns were filed.

5 In addition, actual knowledge does not exist if
6 the responsible person believes something to the contrary.
7 CDTFA ignores the fact that the self-assessed tax returns
8 of IMFG and the payment of such tax liability represented
9 the actual knowledge by me that all taxes due had been
10 reported and paid.

11 The Supplemental Decision found that my control
12 of IMFG and my authority over the individuals preparing
13 IMFG's sales reports and my access to IMFG records make --
14 and I quote, "Make it more likely than not that Petitioner
15 had actual knowledge that IMFG owed taxes that were not
16 paid for the liability period".

17 The Supplemental Decision from this premise
18 concludes that I knew the taxes were underreported. This
19 fact is attempted to be proven by circuitous,
20 circumstantial evidence.

21 The CDTFA memorandum and documents state that the
22 point-of-sale reports were used to prepare IMFG's sales
23 tax reports, that 2008 to 2009 point-of-sales reports show
24 total sales tax liability was underreported, and that
25 these point-of-sale reports were available to Petitioner.

1 From these facts, they attempt to infer that I,
2 therefore, had to know that sales tax liability was being
3 underreported.

4 However, the standard of proof required for RTC
5 Section 6829 liability is actual knowledge. Actual
6 knowledge requires that I -- requires that I must have
7 known of an underpayment of sales tax, not that that it
8 was more likely than not that I knew.

9 CDTFA has presented no direct or indirect
10 evidence that I ever saw or knew the contents of the
11 point-of-sale reports in 2008 through 2009 not prepared by
12 me.

13 The available undisputed evidence is that IMFG
14 had a controller who prepared the sales tax report; that
15 this was the procedure used by IMFG for more than
16 19 years; that IMFG had undergone two audits of its sales
17 tax reports, which with minor errors confirmed the
18 correctness of the reports filed by -- by the controller;
19 and that I wrote and signed the checks for payment of the
20 reported amounts.

21 These facts only lead to the inference that I
22 relied on the controller to continue to do her duties in
23 reporting IMFG's sales tax liability correctly. These
24 facts do not lead to an inference that I, at any time,
25 must have had actual knowledge of the contents of the

1 point-of-sale reports except as the point-of-sale amounts
2 were reflected in the sales tax reports filed by IMFG.

3 Without actual knowledge of the contents of the
4 point-of-sale reports, there is no actual knowledge of any
5 underpayment in the tax reports at the time they were due
6 and filed.

7 In addition, as I will discuss later, even seeing
8 the point-of-sale reports would convey no information as
9 to the ultimate sales tax liability that would be due
10 since the point-of-sale reports were monthly reports that
11 had to be summarized into a quarterly sales tax report.

12 Controller-filed sales tax reports reflecting no
13 underpayment of taxes are not evidence of actual knowledge
14 of the underlying point-of-sale reports' alleged
15 underreporting information.

16 This position is codified by the U.S. Supreme
17 Court, which has held that a taxpayer's signature on a tax
18 return does not, in itself, prove its knowledge of the
19 contents.

20 In Learning versus United States, the court
21 concluded that it is improper to charge a taxpayer with
22 conclusive knowledge of the contents of a tax document on
23 the basis of the signature alone.

24 By the same token, it is improper to charge me
25 with actual knowledge of the contents of the point-of-sale

1 reports based on check payments of the sales tax liability
2 reported on IMFG's returns.

3 CDTFA's attempted inferences are three times
4 further removed from the Learning inference, which was
5 found to be improper -- i.e., I was not the taxpayer, I
6 did not prepare the sales tax returns, and then I did not
7 sign the sales tax returns.

8 The requirement of actual knowledge that the --
9 the decision states did not require CDTFA to guess from
10 information provided to it in IMFG's bankruptcy of IMFG's
11 date of business termination. Yet CDTFA can guess that
12 Appellant had actual knowledge of the contents of the
13 point-of-sale reports because they were available to him
14 as a corporate officer.

15 In this regard, no requirement exists that a
16 corporate officer must review all information from which
17 the corporation's tax reports are prepared.

18 CDTFA has failed to prove by a preponderance of
19 the evidence that I had actual knowledge of the contents
20 of the point of -- point-of-sale reports and has,
21 therefore, failed to prove that I had actual knowledge the
22 taxes were due and not being paid at the time the sales
23 tax reports were prepared in 2008 and 2009.

24 Turning to my knowledge of IMFG's alleged unpaid
25 re-audit liability, it can be assumed that this knowledge

1 arose on or after November 23, 2011, the date of the
2 re-audit completion.

3 As stated previously, CDTFA has presented no
4 evidence that I -- that I had any knowledge of \$894,497 of
5 IMFG's taxes being unpaid prior to November 23, 2011.
6 Completion of the audit ostensibly provided knowledge to
7 me of the unpaid sales tax alleged to be due from IMFG.

8 On November 23, 2011, and thereafter, the real
9 available evidence that's undisputed, i.e., that by
10 November 23, 2011, IMFG was four and a half months into
11 bankruptcy.

12 In this bankruptcy, CDTFA was listed as a
13 creditor. The sales tax claimed by CDTFA as a
14 pre-bankruptcy claim could not be paid by me when asserted
15 by CDTFA on November 23, 2011, and thereafter.

16 On November 23, 2011, and since July 14, 2011, I,
17 as the bankruptcy debtor in possession, was, as described
18 in Regulation 1702.5 Subdivision (b)(2)(b), and I quote:
19 "A responsible person who was required to obtain approval
20 from another person prior to paying the taxes at issue and
21 was -- was unable to act on his or her own in making the
22 decision to pay the taxes does not have the authority --
23 does not have the authority to pay the taxes or to cause
24 them to be paid."

25 On November 23, 2011, and thereafter, I was a

1 debtor in possession. As such, at this time of presumed
2 actual knowledge, I did not have the authority to pay a
3 pre -- prepetition claim, which was CDTFA's claim here,
4 without prior authorization from the court or to pay -- or
5 to pay claims outside the statutory scheme for payment of
6 prepetition claims -- which is embodied in an approved
7 plan of reorganization.

8 And you can see in Exhibit 12, the U.S. Trustee
9 Guidelines, paragraph 6.5.

10 In addition to lacking authority to pay the
11 liabilities set -- asserted on November 23, 2011, no funds
12 were available to IMFG on November 23, 2011.

13 Exhibit 8, the Union Bank Statement shows that I
14 had no ability to pay the taxes CDTFA alleged to be due.
15 IMFG did not have sufficient funds to pay the NOD on
16 November 23, 2011.

17 "Sufficient" is defined, quote, "As of such
18 number or value as is necessary for a given purpose,"
19 close quotations.

20 The question in this context is did IMFG have
21 funds -- that is, money -- of such number or value or
22 amount to pay the State Board of Equalization demand of
23 \$894,000 on November 23, 2011, or thereafter?

24 SBOE's response to this question recites --
25 recites IMFG's gross receipts during periods prior to

1 November 23, 2011, and up to January 2012. This
2 recitation is not responsive to the question.

3 The determination of the sufficiency of funds --
4 or more appropriately, the ability to pay -- has many
5 facets. In this respect, it should be noted that
6 Regulation 1702.5 requires that, when the responsible
7 person had actual knowledge, they must also have the
8 ability to pay the taxes.

9 And I quote, "That's to pay the taxes and must
10 choose not to do so." The regulation does not allow for
11 the ability to pay any part of the taxes. It says it must
12 pay -- pay the taxes, not any part of the taxes, to
13 establish dual liability.

14 To do -- to allow the ability to pay any part of
15 the taxes as being what is meant would lead to a ludicrous
16 result of a responsible person at an entity with only \$1
17 in available funds at the taxes -- at the time the taxes
18 are claimed to be due being found to have the ability to
19 pay a tax liability of over \$800,000.

20 In other words, the plain language of the
21 regulation requires the responsible person to have the
22 authority and the ability to pay the total amount of
23 unpaid taxes for dual liability to attach.

24 The Notice of Determination of November 23, 2011,
25 relays the liability of almost \$900,000. IMFG's bank

1 account balance on November 23, 2011, was approximately
2 \$17,700.

3 This amount represents the funds that were
4 available at the time the liability was asserted.
5 Clearly, IMFG did not have sufficient funds available to
6 pay the liability.

7 CD -- CDTFA's response to this fact is to employ
8 what it usually does to establish evidence that -- funds
9 availability by citing gross receipts before -- received
10 before and after the liability is due to establish ability
11 to pay.

12 These receipts, however, only indicate IMFG's
13 potential capacity to pay and not its real ability to pay.

14 Funds received before IMFG's or the debtor in
15 possession's actual knowledge that taxes were due and
16 unpaid are meaningless if expended before the debt is
17 known or due.

18 As reflected in IMFG's bank balance on
19 November 23, 2011, gross receipts received after knowledge
20 is meaningful only if net profit is generated by the
21 entity sufficient to pay the taxes due.

22 The moment all receipted funds were applied to
23 the CDTFA's alleged liability, sales would cease, and new
24 gross receipts deposits would also cease.

25 Such an approach, therefore, can only

1 realistically look at one to two months of such gross
2 receipts collected after the liability is known as
3 representing the ability to pay the total taxes due.

4 In this case, even allowing CDTFA to use gross
5 receipts collected after the liability arose does not
6 provide sufficient funds to pay \$800,000 of alleged unpaid
7 sales tax.

8 In its bankruptcy, IMFG's -- IMFG had receipts
9 continue during the remaining days in November and through
10 the month of February 2012, which could have been applied
11 to the liability. But these only total approximately
12 \$127,000. You can see that in the operating reports filed
13 by IMFG bankruptcy.

14 IMFG ceased business shortly thereafter the
15 November 23, 2011 action; so clearly, IMFG did not have
16 sufficient funds to pay a NOD -- a Notice of Determination
17 of \$894,000. It did not have the ability to pay the
18 alleged sales tax liability.

19 CDTFA has therefore failed to prove by a
20 preponderance of the evidence that I had the authority or
21 the ability to pay the tax alleged to be due after it was
22 assumed I would have had actual knowledge of the alleged
23 underpayment.

24 CDTFA has failed to prove all the elements
25 required to impose dual liability on a responsible person.

1 It has failed to provide sufficient evidence to prove by a
2 preponderance of the evidence that all the requirements
3 for personal liability have been established.

4 CDTFA has failed to prove by a preponderance of
5 the evidence that I, the Appellant, had actual knowledge
6 the taxes were due and not being paid at the time the
7 sales tax returns were filed.

8 It has failed to prove by a preponderance of the
9 evidence that, when actual knowledge may have existed of
10 sales tax underpayment, I had the authority and ability to
11 pay the taxes but chose not to.

12 CDTFA has failed to meet its burden of proof that
13 the requirements necessary to establish personal liability
14 had been satisfied under the preponderance of the evidence
15 standard of proof.

16 In these circumstances, a Notice of Determination
17 for dual liability cannot issue.

18 Discussing, now, the re-audit liability itself.
19 The re-audit determined that IMFG's unpaid sales tax --
20 underpaid sales tax liability totaled \$849,000 plus
21 interest and penalties and alleges it determined this sum
22 from IMFG's point-of-sale reports provided by IMFG for the
23 period first quarter 2008 to the third quarter, 2010,
24 reduced by IMFG's reported sales tax on its sales tax
25 reports and allowance of a portion of IMFG's unclaimed

1 prepaid sales tax.

2 In preparing its sales tax reports, you have to
3 understand that IMFG was required to use information
4 from several monthly -- monthly reports, its card lock
5 pre-invoice journals, it's collected customer totals, and
6 exempted customer totals.

7 The card lock invoice journal listed all
8 individual sales in -- excuse me -- in the Pacific Pride
9 card lock system concluding with a sales tax recap of the
10 individual transactions broken down by county.

11 The collected customer total sales tax listed
12 individual bulk delivery invoices and summarized them in a
13 grand total listed by product. The exempted customer
14 totals summarized all exempt sales.

15 Preparation of IMFG's sales tax report also
16 required use of the monthly prepaid sales tax report --
17 that's the SG Reports -- as a credit to any quarterly
18 unpaid sales tax reports -- sales tax.

19 These items were all monthly reports, which
20 required IMFG to use an Excel spreadsheet to list the
21 monthly sales and to collect tax collected by county and
22 reduce such tax amount by the monthly prepaid sales tax by
23 product and sales-tax-exempt sales to obtain a quarterly
24 total of the sales tax due on the -- on the quarterly
25 sales tax reports.

1 This required procedure should make it very clear
2 that the simple act of seeing a monthly point-of-sale
3 report would provide no information as to the ultimate
4 quarterly sales tax liability owed by IMFG.

5 On August 10, 2018, I was, for the first time,
6 provided point-of-sale reports submitted by IMFG and
7 allegedly used by CDTFA to compute the unpaid sales tax
8 liability of IMFG.

9 I summarized these monthly point-of-sale reports
10 provided into a quarterly format, which I submitted as
11 exhibits in this matter -- on Exhibit 16; the
12 redetermination, Exhibits 28 through 33.

13 These exhibits clearly demonstrate that the
14 point-of-sale reports utilized by CDTFA reflect a total
15 liability substantially less than the claimed re-audit
16 total.

17 In fact, they demonstrate that \$15,438,640 of the
18 \$70,000,472 re-audit taxable sales cannot be verified by
19 the point-of-sale reports presented by CDTFA in this
20 matter.

21 The point-of-sale reports submitted by CDTFA only
22 show a total in taxable sales of \$55 million -- a sum less
23 than the sum reported by IMFG on a sales tax return for
24 the same for period.

25 This result, however, is best understood by

1 reviewing the events that culminated in the receipt of the
2 point-of-sale reports by myself and the appeals officer.

3 Upon receipt of the NOD of June 25, 2015, I filed
4 the required petition for redetermination. In that
5 petition, I requested copies of all information which the
6 Notice of Proposed Determination indicated would be
7 provided and that supported the amount and information
8 relied on by CDTFA for holding me liable for IMFG sales
9 tax liability.

10 Some of these documents were provided seven
11 months later on February 12, 2016. And these were further
12 updated on February 25, 2016.

13 These documents that were provided, however, were
14 selectively incomplete. No re-audit computational
15 information was provided with these documents, nor were
16 any of the documents provided by IMFG for the re-audit
17 provided to me.

18 I noted this failure to comply with discovery in
19 my petition for redetermination. Yet to this date, CDTFA
20 has not provided all the documents and information
21 provided by IMFG and used by CDTFA for its re-audit.

22 Specifically, it has failed to provide IMFG's tax
23 returns for 2008 and 2009. It has failed to provide a
24 complete set of IMFG's point-of-sale reports. It has
25 failed to provide a complete listing of suppliers' prepaid

1 sales tax reports and the computation of alleged unallowed
2 prepayments. It has failed to provide IMFG's -- IMFG's
3 customer agings. And it has failed to provide all the
4 items that's listed in -- in Respondent's Exhibit E, page
5 1, all of which were employed in determining IMFG's
6 re-audit liability.

7 It should be -- specifically be noted that the
8 point-of-sale reports were eventually provided to me on
9 August 20, 2018, more than three years after commencement
10 of this action and by which time the original decision in
11 this matter had been rendered.

12 Point-of-sale documents were provided only after
13 I made an additional request for full discovery of all
14 IMFG documents employed in the re-audit, which was
15 contained in my Request for Reconsideration of December
16 [sic] on June 29, 2018.

17 The point-of-sale reports ultimately provided by
18 CDTFA -- CDTFA contained only the monthly summaries of the
19 individual transactions. And these summaries were
20 incomplete and did not support or verify the amounts
21 contained in the re-audit computations.

22 It should also be noted that IMFG had provided
23 CDTFA with documentation of the individual transactions
24 summarized in the monthly totals. And these documents
25 were also never provided to my discovery requests.

1 As a successor or assignee to IMFG's sales tax
2 liability, I was entitled to be provided with these
3 documents, especially after repeated requests for the
4 information used by CDTFA to compute IMFG's liability and
5 as required by RTC 756(d) and the Administrative
6 Procedures Act 11507.6.

7 CDTFA did provide a slew of spreadsheets with
8 respect to its claimed alternate method of supporting its
9 point-of-sale totals reflecting the results of DOE
10 price -- Department of Energy pricing applied to IMFG's
11 reported sales tax amount.

12 This failure provide the underlying -- underlying
13 point-of-sales source documents at the same time it
14 provided the DOE pricing spreadsheets used for the
15 re-audit led me and the Appeals Bureau officer to believe
16 that the DOE pricing was the method used to compute the
17 re-audit alleged liability. And that's contained in her
18 Supplemental Decision of November 13, 2018.

19 CDTFA has provided no expert opinion nor
20 testimony under penalty of perjury to substantiate its
21 point-of-sale re-audit computations. It has only provided
22 spreadsheets with amounts that cannot be verified or
23 substantiated from the underlying source documents
24 presented in this matter.

25 Meanwhile, prior to receiving the point-of-sale

1 reports on August 18, 2018, I provided CDTFA's appeals
2 officer with actual -- actual IMFG documents and
3 spreadsheets. These documents and spreadsheets reflect
4 the fact that CDTFA's retail price computations were also
5 completely incorrect.

6 They were incorrect because the contractual price
7 controls on IMFG's buck sales, which represented more than
8 60 percent of its total sales, and the price controls on
9 Pacific Pride card lock foreign sales, when applied to
10 CDTFA's DOE prices, totally eliminate all the alleged
11 unpaid taxable sales asserted by the DOE pricing
12 spreadsheets.

13 In addition, I provided the CDTFA's appeals
14 officer with documentary proof that IMFG had to remove all
15 undelivered invoices via credit memos from its
16 point-of-sale reports to compute the correct amount of
17 sales -- amount of taxable sales.

18 Extrapolating from these credit memos entered by
19 IMFG in its first quarter of 2009 and employing the use of
20 the test period as CDTFA used in its DOE pricing, I
21 established a credit -- credit-memo ratio for use in the
22 re-audit period.

23 When this credit-memo ratio was applied to
24 CDTFA's taxable sales computations, they also result in
25 the elimination of all the alleged unpaid taxable sales

1 established by use of the point-of-sale reports.

2 The cited information should be sufficient to
3 disprove the re-audit's total of understated taxable
4 sales. However, in determining changes to the re-audit
5 taxable sales liability, you must also examine the CDTFA's
6 burden of proof and CDTFA's evidentiary failures.

7 As discussed in my request for reconsideration in
8 the second Supplemental Decision, Exhibit 20 on my appeal,
9 CDTFA has the burden of proving the facts supporting its
10 re-audit liability claims.

11 CDTFA's burden of proof is best understood as a
12 burden of production and a burden of persuasion. This
13 proof burden requires CDTFA to produce the evidence of
14 IMFG's liability and to convince the court of the legal
15 sufficiency of such evidence by a preponderance of the
16 evidence.

17 CDTFA has submitted as evidence of IMFG's
18 liability its Exhibit D, the auditor's R112C2 spreadsheet.
19 This spreadsheet summarizes IMFG's point-of-sale reports
20 on a quarterly basis. These spreadsheets are documentary
21 hearsay evidence since no testimony has been presented as
22 to its preparation.

23 In addition, this hearsay document could not be
24 authenticated or considered reliable because the
25 underlying source documents for the quarterly sales tax

1 amounts recorded do not verify or confirm the amounts
2 entered.

3 The uncorroborated re-audit liability spreadsheet
4 is, therefore, insufficient, non-admissible evidence of
5 IMFG's alleged liability. CDTFA has, therefore, failed to
6 meet its burden of proof.

7 CDTFA attempts to avoid this result by arguing
8 that these point-of-sale reports underlying the liability
9 determination, though now unavailable due to CDTFA's sole
10 actions, were properly transcribed by the auditor.

11 This position ignores the California rules of
12 evidence, which are applicable in administrative hearings.
13 The rules of evidence require CDTFA to -- to prove the
14 reliability of its spreadsheet's summary of the
15 point-of-sale totals.

16 The rules of evidence require that these
17 spreadsheet summaries be authenticated. The best-evidence
18 rule requires that the original CDTFA documents CDTFA
19 employed in creating the spread -- spreadsheets summary be
20 produced for this purpose.

21 Oral testimony is not admissible to prove the
22 content of the point-of-sale reports. CDTFA's liability
23 evidence, as reflected in its R112C2 Spreadsheet, cannot
24 be verified from the point-of-sale documents. CDTFA's
25 liability evidence cannot be authenticated and, therefore,

1 is unreliable and inadmissible as evidence in this matter.

2 It should also be noted that if CDTFA's
3 unauthenticated spreadsheet of alleged liability were
4 allowed to be admitted as evidence, IMFG's responsible
5 person would be denied the legally-required opportunity to
6 cross-examination or refute the CDTFA's determination
7 because of the alleged incomplete point-of-sale reports
8 presented in this matter, which would result in an
9 egregious due process violation.

10 To summarize, changes to the re-audit liability
11 are clearly required. CDTFA's re-audit liability cannot
12 be substantiated from the underlying original
13 point-of-sale reports. CDTFA's Department of Energy
14 pricing methodology is refuted by actual IMFG documents
15 and pricing records.

16 CDTFA's re-audit computations are hearsay,
17 inadmissible as evidence. The Walker Rule that hearsay
18 evidence alone is insufficient to support a decision in
19 the California Statutory Mandate of Government Code
20 11513(c) that hearsay evidence shall not be sufficient in
21 itself to support a finding apply; there must exist at a
22 bare minimum a residuum of legal evidence.

23 Consequently, since there's no evidence to
24 sustain the point-of-sale finding of unpaid sales tax,
25 CDTFA has failed to meet its required burden of proof.

1 This unsubstantiated sales-tax determination arising from
2 the re-audit should immediately be dismissed.

3 Turning now to the first and fourth quarters'
4 2011 liability. The Supplemental Decision estimated the
5 taxes for the first quarter '11 and fourth quarter '11 and
6 disallowed the information provided by me for the first
7 quarter '11, fourth quarter '11 on the basis that no
8 supporting documentation was provided. And the sales
9 journal that I provided is only a summary and not
10 credible.

11 You should -- it should be noted that sales tax
12 reports filed online do not require source documents, and
13 the sales tax reports submitted by IMFG for the second
14 quarter 11 and third quarter 11, without source documents
15 included, were considered the best available evidence of
16 sales.

17 In addition, the point-of-sale records used by
18 CDTFA in its audit are also only a -- only a summary but
19 were considered as actual records of IMFG's sales and the
20 best evidence to be used for the board assessments.

21 Similarly the summaries previously submitted by
22 me as Exhibits 16, 17, and 18 on Exhibit 13 are summaries
23 from IMFG's actual records supporting the submitted
24 computations and are the best evidence to be used for
25 determination of the tax due of these periods.

1 Further, CDTFA's board assessments for the first
2 and fourth quarter of 2011 failed to meet its required
3 burden of proof. CDTFA has failed to provide any evidence
4 as to the method of computations used by the board to
5 establish the amount of taxes assessed for these periods.
6 CDTFA merely lists the quarters as board assessed and
7 asserts an amount as due.

8 These factual insufficiencies report -- result in
9 these determinations being against the law since there's
10 no way to conclude whether the determination was correct
11 or reasonable or rational, resulting in CDTFA's failure to
12 meet its required burden of proof.

13 As stated by the court in the United States
14 versus -- versus Janis, and I quote, "What we have is a
15 naked assessment without any foundation whatsoever.
16 Certainly proof that an assessment is" -- early --
17 "utterly without foundation is proof that it is arbitrary
18 and erroneous," close quotations. Therefore, CDTFA has
19 failed to meet its burden of proof on these assessments,
20 and they should be disallowed.

21 With respect to IMFG's documentation for these
22 quarters, in late 2010, CDTFA switched from paper to
23 electronic filing of quarterly sales tax reports and
24 monthly prepaid sales tax reports.

25 In the first quarter of 2011, IMFG entered the

1 information for its sales tax report into the State Board
2 of Equalization website.

3 IMFG could not complete the report because it
4 lacks Schedule C allocation information. The return was
5 not completed, but a copy of the information entered in
6 the system was printed and retained and entered in IMFG's
7 records.

8 When IMFG -- when IMFG returned to complete the
9 missing allocation, the return was not accessible nor
10 available. IMFG informed CDTFA of this fact July 13 of
11 2011 and was sent paper returns.

12 The board-assessed tax for the first quarter of
13 2011 is listed at \$55,681. The actual tax due for the
14 first quarter of 2011 is \$11,690. And that is contained
15 in Exhibit 16, which is a copy of IMFG's SR first quarter
16 2011 draft, and Exhibit 17, which is a spreadsheet which
17 was used to prepare that draft.

18 It should be noted that one of IMFG's main
19 suppliers, IPC, was charging sales tax on IMFG's
20 purchase -- purchases rather than prepaid sales tax,
21 resulting in the sale of tax-paid fuel purchases during
22 2011.

23 This means that instead of paying \$0.07 a gallon
24 for the prepaid sales tax, IMFG was paying the full sales
25 tax amount, which would be in the range of 10 percent of

1 everything that was sold.

2 IMFG was in the bankruptcy during the fourth
3 quarter of 2011. The operating reports filed during this
4 quarter reflect gross sales of \$333,306 including sales
5 taxes and late charges. The sales tax due in this quarter
6 totaled \$19,352. And this is contained in my Exhibit 18,
7 the sales journals for the fourth quarter of 2011.

8 This amount is further reduced by prepaid sales
9 tax of \$9,295, which should be found in the SG returns for
10 October/November. The net tax due for the fourth quarter
11 2011, therefore, is less than \$10,000.

12 The board-assessed tax of \$31,331 is overstated.
13 And the actual tax due is substantially less than \$10,000.
14 The information to -- to determine the correct amount of
15 sales tax due for the first and fourth quarters of 2011
16 has been provided from IMFG's actual records.

17 CDTFA has never produced any information as to
18 the method or computations used by CDTFA to establish the
19 amount of taxes they have assessed for the first and
20 fourth quarter of 2011. CDTFA has again failed to meet
21 its required burden of proof.

22 I will address, now, the failure to correct the
23 sales tax -- IMFG's failure to collect sales tax.

24 JUDGE ALDRICH: Mr. Falche, I believe it's been
25 about 60 minutes.

1 How much more time do you think you'll need to
2 get through?

3 MR. FALCHE: Perhaps another ten minutes.

4 JUDGE ALDRICH: Okay.

5 MR. FALCHE: The liability asserted by CDTFA in
6 its NOD failed to allow any credit for IMFG's uncollected
7 and worthless receivables.

8 Revenue and Taxation 6055(a) provides that a
9 retailer is relieved from liability for sales tax that
10 became due and payable insofar as the measure of tax is
11 rendered -- represented by a concept that has been found
12 to be worthless.

13 It further allows the retailer to take a
14 deduction -- the amount found worthless.

15 The California Taxpayer's Bill of Rights RTC
16 Sections 7080 to 790 -- 7099.1 states, and I quote:

17 "The legislature finds and declares that the
18 purpose of any tax proceeding between the State Board of
19 Equalization and the taxpayer is the determination that
20 the Taxpayer's correct amount of tax liability."

21 As you are aware, I am not the taxpayer; I am a
22 separate person being held liable for the tax debt of
23 another person, IMFG.

24 I am entitled to a determination of the correct
25 amount of tax liability due to CDTFA by IMFG. I am

1 entitled to all credits and deduction such as to ensure
2 that the State receives only the actual tax due.

3 In the words of the CTTFA's [sic] predecessor,
4 quotation, "However, we would strongly recommend that dual
5 determinations be issued in only those cases where sales
6 tax reimbursement has, in fact, been collected from
7 customers.

8 Applying these prince -- principles requires that
9 IMFG's account be allowed a deduction for all of IMFG's
10 worthless accounts and accounts that were never collected
11 and this -- thus became worthless.

12 The uncollected accounts receivable of IMFG
13 consisted of over \$4 million which must be deducted to
14 determine IMFG's correct tax liability.

15 No sales tax reimbursements was collected from
16 customers on these sales. And no dual determination is
17 applicable to such sales. CDTFA should be required to
18 compute deductions for worthless accounts that IMFG's
19 assignee is entitled to receive to determine and ensure
20 that the State receives only the actual tax due.

21 The Supplemental Decision found -- found that no
22 deduction for IMFG's bad debt should be allowed because
23 IMFG did not provide the books and records necessary to
24 support adjustments and credits.

25 Supplemental Decision contends that, even though

1 I am not the taxpayer, I stand in IMFG's shoes in terms of
2 challenging adjustments or credits to IMFG's liability.

3 This is incorrect. Revenue and Taxation 6829
4 charges a responsible person only with IMFG's unpaid
5 taxes. Appellant is not required to request adjustments
6 and credits to IMFG's tax liability for uncollected and
7 worthless accounts.

8 This position completely ignores the statutory
9 requirements of the Taxpayer Bill of Rights requiring
10 CDTFA to determine the Taxpayer's correct amount of tax
11 liability.

12 I am not IMFG. I'm a separate person charged
13 with IMFG's tax liability. I am entitled to the full
14 protection to the Taxpayer's Bill of Rights.

15 CDTFA was provided and has in its possession the
16 receivables aging of IMFG used for the re-audit. This
17 aging contains the information showing uncollected IMFG
18 accounts, which were never paid or collected due to IMFG's
19 bankruptcy.

20 These accounts can clearly be charged off in
21 accordance with generally account -- accepted accounting
22 principles. And I -- and I am entitled to these credits
23 with the correct determination of the tax liability.

24 To maintain otherwise would render meaningless
25 the provision of the Taxpayer Bill of Rights and the

1 context of RTC Section 6829 dual liability.

2 CDTFA's Legal Division Memorandum 130.0085 and
3 130.0093 support this position as they provide that an
4 account is charged off within the meaning of Regulation
5 1642 when the account is written off that the Taxpayer's
6 bad debt expense account or when the income tax return
7 which includes the bad debt deduction is filed.

8 These memorandums clarify that both an internal
9 accounting write-off and tax return write-off are not
10 necessary. They clarify that a taxpayer may take a bad
11 debt deduction within the meaning of Regulation 1642 when
12 an account has been found worthless and -- and has been
13 charged off on the taxpayer's accounting records.

14 IMFG is defined -- all its receivables are
15 worthless. As the Assignee of IMFG's sales tax liability,
16 I am entitled to a credit for all of IMFG's receivables
17 which became worthless and thus charged-off upon IMFG's
18 bankruptcy insolvency as well as all bad debts reported by
19 IMFG on sales tax returns and disallowed by re-audit.

20 On the imposition of the negligence penalty
21 against IMFG, the CDTFA Appeals Bureau officer -- officer
22 found that the penalties for liabilities issued after
23 termination of IMS -- FG's business should be relieved
24 since the corporation was defunct.

25 It cited the memorandum opinion in -- in the

1 matter of Ravinder Singh Pablo -- that it is reasonable
2 for the taxpayer to have withheld payment of tax until
3 resolution of the administrative protest and that it is
4 reasonable that a defunct corporation did not thereafter
5 pay the tax.

6 It, however, refused to apply relief to the NOD
7 dated April 13, 2011, which concluded in the re-audit of
8 November 23, 2011, which became final on November 25,
9 2013, on the basis that IMFG did not have a good faith
10 belief that its appeal of the April 13, 2011, NOD would
11 result in elimination of the deficiency.

12 As previously stated, the April 13, 2011 NOD,
13 without any evidence, disallowed all of IMFG's exempt
14 sales for the audit period -- the CDTFA's re-audit, no
15 exempt sales were disallowed.

16 Clearly, since no exempt sales were disallowed in
17 the re-audit, IMFG did possess a good faith belief that
18 the NOD of April 13, 2011, was erroneous and therefore had
19 a reasonable cause to withhold payment until after the
20 conclusion of the appeal re-audit.

21 The NOD, having become final after IMFG was
22 defunct -- it is also reasonable that IMFG did not pay the
23 re-audit liability.

24 The decision ignored this result on the basis
25 that the re-audit, even though it was completed while IMFG

1 was defunct and did not disallow any exempt sales,
2 resulted in an increase in the alleged tax liability.

3 I have already discussed the inadmissibility of
4 unsubstantiated computations as evidence of any liability
5 in this matter and the failure, as a result, of CDTFA to
6 meet its burden of proof, rendering the alleged increased
7 liability nonexistent.

8 It is and was reasonable for the taxpayer, IMFG,
9 to have withheld payment of tax until resolution of the
10 administrative protest. And it is reasonable that IMFG, a
11 defunct corporation, did not thereafter pay the tax.

12 Relief from the penalties resulting from IMFG's
13 failure to pay the April 24, 2011 NOD when it became final
14 should be granted.

15 Discussing CDTFA's failure to allow all
16 prepayments reported by vendors BTTFA's [sic] audit
17 performed an ad hoc report of IMFG's prepaid sales tax
18 paid to vendors during the audit period versus the
19 schedule key credits -- G credits claimed by IMFG.

20 The report compiled the amounts of prepaid sales
21 tax collected from IMFG from vendors' records and
22 concluded that IMFG had understated scheduled -- scheduled
23 G credits by \$295,807.

24 The audit allowed only \$114,512 of this credit to
25 IMFG. When queried about this discrepancy by the Appeal

1 Officer, CDTFA responded that the \$114,512 of allowed
2 credits were the Auditor's accepted difference, stating, I
3 quote, "This is explained in Schedule 12-G2-13 -- 12-G-13
4 of the auditor reports," close quotes.

5 In review of these schedules -- shows that the
6 auditor accepted the vendor amounts reported -- that the
7 auditor accepted the reported -- the vendor-reported
8 prepaid sales tax -- taxes by IMFG of \$295,807.

9 However, the Auditor disallowed gas and diesel
10 credits unclaimed by IMFG on its Schedule 3 reports for
11 the third quarter '08 and first quarter '10.

12 The auditor's note in Schedule R1-12G1A states,
13 and I quote, "For computation purpose, auditor used the
14 lesser of the two Schedule E credits. Taxpayer did not
15 report the Schedule B credits, which caused an
16 understatement on the Schedule G. Taxpayer is not
17 eligible for the first quarter '10 and third quarter '08
18 SG credits," close quotations.

19 The auditor thus confirmed that vendor-reported
20 prepaid sales taxes are true. The auditor further --
21 further confirms that IMFG did not to claim all the
22 prepaid credits it was entitled to claim and thereby
23 understated its allotted credits allowed on Schedule G.

24 The auditor gives no reason for the disallowance
25 of the unclaimed credits totaling \$181,280 beyond his

1 unsupported statement and opinion that IMFG is not
2 eligible for tax credits it paid.

3 This error is not just a mistake of the facts, it
4 is also a legal determination unsupported by the law. The
5 auditor's -- auditor's determination of non-eligibility is
6 its naked assertion without support of CDTFA's evidence or
7 the law.

8 Without evidence to support that this allowance
9 of IMFG's Schedule G credits, IMFG is entitled to have all
10 \$285,807 of the Schedule G tax credits applied to any
11 liability of IMFG that may exist and that may be due to
12 me.

13 I'm going to discuss some of the due process
14 violations here, and then I will be concluding.

15 Protection of procedural due process has been
16 held by the courts to apply to administrative proceedings.
17 Courts have consistently found violations of due process
18 not only for failure to provide notice but also for
19 failure to follow the rules and policies of applicable
20 administrative agencies, for failure to provide evidence
21 or withholding evidence, and for delay in prosecution.

22 Any one of these items by themselves are
23 sufficient to support dismissal of an administrative or
24 court action. All of these due process violations are
25 present in this matter.

1 The actions by CDTFA in this matter have violated
2 my procedural due process rights, the requirements of the
3 Equal Protection Clause, protections of the Excessive
4 Fines Clause, the requirements of the Administrative
5 Procedures Act, and Doctrines of Laches and Equitable
6 Estoppel.

7 The facts and the law in this matter require
8 dismissal of CDTFA's entire claim of unpaid sales tax.
9 Factually, no evidence exist to substantiate the amount
10 alleged to be due by CDTFA since they have destroyed or
11 lost IMFG's point-of-sale records, the basis for their
12 liability conclusion.

13 Legally, this evidentiary failure is both -- both
14 a due-process violation depriving me of the ability to
15 dispute the audit conclusions as well as a basic failure
16 by CDTFA to prove their case.

17 Either or both of these failures require
18 dismissal of CDTFA's claim in this action.

19 However, other factors also are present which
20 highlight the problems inherent in the dual liability
21 statute, RTC 6829, and the regulations and policies
22 utilized in its enforcement and which confirm the need for
23 dismissal of CDTFA's claim of unpaid sales tax liability
24 in this matter.

25 JUDGE ALDRICH: Mr. Falche, sorry to interrupt.

1 But -- so it's been approximately 73 minutes.

2 Do you think you could wrap it up in, like, 5?

3 MR. FALCHE: Yeah. I have just a few more pages.

4 JUDGE ALDRICH: Okay.

5 MR. FALCHE: This allegation of liability is
6 brought under 6829, which provides for the dual liability
7 of a responsible corporation officer-owner.

8 Liability, under 6829, requires CDTFA -- CDTFA to
9 prove termination of the business, collection of sales
10 tax, identity to the responsible person, and willfulness
11 of the responsible person in the amount of unpaid sales
12 tax.

13 CDTFA cannot prove the alleged amount of unpaid
14 sales tax by IMFG or the required elements of RTC 6829.
15 And liability under RTC 6829 must fail.

16 In addition, CDTFA, in pursuing this dual
17 liability in action, is required to follow the policies
18 and procedures set forth in its CPPM. These procedures,
19 as implemented by CDTFA, have violated my due process
20 rights and may have been used to violate the due process
21 rights of countless other responsible persons.

22 At the outset, you must understand that the
23 responsible person in a dual-liability action is not the
24 actual taxpayer. You must under -- also understand that
25 the matter before you is not a dual liability action where

1 the corporation has filed its sales tax returns but failed
2 to pay the tax due -- debt it has stated as due.

3 This is not that type of case. These are
4 important distinctions which emphasize how and why my due
5 process rights have been violated.

6 The matter before you is an action where over
7 97 percent of these alleged liability arises from the
8 audit completed more than three years after the
9 corporation first filed its sales tax returns and which
10 CDTFA did not initiate its dual liability collection
11 action for more than seven years after the corporation
12 first filed its sales tax returns.

13 Due process, above all, requires that the
14 accused -- or in this case, the responsible person --
15 receive notice at a meaningful time and in a meaningful
16 manner.

17 As I stated, responsible persons is not the
18 actual taxpayer. The taxpayer who has prepared, signed,
19 and filed a tax return has an obligation to retain the
20 return and information from which it was prepared.

21 This obligation is required by statutory law.
22 The responsible person has no such obligation because he's
23 not the actual taxpayer.

24 Revenue and Taxation 6829 nor any other statute
25 can impose such an obligation on the responsible person.

1 This also means that the due process owed to the actual
2 taxpayer is different than the due process owed to the
3 responsible person.

4 In a dual liability proceeding containing
5 liability arising from an audit, meaningful due process
6 requires that the responsible person receive notice of the
7 audit and its potential liability in order to be able to
8 return records or have any obligation to produce records
9 when disputing the liability.

10 This notice should be provided at the beginning
11 of the audit but, at a minimum, no later than the date of
12 the audit conclusion.

13 No Notice of Determination was issued to me on
14 April 13, 2011, when the Notice of Determination was
15 issued to IMFG for \$530,000 which eventually resulted in
16 the re-audit liability of over \$1.7 million.

17 The taxpayer corporation had an opportunity to
18 contest and dispute the audit determination at the time of
19 the audit or by filing a request for reconsideration.
20 However, the responsible person, without notice of this
21 potential liability, has no opportunity or ability to
22 dispute the audit or collect and retain relevant documents
23 it is later bound by its conclusion.

24 This audit conclusion, as to the responsible
25 person, is a predetermination of liability.

1 Due process has been found to be violated where a
2 failure to follow the rules and policy of the
3 administrative agency has occurred. CTPFA's [sic] CPPM
4 contains the policies and procedures to be followed by
5 CDTFA employees in exercising the agency's powers.

6 These guidelines are also intended to protect the
7 rights of the taxpayer from arbitrary government actions.
8 Thus failure to adhere to the guidelines of CPPM can
9 result in a due process violation.

10 This is so -- especially so when the failure to
11 adhere to the procedures directly impacts the bedrock of
12 due process notice at a meaningful time.

13 CDTFA failed to issue the Notice of Proposed
14 Determination to this responsible person within one year
15 prior to the expiration of the alleged statute of
16 limitations. This failure directly impacted and prevented
17 notice in a more meaningful time.

18 CDTFA compounded this failure by requesting a
19 late issuance of the NOD under an untrue excuse whether
20 due to gross negligence or intentionally that additional,
21 and I quote, "information to dual the responsible person
22 was not available until recently."

23 No mention was made in this request that CDTFA
24 had not commenced the investigation to dual this
25 responsible person until mid-June of 2014, two years after

1 IMFG's date of termination or that an additional 14 months
2 of unexcused delays were present.

3 This procedure with no requirement of a valid --
4 valid excuse for extension provides no adequate procedural
5 safeguards. This intentional action to circumvent the
6 CPPM policy and mandatory procedures for issuance of the
7 notice of proposed decision directly impacted notice of
8 the responsible person and violated the fairness required
9 by due process and directly prevented the responsible
10 person from collecting and obtaining records of the
11 taxpayer, IMFG, now requested to be produced by the trier
12 of fact, but which are no longer available.

13 However, these due process violations are
14 over-saddled by one of the most egregious violations of
15 due process that arises when governmental agents withhold
16 or fail to provide all the evidence on which their
17 obligations of liability are based to the responsible
18 person and/or the trier of fact.

19 The CDTFA's actions against the responsible
20 person here was not commenced until June 23, 2015. The
21 appeal officer's Supplemental Decision, dated
22 November 2018, was the first time it was made clear that
23 IMFG's point-of-sale reports were the only method used to
24 compute IMFG's sales tax liability.

25 These same point-of-sale reports were in the

1 possession of CDTFA since 2011. And though Appellant had
2 been requesting all information from which the sales tax
3 liability had been computed since the inception of the
4 Notice of Determination to him, it was not provided until
5 August 10, 2018 and CDTFA's response to Appellant's
6 request for reconsideration.

7 This withhold and inexcusable delay in providing
8 crucial evidence underlying CDTFA's liability computations
9 is a violation of due process.

10 This is especially egregious where the withheld
11 evidence does not support the audit computations, raising
12 the specter that the failure to provide the point-of-sale
13 reports was done to intentionally deny Appellant the
14 ability to contest the lie -- liability's underlying
15 source evidence.

16 As I indicated at the start of my presentation, I
17 do not believe I am liable for any of the alleged unpaid
18 sales tax liability of IMFG. I believe the evidence I
19 have presented and all the memorandum documents and
20 exhibits previously submitted by me attached hereto as
21 exhibits on all the issues previously presented in the
22 request for reconsideration of the decision, the request
23 for reconsideration of Supplemental Decision, and the
24 request for reconsideration of Second Supplemental
25 Decision, and on the issues listed in the table of

1 contents of this appeal and discussed in my appeal proved
2 that no personal liability exists.

3 The evidence presented in this matter shows that
4 the statute of limitations had expired prior to the
5 issuance of the NOD on June 25, 2015.

6 And even if it had -- if it had not expired, the
7 long unreasonable delay by CDTFA in asserting its claim
8 here -- it's NOD issuance severely prejudiced my defense,
9 resulting in the applicability of laches and/or estoppel
10 against CDTFA's NOD claim.

11 The evidence in this matter clearly proves that
12 CDTFA has also failed to meet its burden of proof as to
13 the elements for RTC 6829 liability as it cannot prove
14 beyond a reasonable doubt that I had actual knowledge at
15 the time the taxes were due of the asserted re-audit
16 liability and that, when actual knowledge may have existed
17 after the re-audit of -- after November 23, 2011, I did
18 not have the authority or the ability to pay the alleged
19 sales tax liability.

20 In addition, CDTFA has failed to meet its burden
21 of proof as to the alleged re-audit liability due to the
22 point-of-sale source documents' failure to verify the
23 hear -- hearsay re-audit computations.

24 Finally, I believe the evidence is undisputable
25 that CDTFA's latest alleged liability and actions in this

1 matter have created a violation of the Extensive Fines
2 Clause and violated the Due Process Clause of the U.S. and
3 California Constitutions.

4 Thank you for your attention. And I apologize
5 for going beyond the 60 minutes.

6 JUDGE ALDRICH: Thank you, Mr. -- Mr. Falche.

7 I wanted to ask the parties if they'd like a --
8 maybe a five-minute recess. We've been going since 9:30.
9 Get up and stretch the legs.

10 MR. NOBEL: That would be appreciated. Thank you
11 very much.

12 JUDGE ALDRICH: Okay. So we're going to go off
13 the record. And we'll resume at approximately 11:08.

14 (The morning recess is taken at 11:03 a.m.)

15 JUDGE ALDRICH: We're going to go back on the
16 record in the Appeal of R. Falche.

17 I believe it's time to switch over to the
18 Department for their combined opening and closing.

19 Are you ready to proceed?

20 MR. NOBEL: Yes, Judge.

21 JUDGE ALDRICH: All right. Go ahead.

22
23 ///

24 ///

25 ///

1 PRESENTATION

2 MR. NOBEL: On June -- on June 25, 2015, a Notice
3 of Determination was issued to Appellant for approximately
4 \$1,069,000 in tax plus accrued interest and penalties
5 totaling \$211,000, representing the unpaid tax liabilities
6 of International Marine Fuel -- Fuel Groups, Incorporated
7 for the period of January 1, 2008, through January 21,
8 2011.

9 The notice reflects the Department's
10 determination that Appellant is personally liable for
11 these amounts pursuant to Revenue and Taxation Code
12 Section 6829.

13 The liabilities at issue result from
14 self-assessed partial remittance and non-remittance
15 returns for the third quarter of 2009 through the third
16 quarter 2010.

17 Two Notice of Determination for compliance
18 assessments issued to IMFG for its failure to file returns
19 for the first -- first quarter of 2011 and fourth quarter
20 of 2011 as well as a Notice of Determination for the audit
21 liability for the period January 1, 2008, through
22 December 2010.

23 With respect to the -- with respect to the
24 timeliness of the June 25, 2015 NOD, IMFG operated as many
25 as ten gasoline -- gas stations during the liability

1 period. And its seller's permit was open with an
2 effective start date of March 1, 1990.

3 On July 12, 2011, IMFG filed for a chapter --
4 chapter 11 bankruptcy. And on April 13, 2012, the chapter
5 11 bankruptcy was converted to chapter 7 bankruptcy.

6 The Department received a copy of the chapter 7
7 bankruptcy court order sometime in April of 2012. And on
8 October 26, 2012, the Department closed out IMFG's
9 seller's permit effective April -- April 13, 2012.

10 Section 6829 Subdivision (f) provides that a
11 Notice of Determination issued under Section 6829 must be
12 mailed within three years after the last day of the
13 calendar month following the quarterly period in which the
14 Department obtains actual knowledge of the termination of
15 the corporation's business.

16 The filing of a notice of business termination,
17 dissolution, or abandonment with a state or local agency
18 other than the Department does not constitute actual
19 knowledge for these purposes.

20 The available evidence establishes that the
21 earliest point in time the Department could have obtained
22 actual knowledge of IMFG's termination was in April 2012
23 when the bankruptcy was converted from chapter 11 to
24 chapter 7.

25 Accordingly, the applicable statute of

1 limitations began on July 31, 2012, the last day of the
2 calendar month following the second quarter of 2012
3 through July 31, 2015. And thus the June 25, 2015 Notice
4 of Determination was timely issued to Appellant.

5 With respect to Appellant's statements here today
6 that chapter 11 was filed in July of 2011, the chapter 11
7 is a reorganization. Appellant was the debtor in
8 possession and continuing to operate the business.

9 I know there was a motion filed by the Bankruptcy
10 Trustee in March of 2012 moving to either dismiss or
11 convert the case. However, that did not happen in March
12 of 2012.

13 The judge's order in April 2012 converting it to
14 chapter 7 was -- was what resulted in termination of the
15 business or, at least, the Department's knowledge of the
16 termination of the business.

17 For that reason, we think that the NOD was timely
18 issued.

19 As for Appellant's assertion the Notice of
20 Proposed Liability was not issued timely, Section 6829
21 does not require a Notice of Proposed Liability to be
22 issued. And his assertion has no bearing on whether
23 notion -- notice at issue was timely.

24 Furthermore, the Department's Compliance Policy
25 and Procedures Manual states that a Notice of Proposed

1 Liability can be issued at a later time with approval from
2 the assigned career executive.

3 Here, the chief of the Department's headquarters
4 operations approved the issuance of the Notice of Proposed
5 Liability on May 18, 2015.

6 Additionally, with Appellant's arguments that the
7 NOD should be considered untimely or dismissed due to
8 equitable estoppel and/or laches, we know that these are
9 equitable defenses that can only be asserted in a suit in
10 equity. And the Department and OTA, as administrative
11 agencies, do not have these powers.

12 Turning to the 6829 liability, 6829 provides that
13 a person may be held personally liable for the unpaid
14 sales and use tax liabilities of a corporation so long as
15 the following four elements are satisfied:

16 The business must have been terminated. The
17 Corporation must have collected sales tax reimbursement.
18 The person must have been responsible for the sales and
19 use tax matters of the corporation. And person's failure
20 to pay must have been willful.

21 Appellant concedes that the corporation is
22 terminated and that he was a person responsible for the
23 sales and use tax compliance of the corporation, at least,
24 up until the filing of the chapter 11 bankruptcy
25 proceedings. As such, we will primarily address the other

1 two elements -- tax reimbursement and willfulness.

2 As relevant here, personal liability can be
3 opposed only to the extent the corporation collected sales
4 tax reimbursement on its sales of tangible personal
5 property in this state but failed to remit the tax to
6 the -- to the Department when due.

7 The audit general comments for the audit
8 liability state that the Department found that IMFG added
9 sales tax reimbursement to the selling price of property
10 it sold.

11 An IMFG invoice examined during the audit shows a
12 separate charge for tax reimbursement. In addition,
13 pre-invoice journals show sales tax reimbursement charged
14 on purchases of fuel. And various contacts with the
15 business during the liability periods -- there were
16 statements by IMFG's accountant and their sales manager
17 that said that IMFG collected sales tax reimbursement.

18 While Appellant disputes the amount of tax
19 reimbursement IMFG collected during the liability periods,
20 the evidence in this appeal clearly establishes that it
21 did collect tax reimbursements on its sales of tangible
22 personal property. And thus this element is satisfied.

23 With respect to "responsible person" and the
24 July 2011 chapter 11 bankruptcy filing, the Department's
25 dual memorandum -- the exhibit contains some information.

1 But Appellant was the debtor in possession and the person
2 responsible during the chapter 11 bankruptcy filing,
3 meaning that they had ongoing commitments to pay taxes
4 timely, sales and use tax returns, and things of that
5 nature.

6 So the Department would argue that, even after
7 July 11th through the conversion to chapter 7, Appellant
8 was still a person responsible for the sales and use tax
9 matters of the corporation.

10 As for the fourth element, willfulness, a
11 person's failure to pay is considered willful if the
12 person had actual knowledge that the taxes were not being
13 paid, had the authority to pay the taxes, and had the
14 ability to pay but failed to do so.

15 Appellant concedes that he had the authority to
16 pay the taxes during the liability periods up until the
17 chapter 11 bankruptcy filing. As such, we will focus on
18 knowledge and the ability to pay.

19 As to knowledge, regarding IMFG's failure to pay
20 tax it reported as due for third quarter 2009 through the
21 third quarter of 2010 as well as IMFG's fail -- failure to
22 file returns for the fourth quarter of 2010 and first and
23 fourth quarters of 2011, it is undisputed that Appellant
24 was the sole corporate officer of IMFG, a small,
25 closely-held corporation, and that Appellant E-filed

1 IMFG's sales and use tax returns for the fourth quarter of
2 2009 to third quarter of 2011.

3 These facts alone establish that Appellant knew
4 that IMFG had an obligation to report and pay its
5 quarterly tax liabilities.

6 In addition, Appellant wrote several letters to
7 the Department between October 12, 2009, through
8 November 11, 2010, concerning IMFG's sales and use tax
9 matters. Including the filing of delinquent returns and
10 paying liabilities.

11 We further note there were contacts between
12 Appellant and the Department regarding these liabilities
13 during the relevant periods.

14 On September 11, 2009, Appellant informed staff
15 that he would instruct the corporation's comptroller to
16 file delinquent returns.

17 In October 2009, Appellant informed staff that
18 IMFG's comptroller was no longer employed with the
19 company.

20 On October 28, 2009, Appellant informed staff he
21 would be filing the returns for the first and second
22 quarter of 2009.

23 And on November 24, 2014, Appellant informed
24 staff that the former comptroller never had check-signing
25 authority and that she worked directly under Appellant's

1 supervision.

2 The foregoing contacts between Appellant and the
3 Department regarding IMFG's sales and use tax matters
4 further established that Appellant knew that IMFG failed
5 to pay its quarterly tax liabilities when they were due.

6 With respect to the audit liability for the
7 period January 1st through December 2010 -- as will be
8 explained in greater detail a little later -- IMFG's
9 liability for this period was calculative -- calculated by
10 an examination of IMFG's own point-of-sale records, which
11 disclosed IMFG collected sales tax reimbursement of
12 \$5,090,000 during this period.

13 When the applicable tax rates were applied to
14 these amounts, it disclosed a taxable measure of
15 approximately \$70,500,000, which represents a difference
16 of \$10.7 million when compared to reported taxable sales
17 of about \$60 million for the same period.

18 As the sole shareholder of the Corporation during
19 each period, Appellant would have had access to the POS
20 records, which clearly show the taxable sales made -- made
21 by the corporation. Yet the corporation failed to report
22 over \$10 million in taxable sales during this period.

23 While the Appellant asserts that the
24 comptroller -- comptroller filed some of these returns, we
25 note that Appellant has stated that he oversaw the

1 preparation of IMFG's returns. And we further note that
2 IMFG underreported his taxable sales throughout the
3 liability period and not just the quarters that were
4 prepared by the comptroller.

5 Finally, and as will be discussed in further
6 detail, Appellant has failed to provide any evidence the
7 POS reports were not accurate; therefore, the evidence in
8 this appeal establishes that Appellant knew of IMFG's
9 unpaid tax liabilities when the returns were due and
10 payable.

11 We also note that Appellant would have known of
12 IMFG's initial audit liability of approximately \$450,000
13 in April of 2011, based on the disallowed resales. And
14 they would have had full knowledge of the measure at issue
15 in November of 2011, when the audit was completed.

16 With respect to whether IMFG had funds available
17 to pay the tax liabilities at issue but chose to pay other
18 creditors rather than the Department, we first note that
19 the evidence establishes that IMFG collected tax
20 reimbursements on its sales throughout the liability
21 periods at issue.

22 Therefore, IMFG had the funds available to pay
23 its tax liabilities when due and, instead, used the
24 reimbursement to pay others rather than CDTFA.

25 Furthermore, we provide an exhibit that shows a

1 matrix of different payments and deposits. These show
2 that IMFG made a total of \$14,500,000 in payments to
3 creditors and suppliers from the first quarter of 2008
4 through the second quarter of 2012.

5 These payments are further evidence showing that
6 IMFG had the funds available to pay its tax liabilities.

7 We note that this includes wages of \$40,000 in
8 the third quarter of 2011, \$20,000 in the fourth quarter
9 of 2011, \$48,000 in payments to Bay Area paving -- Paving,
10 and bank statements showing balances of approximately \$30k
11 for the third quarter of 2011 and \$280,000 for the fourth
12 quarter of 2011.

13 Based on the all the foregoing, the -- the
14 Department has clearly met its burden in establishing all
15 elements for imposing personal liability.

16 As for the audit period and disputed measures at
17 issue, during this period, IMFG reported total sales of
18 \$70,600,000 with claimed deductions of approximately
19 \$10 million for sales for resale, \$475,000 for bad debts,
20 and \$108- -- \$198,679 in tax exempt sales of fuel,
21 resulting in reported taxable sales of \$59,724,000.

22 Upon audit, IMFG refused to provide any records
23 for examination and would not sign a waiver of the statute
24 of limitations. Accordingly, the Department disallowed a
25 large portion of the claimed sales for resale and bad

1 debts due to a lack of supporting documentation and issued
2 a timely NOD for \$450,610 plus interest and a negligence
3 penalty.

4 After filing the timely petition for
5 redetermination, IMFG provided sales and use tax
6 worksheets, accounting system reports, point-of-sale
7 records for every quarter of the liability period except
8 the first quarter of 2010, card lock sales tax worksheets,
9 and federal income tax returns for 2008 and 2009.

10 The Department also obtained prepaid sales tax
11 reports from IMFG's fuel vendors and historic fuel prices
12 from the U.S. Department of Energy.

13 During the re-audit, the Department initially
14 compared gross receipts IMFG reported on its federal
15 income tax returns to the total sales it reported on its
16 sales and use tax returns and found that the amounts
17 reported on its federal income tax returns exceeded those
18 reported on its quarterly sales and use tax returns.

19 They also found lower bookmasks than -- book
20 markups than would have been expected for a gas station.
21 And based upon these discrepancies, the Department
22 investigated the reported taxable sales further.

23 There were two audit methods employed by the
24 Department: The first was a fuel differential pricing
25 method that disclosed a deficiency of approximately

1 \$9 million.

2 However, during the Department's calculation
3 using this method, IMFG provided the point-of-sale
4 records, which allowed a direct examination of actual
5 sales, and the Department proceeded with those records.

6 The -- they examined the records for the
7 liability period absent the fourth quarter of 2010 and --
8 and noticed that IMFG accrued sales tax of \$5,970,641.

9 The Department divided the recorded sales tax
10 accrued by the average sales tax rate for all districts
11 during this period to arrive at audited taxable sales of
12 \$70,477,118.

13 IMFG did not provide records -- provide records
14 for the fourth quarter of 2010 or report any sales for
15 this quarter; so the Department used the amounts
16 determined in the fuel-differential test to estimate sales
17 for this quarter.

18 The Department added together audited gasoline
19 sales of \$106,787 and audited diesel fuel sales of
20 \$1,034,528 to compute audited taxable sales of \$1,141,315
21 for the fourth quarter of 2010.

22 In total, the Department calculated audited
23 taxable sales of \$71,618,433, which resulted in the
24 measure of unreported taxable sales of \$11,894,000 that is
25 at issue here.

1 Revenue and Taxation Code Section 6051 imposes
2 sales tax on a retailer's retail sales of tangible
3 personal property in this state measured by the gross
4 receipts unless the sale is specifically exempt or
5 excluded from taxation.

6 Section 1691 provides that all of a retailer's
7 gross receipts are presumed subject to tax unless the
8 contrary is established.

9 When a taxpayer challenges a determination, the
10 Department has the initial burden to explain the basis of
11 the deficiency. When that explanation is reasonable, the
12 burden of proof shifts to the taxpayer to establish that
13 the asserted deficiency is not valid.

14 Here, the Department used IMFG's own POS records
15 which showed the sales tax reimbursement it accrued
16 through all but one quarter of the liability period.

17 The calculation of audited sales based on a
18 corporation's own POS records is a direct audit method and
19 is the preferred method when such records are available.

20 Pursuant to Audit Manual Sections 0405.0 --
21 0404.05 and 0407.05, the use of alternative audit methods
22 is generally used and accepted when a direct method, such
23 as the one used here, is unavailable.

24 Accordingly, the Department used the best records
25 available, IMFG's own recorded sales, to calculate the

1 measure at issue.

2 For the fourth quarter of 2010, IMFG did not file
3 a return. And the Department calculated sales by
4 multiplying fuel selling prices by the number of gallons
5 purchased during this period.

6 IMFG's fuel purchases during this quarter is the
7 best available evidence; therefore, the Department's
8 determination is reasonable. And the burden shifts to
9 Appellant to prove that the measure is overstated.

10 With respect to Appellant's assertion that the
11 bad debt deductions should have been allowed during the
12 audit, there is no evidence that IMFG legally charged off
13 this debt on its federal income tax returns or that it
14 charged off bad debts in accordance with generally
15 accepted accounting principles as required by Regulation
16 1642.

17 Furthermore, neither Appellant nor IMFG provided
18 documents establishing that the bad debts had been
19 incurred during the liability periods at issue.
20 Therefore, no adjustments are warranted based on this
21 assertion.

22 While Appellant asserts that the POS records are
23 inaccurate because predelivery purchases were entered into
24 the POS system as sales but were not removed from the POS
25 system when the fuel was not delivered, the only evidence

1 Appellant has provided show that undelivered purchases of
2 fuel were accounted for in the POS system by credit
3 entries.

4 In other words, the evidence provided by
5 Appellant indicates that the POS records were accurate;
6 therefore, there is no basis to make adjustments based on
7 this assertion.

8 As for Appellant's assertions regarding the
9 prepaid sales tax credits, the Department allowed
10 additional unclaimed Schedule G credits of \$114,512 after
11 comparing the unclaimed Schedule G credits and IMFG's
12 records with the amounts fuel vendors reported on their
13 Schedule B returns.

14 Appellant has not provided any further
15 documentation or indication that these calculations are
16 incorrect. And no additional adjustments are warranted.

17 With respect to Appellant's assertion that the
18 copy of the POS records the Department provided to him are
19 incomplete, there's no indication that the POS records
20 provided by Appellant on behalf of IMFG during the
21 re-audit were incomplete. Instead, it appears that the
22 copy of the POS records retained in the audit file had
23 some pages missing with respect to some of the months.

24 There is no evidence the amounts attributed to
25 the POS records in the audit papers were inaccurate, and

1 no better records have been provided. Therefore, no
2 adjustments are warranted for this assertion.

3 With respect to IMFG's estimated taxes for the
4 fourth quarter of 2011 and the first quarter of 2011, I
5 need to correct an error in the Decision's explanation.

6 The Department estimated the liability for the
7 first quarter of 2011 by examining IMFG's reported tax
8 liabilities for both the third quarter of 2011 and the
9 second quarter of 2011. It was not just a one-quarter
10 direct-direct comparison like the decision described.

11 Similarly, with respect to the fourth quarter,
12 the Department looked at the second quarter of 2011 and
13 third quarter of 2011 returns and averaged out the
14 reported sales on those to calculate the estimated
15 deficiency for the fourth quarter.

16 As relevant here, all sales taxes are due
17 quarterly on the last day of the month following the end
18 of each quarter. And every seller of tangible personal
19 property is required to file a return by the last day of
20 the month -- month following the end of each quarter.

21 If any person fails to make a return, CDTFA is
22 required to make an estimate of the amount of the gross
23 receipts of the person. This estimate is based upon any
24 information which is in CDTFA's possession or may come
25 into the possession -- its possession.

1 Appellant has not provided source documents or
2 other means to verify IMFG's sales for these quarters or
3 documentation establishing that the monthly operating
4 reports filed with the bankruptcy court were accurate.
5 And therefore, there is no basis to make adjustments to
6 these assessments.

7 With respect to whether IMFG was negligent,
8 taxpayers are required to maintain and make available for
9 examination all records necessary to determine the correct
10 tax liability and all records necessary for proper
11 completion of the sales and use tax returns.

12 If any part of a deficiency for which a
13 determination is made is due to negligence or intentional
14 disregard of the law, a penalty of 10 percent of the
15 amount of determination should be added.

16 IMFG was previously audited from April 1, 1991,
17 through March 31, 1994, resulting in unreported taxable
18 sales of \$32,000, disallowed sales for resale of \$8,900,
19 and disallowed bad -- bad debts of approximately \$20,000.

20 They were also audited from October 1, 1998,
21 through September 30, 2001, and no tax liability was
22 found.

23 With respect to the current audit, there is an
24 error rate of just under 20 percent when unreported
25 taxable sales are compared to reported taxable sales.

1 IMFG's fail -- failure to report approximately 20 percent
2 of its taxable sales is strong evidence of negligence.

3 Furthermore, the deficiency at issue was
4 calculated from point-of-sale records that clearly --
5 clearly state the recorded amount of sales tax accrued
6 during the liability period.

7 However, despite having this information, the
8 business failed to report its sales accurately. The
9 business's failure to use its own sales records to report
10 its taxable sales is further evidence of negligence.

11 Lastly, with the exception of a small liability
12 for the period April 1991 through March 1994, IMFG was
13 able to file substantially accurate returns in the prior
14 audit periods.

15 Since IMFG was able to file accurate returns in
16 the past, it should have been able to file accurate
17 returns for the periods at issue.

18 Therefore, because of the large understatement of
19 taxable sales, its failure -- its failure to use its own
20 point-of-sale records, and the prior history of accurate
21 reporting, the negligence -- negligence penalty was
22 properly imposed for the periods at issue.

23 That concludes our presentation. Thank you.

24 JUDGE ALDRICH: Thank you. I do have some
25 questions for both the parties.

1 So, CDTFA, it's my understanding that the date of
2 knowledge stems from the conversion date in the -- from
3 the chapter 11 to chapter 7 -- so when that was ordered --
4 I think it's April 2012?

5 MR. NOBEL: Okay. Yes, sir. Correct.

6 JUDGE ALDRICH: And, Appellant, your position is
7 that the termination date would be sooner than that; is
8 that correct?

9 MR. FALCHE: That's correct. That it would be no
10 later than the end of -- oh, I'm sorry.

11 Yes, that's correct. That it would be no later
12 than the end of March --

13 JUDGE ALDRICH: Okay.

14 MR. FALCHE: -- 2012.

15 JUDGE ALDRICH: And that -- what -- I guess, what
16 is that based on? The fact that there was a request for
17 conversion.

18 Is -- is that what you're looking at as the
19 triggering event? Or --

20 MR. FALCHE: No. The triggering event would be
21 the fact that they were required to look at all of the
22 bankruptcy information which was available to them.

23 They failed to do that.

24 The action by the Trustee is only a summary of
25 what they should have seen from the date of January --

1 excuse me -- from January of 2012 through the date of --
2 of April 12, 2012.

3 In other words, the Trustee saw that all of these
4 things had occurred. They should have also have seen them
5 and known that the business had ceased, as a Trustee.

6 JUDGE ALDRICH: Okay. So you're saying, like,
7 the summation of the documents filed in the bankruptcy
8 will -- should have put them -- should have given them the
9 actual knowledge.

10 MR. FALCHE: Yes. The actual knowledge that the
11 Trustee then reported on April -- on March of -- of 2012.

12 JUDGE ALDRICH: Okay.

13 MR. FALCHE: So he -- he just summarized,
14 basically, what they should have been seeing all along.

15 JUDGE ALDRICH: Okay. And I guess -- so there
16 was the request for conversion. And I saw a copy or a
17 portion of that.

18 And -- did that request from the Trustee go
19 unopposed?

20 MR. FALCHE: No. I -- I attempted to oppose it
21 but was unsuccessful because of the factors that he had
22 laid out.

23 JUDGE ALDRICH: Okay. And so we had some of the
24 monthly operating reports from the bank -- chapter 11
25 bankruptcy in both parties' exhibits.

1 But regarding the January operating report, is it
2 accurate to deduce that sales were still occurring in
3 January?

4 MR. FALCHE: We were collecting the sale --
5 International Marine Fuels Group was a credit seller; so
6 all of the sales were done on credit.

7 So it -- we didn't have a cash basis. We didn't
8 collect the money until later. So the money that was
9 coming in January and February was from the sales that had
10 been made prior to that time period.

11 JUDGE ALDRICH: So typically --

12 MR. FALCHE: So the sales may -- may have been
13 made in December or prior to that time period. And then
14 the customers paid in January or February.

15 JUDGE ALDRICH: Okay. So what kind of turnaround
16 are we talking?

17 So if I -- I purchased gas, for example, on
18 December 1, when would that credit be due or -- and paid?

19 MR. FALCHE: We -- we would bill the customer --
20 if he purchased on December 1st, we would bill him -- by
21 December 7th or 8th, we -- we would be preparing the bill.
22 And it would go out probably by the 10th of the -- of
23 December.

24 The customer would then receive it through the
25 mail -- give it a day or two -- so he'd receive it about

1 the 12th. And then most customers were paying in -- after
2 30 days.

3 JUDGE ALDRICH: Okay.

4 MR. FALCHE: And by this time, because we were in
5 bankruptcy, they were paying even later than that, if they
6 paid at all.

7 JUDGE ALDRICH: Okay.

8 So I think you touched on it during your
9 presentation, but just to be clear, the disputed amount
10 indicated that from the unsecured priority claim of CDTFA
11 stems from the -- the audit liability NOD that you
12 received?

13 MR. FALCHE: I'm sorry. I didn't understand the
14 question.

15 JUDGE ALDRICH: Sorry.

16 So in the Statement of Financial Affairs in the
17 bankruptcy filings, there's a debt of -- a disputed amount
18 listed of approximately \$500,000 -- a little bit more --
19 for the Department.

20 I guess, what was the basis for -- how did you
21 know to put that down?

22 MR. FALCHE: That was the Notice of Determination
23 that the corporation received in April of 2011 -- 2011.

24 JUDGE ALDRICH: Okay.

25 MR. FALCHE: That -- that was the -- where they

1 disallowed the exempt sales.

2 JUDGE ALDRICH: Got it. Thank you.

3 And I think you may have misspoken earlier. You
4 called it a "chapter 13."

5 Was it, in fact, a chapter 13? Or was it a
6 chapter 11?

7 MR. FALCHE: I'm sorry. It was a chapter 11.

8 JUDGE ALDRICH: Okay. All right.

9 And I noted that there were varying kinds of
10 fuels sold, specifically in diesel. There was biodiesel
11 and normal diesel.

12 And what was the price differential between
13 biodiesel and regular diesel, if any?

14 MR. FALCHE: At the time, in 2008 and 2009, San
15 Francisco Petroleum was the only biodiesel seller on the
16 West Coast.

17 In the contract with the City and County of San
18 Francisco, we were required to do a 20 percent blend of
19 biodiesel with the diesel we were providing.

20 The biodiesel, because it was being brought from
21 back East by railcar -- we had to purchase a railcar at a
22 time and store it in our 20,000-gallon tank that we had in
23 San Francisco.

24 The price differential on that was -- the margin
25 of profit, I should say --

1 JUDGE ALDRICH: Okay.

2 MR. FALCHE: -- was substantially more than we
3 were allowed on the -- under the contract for regular
4 diesel. Under the contract for regular diesel, the markup
5 was 0.0175 -- that's a penny and three quarters was the
6 markup that was allowed.

7 On the biodiesel, we had a dollar markup for
8 the -- for the -- or more depending on what we purchased
9 it at that -- that was allowed on the fuel. So the
10 20 percent we were marking up a dollar as opposed to a
11 penny.

12 So 20 percent of an 8,000-gallon tank would be
13 1,600 gallons. So we would be making \$1,600 as opposed to
14 making -- on 8,000 gallons -- \$800 -- no not \$800. My
15 math isn't that good.

16 But there was a substantial difference in the
17 profit that was generated by the biodiesel. And that
18 would account for why the percentage in -- in profit was
19 more than what they expected.

20 JUDGE ALDRICH: I guess that -- if I could ask
21 you to speak more into the mic --

22 MR. FALCHE: Sorry.

23 JUDGE ALDRICH: We're having a little bit of
24 difficulty picking you up.

25 Okay. Thank you.

1 For the Department, I guess -- my understanding
2 is that, for a portion of the audit, the -- the Board of
3 Energy pricing was used and then adjusted downward for the
4 price per gallon.

5 Did that take into account the difference between
6 the biodiesel and the regular diesel sold by Appellant --
7 or IMFG? Excuse me.

8 MR. NOBEL: One second.

9 From my understanding of the fuel pricing
10 differential method they used, they didn't look at the
11 difference in pricing between biodiesel and regular
12 diesel.

13 They tried to account for differences in pricing
14 between wholesales to bus operators and other sales of
15 diesel fuel. But I -- I don't know if the Department
16 accounted for difference in pricing on biodiesel,
17 especially considering they didn't fully go through this
18 test once the POS records were provided.

19 JUDGE ALDRICH: Got it.

20 MR. FALCHE: If I could clarify something else, I
21 believe in my documents I stated it before, but the -- the
22 Department of Energy pricing that they used selected two
23 dates to do its -- its computations as -- as
24 representative of what the pricing would be.

25 But because of IMFG's sales to customers and the

1 requirements that it used OPIS-based pricing, which
2 changed once a week -- that -- that use of just two days
3 to figure out what the -- what the differential is would
4 have been inadequate.

5 JUDGE ALDRICH: Thank you.

6 At this point I'm going to refer to my panel
7 members.

8 Judge Geary, did you have any questions for
9 either of the parties?

10 JUDGE GEARY: I -- I do. I do have a question
11 for Mr. Falche or a couple of questions, perhaps.

12 Mr. Falche, did you start this business?

13 MR. FALCHE: No. I purchased it in 1990. It was
14 an ongoing business. At the time we purchased it, it had
15 two card lock sites. And we expanded it from 2 to 11 card
16 lock sites.

17 And we were operating bulk sales with three
18 trucks. And by the time we -- in 2010, we had eight
19 trucks. And we were delivering all of -- in -- not only
20 in card locks in -- in San Francisco and Northern
21 California but also in the Los Angeles area.

22 JUDGE GEARY: Did you have prior experience in
23 this business before you purchased the company?

24 MR. FALCHE: No.

25 JUDGE GEARY: When you purchased the company, did

1 you purchase, in essence, an operating staff already there
2 working for the company?

3 MR. FALCHE: Yes. We retained all of the
4 employees, including the owner, who stayed on for an
5 additional six months of transition.

6 JUDGE GEARY: Was the comptroller that was there
7 in -- when you purchased the company the same one that was
8 there subsequently at the end when they were let go?

9 MR. FALCHE: Yes.

10 JUDGE GEARY: Would -- would I be correct to --
11 to suggest that, when you first purchased the company, you
12 took a direct hand in the operations of the company
13 including its finances so that you could familiarize
14 yourself with that aspect of the business?

15 MR. FALCHE: Yes. But I dealt mainly with the
16 financial aspects of the business -- that is dealing with
17 the banks for -- for credit lines and dealing with the --
18 the collections of the accounts.

19 Because truckers are -- are notorious for paying
20 late. And so you have to stay continuously on them to
21 collect your money.

22 JUDGE GEARY: Was your involvement after
23 purchasing this company and the filing of these types of
24 tax returns your first such experience filing tax returns
25 for a commercial fuel business?

1 MR. FALCHE: Yes.

2 JUDGE GEARY: Did the -- did the original -- the
3 owner from whom you purchased the business, did that
4 person, in the six months that they remained on site, show
5 you the ropes on filing returns and what you need to do
6 and how often you need to pay, things like that?

7 MR. FALCHE: No. That was -- he informed me that
8 that was done by the controller. I knew -- he gave me
9 information as to when they were due and how they were
10 paid.

11 At the time we started, they were all paid
12 initially by check. And as I said, later on, it became
13 online payments.

14 JUDGE GEARY: When they were paid by check
15 initially, tell me how -- how it occurred that the -- the
16 check requests would come to you.

17 Did it -- did -- did the comptroller or some
18 other staff person simply send you a request that you
19 issue and sign the check? Or did they actually provide
20 you with some supporting documentation to describe for
21 your benefit what that check was for?

22 MR. FALCHE: No. They would give me a copy of
23 the check and tell me it was for the sales tax that was
24 due for that particular quarter.

25 JUDGE GEARY: So back when you --

1 MR. FALCHE: I did not look at any documents, if
2 that's what you're asking.

3 JUDGE GEARY: So back when you paid by check, the
4 staff person did not submit, for example, a copy -- a copy
5 of the quarterly return with a request for the check?

6 MR. FALCHE: No.

7 JUDGE GEARY: Were you the only one signing the
8 checks --

9 MR. FALCHE: Yes.

10 JUDGE GEARY: -- throughout the time you owned
11 the business?

12 MR. FALCHE: Yes.

13 JUDGE GEARY: You referred in your argument --
14 your thorough argument to various burdens of proofs. And
15 at one point, you talked about the -- the Department
16 having the burden of proof -- something about "beyond a
17 reasonable doubt."

18 You -- you understand, I think, based on a later
19 comment you made, that the Department's burden on the 6829
20 elements is that they -- they prove those elements by a
21 preponderance of the evidence; correct?

22 MR. FALCHE: Yes.

23 JUDGE GEARY: Do you understand that the
24 Department's burden -- burden on proving the accuracy of
25 its determinations is -- is minimal?

1 It -- it is, essentially, if -- if they prove a
2 reasonable, rational basis for its determination, the
3 burden shifts to the taxpayer to proving more accurate
4 measure of tax.

5 Do you understand that?

6 MR. FALCHE: No, not quite.

7 JUDGE GEARY: When you say that, it sounds like
8 this is as if you disagree with me. And -- and I -- I
9 note in your argument, you seem to be under the impression
10 that the Department has the burden of the proving the
11 accuracy by a preponderance -- the accuracy of its
12 determinations of tax due by preponderance of the
13 evidence.

14 Have -- have you -- have you ever -- have you
15 looked at prior decisions issued by the Office of Tax
16 Appeals on sales tax cases?

17 MR. FALCHE: Yes, I have.

18 JUDGE GEARY: And -- and did you note that, in
19 those -- those decisions, the burden on the Department,
20 CDTFA, is described as minimal? That they need to prove
21 an -- a reasonable and rational basis for their
22 determination?

23 MR. FALCHE: Yes. But in most of those cases --
24 I would say 90 percent of them -- they involve
25 self-assessed amounts by the Corporation that were not

1 paid. They're not the results of an audit.

2 If you have an audit, you have to show what the
3 amount is, how you computed that amount, and that that --
4 that amount is correct. Failure to do so means that you
5 haven't met your burden of proof.

6 Regardless of whether it has shift -- it has
7 shifted when they present their -- their claim and show
8 that their claim is based on -- on point-of-sale reports,
9 they, then, have an obligation, after they do that, to
10 show that it's correct.

11 They can't simply say, "Well, we've -- we've --
12 we've looked at the documents, and this is what it is.
13 Take it or leave it."

14 JUDGE GEARY: Did you receive copies -- did you
15 receive copies of the audit work papers for the -- for the
16 audit that was done?

17 MR. FALCHE: The papers -- as I said, what I
18 received was a spreadsheet showing the Department of
19 Energy pricing.

20 On the point-of-sale reports -- I did not receive
21 any of that information until 2018, when -- when it became
22 clear that -- that the Department of Energy pricing was
23 not what was used to determine the liability -- that it
24 was these point-of-sale reports.

25 And at that point in time, I received them in

1 2018.

2 And as I said, they were -- they were incomplete.
3 So it's impossible to determine whether or not the amount
4 that they reflect is correct. And it's impossible for
5 them to prove that the amount that they have reported is
6 correct.

7 And they're required to show that their amount of
8 tax that they're claiming is correct.

9 JUDGE GEARY: Before we began arguments in the
10 case, the lead Judge was just discussing the -- the --
11 exhibits that the parties proposed for admission here.
12 And you indicated you had no objections to the documents
13 that were submitted by the Department, CDTFA.

14 But in your argument, you were arguing that some
15 of those documents -- specifically, you made reference to
16 spreadsheets, and I'm -- you're referring, I believe, to
17 the Schedules that were part of the audit work papers --
18 that you -- you felt that -- you were stating objections.

19 Did you mistakenly not state objections to the
20 admission of those documents before we began arguments in
21 this case?

22 MR. FALCHE: No.

23 JUDGE GEARY: Okay. That's all I have.

24 Thank you.

25 JUDGE ALDRICH: Thank you, Judge Geary.

1 This is Judge Aldrich. I have a few more
2 questions for the Department.

3 So in the minutes and orders, I indicated that
4 the Department should have a position as to the list of
5 undisputed material facts that the Appellant had included
6 in his prehearing conference statement.

7 Did you have a response?

8 MR. NOBEL: The -- the Department agrees with
9 Undisputed Material Fact 1 and Undisputed Material Fact 8,
10 just to the extent that it says we issued the Notice of
11 Proposed Liability on May 25, 2015.

12 Those are the only material facts that we agree
13 are undisputed.

14 JUDGE ALDRICH: Thank you.

15 And then, I wanted to go back to Appellant.

16 So regarding the controller, the Department had
17 made an argument -- or made reference to the fact that the
18 controller had been let go.

19 And I believe there's ACMS notes regarding
20 that -- some sort of ACMS -- ACMS notes that memorialize a
21 conversation between you and the Department regarding the
22 controller.

23 Could you, I guess, describe the scenario leading
24 up to letting the controller go?

25 MR. FALCHE: The -- I believe it was at the end

1 of 2009, the State Board of Equalization was calling me
2 saying that we were not filing our accounts on time --
3 our -- our reports on time. And that was news to me.
4 And --

5 JUDGE ALDRICH: Sorry. Filing your sales and use
6 tax returns on time?

7 MR. FALCHE: Yes.

8 JUDGE ALDRICH: Okay.

9 MR. FALCHE: They were not being filed timely.

10 So I went to the controller and told her she --
11 she needs to get all of these reports filed on time.

12 And that -- that was -- and then, three months
13 later, she was still delinquent in filing the returns.
14 And it did not appear that she was going to be able to --
15 to get them done.

16 And she was not -- she was asking to quit; so
17 I -- I terminated her.

18 JUDGE ALDRICH: Okay. Because, if I -- I -- if I
19 recall correctly from the ACMS notes, it was something to
20 do with the, like -- the returns weren't being filed
21 correctly.

22 So you're saying it was a timeliness issue?

23 MR. FALCHE: No. They weren't being filed on
24 time.

25 JUDGE ALDRICH: Okay.

1 MR. FALCHE: There was one return that the State
2 Board of Equalization said was -- was not filed correctly.
3 And they sent it back to her to -- to correct the -- make
4 the changes. But that was -- that was only one time.

5 JUDGE ALDRICH: Okay. At this point, I would
6 like to refer to Judge Kwee to see if he has any
7 questions.

8 JUDGE KWEE: Yes. Thank you, Judge Aldrich.

9 I don't have questions for CDTFA. But I did have
10 a couple of questions for the Appellant regarding the
11 statute of limitations argument.

12 So, I -- I guess, just to be clear on the
13 timeline, I believe your testimony was that there wasn't
14 any fuel or cash in 2012.

15 So I was just wondering, do you know when IMFG
16 stopped selling gas or making retail sales?

17 MR. FALCHE: We stopped putting fuel into the
18 tanks in January of 2012. So for the whole first quarter
19 of 2012, there was no fuel put into the tanks. At that
20 point in time we had only one location.

21 The amount of fuel that was left in the tank
22 in -- by January was less than several thousand gallons.
23 That would have been sold and finished within a few days.

24 JUDGE KWEE: Okay.

25 MR. FALCHE: I don't know if that -- that answers

1 your question.

2 JUDGE KWEE: Oh, yes. Thank you.

3 And so for the January fuel sales, when did you
4 stop, like -- or, I guess, and any prior fuel sales --
5 when would you have stopped -- or when would IMFG have
6 stopped collecting payments on those fuel sales?

7 MR. FALCHE: They would have continued to collect
8 payments on those sales up until the Trustee took over.
9 And I'm assuming that he collected money if anybody paid
10 anything.

11 It -- it was not coming through me at that point
12 in time.

13 JUDGE KWEE: Okay. So maybe I should rephrase
14 the question.

15 When -- when did the business stop collecting the
16 fuel sales from the fuel then? So when did people stop
17 paying IMFG either in bankruptcy -- for the fuel?

18 Is that something that you would know?

19 MR. FALCHE: I -- I can only refer you to the
20 operating reports, which -- which would show what amounts
21 were being collected.

22 JUDGE KWEE: Okay.

23 MR. FALCHE: But nothing was being sold by that
24 point in time.

25 JUDGE KWEE: Okay.

1 MR. FALCHE: It was just the collection of the --
2 the credit sales that would have been made in the previous
3 months.

4 JUDGE KWEE: So collections and credit sales
5 would have continued until the motion to convert to
6 chapter 7 was granted.

7 Is that -- would that be a correct statement?

8 MR. FALCHE: I believe so. I -- I don't know.

9 JUDGE KWEE: Okay. So then -- yeah.

10 So I think we were talking about the United
11 States Trustee and the motion to convert or dismiss the
12 case. And then you had mentioned that you -- I'm sorry --
13 that IMFG had opposed the motion to convert or dismiss the
14 case to -- to convert to chapter 7 or dismiss them.

15 I'm wondering, if -- if the business was --
16 was -- was terminated, why would IMFG have opposed the
17 motion?

18 MR. FALCHE: We had a -- we had a -- a potential
19 claim against the Shell Oil Company on a piece of property
20 that was owned by the corporation in Southern California.
21 And I was asking the Trustee to use that as -- as -- or to
22 view that -- to try to view that as a possibility for
23 continuing the corporation --

24 JUDGE KWEE: Okay.

25 MR. FALCHE: -- by selling that -- that.

1 And his response was that it had no real value.
2 And even if it did, Shell would be opposing it. And it
3 was -- was not a viable means of -- of staying in
4 business.

5 JUDGE KWEE: Okay. So I guess that's another
6 question then. Because I understand there were either 2
7 to 12 gas stations -- or I guess fuel stations.

8 What happened to those fuel stations after
9 January 12? Did they just shutter? Or --

10 MR. FALCHE: No. Prior to that time, because San
11 Francisco Petroleum was not making its payments on the
12 mortgages for those properties, they were foreclosed upon.

13 So -- so they didn't -- they no longer existed
14 as -- as an asset of the company -- of the operation.

15 JUDGE KWEE: Okay. And then --

16 MR. FALCHE: And that was before the bankruptcy
17 had been filed.

18 JUDGE KWEE: Oh, okay. Okay.

19 So then another question is that in the March --
20 I think it was 12th -- or March 13, 2012 motion by the
21 United States Trustee to convert or dismiss the case, you
22 had highlighted language in your September -- in your
23 response to the minutes and orders with the additional
24 exhibits.

25 And I think the language you highlighted said

1 that -- and this was also attached as Exhibit, I believe,
2 28 to your Index -- and it said that, here -- and this is
3 a quote from the language that you highlighted -- that
4 "Here, Debtor's monthly operating reports demonstrate the
5 Debtor has maintained a negative-cash-flow position since
6 the petition was filed, continues to operate at a loss,
7 and that the Debtor does not have enough cash on hand to
8 pay its administrative expenses."

9 So on March -- I guess that was filed on
10 March 14th. If the U.S. Trustee is saying that the
11 business continues to operate at a loss, why would CDTFA
12 have reason to believe that business is terminated if --
13 if the Trustee is saying they're continuing to operate and
14 lose money?

15 MR. FALCHE: The -- the Trustee was using the
16 January operating report, at which time it was still
17 receiving funds from the sales that were done in -- in
18 2011. And it was -- had no -- no cash to purchase any
19 additional fuel, which was the business that it's in; so
20 it could not operate any further.

21 JUDGE KWEE: Right. And I -- I see that in
22 the -- it looks like the February 2012 operating report
23 was filed after the bankruptcy trustee's motion on
24 March 16, 2012 -- or that was for the period ending
25 1/31/2012.

1 So it, I mean, it looks like the business
2 continued filing those operating reports until -- well,
3 not the business -- IMFG continued filing operating
4 reports until it was -- the -- the motion that was granted
5 by the Trustee --

6 I guess I'm just having trouble seeing that, you
7 know, like, from -- if you were taking CDTFA's
8 perspective, you know, the business -- the -- IMFG
9 continued filing operating reports -- the Trustee's
10 motions that they were still operating -- I -- I guess I'm
11 just trying to, like, what -- what why would they --

12 MR. FALCHE: I -- I was required to continue
13 filing the operating reports until -- until the case is
14 transferred to the Trustee. Then it becomes his
15 obligation.

16 So I -- I -- I had no choice in that. And it had
17 nothing to do with whether the business was -- had ceased
18 or not. It had to do with my obligation as a debtor in
19 possession.

20 JUDGE KWEE: Okay. Thank you. I think I
21 understand at least the questions that I was going to ask.
22 So that was all I had for the Appellant.

23 I don't have any questions for CDTFA. So I'll
24 turn it back to Judge Aldrich.

25 Thank you.

1 JUDGE ALDRICH: Thank you. This is Judge
2 Aldrich.

3 Mr. Falche, would you like to present a closing
4 argument, rebuttal, or otherwise address arguments made by
5 the Department?

6 MR. FALCHE: No. I think I've presented -- I'm
7 sorry -- I think I've presented all the arguments that
8 refute what they have stated.

9 JUDGE ALDRICH: Okay.

10 MR. FALCHE: So I -- I don't think I need
11 anything for that.

12 JUDGE ALDRICH: And -- so I think we're going
13 to -- we're ready to close the -- the record -- or
14 conclude the hearing and close the record.

15 The panel will meet and decide the case based off
16 of the evidence and arguments presented today. We'll send
17 both parties our written decision no later than a hundred
18 days from today.

19 And this was the only appeal for the morning
20 calendar. The hearing calendar will resume this afternoon
21 at 1:00 p.m.

22 Thank you, everyone. And have a wonderful
23 afternoon.

24 (Proceedings concluded at 12:05 p.m.)
25

1 REPORTER'S CERTIFICATION

2
3 I, Sarah M. Tuman, RPR, CSR No. 14463, a
4 Certified Shorthand Reporter in and for the State of
5 California, do hereby certify:

6 That the foregoing proceedings were taken before
7 me at the time and place herein set forth; that any
8 witnesses in the foregoing proceedings, prior to
9 testifying, were duly sworn; that a record of the
10 proceedings was made by me using machine shorthand, which
11 was thereafter transcribed under my direction; that the
12 foregoing transcript is a true record of the testimony
13 given.

14 Further, that if the foregoing pertains to the
15 original transcript of a deposition in a federal case,
16 before completion of the proceedings, review of the
17 transcript [] was [x] was not requested.

18 I further certify I am neither financially
19 interested in the action nor a relative or employee of any
20 attorney or party to this action.

21 IN WITNESS WHEREOF, I have this date subscribed
22 my name.

23 Dated: November 4, 2022

Sarah M. Tuman, CSR, RPR, CSR No. 14463

24 Certified Shorthand Reporter
25 For The State of California

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