

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
R. FARRELL,) OTA NO. 18083583
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Tuesday, November 15, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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IN THE MATTER OF THE APPEAL OF,)
R. FARRELL,) OTA NO. 18083583
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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:30 a.m. and concluding at 10:37 a.m. on
Monday, November 14, 2022, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead:	ALJ KEITH LONG
Panel Members:	ALJ ANDREW KWEE ALJ SHERIENE RIDENOUR
For the Appellant:	ASHLEY FARRELL PICKETT
For the Respondent:	STATE OF CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION SCOTT CLAREMON JOSEPH BONIWELL JASON PARKER

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I N D E X

E X H I B I T S

(Joint Exhibit J-1 was received at page 6.)

(Appellant's Exhibits 1-15 were received at page 7.)

(Department's Exhibits B-FF were received at page 6.)

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By Ms. Farrell Pickett	43, 50
By Mr. Claremon	48

1 California; Monday, November 14, 2022

2 9:30 a.m.

3
4 JUDGE LONG: We're opening the record in the
5 Appeal of R. Farrell, OTA Case Number 18083583. This
6 matter is being held before the Office of Tax Appeals.
7 Today's date is November 15, 2022, and the time is
8 approximately 9:30 a.m. This hearing is being convened
9 electronically.

10 Today's hearing is being heard by a panel of
11 three Administrative Law Judges. My name is Keith Long,
12 and I will be the lead Administrative Law Judge.
13 Judge Sheriene Ridenour and Judge Andrew Kwee are the
14 other members of this tax appeals panel. All three judges
15 will meet after the hearing and produce a written decision
16 as equal participants. Although the lead judge will
17 conduct the hearing, any judge on this panel may ask
18 questions or otherwise participate to ensure that we have
19 all the information needed to decide this appeal.

20 For the record will the parties please state
21 their names and who they represent, starting with the
22 representatives for Appellant.

23 MS. FARRELL PICKETT: Good morning. My name is
24 Ashley Farrell Pickett, and I'm here on behalf of
25 Appellant.

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JUDGE LONG: And for CDTFA.

MR. CLAREMON: Good morning. My name is Scott Claremon representing CDTFA.

MR. BONIWELL: Hi, good morning. I'm Joseph Boniwell also representing CDTFA.

MR. PARKER: I'm Jason Parker with CDTFA as well.

JUDGE LONG: Thank you.

With respect to the exhibits for this appeal, we have Joint Exhibit J-1, which was previously labeled CDTFA Exhibit A. We also have CDTFA Exhibits B through FF. At the prehearing conference, Appellant objected to portions of Exhibit P, titled "Court Forensic Accounting Report" -- "Accountant Report." As discussed, OTA may consider any probative evidence and admits Exhibit P in its entirety. We will give the exhibit the weight that it deserves.

OTA also advised Appellant that they may introduce exhibits to impeach the reliability of Exhibit P on or before the due date of November 1st, 2022. Appellant did not raise any other objections to CDTFA's Exhibits B through FF, and they are admitted -- or B through EE, and they are admitted.

(Joint Exhibit Number 1 was received in evidence by the Administrative Law Judge.)

(Department's Exhibits #B-EE were received in evidence by the Administrative Law Judge.)

1 However at the prehearing conference, Appellant
2 stated they did not receive a copy of Exhibit FF. I want
3 to give Appellant the opportunity to make any objections
4 to Exhibit FF, if there are any at this time.

5 MS. FARRELL PICKETT: There are no objections.
6 Thank you.

7 JUDGE LONG: Thank you.

8 Next after the prehearing conference Appellant
9 submitted an exhibit index identifying Exhibits 1
10 through 15. Copies of Exhibits 1 through 15 were
11 distributed on November 10th, 2022, with the exhibit
12 binder.

13 Does CDTFA have any objections to Exhibits 1
14 through 15?

15 MR. CLAREMON: No, we did not.

16 JUDGE LONG: Thank you.

17 These exhibits as they are summarized above are
18 admitted into the evidentiary record.

19 (Appellant's Exhibits 1-15 were received
20 in evidence by the Administrative Law Judge.)

21 Okay. There are three issues to be heard in this
22 appeal. They are first, whether Appellant is personally
23 responsible for the unpaid liabilities of the corporation
24 with respect to this issue. One of the following items
25 were agreed upon at the pre-hear-- one or -- sorry.

1 With respect to Issue One, the following items
2 were agreed upon at the prehearing conference and
3 memorialized in the OTA's subsequent minutes and orders
4 document. One, it is undisputed that Irvine Photo
5 Graphics, IPG, operations terminated by December 31st,
6 2009. Two, it is undisputed that IPG collected sales tax
7 reimbursement on sales made to Gap, which were actually
8 exempt sales in interstate commerce and paid such
9 reimbursement to the CDTFA as sales tax.

10 And, three, it is undisputed that Appellant was
11 the president of IPG and a responsible person for IPG
12 sales use tax compliance as defined in subdivision (b)(1)
13 of California Code of Regulations Title 18,
14 Section 1702.5. Issue Number Two and Three are related.
15 They are whether Appellant has standing to contest the
16 fraud penalty and whether the fraud penalty was properly
17 imposed.

18 Ms. Pickett, is that your understanding of the
19 issues as well?

20 MS. FARRELL PICKETT: It is. Thank you.

21 JUDGE LONG: Okay. And CDTFA, is that your
22 understanding of the issues as well?

23 MR. CLAREMON: Yes, it is.

24 JUDGE LONG: Thank you.

25 This hearing will take approximately two hours.

1 We will begin with Appellant's opening presentation.

2 Appellant, you have one hour, and you may begin
3 whenever you are ready.

4 MS. FARRELL PICKETT: Thank you. Thank you I
5 appreciate that.

6

7 PRESENTATION

8 MS. FARRELL PICKETT: It's probably important for
9 me to address the elephant in the room. I am not a tax
10 attorney. This -- much less, you know, tax appeals is not
11 something I will pretend to know much, if anything, about.
12 I'm, unfortunately, in a position where -- my father can't
13 afford an attorney. So I've been forced to try my best to
14 learn and be here today. So I say this one, in the hopes
15 that you all bear with me, provide me some grace should I
16 mis-procedure [sic] or anything along those lines.

17 And two, the fact that I am here and -- in lieu
18 of an attorney who is more well-versed in this area of the
19 law. I know, unfortunately, have no doubt could better
20 present the case is really at the core of this issue. I
21 had intended for my mother Betty Farrell to attend today.
22 She's, unfortunately, in an assisted-living facility
23 called Studio Royal. And she broke her rib the day before
24 yesterday, and it made logistics very, very difficult.
25 Even more difficult than it had been.

1 And that, really, I was balancing with what I
2 understood of this case and trying to come down to the
3 core of what evidence has actually been presented to one,
4 support fraud and two, support willfulness, balancing that
5 against, you know, everything, including she can't really
6 sit up right now, made me avoid having her here today. I
7 say that all that because I appreciate that we moved this
8 to a remote hearing so she could attend. So thank you for
9 that, the ability to do that. It is appreciated, even
10 though it ultimately did not work out.

11 I think it is important, unfortunately, to go
12 through some of the background between my mother and
13 father because it really goes to what we're here about,
14 unfortunately, today. My mother and father were married
15 for 27 years and divorced in what was an amicable
16 separation quickly turned to what is -- I think I can
17 adequately say -- probably the worse divorce anyone has
18 ever heard of. It completely depleted any kind of source
19 of funds for either of my parents, and I'm, unfortunately,
20 not exaggerating.

21 But now, their support financially is really on
22 my sister and I. And I say that because, you know, this
23 tax appeal is almost as if trying to get water from stone.
24 There's -- there's just no money there, and there hasn't
25 been for a very long time. I think it's important to also

1 understand this because I understand that a declaration
2 that was provided by my mother, you know, years ago really
3 is what has been relied on here.

4 That declaration as I read it, speaks to some
5 kind of knowledge -- claiming some kind of knowledge being
6 imputed to my father that the excise tax was due to be
7 refunded to the Gap. Again, unfortunately, while I hate
8 to -- and I could tell you I really don't want to be, kind
9 of, airing this laundry, although, it's probably, frankly,
10 in the public record from the divorce proceedings.

11 It's really important to understand. And the
12 reason I wanted to have my mother here today is to
13 understand the history of what happened in the divorce
14 that I think lead to that declaration. My mother, as set
15 forth in the declaration, believes that my father was
16 hiding money. It was in forensic reports from
17 accountants, several rounds of attorneys, again, to the
18 point where it was pretty much an all-out war between
19 them.

20 And each side was looking for any way to try to
21 gain leverage against the other, even if it was to the
22 family's detriment, including trying to have other
23 agencies even look into the other in regards to their use
24 of funds and so forth. And, you know, the case between my
25 parents only recently has ended in trial in state court,

1 and I think it's important to know -- as I included as an
2 exhibit -- that the claims made in the declaration, aside
3 from my mother, aside from the claim trying to impute some
4 kind of an established knowledge on my father that this
5 was due back to the Gap.

6 Importantly the Gap and not the Board was all
7 undermined from the ultimate findings of that family
8 court. There was no finding that there was any misuse of
9 money or hiding of money or anything like that. And
10 unfortunately, it took literally about 20 years for that
11 to ultimately come to -- to an ultimate decision.

12 JUDGE LONG: Ms. Pickett.

13 MS. FARRELL PICKETT: Yes.

14 JUDGE LONG: I'm sorry to interrupt. This is
15 Judge Long. I just wanted to confirm with respect to your
16 presentation, did you want to be -- did you want us to
17 consider this as testimony as well? Did you want to be
18 sworn in as a witness?

19 MS. FARRELL PICKETT: Oh, you know, I had not
20 thought about that. Sure. That would -- that would be
21 great. Thank you for noting that.

22 JUDGE LONG: Sure. If you could raise your right
23 hand.

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ASHLEY FARRELL PICKETT,

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

JUDGE LONG: Okay. Thank you. You may cannot.

MS. FARRELL PICKETT: Thank you.

So, again, I just think this is important background to understand some of the motivations that could be behind the evidence presented in this case that, unfortunately, has led -- led to this and, again, the fact that there -- there really is no money at the end of this. My sister and I, unfortunately, are in a position where we are ultimately supporting both of our parents, which is very difficult.

But turning to the ultimate law, with that background, my understanding of this is that it comes down to rather there has been shown by clear and convincing evidence, the fraud standard, whether my dad knew of the rule that excess tax reimbursement, that if it doesn't go back to the customer, it needs to go back to the State. And, again, you know, I'm trying to avoid kind of hitting on what's already in the briefs, but I do want to hit on a few key points.

Specifically, the excise tax issue was received

1 January 26, 2005, and it concerned orders made from
2 1998 -- July 1998 to September 2001, a very long time ago.
3 IPG, unfortunately, closed in December -- December 31st,
4 2008, and it was five-and-a-half years after that
5 reimbursement was received in 2005 and two years after the
6 closure of the business that a letter first received on
7 September 9th, 2010, saying that the funds needed to be
8 returned to the Board.

9 Importantly, while there were two letters prior
10 to that September 3rd, 2010, date that came to IPG from
11 the Gap directly, those letters actually said that the tax
12 needed to be returned to the Gap. I'm not going to get
13 into it here whether there was an agreement between IPG
14 and the Gap as to how that was going to be handled because
15 I understand it's really a moot point. I can tell you
16 from the perspective of everybody that, you know, knows
17 the parties at issue here knows my dad, the concept that
18 the largest client by far, Gap, that he would put that at
19 risk by trying to keep a refund that was due to them,
20 makes no sense.

21 And there have never been any run-ins with the
22 law or business issues or any claims of this kind levied
23 against my father either, only in the sense of the claims
24 are ultimately determined to not be supported by the
25 family law court from my mother. But this really is an

1 important date, specifically, the September 3rd, 2010,
2 date because that's the first time that there's any -- any
3 record that IPG or my father was informed that liability
4 may be due to the Board, importantly, not the Gap but to
5 the Board. And, again, any knowledge that Gap was even
6 claiming anything may be due to them had just been made,
7 you know, a few months prior.

8 I go back to -- I'm going to go back to this
9 throughout that there's nothing in the record to show
10 under the clear and convincing standard of fraud or even
11 as to personal liability, which requires preponderance of
12 the evidence, show that there was knowledge that there was
13 one, any issue even as to the excise tax but much --
14 between IPG and Gap. But much less that there was any
15 knowledge of some kind of issue and some kind of
16 reimbursement being due to the Board, which is what is at
17 issue here.

18 You know, the timing of this, the statute of
19 limitations had clearly run. The business had been closed
20 by the time that this actually came out. And it's for
21 those reasons that of course there's not -- unfortunately,
22 not any documentation here. But it was not until
23 November 16, 2010, that the BOE, I believe it was at the
24 time, claimed fraud and issued decisions both against IPG
25 and then also against my father personally, relying on my

1 mother's declaration.

2 Importantly, the December 12th, 2010, BOE auditor
3 statement, which is Exhibit Number 6, admits that there
4 was no knowledge by IPG or my father that anything was due
5 to the State within the statute of limitations. It's as,
6 quote, "Auditor cannot find anywhere in the audits written
7 information that the taxpayer was advised that they were
8 required to refund the tax back to the State, if it was
9 not returned to the customers."

10 So the BOE auditor themselves admits that there
11 was no knowledge as is required here. So, again, if the
12 Appellant did not have knowledge of the alleged -- of one,
13 the alleged liability until well after the three-year
14 statute of limitations had run. It had been
15 five-and-a-half years at this point. Further, Appellant
16 did not have any knowledge that the refund could be owed
17 to the State and not to Gap until even after that period
18 of time.

19 And once they found out about the alleged
20 liability, the company had been closed and there was no
21 longer an ability to pay. There were no funds. The
22 company, again, had been closed for years at this point,
23 and you cannot willfully fail to pay when there's no
24 knowledge that the refund was one, allegedly due, and the
25 company had closed its doors. Even on a personal level

1 there was no ability to pay at that time.

2 And even if we were to assume that, you know,
3 against all reason, frankly, that IPG and/or my father had
4 decided to try to, you know, keep \$500,000 at the risk of
5 ruining the relationship with their largest client that
6 had given them multiple -- multiples of that business to
7 IPG each year, again, there's no knowledge anywhere that
8 they knew that the refund had to go back to the State.

9 Knowledge simply just can't be imputed to
10 Appellant, which is what the core of the issue is here.
11 There was no information nowhere in the record that
12 potential liability could be had until the statute of
13 limitations has run -- had run. And the only way to
14 extend that statute of limitations is fraud, but fraud is
15 a heightened standard, and it is a heightened standard for
16 a good reason. It sought to and it did here, extend to
17 seek the liability -- extend the liability when there's no
18 longer documentations, no longer able to send the self --
19 IPG and show agreement.

20 And you have to have clear and convincing
21 evidence -- the Board does -- to show that they actually
22 knew. It's, quote, "Actual intentional wrongdoing that
23 the intent required is specific purpose to evade tax
24 believed to be owed. There is simply nothing here. This
25 respectfully appears to be a clear overreach, and it's not

1 supported by any of the documentation.

2 Appellant did not timely know that the tax or
3 refund was allegedly owed to the State within the statute
4 of limitations, nor did it intentionally or knowingly it
5 somehow evade that obligation when IPG had funds to pay
6 it. And it's important to not only look at
7 Exhibit Number 6, which we went over in which the BOE
8 auditor herself issues a statement and admits there was no
9 knowledge. But also Exhibit Number 7, is a November 10th,
10 2010, recommend -- memorandum from the tax Board
11 recommending the fraud penalty that by the language showed
12 it was based on flawed understanding of what the legal
13 standard was.

14 Because it says, quote, "Taxpayer aware of the
15 requirement to refund the excess tax received to their
16 customer Gap," based on Mr. Farrell's letters to
17 Mr. Stefan, dated 1/11/2001. So here it's recommending
18 fraud on a basis that there was somehow -- I don't see how
19 those letters do this -- but there was somehow a knowledge
20 that by failing to return the excise tax to Gap, that they
21 had knowingly done that, but not importantly for failing
22 to return it to the State or the Board.

23 And it's important to recognize here that the
24 excise tax was received. The refund was received from the
25 Board to IPG, and the concept that IPG was then supposed

1 to understand that somehow, they needed to take that
2 refund and send it right back to the Board really defies
3 logic. Again, I'm an attorney. I have yet to get my head
4 around this. Even sophisticated business people I don't
5 think can be imputed to somehow have this kind of
6 knowledge, especially, with no documentation showing that
7 here.

8 It seems that this claim is based on nothing more
9 than that -- than an opinion and a conclusion that
10 Appellant must have understood this nuance are of the law
11 and thus, should be held responsible on a personal basis
12 for it as well after the statute of limitations had
13 already run.

14 And now, importantly, just one more issue is the
15 standing argument raised by the CDTFA and its opposition
16 for the first time that Appellant somehow does not have
17 standing to challenge IPG's penalty. And I would just
18 point out one more time this is contradicted by historical
19 practices, as noted in all of Appellant's briefings, how
20 the CDTFA and the Board has treated the same issue with
21 other taxpayers, its own published authority, its own
22 written decisions on the appeal, which did allow the same.

23 And the concept that they somehow can deny due
24 process and not permit Appellant to challenge a penalty of
25 IPG, which is the conduit by which personal liability is

1 somehow being attributed to him is not fair. Again, it's
2 not supported and would violate due process and equal
3 treatment under the law. With that, I'll submit to the
4 CDTFA. And I believe I reserved 15 minutes for reply, if
5 I could also maintain some of my time that I saved here,
6 as needed. I would appreciate that.

7 JUDGE LONG: Thank you, Ms. Pickett. And then
8 just before we continue on with questions from the
9 Panel -- my co-Panelists, I wanted to clarify that as your
10 Appellant's attorney as well regarding your testimony,
11 we'll only consider the aspects that are -- things that
12 you actually witnessed, and then the rest we will consider
13 as arguments.

14 And I also need to verify whether CDTFA had any
15 objections to Appellant's testimony.

16 MR. CLAREMON: We have no objections.

17 JUDGE LONG: Thank you. And then also CDTFA do
18 you have any questions for Ms. Pickett as a witness?

19 MR. CLAREMON: I don't have any questions.

20 JUDGE LONG: Okay. Thank you.

21 And so I'd just like to turn to my co-Panelists
22 real quickly to see if they have any questions.

23 Judge Ridenour, do you have any questions?

24 JUDGE RIDENOUR: Hello. This is Judge Ridenour.
25 No questions at this time. Thank you.

1 JUDGE LONG: And Judge Kwee, do you have any
2 questions?

3 JUDGE KWEE: This is Judge Kwee. Yeah, I think I
4 just want to get a quick clarification about the sales tax
5 aspects. So as I'm understanding, IPG collected the sales
6 tax reimbursement from Gap, and then IPG filed a claim for
7 refund on the basis that tax wasn't due, so it shouldn't
8 have been collected or paid to the State. That amount was
9 refunded to IPG, and IPG didn't refund that to the Gap.
10 That -- it's my understanding that those aren't -- those
11 facts aren't disputed. Is that -- those are, like, agreed
12 facts; is that correct?

13 MS. FARRELL PICKETT: Yes. So my understanding
14 as well is that the IPG was asked -- I believe it's
15 undisputed. IPG was asked by the Gap to request that
16 refund through the State. IPG expended funds in doing so
17 and it's our position had an agreement with Gap to offset
18 any cost incurred with that -- because I understand it was
19 quite the process.

20 They received the refund, and then
21 five-and-a-half years later was suddenly told that needed
22 to go back to one, the Gap and then separately told months
23 later it actually needed to go back to the State if it had
24 not gone to the Gap. And that was the first time they
25 were informed.

1 JUDGE KWEE: And during this process was
2 Mr. Farrell -- was your father, your client, involved in
3 the refund claim aspect? Or was the testimony that
4 your -- his spouse involved in the refund claim aspect?

5 MS. FARRELL PICKETT: No. So they engaged --
6 bookkeeper is the best word that I can think of it -- to
7 assist in it, but he was still overseeing IPG at the time.
8 Really, the issue I was raising as to my mom is she was
9 not actually working at that time. She was not at the
10 company. She had stopped working several years prior.
11 And, you know, nonetheless tried to state that she somehow
12 had knowledge of what my dad knew at that time, whether of
13 the refund allegedly being due to Gap and/or the State.

14 But no, the issue is not that while we do
15 disagree as to the agreement between IPG and Gap, and our
16 position is, hey, this was our agreement. IPG even signed
17 off on it where we would undertake the efforts to do this,
18 but we would offset any cost, and there was significant
19 cost. There was no issue about it. They never raised any
20 issues. We never raised any issues. We incurred cost.

21 Unfortunately it was not raised until
22 five-and-a-half years later when we couldn't find a lot of
23 the documentation to support that. So then they claimed
24 that there was no agreement actually in place, and we had
25 somehow -- IPG had somehow improperly kept those funds.

1 But the issue here on the appeal really doesn't matter.
2 None of that really matters because the statute of
3 limitations at that time had already run.

4 So because there was no knowledge as the auditor
5 and the Board at the time admitted, there was no knowledge
6 that this would have been anything owed to the State.
7 There was no ability for the State now to be claiming
8 fraud to try to reach back beyond the statute of
9 limitations and obtain those funds. So said a little bit
10 differently and perhaps more simply, while I would
11 vehemently contest that there was any wrongdoing here at
12 all between even IPG and Gap, that doesn't really matter.

13 Because what matters is how the State is able to
14 get involved here, and the law is pretty clear. They can
15 only extend the statute of limitations if they prove
16 fraud, and there's nothing showing that there was any
17 knowledge on the part of IPG or Rick Farrell at the time
18 that this conceivably could be due to the State, to the
19 tax Board.

20 And even if there was that, by the time they did
21 know, by the time they were informed, and IPG had been
22 closed for several years, and it was five-and-a-half
23 years, while after the statute of limitations again had
24 run, that the refund had been received. There was no
25 ability to pay at the time. So there was no willfulness.

1 JUDGE KWEE: Okay. And just going back for a
2 minute to the agreement aspect. Is the amount at issue,
3 was any portion refunded to the Gap? Or was -- because
4 you had mentioned that there was an agreement potentially
5 that there would be an offset for fees, or is the amount
6 that we're discussing some sort of offset amount, or was
7 the -- was any amount refunded to the Gap, or was this
8 entire amount retained by IPG, and that's what's before
9 us?

10 MS. FARRELL PICKETT: So, you know, I know there
11 was an offset agreement. I admittedly don't know. I
12 apologize. I admittedly don't know if we have records
13 anymore about what that is and what the ultimate number
14 here, if that is the offset amount or something different.
15 I just don't have that knowledge. Apologies.

16 JUDGE KWEE: Okay. Thank you.

17 I will turn it back over to the lead ALJ,
18 Judge Long.

19 JUDGE LONG: Thank you.

20 I just had one quick question for you. With
21 respect to the business closure, you said December 31st,
22 2008, but the sales permit was not closed until
23 December 31st, 2009. Do you know when CDTF, or back then
24 BOE, was informed of the closure?

25 MS. FARRELL PICKETT: So I do know that IPG did

1 not file any returns for all four quarters for 2009 and
2 was officially closed May 10th, 2010. The account was
3 officially closed effective December 31st, 2009. But in
4 the Decision and Recommendation for this case -- for the
5 appeal, I guess I should say, it accepts the actual
6 termination date of December 31st, 2008.

7 JUDGE LONG: Okay. Thank you. And my apologies,
8 but that Decision and Recommendation is a lot to get
9 through. Do you have the page number for that specific
10 assertion?

11 MS. FARRELL PICKETT: I'm sorry. I don't.

12 JUDGE LONG: Okay. I can find it. That's fine.
13 Thank you. And that is all the questions that I have at
14 this time.

15 CDTFA, you have 30 minutes to make your
16 presentation, and you may start when you are ready.

17
18 PRESENTATION

19 MR. CLAREMON: Thank you and good morning.

20 The primary issue in this appeal is whether
21 Appellant is personally liable for the unpaid liabilities
22 of Irvine Photo Graphics, Inc., IPG, pursuant to Revenue &
23 Taxation Code Section 6829. An additional issue is
24 whether Appellant may appeal the imposition of the 25
25 percent fraud penalty imposed upon IPG pursuant to Section

1 6485 and if so, whether that penalty was properly imposed.

2 The relevant facts in this appeal are described
3 in the Department's response brief dated January 28th,
4 2019, and supported by the evidence cited therein, all of
5 which is in the record for this Panel. To briefly
6 summarize, Appellant was the president and owner of IPG
7 and, essentially, all the actions of IPG discussed in this
8 appeal were undertaken by Appellant personally.

9 As described in the dual memorandum, Exhibit H,
10 with regard to responsibility, he had sole control of IPG
11 during the period in question. On page 192 of Exhibit P,
12 the statement is attributed to Appellant that he was the
13 CEO and primary decision maker of IPG, and that there was,
14 quote, "No number two." In addition, he personally
15 represented IPG throughout the refund and appeals process.

16 At the request of IPG's customer, the Gap,
17 Appellant filed claims for refund on behalf of IPG for
18 excess tax reimbursement collected on out-of-state
19 transactions from 1998 to 2003. After a relatively brief
20 examination by Department audit staff, that pursuant to
21 Exhibit CC, involved meetings over three days between
22 KPMG, Appellant, and audit staff, a refund of
23 approximately \$468,000 was granted on January 31st, 2005,
24 if the issuance of the refund was conditioned on it being
25 refunded to the customer, as explicitly memorialized in

1 Exhibit N, the report of discussion of audit findings at
2 which Appellant personally represented IPG. However, IPG
3 never refunded the amount to the customer.

4 Accordingly, the Department issued a Notice of
5 Determination to IPG on November 16th, 2011, which became
6 final on October 27th, 2013. And the Board of
7 Equalization issued a summary decision pursuant to
8 Revenue & Taxation Code Section 40 on December 17th, 2013,
9 wherein it concluded that there was clear and convincing
10 evidence of fraud as the basis of IPG's liability.

11 Appellant's liability here, under Section 6829,
12 is derived from the November 16th, 2011, Notice of
13 Determination. Under Section 6829, any person who has
14 control or supervision of a corporation is personally
15 liable for that corporation's unpaid liabilities,
16 including interest and penalties, if four elements can be
17 established; that the corporation terminated; the
18 corporation collected sales tax reimbursement; the person
19 was responsible for the payment of sales and use tax; and
20 the person's failure to pay was willful.

21 Here, there is no dispute that the first three
22 elements have been met. The three sub-elements must be
23 met to establish willfulness. On or after the date the
24 taxes came due, the person must have had actual knowledge
25 that they were due, and they must have had both the

1 authority and the ability to pay it to the State.
2 Finally, liability under Section 6829 in the elements
3 thereof must be established by the preponderance of the
4 evidence. That is, based on all of the evidence, both
5 direct and circumstantial, it must be found to be more
6 likely than not that each element is met.

7 With regard to Appellant's knowledge as a
8 starting point, there is overwhelming evidence that
9 Appellant knew that the issuance of the refund by the
10 Department was conditioned on it being delivered to the
11 customer. Again, as most clearly demonstrated by the
12 report of discussion of audit findings and is also
13 supported by the auditor's declaration, Exhibit EE and the
14 three separate statements of Betty Farrell, Exhibits AA
15 and FF.

16 In other words, while the requirement was to
17 deliver the refund to the customer, that requirement was
18 imposed by the Department. IPG undertook an obligation to
19 the Department to deliver it to the customer. On that
20 basis alone, it is more likely than not that Appellant had
21 actual knowledge. That --

22 JUDGE LONG: Mr. Claremon. I'm sorry to
23 interrupt.

24 Ms. Pickett, would you mind muting your
25 microphone? I'm getting some noise disturbances.

1 MS. FARRELL PICKETT: Apologies.

2 JUDGE LONG: Thank you.

3 Mr. Claremon, you can continue. Sorry.

4 MR. CLAREMON: No worries.

5 On that basis alone, it is more likely than not
6 that Appellant had actual knowledge that if he failed to
7 deliver the refund to the customer, IPG would be required
8 to return it to the State. The alternate being that he
9 honestly believed that by simply ignoring this obligation
10 to the Department, IPG was entitled to keep almost
11 \$470,000 that did not belong to it.

12 Appellant is a sophisticated businessperson with
13 significant experience with sales and use tax matter, who
14 is specifically involved in all aspects of this refund.
15 And the requirement to pay excess tax reimbursement to the
16 State, if not refunded to the customer, is clearly stated
17 in Section 691.5 and Regulation 1700. But such facts are
18 not necessary to establish Appellant's knowledge in this
19 matter. IPG was, in essence, engaged as a delivery
20 person. Its role is to deliver the refund from the
21 Department to its customer.

22 It clearly knew that it had no right to the
23 refund as evidenced, for example, by Exhibit O, in which
24 the debts to the customer were reported as a liability on
25 IPG's income tax returns in 2005 and 2006. One does not

1 need to be a sophisticated business person to know that a
2 delivery person can't simply decide to keep the item they
3 promised to deliver. And in this case as a result, reap a
4 \$470,000 windfall.

5 But as a sophisticated businessperson with a
6 familiarity with sale and use tax matters, Appellant's
7 actual knowledge is even more obvious. This is further
8 supported by evidence of Appellant's conduct after
9 receiving the refund from the Department. The evidence
10 indicates that Appellant intentionally withheld the
11 refunds from and actively mislead the customer before
12 abruptly cutting off communication; see Exhibits Q through
13 U.

14 And when contacted by the Department, Appellant
15 provided erroneous information regarding its past
16 communication with the customer and with regard to a
17 purported reimbursement agreement. And that's Exhibits W
18 and X. Exhibit X being the letter Appellant claims he sent
19 to the customer's representative in February 2005
20 purporting to explain why it did not receive a single cent
21 from the refund.

22 As discussed in great detail in the Appeals
23 Bureau decision, Appellant's claims regarding a
24 reimbursement agreement make no sense both generally, and
25 that the customer's representative was itself an

1 accounting firm hired on a contingency basis to secure the
2 refund. And, specifically, with regard to the exorbitant
3 offsets of detail in Exhibit X, there is no documentary
4 evidence whatsoever of the alleged agreement, and the
5 customer and its representatives declare that no
6 reimbursement agreement was ever entered into, nor any
7 letter regarding its existence ever received. And that's
8 Exhibits R, Y, and Z.

9 Ms. Farrell has also provided multiple accounts
10 of her conversations with Appellant in which he admits
11 that no such agreement existed. And, again, that's
12 Exhibits AA and FF. I note, again, that Appellant did not
13 send this letter to the customer or to its representative.
14 The letter was sent to the Department. In other words,
15 Appellant's conduct not only reenforces the fact that he
16 clearly knew IPG had no entitlement to keep the refund and
17 thus, had to conceal its receipt from the customer. But
18 in providing an explanation to the Department, that does
19 not appear to be genuine.

20 His conduct also indicates an awareness of
21 liability to the Department if he could not explain his
22 failure to deliver the refund to the customer. Taking
23 into account all of the evidence in the appeal, it's far
24 more likely than not that Appellant knew that his
25 obligation to the Department meant he had to return the

1 refund to the Department if he failed to deliver it to the
2 customer.

3 Turning to the second element of willfulness,
4 authority to pay, again, as described in Exhibit H with
5 regard to responsibility, Appellant was the president and
6 CEO of IPG as listed on numerous documents, including
7 authorization of payment by electronic funds transfer.
8 There's no dispute that he had sole control over the
9 corporation, which would include the authority to make
10 payments as also evidenced by the statement of Betty
11 Farrell regarding his control of the corporation's bank
12 accounts and his being named the corporation's fiduciary.

13 Also for statements attributed to Appellant on
14 pages 191 and 192 of Exhibit P, he had check signing
15 authority and was the only decision maker. As such, it is
16 established by a preponderance of the evidence that
17 Appellant had the authority to pay.

18 Finally, with regard to ability to pay, per
19 Exhibit H and Exhibit O, in addition to the fact that IPG
20 received the refund itself, IPG made almost \$6 million in
21 sales in 2005, more than \$2.5 million in sales in both
22 2006 and 2007, and over \$1 million in sales in 2008.
23 Therefore, there were funds available to satisfy the
24 liability well after IPG received the refund and even
25 after several of the emails from the customer indicating

1 that Appellant was concealing IPG's receipt of the refund.

2 Accordingly, it is established by a preponderance
3 of the evidence that after deciding not to deliver the
4 refund to the customer or to remit it to the Department,
5 Appellant still had the ability to pay. In sum, all of
6 the elements of Section 6829 liability have been met, and
7 Appellant is liable for the unpaid liabilities of IPG.

8 Turning to the second issue in this matter, after
9 IPG petitioned the underlying liability, the issues were
10 fully briefed, and an oral hearing was scheduled for
11 April 2013 and then rescheduled for July 17th, 2013.
12 Appellant failed to appear at that hearing and the Board
13 denied the petition by a unanimous vote and issued a
14 summary decision pursuant to Section 40. As such, the
15 Board's decision with regard to IPG's liability is final
16 and non-appealable.

17 There's no provision in the Government Code or
18 the OTA rules for tax appeals that would allow for the
19 appeal of the decision of the Board of Equalization that
20 went final prior to January 1st, 2018. This is
21 essentially what Appellant is asking the Panel to do here
22 in seeking a decision by OTA that IPG's liability is not
23 based on fraud contrary to the final written decision of
24 the BOE.

25 It is not supported by the OTA's precedential

1 decision in Eichler in which no request for relief from
2 penalties or interest was filed prior to the Section 6829
3 case, nor is it supported by Section 6592 or annotation
4 320.025, which do not apply to fraud penalties imposed
5 pursuant to Section 6485. I also note that the statement
6 in the Appeals Decision regarding reexamining the issues
7 in the underlying case is being taken out of context.

8 The Appeals Decision has a single issue, whether
9 Appellant is liable for 6829. And that statement simply
10 means that they're going to reexamine the facts in light
11 of the 6829 liability. The Appeals Decision makes no
12 examination and reaches no conclusion with regard to the
13 underlying liability or the fraud penalty. It is simply
14 not an issue that's addressed in the Appeals Decision.

15 Furthermore, as stated in OTA's precedential
16 decision in Millennium Dental Technologies, and also
17 applied to sales and use tax cases, the doctrine of Res
18 judicata prevents parties or their privies from
19 relitigating a cause of action after a final judgement on
20 the merits. The California Supreme Court in DKN and
21 Holding v Faerber 61 Cal.4th 813 at 826 through 828, held
22 that a person whose liability is derivative of a prior
23 litigant can be considered to be in privity with them.

24 It further states that privity requires the
25 sharing of an identity or community of interest with

1 adequate representation of that interest in the first suit
2 and circumstances such that the non-party should have
3 reasonably expected to be bound by the first suit. Here
4 as we've already described, Appellant was the president,
5 CEO, and owner in complete control of IPG during this
6 period and personally undertook on all of the actions and
7 communications that we have discussed. He represented IPG
8 during the refund and related audit and during the
9 entirety of the IPG appeal.

10 Specifically, per Exhibit BB, at or around the
11 time of the first hearing date, IPG's attorney was not
12 retained and Appellant personally requested a continuance
13 and communicated with the BOE with regard to settlement,
14 and thereafter was its sole representative. It is
15 important to note that Appellant received the NOD for this
16 action, his personal liability, on December 28th, 2011,
17 meaning he represented IPG at the appeals conference and
18 thereafter having already received a notice of his
19 liability as a responsible person.

20 As such, not only is his liability completely
21 derivative of IPG, but his interests were entirely aligned
22 with IPG, and he was adequately represented by himself
23 during those proceedings. And he knew, based on already
24 being issued the Section 6829 NOD that he would be bound
25 by those proceedings. In addition, the BOE is considered

1 a court competent jurisdiction for the purposes of Res
2 judicata. It rendered a final judgment on the merits and
3 the same claim the appeal of IPG's liability is being
4 raised here. Accordingly, Appellant's appeal of the fraud
5 penalty imposed on IPG is barred by the doctrine of Res
6 judicata.

7 Finally, even if OTA were to consider the issue,
8 the BOE properly found that IPG's liability was based on
9 clear and convincing evidence of fraud. Per the OTA's
10 decision ISIF Madfish fraud can be proved by
11 circumstantial evidence. And such badges of fraud may
12 include inadequate records, implausible or inconsistent
13 explanations of behavior, concealment of assets, failure
14 to cooperate with tax authorities, and lack of credibility
15 in the taxpayer's testimony.

16 As I've already discussed, each of those elements
17 is present here in the basic fact that Appellant did not
18 simply deliver the refund to its customer in his dealings
19 with the customer and in the explanation, he provided to
20 the Department. Appellant has not provided a single
21 credible record with regard to the alleged agreement, any
22 of his claimed communications with the customer, or, for
23 example, with regard to the almost 3,000 hours he claims
24 that an account temps billed him for working on the
25 refund.

1 Exhibits AA and FF also describe admissions of
2 fraud by Appellant and his pattern of concealment of
3 assets, which is corroborated by the descriptions in
4 Exhibit P of Appellant's commingling of IPG's funds with
5 his personal assets and that of another corporation. As
6 also described in great detail in the Appeals Decision,
7 many of Appellant's specific explanations as to individual
8 issues are implausible and lack credibility, from his
9 claim to how he found Exhibit X in storage, given the lack
10 of any records with regard to the agreement, to his
11 explanation that he never read and deleted thousands of
12 emails that he received on his work account.

13 For all these reasons, and for all the reasons
14 I've previously discussed, the BOE properly found the
15 liability of IPG was based on fraud and properly applied
16 the RTC 6485 penalty. In sum, Appellant is liable under
17 Section 6829, and the petition for redetermination should
18 be denied.

19 Thank you.

20 JUDGE LONG: Thank you, Mr. Claremon.

21 I would like to turn to my co-Panelists to see if
22 they have any questions.

23 Judge Ridenour, do you have any questions?

24 JUDGE RIDENOUR: This is Judge Ridenour. No
25 questions at this time. Thank you.

1 JUDGE LONG: Thank you.

2 And Judge Kwee, do you have any questions?

3 JUDGE KWEE: This is Judge Kwee. Yeah. I guess
4 I would like to follow up with CDTFA about the position
5 that the taxpayer cannot challenge the fraud penalty
6 imposed on the corporation and just to get clare -- I
7 guess first to get clarification on that aspect. Is
8 CDTFA's position that in any 6829, I guess, the taxpayer
9 can't challenge the underlying liability? Or is it only
10 because there was a prior appeal on that aspect that
11 you're saying that we can't examine the fraud aspect?

12 MR. CLAREMON: Our position is that there is --
13 it is because there's a prior appeal and there's a prior
14 decision. And, specifically, that it was a prior decision
15 of the BOE prior to January 1st, 2018.

16 JUDGE KWEE: Okay. So --

17 JUDGE LONG: I'm sorry. I don't want to
18 interrupt.

19 But I need to make sure, Ms. Pickett, are you
20 still there. I'm sorry you're muted.

21 MS. FARRELL PICKETT: Yeah. Apologies. I'm
22 still here.

23 JUDGE LONG: Okay. And were you able to hear
24 CDTFA's answer?

25 MS. FARRELL PICKETT: I did. Thank you.

1 JUDGE LONG: Okay. Thank you.

2 Go ahead and continue, please.

3 JUDGE KWEE: Oh, okay. Yeah. I did have an
4 additional continuation to my question for CDTF. So I
5 understand, you know, that there's the appeal for the
6 underlying IPG, the corporation. And then also we have an
7 individual who is being held, you know, personally liable
8 for the unpaid taxes of the corporation but -- so we have
9 a different person before us. I guess I'm not
10 understanding why that person can't establish that they
11 shouldn't be held personally liable on the basis that --
12 you know, for whatever reason that those taxes aren't
13 correct.

14 And I guess we also have, for example, the
15 Talavera Decision where the only issue being decided, you
16 know, 6829 responsible person liability was conceded, and
17 the only dispute there was whether or not they could be --
18 or the tax liability was correct. And it didn't seem in
19 that case there was any issues raised about jurisdiction
20 to challenge the underlining liability. And so I guess it
21 seems that in prior appeals, even prior precedential
22 appeals, that we considered that aspect without disputes
23 raised by the parties about, you know, jurisdiction over
24 the underlying liability.

25 So I guess I was just having a hard time

1 understanding why when we have an individual being held
2 personally liable they cannot challenge both, you know,
3 the elements for imposing personal liability as well the
4 validity of the liability for which they're being held
5 personally liable. So I guess that's a concern that I was
6 thinking, and the case that I had in mind was the appeal
7 of Talavera, or one of those cases that I had in mind.

8 I guess you don't have to answer, but that's just
9 what I had in my mind. I wanted to share that in the
10 event that CDTFA wanted to add or elaborate to what they
11 had previously stated.

12 MR. CLAREMON: You know, I don't -- I don't think
13 so. I'm not -- I am not familiar with all of the details
14 of Talavera, but again I'm not aware of any OTA decision,
15 either precedential or otherwise where in a 6829 case
16 there was already a decision, particularly a written
17 decision, on the underlying liability where that
18 underlying liability was then reexamined. And, again, if
19 OTA were to find here that not the Appellant, but the
20 underlying corporation was not fraudulent, they would
21 essentially be re-deciding the case that was finally
22 decided nine years ago.

23 JUDGE KWEE: Okay. Thank you.

24 I will turn it back to the lead judge,
25 Judge Long.

1 JUDGE LONG: Thank you.

2 I just wanted to circle back to one of
3 Ms. Farrell's arguments and hope that you can address this
4 with me. With respect to the statements and the letter
5 issued by Ms. Betty Farrell and the weight that CDTFA put
6 on that with respect to imposition of the fraud penalty, I
7 just wanted to confirm I have from the decision
8 recommendation the statement. It's nevertheless
9 petitioner and Ms. Farrell apparently had an acrimonious
10 divorce which could call into question statements by Ms.
11 Farrell against petitioner's interest and we, thus, simply
12 note her statement for the record.

13 It seems from that instance that CDTFA is
14 actually not putting much weight on Ms. Betty Farrell's
15 statement alone; is that correct? There's -- I believe
16 that there's other statements as well with respect to this
17 fraud penalty?

18 MR. CLAREMON: That's correct. We believe that
19 the evidence of fraud and the evidence of willfulness is
20 based on all of the evidence, including Mr. Farrell's
21 own -- primarily, Mr. Farrell's own actions, the evidence
22 with regard to his communication with the customer's
23 representatives from 2006 to 2009, with the communication
24 with the Department at 2010 in which he provided this
25 explanation, which we do not believe to be genuine.

1 And with that said, Ms. Farrell made three
2 separate statements. One not to us but to the Gap -- or
3 to KPMG, and two other statements; one under penalty of
4 perjury to us. So we do give it some weight as
5 corroborating evidence to the other evidence in this case.

6 JUDGE LONG: Okay. And then with respect to the
7 fraud penalty, I understand your position with respect to
8 the Res judicata and that the prior penalty was previously
9 decided and is final with respect to the Board of
10 Equalization's decision. But I just wanted to confirm
11 because what it sounds like to me is that you're arguing
12 with respect to the annotation as well as with Eichler
13 that a party can never dispute a fraud penalty when it's
14 being imputed through 6829?

15 MR. CLAREMON: We -- I just want to with the --
16 the annotation was brought up in briefing by Appellant's
17 former counsel. So I just wanted to point out that it's
18 not supported by that. I don't -- I don't want to speak
19 to another when there is not a prior decision by the BOE
20 or I guess now OTA. But I just want to point out that it
21 did not support their arguments in this case.

22 JUDGE LONG: Okay. Thank you.

23 I have no further questions. So we can turn to
24 final statements.

25 Appellant, you requested 15 minutes. However,

1 you do have some additional time if you would like to take
2 that I would -- because left over from your opening
3 statement. So I think it's probably about 30 minutes.
4 You may begin when you're ready.

5 MS. FARRELL PICKETT: Thank you very much.

6
7 CLOSING STATEMENT

8 MS. FARRELL PICKETT: You know, I -- sitting here
9 and listening and looking over the evidence there's a lot
10 that's said, but there's not actually anything behind it.
11 I've heard a lot of more likely than not. They knew --
12 IPG, Mr. Farrell must have known that they had to send it
13 to -- send the refund back to the Gap. I heard a lot of
14 conclusions saying that there must not have been an
15 agreement between Gap and IPG for this offset amount.

16 But the problem is that the only evidence or
17 alleged evidence are statements one, from a bitter
18 divorce -- no other way to put that -- who is from -- you
19 know, unfortunately, my mother who -- whose own statements
20 are undermined by the State court family law actual
21 findings. So numerous statements that she makes in those
22 same declarations have been directly contradicted and
23 found to be not accurate and not true by the State courts.
24 Those cannot be given credibility.

25 Also self-interested statements from Gap that

1 there was no agreement, but the problem here goes back to
2 the statute of limitations. This is an instance where
3 five-and-a-half years after the refund, and two years plus
4 after the closure of the business, suddenly the business
5 is told you have to provide us money, and you also need to
6 come up with documentation showing that there was this
7 prior agreement. The company had closed. There was no
8 documentation that we were able to find.

9 But the fact that it hadn't been raised for so
10 many years, similarly I would say on IPG's end, shows that
11 it wasn't an issue. This does not meet the clear and
12 convincing standard. These are assumptions and a lot of
13 conclusions. And, importantly, if you actually listen to
14 what the argument is and look at the documents, at most,
15 even if you were to find that this is some kind of
16 conspiracy to make sure that -- or to try to pull a fast
17 one on, again, their biggest customer -- IPG's biggest
18 customer -- at most, the evidence, quote, unquote, "would
19 go to knowledge that the refund needed to be returned to
20 the Gap, not that it was somehow owed to the State," which
21 is the only reason and only ability for us to be here,
22 would be between two private parties, nothing where the
23 State is involved.

24 Again, they have to prove fraud, and they're
25 trying to -- the CDTFA continues to try to paint really in

1 a false light with any proof to support that false light,
2 the statute of limitations, the business being closed, the
3 lack of documentation, all trying to use that to support
4 the elevated standard. But the fact that there is an
5 elevated standard shows that you cannot rely on the
6 facts -- on -- you can't rely on the impropriety of not
7 raising this for several years to then to try to say that
8 can be held against the Appellant here.

9 There was no ability to pay, the Great Recession,
10 and they had to close the business. Importantly, you
11 know, as to ability to pay, there's nothing being said
12 about profits or other debts. Again, a lot of
13 assumptions. They would not have shut down a business in
14 2008 if it was profitable. It had not been profitable for
15 years, and all the money kept going back into that
16 business to try to keep it afloat.

17 Again, this comes down to whether there is clear
18 and convincing evidence that IPG and/or Rick Farrell knew
19 some nuance tax law that the excess tax reimbursement, if
20 it doesn't go to the customer, it has to go to the State.
21 It's not about whether there's even knowledge that it
22 should have gone back to IPG. That's not at issue here
23 that we would, again, take a strong position that there
24 wasn't an agreement between the parties, but that's not at
25 issue here.

1 It doesn't matter. Even if IPG or Mr. Farrell
2 thought that it should go back to the Gap and violated
3 that agreement in some way, that doesn't impute liability
4 for the State to come in with the fraud allegations and
5 the ability to extend the statute of limitations here.
6 Again, even if there was no agreement between IPG and Gap,
7 even though we would definitely say there is, unless the
8 agency can show that there was actual knowledge that the
9 funds had to go back to the State, there's no way that
10 they can show that there's liability.

11 And they have also failed to show that there was
12 a willful failure to pay only by speaking to sales. Sales
13 has nothing to do with profits or other ability to pay.
14 We have not seen or heard any evidence to that. I would
15 just say one more time, there's unfortunately no
16 credibility that can be had to Betty Farrell's statements.
17 The family court found just the same. This is really a
18 situation where the -- there was an agreement between two
19 parties, years later attempted -- attempts to backtrack
20 that agreements.

21 The State improperly came in and tried to exert
22 some kind of control over it by saying that there was
23 fraud and that there was knowledge that this was due to
24 the State and there has been literally no evidence to
25 support that as Exhibit 6 and 7 actually show as admitted

1 by the auditor and prior statements of the Board in and of
2 itself.

3 I would just point out that subdivision (b)(2) of
4 1702.5 regulation says that a person has willfully failed
5 to pay the -- it says it must be proven that, quote, "A
6 person has willfully failed to pay the taxes or to cause
7 them to be paid only when the Board establishes all of the
8 following: On or after the date that the taxes come due,
9 the responsible person had actual knowledge that the taxes
10 were due but not being paid. And when the responsible
11 person had actual knowledge as defined in A, the
12 responsible person had the ability to pay the taxes but
13 chose not to do so."

14 Neither of those elements have been supported
15 here. There's no actual knowledge that the statute of
16 limitations had run for some time. And it's a dearth of
17 purported evidence to try to put responsibility and really
18 paint Mr. Farrell and IPG in a false light here to try to
19 get this penalty paid.

20 I would just note once more -- or one more thing
21 I should say, that IPG was not trying to hide this. As
22 noted at page 7 of the Appellant's opening brief, the
23 Department prepared an IPG reaudit report on January 31st,
24 2008 -- that's Exhibit 9 of the record -- to reduce the
25 measure of tax for IPG's purchases of fixed assets based

1 on a D&R that Appeals issued to IPG on December 18th,
2 2007. No adjustment was made to Audit Item Number 3,
3 which includes the Gap refund measure of minus or negative
4 \$4,902 -- \$902,559 because the earlier refund was not
5 considered an issue.

6 There was nothing here or within the statute of
7 limitations that IPG or Mr. Farrell were informed that
8 there was any kind of an issue or any amount due one, to
9 Gap, but much less and more importantly to the State.

10 And with that I submit.

11 JUDGE LONG: Thank you, Ms. Pickett.

12 CDTFA, do you have any closing statements before
13 we adjourn?

14
15 CLOSING STATEMENT

16 MR. CLAREMON: Yeah. I just want to add one
17 other thing. It's not really a closing statement. But I
18 do think that -- something we do not address in the -- in
19 our statement is that the existence of the IPG audit on
20 other issues that they had their own -- they had their
21 liabilities as evidenced by Exhibit CC and as discussed in
22 Exhibit N, the report of discussion of audit findings,
23 provides context to the communication attached to Exhibit
24 U, between the representative and IPG.

25 As you can see in the -- it's attached to Exhibit

1 H, the dual memorandum, IPG actually went through a full
2 audit appeal on those other issues. And the -- there's an
3 appeals conference held in 2007, and a decision issued in
4 that case. And when you look at the statements in
5 Exhibit U where the customers's representative is
6 memorializing his conversation -- his apparent phone
7 conversations with the Appellant, you can see that the
8 existence of the audit case is giving cover for why
9 apparently the refund, again, this misleading kind of
10 notion that the refund was never received.

11 And you can see that's clear from Exhibit U. And
12 this didn't come out of the blue in 2010, and that
13 existence in the other case gives that context of they
14 were checking, and you can see from Exhibit U that the
15 belief, was caused by Appellant, was that the existence of
16 this other audit case, which was still ongoing that went
17 through the appeals process, was what was holding up the
18 refund claim. So there is -- like, that is the context of
19 why they could reasonably believe there was a delay in
20 getting this refund. And I just wanted to add that.

21 MS. FARRELL PICKETT: Can I quickly respond with
22 one -- with just one brief statement?

23 JUDGE LONG: Sure.

24 MS. FARRELL PICKETT: Okay. Thank you.
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13 This would have to be a mastermind of tax nuanced
14 liability attempt conspiracy to try to pull the wool over
15 the eyes of both Gap and the State of California as it's
16 being told by the CDTFA, and there's nothing to support
17 that, nor would any -- it really would be believable that
18 a common businessperson who has no tax experience would
19 somehow see a way to try to do this as it's being
20 portrayed by the CDTFA. This just seems like a very
21 outlandish story.

23 JUDGE LONG: Thank you.

25 | Are my co-Panelists ready to close this appeal?

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Judge Kwee?

Judge Ridenour?

Yes. Excellent.

Then this case submitted on Tuesday,
October 15th, 2022. The record is now closed.

Thank you everyone for coming today. The judges
will meet and decide your case later today, and we will
send you a written opinion on our decision within 100 days
after the record is closed, or today in this case.

Today's hearing in the Appeal of R. Farrell is
now adjourned.

Thank you.

(Proceedings adjourned at 10:37 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 14th day of December, 2022.

ERNALYN M. ALONZO
HEARING REPORTER