

IN THE MATTER OF THE APPEAL OF:)
)
M. HAYER,) OTA NO. 19034560
)
)
) APPELLANT.
)
)

TRANSCRIPT OF PROCEEDINGS
Sacramento, California
Wednesday, November 16, 2022

Job No. :
39134-OTA REV

1 BEFORE THE OFFICE OF TAX APPEALS

2 STATE OF CALIFORNIA

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5 IN THE MATTER OF THE APPEAL OF:)
6 M. HAYER,) OTA NO. 19034560
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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 11:30 a.m. on Wednesday, November 16, 2022,
19 reported by Inez Deorsene, Hearing Reporter
20 in and for the State of California.

1 APPEARANCES:

2
3 Panel Lead: ALJ KEITH LONG

4
5 Panel Members: ALJ NATASHA RALSTON
6 ALJ MIKE LE

7 For the Appellant: R. TODD LUOMA, ATTORNEY
8 M. HAYER

9 For the Respondent: STATE OF CALIFORNIA
10 DEPARTMENT OF TAX AND FEE
11 ADMINISTRATION
12 NALAN SAMARAWICKREMA
13 CHRISTOPHER BROOKS
14 JASON PARKER
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I N D E X

E X H I B I T S

(Department's Exhibits A-F, J-N were received at Page 6)

(Department's Exhibits L, M, and N were partially
received at Page 7)

(Appellant's Exhibit Nos. 1-7 were received at Page 7)

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BY MR. SAMARAWICKREMA	39

APPELLANT'S WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
MANJINDER S. HAYER	21	NONE	NONE	NONE

C L O S I N G A R G U M E N T

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1 Sacramento, California; Wednesday, November 16, 2022

2 9:30 a.m.

3
4
5 JUDGE LONG: We are opening the record in the
6 Appeal of M. Hayer, the OTA Case Number is 19034560. This
7 matter is being held before the Office of Tax Appeals.
8 Today's date is November 16, 2022, and the time is
9 9:38 a.m. This hearing is being convened at Sacramento.

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. Judge
13 Natasha Ralston and Judge Mike Le are the other members of
14 this tax appeal's panel.

15 All three Judges will meet after the hearing and
16 produce a written decision as equal participants.

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

21 For the record, will the parties please state
22 their names and who they represent starting with
23 Appellant?

24 MR. LUOMA: My name is R. Todd Luoma, and I
25 represent Manjinder Singh Hayer, who's with me on my

1 right.

2 JUDGE LONG: Thank you.

3 And CDTFA?

4 MR. SAMARAWICKREMA: Nalan Samarawickrema,
5 Hearing Representative for the Department.

6 MR. PARKER: Jason Parker, Chief of Headquarters
7 Operation Bureau with CDTFA.

8 MR. BROOKS: Christopher Brooks, Tax Counsel for
9 CDTFA.

10 JUDGE LONG: Thank you.

11 With respect to preliminary matters, I understand
12 we have one witness today, Mr. Hayer.

13 In addition, there are several exhibits for this
14 appeal.

15 First, CDTFA's Exhibit's A through N need to be
16 discussed. At the prehearing conference, OTA did not
17 accept Exhibit G, titled, some documents exchanged during
18 the appeals process based on the determination that
19 admission will necessitate undo consumption of time.

20 Additionally, Pages 1 and 2 of Exhibit L, Pages 1
21 through 3 of Exhibit M, and Exhibit N, were not accepted
22 as they were briefs and therefore not evidence. These
23 briefing documents remain part of the administrative
24 record. The remaining exhibits are admitted without
25 objection.

1 (Department's Exhibits A-F, J-N were received
2 in evidence by the Administrative Law Judge.)

3 (Department's Exhibits L, M, and N were
4 partially received into evidence by the
5 Administrative Law Judge.)

6 JUDGE LONG: Additionally, Appellant submitted 1
7 through 7, which were -- are also admitted without
8 objection.

9 (Appellant's Exhibit Nos. 1 through 7 were
10 received in evidence by the Administrative Law
11 Judge.)

12 JUDGE LONG: Before we go on, I want to make sure
13 that I summarize these things correctly. CDTFA, did I
14 summarize your exhibits correctly?

15 MR. SAMARAWICKREMA: Yes.

16 JUDGE LONG: Thank you.

17 And Mr. Luoma, did I summarize Appellant's
18 exhibits correctly?

19 MR. LUOMA: Yes, Your Honor.

20 JUDGE LONG: Thank you.

21 At the prehearing conference, Appellant conceded
22 to unreported taxable sales of \$1,091,810 as reflected in
23 Appellant's June 25, 2021 brief.

24 Additionally, Appellant clarified that although
25 the amount of Appellant's claimed money orders, as

1 reflected in Appellant's Exhibit 6, is less than the
2 amount of nontaxable sales of money orders reflected in
3 CDTFA's audit. The amount of nontaxable sales of money
4 orders are not in dispute. However, Appellant stated that
5 the total amount of unreported taxable sales that derived
6 from Exhibit 6 is correct.

7 Mr. Luoma, is that your understanding of what
8 happened at prehearing conference?

9 MR. LUOMA: Yes, Your Honor.

10 JUDGE LONG: CDTFA?

11 MR. SAMARAWICKREMA: Yes, Judge.

12 JUDGE LONG: Great. There are three issues in
13 this Appeal. They are: One, whether Appellant has
14 established that any further reduction to the amount of
15 unreported taxable sales is warranted; two, whether
16 Appellant was negligent; and three, whether relief from
17 the finality penalty is warranted.

18 This hearing is estimated to take approximately
19 two hours. It will begin with the taxpayer's opening
20 presentation and witness testimony.

21 Before you start, I would like to -- I need to
22 swear in the witness.

23 ///

24 ///

25 ///

1 MANJINDER SINGH HAYER,
2 called as a witness on behalf of the Appellant, having
3 first been duly sworn by the Administrative Law Judge, was
4 examined and testified as follows:
5

6 MR. HAYER: Yes.

7 JUDGE LONG: Thank you.

8 Does anyone have any final questions before we
9 begin with our opening presentation?

10 Mr. Luoma?

11 MR. LUOMA: I have somewhat of an odd request.
12 Mr. Hayer now is back from India, and today, he brought a
13 box from one of the months of the audit period. The audit
14 period being 2007, '08, and '09, and he's advised me that
15 he has boxes for each month for each period in the audit
16 period that includes all of the cash register tapes, all
17 of the daily reports, the summaries.

18 I don't know if CDTFA or at that time, the Board
19 of Equalization had access to those records for audit
20 purposes, but those records would represent the most
21 direct method of accounting for -- for audit purposes as
22 opposed to the bank deposits analysis, which of course is
23 an indirect method.

24 So my request is that the case be sent back to
25 CDTFA to be considered.

1 JUDGE LONG: Okay. First, I have to ask
2 Mr. Hayer. Were these documents submitted during the
3 initial audit?

4 MR. HAYER: Your Honor, I left to U.S. in May
5 2006 because I was depressed from the business affairs and
6 all that, and I stayed in India until 2015. I only came
7 in 2009 when my wife filed for divorce.

8 And back in India, I got implicated into some
9 false cases, which didn't allow me to travel back. So, at
10 that time, I filed a request to give me permission. I got
11 a permission to come here, resolve that issue for four
12 months. I'm not aware what happened during that.

13 It's my assumption that my dad didn't know what
14 he's doing, and my wife pretty much knew. But in 2009,
15 she filed divorce, took the kids, and left family, and I
16 wasn't planning to come back, honestly.

17 The day my dad had a stroke in 2015, December --
18 April 22nd, that's the day I came back; same day. I got a
19 ticket, came back to take care of my father. Then, I took
20 him back to India after rehab. So he's staying in India
21 with me.

22 During my marriage, property stuff whatever, you
23 know, she wanted to take the store back. I gave it to her
24 in our final judgement at the family hearing. She said,
25 "You give me the store." So I write it off. I say, "You

1 can have it. You can take care of the taxes."

2 But after a year or so, I found out that she's
3 not taking part into it. So that's when I asked Mr. Luoma
4 to get involved again. I came back and then she gave me
5 back the store again, my portion.

6 I think nobody looked into these boxes. I'm sure
7 they can probably verify that. As far as I know from my
8 manager at that time, I asked him what happened and all
9 that, and nobody went through these boxes, which is
10 reports from our gas registers, POS reports from inside
11 POS NCR reports and all that. Everything was documented,
12 and that's what it used to go to our sales accountant here
13 in Sacramento.

14 And I believe nobody went through those actual
15 boxes, which should have been the right way to do this
16 audit, to see black and white. Rather than -- they went
17 through these statements. It's even hard for an owner to
18 go through the statement and find out what is what, you
19 know, Anton is their every day, hands on.

20 And it's most -- I believe it's most of
21 assumption. You know, they didn't even know -- even when
22 I read their briefs last time.

23 A lot of ATM monies are coming in -- what is
24 what? The sales ATM or this is cash ATM? You know --
25 plus the Lotto machine, Scratcher machine, which you take

1 the cash out. That didn't ring up on registers.

2 ATM machine does not -- that money does not, you
3 know, that -- that's additional money from the sales. You
4 don't make any money on that. You don't make money -- any
5 money on Scratchers or Lotto. You don't make any money on
6 money orders. So that's why I'm trying to exclude that.

7 JUDGE LONG: I understand your position with
8 respect to that. Right now, we're just discussing the
9 actual boxes themselves and I --

10 MR. HAYER: I believe they weren't audited.

11 JUDGE LONG: -- okay. And so you're here in
12 2015, and you went back to India. When did you go back to
13 India?

14 MR. HAYER: I think in September 2015, I took my
15 dad after his rehab back to India because I can personally
16 take care of him back there, you know.

17 JUDGE LONG: And you stayed here for -- stayed
18 there for the entire time?

19 MR. HAYER: Two -- two to three months, yes.

20 JUDGE LONG: Two to three months. So --

21 MR. HAYER: From the day I came -- when he was
22 hospitalized here in Citrus Heights, I stayed with him. I
23 had him do his rehab, and after he was okay and cleared by
24 doctors, I took him back to India.

25 JUDGE LONG: Okay. And Mr. Luoma, why didn't you

1 try to submit these documents before today?

2 MR. LUOMA: I was not aware that they existed.

3 JUDGE LONG: Okay.

4 MR. LUOMA: He -- just for a little bit of
5 history, the original petition in this matter filed with
6 the Board of Equalization was by Bill McDevitt, who is a
7 non-attorney representative. He is an enrolled agent,
8 former IRS special procedures individual, and so he filed
9 a petition, which was originally filed late, and then he
10 recommended that I pick up the case because he didn't
11 think he could handle the sales tax issues.

12 I then did the representation, was unaware that
13 what boxes were available. Had I known -- and I talked to
14 the CPA, who was not exactly helpful to the case because
15 he was nonresponsive. And that's not Mr. McDevitt, that
16 was --

17 MR. HAYER: Mr. Eldridge?

18 MR. LUOMA: Yes.

19 MR. HAYER: Richard Eldridge?

20 MR. LUOMA: Richard Eldridge. And so I wasn't
21 even aware that the boxes existed. And yesterday, I met
22 with Mr. Hayer to discuss it and that's when he said he
23 had these boxes, and he brought one of boxes today as a
24 sample. So, you know, if I don't ask for the -- the
25 relief, you know, I know we're not going to get it. So

1 that's why I'm asking that it be sent back.

2 And while I represented Mr. Hayer through the
3 first hearing at the Board of Equalization, he then
4 engaged a former Board of Equalization member to represent
5 him through the -- the next step.

6 And then that's where there's some issues about
7 whether or not the taxpayer and the representative were in
8 agreement. So Mr. Hayer rehired me to come back in, and
9 I've been on the case since OTA.

10 JUDGE LONG: Okay. And so OTA's not able to
11 order CDTFA to make a re-audit at this time, but we can
12 ask CDTFA if they would like to review this documentation
13 and perform a re-audit.

14 CDTFA?

15 MR. SAMARAWICKREMA: According to the Exhibit A,
16 Page 128, the Audit Report says they will -- the
17 Department received a PNO statement, General Ledger, bank
18 statements, purchase invoices, check stubs, monthly sales
19 spreadsheets, daily point-of-sales reports, buy-down
20 summaries from cigarette manufactures, fuel-sales
21 summaries, and purchase invoices from vendors.

22 So what are the new information that the
23 Appellant is providing today in addition to this
24 information?

25 MR. HAYER: When I read the brief, Sir, they

1 didn't go by the actual sales from the invoices, like
2 printouts?

3 JUDGE LONG: Right. I -- I understand that. But
4 the question isn't how did CDTFA perform its audit? It's
5 what is new in the boxes that you gave us -- or that you
6 brought today when compared to the items that CDTFA just
7 listed?

8 MR. HAYER: Can I -- Can I just go through the
9 box and show you a couple things?

10 MR. LUOMA: You could just start --

11 MR. HAYER: My -- my issue is that they have not
12 gone by the actual sales.

13 How could somebody forge or change something from
14 the actual receipts? Like, for example, gas reports.
15 They get printed twice a day when the shift changes.

16 So it's like employees with double shift,
17 employees change, their register gets closed, and all of
18 that and an end of day report is -- that's what we go by.

19 The numbers they are coming up with they tell
20 today, they didn't know what ATM, or Scratcher monies,
21 money order money -- they added all that into the total.

22 JUDGE LONG: Sir, again, we're not even close to
23 arguing our case yet.

24 MR. HAYER: Okay.

25 JUDGE LONG: Just wanted to discuss what is in

1 the box that is new when compared to the list of things
2 that CDTFA just stated?

3 MR. HAYER: It's -- It's the actual sales
4 reports -- the numbers -- actual sales numbers of what
5 should have been audit based on.

6 MR. LONG: And are there supporting documents in
7 addition to those sales reports?

8 MR. HAYER: Yes. Every -- Every report --

9 JUDGE LONG: Such as POS reports, etc.?

10 MR. HAYES: -- yes. Yes.

11 JUDGE LONG: Okay. CDTFA?

12 MR. SAMARAWICKREMA: We -- we reviewed the
13 information and during the field work the -- and mainly,
14 the unreported taxable sales of 4.3 million coming from
15 over-claim exemptions.

16 Appellant did not bring credit card fuel sales
17 paid at the pump, and also, Appellant did not report their
18 first cash sales at the store. So most of the sales are
19 not recorded in the POS or even if it is report --
20 recorded, it was recorded as nontaxable.

21 So if the Appellant is providing the same periods
22 data -- and during our presentation, we will explain
23 exactly how we did the audit and what we found. And it is
24 our position at this point that whatever information that
25 the Appellant is going to provide, he's also -- he would

1 have at the time of the field work.

2 JUDGE LONG: Okay. Thank you.

3 So CDTFA is not going to complete a re-audit, so
4 we'll move forward with the Arguments.

5 Mr. Luoma, you have 50 minutes, and you may begin
6 when you're ready.

7
8 PRESENTATION

9
10 MR. LUOMA: Thank you, and good morning to the
11 panel.

12 As I stated, my name is Todd Luoma, and I
13 represent Mr. Hayer as one of the partners. Actually, I
14 represent Lakeside Market, which is the sales tax paying
15 entity, and Mr. Hayer is one of partners in the -- in the
16 business.

17 And through the process of filing the Appeal with
18 OTA and trying to minimize the number of issues to be
19 addressed, we made a concession on fuel sales and on an
20 excess amount of deposits that we agreed would be reported
21 or would be considered unreported income.

22 But the balance of the receipts or the deposits
23 in the bank -- because the -- both sides did bank deposits
24 analysis, which is an indirect method of audit as opposed
25 to a direct method, which of course, you know, the box

1 that we've got here and the other 35 boxes, would be a
2 direct method of auditing because its got the cash
3 register tapes. So every sale would show up, as well as
4 the point-of-sales, the daily summaries, the monthly
5 summaries, all that would be there.

6 But we are aware of where we are right now and
7 we're down to the bank deposits analysis. And our
8 starting point for the bank deposits analysis was the
9 revised decision and -- or the supplemental decision and
10 recommendation where there was 4 million plus in the
11 nature of unreported income based on the bank deposits
12 analysis that the CDTFA, or at that time, the Board of
13 Equalization had conducted.

14 And then our focus has been on the addressing the
15 various issues where the deposits were nontaxable type of
16 deposits.

17 And the four categories that we addressed in the
18 briefing and in our spreadsheet, which was originally the
19 -- our Exhibit G, which was revised through the briefing
20 process, and that was the spreadsheet that was provided
21 electronically to the OTA.

22 Those items include ATM deposits, the money
23 orders, the Lottery Scratchers and transfers between
24 accounts including transfers from personal credit cards
25 into the bank accounts of the -- of the business.

1 During the course of the prehearing conference,
2 Judge Long raised the question about the ATM deposits, and
3 you know, the question was how do you feed the ATM
4 machine? And my position in the Brief was, it doesn't
5 matter how the ATM machine is fed. The real question is
6 the deposits, since that's what we're talking about.
7 We're talking about deposits in the bank, and the manner
8 in which an ATM deposits is done.

9 A customer comes in, sticks his debit card or his
10 credit card into the machine, pulls out something multiple
11 of 20s -- the \$20 minimum, or multiples of 20s, and at the
12 end of the day, the business closes out the account.

13 The processor then collects the money from the
14 customer's bank account or credit card and then processes
15 and then deposits in the bank account -- it's just like
16 any other merchant -- in the bank account of Lakeside
17 Market.

18 And we had calculated what all those were over
19 the audit period, and CDTFA and prior, Board of
20 Equalization did not provide any reduction in the amounts.

21 ATM deposits or deposits from the merchant
22 account -- merchant processor are not sales of tangible
23 personal property and therefore can't be subject to sales
24 tax. And so the deposits that go into the bank account,
25 that's the real question.

1 CDTFA raised an issue of -- well, how do they
2 feed that -- that -- the ATM machine? And my response was
3 that's a red herring. Who cares how it's fed, because
4 it's the deposits that we have into the bank from the
5 merchant processor that was included in purported
6 unreported sales when they were not sales.

7 And the total on the ATM was \$1.5 million over
8 the audit period. So that's 1.5 million that the CDTFA
9 said is unreported sales; but, there were no unreported
10 sales.

11 Then, the question is -- they raised the issue in
12 response to a supplemental brief that I filed in response
13 to the request by the OTA; yet, they didn't provide any
14 evidence saying that, you know, unreported sales cash was
15 used to fill the ATM. Mr. Hayer will testify as to the --
16 how that was filled, but the real question is, where's the
17 evidence from the OTA other than a statement?

18 So they -- they want to include \$1.5 million
19 of -- of deposits coming from the merchant processor as
20 subject to sales -- sales tax, sorry.

21 And then for the money orders, I think that
22 issue's been resolved. The CDTFA agreed that there was
23 368,000 of money order sales that they backed out. The
24 Lottery Scratchers, those total 141,000, and the transfers
25 between accounts is 1.1 million.

1 We've detailed through the -- through the
2 briefing process what all those transfers were, and in
3 many cases, the -- if the Lakeside Market was going to go
4 with a negative balance in their account, Amrik Hayer,
5 Manjinder Hayer's father, he would go down and make a
6 deposit, drawing on a credit card.

7 And those are all representatives I lay out in --
8 in the final brief that I submitted. They're large dollar
9 numbers with all zeros was 15,000 or 31,000, and I tied
10 those particular deposits to the timing of the account
11 going to a zero or negative balance. They wanted to avoid
12 that happening.

13 So ultimately, again, considering the 380,000
14 that's already been conceded by CDTFA, there's a balance
15 of 2.8 million made up primarily of ATM deposits and the
16 transfers between accounts that were treated as unreported
17 sales when they weren't sales at all.

18 Okay. I'd like to ask a few questions of --of
19 Mr. Hayer so that we're now a part of the record beyond,
20 you know, my request to start the hearing day.

21 I'd like Mr. Hayer to briefly describe the
22 process; although, since he was in India, he can relate
23 only what is -- what he was told by his -- by his father.

24 ///

25 ///

1 DIRECT EXAMINATION

2 BY MR. LUOMA:

3 Q So if you'd describe what happened in the audit?

4 A Well, the audit -- I already told -- are you
5 asking me, particularly, the whole process of audit?

6 Q Yes. I know we kind of started addressing it,
7 but that wasn't quite -- you know, -- that was part of the
8 argument that the Judge preferred us to wait on. So now
9 you can make -- make your statement?

10 A Okay. Well, like I said, I was in India at that
11 time. My dad wasn't a hands-on guy to run the store; I
12 was the one.

13 But when I was depressed, and I realized I had to
14 take a different path. So I went on my spiritual path. I
15 left everything. I told -- my manager wanted to buy the
16 business. I told my parents, and they said, "No, we don't
17 want to. We want to keep it." I said, "Then I'm leaving.
18 I don't need anything."

19 So I left everything. I didn't take anything. I
20 walked away from here, and I spend all these years on my
21 spiritual path since then, and I needed a happiness.

22 I was number six in all U.S. Century 21 in
23 commercial region when I left. I left everything. All
24 my -- you know, -- whatever I was doing. I was very
25 successful; but I wanted peace. I couldn't go to sleep

1 every night. I'll take -- drink about a bottle of liquor
2 to go to sleep for a few hours, and then I wake up, and
3 I'm going through same stuff.

4 So I -- one day, I searched on Google, like,
5 "What is depression?" This friend of mine gave me some
6 medication, and I started seeing a psychologist; but, I
7 went for a month or two. Nothing changed. Everything
8 stayed the same. So one day, I searched, "What is
9 depression?"

10 So I'm a Sikh by religion. So something popped
11 up on the thing. Its site was waheguru.com. From our
12 Fifth Guru it say's, "When you are afraid of losing
13 something precious, you get depressed."

14 So I got what was bearing me down. There was our
15 store, it was losing money. It wasn't making anything.
16 We were trying to, you know, put money from our credit
17 cards and everything and it's still not making it. So
18 that was one of the reasons.

19 And I started doing meditation from the same day,
20 downloaded some stuff from that. Within one week, I was
21 out of depression. That's when I realized I need to
22 change my path. So I left everything. I walked away. I
23 never asked my parents to give me money, do anything.

24 I lived in India, like, from one temple to
25 another or it's more like a "Gurdwara", but you guys

1 probably wouldn't understand by temple word because that's
2 what a lot of people know by.

3 So in 2009, that's when I came back. I heard
4 from my parents the audit is going on and my wife, AJ, she
5 was taking care of it. But in 2009, suddenly she took the
6 kids and left the family, you know, walked away from and
7 left them alone.

8 So I -- I think there was a communication gap
9 between -- if I would have been here, I would have handled
10 it very well. I would show them what they needed to see
11 or whatever the issue was, because I was the one, when I
12 left the day-to-day operations, handing, telling my
13 employees or managers, or whatever how things were
14 handling; right?

15 So after I left, they were pretty much running it
16 but no direction. So I think they were unable to answer
17 their question, or whatever happened, I'm not aware; but
18 this -- these boxes were the first step. Anybody -- when
19 they did the audit they should have gone through, which I
20 believe they didn't.

21 And I also heard the gentleman saying that
22 outside credit card sales weren't in. They were in; every
23 day. There's two merchants -- we have two merchant
24 accounts. One from gas sales outside and one grocery
25 store sales inside. They all go in the same account at

1 the end of the day. Maybe not the same day, but next day
2 or next to next, like on weekends -- on Monday's you get
3 three deposits in.

4 So everything was in there. There's -- there's
5 no unreported sales. As far as I know, we have not done
6 anything wrong. What happened here is a miscommunication
7 or lapse between the parties to communicate the real issue
8 of what it was. So that's how this whole stuff started.

9 If they would have gone through the boxes, they
10 would have looked at daily reports and all that. The
11 number would match what we showed it to our accountant.

12 The boxes -- we fill out at the end of the month,
13 they'll go to the accountant, who'll go through every
14 single invoice, match it with the checks returned and all
15 that.

16 And also, I would like to mention, we didn't --
17 in the briefs, I didn't notice that the one million or so
18 that's coming over that is because we were doing a lot of
19 check cashing, and I have nothing to support that. We
20 would cash checks; they would also go into the bank.

21 So that -- that is also that additional -- if
22 anybody who's -- has run a business, they would understand
23 what I'm trying to say.

24 So that is added extra cash into the account; but
25 today, I have nothing to support that. At that time, I

1 want to show them from even the current time, at that
2 time, this is we do. We submit our checks and all that.

3 People, you know, they bring in at the store
4 because it's a grocery store, and people -- they get their
5 welfare checks and their paychecks, all that. We used to
6 cash all those. We're not doing that anymore, but at that
7 time, we used to do that.

8 So that million dollar -- whatever that's coming
9 over that is partly that, but -- but I don't have anything
10 to support other than admitting, like, okay, you know,
11 it's over.

12 Q Okay. I have a few questions about some of the
13 specifics such as the -- the ATM just so that the -- the
14 panel understands the process.

15 Could you describe the customer coming into the
16 store using the ATM to withdraw cash, and then how that
17 ends up being deposited back into your account?

18 A Yes. This ATM machine is separate from our
19 check-stands. Like, where our customers buy groceries and
20 stuff is a separate machine set up in the store, which we
21 refill. And like I said, we do check cashing, money
22 orders, and this ATM machine that was not a part of our
23 sales. We never did anything with the actual sales on
24 that end.

25 So we would deposit money from check cashing,

1 which we weren't ringing up on registers. Money orders we
2 weren't ringing up because we didn't want our employees to
3 handle it. It was only handled by one of the -- of the
4 family members or the manager, because anybody knows that
5 there's a lot of people who come with the fake checks and
6 all that. So somebody who's doing it, they have to have
7 the knowledge. Plus, money orders is -- anybody can issue
8 it and go cash it, so it will go from our pocket. So we
9 would have a really close control on that.

10 So we were using, like, two -- we had, like,
11 50,000 or so on hand, which was used to use for our check
12 cashing, money orders, and fill this ATM machine.

13 We would sometimes switch checks with our actual
14 sales on grocery side of gas side to get that much cash
15 out to this 50,000, so we have on hand to refill our
16 machine and all that. But it was going from that money.
17 It was not going from sales money.

18 And other two -- like I say, Worldpay pays our
19 inside store sales and gas sales. That -- that is our
20 merchant -- merchandiser for actual sales, gas sales.

21 You will see on the statements two deposits every
22 day. One for gas that goes in all credit cards used at
23 the pumps, or any credit card or ATM used inside. So
24 there was two separate accounts for that -- for the cards.

25 So we get -- every day we get two deposits from

1 whatever's used in our accounts because they were on a
2 different level of discount rate. Grocery discount rate
3 was not lower. We were paying 1.25 percent on that. Gas
4 is a lot higher. We were paying, like, two to three
5 percent on top of whatever they would use. So there was
6 two separate accounts.

7 And this third one machine, it is a totally
8 different deposit that goes into the bank. We will
9 sometimes withdraw from there. We will switch our check
10 cashing checks. They came in, we cash it. We will swap
11 it with the cash from actual sales to fill that, but that
12 was not part of the sales to go into that ATM machine.

13 Q So you're saying you used the nontaxable source
14 of cash or put -- exchanging the -- the checks cashed for
15 the funds used to --

16 A Cash from the grocery store or of gas sales
17 account site for the check cashing. We would swap it --
18 will deposit those checks into the grocery account or gas
19 account and take that much cash from that to bring it
20 towards this 50,000 we have cash for check cashing and ATM
21 machine.

22 Q And as far as the cash that you swapped the
23 checks for, those were cash sales that were rung up and
24 reported for sales tax purposes?

25 A I'm sorry. Say that one more time.

1 Q The fund of cash that you swapped the -- the
2 checks for --

3 A Right.

4 Q -- they came out of the register, that cash?

5 A Sometimes, we will do that from that. Sometimes,
6 we will withdraw it from the bank. Sometimes, we will
7 withdraw if from our personal accounts to fill -- keep
8 that up to date.

9 If you noticed -- if I were able to do -- show
10 you the reports from our credit cards back then, you'll
11 see how much badly we were in debt.

12 If I were making the money they are wishing on
13 the paper that I was, I wouldn't be in India today. I
14 would be still living a lavish life here. I walked away
15 from everything.

16 Q All right. Just a follow-up question on the --
17 the cash from the register that was used that you swapped
18 the checks for?

19 A That -- that has been reported into the sales.

20 Q Okay.

21 A The sales are reported already on the machines if
22 there's a cash there, right? And here's our check
23 cashing, which we are doing check cashing, money orders,
24 and filling the ATM machine. So if we have check sales,
25 we will swap it with the cash here, deposit these checks

1 into the account and take that much cash into this -- our
2 extra deposit money for ATM or check cashing.

3 Q But that cash that you put into the ATM --

4 A Yes.

5 Q -- in that transaction --

6 A Yes, but that was not a sales cash. You see what
7 I'm saying?

8 Q I understand. But the source of that cash, you
9 reported for sales tax purposes on the sales of tangible
10 personal property; correct?

11 A Yeah. That has been already been reported from
12 the sales.

13 Q Okay. Now the transfers between accounts --
14 there was like 1.1 million plus for the transfers between
15 accounts. What kind of accounts were those transfers
16 between?

17 A When most of those transfers are done after my
18 wife left. I mean she was on the account, and what
19 happened, she cleaned all the accounts the day she left.
20 She even made some money orders, she cashed it, and just
21 all that. The accounts were depleted, and my father was
22 running around.

23 So that's when we opened two new accounts, and he
24 would start putting the money into those new accounts
25 because that is a long process.

1 These Worldpay Merchandising -- all that was in
2 my name. Like, sales tax permit is in my name. So my dad
3 couldn't do nothing until I came back, and so he opened
4 two accounts.

5 So he would deposit that money into these
6 accounts, and he would transfer -- okay, there's a 30,000
7 due for gas load today; right? They're going to pull --
8 so he'll transfer that much money into it.

9 I'm trying to keep that balance on that previous
10 new or old accounts to be very low so she cannot take
11 anything out of those accounts.

12 Q Okay.

13 A By then, we also reported to the, you know, bank
14 and all that and took her out of the account so she
15 couldn't that anymore.

16 But I noticed when I came back even later, she
17 was taking -- paying her, like, credit cards and all that
18 from the store, which my dad he's not like -- he didn't
19 know nothing about it. This -- I found it when I came
20 back in 2009 with the permission from the government. So
21 that -- that's why that happened.

22 Those transfers are within the accounts. It's
23 not like those transfer from one account to another. We
24 still do that sometimes if one account within two many
25 accounts checks. So we will transfer from or gas account

1 to cover that particular check so it doesn't get bounced.

2 Q Did you ever use personal funds or credit cards
3 to make deposits into the business account?

4 A We always did. We were not aware of this fact
5 that we should have go -- got to go by the dotted thing.
6 It's my first business I purchased. I have no prior
7 experience to this. I -- I'm going by those books that
8 this is my actual sales. This is what I'm supposed to
9 report. I'm not aware of the fact that I shouldn't be
10 doing this.

11 And I'm sure there's a lot of other people
12 doing -- making the same mistakes. They don't know
13 that and until -- unless somebody, you know -- audit
14 happens.

15 And I'm sure because I asked a couple peoples
16 about this, and they said when audit happens with them,
17 the Board of Equalization had them write an affidavit, and
18 they kind of took care of it without penalizing them.

19 But only problem in my case is I wasn't here to
20 represent myself and like I said, now is -- we're at a
21 stage where it's kind of too late for me, but I -- I'm
22 getting penalized for something which I haven't done.

23 Q All right. And far as -- when would you use
24 personal funds or your credit card to make deposits into
25 the business account?

1 A Whenever we checked that -- okay, we wrote extra
2 checks, and there's not enough money and the bank would
3 sometimes call. "Hey, this check came in and you don't
4 have enough funds. Do you want to make a quick deposit?"
5 So we will look at whatever check or credit card we have a
6 better rate or not, and on top of that we deposit that.

7 And sometimes, we would also do credit card
8 transfers based on -- okay, this credit card has a better
9 rate. They send you offer and you deposit that into the
10 account and pay the other credit cards from that account,
11 you know, so a lot of that happened too. That is one of
12 the reasons this audit is based on deposits, particularly,
13 in my -- my case is totally out of the, you know, whack.

14 Q Did -- when you made the credit card deposits, or
15 do you use personal funds, did you go to the bank -- and
16 again this is 2007 to 2009 -- to make those deposits?

17 A That was the trend even before I left in 2000 --
18 May 2006. Whenever it needed to be, I used my credit card
19 or my dad's credit card. We look at who can -- has a
20 better rate. We'll pay each other's credit card, and we
21 will take that offer and deposit it into the bank and
22 write the check to pay off some other check at the same
23 time.

24 That -- that is another reason these numbers are
25 high because there was a lot of credit card transactions --

1 personal, like, putting the money into the account.

2 Then you got -- okay, we got a zero percent APR, or we got
3 a 2.9 whatever based on that time. I don't remember much,
4 but then we will take that offer, deposit that into the
5 bank, and pay that from the store account.

6 So that also made our deposits go up, and I'm not
7 aware of that at that time, you know, that I'm not
8 supposed to do that.

9 With you guy's experience, you probably know more
10 than I do that how it -- this happens with a normal
11 person, who doesn't understand how they should have played
12 their business accounts and all that. I can just tell you
13 what my -- what happened with me.

14 Q But you were able to -- when you did the bank
15 deposits analysis, you were able to determine what those
16 personal credit card or personal cash deposits were;
17 correct.

18 A I were able to do some, but there's probably some
19 many others which I couldn't because I don't have records
20 of that, and it's hard to recognize some of that at this
21 stage, you know. If I had my bank statements or like my
22 credit card statements from then, I -- I probably would
23 have been -- it been easier.

24 But when I left, I left with a lot of debt. I --
25 I had no money to pay and all that. My credit got screwed

1 and it was -- it was just a mess for me. I needed peace.
2 So I -- I said to hell with it. I -- I need peace. So I
3 walked away from it.

4 My parents wanted to keep it. It was within the
5 family, so I said, "Okay. That's fine. You guys run it."
6 But they weren't capable of running it.

7 And I'm very spiritual guy. I -- I -- I cannot
8 take one dollar from somebody. I came in U.S. in 1992.
9 Till today, I have not got one dollar in -- in sport from
10 the government.

11 I worked for my living either here or in India.
12 My family never ever -- not even one dollar from
13 government in assistance of any kind. It will hurt my
14 pride.

15 MR. LUOMA: No further questions at this time.

16 JUDGE LONG: Thank you. Thank you.

17 Does CDTFA have any questions for the witness?

18 MR. SAMARAWICKREMA: No, we don't.

19 JUDGE LONG: Okay. Thank you.

20 Before we move forward with CDTFA's presentation,
21 I have a few questions, and I'd also like to give my
22 co-panelist the opportunity to ask questions.

23 Judge Ralston, do you have any questions?

24 JUDGE RALSTON: Not at this time. Thank you.

25 JUDGE LONG: Judge Le, do you have any questions?

1 JUDGE LE: No questions at this time.

2 JUDGE LONG: Okay. Thank you. I have a few
3 questions for the witness.

4 With respect to your testimony as to the process
5 of how ATM deposits and transfers occurred -- bank
6 deposits, I just want to make clear. You were out of the
7 country during the liability period; correct?

8 MR. HAYER: I was, Your Honor.

9 JUDGE LONG: And so any testimony with respect to
10 that would -- would have been the process prior to your
11 leaving the country, or anything that was told to you that
12 occurred?

13 MR. HAYER: All I can say is what -- it is
14 similar procedure what they kept doing after I was gone.
15 That's all -- when I was here, this is how we used to do.
16 When I left, everything pretty much stayed the same
17 procedure wise, you know. It's -- nothing changed.

18 So that is why I can testify. I talked to my
19 dad. I was aware of his credit card online. I would
20 check if he wanted me to some -- to check or some --
21 because he wasn't able to do that stuff, you know. He had
22 to go to the bank or I ask him, but I could check it for
23 him and stuff.

24 We talked over the phone sometimes even though I
25 was staying away from home being back in India, but I had

1 a phone so they would call me, and they wanted me to come
2 back and -- like every parents, you know.

3 JUDGE LONG: Okay. And then you mentioned that
4 sometimes the bank would call you with respect to any
5 deposits that -- that would not clear or checks that would
6 not clear. Was that during the time that you were out of
7 country?

8 MR. HAYER: No, not during the time when I was
9 out the country; then they would call my dad.

10 JUDGE LONG: Okay.

11 MR. HAYER: It was the same procedure. The bank
12 managers -- we were one of their best client in the Wells
13 Fargo and they were treating us very wrong. They would
14 hold the checks to let us bring money into the account.

15 Sometimes what happened -- like, for example,
16 right now, we make pretty much one deposit every -- from
17 all those days. Back then, we were making deposits pretty
18 much every day or every end of -- Monday we have to make
19 deposit to make sure our checks are covered.

20 Certain days, our -- most of the heavy billing
21 comes out, like, Wednesdays, the grocery bills comes out
22 and all that. So they hit hard so we make sure on Tuesday
23 the funds are in there.

24 And because my dad wasn't computer savvy, or you
25 know -- so he couldn't see online stuff so the bank would

1 call him or me when I was here. They used to call me, but
2 when I went, they start calling him to cooperate.

3 JUDGE LONG: And just so I'm clear, with respect
4 to the check cashing, the -- you received the checks from
5 the customer, provided them with the cash, deposited it in
6 the bank, and then took that money, which would be a
7 nontaxable sale, and inserted it into the ATM; is that
8 correct?

9 MR. HAYER: I'll just give you an example. Let's
10 say today's sale is 10,000 --

11 JUDGE LONG: Mm-hmm.

12 MR. HAYER: -- and out of that 5,000 is cash and
13 5,000 is ATM and credit cards. So we got -- there's 5,000
14 cash from our grocery sales and here on this end, we cash
15 checks for 5,000. I'm just giving you an example. So we
16 will deposit these checks right here and take that 5,000
17 cash from here -- from the sales to swap it with the
18 checks to deposit into the ATM machine, and we were
19 keeping about \$50,000 or more just for check cashing.

20 Check cashing was heavy back then. Not anymore
21 because everybody got car now and they can go and pay it
22 right in the -- like for us, especially up to the 10th of
23 month.

24 We used to get a ton of checks, which we used to
25 cash it, and it has to be initialed by me, my dad, or my

1 wife. So we will cash it here and then they will take the
2 money and go in the store and pay it.

3 If they buy a grocery from the store, they would
4 give them an additional discount at the register. If they
5 don't, then they don't get that discount.

6 JUDGE LONG: Okay. Thank you. I don't have any
7 further questions.

8 At this time, I would like to move to CDTFA for
9 their presentation. Hold on one moment.

10 CDTFA, you have 30 minutes, and you may begin
11 when you are ready.

12
13 PRESENTATION

14
15 MR. SAMARAWICKREMA: Thank you, Judge.

16 Appellant, a sole proprietor, operated an
17 unbranded gas station and a mini-mart in Orville,
18 California.

19 Appellant sold both gasoline and diesel fuel.
20 Taxable sales in the mini-mart include beer, wine, liquor,
21 cigarettes, carbonated beverages, propane, and
22 miscellaneous taxable merchandise. The mini-mart had a
23 deli, which sold both hot and cold prepared food.
24 Appellant also sold Lottery tickets and money orders.

25 The Department audited Appellant's business for

1 the period of January 1st, 2007 through December 31st,
2 2009. During the audit period, Appellant reported around
3 23 million as total sales and claimed various types of
4 deductions resulting in reported taxable sales of around
5 13.4 million, and that will be on the Exhibit A, Pages 20
6 and 21.

7 Appellant also claimed around 570,000 in prepaid
8 sales tax on purchases of gasoline and diesel, and that
9 will be on the Exhibit A, Pages 23 and 103.

10 During our presentation, we will explain why the
11 Department rejected Appellant's reported taxable sales;
12 why the Department used an indirect audit report; how the
13 Department determined Appellant's unreported sales tax for
14 the audit period; and why the Department recommended a
15 negligence and finality penalty for this Appellant.

16 According to Appellant's previous representative,
17 Appellant generated daily POS sales reports, which
18 categorized sales into gross sales, taxable sales, and tax
19 collected.

20 A monthly spreadsheet is prepared based on POS
21 daily summaries. The spreadsheet includes gross sales,
22 taxable sales, tax collected, nontaxable sales for sales
23 paid inside the store, and propane sales, and that will be
24 on the Exhibit A, Pages 79 through 81.

25 The Department determined that fuel sales paid at

1 the pump outside the store with credit card were not
2 recorded on the daily POS reports. Appellant also
3 incorrectly recorded his inside cash flow sales as
4 nontaxable sales on his POS system.

5 Appellant also recorded taxable sales, nontaxable
6 sales, propane sales, Lotto sales, and money order sales
7 in his General Ledger, which is used along with summary
8 reports to prepare sales and use tax returns, and that
9 will be on the Exhibit A, Pages 77 and 78.

10 During the audit, Appellant failed to provide
11 complete sales records such as POS sales information, cash
12 register Z tapes, or accurate sales journals for the audit
13 period. In addition, Appellant failed to provide complete
14 fuel and merchandize purchase invoices, or purchase
15 journal for the audit period.

16 The Department did not accept Appellant's
17 reported taxable sales due to lack of reliable records.
18 Since Appellant's taxable sales could not be verified by a
19 direct audit approach, the Department used an indirect
20 audit approach.

21 The Department determined taxable sales for the
22 audit period based on net bank deposits reflected on
23 Appellant's available bank statements and the General
24 Ledger.

25 Then, to verify the reasonableness of audited

1 fuel sales for the audit period, the Department calculated
2 the average quarterly taxable fuel sales using the
3 information from the U.S. Department of Energy.

4 During the audit, the Department reviewed and
5 analyzed Appellant's records to verify the reasonableness
6 of Appellant's reported taxable sales. Five verification
7 methods show the records were incomplete and taxable sales
8 were understated.

9 First, the Department compared the recorded
10 taxable sales reflected on Appellant's General Ledger of
11 around 40 million with reported taxable sales of around
12 13.4 million and calculated a difference of around
13 \$600,000 for the audit period, and that will be on the
14 Exhibit A, Pages 20, 77, and 83.

15 Second, Appellant had incomplete bank statements,
16 so the Department compared Appellant's available bank
17 statements to his General Ledger to determine total bank
18 deposits excluding loans, credit card transfers, and
19 transfers between bank accounts of around 24 million for
20 the audit period, and that will be on the Exhibit A, Page
21 82.

22 The Department compared the calculated bank
23 deposits with reported total sales of around 23 million to
24 calculate an overall difference of around 1 million for
25 the audit period, and that will be on the Exhibit A, Page

1 102.

2 Third, the Department compared claim prepaid
3 sales tax of around \$570,000 with prepaid sales tax of
4 around \$589,000 that Appellant's fuel vendors reported to
5 have collected from Appellant and calculated a difference
6 of around \$19,000, and that will be on the Exhibit A, Page
7 103.

8 Fourth, the Department compared the recorded fuel
9 sales reflected on Appellant's profit and loss statement
10 of around 10.8 million to the purchases of around 10.6
11 million reflected on Appellant's profit and loss
12 statements. The Department calculated negative recorded
13 fuel book markups for the years 2008 and 2009, and that
14 will be on the Exhibit A, Page 104.

15 This means Appellant was losing money every time
16 it made sales of fuel for years of 2008 and 2009.
17 Accordingly, the Department did not accept Appellant's
18 recorded fuel sales for the audit period, and that will be
19 on the Exhibit A, Page 104. However, based on the audited
20 fuel sales, the fuel markup was around five percent, and
21 that will be on the Exhibit A, Page 104.

22 Fifth, the Department compared the recorded
23 gasoline and diesel sales of around 10.8 million with
24 total number of gallons of gasoline and diesel purchased
25 to determine overall selling price of a gallon of \$2.76

1 percent ranging from as low as \$1.51 to as high as \$4.36.
2 However, based on the Department's audit, the auditor net
3 weighted price per gallon range from as low as \$1.73 to as
4 high as \$4.90 for the audit period, and that will be on
5 the Exhibit A, Page 55.

6 Appellant was unable to explain the reason for
7 bank deposits differences, prepaid sales tax differences,
8 low reported fuel book markups, low reported average
9 selling prices of a gallon, and reasons for recording
10 Appellant's cash flow sales as nontaxable sales.

11 Therefore, the Department conducted further
12 investigation by analyzing available sales spreadsheets,
13 the General Ledger, and bank deposits information.

14 The Department completed a Purchase Segregation
15 Test for Appellant's mini-mart, and that will be on the
16 Exhibit A, Pages 59 through 71.

17 The Purchase Segregation Test disclosed around 59
18 percent as taxable and 41 percent as nontaxable for
19 Appellant's mini-mart, and that will be on the Exhibit A,
20 Page 65.

21 The Department then used the taxable purchase
22 ratio merchandise purchases and recorded taxable mini-
23 mart sales, excluding propane sales, to calculate the
24 recorded mini-mart taxable markup of around 27 percent for
25 the audit period, and that will be on the Exhibit A, Pages

1 57 and 110.

2 To Appellant's benefit, the Department accepted
3 this low recorded book markup and accepted the recorded
4 taxable non-fuel sales, including propane sales, of around
5 6.5 million for the audit period, and that will be on the
6 Exhibit A, Pages 72 and 73.

7 Appellant used bank deposits information and POS
8 sales reports to complete his sales and use tax returns,
9 but during the audit field work, Appellant did not provide
10 all his bank statements and complete POS sales information
11 for the audit period.

12 As stated earlier, the Department used
13 Appellant's provided bank statements and General Ledger
14 information to determine net bank deposits of around 24
15 million, which included cash taken from the register to
16 pay his vendors. These bank deposits did not include
17 loans, credit card transfers, and bank transfers.

18 The Department deducted recorded total mini- mart
19 sales of around 11 million, sales tax reimbursement
20 collected in the mini-mart of around \$500,000, recorded
21 money order sales of around 400,000, and an excise tax of
22 around \$97,000 to determine audited fuel sales including
23 sales tax reimbursement of around 12 million, and that
24 will be on the Exhibit A, Page 76.

25 The Department then used the applicable sales

1 weighted factors to determine the audited X-tax fuel sales
2 of around 11 million for the audit period, and that will
3 be on the Exhibit A, Page 76.

4 The Department also determined additional audited
5 fuel sales of around \$117,000 using U.S. Department of
6 Energy's information for the third quarter of 2009, and
7 that will be on the Exhibit A, Page 53.

8 This is mainly due to recording Appellant's July
9 2009 bank deposits amount on his General Ledger as
10 \$522,000 instead of \$810,000, and that will be on the
11 Exhibit A, Page 82, Exhibit L, and Exhibit C, Pages 812
12 and 819.

13 The Department then combined audited taxable fuel
14 sales of around 11 million and recorded mini-mart taxable
15 sales of around 6.5 million to determine audited taxable
16 sales for the audit period of around 17.5 million.

17 Audited taxable sales were compared with reported
18 taxable sales of around 13.4 million to determine
19 unreported taxable sales of around 4.3 million for the
20 audit period, and that will be on the Exhibit A, Page 50.

21 The Department then compared the unreported
22 taxable sales of around 4.3 million with a reported
23 taxable sales of around 13.4 million to calculate the
24 error rate of 32 percent.

25 Appellant subsequently provided his missing bank

1 statements, for the audit period and will be on the
2 Exhibits 2, 3, and 4.

3 If the Department updated its audit working
4 papers with Appellant's newly provided bank statement
5 information for the audit period, this would increase the
6 net bank deposits amount by around \$190,000, and that will
7 be on the Exhibits L and M.

8 At this time, the Department will not assert an
9 increase to the account for the additional taxable sales
10 of around \$67,000, and that will be on the Exhibit A,
11 Pages 111 and 112.

12 Therefore, the Department finds that the
13 estimated amount accessed in this audit is not only
14 reasonable but benefit to the Appellant.

15 To verify the reasonableness of the audit fuel
16 sales of around 11 million, the Department used an
17 alternative audit approach. This alternative audit
18 approach used the number of fuel gallons purchased and the
19 audited sales price per gallon to determine audited fuel
20 sales.

21 The Department obtained Appellant's fuel prices
22 from the Appellant's fuel vendors and determined that
23 Appellant had purchased a total of around 3.4 million
24 gallons of gasoline and 541 thousand gallons of diesel
25 during the audit period, and that will be on the Exhibit

1 B, Page 65 -- 165.

2 The Department obtained the average weekly retail
3 fuel prices from the weekly database published by the U.S.
4 Department of Energy, and that will be on the Exhibit A,
5 Pages 55 and 107.

6 The Department of Energy surveyed gasoline
7 stations in various areas one day each week and determined
8 an average selling price for that week, which the
9 Department will refer here as the average weekly prices.

10 Using the corresponding average weekly prices,
11 the Department determined a weighted average selling price
12 for gasoline and diesel for each monthly period in the
13 audit, and that will be on the Exhibit A, Pages 55 and
14 107.

15 To determine the price differential between the
16 weekly weighted average selling prices and Appellant's
17 selling prices, the Department compared the sales receipt
18 showing Appellant's selling prices for regular, unleaded,
19 mid-grade, and premium gasoline with the published
20 statewide weekly average prices for those same days to
21 determine an average price differential of 14.09 cents per
22 gallon, and that will be on the Exhibit A, Page 56.

23 The Department also compared sales receipts
24 showing Appellant's diesel selling prices with the
25 published statewide average weekly prices for those same

1 days to determine an average price differential of 6.1
2 cents per gallon, and that will be on the Exhibit A, Page
3 56.

4 Since Appellant's gasoline and diesel selling
5 prices were lower than the published statewide selling
6 prices, the Department reduced the average monthly selling
7 prices for all grades of gasoline and diesel by the
8 respective price differential to determine audited average
9 monthly selling prices for gasoline and diesel, and that
10 will be on the Exhibit A, Page 55.

11 The Department then multiplied the audited
12 monthly selling prices for gasoline and diesel by the
13 number of gallons purchased to calculate audited gasoline
14 sales, including sales tax reimbursement of around 10
15 million and audited diesel sales, including sales tax
16 reimbursement and state excise taxes of around 1.7 million
17 for the audit period, and that will be on the Exhibit A,
18 Page 55.

19 The Department determined the X-tax gasoline
20 sales of around 9.5 million and diesel sales of around 1.5
21 million using applicable sales tax weighted factors and
22 excise tax amount for the audit period, and that will be
23 on the Exhibit A, Page 55.

24 Next, the Department combined the audited
25 gasoline sales of around 9.5 million with audited diesel

1 sales of around 1.5 million to determine total audited for
2 sales of around 11 million for the audit period, and that
3 will be on the Exhibit A, Page 53.

4 When the Department compared audited taxable fuel
5 sales in each quarterly period from this alternative audit
6 method to audited fuel sales determined, using Appellant's
7 bank information, the Department authored that unusual
8 result in the third quarter 2009.

9 In that quarter, Appellant's audited taxable
10 sales of around \$937,000, using this alternative audit
11 method, exceeded audited fuel sales of around \$820,000,
12 using Appellant's bank information by around \$117,000, and
13 that will be on the Exhibit A, Page 53.

14 As stated earlier, this is mainly due to
15 recording Appellant's July 2009 bank deposits amount on
16 his General Ledger as \$522,000 instead of \$810,00, and
17 that will be on the Exhibit A, Page 82, Exhibit L, and
18 Exhibit C, Pages 812 and 819.

19 Thus, the Department determined that taxable fuel
20 sales were understated by an additional \$117,000 in the
21 third quarter 2009. Therefore, the Department determined
22 unreported taxable sales of around 4.3 million, including
23 this \$117,000 for the audit period, and that will be on
24 the Exhibit A, Page 50.

25 Appellant disputes the audit results and claims

1 that the Department failed to determine the correct amount
2 of taxable sales for the audit period. Appellant believes
3 that he's entitled to three additional adjustments to the
4 audit finding.

5 First, Appellant is requesting an adjustment from
6 ATM deposits of around 1.5 million. Second, Appellant is
7 requesting an adjustment for sales of Scratchers for -- of
8 around \$142,000. Third, Appellant is requesting an
9 additional adjustment for transfers between bank accounts
10 of around 1.1 million. As support, Appellant provided his
11 evidences of the bank deposits for the audit period, and
12 that will be on the Exhibits 2, 3, and 4.

13 He analyzed each bank statement and color-coded
14 the deposits that were not taxable. Appellant's
15 representative also prepared and provided multiple Excel
16 spreadsheets consisting of a summary, day-to-day road
17 deposits, and withdrawal data to support his claim of
18 nontaxable deposits and nontaxable sales for the audit
19 period, and that will be on the Exhibits 5 and 6. He also
20 provided a declaration, and that will be on the Exhibit 1.

21 Prior to today, Appellant claims that he
22 withdraws cash from his bank account to fill his ATM
23 machine. He further claims that the ATM was filled -- the
24 ATM was not filled from the cash registers. Appellant
25 provided an Excel worksheet to show daily ATM deposits to

1 support his claim amounts.

2 To verify the accuracy of Appellant's claim that
3 cash was withdrawn from the bank to fill the ATM machine,
4 the Department tried to trace back ATM deposits from
5 Appellant's worksheet to the bank statement to determine
6 if there were corresponding bank withdrawals.

7 The Department spot-tested withdrawals for
8 15 days period in February 2007, in December 2007, in
9 January 2008, in May 2008, in October 2008, and in
10 September 2009, but the Department could not find any cash
11 withdrawals that matched with the claim deposits.

12 JUDGE LONG: Excuse me. I'm sorry to interrupt.
13 I just want to make sure that I have it for my notes. Is
14 that spot-test of 15 days in each of those months?

15 MR. SAMARAWICKREMA: Yes.

16 JUDGE LONG: And, um --

17 MR. SAMARAWICKREMA: I can give you the exact
18 date if you want.

19 JUDGE LONG: No, that's fine. But can you give
20 me a total number of months?

21 MR. SAMARAWICKREMA: Oh, okay.

22 JUDGE LONG: I Just couldn't keep up with the
23 typing like this.

24 MR. SAMARAWICKREMA: For six months.

25 JUDGE LONG: Six months. Thank you. Continue.

1 MR. SAMARAWICKREMA: In fact, the Department did
2 not find any cash withdrawals during these periods.

3 Based on the Department's experience with similar
4 transactions relating to ATMs, it is illogical for any
5 taxpayer to deposit cash from the cash register into the
6 bank then make a withdrawal of cash from the bank to add
7 to the ATM machine.

8 Taxpayers typically would add the cash from the
9 their cash registers directly into the ATM machine instead
10 of doing unnecessary steps of depositing and then
11 withdrawing from the bank.

12 Appellant failed to demonstrate his claim of ATM
13 business practices with documentary evidence. Therefore,
14 the Department determined that Appellant used cash from
15 his cash register to fill the ATM machines.

16 Today, Appellant is claiming that he used the
17 cash -- the check cashing money or money from personal
18 loans and credit cards to fill ATM machines. However,
19 Appellant did not provide any documentary evidence to
20 support this new condition. Therefore, the Department
21 rejected Appellant's arguments relating to ATM deposits.

22 The Department used Appellant's General Ledger
23 and Profit and Loss Statements to identify his Lotto sales
24 of around \$380,000, and considered these amounts when
25 determining unreported taxable sales for the audit period,

1 and that will be on the Exhibit A, Pages 77, 78, and 83.

2 Appellant's General Ledger and his Profit and
3 Loss Statements did not separate Lotto sales from
4 Scratcher sales.

5 Appellant failed to support with documentary
6 support that there were \$142,000 worth of bank deposits in
7 his bank statements in addition to the allotted amount of
8 \$380,000 for the audit period.

9 This allotted amount of around \$380,000 is
10 significantly higher than the Appellant's claimed amount
11 of around \$142,000 for Scratchers. If the Department
12 updated its audit working papers with this \$142,000 for
13 the audit period, this would increase additional taxable
14 sales by around \$230,000 for the audit period.

15 The Department will not assert any increase to
16 account for the additional taxable sales of around
17 \$238,000. Therefore, the Department finds that the
18 estimated amount accessed in this audit for the audit
19 period is not only reasonable but benefit to Appellant.

20 Appellant is also requesting an additional
21 adjustment for bank transfers between bank accounts. As
22 stated earlier, the Department used the available bank
23 statements and General Ledger information to determine net
24 bank deposits of around 24 million, which included cash
25 taken from the cash registers to pay for Appellant's

1 vendors, and that will be on the Exhibit A, Page 82.

2 These bank deposits were adjusted for loans,
3 credit cards transfers, and bank transfers. Appellant
4 provided an Excel worksheet to support his loans and bank
5 transfers between accounts for the audit period, and that
6 will be on the Exhibit 6.

7 The Department reviewed Appellant's bank
8 statements and Appellant's Excel spreadsheet and compiled
9 a new exhibit to indicate the Appellant's claim amount of
10 1.1 million, and the Department accepted the amount of
11 around \$880,000, and that will be on the Exhibit L.

12 The Department's detailed review of all bank
13 statements and supporting documents resulted in an
14 adjusted bank deposit amount of around \$190,000, more than
15 the amount that was used in this audit, and that will be
16 on the Exhibits L and N.

17 Thus, the Department rejected Appellant's
18 arguments relating to additional transfers between bank
19 accounts.

20 Your -- your panel can see that the Department
21 determined audited fuel sales of around 11 million for the
22 audit period, and that will be on the Exhibit A, Pages 53
23 and 76.

24 The Department compared the audited fuel sales of
25 around 11 million with recorded fuel purchases of around

1 10.6 million to calculate fuel markups of around five
2 percent for the audit period, which is at the lower end of
3 the range that the Department would normally expect for a
4 gas station, and that will be on the Exhibit A, Page 104.

5 Thus, the Department finds that the audit
6 produced a fair and reasonable determination for the audit
7 period.

8 Appellant also claims that he began his business
9 as a partnership with his father. Appellant owns 40
10 percent of the business while his father owns 60 percent
11 of the business, and that will be on the Exhibits 1 and 7.

12 However, Appellant did not file a partnership
13 income tax return to report business income to the federal
14 government; did not obtain his liquor license under the
15 partnership; did not obtain a seller's permit as a
16 partnership; therefore, the Department determined that
17 Appellant did not provide collaborative documentary
18 information to support that he's a partner of a
19 partnership other than providing Exhibit 1 and Exhibit 7.

20 The Department imposed a negligence penalty based
21 upon its determination that Appellant's books and records
22 were incomplete and inadequate for sales and use tax
23 purposes, and because Appellant failed to accurately
24 report his taxable sales.

25 Specifically, the Department ordered that

1 Appellant provide limited records for the audit period,
2 and Appellant failed to provide documents of original
3 entries to support his reported sales tax liability.

4 As a result, the Department had to calculate
5 Appellant's taxable sales based upon available sales
6 spreadsheets, General Ledger, bank deposits information,
7 and Appellant's gasoline selling prices using Department
8 of Energy's weekly published selling prices.

9 The audit examination disclosed unreported
10 taxable sales of around 4.3 million, which when compared
11 with reported taxable sales of around 13.4 million for the
12 audit period resulted in an error rate of around 32
13 percent. This high error rate is additional evidence of
14 negligence.

15 Finally, the Department imposed a finality
16 penalty because the determination became final on May 19,
17 2011, and Appellant did not make full payments towards the
18 determination prior to -- to this date.

19 However, the Department will waive the finality
20 penalty if the Appellant pays the full liability within
21 30 days from the date of the Notice of Redetermination.

22 Appellant has not provided any reasonable
23 documentation or evidence to support an adjustment to the
24 audit findings.

25 Therefore, for all of these reasons, the

1 Department requests the appeal be denied.

2 This concludes our presentation, and we are
3 available to answer any questions the panel may have.
4 Thank you.

5 JUDGE LONG: Thank you.

6 Judge Ralston, do you have any questions?

7 JUDGE RALSTON: No questions. Thank you.

8 JUDGE LONG: Judge Le, do you have any questions?

9 JUDGE LE: No questions. Thank you.

10 JUDGE LONG: Thank you.

11 At this time, I would like to move to closing
12 arguments.

13 Mr. Luoma, you have ten minutes and may begin
14 when your ready.

15
16 CLOSING ARGUMENT

17
18 MR. LUOMA: Your Honor, we've submitted
19 documentary evidence. We've submitted testimonial
20 evidence both in the form of a declaration as well as
21 Mr. Hayer's sworn testimony today, and there's adequate
22 information to demonstrate that the CDTFA had errors in
23 its conclusions based on the bank deposits analysis.

24 The other issues raised and discussed by CDTFA,
25 today, many are not at issue. It really is the bank

1 deposits analysis. There's no issue on the fuel. There's
2 no issue on the percentage markup analysis. It's all on
3 the bank deposits analysis, and based on the -- the
4 arguments and the evidence that was submitted, that
5 includes Mr. Hayer's bank deposits analysis, it
6 demonstrates that there should be an adjustment to the
7 taxable sales because of these nontaxable bank deposits.

8 The ATM -- there's already been a concession on
9 the money orders, the bank transfers, all of that should
10 result in a reduction against the purported unreported
11 sales.

12 With regard to the penalty, Mr. Hayer has
13 testified as to the manner in which the audit was
14 conducted and that his father, who stood in his stead when
15 Mr. Hayer was in India on his pilgrimage, demonstrates
16 that there is reasonable cause for any understatement of
17 sales.

18 There's a misunderstanding -- and unfortunately,
19 the documents that we have would have cured the entire
20 audit had the Board had access to the documents, which we
21 offered today.

22 So I think everything that has been presented,
23 testimonial and documentary, establishes that there's
24 reasonable cause for the negligence penalty, and that
25 there shall be a reduction of 2.8 million in taxable

1 sales. Thank you.

2 JUDGE LONG: Thank you.

3 And CDTFA, did you want to make any closing
4 remarks?

5 MR. SAMARAWICKREMA: No.

6 JUDGE LONG: Okay. Thank you.

7 At this time, I believe we are ready to conclude
8 this hearing. Just to confirm, Judge Ralston, are you
9 ready to close this appeal?

10 JUDGE RALSTON: Yes.

11 JUDGE LONG: And Judge Lee.

12 JUDGE LE: Yes.

13 JUDGE LONG: Thank you.

14 This case is submitted on Wednesday, October 16,
15 2022. The record is now closed.

16 Thank you, everyone, for coming in today. The
17 Judges will meet and decide your case later on, and we
18 will send you a written opinion of our decision within 100
19 days of today.

20 Today's hearing in the Appeal of M. Hayer is now
21 adjourned. The next hearing will resume at 1:00 p.m.
22 Thank you.

23 MR. LUOMA: Thank you, Your Honor.

24 And the date -- you said October. It can be
25 corrected. It's November 16th. Unless I heard wrong.

1 JUDGE LONG: No, you're -- you're correct. Thank
2 you.

3 We are going to reopen the record for just one
4 moment.

5 (Record was reopened to record correct hearing
6 date)

7 This case is submitted on Wednesday, November 16,
8 2022.

9 Now the record is closed. Thank you.

10 MR. HAYER: Thank you, Your Honor.

11 MR. LUOMA: Thank you.

12 (Proceedings concluded at 11:30 a.m.)
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1 REPORTER'S CERTIFICATION

2
3 I, Inez Deorsene, Hearing Reporter in and
4 for the State of California, do hereby certify:

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

13 I further certify I am neither financially
14 interested in the action nor a relative or employee of any
15 attorney or party to this action.

16 IN WITNESS WHEREOF, I have this date subscribed
17 my name.

18 Dated: December 7, 2022

19
20
21 

22
23 Inez Deorsene, Hearing Reporter
24
25

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