

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
NINA BAHRAMI,) CASE NO. 21027296
)
 APPELLANT.)
)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Thursday, December 15, 2022

Reported by:

Maria Esquivel-Parkinson,
CSR No. 10621, RPR

Job No. :
39620 OTA(A)

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15 TRANSCRIPT OF PROCEEDINGS, taken at
16 400 R Street, Sacramento, California,
17 commencing at 9:35 a.m. and concluding
18 at 10:19 on Thursday, December 15, 2022,
19 reported by Maria Esquivel-Parkinson,
20 CSR No. 10621, RPR, a Certified Shorthand
21 Reporter in and for that State of California.

1 APPEARANCES:

2
3 Panel Members: SUZANNE BROWN
4 NATASHA RALSTON
5 JOHN JOHNSON

6 For the Appellant: NINA BAHRAMI

7
8 For the Franchise Tax Board: OFFICE OF TAX APPEALS
9 MARI GUZMAN, Tax Counsel
10 CARY HUXSOLL, Tax Counsel
11 JASON PARKER, Hearing Representative
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I N D E X

E X H I B I T S

(CDTFA'S Exhibits A-E admitted on page 12)

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

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By Ms. Guzman, CDTFA's Counsel	21

1 Sacramento, California; Thursday, December 15, 2022

2 9:35 a.m.

3
4 ALJ BROWN: And we are on the record for the
5 appeal of Bahrami, OTA Case No. 21027296. Today is
6 Thursday, December 15th, 2022, and it is approximately
7 9:35 a.m. We are holding this hearing in Sacramento,
8 California.

9 I'm Suzanne Brown, and I'm the lead
10 administrative law judge for this case. My co-panelists
11 today are Judge Natasha Ralston and Judge John Johnson.
12 I'll start by asking each of the participants to please
13 state their names for the record, and I will start with
14 CDTFA.

15 MS. GUZMAN: Mari Guzman, legal with the
16 Department.

17 MR. HUXSOLL: Cary Huxsoll with the
18 Department's legal division.

19 MR. PARKER: And Jason Parker, chief of
20 headquarter operations bureau.

21 ALJ BROWN: Thank you. And now I will ask for
22 the Appellant.

23 APPELLANT BAHRAMI: Nina Bahrami.

24 ALJ BROWN: I'm sorry. I didn't hear you.

25 APPELLANT BAHRAMI: Nina Bahrami.

1 ALJ BROWN: Okay. Thank you. I'll just remind
2 you, look and see if the green light is on your
3 microphone.

4 APPELLANT BAHRAMI: Okay.

5 ALJ BROWN: And when you're not speaking, just
6 turn it off.

7 APPELLANT BAHRAMI: Okay.

8 ALJ BROWN: Next I want to confirm that both
9 parties first received the prehearing conference minutes
10 and orders that I issued after our prehearing
11 conference. That document was dated November 21st,
12 2022.

13 CDTFA?

14 MS. GUZMAN: Yes, we did receive it. Thank
15 you.

16 ALJ RALSTON: And Appellant?

17 APPELLANT BAHRAMI: Yes.

18 ALJ RALSTON: Thank you. I'm going to refer
19 back to that document just saying as we discussed in the
20 prehearing conference and as you saw on the minutes and
21 orders that I issued, so I just wanted to make sure you
22 knew what I was talking about.

23 Okay. All right. As we discussed at the
24 prehearing conference confirmed in the minutes and
25 orders, we identified three issues for hearing, and

1 those issues are: First, whether adjustments are
2 warranted to the measure of unreported taxable sales for
3 the liability period, which is January 1st, 2014,
4 through December 31st, 2016; and second, whether
5 appellant should be relieved of the liability based on
6 reasonable reliance on erroneous advice from CDTFA; and
7 then third, whether CDTFA correctly imposed the
8 negligence penalty.

9 ALJ BROWN: I'll say, can I confirm with both
10 parties that that's your understanding of the issues?

11 MS. GUZMAN: Yes, that's our understanding.

12 APPELLANT BAHRAMI: Yes.

13 ALJ BROWN: Thank you. I'll just confirm that,
14 Ms. Bahrami, you will be testifying as a witness today?

15 APPELLANT BAHRAMI: Yes.

16 ALJ BROWN: Okay. And before we begin
17 presentations, I will swear you in as a witness.

18 APPELLANT BAHRAMI: Okay.

19 ALJ BROWN: Okay. Let me just review the order
20 of events about what's going to be happening this
21 morning and how much time everyone has. We're going to
22 start with Appellant's presentation.

23 And, Ms. Bahrami, you'll have up to 20 minutes.
24 You don't have to use all of that time, but that's --
25 that's how long we estimated. And then after that, we

1 have what we call witness examination. CDTFA is allowed
2 to ask questions because you're testifying as a witness,
3 and the panel may have questions for you also.

4 After that, then CDTFA will make its
5 presentation and it has up to 20 minutes, as we
6 discussed. And then the panel may have questions for
7 CDTFA also. And then we'll have some time for rebuttal
8 from Appellant, which could take five to ten minutes. I
9 want to confirm that those time estimates are still
10 sufficient for our schedule this morning. We are the
11 only hearing this morning, so I'm not too concerned
12 about, you know, if for some reason we go an extra
13 couple minutes. It's not going to throw off the
14 schedule for the day.

15 But I'll just say, CDTFA, that time is still
16 sufficient for you?

17 MS. GUZMAN: Yes, it is.

18 ALJ BROWN: Okay. And Appellant?

19 APPELLANT BAHRAMI: Yes.

20 ALJ BROWN: Thank you. All right. Let me just
21 briefly address the evidence, the exhibits. We have
22 exhibits from CDTFA. Let me pull up my binder. We have
23 Exhibits A through E. And my office put together a
24 hearing binder that was sent out to the parties a couple
25 of days ago. CDTFA submitted these exhibits by the

1 deadline, and the copy that my office put together is
2 just what we call a courtesy copy compiling them all
3 into the same place.

4 Ms. Bahrami, I just want to check that you
5 received these exhibits. You should have gotten them
6 first in two parts from CDTFA, and then you should have
7 gotten them put all together from -- in one place from
8 my office, I think, two days ago.

9 APPELLANT BAHRAMI: The only thing I got was an
10 email yesterday.

11 ALJ BROWN: Was it yesterday?

12 APPELLANT BAHRAMI: Not yesterday, sorry. The
13 day before.

14 ALJ BROWN: Okay.

15 APPELLANT BAHRAMI: Yes. Yes.

16 ALJ BROWN: So you got that email.

17 APPELLANT BAHRAMI: Yes.

18 ALJ BROWN: And that contained all the exhibits
19 in one place.

20 APPELLANT BAHRAMI: Yes. Yes.

21 ALJ BROWN: You didn't get the exhibits
22 previously, you're saying?

23 APPELLANT BAHRAMI: No. I just got --

24 ALJ BROWN: You've never seen these before?

25 APPELLANT BAHRAMI: No. Was it through email

1 or mail? Because I didn't get anything an email or --

2 ALJ BROWN: CDTFA?

3 APPELLANT BAHRAMI: This is the only thing I
4 have.

5 ALJ BROWN: Okay.

6 MS. GUZMAN: We did email Appellant all the
7 exhibits -- on the deadline date.

8 ALJ BROWN: Yeah. And I do remember checking
9 with my support staff person when we got the second
10 batch of documents that, Ms. Bahrami, that you were on
11 that email. Hold on a second.

12 Yes. So these are just the basic audit
13 documents also.

14 APPELLANT BAHRAMI: Okay.

15 ALJ BROWN: So I didn't see anything new in
16 them. They were what the audit was based on, and then
17 it was the --

18 APPELLANT BAHRAMI: Okay.

19 ALJ BROWN: -- appeals decision.

20 I'm going to -- let me just go over briefly.
21 You saw that Exhibit A is the appeals decision.
22 Exhibit B is the Notice of Determination that CDTFA
23 issued.

24 Exhibits C and D are the audit work papers and
25 supporting documentation like the waivers --

1 APPELLANT BAHRAMI: Okay.

2 ALJ BROWN: -- of limitation forms and other
3 things that the audit was based on.

4 And then Exhibit E is the petition for
5 redetermination that your representative submitted back
6 in 2019.

7 APPELLANT BAHRAMI: Okay.

8 ALJ BROWN: So these all should have -- these
9 should be documents that you already had.

10 APPELLANT BAHRAMI: Okay.

11 ALJ BROWN: Now, when you got the documents two
12 days ago, have you had a chance to review them?

13 APPELLANT BAHRAMI: Not really. I've been
14 busy, but -- but I have everything. I have everything
15 though.

16 ALJ BROWN: Okay. Because my next question to
17 you was going to be whether you had any objection to any
18 of these documents being admitted into evidence.

19 APPELLANT BAHRAMI: No.

20 ALJ BROWN: Okay. Very good. Thank you. And
21 I'll just reiterate -- and I think we talked about this
22 at the prehearing conference --

23 APPELLANT BAHRAMI: Yes.

24 ALJ BROWN: -- that when the documents are
25 admitted into evidence that just means that the panel

1 can look at them --

2 APPELLANT BAHRAMI: Yes.

3 ALJ BROWN: -- when we're making our decisions.
4 It doesn't mean that we're necessarily accepting them
5 as -- any of the documents as true.

6 APPELLANT BAHRAMI: Yes.

7 ALJ BROWN: And that's what the parties -- you
8 both are going to make arguments about, about what
9 weight we should give to the evidence and how we should
10 interpret the documents.

11 APPELLANT BAHRAMI: Okay.

12 ALJ BROWN: So you indicated you have no
13 objection --

14 APPELLANT BAHRAMI: Yeah, no.

15 ALJ BROWN: -- to CDTFA's Exhibits A through E.
16 And they were timely submitted, and, therefore, I will
17 say that Exhibits A through E are admitted into the
18 record.

19 APPELLANT BAHRAMI: Okay. Okay.

20 (CDTFA's Exhibits A through E admitted.)

21 ALJ BROWN: All right. And I'll just confirm
22 from both parties that no one has any additional
23 exhibits that they are submitting.

24 CDTFA?

25 MS. GUZMAN: No, we do not.

1 ALJ BROWN: Okay.

2 And, Ms. Bahrami?

3 APPELLANT BAHRAMI: No, I don't.

4 ALJ BROWN: Okay. And that's what we discussed
5 at the prehearing conference, but I'm just confirming
6 it.

7 Okay. I think I've covered all of the
8 logistics that we need to go over. Does anyone -- I'm
9 going to pause and say, does anyone have any questions
10 or anything that they want to ask or, you know, anything
11 that we want to raise before we begin the presentations?

12 APPELLANT BAHRAMI: (Indicates with head)

13 MS. GUZMAN: (Indicates with head)

14 APPELLANT BAHRAMI: No.

15 MS. GUZMAN: No.

16 ALJ BROWN: Oh, and I did confirm -- yeah.
17 Yeah. Okay. Okay, then, what I will do is,
18 Ms. Bahrami, I will swear you in as a witness. If you
19 could please raise your right hand.

20 Do you swear or affirm that the testimony you
21 are about to give will be the truth, the whole truth and
22 nothing but the truth?

23 APPELLANT BAHRAMI: Yes.

24 ALJ BROWN: Thank you. Okay. You may begin
25 your presentation. You have 20 minutes.

1 PRESENTATION

2 BY NINA BAHRAMI, Appellant:

3 Okay. When we initially applied for the
4 license, we were told that it's a wholesales license, so
5 that is the reason we did not charge any taxes. At the
6 time we had gym, we weren't really selling equipment.
7 We was just -- every now and then we were changing new
8 equipments and selling them to people that they're
9 wholesale, that they would sell -- resell them,
10 refurbish and resell them.

11 That's all I have to say. I did not charge any
12 taxes.

13 ALJ BROWN: All right. That's your -- that is
14 the sum of your presentation?

15 APPELLANT BAHRAMI: Yes.

16 ALJ BROWN: Okay. One second.

17 Let me -- I'll say -- actually, I guess I
18 should start with saying, CDTFA, do you have any
19 questions for Appellant?

20 MS. GUZMAN: No questions. Thank you.

21 ALJ BROWN: Okay. Thank you.

22 Let me begin with asking a couple of questions.

23 APPELLANT BAHRAMI: Okay.

24 ALJ BROWN: You said you were told it was a
25 wholesaler's license?

1 APPELLANT BAHRAMI: Yes. Correct.

2 ALJ BROWN: Can you give me -- be more specific
3 about who -- who told you and who --

4 APPELLANT BAHRAMI: When --

5 ALJ BROWN: -- exactly -- who the individual
6 was? Was it by -- you know, what happened? Who spoke
7 to who?

8 APPELLANT BAHRAMI: Okay. When we applied for
9 the license in 2013 -- I believe, it was early 2013
10 and -- no -- we called the office and one of the agents
11 told us. I don't remember the name. It's nine years
12 ago.

13 ALJ BROWN: And were you on the phone? Was
14 your --

15 APPELLANT BAHRAMI: It was my husband actually.

16 ALJ BROWN: Were you in the room?

17 APPELLANT BAHRAMI: Yes. I was with him when
18 we were applying.

19 ALJ BROWN: Hold on. And I'll just confirm,
20 you didn't receive any of this in writing?

21 APPELLANT BAHRAMI: No.

22 ALJ BROWN: Did you or your husband ask any
23 questions about what that meant, to say it was a
24 wholesaler's license?

25 APPELLANT BAHRAMI: No. We know what a

1 wholesaler's license is. It's when we were selling to
2 people that were selling the items back, resellers.

3 ALJ BROWN: And if -- since you believe that
4 the people that you were selling to, your customers,
5 were resellers, is there a reason why you didn't -- my
6 understanding from reading the file is that you did not
7 obtain resale certificates when you made your sales;
8 correct?

9 APPELLANT BAHRAMI: No.

10 ALJ BROWN: All right. Is there a reason why
11 you didn't obtain resale certificates or ask for resale
12 certificates?

13 APPELLANT BAHRAMI: You know, at that time we
14 were new. We were just busy with the gym. We weren't
15 into -- we weren't selling that -- right now we're
16 selling full time so it's a different license. We are
17 charging. But back then it was just the gym. We were
18 just selling our machines every now and then.

19 ALJ BROWN: So were you aware that part of
20 making a sale for resale involved --

21 APPELLANT BAHRAMI: Unfortunate --

22 ALJ BROWN: -- obtaining a resale certificate?

23 APPELLANT BAHRAMI: Unfortunately, at that
24 time -- I got the -- mainly I got the license because I
25 was selling supplements at the gym. We were selling

1 drinks in which I did pay taxes on those.

2 ALJ BROWN: Was this -- this was your first
3 ever business --

4 APPELLANT BAHRAMI: Yes.

5 ALJ BROWN: -- that you were operating?

6 APPELLANT BAHRAMI: Yes.

7 ALJ BROWN: And also for your husband? He had
8 never been --

9 APPELLANT BAHRAMI: Yes. No.

10 ALJ BROWN: -- never operated as a business
11 before?

12 APPELLANT BAHRAMI: No. Well, he was a real
13 estate appraiser before that, but we didn't do any
14 sales.

15 ALJ BROWN: Okay. So when you said that you
16 never collected tax --

17 APPELLANT BAHRAMI: Yes. At that time, yes.

18 ALJ BROWN: Okay. So in the exhibits, I can
19 point you to a specific page, but I don't know if you
20 have it --

21 APPELLANT BAHRAMI: I don't.

22 ALJ BROWN: -- handled -- handy.

23 APPELLANT BAHRAMI: I don't.

24 ALJ BROWN: There was one invoice, Invoice
25 No. 180. It was dated December 11th, 2014.

1 APPELLANT BAHRAMI: Yes --
2 ALJ BROWN: And it -- the invoice showed tax
3 charged of \$117.04 --
4 APPELLANT BAHRAMI: Yes.
5 ALJ BROWN: -- on sale of a VersaClimber.
6 APPELLANT BAHRAMI: Yeah, I --
7 ALJ BROWN: I wanted to ask you if --
8 APPELLANT BAHRAMI: Yeah. I don't remember
9 that.
10 ALJ BROWN: -- you knew about -- anything about
11 that.
12 APPELLANT BAHRAMI: I don't remember that far,
13 no. It was 2014?
14 ALJ BROWN: Yes.
15 APPELLANT BAHRAMI: Okay. Yeah. I don't
16 remember that far.
17 ALJ BROWN: But from your understanding, there
18 was no reason why tax would have been charged at that
19 time because that wasn't --
20 APPELLANT BAHRAMI: Yes.
21 ALJ BROWN: -- your practice?
22 APPELLANT BAHRAMI: Yes. Yes. As far as I
23 know, we were not charging any taxes. I was charging
24 taxes on the drinks that I was selling in the gym.
25 ALJ BROWN: And I guess I wanted to ask about

1 the invoices that the business produced when you were
2 audited --

3 APPELLANT BAHRAMI: Mm-hmm.

4 ALJ BROWN: -- because I think you probably saw
5 in the audit documents at some point when you looked at
6 them that CDTFA thought that the records you produced
7 were incomplete because you didn't produce all of --
8 there were -- you didn't -- the business didn't produce
9 all of these invoices is what they found, that there
10 were more sales than you had invoices to account for.

11 APPELLANT BAHRAMI: Okay.

12 ALJ BROWN: I guess I wanted to ask, do you
13 know anything about the -- about your recordkeeping,
14 about why it might have been that there weren't enough
15 invoices? Or was that -- is that not true? Did you
16 produce all the invoices?

17 APPELLANT BAHRAMI: As far as I know, I
18 produced all the invoices.

19 ALJ BROWN: Were you involved in keeping track
20 of the invoices?

21 APPELLANT BAHRAMI: Not that much, no. I was
22 more involved at the gym side.

23 ALJ BROWN: Okay. All right. I think that's
24 all the questions that I have right now, so I'm going to
25 turn to my co-panelists.

1 Judge Johnson, do you have any questions?

2 ALJ JOHNSON: No questions for me. Thank you.

3 ALJ BROWN: Okay. Judge Ralston?

4 ALJ RALSTON: Yes.

5 Just to follow up on Judge Brown's questions,
6 so you were saying that you -- when you would replace a
7 piece of gym equipment, then you would sell the old
8 equipment?

9 APPELLANT BAHRAMI: Yes.

10 ALJ BROWN: What kind of documentation did
11 you -- did you have typically in those types of sales
12 with the -- with the person or entity you were selling
13 to?

14 APPELLANT BAHRAMI: What do you mean? As a
15 receipt?

16 ALJ RALSTON: Right. Would it just -- it would
17 just be an invoice or --

18 APPELLANT BAHRAMI: Yeah. It would be mainly
19 an invoice.

20 ALJ RALSTON: Okay. And -- that's all for now.
21 Thank you.

22 ALJ BROWN: Okay. So we're done with questions
23 for Appellant at this point, so now I will turn to CDTFA
24 and say that if CDTFA is ready to make its presentation,
25 you can go ahead. You have 20 minutes.

1 MS. GUZMAN: Thank you.

2
3 PRESENTATION

4 BY MS. GUZMAN, Tax Counsel for CDTFA:

5 Good morning. There are three issues before
6 the panel today: First, whether an adjustment is
7 warranted to the audited measure of unreported fitness
8 equipment sales; second, whether Appellant should be
9 relieved of the liability based on reliance on alleged
10 erroneous advice from the Department; and, lastly,
11 whether the Department properly imposed the negligence
12 penalty.

13 Appellants, a married co-ownership doing
14 business as Livingston Fitness, operated member-only
15 fitness centers during the liability period,
16 January 1, 2014, through December 31st, 2016. Appellant
17 operated fitness centers at two registered locations:
18 One in Livingston, California, and another in Modesto,
19 California. Appellants also operated as a reseller and
20 sold fitness equipment via upfront retail stores called
21 "We Sell Fitness" located at the Modesto Fitness Center
22 and at another location in Modesto.

23 Appellants closed the fitness center at the
24 Livingston location effective December 31st, 2016.
25 Appellants also closed the Modesto fitness center and

1 ceased operation for We Sell Fitness at that location
2 effective December 31st, 2016.

3 As relevant here, Appellants obtained their
4 seller's permit from the Department effective May 23rd,
5 2013. On May 24th, 2019, upon completion of Appellant's
6 first audit, the Department issued a Notice of
7 Determination, Exhibit B, to Appellants for
8 approximately \$82,000 in tax plus applicable interest
9 and a 10 percent negligence penalty of approximately
10 \$8,000 for the liability period.

11 The Notice of Determination was timely issued
12 by the Department because Appellants waived the
13 otherwise applicable three-year statute of limitation
14 for issuing notices of determination by signing these
15 series of waivers, Exhibit D, the last of which was
16 signed on June 28th, 2018, which gave the Department
17 until July 31st, 2019, to issue the notice of
18 determination for the period January 1st, 2014, through
19 December 31st, 2015.

20 With respect to the liability period
21 January 1st, 2015 through December 31st, 2016, a waiver
22 was not necessary as the Department had until
23 January 31st, 2020, to issue the Notice of Determination
24 within the three-year statute of limitations. Because
25 the Notice of Determination was issued on May 24th,

1 2019, it was timely. On June 19th, 2019, Appellants
2 filed a timely petition for redetermination, Exhibit E,
3 disputing the Notice of Determination in its entirety.

4 We first turn to the issue of whether
5 adjustments are warranted to the audited measure of
6 unreported fitness equipment sales for the liability
7 period. During the course of the audit, Appellants
8 provided their federal income tax returns for 2014,
9 2015, and 2016, Exhibit C; a sales and use tax return
10 worksheet; a sales summary for the fitness center
11 located at the Livingston location; incomplete purchase
12 invoices for We Sell Fitness; Exhibit D, bank
13 statements; and yearly merchant credit card statements.

14 For the liability period, Appellants reported
15 total taxable sales of approximately \$11,000 on their
16 sales and use tax returns and claimed no deductions.
17 However, Appellants' federal income tax returns
18 disclosed gross receipts from Appellants' sales of
19 fitness equipment of approximately \$230,000 for 2014,
20 \$291,000 for 2015, and \$556,000 for 2016 totaling almost
21 \$1.1 million for three years.

22 As stated in the decision, Exhibit A, it was
23 Appellants' understanding that their sales of fitness
24 equipment to gyms or other end-use consumers were
25 nontaxable transactions; therefore, Appellants did not

1 report any of their fitness equipment sales on their
2 sales and use tax returns. The Department determined
3 the sales summary provided by Appellant did not contain
4 the sales of their fitness equipment; therefore, the
5 Department requested that Appellants provide sales
6 invoices for the liability period, Exhibit D.

7 Appellants' fitness equipment sales per their
8 sales invoices were approximately \$37,000 for 2014 and
9 \$206,000 for 2015. With respect to the 2016 sales
10 invoices, the Department determined that they were
11 incomplete and not scheduled.

12 Appellants' gross receipts for their federal
13 income tax returns were greater than their total sales
14 per their sales invoices by approximately \$193,000 for
15 2014 and by \$84,000 for 2015.

16 Because Appellants did not produce documents
17 supporting the reported fitness equipment sales on their
18 federal income tax returns, the Department deemed the
19 sales and invoices Appellant did provide to be
20 incomplete, fragmented, inaccurate, and thus unreliable.
21 As a result, the Department accepted Appellants reported
22 sales of fitness equipment on their federal income tax
23 returns of almost \$1.1 million for 2014, 2015, and 2016
24 to be their total taxable sales of fitness equipment for
25 the liability period. After comparing audited taxable

1 sales to reported taxable sales, Appellants' total
2 unreported taxable sales came to approximately \$1.1
3 million.

4 California imposes sales tax on a retailer's
5 sale in this state of tangible personal property
6 measured by the retailer's gross receipts unless the
7 sale is specifically exempt or excluded from taxability
8 by statute. All of the retailer's gross receipts are
9 presumed to be subject to tax until the contrary is
10 established, and the retailer has the burden of proving
11 otherwise.

12 If the Department is not satisfied with the
13 accuracy of the sales and use tax returns filed, it may
14 base its determination of the tax due upon facts
15 contained in the return or any other information that
16 comes within its possession. It is the taxpayer's
17 responsibility to maintain and make available for
18 examination on request all records necessary to
19 determine the correct taxability.

20 If a taxpayer's records are insufficient or are
21 proven unreliable, it is appropriate for the Department
22 to compute and estimate the taxpayer's liability by
23 alternative means. The Department has a minimal initial
24 burden of showing that its determination was reasonable
25 and rational.

1 In this case, as previously discussed,
2 Appellants' books and records were not reliable to
3 determine appellants' taxable sales for the liability
4 period. When it is determined that a taxpayer's records
5 are such that sales cannot be verified by a direct audit
6 approach or reliance cannot be placed on the taxpayer's
7 records, the Department must calculate the sales from
8 whatever information is available using indirect audit
9 methods to determine the correct liability.

10 Based on Appellants' lack of documentation to
11 support their fitness equipment sales and the
12 discrepancies in the records they did provide, the
13 Department was justified in using Appellants' federal
14 income tax returns in determining their taxable sales.
15 The use of federal income taxes has proven to be an
16 effective audit procedure for establishing taxable
17 sales, therefore, the Department's determination of
18 Appellants' liability was reasonable and rational.

19 Once the Department has met its initial burden,
20 the burden of proof shifts to the taxpayer to establish
21 by a preponderance of the evidence that a result
22 differing from the Department's is warranted. Here, as
23 stated in the decision, Appellant did not dispute the
24 manner in which the Department conducted the audit.
25 Rather, Appellants contend that it is unfair to assess

1 the liability at issue because they did not collect
2 sales tax reimbursement from their customers.

3 Appellants also argued that paying the
4 liability may cause them to shut their business down or
5 file for bankruptcy or both. However, Appellants sold
6 fitness equipment to gyms and other end users, and
7 pursuant to the sales and use tax law, a tax is required
8 to be imposed on these sales measured by Appellants'
9 gross receipts unless the sales were specifically exempt
10 or excluded from taxation by statute. Furthermore, all
11 of Appellants' gross receipts are presumed to be subject
12 to tax until the contrary is established with
13 Appellants' having the burden of proving otherwise.

14 Appellants have not provided any evidence
15 whatsoever to show that their gross receipts, as
16 determined by the Department based on Appellants'
17 federal income tax returns, are not subject to tax. Due
18 to a lack of supporting evidence, Appellants have not
19 met their burden of proof by a preponderance of the
20 evidence that their gross receipts are not subject to
21 tax; therefore, no adjustments are warranted to the
22 audited measure of unreported fitness equipment sales.

23 With respect to Appellants' contentions
24 regarding fairness and inability to pay the liability
25 due to financial hardship, such arguments are based on

1 equity, and the Office of Tax Appeals as an
2 administrative agency does not have any broad authority
3 to grant equitable relief. As a general matter,
4 equitable powers can only be exercised by a court of
5 general jurisdiction. Because the Office of Tax Appeals
6 is unable to grant equitable relief here, these
7 contentions lack merit.

8 We next turn to the issue of whether Appellant
9 should be relieved of the liability based on reliance on
10 alleged erroneous advice from the Department. Revenue
11 and Taxation Code Section 6596 provides that a person
12 may be relieved of sales or use taxes otherwise due and
13 any penalty or interest if the person's failure to make
14 a timely return or payment is due to the person's
15 reasonable reliance on erroneous written advice from the
16 Department. Reasonable reliance on written advice
17 occurs when a person makes a written request for advice
18 from the Department on a particular activity and the
19 Department responds in writing to the person requesting
20 advice.

21 Here, Appellants contend that they were told by
22 a Department employee that their permit was related to
23 wholesales and not retail sales which led appellants to
24 believe that their sales of fitness equipment were
25 nontaxable and that they had correctly reported their

1 taxable sales in the past; however, Appellants have not
2 provided any evidence to show that they requested
3 written advice from the Department, nor that they
4 received written advice from the Department as required
5 by Revenue and Taxation Code Section 6596.

6 Moreover, as stated in the decision and here
7 today, Appellants admit that they do not remember the
8 name of the Department employee whom they allege they
9 spoke to and they did not get the advice in writing.
10 Accordingly, Appellants are not entitled to relief under
11 Revenue and Taxation Code Section 6596.

12 Lastly, we turn to the issue of whether the
13 Department properly imposed the negligence penalty.
14 Revenue and Taxation Code Section 6484 provides for the
15 imposition of a 10 percent penalty if any part of the
16 deficiency for which a determination is made was due to
17 negligence or intentional disregard of the law or
18 authorized rules and regulations. Negligence is
19 generally defined as a failure to exercise such care
20 that a reasonable and prudent person would exercise
21 under similar circumstances.

22 A taxpayer is required to maintain and make
23 available for examination on request by the Department
24 all records necessary to determine the correct tax
25 liability under the sales and use tax law and all

1 records necessary for the proper completion of the sales
2 and use tax returns. Failure to maintain and keep
3 complete and accurate records will be considered
4 evidence of negligence.

5 A negligence penalty may also be based upon a
6 taxpayer's failure to properly prepare its returns. The
7 size of the understatement as a proportion of the
8 audited measure is not alone proof of negligence, but as
9 that proportion increases, it may provide persuasive
10 evidence of negligence.

11 Also, in analyzing the issue of negligence, one
12 of the factors that must be considered is whether a
13 taxpayer has been previously audited. A negligence
14 penalty is not generally imposed when the taxpayer has
15 not previously been audited. Nevertheless, even in
16 connection with a first audit, as is the case here,
17 imposition of a negligence penalty is warranted if there
18 is evidence establishing that bookkeeping and reporting
19 errors cannot be attributable to the taxpayer's good
20 faith and reasonable belief that its bookkeeping and
21 reporting practices were in substantial compliance with
22 the requirements of the sales and use law or
23 regulations.

24 Relevant factors such as the general state of
25 the books and records and taxpayer's business experience

1 must be considered. And where the evidence clearly
2 shows that the understatement is due to negligence, then
3 the penalty applies even when the taxpayer has not been
4 previously audited.

5 Here, as stated in the decision, Appellants
6 contend that they were cooperative during the audit and
7 that paying the negligence penalty will cause them
8 financial hardship. However, Appellants failed to
9 provide documents of original entry to support the
10 amount of gross receipts and fitness equipment sales
11 that they reported on their federal income tax returns,
12 nor did they provide complete and accurate source
13 documents for the sales of fitness equipment.

14 Therefore, Appellants failed to provide, maintain, and
15 make available for examination adequate records for
16 sales and use tax purposes, which is evidence of
17 negligence.

18 Furthermore, when comparing Appellants'
19 reported taxable sales of approximately \$11,000 to the
20 deficiency measure of almost \$1.1 million, the
21 Department computes an error rate of 9,584 percent.
22 This understatement of sales is substantial and
23 persuasive evidence of negligence. The Appellants'
24 failure to maintain and provide adequate records and the
25 significant 9,584 percent error rate together represent

1 compelling evidence of negligence.

2 When all of the relevant factors as just
3 discussed are considered, Appellants could not have held
4 a good faith and reasonable belief that their
5 recordkeeping and reporting practices were in
6 substantial compliance with the requirements of the
7 sales and use tax law and regulations. Therefore, it
8 was proper for the Department to impose the 10 percent
9 negligence penalty even though it was Appellants' first
10 audit.

11 In conclusion, no adjustment is warranted to
12 the audited measure of unreported fitness equipment
13 sales. Furthermore, Appellants should not be relieved
14 of the liability based on reliance on alleged erroneous
15 advice from the Department and the Department properly
16 imposed the negligence penalty; therefore, the appeal
17 should be denied. Thank you.

18 ALJ BROWN: Thank you very much. Let me go
19 back to the beginning of your presentation where you
20 talked about the waivers of limitation.

21 MS. GUZMAN: Mm-hmm.

22 ALJ BROWN: So I just want to focus on the
23 first quarter of January -- the first quarter of 2016
24 because looking at -- hold on -- Revenue and Taxation
25 Code Section 6487 that says that every determination

1 shall be mailed within three years after the last day of
2 the calendar month following the quarterly period for
3 which the amount is proposed to be determined or within
4 three years after the return is filed, whichever expires
5 later.

6 So the quarter ends March 31st, and the last
7 day of the calendar month following March 31st would be
8 April 30th. So how -- if the NOD was issued May, in May
9 of 2019, how is the first quarter of 2016 covered?

10 MR. HUXSOLL: Appellant was an annual filer.

11 ALJ BROWN: Oh, okay. I'm sorry. Thank you.

12 (Reporter clarification)

13 ALJ BROWN: And then I just wanted to ask, as I
14 indicated at the prehearing conference and mentioned in
15 the order, I wanted to ask about whether there was any
16 indication that any of what was treated as taxable
17 sales, whether there's any indication that any
18 nontaxable items were included in that, because my
19 understanding is Appellant did sell some nontaxable
20 items such as membership fees.

21 MS. GUZMAN: Appellants did file returns for
22 2014, 2015, and 2016, which totaled approximately
23 \$310,000 in membership fees, and Appellants have not
24 provided any evidence here that the amount -- the
25 audited amount that was determined by the Department

1 included any sales that were not taxable. And because
2 they reported the membership fees separately in their
3 federal income tax returns, we do not believe that those
4 amounts were included in the audited amount.

5 MR. PARKER: All right. So can I, add on real
6 quick?

7 ALJ BROWN: Yes.

8 MR. PARKER: So they did file two separate
9 income tax returns: One for the fitness centers, which
10 was the 310,000 that she mentioned. And then the
11 equipment sales was a complete separate income tax
12 return. The Appellant mentioned that they sold
13 supplements and drinks and that's what -- at the fitness
14 centers, and that's what they reported taxable sales on,
15 which is part of the fitness center income tax return.
16 So there's two separate returns.

17 ALJ BROWN: Thank you. And now I will turn to
18 my co-panelists to ask -- see if they have any
19 questions.

20 Judge Ralston?

21 ALJ RALSTON: No questions. Thank you.

22 ALJ BROWN: Okay. Judge Johnson?

23 ALJ JOHNSON: No questions. Thank you.

24 ALJ BROWN: Okay. Then -- all right. Then I
25 will say if CDTFA is done with its presentation, we go

1 back to Appellant.

2 And, Ms. Bahrami, if you would like to make any
3 kind of rebuttal argument, you can go ahead and do so.

4 APPELLANT BAHRAMI: No, I don't have any.

5 ALJ BROWN: Okay. Then I believe we have
6 completed everything. One second.

7 And I also just will confirm, when we were
8 talking earlier about the evidence that I did check and,
9 Ms. Bahrami, you were -- I know you said that you
10 received the email a couple days ago that had the
11 evidence binder, but the earlier submissions were
12 emailed to your address?

13 APPELLANT BAHRAMI: I probably have to go back
14 and check it.

15 ALJ BROWN: All right.

16 APPELLANT BAHRAMI: Yeah.

17 ALJ BROWN: I just am --

18 APPELLANT BAHRAMI: I'm sure --

19 ALJ BROWN: I'm confirming that I can tell you
20 that I looked and saw that --

21 APPELLANT BAHRAMI: Okay.

22 ALJ BROWN: -- your email address was on there.

23 APPELLANT BAHRAMI: Okay.

24 ALJ BROWN: Okay. But you indicated you had no
25 objection to the admission and they've already been --

1 admitted.

2 APPELLANT BAHRAMI: Yes.

3 ALJ BROWN: So I'm just confirming that I
4 looked and I saw that you were included in the earlier
5 submissions.

6 APPELLANT BAHRAMI: Okay.

7 ALJ BROWN: Okay. All right. Since we have
8 completed all of the arguments, then I can say that this
9 concludes the hearing and the record is closed and the
10 case is submitted today. The judges will meet and
11 decide the case based on the evidence, arguments, and
12 applicable law, and we will mail both parties our
13 written decision no later than 100 days from today.

14 The hearing is now adjourned, and this also
15 concludes the morning hearings. The hearings will
16 resume again in the afternoon. Thank you all very much.

17 (Conclusion of the proceedings at 10:19 a.m.)

18 ---oOo---

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)

COUNTY OF SACRAMENTO) ss.

I, MARIA ESQUIVEL-PARKINSON, do hereby certify that I am a Certified Shorthand Reporter, and that at the times and places shown I recorded verbatim in shorthand writing all the proceedings in the following described action completely and correctly to the best of my ability:

IN THE APPEAL OF NINA BAHRAMI, Case No. 21027296

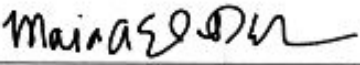
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Date: Thursday, December 15, 2022

I further certify that my said shorthand notes have been transcribed into typewriting, and that the foregoing 36 pages constitute an accurate and complete transcript of all my shorthand writing for the dates and matter specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California on this 10th day of January, 2022.



Maria Esquivel-Parkinson
CSR No. 10621, RPR

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