

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
G. RAMIREZ and P. RAMIREZ,) OTA NO. 18103890
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, December 29, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 2:30 p.m. and concluding at 4:39 p.m. on
Thursday, December 29, 2022, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSHUA ALDRICH

Panel Members: ALJ KEITH LONG
ALJ ANDREW WONG

For the Appellant: G. RAMIREZ
P. RAMIREZ

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE DEPARTMENT

RANDY SUAZO
CHRISTOPHER BROOKS
JASON PARKER

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I N D E X

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California; Thursday, December 29, 2022
2:30 p.m.

JUDGE ALDRICH: This is Judge Aldrich. We're opening the record in the Appeal of G. Ramirez and P. Ramirez doing business as the Kennedy Store and Deli before the Office of Tax Appeals, OTA Case Number 18103890. Today's date is Thursday, December 29th, 2022, and it's approximately 2:30 p.m.

This hearing was noticed for a virtual hearing and is being heard by a panel of three Administrative Law Judges. My name is Josh Aldrich. I am the lead for purposes of conducting the hearing. I'm joined by Judges Keith Long and Andrew Wong.

During the hearing, the Panel members may ask questions or otherwise participate to ensure that we have all the information needed to decide this appeal. And after the conclusion of the hearing, we three will deliberate and decide the issues presented.

As a reminder the Office of Tax Appeals is not a court. It is an independent appeals body. The Panel does not engage in ex parte communications with either party, and our opinion will be based off the party's arguments, the admitted evidence, and the relevant law. We have read your submissions, and we're looking forward to hearing

1 your arguments today.

2 Now, who is present for the Appellant?

3 Mr. Armijo, could you start?

4 MR. ARMIJO: Sure. Well, first of all, good
5 afternoon and thank you for the opportunity to have this
6 hearing. What I'd like to do is introduce the Ramirezes.
7 Here behind me is Gilbert Ramirez.

8 MRS. RAMIREZ: I'm Patricia Ramirez.

9 JUDGE ALDRICH: Thank you.

10 MR. ARMIJO: And -- yes. And of course myself,
11 Oscar G. Armijo, CPA. So I just wanted to give you a
12 little bit of --

13 JUDGE ALDRICH: It looks like you're switching
14 into your presentation. I'm just trying to get who the
15 parties are at this moment.

16 MR. ARMIJO: Okay. All right.

17 JUDGE ALDRICH: I'll give you a little bit of
18 leeway --

19 MR. ARMIJO: That's fine.

20 JUDGE ALDRICH: -- or lead-in into your
21 presentation.

22 MR. ARMIJO: That's fine. Go ahead.

23 JUDGE ALDRICH: And Department, who is here for
24 CDTFA?

25 MR. SUAZO: This is Randy Suazo, Hearing

1 Representative.

2 MR. PARKER: Jason Parker, Chief of Headquarters
3 Operations Bureau.

4 MR. BROOKS: Christopher Brooks, Tax Counsel for
5 CDTFA.

6 JUDGE ALDRICH: Thank you.

7 Next, we're going to talk about what the issues
8 are. Those have been memorialized in minutes and orders.
9 But Mr. Armijo did indicate that they were disputing the
10 negligence penalties, so there are technically two issues.
11 I'll read them just briefly: Whether Appellant has shown
12 that further adjustments are warranted to the audited
13 understatements of reported taxable sales; and whether the
14 negligence penalty was properly imposed.

15 Does that sound about right, Mr. Armijo?

16 MR. ARMIJO: That's correct.

17 JUDGE ALDRICH: Okay. And Department, Mr. Suazo?

18 MR. SUAZO: That's correct.

19 JUDGE ALDRICH: Great. So next we're going to
20 talk a little bit about exhibits. So CDTFA's exhibits are
21 identified alphabetically as Exhibits A through F. They
22 were submitted timely. And during the prehearing
23 conference, Mr. Armijo indicated he had no objections to
24 admitting them.

25 Is that still true, Mr. Armijo?

1 MR. ARMIJO: Yes.

2 JUDGE ALDRICH: Okay. Hearing no objections,
3 we'll move those into evidence.

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

6 And then Mr. Armijo submitted an exhibit index
7 identifying Exhibits A through G on December 14th. And to
8 avoid confusion when we're discussing them, we will
9 relabel them as Exhibits 1 through 7. So Appellant's
10 Exhibit A will now be Exhibit 1. Appellant's Exhibit B
11 will now be Exhibit 2 and so forth. And the reason why
12 I'm doing that is because CDTFA has their exhibits labeled
13 as A through F and I don't want to cause confusion.

14 But if, Mr. Armijo, if you refer to it as your
15 Exhibit A, just be -- if you could clarify that it's
16 Appellant's Exhibit A. But it would be more helpful if
17 you could refer to it numerically.

18 But I also indicated on those minutes and orders
19 we discussed any objections to admitting those exhibits.

20 Mr. Suazo, did you have an objection to admitting
21 Appellant's proposed exhibits?

22 MR. SUAZO: No objections.

23 JUDGE ALDRICH: Okay. So excuse me. The
24 Appellant's Exhibits 1 through 7, formally A through G,
25 are admitted into evidence.

1 (Appellant's Exhibits 1-7 were received
2 in evidence by the Administrative Law Judge.)
3 To let everybody know how the hearing will
4 proceed, we're going to start off with Appellant's opening
5 presentation -- excuse me -- and we estimated that was
6 60 minutes long. Next, we'll have CDTFA's combined
7 opening and closing statement for approximately
8 25 minutes. And then the Panel will ask questions for
9 about 5 to 10 minutes. Following that, there will be an
10 opportunity for Appellant to provide closing remarks or
11 rebuttal for about 5 or 10 minutes. And like I indicated
12 before, these are estimates made for calendaring purposes.
13 If you need additional time or if you wish to waive time,
14 please let me know and I'll address your request. Next,
15 we'll switch to witness testimony.

16 So Mr. Suazo, is it still correct that CDTFA
17 doesn't intend to call a witness? You're muted. Sorry.

18 MR. SUAZO: This is Randy Suazo. No witnesses.

19 JUDGE ALDRICH: Great. Thank you.

20 And, Mr. Armijo, I believe you had two witnesses
21 today.

22 MR. ARMIJO: Correct.

23 JUDGE ALDRICH: And so, since I'm not sure at
24 what point in your presentation, you're going to be having
25 witness testimony, I'm going to go ahead and swear them in

1 now.

2 If Mr. Ramirez and Mrs. Ramirez could please
3 raise your right hand.

4

5 G. RAMIREZ,

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

9

10 P. RAMIREZ,

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

14

15 JUDGE ALDRICH: Okay. I heard two verbal yeses.
16 Ms. Alonzo, did you hear that as well? You're
17 good.

18 All right. They were just a little bit faded.
19 So it sounds good.

20 Are there any questions before we transition to
21 presentations? Mr. Armijo?

22 MR. ARMIJO: No, I have no questions.

23 JUDGE ALDRICH: And Mr. Suazo?

24 MR. SUAZO: No questions.

25 JUDGE ALDRICH: All right. So, Mr. Armijo,

1 please proceed with your opening presentation when you're
2 ready.

3 MR. ARMIJO: Okay. Well thank you so much.

4

5 PRESENTATION

6 MR. ARMIJO: So what I'd like to do is start off
7 by giving you just a very brief introduction of myself and
8 my work experience and, you know, what I do and what we've
9 done here at the firm. So we've been in practice for over
10 35 years. Most of my experience has been related to
11 conducting audits of organizations, non-profits,
12 businesses, government units, districts, and special
13 districts.

14 So I say this because I wanted, you know, I --
15 I -- I want you to understand that when we talk about
16 auditing procedures and when we talk about the auditing
17 standards that you know that I understand what exactly it
18 is. And, you know, our firm has been subject to many peer
19 reviews, over ten of them, and we have passed every one of
20 them.

21 So I have extensive experience in conducting
22 different types of audits. So -- but what I'm going to
23 do, I'm just going to give you a very brief presentation
24 of the things that I'm going to be discussing, and then
25 we'll get into it in more detail as we go through the

1 exhibits.

2 First, the -- one of the objections and one of
3 the issues that we had is throughout this process is how
4 the audit was conducted. Okay. And -- and in one of my
5 exhibits, and that would be Exhibit 1, I included an audit
6 report which is not related to the audit period that we're
7 appealing. That was the first audit that was conducted on
8 my clients for the years 2008 and 2010.

9 And, you know, we -- you know, just to be very
10 brief, I would say that was a total surprise to my
11 clients. You know, the process that was supposed to be
12 followed in notifying the client about the audit and
13 actually, you know, the conducting of the audit and
14 everything that has to be done, none of that was done. In
15 fact, the report that was issued on that particular audit
16 was actually not even provided to my client until we
17 started the audit for 2011 and 2013.

18 That report was actually handed over to us when
19 we had our first interview with the auditor at their
20 offices here in Rancho Mirage, which was a total surprise
21 to me. And it made a lot of sense because some of the
22 money that the audit report said that they owed, it's
23 actually garnished from my clients' accounts. And, you
24 know, we didn't realize, or they didn't realize that had
25 happened until, you know, we started preparing the

1 financial statements, and that's how this large, you know,
2 withdrawals from their accounts -- I said, "Well, what's
3 going on here?"

4 And anyways, so they weren't able to provide any,
5 you know, information about that until, you know, we
6 started to investigate this. And then when we got the
7 report, we realized that the tax liability had been paid
8 through garnishments. And I really don't understand how
9 that happened, you know. They were not my clients at that
10 point, but it happened. Okay.

11 So when we started the audit for 2011, 2013, the
12 first thing that the auditor -- the field auditor that
13 came in to do the audit, they told us. They said, "Hey,
14 you know, we're doing this because you had a lot of issues
15 with the 2010 -- 2008, 2010 audit. And so -- but, you
16 know, I've -- I've," he says, "I realize there was some
17 lack of communication. And the way -- I'm not going to do
18 that, you know. We're going to have full disclosures, and
19 we're going to be in communication at all times, and there
20 will be no surprises. So we -- you know, this is how I
21 intend to conduct the audit."

22 For the most part, that's actually how it
23 happened. I mean, he was very cordial. He was very
24 responsive. And, you know, until we got to the point
25 where, you know, he gave us his preliminary findings and

1 that's when we kind of disagreed, you know, on -- on the
2 findings. And so -- but, you know, I asked him. I said
3 why, you know -- I said why, you know, they -- why are you
4 doing these audits?

5 Well because, you know, this is something that
6 we -- you had problems before, so we're just following up.
7 And, you know, I guess that's the practice that you guys
8 follow up when you conduct audits and there's a problem.
9 And I believe him because I had another audit for other
10 clients and that was the case too. There was an audit,
11 and then there was a subsequent audit after that. So, you
12 know, I had no problems.

13 But one of the things that he told us is, "Well,
14 you know, I don't agree on some of the conclusions that
15 were actually arrived." And I said, "Well, look. I can't
16 really speak to that because I've never seen the audit
17 report. So I'm not sure what's going on."

18 And so he says, "Well, you know, that's not going
19 to happen with us. We're going to be -- you know, I'm
20 going to be up front with all the issues that we had."

21 One of the issues that we had was that, at that
22 time 2008, 2010, the Ramirezes, they also had a truck,
23 like, a taco truck. And -- but that was discontinued in,
24 you know, shortly before 2010 because, you know, that's
25 when the, you know, we had the recession, and -- and, you

1 know, the clientele that they served was not there
2 anymore.

3 You know, they usually -- they used to go out to
4 construction sites and, you know, so construction came to
5 a stop. And so there was no -- there was, you know, that
6 was really not enough business to maintain the truck. So,
7 you know, the -- so we told him, and I explained to him.
8 I said, "Look," I said, "There is no truck." And besides,
9 for you to have a truck, you have to have a license, and
10 it has to be renewed. And, you know, the Department of
11 Health and Services needs to -- you know, needs to approve
12 that.

13 So that was the first disagreement that we had.
14 And he just said, "Well, you need to give us, you know,
15 requested information," which we did. And then finally,
16 you know, he -- you know, he agreed to -- he said, "Okay.
17 Well, this additional taxable sales that I thought
18 happened with the truck sale, I'm just going to go ahead
19 and eliminate them." And -- and -- but once he did that
20 and we, you know -- I started to question his rationale
21 for, you know, for the -- for his findings, you know,
22 we -- that's when he started to kind of disagree.

23 And I said, "Okay. Well, you know, whatever
24 you -- that's fine." I said, "But, you know, I think I
25 have a right to talk to your supervisor, to your manager

1 or supervisor, district supervisor." And -- and those are
2 the kind of things that didn't happen, okay, only because
3 he ran out of time. And we -- we granted a couple of
4 extensions, and he requested another extension.

5 I said, "Look, my clients just want to get done
6 with this thing. So go ahead, you know. And we're not
7 going to, you know, we're not going to agree to give you
8 an additional extension."

9 And he says, "Okay. Then I'm going to have to
10 finalize the report."

11 I said, "Fine. If you're going to file the
12 report," then I said, "I have a right to meet with your
13 supervisor," and -- and there were just a lot of delays,
14 you know. And, you know, he would come. He started the
15 audit in, like, September or October of 2014, and when we
16 didn't get the final report until, you know, the middle of
17 2015, maybe towards the end of the summer.

18 And there was a lot of -- a lot of gaps in
19 between that we would provide information, and then we
20 would not hear from the auditor until like a month later
21 or two months later with, you know, no explanation for
22 that. And so, you know, so that was a problem in that,
23 you know, we just felt that we were just kind of rushed to
24 it. I mean, a lot of differences I really believe that
25 they could have been worked out.

1 And, you know, had he followed through, you know,
2 in a timely basis and, you know, it just -- it just didn't
3 happen. I mean, so -- so here we are, you know, to --
4 right here, you know, at this point, you know, having this
5 hearing. We really felt that -- that a lot of this could
6 have been -- could have been -- could have been avoided.

7 The -- the -- so the other thing that I want to
8 talk about, and I just want to give you this -- this, you
9 know, this, you know, brief context because I think it's
10 important because a lot of the audit findings came from
11 the audit findings that were -- that were reported on the
12 first audit. And, you know, every time I asked questions.
13 He said, "Well, you know, we're doing this because that's
14 what we did before. So, you know, we're just kind of
15 being consistent."

16 And he said, "Okay. Well, that's -- that's what
17 you guys do, well that's what you do. I'm not going to
18 argue with that."

19 But the main thing here, and the reason why we're
20 here in this hearing is because, you know, the main point
21 of contentions that we always maintained is that the data
22 that was being used, okay, to -- to, you know, to -- the
23 data that was used to actually prepare the reports that we
24 got, you know, we thought that that data was not, you
25 know, was not sufficient. It was not complete. It was

1 not relevant to the audit. So we're going to talk about
2 that later on.

3 You know -- you know, your regulations also call
4 that, you know, your audit manual is very specific, you
5 know, how the audit is going to be conducted and the type
6 of things you have to do. And -- and, you know, we really
7 felt that those audit findings, you know, the projections
8 of the taxable sales and nontaxable sales, you know, were
9 really out of line.

10 That really didn't make any sense for us because,
11 you know -- you know, those reports actually were saying
12 that -- that my clients, you know -- you know, were
13 underreporting taxable sales and if you're underreporting
14 taxable sales and then you're reporting, you know, total
15 sales as well.

16 And then one of the things that I noticed is
17 that -- is that every time we got a report from the
18 auditor, you know, it was a different report, different
19 findings, different amounts, different assumptions,
20 different set of facts. And, you know, so, you know, I
21 guess, you know, he would just go back and forth to his
22 office and get some input from, you know, from his
23 co-workers and supervisors and come back with a different
24 reports.

25 I did a summary which I wasn't able to include in

1 my exhibits -- but I can provide this for you guys later
2 on if that's acceptable, okay -- where, you know, I did a
3 summary of all these reports that this person issued. And
4 every time we had a, you know, report, that was a
5 different estimated tax liability. The facts didn't
6 change. You know, the sample that he used were the same.
7 It's just the assumptions that he used to come up with
8 markups, with taxable ratios, and all that kind of stuff
9 that he used.

10 And, you know, it was very consistent. It was
11 consistent, actually, with what, you know, the first
12 auditor used for that period 2008, 2010 and the amounts of
13 estimated liability were all different, you know, all over
14 the map. Okay. We started out with \$43,000. In the
15 second report the liability went up to \$41,000. His third
16 report went up to -- the tax liability went up to \$77,000.
17 And then when we appealed it and the OTA sent it back to
18 the field auditors, then their liability came down to
19 \$57,000, and then it went up to \$60,000.

20 So every time there was a report issued the
21 numbers were all different, you know. Which is to me, I
22 really don't understand. That was -- you know, there was
23 no additional information. It was just them working the
24 numbers too. That's -- that's when, you know, I've never
25 seen anything like that. But so -- so what I'd like to do

1 is take you to exhibit -- what we call exhibit -- which
2 would be Exhibit Number 3. Okay. And I just want to
3 review that with the panel, okay.

4 And -- and so, you know, I'm not sure how
5 familiar you are with the case, but I think that letter
6 that I wrote to the Office of Tax Appeals to state our
7 position pretty much lays out, you know, in detail, you
8 know, the issues that -- the specific issues that we had,
9 you know, with -- with the audit. What has changed?
10 Obviously, this letter was written before the OTA had an
11 opportunity to review this.

12 So the numbers that we talk about here obviously
13 are not going to be the same as -- as, you know, as they
14 are now. So the first thing is that I just want to give
15 you a little bit of context on -- on the -- on the store,
16 you know, what we're talking about. And if you don't
17 mind, I'm just going to read off of this, if that's okay
18 with you.

19 JUDGE ALDRICH: That's fine by me.

20 MR. ARMIJO: Okay. Great. All right.

21 So the first thing I said is the description of
22 the store, and it reads:

23 Kennedy Store and Deli is a small store owned and
24 operated by Mr. and Mrs. Ramirez. The store is located in
25 a rural and remote area recently annexed by the City La

1 Quinta. Most of the store's customers are farm workers
2 that work and live on the farms in trailer parks that
3 surround the store and construction and service workers
4 that work in the exclusive gated communities that are
5 located near to the store. Many of them, the residents,
6 that live around the store are undocumented families.

7 The physical footprint of the store is very
8 small. The main retail space is approximately 13 feet by
9 22 feet, with an additional small kitchen that includes a
10 small stove and sink measuring no more than 54 square
11 feet, 9 by 6 feet. The major items sold at the store are
12 beer, sodas, water, candies, chips, ice, groceries like
13 milk, cheese, eggs, vegetables, fruits, cold sandwiches,
14 ice cream, bacon, and ham, snacks, precooked burritos and
15 tacos, shrimp cocktails, nachos, and other miscellaneous
16 taxable groceries.

17 And then I -- you know, there were some exhibits
18 that I included, which I took pictures of the store but
19 they -- they really didn't come out very good. But it's a
20 very small store. In addition to selling merchandise, the
21 store also has a large check cashing business where
22 payroll checks issued to mostly undocumented workers to be
23 cashed for a fee of 1 or 2 percent of the gross payroll
24 amount. This constituted the most profitable activity of
25 the store as hundreds of thousands of dollars were cashed

1 on a monthly basis.

2 The store's ability -- and this is important.
3 The store's ability to track inventory for merchandise
4 purchased and sold were minimum as there were no internal
5 controls over inventory. As a result, the store
6 experienced many losses from daily petty theft perpetuated
7 by customers and employees. The store had one major break
8 in where a significant amount of merchandise was stolen.
9 We tried to get the police report to give to you but
10 unfortunately we weren't able to, you know, to get that,
11 and we're still waiting for that.

12 The hours of operation for the store for the
13 audit period 2011 to 2013 were 6:30 a.m. to 6:30 p.m. from
14 Monday through Sunday -- through Saturday -- I'm sorry --
15 8:00 a.m. to 5:00 p.m. on Sundays. Then I'm going to talk
16 a little bit about the audits -- the auditor's audits --
17 SBA prior audits. The store has recently been audited for
18 the audit periods 2008 to 2010, 2011 to 2013, and 2014 and
19 2016. For every one of these audits, there has been major
20 violations of taxpayer's rights as outlined in the SBA
21 Audit Manuals that has deprived Mr. and Mrs. Ramirez the
22 opportunity to dispute many of the final findings of the
23 auditor, auditor's supervisor, and district supervisor.

24 The words of these violations include failure to
25 provide final audit reports for Mr. and Mrs. Ramirez for

1 the audit periods of 2008, 2010, and 2014, and 2016 on a
2 timely basis and failure to properly notify taxpayer that
3 a sales tax audit was about to be conducted. This is for
4 the audit period 2014, 2016. This was done remotely
5 without telling them that there's an audit being
6 conducted. Okay.

7 The most striking characteristic of this audit is
8 that in every audit that was conducted there was no
9 consistency in the assumptions and facts used by the
10 auditors to arrive to the conclusions. In fact, the
11 markup ratios and sample size used on taxable and
12 nontaxable items and not -- and hot food items were all
13 noticeably different. For the audit period 2008, 2010,
14 which was the first one, the final audit report was
15 provided on September 11th of 2014.

16 That's the first time that my client saw a copy
17 of the audit report, and that was handed to us at the
18 State Board of Equalization BOE office in Rancho Mirage.
19 And for the audit period 2014, 2016, the final audit
20 report was provided on December 11, 2018. After it was
21 phone billed on 10 -- on October 24, '17. We provided
22 documentation, you know, to, you know, corroborate that.

23 What are the disputed findings? Okay. Sample
24 size and calculation of markup ratios. The auditor used
25 the month of February 2015 to perform his purchase

1 segregation analysis and the sales for the month of 2013
2 to estimate taxable sales for the three-year audit period.
3 The State Board of Equalization Audit Manual Chapter 4
4 Section 0405.20 states that the test base should be
5 representative for the total population of the item being
6 tested.

7 This manual further states that when a business
8 has little or no internal controls, the test period should
9 cover a larger portion of the audit period. And the
10 periods selected for tests should be spread over the
11 entire audit period so that the sample can be taken for
12 all the years and all seasons of the years. So there were
13 only two samples, one for February 2015, and another one
14 for April 2013. April 2013 was for sales, and
15 February 2015 were for the purchase segregation analysis.
16 We do not believe that the sample size selected by the
17 auditor, one month, is representative of the entire
18 population subject to the audit.

19 Secondly, the auditor selected the month of
20 February 2015 to perform his purchase segregation
21 analysis. This is a month that's clearly outside of the
22 audit period and should not be used as a basis to
23 calculate ratios of taxable and nontaxable sales. We
24 believe and agree with SBE Audit Manual that information
25 selected for sample testing should be representative and

1 relevant to the population being tested.

2 During our appeal, we presented -- this is when
3 we had the appeals conference. We presented purchase
4 segregation analysis information for three months during
5 the audit period. This information was unjustifiably
6 dismissed on the grounds that it was going to be too time
7 consuming to look into all the purchases that were
8 included in the schedules provided. Weighted markup
9 issues can be greatly affected when relevant sample sizes
10 are not properly selected.

11 We also presented information regarding the
12 variation of the amount of sales throughout the year.
13 Economic activity varies considerably throughout the year
14 in the Coachella Valley. The majority of the Coachella
15 Valley economy is driven by tourism and part-time
16 residents. This was addressed -- this issue was
17 specifically addressed by information that we provided
18 during that reaudit. So this is not an issue for us
19 anymore.

20 The other disputed item that we had was projected
21 sales of hot prepared foods. At this time the auditor
22 estimated \$817,000 roughly in sales of hot prepared food
23 for the three-year period which comes out to an average
24 \$22,721 per month. This amount was based on a purchase
25 segregation analysis performed for the month of

1 February 2015 using a markup rate of 155 percent of the
2 cost.

3 The markup rate that the auditor originally
4 calculated was 46.85 percent. That was the original
5 markup. The markup rate was subsequently increased to
6 155 percent based on supervisor recommendation. No
7 documentation was provided to support this increase. The
8 \$22,721,000 monthly average where sales of prepared hot
9 food seem high when compared to \$13,181 actual sales of
10 hot prepared food for the month of April 2013.

11 Now, one important thing about this is that April
12 is the month where the store made the most money. Because
13 in April, you know, we have a whole bunch of events in the
14 valley that they play very close to where the store was
15 located. And those are the musical festivals, the
16 Coachella Fest and the Stage Coach. And, you know, that's
17 when whole -- hundreds of thousands of people come and,
18 you know, they -- they consume, they buy things, you know,
19 from stores that are around where the events are being
20 held, you know. So -- so that was really not
21 representative of what happens throughout the year.

22 We believe that the projected sales of
23 hot-prepared food to be unreasonable. Most of the
24 hot-prepared food reflected in the auditor's projection
25 relate to sales of precooked burritos that were prepared

1 every morning prior to the opening of the business. As
2 tested by the prior sales tax audit, the taxpayers were
3 preparing 50 to 65 burritos every day and selling an
4 average of about 90 percent of the burritos they prepared.
5 The prior auditor projected an average of \$26,000 of
6 hot-food sales per quarter.

7 The projected -- the projection of sales for hot
8 foods for this audit period was \$68,000. So it's just
9 about triple, you know, from the prior audit to this
10 audit. Nothing else happened. Same thing. We pointed
11 out the difference to the auditor and, again, the auditor
12 refused to make any adjustment to these projections.

13 And then the next section I have is analysis of
14 sample results. Section 0405.20(b) says that the proposed
15 measure of taxable sales results from the projection of
16 the simple results must be compared -- must be compared
17 and analyzed for reasonableness by looking at the entire
18 taxpayer's business as a whole. This section further
19 states that the auditor and the taxpayer should come to
20 some agreement as to whether or not the results are
21 representative of the business for the time period in
22 question.

23 When we discussed this matter with the auditor
24 and presented an analysis of how the projected increase in
25 taxable sales and total sales would have impacted the

1 financial situation on my taxpayers. So based on those
2 numbers, original numbers, you know, the increase that we
3 projected, based on those audited numbers, were a lot more
4 than what they are now. But, you know, they're still
5 significant. That would have made a difference in my
6 client's financials.

7 There was no -- aside from the auditor's report,
8 there's no evidence that showed that the center of living
9 of the taxpayers improved dramatically. Instead, when you
10 look at the economic realities of the taxpayers of the
11 audit period, you will find that the taxpayers lived
12 through serious economic hardships that resulted in loss
13 of their primary residence, increase in debt settlement of
14 past due payroll taxes with the IRS were an offer and
15 compromise program. So those are -- those are the issues
16 that, you know, that we -- that we -- that we had
17 identified.

18 The -- I'll talk a little bit about Exhibit 4,
19 which is Exhibit D for me. And there's Exhibit 4-1,
20 Exhibit 4-2, Exhibit 4-3, Exhibit 4-4, and Exhibits 4-5,
21 which I included copies of all the audit reports that were
22 issued by the auditors that were involved in the initial
23 audit and the reaudit. And again, you know, I prepared a
24 schedule that -- that basically shows the different, you
25 know, results of those audits and, you know, and, you

1 know, which I find it very interesting about, you know,
2 you know, just because, you know, different conclusions
3 and the same set of facts and information.

4 So -- and a lot has to do, you know, the
5 methodology that was being used to, you know, by the
6 auditors to actually prepare those audit reports. And
7 again, you know, I find it a little bit confusing, you
8 know, to, you know, to see how these change from one
9 report to the next. But that did happen. So the next
10 thing is that, you know, so really, you know, what we need
11 to deal with is the final audit report that was issued by
12 Mr. Pruitt. And this happened after we filed our appeal
13 with the OTA and, you know, they were directed -- you
14 know, they were directed to some of the, you know, some of
15 the issues that we raised.

16 And so on top of that we had a decrease of tax
17 liability, almost \$20,000. And then for some reason that
18 liability went up another \$3,000, which is not really
19 significant to the total scheme of things. But the main
20 problem that we have -- that I have with this final report
21 is -- is how the -- how the markup ratios were -- were
22 calculated. Okay. So -- the auditor went back and -- and
23 basically changed his position on -- on what the markup
24 for hot-prepared foods should be. He basically did away
25 with the approach that we've taken initially.

1 And then he just looked at the approach and said,
2 okay, I'm going to look at the book markup using the, you
3 know, the information that we provided, financial
4 statement and through the tax returns. Okay. The problem
5 with that is that in making that calculation he used -- he
6 used the sales for the month of April, okay. And he used
7 a combination of the purchase segregation analysis for
8 April 2013 and February 2015.

9 Now, you know, when that purchase segregation
10 analysis was first performed by the first auditor, he only
11 used one month. Okay. But when this purchase segregation
12 analysis was done again, the auditor -- the new auditor
13 used two months, one for April 2013 and February 2015.
14 Okay. Two different sets of numbers, two different sets
15 of ratios between taxable and nontaxable, and it's a
16 totally different period. So we really feel that if
17 you're going to take a sample, then the sample should be,
18 you know, just like I stated, you know, earlier. It
19 should be from the period that you're auditing, you know,
20 not from an outside period.

21 Information was available, you know, we actually
22 provided three more months of seg -- well, purchase
23 segregation analysis that were within the audit period and
24 for some reason they refuse to look at that. Okay.
25 Instead, they went one month outside the audit period, you

1 know, to come up with a combination and, you know, of cost
2 and -- and determination of what was taxable and what was
3 not taxable, you know, to use to prepare this final
4 report.

5 So there's a schedule that is included in this
6 final report, and that is -- that was used as a basis to
7 come up with the, you know, what was taxable and what was
8 nontaxable and the ratio included those two items, the
9 taxable and nontaxable. So that schedule is R112B-1. And
10 what it does is he starts off with purchases made for
11 resale. Those were taken from the audited -- not
12 audited -- from the financial statements that were
13 compiled for Kennedy Store. And then he added supplies
14 and then he comes up with the total purchases made by the
15 business.

16 And then he has a ratio that he used to calculate
17 or estimate the purchases that were related for the
18 preparation of hot-prepared foods. Okay. So when he did
19 these purchase segregation analysis, you know, he
20 identified what percentage of those to, you know, of food
21 that was actually used to prepare the hot foods. Okay.
22 The problem with that is that when you use those two
23 numbers, which was April and February 2015, that average
24 comes out to 15.46 percent, which is found in this report.
25 But if you just do what the original auditor did, then

1 that percentage comes up to -- goes down to 11.82 percent.

2 Now, a lower percentage is going to give you a
3 lower amount of purchases that were used to estimate how
4 much he purchase -- how much you actually purchase in
5 foods that were used to prepare foods. So obviously
6 that's going to impact everything else. Now, you know,
7 the other issue that we have with that is that when he
8 performed his purchase segregation analysis, okay, we
9 identified -- my client went through it and identified,
10 you know, what -- what percentage of the groceries that
11 were on that purchase segregation analysis that my client
12 prepared were actually used for hot-prepared foods.

13 The auditor took the position that everything,
14 everything that you bought, okay, was actually
15 allocated -- was used to prepare hot foods. Okay. In
16 this calculation, if you go through this, there's no
17 allowance. There's no allowance for waste. There's no
18 allowance at all. I mean -- I mean, you know, if you --
19 you know, if you, you know, ever been involved in cooking
20 anything you know that not everything that you buy you're
21 going to eat.

22 I mean, there's some stuff that's not going to be
23 used just simply because when you go through the cooking
24 process, you know, some stuff is going to be wasted
25 because it's not, you know, it's not-- it's not edible.

1 It's not something that you want -- that you want to, you
2 know, put in the product itself. There was no allowance
3 for that. Okay.

4 You know, to take up the position that, you know,
5 everything you buy. You know, you buy one pound of meat
6 that you're going to be able to sell it and make burritos
7 out of that, well, that's not true. That's not going to
8 happen, you know. I mean, you know, if you want -- if you
9 buy one pound of chicken, well, you're not going to eat
10 the bones. I mean, you're going to get rid of the bones.
11 And so, you know, how much of that should be discounted
12 from what you paid.

13 None of that was actually considered. I mean,
14 those are very logical things. I mean it's like, come on.
15 You know, you've got to provide some allowance for that.
16 We discussed that with the auditors. And, in fact, we had
17 him here at the office. You know, he was -- he was told
18 to come in here and go through those schedules. And
19 unfortunately, that meeting didn't really -- didn't go
20 very well.

21 I mean, the -- I mean, his -- his, you know, his
22 hair was very unprofessional. He was here. We disagreed
23 with the input that he was getting with -- from my, you
24 know, from my clients. We were here for maybe an hour and
25 a half to two hours, and he just -- he just walked out and

1 left the office just like that, you know.

2 It's like when you buy chips, you know, you don't
3 sell the chips. You don't sell nachos, 100 percent of the
4 nachos, you know. I mean, your -- you know, some of the
5 chips go into the burritos that you're selling. You're
6 not selling the chips. It's a complement to the stuff
7 that you provide for, you know, for, you know for your
8 customers, you know, napkins, salt and, you know,
9 condiments. Things that go with, you know. You don't --
10 salsas and things like that, you know, you don't sell
11 those things. You just provide that to your, you know,
12 for your clients.

13 When you go to a restaurant -- a Mexican
14 restaurant, you know, some restaurants do charge you for
15 chips, but most of them, 95 percent of them, they don't.
16 They just -- it's complimentary. So it's not included on
17 your bill when you pay your bill, you know, a basket of
18 chips or anything like that. It's just you're not going
19 to even see that. Anyways, so we tried to make that, you
20 know, clear. I said hey, you know, this is -- this is not
21 right. I mean, you have to make some allowances to come
22 up with what exactly you're, you know, you're going to use
23 to project sales based on cause. I said, you know, you
24 just can't use 100 percent.

25 Anyways, so that was one of the points of

1 contention that, you know, that we had with him. And then
2 the other, you know, factor in computing your bookmark up
3 is your sales. Again, I said, look, you know, you're
4 selecting a month that is not representative of, you know,
5 of the entire population. And I said, so obviously your
6 projections are going to be high because, you know, you're
7 using the highest month, you know, of the year. So that's
8 not -- that's not right either.

9 Anyways, so that's, you know, one of the reasons
10 why, you know, there's, you know, that we're like, if
11 you're not doing purchase segregation analysis correct,
12 and you're not using the base amount for your projected
13 sales, then your findings are totally out of whack. And
14 that's exactly why, you know, what, you know, what we saw
15 here. And, you know, that's where we are. I mean, things
16 were corrected to a certain percent, you know, when we
17 went through the OTA, but we still think that those sales
18 and those projections don't reflect what should be, you
19 know, on these audit reports.

20 Part of the exhibits include a whole bunch of
21 analysis that I prepared to kind of show, you know, the --
22 show where the, you know, where things are really obvious
23 where those projections are really, you know, out of line.
24 On Exhibit E-1, and it's the -- I titled it "Analysis of
25 Estimated Audited Sales of Hot-Prepared Foods." I make a

1 comparison of what was on the report versus an average of
2 sales that I prepared. I went back and I on exhibit --
3 Exhibit 5-1, which would be E-2 for my index, I went back
4 and I did a -- I did exactly what the auditor did for
5 April.

6 And I took the -- I identified based on the -- on
7 the cash versus paid, I identified what was sold on -- on
8 27 days from years 2012 and 2013, and then I came up with
9 averages, okay. And then I compared that to what the
10 average the daily average was based on the audits
11 projections, and we find that there was a discrepancy of
12 \$66.18 a day. Okay. So when you project that out on the
13 analysis that I performed on -- on 5-1 or E-1, you see
14 that there's a difference there, a significant difference.
15 Okay.

16 First, on the audit report, they use sales for
17 April 2013, and that was actual sales of hot-prepared
18 foods that were recorded on the cash register. That was
19 \$13,180. But when he did his audit, okay, and he said,
20 oh, this is the audit sales for hot-prepared foods. That
21 monthly average came out to \$15,664, which makes no sense.
22 That averages higher than the actual sales for one month.
23 It's significant, \$1,684. When I compare that to the
24 actual sales, and I do the same analysis when I do the
25 same comparison, that difference with actual sales,

1 recorded sales, okay, goes up to \$3,696.

2 So over a three-year period, that's a difference
3 of \$133,000, just that alone. This is all based on
4 factual information. Now, one of the things that -- that
5 you should know is that -- that those cash register tapes
6 were audited by the first auditor. Okay. And he found no
7 discrepancies at all. Actually, he wrote in his report,
8 everything is reconciled, everything is complete based on
9 my audit, my review, you know. He's basically saying we
10 can rely on those things. Okay. So that's where the
11 information came from.

12 On Exhibit 5-3 or E-3, you know, I went ahead and
13 I summarized all the sales based on the cash receipts for
14 15 months. This is by quarters. Okay. And I noticed,
15 you know, and I identified differences between those
16 stated and what was reported. And the reason why there
17 was a difference is because I told this auditor that --
18 that those tapes included voids that -- that were not
19 taken out of the totals. There's, you know, there's a
20 software problem, and my client realized that.

21 And -- and my client made, you know, adjustments
22 to reflect the voids. So, you know, again, you know,
23 these calculations that I prepared didn't take into
24 account the voids that should have not counted or reported
25 as actual sales. But just using the tapes as they were

1 generated, we noticed that over 15-month and projected out
2 to the entire year, the three-year period, we noted there
3 was an understatement of taxable sales of \$26,484.

4 And, you know, we discussed this with the
5 auditors. We said, look, you know, this is, you know,
6 this is not subjective. This is pertinent information
7 that you tested and our sample included, not just 1 month,
8 but included 15 months. And so we were ready and proposed
9 because we don't have anything else, you know. We just
10 couldn't -- I didn't have the information to see how the
11 reports, you know, the monthly cash receipts, those were
12 being adjusted.

13 So I recommended to my client that we should, you
14 know -- although, they didn't agree with that, I mean, but
15 they accepted it that we should offer, you know, to settle
16 for \$26,000, you know, pay the additional tax liability
17 for \$26,000.

18 JUDGE ALDRICH: Mr. Armijo, I'm going to stop you
19 for one second. It looks like we lost Mr. Suazo.

20 MR. PARKER: Yeah, this is Jason Parker. We've
21 been having a little bit of technical difficulties on our
22 side. And Brooks logged out and logged back in a little
23 bit earlier, and Mr. Suazo just did as well. So some of
24 the transmission has been a little bit choppy and our
25 screens freeze a little bit. So I don't know if anyone

1 else has had the same issues, but all three of us had on
2 our side.

3 JUDGE ALDRICH: Okay. Sounds good. I don't
4 think I stopped it, Mr. Suazo. So I don't think you
5 missed much from Mr. Armijo's argument, but I'll keep a
6 lookout for further drops so we can pause the hearing, you
7 know, when necessary.

8 Mr. Armijo, since it's a little bit of a pause, I
9 wanted to let you know that we're at about 50 minutes. So
10 to -- so that you can optimize your time however you see
11 best. Okay?

12 MR. ARMIJO: Okay. Yeah, I'm just about, you
13 know, ready to wrap it up in another 10 minutes.

14 The next analysis that I performed is on 5-4 or
15 E-4. And, again, I made a comparison between what was
16 reported. And then I prepared a -- what the sales tax
17 should have been based on the same approach that the
18 original auditor used, which is the bookmark up with, you
19 know -- and I came out that the difference that the
20 understatement of sales taxes was \$20,177, which is pretty
21 close to my other estimate. So, you know, I felt pretty
22 confident that -- felt good about, you know, seeing that
23 relationship.

24 But the last one is the Exhibit 5-5, which is
25 E-5. And, again, I used the numbers from the latest audit

1 report. I took the additional taxable merchandise. I
2 came out with the -- I used a taxable ratio that was
3 reported per the audit report. And then based on that, I
4 estimated the gross sales per audit. When I compared that
5 to the gross sales per financial statements and tax
6 returns, you know, I came up with a difference of \$397,000
7 for an overstatement of gross sales per year of \$133,000.

8 Now, with that additional \$133,000, I'm sure that
9 my clients, if that was the case, you know, wouldn't have
10 had to lose their primary home. They would not have
11 qualified for an offer and compromise with the IRS. And
12 sadly, I mean, things didn't really get better for them.
13 So I provided on Exhibit 6-1 the correspondence and
14 information related to the Internal Revenue Service's
15 offer and compromise acceptance. So that was accepted.

16 And then just lately Exhibit 5-2, Exhibit F-2 in
17 my exhibits, it's a proof of order of discharge for
18 Chapter 7. So they filed Chapter 7 bankruptcy, and it
19 just got completed not too long ago. And basically, you
20 know, my clients don't own the store anymore because of
21 the bankruptcy. So I think that really proves a point
22 that, you know, all these estimates and assumptions,
23 that's all they are. They're just estimates and
24 assumptions, and they're not really based on any -- any,
25 you know, any factual information.

1 And I think that, you know, the auditors really
2 failed to look at the whole picture, just like what you're
3 required to do. Based on your Audit Manuel, that's what
4 you need to do, you know, and see if you're projections
5 are making any sense. It didn't make any sense, you know,
6 as far as my clients are concerned. And so as a result,
7 you know, they paid a high price for it. I mean, business
8 was not as good.

9 The cash checking business they had went away
10 because, you know, banks weren't able to -- they didn't
11 want to do anymore two-party checks anymore. So, you
12 know, they had to discontinue that. So it really put a
13 big strain on their finances. You know, their -- you
14 know, the shelf test that they took, again, they're using
15 information from 2015, which is totally different than
16 what was happening in 2011, 2012, 2013. That's why on my
17 exhibits it just says irrelevant because that's not what
18 they were, you know, charging.

19 In 2015 -- the price they were paying for 2015
20 for goods was much higher than what they were paying for
21 in 2013. I mean there's inflation. I mean, you know,
22 none of that is taken into consideration in, you know --
23 or make -- you know, to really make this thing a --
24 something that was -- that would be credible in terms of
25 determining what the cost should be and what the final

1 number should be on your purchase segregation analysis.

2 So I think that's just not correct. The last
3 thing is I want to talk about negligence. And, again,
4 last time we spoke I just told you I needed to look at
5 exactly how you guys define negligence and when penalties
6 are allowed to be charged -- negligence penalties. And,
7 again, is, you know, my clients the way we define
8 negligence here is that is -- this is our new manual. It
9 says that -- it talks about classes of negligence.

10 Negligence 1 is in keeping records. Okay. So
11 we're talking about source documentation, okay, cash,
12 register tapes, financial statements, you know, compiled
13 financial statements, tax returns, checks, bank
14 statements, reconciliations, stuff that you have to do
15 with business was all there. It's there. It was
16 available to the auditor.

17 And the other one is negligence in preparing
18 returns. The returns were prepared on a timely basis
19 based on the information that, you know, that my client
20 used, you know, to prepare those tax returns. The only
21 thing that was adjusted from the tapes was the penalties
22 that she identified and she, you know, typed them herself.
23 She discounted them from the totals that -- that they were
24 on the total monthly and daily cash receipts. And that's
25 what she did.

1 So, you know, so the information -- I mean, there
2 was -- there was, you know, that was -- there were
3 records. And, you know, that was -- that was, you know,
4 the returns were prepared and, you know, they were used
5 based on how she understood things that needed to be done,
6 you know. I mean, if you're -- you know, you're not going
7 to, you know, report something that is not true. If you
8 have voids, I mean, what is the most logical thing to do?

9 Well, you've got to find a way to adjust those
10 things because that's not, you know, that's -- that would
11 be overstating your sales. And, again, I explained that
12 to the auditor, and I said -- and that's when he
13 recommends. He says, okay, well let's -- you're saying
14 that your records are impeached, so let's do the purchase
15 segregation analysis. But then when I said that, you
16 know, he said, but I want to caution you that if you do
17 that, then your tax liability is gonna go up. And I said,
18 well, why is it going to go up?

19 Well, I didn't know how, you know, data was going
20 to be used. Had I known that, you know, then I would
21 never have agreed to do anything like that. But, you
22 know, of all the other sales tax audits that I've been
23 involved, it's all -- you know, it's all been based on,
24 you know, what, you know, what sales were reported based
25 on the records that were obtained from the cash registers

1 and that, you know -- and my clients generated out of
2 their, you know, systems that they used.

3 So I don't understand, you know, about why these
4 negligence penalties are assessed. And your manual
5 specifically says that -- that the -- it says here, if a
6 negligence penalty is being recommended, the auditor must
7 provide in clear and concise terms the rationale for
8 imposing a penalty. An explanation of the evidence and
9 facts upon which the auditors relies on to support the
10 recommendation for imposition of a penalty must be given.
11 The explanation must be enabled -- must enable supervisor,
12 reviewers, the taxpayer and or the taxpayer representative
13 to determine whether that recommendation is consistent
14 with the fact established by the audit.

15 That never happened. It never happened. Never.
16 Period. But reading what is in this audit manual in
17 Chapter 5, it's clear that that's not applicable because
18 my clients have records. They have records. We made them
19 available whenever information deemed requested, was
20 provided. You don't see anything on his work paper that
21 said this information was not provided. None. And
22 neither do you see a finding that the tax returns were not
23 filed. It's not there.

24 So then what is the rationale? What is the basis
25 that it was used to make that conclusion? And that's the

1 frustrating part of, you know, for us is that a lot of
2 decisions were just made just because, you know, that's
3 how we do business. Like the markup cost of 155 percent,
4 I said where did you come up with that number? You know
5 you have 44 percent. Now you go up to 155. What's the
6 rationale for that. What's the justification, you know.

7 Yeah. And the previous auditor was 227 percent.
8 It's like, where are you guys getting this information?
9 But again, it seems like that's the practice. And, I
10 mean, I as an auditor, I dealt with federal auditors,
11 state auditors, family auditors, IRS auditors, Franchise
12 Tax Board auditors. I've dealt with all of them, and it's
13 not like well, we're just getting this number from out of
14 the air. It's like, no, there's documentation for that.

15 But here it seems to be very subjective, you
16 know. And it's, you know, it's very, you know, the
17 defense is like, well, this is our experience. This is
18 what we see. I don't know if that's okay with you guys.
19 I don't think that is. I think it's very unfair to the
20 taxpayer. It's not right. And, you know, if you're going
21 to make a conclusion, it's got to be based on data that
22 could be corroborated and could be proven but cannot be
23 based on opinion. It cannot be based on how you feel. It
24 cannot be based on, you know, what -- you know, how you
25 feel about the client, you know.

1 When you said you're going to perform an audit in
2 accordance and accepted audit standards, you know, you
3 have to use professional judgment, and you have to be
4 impartial. You have to be objective. You can't just be
5 bias and say, oh, you know, we're going to go ahead and do
6 this. That's what your manual says.

7 So the question for us is that why didn't you
8 follow that, you know? The explanation that was given to
9 me too is that, well, it's going to take too much time to
10 do that. Well, I mean, that's not really my problem.
11 It's that you got to find the facts. And based on the
12 facts, you need to do the report. But don't tell me that
13 I was selling coats for 250 just because you think that's,
14 you know, you thing that's the number I should be using.

15 And, unfortunately, you know, we really believe
16 that's really what happened in this situation. If you
17 look at my analysis I performed, they just don't make any
18 sense. Your conclusions don't make any sense at all. And
19 if it was -- if that was correct, then my clients wouldn't
20 be losing their home. They wouldn't be able to file for
21 an offer and compromise with the IRS. You know what it
22 takes to get an offer and compromise approved by the IRS?
23 Do you know what the approval rate is on the offer and
24 compromise? Very small.

25 They check everything out. They look at facts.

1 They don't assume that you have this and you have that.
2 No. They look at everything. You go through bankruptcy,
3 you know, same thing. It's all based on facts. So I mean
4 it's very, you know, like, you know, we feel that it's
5 very unfair, you know, that your findings, and it's
6 important, don't really reflect the realities of what's
7 really going on. I mean, it's -- you have the records.

8 You could have -- the auditors never ever looked
9 at the financial statements. They never verified the
10 purchases. Never. All the data was there. There was a
11 general ledger with detailed information, invoices that
12 were paid, everything, check numbers, dates, everything,
13 bank statements. Never looked at any of that stuff. But
14 yet, they're using it to, you know, to make all their
15 projections. They're using it wrong, you know. What if
16 there were misclassifications on purchases and beer and
17 sodas and other groceries and stuff like that, you know?
18 So I mean, you know, you just can't get stuff that's not
19 there and use that to, you know, to make some conclusions.

20 But anyways, so that's really my presentation,
21 and I'm sure if --

22 Is there anything you want to say?

23 MR. RAMIREZ: Yeah.

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12 If you Google the store, you'll see it's a small
13 store. I was always busy when another auditor came in and
14 said, "Sign me a paper." Didn't explain it to me, you
15 know. I guess after I showed it to Mr. Armijo, it's an
16 extension for one of the audits -- for another audit
17 period that I -- I wasn't even done with one, and I'm
18 already getting into another. So this is what I've been
19 dealt with.

And then I think in all this audit period, I've gone through five or six auditors, and I never had a complete audit. So, you know, all I saw during this whole period was my debt come -- I -- it was frustrating. I couldn't -- I couldn't get -- I couldn't go to a bank. I can't -- you know, the liens were placed. You know, they

1 restricted me on how I did business. It really, you know,
2 losing \$67,000 of garnishments at that time when it did
3 back in 2009, during a recession, killed me.

4 I didn't know what happened. Once we started
5 going through everything, I didn't receive anything that
6 said -- you know, these auditors would come to you first
7 and show you what your liabilities are. They -- they had
8 Mr. Armijo's address. They had my address. I used to
9 work six days a week, seven days a week in that business.
10 I gave my life to that business. And never once did
11 anything ever finalize but yet, I'm here still dealing
12 with the markup.

13 You know, when I realized that it was a
14 250 percent markup, the first one, I about --

15 MR. ARMIJO: 220.

16 MR. RAMIREZ: I'm sorry?

17 MR. ARMIJO: 220.

18 MRS. RAMIREZ: 220.

19 MR. RAMIREZ: Oh, 220 percent markup. I wouldn't
20 have been able to stay in business with a 220 percent
21 markup. I don't care what item. A 150 percent markup,
22 the last one. Please go touch your -- I mean, the sad
23 thing here is go tell somebody else to dictate and -- and
24 this is a conversation I had with Frank. This is why he
25 walked out of here one time we met here. How can you tell

1 me to sell at a markup of 155 percent. I'm not going to
2 have a business. So why am I -- what are we doing here?

3 And then he said, oh, well, we use Chipotle as
4 a -- as the model.

5 And I said, "Chipotle? But we're in audit period
6 2007, 2008, 2009. There was no Chipotle."

7 Now, I'm out there in thermal, okay. And, you
8 know, 90 -- I couldn't get lottery because 98 percent of
9 my clientele was Hispanic. The lottery -- California
10 Lottery wouldn't even give me a lotto machine -- lotto,
11 not tickets -- lotto, because the demographics were high
12 density Hispanic. Low income. So it's like challenge
13 after challenge after challenge and trying to get these
14 things to -- to not to go away, to deal, move forward, so
15 I can move forward, which I never had the opportunity
16 because I'm still not done.

17 JUDGE ALDRICH: Thank you, Mr. Ramirez.

18 Does that conclude your witness testimony,
19 Mr. Armijo?

20 MR. ARMIJO: Yes.

21 JUDGE ALDRICH: Thank you.

22 So now we'll switch over to the Department's
23 presentation or the combined opening and closing.

24 Mr. Suazo, are you ready to proceed with that?

25 MR. SUAZO: I'm ready.

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JUDGE ALDRICH: Go ahead, when ready.

PRESENTATION

MR. SUAZO: The Appellants operated Kennedy Store and Deli, a convenient store that also sells hot food to go. The audit period is from January 1st, 2011, to December 31st, 2013. The Appellants had been previously audited. Records reviewed include the federal income tax returns for 2011 and 2012, income statements for the audit period, general ledgers, purchase invoices, and cash register tapes.

A comparison of federal income tax returns for 2011 and 2012 along with the income statement of 2013 to Appellants' reported sales and use tax returns disclose minimal differences; Exhibit E, page 157. A comparison of recorded sales per federal income tax returns and income statements disclosed low markups considering the Appellant sold hot food. It also disclosed fluctuating markups for all three years; Exhibit E, page 157.

The Appellant requested that a markup audit approach be used because they did not believe their cash register sales were correct; Exhibit A, page 7, Exhibit E, pages 123, 130 and 159. A purchase segregation was conducted by the Department on Appellant's purchases for February 2015. Purchases were categorized into the

1 following groups: Beer and wine, carbonated soda, tobacco
2 products, miscellaneous taxable items, phone cards,
3 miscellaneous nontaxable items, food purchases for hot
4 food sales, and tax-paid consumable supplies; Exhibit E,
5 pages 152 to 155.

6 The Appellant conducted their own purchases
7 segregation categorizing purchases in the same fashion as
8 the Department for April 2013; Exhibit D, pages 60 to 85.
9 The two purchase segregations were combined and ratios
10 were developed to determine purchases of taxable items,
11 exempt items, and purchases for the restaurant or for hot
12 food sales; Exhibit D, pages 58 and 59.

13 Shelf tests were conducted to obtain markup
14 percentages for beer, carbonated and tobacco products;
15 Exhibit E, pages 148 to 150. And industry average markup
16 of 50 percent was applied to miscellaneous taxable items.
17 Using the shelf test results, the Department calculated a
18 weighted taxable markup of 26.89 percent; Exhibit D, page
19 57. Recorded purchases were reduced by supply items and
20 purchases used in making hot-prepared foods. The adjusted
21 purchases were then multiplied by the taxable purchase
22 segregation for the combined segregation tests to arrive
23 at taxable purchases for the convenience store.

24 Taxable purchases were reduced for pilferage at 2
25 percent and self-consumption at 3 percent. The taxable

1 cost of goods sold was then multiplied by the taxable
2 weighted markup factor to compute taxable sales for
3 convenience store of more than \$1.336 million. When
4 compared to reported taxable sales of \$1.183 million, the
5 difference of \$153,000 existed; Exhibit D, page 55.

6 To establish the hot-prepared food markup, the
7 cash register tapes for April 2013 of \$13,181, Exhibit E,
8 page 144, were compared to April 2013, through purchases
9 established by the Appellant during their segregation test
10 of \$6,758; Exhibit D, page 60. A comparison showed a
11 recorded markup for hot-prepared food of 106.88 percent;
12 Exhibit D, page 54. A markup factor was applied to the
13 audited cost of goods sold used in preparation of hot food
14 sales to establish sales of just under \$564,000;
15 Exhibit D, page 53.

16 The taxable self-consumption based on the
17 3 percent of taxable purchases of \$33,000 was also
18 assessed; Exhibit D, page 86. A combined unreported
19 taxable measure was approximately \$750,000; Exhibit D,
20 page 51. The Department considers the audited sales of
21 both the convenience store and hot-prepared food portion
22 of the business to be reasonable. A segregation was based
23 on two separate months, one of which was performed by the
24 Appellant. The weight markup for taxable items was less
25 than the industry average at 26 percent.

1 Audited taxable prepared food sales were
2 determined using the same two-month purchase segregation
3 to obtain taxable prepared food cost of goods sold and
4 applying the Appellant's own recorded markup for the month
5 of April 2013. The prepared food markup used of 106
6 percent is well within the industry standard markup.

7 A 10 percent negligence penalty was applied as
8 records were impeached. The Appellant's own cash register
9 tape showed larger amounts collected than were reported on
10 the sales and use tax returns; Exhibit D, page 97. The
11 Appellant had stated, due to inadequacy of the sales
12 records, a markup of audit approach should be used to
13 conduct the audit. This is the Appellant's second audit
14 and the same issues noted in the prior audit existed in
15 this audit.

16 The percentage of error on taxable measure is
17 77 percent. The additional measure of three quarters of a
18 million dollars is substantial. The Appellant failed to
19 correct the issues revealed in the prior audits findings.
20 Therefore, the Department contends that the negligence
21 penalty is warranted.

22 This concludes our presentation. I'm available
23 to answer any questions you may have.

24 JUDGE ALDRICH: Thank you, Mr. Suazo.

25 Now we're going to switch gears over to

1 questioning from the panel. I had a question for
2 Mr. Ramirez or Mrs. Ramirez.

3 So you know from Mr. Armijo's presentation, it
4 sounds like the month of April was rather busy; is that
5 correct?

6 MR. RAMIREZ: Yes, sir.

7 MRS. RAMIREZ: Yes.

8 JUDGE ALDRICH: And what events, if any, occurred
9 during April?

10 MR. RAMIREZ: Well, first of all, being an
11 agricultural community, the majority of the crops are
12 getting ready right at April. February planning and then
13 like an April date to start picking. April is another
14 good month because of the fact there's a lot of palm
15 trees, a lot of pollination. Getting the palm trees ready
16 for harvest, so that's another big month.

17 And if you look at the Coachella Valley, it's
18 known for our dates. So where Thermal is, there's a
19 density of palm trees. So that's the time when there's a
20 lot of work. Also, the seasonal planning of all the --
21 for all the home owners that live in the area. So April
22 has historically always been -- and then the festivals.
23 The festivals are usually in the first week of -- the end
24 of March.

25 MRS. RAMIREZ: No, it's the second week of April,

1 then the third one --

2 MR. RAMIREZ: But -- but they start getting
3 ready --

4 MRS. RAMIREZ: -- and then the fourth one. Yeah.
5 There's three --

6 MR. RAMIREZ: -- they start getting ready the
7 month before with just maybe -- you can imagine there's
8 150 -- 100,000 -- 150,000 people at these events. It
9 takes maybe, you know, how many people to get everything
10 prepared. So we start, you know --

11 MRS. RAMIREZ: The last-- the last week of
12 March -- they start the last week of March to prepare two
13 weeks for the events. Which the events start the second
14 week of April and there's three concerts. The --

15 MR. RAMIREZ: Coachella Fest is two weekends.

16 MRS. RAMIREZ: And then the state --

17 MR. RAMIREZ: And then a Country Fest --

18 MRS. RAMIREZ: -- the last weekend of April.

19 THE STENOGRAPHER: I need you to, please, speak
20 one at a time, please. I cannot get both of you at the
21 same time.

22 MRS. RAMIREZ: I'm sorry.

23 MR. ARMIJO: One at a time.

24 MRS. RAMIREZ: So the last week of March they
25 start preparing for the festivals. Aside from what

1 Gilbert said about the crops and everything, yes, the last
2 week of March then they start -- then the concerts start
3 the second week of April, and they go up to the last
4 weekend of April. So yes, April is our busiest month of
5 the year.

6 JUDGE ALDRICH: Okay. And so in anticipation of
7 April did you raise your cigarette prices?

8 MRS. RAMIREZ: No.

9 JUDGE ALDRICH: Did you raise your soda prices?

10 MRS. RAMIREZ: No.

11 JUDGE ALDRICH: Did you raise miscellaneous
12 taxable items?

13 MRS. RAMIREZ: No.

14 JUDGE ALDRICH: So really what you would see is
15 an increase of sales but not necessarily a change in the
16 markup?

17 MR. RAMIREZ: We -- yes. You know, we're a small
18 store. And we rely -- I don't know if I'm going to be
19 able to tell you this. Maybe he'll be able to tell you,
20 but I'm going to start it. We rely on like, for example,
21 Pepsi, Coke, and the beer companies. We rely on -- we
22 buy, let's say, two cases, and we sell it for what they
23 tell us, which is -- I don't know the deal -- the
24 two-for-two, which we don't make the money.

25 We make the money on being able to sell them.

1 How does that work? So what it is that we rely on the --
2 we can't change our prices because the company goes and
3 takes a picture of the window, right.

4 MR. RAMIREZ: We kind of try to lock in on
5 contracts and things so that we can have a certain pricing
6 for, you know, periods of time. What the companies do is
7 try to have everybody kind of pay the same thing. So
8 there's no fluctuation of prices. When there's an event
9 Cinco de Mayo, September 16th, you know, they try to keep
10 the standard to everybody to come down a little bit. So
11 we never go up. We usually come down for events or for
12 special promotions and things like that. You know, that's
13 how they make their money. So our -- our increase -- what
14 we are, markups never change.

15 JUDGE ALDRICH: Okay.

16 MR. RAMIREZ: They stay consistent.

17 JUDGE ALDRICH: That's what I was asking. And
18 then with respect to the burritos, were these burritos hot
19 when they were sold?

20 MR. RAMIREZ: Actually, we would cook them in the
21 morning and we had a warmer -- an electronic warmer that
22 we had to keep them at a certain temperature all day.
23 That's a standard through the Health Department.

24 JUDGE ALDRICH: Okay. And --

25 MR. RAMIREZ: So we would make a certain amount

1 of burritos. I'm sorry.

2 JUDGE ALDRICH: That was the predominant, like,
3 hot item or item that was under the food warmer?

4 MR. RAMIREZ: Yes.

5 JUDGE ALDRICH: Were there other items?

6 MRS. RAMIREZ: No.

7 MR. RAMIREZ: Well, we sold tacos.

8 MRS. RAMIREZ: Yeah. We had tacos and burritos
9 and the cheese for the nachos.

10 JUDGE ALDRICH: Okay. All right. So I'm going
11 to switch gears to see if my panel members have more
12 questions for you.

13 Judge Wong, did you have questions for either
14 party?

15 JUDGE WONG: This is Judge Wong. Yeah, I had
16 several -- a couple of questions for Mr. and Mrs. Ramirez.
17 I just wanted to get a sense of your store. It's been
18 described as a convenient at any point an acceptance of
19 your store described convenience store/deli; is that
20 correct?

21 MR. RAMIREZ: No. We just put the deli because
22 we were hoping that one day, we would have a deli there.
23 And I bought the sign of buying into the future. So I put
24 the deli just to throw it in there. It should just have
25 been Kennedy Store. The "Deli" I just threw it in there

1 for the name.

2 JUDGE WONG: But is there a kitchen part of it
3 where you prepare the foods?

4 MR. RAMIREZ: Okay. There -- like Mr. Armijo
5 said, there's a small -- how many square?

6 MR. ARMIJO: 54.

7 MR. RAMIREZ: 54 square feet. It's just a little
8 window, and it's an electronic stove. No hood. You got
9 to remember. This store is built in the 1930s. Okay. It
10 was an adobe store. So the county didn't ever allow me to
11 increase size. No added electricity outlets. So
12 everything that I had to do had to be within that
13 54 square feet, which is nothing. So it was all just one
14 little -- my whole store almost fit in this little room
15 here. So it was just a room that I made. Put a little
16 window up so that I could sell food out of the store.

17 JUDGE WONG: This is Judge Wong. So there was no
18 seating; is that correct?

19 MR. RAMIREZ: No.

20 MRS. RAMIREZ: No.

21 MR. RAMIREZ: All --

22 MRS. RAMIREZ: If you're looking at this bookcase
23 that's there, if you stand it further back -- a little
24 back, that's the size of where I have my burritos. It's
25 not bigger than that.

1 MR. ARMIJO: But there was no seating.

2 MR. RAMIREZ: No seating.

3 MRS. RAMIREZ: No seating at all.

4 MR. RAMIREZ: No indoor seating at all.

5 JUDGE WONG: This is Judge Wong. Is there

6 seating outdoors?

7 MRS. RAMIREZ: No. Everything is --

8 MR. RAMIREZ: It was cash and carry.

9 MRS. RAMIREZ: Yes.

10 JUDGE WONG: This is Judge Wong. So all those

11 sales, like, burritos, tacos were sold to go; is that

12 correct?

13 MRS. RAMIREZ: Yes.

14 MR. RAMIREZ: Yes.

15 JUDGE WONG: This is Judge Wong again. I had one

16 question about one item that was mentioned that you sold.

17 It's, like, described as cocktails, either shrimp

18 cocktails or seafood cocktails. Could you describe what

19 that is?

20 MR. RAMIREZ: It was just a ceviche. It's just

21 the shrimp with the cocktail sauce like you would --

22 MRS. RAMIREZ: It's cold.

23 MR. RAMIREZ: Yes, a cold food.

24 JUDGE WONG: Okay.

25 MRS. RAMIREZ: When --

1 JUDGE WONG: Sorry. Go ahead.

2 MR. RAMIREZ: It was just a cold food. It was a
3 cold food. It was just shrimp with a cocktail sauce.

4 JUDGE WONG: This is Judge Wong. Okay. Did you
5 charge tax for those?

6 MR. RAMIREZ: No.

7 JUDGE WONG: Okay. Thank you. My next questions
8 are for CDTFA. It's in the decision -- in the appeals
9 decision, it mentioned that the 80-80 rule applied, and I
10 was just -- I had a hard time trying to find where that
11 analysis was in the audit working papers or in the reaudit
12 working papers. Sorry. Go ahead.

13 MR. SUAZO: If you go to Exhibit E, page 144.

14 JUDGE WONG: Okay. Exhibit A, page 144?

15 MR. SUAZO: Exhibit E, page 144.

16 JUDGE WONG: Oh, E. Okay. Got it. Okay.

17 MR. SUAZO: Okay. So basically where it says
18 shrimp taco, beef taco, lunch bar, all that, that's all
19 taxed.

20 JUDGE WONG: Okay.

21 MR. SUAZO: That's part of the -- some of the
22 taxable items on AB, the \$55,107. That all adds into it.
23 So there might have been sometimes where they didn't
24 charge tax because if you look at nontaxable grocery,
25 that's \$22,000. They could have rang it up in there. But

1 if they rang it up separately under those highlighted
2 yellow ones, they're of the \$77,000 in tax -- or the
3 \$55,000 in tax.

4 JUDGE WONG: Okay.

5 MR. SUAZO: So there is tax being charged on
6 those items, even charged tax on the chips and the ice
7 cream when he separately rang it up. If he rang it up as
8 non-taxed food, I believe it is. What's that?

9 MR. RAMIREZ: So -- so I had --

10 MR. SUAZO: So that's one of the reasons I
11 believe he didn't really want to use the cash register
12 tapes because they were ringing it up as both taxable and
13 nontaxable. So they actually got a break on this because
14 if there was taxable and it's rung up as nontaxable, we
15 didn't use it in the calculation for the markup. Because
16 if they sold burritos and they said it was nontaxable,
17 it's not going to be picked up in that -- whatever that
18 amount was -- \$13,981. It wouldn't be included in that.

19 JUDGE WONG: So -- sorry. This is Judge Wong
20 again. Okay. I guess my question -- another question I
21 had was about the first 80. So it has to be more than 80
22 percent of the seller's gross receipts are from the sale
23 of food products and was -- and food products I don't
24 think includes -- at least based on the definition, it
25 doesn't include like carbonated beverages and what not.

1 So does --

2 MR. SUAZO: But the thing is, though, it's a moot
3 point at this point. Because what they're actually
4 picking up is the \$13,000 that was taxed.

5 JUDGE WONG: Okay. Yeah. My question was just
6 whether it's -- whether --

7 MR. SUAZO: No. I understand what you're saying.
8 It's a moot point, though, because she's -- they're only
9 picking up the food that was taxed.

10 JUDGE WONG: Okay. Got it.

11 MR. SUAZO: And, again, if a burrito was not
12 taxed and it went into a different ring key, which it
13 probably -- which, I don't know if it did or not, but
14 chances are it probably did. It would not have been
15 included in the calculation which gives them a break.

16 MR. ARMIJO: Yeah. So may I make a comment,
17 Mr. Wong?

18 MR. SUAZO: The other thing is that if you look
19 at what they've -- when we picked up our difference,
20 60 percent of our difference is associated with ringers --
21 or not ringers. We're picking up \$750,000. I think
22 around 60 percent of that can be identified as stuff they
23 had taxed but failed to report. It's going to be in --
24 there's an analysis of that in Exhibit F.

25 MR. ARMIJO: Ring errors.

1 MR. SUAZO: No ring errors per se, but stuff that
2 was taxed that when you compared it to what was reported,
3 then what we picked up. The 60 percent of what we picked
4 up is the unreported tax that they should have reported
5 based on the register that made up of those five quarters
6 that we were given register tapes or data for.

7 MR. ARMIJO: Yeah.

8 JUDGE WONG: This is Judge Wong. Okay. Thank
9 you.

10 MR. SUAZO: And if you wanted to, I can show you
11 that on page --

12 MR. RAMIREZ: Can I insert a comment?

13 MR. SUAZO: Or maybe it's an exhibit. Oh, sorry.
14 It might be exhibit -- it might be in Exhibit D in the
15 reasonableness test.

16 MR. RAMIREZ: Judge Wong, can I say something.

17 MR. ARMIJO: Can I just make a comment,
18 Judge Aldrich? Mr. Aldrich, can I say something about
19 that?

20 JUDGE ALDRICH: Hi, Mr. Armijo.

21 Judge Wong, did you want to offer Mr. Armijo that
22 opportunity right now, or would you like to continue
23 asking Mr. Suazo some questions?

24 JUDGE WONG: This is Judge Wong. Yeah.
25 Mr. Armijo, you were going to say something. Please go

1 ahead.

2 MR. ARMIJO: Yes. Thank you. Thank you so much.
3 First of all, that statement that the shrimp cocktails
4 were being taxed, that's something that we, you know, you
5 heard from Mr. and Mrs. Ramirez that the shrimp cocktails
6 were not taxed. Okay. We asked to show us, you know,
7 like where did you get this information. Because it's a
8 cold item, so clearly -- clearly it was not supposed to be
9 taxed. And it wasn't taxed, which you just heard it from
10 Mr. and Mrs. Ramirez.

11 I don't know what Mr. Buenrostro looked at, but
12 I -- you know, he made a passing comment. And again, you
13 know, we said, well, show us. What else did you look at?
14 I mean, you're looking at one day? One month? What are
15 you looking at. And, you know, so that never really got
16 solved. So I don't accept the premise that -- or the
17 statement that the shrimp cocktails were taxed. Because,
18 you know, it's something that they've been doing for a
19 while.

20 That was not something that was picked up by the
21 previous auditor. And, you know, like I said -- like I
22 mentioned earlier, Mr. Buenrostro was the first auditor.
23 He tested those cash receipt tapes for at least two
24 months, and the conclusion was that there was no issues
25 with it. But I don't know. I don't know, you know,

1 exactly, you know, where he got that information. I mean,
2 that's really -- that's -- that's -- that's questionable.
3 I don't know what that is.

4 JUDGE WONG: This is Judge Wong. Thank you.

5 MR. SUAZO: Can I go back to help you out there
6 on where the items are located at, the 50 percent.

7 JUDGE WONG: Sure. Go ahead.

8 MR. SUAZO: It's located on Exhibit D, page 97.
9 So they collected for three -- for five quarters because
10 we couldn't get the first quarter of '13. Sales tax
11 collected was \$51,000, report is \$38,000. So there's a
12 difference of \$12,000. The Department assessed \$20,000
13 during that time period. So 60 percent of that 20 --
14 \$12,000 from \$20,000 is basically 60 percent is
15 attributable to just pure facts that they rung stuff up
16 taxable and didn't report it.

17 JUDGE WONG: This is Judge Wong. Thank you. I
18 don't have any other questions at this time. Thanks.

19 JUDGE ALDRICH: Thank you.

20 This is Judge Aldrich. Judge Long, did you have
21 any questions for either of the parties?

22 JUDGE LONG: Yes, I did have a few questions
23 regarding the markup on the hot food sales. So first,
24 Mr. Suazo, it looks like when April 2013 numbers were
25 incorporated into the audit, the markup percentage went

1 down by 106 point -- or went down to 106.88 percent,
2 right?

3 MR. SUAZO: That is right.

4 JUDGE LONG: Was there any reason, though, that
5 April was chosen for the reaudit as opposed to any of the
6 other months that were provided during the appeal at
7 CDTFA?

8 MR. SUAZO: The only thing I show is April being
9 the purchase segregation where he was able to do it for
10 us. And the April sales we have the detail for. So we're
11 able to compare the detail of the sales versus the detail
12 of the purchases. We're actually able to get that 15.4
13 percent of purchases from both the February 2015 and the
14 April 2013 to get a 15.4 percent. Then we're actually
15 able to compare it to the detail of the sales amount
16 there. So we're able to get 106 percent recorded book
17 markup.

18 JUDGE LONG: Okay. And then with respect to
19 Appellant's contention that April was a busy month, the
20 volume of sales here wouldn't have affected the
21 calculation markup because it's just sales over purchases,
22 right?

23 MR. SUAZO: Well, actually, if you look at
24 February of 2015, purchases for the restaurant are a lot
25 higher, which sort of goes against what they're saying.

1 JUDGE LONG: Okay. And then in February of 2015
2 then, the markup was actually much higher as well, though?
3 It was 155, right?

4 MR. SUAZO: No. It's not 155. The markup they
5 used was an industry markup that they said for that area
6 was 155 for a place selling hot foods to go. Restaurants
7 are normally going to be around 200 to 250. This is
8 prepared food basically in the same class. So 106 percent
9 is well, well below industry average. Even with the 155,
10 this 106 percent is well below that.

11 JUDGE ALDRICH: Okay. And I'd like to move to
12 Appellant real quickly. I just wanted to ask. So in
13 Appellant Exhibit 3, Mr. Armijo, you wrote that the
14 auditor estimated \$817,983 in sales of hot-prepared food
15 for the three-year period, which comes out to an average
16 of \$22,721.75 per month. This amount was based on the
17 purchase segregation analysis for the month of February
18 2015 using the markup rate of 155 percent of cost.

19 However, then you write further down in that same
20 exhibit \$22,721.75 monthly average for sales of that
21 period seems high when compared to the \$13,981 actual
22 sales of hot food prepared for the month of April 2013.
23 So I wanted to look at the math on the reaudit. On the
24 reaudit the hot food sales worked out to be \$563,939,
25 which when compared to -- or which works out to

1 approximately \$15,664 in sales per month or within \$2,000
2 of the April sales amount.

3 Are you asserting then that the markup would be
4 even lower if other months were used in addition?

5 MR. ARMIJO: No. The only point that I'm making
6 here is that -- is that based on your total projected
7 sales for hot-prepared foods, okay, you know, whatever
8 assumptions you use, whatever data you use, that average
9 is higher than the actual sales that the auditors used for
10 that particular -- you know, to make that projection.

11 So -- and we just talked about that in April, you
12 know, that's going to be your highest, you know, highest
13 month of every -- of any month. So when you compare that
14 to the total projected audited sales -- taxable sales of
15 hot-prepared foods, it's, you know, it's higher than the
16 actual sales -- so recorded sale. This is the actual
17 recorded sales. So, you know, that just makes no sense,
18 you know.

19 So that's -- the first column is based on the
20 auditor's numbers. The second column is based on further
21 analysis that I prepared when I used 27 days, you know,
22 throughout the audit period and looked at the actual sales
23 of -- of hot-prepared foods, what they considered to be
24 hot-prepared foods. And by the way, I included -- I
25 included the shrimp cocktails there because that's what --

1 you know, I just wanted to see if there was any
2 relationship between, you know -- you know, what the
3 auditor found and then the projections that I was making.

4 And you see that difference is here and more.
5 It's \$3,696. So I'm just trying to -- to, you know, to
6 compare, you know, the projection of audited sales of
7 hot-prepared foods, which was \$563,000 for the three-year
8 period to, you know, to what the actual numbers were based
9 on the auditor's use of one month information, which is
10 \$13,000 versus when I -- versus my numbers where I use a
11 sample that was, you know, more representative than just
12 one month of the entire audit period. And, you know, you
13 see the differences are even more.

14 So that only proved a point that that \$13,180
15 that I -- that they used is not an amount that is not
16 representative of the actual sales for hot-prepared foods
17 throughout the year. So whatever projections are going to
18 be made based on this inflated number then, you know, then
19 your projection for the audit sales of hot-prepared foods
20 are going to be higher. I mean, that just follows logic.

21 JUDGE LONG: Okay. Thank you. I don't have any
22 more questions.

23 JUDGE ALDRICH: Hi. This the Judge Aldrich. So
24 I guess it's time to turn it back to you Mr. Armijo to see
25 if you'd like to make a closing statement, rebut something

1 that the Department has said, or otherwise add anything
2 additional.

3
4 CLOSING STATEMENT

5 MR. ARMIJO: Well, the only thing that I just
6 want to point out is that purchase segregation analysis
7 for February 2015 really have nothing to do with, you
8 know, with the audit period that is -- that is the, you
9 know, we're dealing with. Okay. It's outside the audit
10 period. And according to your own manual, that's not
11 representative of the audit period that is being audited.
12 Okay.

13 Now, if you look at what happened in
14 February '15, okay -- and I looked -- and, you know,
15 things changed quite a bit in terms of the economy. If
16 you look at the GDP, you know, things picked up quite a
17 bit in 2015 compared to what happened in, you know, in
18 '11, '12, and '13. You know, again, that was -- that was
19 inflation. Okay. Prices are going to go up.

20 So if you're, you know, if you're using those
21 numbers, you know, that is -- that's going to increase
22 your cost, and that's going to impact, you know, the
23 number that you're using to come up with, you know, what
24 percentage of total cost, you know, are being used for
25 hot-prepared foods because you're using a higher, you know

1 prices.

2 So I just want to make clear to the panel that is
3 not the -- you know, that's information that's irrelevant
4 to, you know, to the audit period. There was information
5 for -- and we make that information available to them. I
6 said there's information for every year. What do you
7 want, you know? Why not pick purchases for, you know,
8 2011 and 2012 and 2013? Why do you use, you know, 2015?

9 I really don't understand the rationale. And
10 according to your manual, I don't think that's allowable.
11 I mean that's -- I mean, that's in practice with what you
12 guys do, but that's not what your manual says you should
13 be doing, you know. The information sample has to be
14 representative of your total population. February 15th
15 has nothing to do with '11, '12, and '13. Nothing to do.

16 JUDGE ALDRICH: Thank you, Mr. Armijo. I wanted
17 to reference back. You had said that you had prepared
18 some sort of schedule of the changes and the different
19 audit reports. It sounded like you were requesting to
20 submit that, but it wasn't clear. Are you making that
21 request?

22 MR. ARMIJO: Yes, I am. Yeah. I mean, I just
23 think it provides some additional context to, you know, to
24 the presentation. It's that -- the question is that why
25 are these -- you know, why are these audit reports

1 changing so much? And I mean, if you look at the -- if
2 you actually look at the -- follow the process and look at
3 the methodology that the auditors used to come up with the
4 numbers, it's just different stuff. And, you know, that
5 doesn't -- you know, why is it changing? I mean --

6 JUDGE ALDRICH: So to be clear, you would be
7 submitting it as a form of argument and not necessarily as
8 a form of evidence; is that right? Because it didn't
9 sound like it's a supporting documentation. Like, it's
10 not an original source document, right? Like, it's
11 something that you've compiled?

12 MR. ARMIJO: I compiled it based on the reports
13 that were issued. So you could trace all those numbers to
14 the reports that are included in my Exhibits D-1 through
15 D-5.

16 JUDGE ALDRICH: So I guess the question remains,
17 like, for what purpose are you submitting it, argument or
18 evidence?

19 MR. ARMIJO: I would say it's -- it's supporting
20 documentation to my presentation about the inconsistencies
21 that were -- you know, that the auditors used in preparing
22 their, you know, their reports. I don't know if that
23 makes any difference for the panel. But, you know, it's
24 just that, again, you know, when we talk about, you
25 know -- you know -- you know, auditing, you know, I mean,

1 you got to be consistent on how you apply principles and
2 how you apply used information. You know, you can't
3 just --

4 JUDGE ALDRICH: Okay. Sorry.

5 MR. ARMIJO: I don't know.

6 JUDGE ALDRICH: But --

7 MR. ARMIJO: Yeah.

8 JUDGE ALDRICH: I guess since you're saying that
9 it's being submitted as evidence, I guess my question is,
10 like, is there a reason it couldn't be submitted before
11 the December 14th?

12 MR. ARMIJO: I -- I just basically, you know,
13 when I was doing my analysis and preparing the exhibits,
14 you know, I wanted to do that, and, you know, I just
15 basically ran out of time. I mean, that's the only thing.
16 But I thought it would enhance, you know, the information
17 that I, you know, that I presented it, you know. Just, I
18 mean, I don't know if it's just -- if it's significant for
19 you guys to see how, you know, how things were done
20 throughout the process.

21 JUDGE ALDRICH: Okay. And my next question is
22 for the Department. Would you object to Mr. Armijo
23 submitting the additional document?

24 MR. SUAZO: I was going to have Mr. Brooks handle
25 that one.

1 MR. BROOKS: Your Honor, we haven't seen the
2 information. But if you're saying that it's just
3 repeating information from different exhibits, we still
4 need some time to respond to it if -- in case some there's
5 some, you know, some issue that we haven't seen yet.

6 JUDGE ALDRICH: Okay. So I haven't seen it
7 either, Mr. Armijo, but if you'd like, I can hold the
8 record open. You can submit it, and then I'll give CDTFA
9 some time to, you know, state its objection or respond.
10 If not, we can close the record today. Which would you
11 prefer, Mr. Armijo?

12 MR. ARMIJO: I -- I'd like to submit it.

13 JUDGE ALDRICH: Okay.

14 MR. ARMIJO: If it's permissible, I'd like to
15 submit it. I think it, you know, provides some additional
16 information.

17 JUDGE ALDRICH: And is that an accurate
18 representation that the numbers on there stem from
19 documents that are already in evidence?

20 MR. ARMIJO: On file, yes.

21 JUDGE ALDRICH: Okay.

22 MR. ARMIJO: Yes. Probably.

23 JUDGE ALDRICH: So here's what I'll do. I'll
24 prepare post-hearing orders that lays out what the
25 briefing schedule is. So can you get it to us in --

1 within 30 days? What's your time frame?

2 MR. ARMIJO: I can do it, you know, within
3 obviously within the new year. But within 15 days I can
4 do that.

5 JUDGE ALDRICH: 15 days is what you're
6 requesting?

7 MR. ARMIJO: Yes.

8 JUDGE ALDRICH: Okay. And since CDTFA hasn't
9 seen it before -- well, how about this. There's a lot of
10 holidays in between now and then, so we'll give you
11 30 days. If you get it in sooner, great. If not, that's
12 a hard deadline. And then CDTFA will have 30 days to
13 respond and state its objection if it has it and -- or
14 otherwise respond to it. Does that work for you?

15 MR. ARMIJO: Okay. That works for me. That's
16 fair.

17 JUDGE ALDRICH: All right. So with that said the
18 record won't close just yet. But once it does close, the
19 panel will meet and confer and decide the case based off
20 of the evidence and the arguments. Oh, excuse me. It
21 seems like there might be one more question.

22 Judge Wong, did you have a question to ask one of
23 the parties?

24 JUDGE WONG: This is Judge Wong. Yes, I had a
25 question for Mr. Armijo and his clients. So I was just

1 reviewing the document that Mr. Suazo had referred to
2 earlier in Exhibit D. So basically, it's saying that
3 based on taxpayer's own documentation, they collected a
4 certain amount of tax, \$51,000, but they only reported
5 \$38,000 tax. So I was just wondering why there's this
6 discrepancy.

7 MR. ARMIJO: Okay. I'm sorry. You said Exhibit
8 D, my exhibits?

9 JUDGE WONG: No. This is D, CDTFA's Exhibit D.

10 MR. ARMIJO: Exhibit D?

11 JUDGE WONG: Yes. Page 97.

12 MR. ARMIJO: Page 97. Okay. Let me just take a
13 look at that.

14 JUDGE WONG: Okay.

15 MR. ARMIJO: Okay. So this page 97 I believe
16 those numbers are coming from a schedule that I prepared
17 that's on page 98.

18 JUDGE WONG: Right.

19 MR. ARMIJO: It's a summary of the schedule that
20 I prepared where I basically compiled all the sales,
21 taxable and nontaxable, from the cash register tapes.
22 Okay. And basically, we did find that based on those cash
23 register tapes, you know, there was an understatement of
24 taxable sales. And -- and I explained that the reason for
25 that is because the client when they were preparing the

1 sales tax returns, the cash tapes that they -- the cash
2 register tapes that they were using included -- the totals
3 included voids --

4 JUDGE WONG: Oh.

5 MR. ARMIJO: -- that they adjusted out of what
6 they reported. But my schedules, you know, did not do
7 that. I basically went off the totals per the tapes from
8 the cash register. So that's why there was a discrepancy
9 and, you know, we basically, you know, made that
10 recommendation that, you know, \$27,000 was actually
11 underreported taxable sales -- tax on underreported
12 taxable sales.

13 JUDGE WONG: This is Judge Wong. So you're
14 saying that this schedule that you prepared is inaccurate;
15 is that right?

16 MR. ARMIJO: Is that a question for me?

17 JUDGE WONG: Yes.

18 MR. ARMIJO: For me. Okay. So no. The schedule
19 that I prepared was correct in that I went off the totals
20 that were reflected on the tapes -- on the tapes that were
21 generated by, you know, by their -- by the POS system that
22 they used at the store. But that's not what the client
23 used to prepare the sales tax returns. They were
24 adjusting those numbers by the voids that it was recorded
25 on that same tape that were generated by their POS system,

1 and that's what she was reporting.

2 But I -- when I put this together, I was not -- I
3 was not aware of that discrepancy, why there was a
4 discrepancy. So, you know, I just went off the totals,
5 the rough total that were, you know, that were actually
6 reflected on the tape. So it's very possible that my
7 analysis is overstating the taxable sales because I'm not
8 making any adjustment for the voids that, you know, that
9 happened.

10 I mean, there's voids all the time. But,
11 apparently, there's a problem with their software or with
12 the, you know, the system they were using, that it -- that
13 it didn't back out the voids from the totals. You know,
14 again, I just -- I just went off of what, you know, what
15 is being tested. Your auditor did not identify anything
16 about the voids.

17 So I just said okay. Well, let's -- let me use
18 that information because it's already being audited. It's
19 been confirmed. It's been verified. It's been tested, so
20 let me use that. Now, I don't have any documentation to
21 show you, you know, to show anybody that the voids were
22 actually -- you know, I don't know what documentation the
23 system generates. It's just a total on the tape, but I
24 don't know which transactions were voided, you know. It
25 was just the total.

1 So I didn't use that. I just said I'm just going
2 to use the total, you know, that's on the tapes. I
3 understand, and I explained that to my clients that it may
4 be -- that it may be my numbers. My schedules may be
5 overstating total sales and gross sales and taxable sales
6 because I'm not making an allowance for those voids that
7 happen throughout the year.

8 JUDGE ALDRICH: This is Judge Wong. Thank you,
9 Mr. Armijo. You refer to it as, like, an issue with the
10 software. Is that a problem with the recordkeeping?

11 MR. RAMIREZ: What happened at that time was the
12 machine that we were using was taking an accumulative
13 total. So if you voided something, it was still taxing
14 and removing what you voided but not the tax.

15 MRS. RAMIREZ: No. It did -- it went -- it went
16 to -- it would add everything. It would show you voids
17 and would tell you the amount, but at the end, if you add
18 it, it included the voids. It wouldn't -- it didn't void
19 it. It would -- it will say void, but then it would still
20 come up on the bottom as not voided.

21 MR. RAMIREZ: It was doing an accumulative total.

22 MRS. RAMIREZ: Yes.

23 MR. RAMIREZ: It wouldn't -- it wasn't giving us
24 the actual void on the tape. And even Frank saw that and
25 collaborated it because when you do the numbers, they

1 weren't adding up, even on our tickets. So it was
2 something that he caught between all of us when he sat
3 down, and then we started doing the numbers, that's when
4 we came to what we wanted to do the analysis for the --
5 instead of the tape register roles because we -- that's
6 why the comprise was in the tape registers because it was
7 something that we weren't even aware of it until it was --
8 until we all saw that that was the problem.

9 That it was giving us a total. It acted like it
10 gave us a void, but it was adding an accumulative total.
11 And wasn't until that point that we realized that we had
12 been subjected to paying more. So that -- we didn't want
13 to use that, according to Mr. Armijo, as part of our
14 calculation.

15 JUDGE WONG: This is Judge Wong. Thank you. No
16 further questions. Thanks.

17 JUDGE ALDRICH: Judge Long, did you have any
18 questions to follow up?

19 JUDGE LONG: [NO SOUND]

20 JUDGE ALDRICH: It sounded like you voiced no
21 questions, and that's what I'm going to go with.

22 So at this point I just wanted to thank everyone
23 for your time. I'm going to conclude, and the hearing
24 calendar for today has concluded.

25 Happy New Year to you all. I'll be issuing those

1 orders after the hearing for the additional briefing
2 schedule, and please cut the live stream when you can.

3 (Proceedings adjourned at 4:39 p.m.)
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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was
taken before me at the time and place set forth, that the
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by me and later transcribed by computer-aided
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foregoing is a true record of the testimony and
proceedings taken at that time.

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

I have hereunto subscribed my name this 31st day
of January, 2023.

ERNALYN M. ALONZO
HEARING REPORTER