

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
DAY RIVERSIDE PETROLEUM, LLC,) OTA NO. 21027297
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, May 10, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken
at 12900 Park Plaza Dr., Suite 300,
Cerritos, California, 91401, commencing
at 9:33 a.m. and concluding at 10:29 a.m.
on Wednesday, May 10, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in
and for the State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW WONG

Panel Members: ALJ SUZANNE BROWN
ALJ JOSHUA ALDRICH

For the Appellant: GILBERT TAUBERG
MINA TAUBERG

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

E X H I B I T S

(Appellant's Exhibits 1-6 were received at page 7.)
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1 Cerritos, California; Wednesday, May 10, 2023

2 9:30 a.m.

3

4 JUDGE WONG: Let's go on the record.

5 This is the Appeal of Day Riverside Petroleum,
6 LLC, before the Office of Tax Appeals. This is OTA Case
7 Number 21027297. Today is Wednesday, May 10th, 2023. The
8 time 9:33 a.m. We're holding this hearing in person in
9 Cerritos, California.

10 I am lead Administrative Law Judge Andrew Wong.
11 And with me today are Judges Suzanne Brown and Josh
12 Aldrich. We are the panel hearing and deciding this case.

13 Individuals representing the Appellant taxpayer,
14 Day Riverside, LLC, please identify yourselves for the
15 record.

16 MR. TAUBERG: Gilbert Tauberg. I'm the owner.

17 JUDGE WONG: Thank you.

18 And who is sitting with you?

19 MR. TAUBERG: My wife.

20 JUDGE WONG: Would you like to identify her for
21 the record, please?

22 MR. TAUBERG: Her name is Mina Tauberg.

23 JUDGE WONG: Thank you.

24 Individuals representing the Respondent tax
25 agency California Department of Tax and Fee

1 Administration, could you please identify yourselves.

2 MR. SUAZO: Randy Suazo, Hearing Representative,
3 CDTFA.

4 MR. PARKER: Jason Parker, Chief of Headquarters
5 Operations Bureau with CDTFA.

6 MR. BROOKS: Christopher Brooks, Tax Counsel for
7 CDTFA.

8 JUDGE WONG: Thank you.

9 We are considering four issues today. Number 1,
10 whether the amount of unreported taxable sales should be
11 reduced; Number 2, whether the amount of excess collected
12 tax reimbursement should be reduced; Number 3, whether the
13 amount of unreported taxable rebates should be reduced;
14 and Number 4, whether Appellant was negligent or
15 intentionally disregarded applicable authorities.

16 Mr. Tauberg, is that a correct statement of the
17 issues?

18 MR. TAUBERG: Yes, it is.

19 JUDGE WONG: CDTFA?

20 MR. SUAZO: Yes, it is.

21 JUDGE WONG: Thank you.

22 Appellant let's move on to the exhibits.

23 Appellant has identified and submitted proposed Exhibits 1
24 through 6 as evidence.

25 And, Mr. Tauberg, you have no other additional

1 exhibits?

2 MR. TAUBERG: No, I don't.

3 JUDGE WONG: Thank you.

4 And, CDTFA, did you have any objections to those
5 proposed exhibits?

6 MR. SUAZO: No objections.

7 JUDGE WONG: Okay. Thank you.

8 Appellant's Exhibits 1 through 6 will be admitted
9 into the record as evidence.

10 (Appellant's Exhibits 1-6 were received
11 in evidence by the Administrative Law Judge.)

12 And CDTFA has identified and submitted proposed
13 Exhibits A through H as evidence.

14 CDTFA, you have no other exhibits; is that
15 correct?

16 MR. SUAZO: That's correct.

17 JUDGE WONG: Thank you.

18 Mr. Tauberg, did you have any objections to
19 CDTFA's proposed exhibits?

20 MR. TAUBERG: No, I don't.

21 JUDGE WONG: Thank you.

22 So CDTFA's Exhibits A through H will be admitted
23 into the record as evidence.

24 (Department's Exhibits A-H were received in
25 evidence by the Administrative Law Judge.)

1 JUDGE WONG: Mr. Tauberg you have no witnesses;
2 correct?

3 MR. TAUBERG: That is correct.

4 JUDGE WONG: And CDTFA, you also have no
5 witnesses; is that right?

6 MR. SUAZO: That is correct.

7 JUDGE WONG: Okay. All right. It was
8 anticipated this oral hearing would take approximately
9 55 minutes.

10 Mr. Tauberg, you asked for 20 minutes. Is that
11 correct?

12 MR. TAUBERG: That's correct.

13 JUDGE WONG: You can divide that between your
14 opening and your closing. Do you have an idea of how you
15 wanted to allocate your time?

16 MR. TAUBERG: No, I do not at the present time.

17 JUDGE WONG: Okay.

18 MR. TAUBERG: Most of it will probably be the
19 opening statement.

20 JUDGE WONG: Okay. I'll just try to keep track
21 of your time. And then whatever you have left over you
22 can use in your closing and rebuttal. Does that sound
23 fair?

24 MR. TAUBERG: That is fine.

25 JUDGE WONG: Okay. And then, CDTFA, you had also

1 asked for 20 minutes; is that correct?

2 MR. SUAZO: That is correct.

3 JUDGE WONG: Okay. Did either party have any
4 questions before we start?

5 Mr. Tauberg, do you have any questions?

6 MR. TAUBERG: No, I do not.

7 JUDGE WONG: Thank you.

8 CDTFA, any questions?

9 MR. SUAZO: No questions.

10 JUDGE WONG: Okay. Mr. Tauberg, please proceed
11 with your presentation. You have 20 minutes.

12

13 PRESENTATION

14 MR. TAUBERG: Your Honors, thank you for taking
15 the time to hear my appeal.

16 The results of the audit for the period of
17 October 1st, 2012, through September --

18 JUDGE WONG: Mr. Tauber, I'm sorry. Could you
19 pull the microphone closer to you and speak into it. Even
20 though we can hear you in the room, it might not be clear
21 to the people on YouTube or for the record. Thank you.

22 MR. TAUBERG: All right.

23 The results of the audit for the period of
24 October 1st, 2012, through September 30th, 2015, show that
25 Day Riverside Petroleum owed \$141,790.33 plus \$21,031.39

1 as interest and \$14,179.05 penalty for a total of
2 \$177,000.77. In addition to that amount, they have added
3 \$63,319.27 in additional interest. I am trying to show
4 that I should not have to pay the above amount because of
5 errors that the computer system provided by British
6 Petroleum were giving to us and to the Board of
7 Equalization.

8 Since the results of the audit of Day Riverside
9 Petroleum were provided to me, I have been trying to
10 convince first, Board of Equalization and now the
11 California Department of Tax and Fee Administration, that
12 the software system provided by British Petroleum, which
13 was called Retalix, was providing incorrect data both to
14 me and to the Board. I was told by them repeatedly that
15 because of a lawsuit between ARCO ampm franchisees and
16 British Petroleum was still ongoing, they would not look
17 at it until everything was finalized.

18 Exhibit 1 shows that there were 508 franchisees
19 in California participating in the lawsuit against British
20 Petroleum. Other lawsuits were proceeding in Oregon,
21 Washington, Nevada, and Arizona. The lawsuits, which is
22 shown in Exhibit 2 had two parts. The first part was for
23 vendor manipulation, and the second part was because of
24 the Retalix system.

25 The result of the Superior Court trial were that

1 the vendor manipulation portion was declared -- was
2 decided in favor of British Petroleum. And the Retalix
3 portion was decided in favor of the franchisees. Both
4 parties decided to appeal the Superior Court decision.

5 Exhibit 4 shows the opening brief before the
6 Appellate Court. The Appellate Court agreed with the
7 Superior Court decision, which is shown on Exhibit 5. To
8 sum up the decision of both the Superior and Appellate
9 Court, British Petroleum was found at fault for providing
10 their franchisees with a computer system that was
11 inadequate and faulty, and that the franchisees had lost a
12 considerable amount of money because of it.

13 At the time of the audit, I did not know that the
14 Retalix system was providing incorrect data until the
15 result of the audit was shown to me. The audit shows that
16 as of the first quarter of 2015, something happened
17 because the differences between the audit and what was
18 reported was very small. Why was this? At the end of the
19 day of 2014, the Retalix system was replaced with a new
20 system, and we were not doing anything different in
21 preparing the quarterly sales tax returns.

22 During the time that the franchisees were
23 required to use the Retalix system and errors were showing
24 up in the system, I offered to work with British
25 Petroleum's Retalix group to try to fix the system. You

1 may ask why. I thought I was qualified to help British
2 Petroleum resolve their problems. For over 40 years, I
3 was a computer consultant to various governments to plan a
4 budget organization of Iran and the Office of the
5 President of the United States.

6 I was also a consultant to various international
7 companies, including Aramco, Arabian American Oil company,
8 and Nestle. During the appeal process with the Board of
9 Equalization, the Department of Tax and Fee
10 Administration, and the Office of Tax Appeals, I have
11 tried to speed the process so the matter could be
12 resolved. I've either talked to them or written to them
13 several times each year. Each time that I asked, I was
14 told this would go through the normal processing, and it
15 takes time.

16 The issue of the Board of Equalization changing
17 to the Department of Tax and Fee Administration also did
18 not help. The issue of Covid-19 did not help. It caused
19 people to have to work from home, and a lot of work took
20 longer for normal work to complete. 26 months ago I filed
21 an appeal with the Office of Tax Appeals. I was told that
22 they would not give me an approximate time frame, but I
23 would be notified about 45 to 75 days before the hearing.
24 I called back numerous times to see if anything changed on
25 the status of the appeal, but I was told I would have to

1 wait, and I would be notified.

2 The Retalix system has been proven to be a very
3 faulty system because of modifications made by British
4 Petroleum to a software that they bought. Both the
5 Superior Court and the appeals court agreed that the
6 British Petroleum was at fault for providing such a faulty
7 system and penalized them because of it knowing that both
8 courts agreed with the franchisees who bought the system.

9 That ruling makes it hard to decide which side is
10 right and the amount due by Day Riverside Petroleum. I
11 honestly believe that it should be substantially lower
12 than \$141,790.33 that the Department of Tax and Fee
13 Administration says it's due, since it has taken seven
14 years despite my constant request to speed up the appeal
15 process. I strongly recommend that the Department of Tax
16 Appeals waive all the interest, penalties, and reduce the
17 initial amount of \$141,790.33.

18 As far as the other items you brought up about
19 the money that had gotten rebates on there, the Tax Appeal
20 figures that is income because I would -- I reduced the
21 price that I'm selling it to the customer on it. That's
22 not true. Those amounts were not factored at all into the
23 selling price. Those amounts are given after the fact by
24 the companies to -- so that we would sell their products.

25 Thank you very much for listening to me.

1 JUDGE WONG: Thank you, Mr. Tauberg. Just one
2 moment while I take some notes.

3 Okay. I will now turn to my Co-Panelists for
4 questions.

5 You have 12 minutes left for rebuttal and
6 closing, just to let you know.

7 I will turn first to Judge Aldrich.

8 JUDGE ALDRICH: Hello. Good morning. I just
9 wanted to ask a couple of questions regarding the timing.
10 So I understand that Retalix was an issue for you,
11 according to your argument. When did you discover that it
12 was causing problems?

13 MR. TAUBERG: Retalix was causing problems as
14 soon as they installed it onto our system. Problems were
15 reported multiple times every week to them, and they were
16 fixing them. Every site was having different sets of
17 problems. I didn't realize that it was reporting
18 differently data in there until the audit was done and the
19 results were shown to me.

20 JUDGE ALDRICH: So when you say audit, are you
21 saying the audit at issue or the prior audit.

22 MR. TAUBERG: I'm talking about the audit at
23 issue.

24 JUDGE ALDRICH: Okay. And then would it be fair
25 to say that you're required to use Retalix according to

1 your franchisee agreement?

2 MR. TAUBERG: Yes. Retalix was required. We
3 were not allowed to put in a different type of computer
4 system.

5 JUDGE ALDRICH: But ultimately, a different
6 system was put in?

7 MR. TAUBERG: British Petroleum sold ARCO to
8 Tesoro. And part of the thing was they had to get rid of
9 the Retalix system at a certain point.

10 JUDGE ALDRICH: So you didn't get to take
11 independent action of like getting a new POS system?

12 MR. TAUBERG: No. I was not -- by the contract I
13 had with ARCO, I wasn't allowed to. I had to use the
14 computer system provided.

15 JUDGE ALDRICH: Okay. And then just in general
16 terms, could you tell me how your reporting process would
17 work with Retalix. Would that populate sales and use tax
18 return or were you taking the data from that and then
19 using that to --

20 MR. TAUBERG: Basically, we would call up the
21 support number, report a problem on there, and they
22 would -- they had the capability to go into the system and
23 look at it and try to resolve the problem.

24 JUDGE ALDRICH: Okay. All right. That's all the
25 questions I had at the moment. I'm going to return it to

1 Judge Wong. Thank you.

2 JUDGE WONG: Thank you, Judge Aldrich.

3 Judge Brown?

4 JUDGE BROWN: Thank you.

5 Mr. Tauberg, I wanted to ask about the court
6 complaint in October of 2012 that you were a party to. I
7 understand that the Appellate Court ruled on the other
8 complaint where you weren't a party. I wanted to ask what
9 happened to the one where you were a party. It said in
10 Appeals Bureau decision, for example, that it was in
11 settlement.

12 MR. TAUBERG: Yes. It went into settlement
13 conference on there, which I can't remember how long it
14 lasted. And because of the time it had taken for all this
15 stuff to go through, I don't think it settled until about
16 2020. I think it was somewhere around 2020 or '21,
17 somewhere around there. We both settled on an agreement
18 that was split between all the -- equally between all the
19 parties of the agreement.

20 JUDGE BROWN: And is there any evidence of that
21 that we have?

22 MR. TAUBERG: I could not find a document that
23 the attorneys had sent to me on that. The attorneys that
24 we had is no longer there. He moved out of California,
25 and I don't know where he is.

1 JUDGE BROWN: One second. I had another
2 question. In the documents there was a reference to a
3 different POS, point-of-sale system, that you had
4 submitted sales that were created from a -- or recorded
5 from a different POS system. Was Retalix the only POS
6 system you were using during the audit period?

7 MR. TAUBERG: During the audit period, that was
8 the only one. Except at the very end they replaced it
9 with another one, and I don't even know what they called
10 that one. You know we just talk -- we just call it the
11 back-office system.

12 JUDGE BROWN: I think that's all that I have
13 right now. So I will turn back to Judge Wong. Thank you.

14 JUDGE WONG: Thank you, Judge Brown.

15 Judge Aldrich has another question for you.

16 JUDGE ALDRICH: Hi. Yes. So during your opening
17 you discussed interest. Are you asking for interest
18 relief?

19 MR. TAUBERG: Yes, I am.

20 JUDGE ALDRICH: Okay. So I didn't see -- I saw
21 the negligence penalty was at issue, but I didn't see the
22 interest relief. Was it an issue? So I was hoping you
23 could explain which exact periods you're asking for
24 interest relief.

25 MR. TAUBERG: I'm asking interest relief because

1 of the time frame it was taken to do all this. Covid
2 delayed everything for quite a while, a period of time,
3 and a time when the Board of Equalization was split into
4 two different organizations. The people in the new Tax
5 and Fee Administration, when it got started, didn't know
6 what was going on, and that was delaying everything for at
7 least a year.

8 JUDGE ALDRICH: Okay. So to be clear, you're
9 asking for interest relief while it was at CDTFA and the
10 appeals process and also while it was at the Office of Tax
11 Appeals?

12 MR. TAUBERG: Basically, for those times. But it
13 was still taking longer for just about every part of this
14 process to go on there. That if the problems were caused
15 because of the software being incorrect and reporting
16 incorrect, then the amount due should not have been --
17 what I'm claiming is the amount due should not have been
18 \$141,000 that the Board was saying I was due, then the
19 interest should be a lot lower too.

20 JUDGE ALDRICH: So with that respect, are you
21 attributing the delay to the software or to actions taken
22 by CDTFA?

23 MR. TAUBERG: Both.

24 JUDGE ALDRICH: Okay. So one of requirements for
25 interest relief is that you submit a signed declaration or

1 a form called CDTFA 735, I believe. And I don't -- I
2 don't see that in the appeal. And part of that is that
3 you specify the periods and the grounds for the interest
4 relief. I guess, are you requesting to submit that form
5 since you brought up interest relief?

6 MR. TAUBERG: Yes, I would.

7 JUDGE ALDRICH: You will?

8 MR. TAUBERG: I will submit that form. I wasn't
9 aware that's -- I was not aware that there was a form that
10 I had to fill out for that.

11 JUDGE ALDRICH: Okay. And how long do you think
12 you might need to submit such a form?

13 MR. TAUBERG: Since I've never seen the form, I
14 don't know. Basically, I don't know how complicated that
15 form would be, but I would start working on it right away.

16 JUDGE ALDRICH: Okay. Well, I'm going to refer
17 it back over to Judge Wong, and he can help establish a
18 time frame for that. But it sounds like you're interested
19 in it.

20 Judge Wong?

21 JUDGE WONG: Okay. Let's see. We could hold the
22 record open for -- would two weeks be sufficient for you
23 to find and fill out and submit that form to CDTFA?

24 MR. TAUBERG: That would be sufficient.

25 JUDGE WONG: Okay. And then I will give CDTFA

1 two weeks as well to process the form.

2 MR. PARKER: Judge Wong, since this hasn't been
3 an issue in the past, and we have to reach out to all the
4 different areas within CDTFA, could we get 30 days,
5 please?

6 JUDGE WONG: Sure.

7 MR. PARKER: Thank you.

8 JUDGE WONG: Okay. I mean just to be fair, do
9 you want 30 days, Mr. Tauberg or is 30 and 30 --

10 MR. TAUBERG: That's fine.

11 JUDGE WONG: Okay. Okay. Someone will try to
12 get you that form today. You will have 30 days, but
13 please try to submit it as soon as possible. And once you
14 submit it to CDTFA, then CDTFA will have 30 days to
15 process that form.

16 MR. TAUBERG: That's fine.

17 JUDGE WONG: Okay. Sorry. Let me make a note.
18 Okay. I have a few questions, Mr. Tauberg, about your
19 presentation. So you had mentioned that you didn't know
20 that the Retalix system was providing incorrect data until
21 after the audit.

22 MR. TAUBERG: That is correct.

23 JUDGE WONG: But you had appealed the tax bill,
24 the Notice of Determination you received from CDTFA.
25 Actually, hold on just a second. Okay. How did you

1 know -- how did you know that -- what was the nature of
2 the errors in the Retalix system that came out of the
3 audit?

4 MR. TAUBERG: Well, the amounts that they were
5 reporting on there, of probably of sales and tax due, the
6 total amount were showing on there that I owed more in
7 sales tax. When the Retalix system went away those
8 amounts went down to just about zero. Now, I didn't do
9 anything different when I was doing the tax returns. I
10 pulled the same data -- I tried pulling the same date the
11 same way from the system and submitted it that way.

12 JUDGE WONG: So while you had the Retalix system
13 itself, there is nothing to indicate to you that you were
14 reporting incorrectly?

15 MR. TAUBERG: That's correct.

16 JUDGE WONG: And so it was only after you had
17 this new POS system and that you summarized that the
18 Retalix system was producing incorrect data?

19 MR. TAUBERG: That's correct.

20 JUDGE WONG: Okay. And the POS system was the
21 only records you kept as far as your sales and --

22 MR. TAUBERG: The POS and back-office system,
23 what it did is it transmitted data from there to ARCO.
24 And ARCO then sent data -- sent that data to it and S2K
25 system, which is another company which provided reports.

1 Up until -- when the new system went in, they also
2 provided a completely different S2K system to report data
3 back, which gave us all the daily reports and monthly
4 reports and everything else that were used.

5 JUDGE WONG: So the S2K system, that was in place
6 during the liability period at issue?

7 MR. TAUBERG: That's correct. The S2K system has
8 been in use for many years. It's basically a reporting
9 system that some other company came up with, which ARCO
10 uses. They were using a subset of it when they were using
11 Retalix. And then it was completely modified and a new
12 version of it went in there with a lot more reporting and
13 things to see which you could get out of it when they got
14 rid of the Retalix system.

15 JUDGE WONG: Were there any records from the S2K
16 system from the liability period?

17 MR. TAUBERG: Not anymore. During that period of
18 time, they're probably -- they're gone. I can't pull data
19 back from that anymore.

20 JUDGE WONG: Okay. But what you reported on your
21 sales and use tax returns for the liability period was
22 based on the Retalix system?

23 MR. TAUBERG: Based on the Retalix system that
24 reported the stuff back that went through another system,
25 the S2K system they would -- which would pull it.

1 JUDGE WONG: So were you reporting data from the
2 S2K system or the Retalix system?

3 MR. TAUBERG: It's a combination of both because
4 the S2K system -- the Retalix system fed the S2K system.

5 JUDGE WONG: So the S2K system's data was
6 correct, but the Retalix system was incorrect?

7 MR. TAUBERG: No. The S2K system back there, the
8 system could only take the data that's presented to it.

9 JUDGE WONG: Okay.

10 MR. TAUBERG: The Retalix system at the time was
11 reporting incorrect data to it. So the data it was
12 providing to me was basically the data that it was getting
13 from the back-office system -- the Retalix back-office
14 system.

15 JUDGE WONG: And you know that data was incorrect
16 was basically comparing it to what the successor POS
17 system was producing?

18 MR. TAUBERG: No. I knew it was incorrect when I
19 saw the audit when the audit was showing that the last
20 three quarters of the audit everything -- I was reporting
21 everything correctly when I wasn't doing anything, you
22 know, different when I was doing the tax returns.

23 JUDGE WONG: So you -- what did you base the tax
24 return data on? Because that -- for your unreported
25 taxable sales, based on what I understand CDTFA's audit --

1 CDTFA's audit method, they compared what you reported to
2 what was recorded by your records, and there was a
3 difference there. And so the unreported sales you're
4 claiming is based on the Retalix system, which is
5 incorrect. And -- but your -- what you reported on your
6 sales and use tax returns, I'm assuming you're saying
7 that's correct. So how did you report -- like what -- why
8 is there a difference between what you recorded and what
9 you reported?

10 MR. TAUBERG: No. What I'm saying is -- what I'm
11 saying is I reported basically what the Retalix system
12 said. The Retalix system gave it to S2K. I could see the
13 same -- basically the same thing from S2K that the Retalix
14 system was given.

15 JUDGE WONG: So where did the error come in?
16 From the Retalix system? So the Retalix system was --

17 MR. TAUBERG: Basically, it was from the Retalix
18 system that was causing the error.

19 JUDGE WONG: So the Retalix system is producing
20 two sets of data? One to you --

21 MR. TAUBERG: No. One set of data.

22 JUDGE WONG: Okay. So where's the -- the
23 discrepancy between what was reported and recorded coming
24 from?

25 MR. TAUBERG: That -- that I can't say where ARCO

1 was getting their portion of data or where that was coming
2 from. That I can't say.

3 JUDGE WONG: Okay.

4 MR. TAUBERG: You know, I was -- you know, one of
5 the things as I said before, that I had offered to work
6 with ARCO on the Retalix system. Then I would have been
7 able to have more insight of where everything was coming
8 from on that point. But since I -- since they refuse to
9 let me help them at all -- you know, I was going to do it
10 for nothing, you know, basically to get the system to work
11 correctly.

12 JUDGE WONG: Okay. Got it. Thank you. I wanted
13 to turn to the rebates from your vendors. It looks like
14 from soda, beer, and cigarettes; is that correct?

15 MR. TAUBERG: Can you repeat that again?

16 JUDGE WONG: I want to turn to the rebates that
17 you received from vendors; soda, beer, and cigarettes; is
18 that correct?

19 MR. TAUBERG: Okay.

20 JUDGE WONG: And so you received those rebates --
21 or sorry. The Appellant, your company, received those
22 rebates; is that right?

23 MR. TAUBERG: That's correct.

24 JUDGE WONG: And what were they received for?

25 MR. TAUBERG: They were received for the amount

1 of product that we sold on there. Those rebates were
2 never factored into the sales price on there, where we
3 would give the customers a reduction. Like they would use
4 a coupon, and we would give a -- it was a coupon. There
5 were no such things as coupons on there.

6 So it did not affect the sales price at all, so
7 there was no sales tax on it. That was something that was
8 more as income coming to us afterwards on there that was
9 records to the IRS and Franchise Tax Board as income.

10 JUDGE WONG: Do you have a copy of any of these
11 agreements with your vendors for the liability period with
12 the terms of these payments?

13 MR. TAUBERG: Well, that money went back.
14 Basically, that money went back to ARCO, and then ARCO
15 sent it to us. It was not -- it did not come directly to
16 us. The agreements were between ARCO and the vendors.

17 JUDGE WONG: So you do not have a copy of the --

18 MR. TAUBERG: No, I do not.

19 JUDGE WONG: Okay.

20 MR. TAUBERG: That was never -- those agreements
21 were never provided to any of the franchisees.

22 JUDGE WONG: Okay. Thank you, Mr. Tauberg.
23 Those are all the questions I have for now.

24 Okay. We will now turn it over to CDTFA for
25 their presentation.

1 You have 20 minutes. Thank you.

2 PRESENTATION

3 MR. SUAZO: The Appellant is a limited liability
4 corporation operating an ARCO gas station with a mini-mart
5 in Riverside, California. Audit period is from October 1,
6 2012, through September 30th, 2015. Appellant has been
7 previously audited. The Department reviewed Appellant's
8 federal income tax returns for 2013 and 2014, P&L
9 statements for 2013, 2014, and 2015.

10 The Department also obtained retail gasoline
11 pricing information for the Los Angeles metropolitan area
12 from the U.S. Department of Energy for the audit period.
13 Total sales for the audit period amounted to almost
14 \$31 million. Exemptions claimed included nontaxable food
15 sales, labor, state excise on diesel, bad debts, and
16 partial exempt motor vehicle fuel sales. Total exemptions
17 claimed were over \$29 million. Taxable sales recorded
18 were just over \$1.5 million; Exhibit D, pages 37
19 through 38.

20 The Department compared federal income tax
21 returns to reported sales for 2013 and 2014 and a
22 difference of just over \$100,000 for the two-year period
23 as revealed; Exhibit D, page 88. The Department scheduled
24 Appellant's recorded fuel sales and mini-mart sales from
25 Appellant's monthly sales summaries for the period from

1 January 1st, 2013, through September 30th, 2015;
2 Exhibit D, page 87, and also transcribed Appellant's
3 purchases for profit and loss statements; Exhibit D,
4 page 86.

5 Comparison of recorded sales to recorded
6 purchases disclosed markups of around 6 percent for fuel
7 and just over 26 percent for taxable mini-mart sales;
8 Exhibit D, page 85. The Department found these markups
9 reasonable and accepted them. Comparison of reported
10 taxable sales of over \$1.2 million; Exhibit D, page 79, to
11 audited taxable purchases of just over \$2.1 million;
12 Exhibit D, page 85, for the period of January 1st, 2013,
13 through September 30th, 2015, showed a negative gross
14 profit of \$861,000 and a markup of negative 41 percent.
15 That is using reported mini-mart taxable sales to recorded
16 mini-mart taxable purchases.

17 The Department found that the reported sales
18 amounts for the mini-mart to be unreasonable and,
19 therefore, did not accept them. The Department reconciled
20 Appellant's various recorded taxable sales to its reported
21 sales. For Appellant's gasoline sales, the reconciliation
22 disclosed an over reporting of \$460,000. So the
23 Department allowed a credit for the difference; Exhibit D,
24 pages 83 and 53.

25 The reconciliation of recorded diesel sales to

1 reported diesel sales disclose an underreporting of
2 \$49,000; Exhibit D, pages 80 and 53. And the
3 reconciliation of recorded mini-mart taxable sales to
4 reported minimarket taxables showed Appellant had
5 underreported taxable sales of close to \$1.7 million;
6 Exhibit D, pages 79 and 53.

7 Further, a review of sales tax computed per
8 taxable sales of mini-mart sales to sales tax collected
9 per Appellant's tax summary reports revealed that the
10 Appellant collected tax on some exempt sales. Therefore,
11 the Appellant had excess tax -- excess sales tax
12 reimbursement; Exhibit D, page 71. The excess sales tax
13 reimbursements are included in the audit, page --
14 Exhibit D, page 52.

15 As sales tax reconciliation was also performed
16 using the Appellant's sales tax summary reports,
17 comparison to reported sales tax disclosed a difference of
18 almost \$132,000 in sales tax; Exhibit D, page 73 through
19 75. Appellant claimed exempt labor sales of \$117,000.
20 These claims were disallowed as review of records
21 disclosed no exempt labor sales; Exhibit D, page 77.

22 Appellant claimed other deductions which included
23 state excise tax on diesel of over \$1 million. The
24 Department determined the amount claimed was overstated.
25 Only \$11,000 of state excise tax on diesel was found to be

1 properly claimed and supported. The remaining amounts
2 still totally over \$1 million was disallowed; Exhibit D,
3 page 76. Bad debts were not recorded on the federal
4 income tax returns provided; Exhibit D, page 88, and were
5 not supported by Appellant. Therefore, claimed bad debts
6 were disallowed.

7 Then to ensure that the recorded amounts were
8 accurate, the Department computed taxable sales for both
9 fuel sales and mini-mart sales using alternative methods.
10 For fuel sales, a weighted selling price per gallon for
11 all grades of gasoline and diesel was determined using the
12 U.S. Department of Energy data for the Los Angeles
13 Metropolitan Area for the audit period; Exhibit D, pages
14 60 through 68.

15 Appellant's average per gallon selling price of
16 gasoline and diesel was established based on January
17 through June 2015, recorded sales of gasoline and diesel
18 sales divided by recorded gasoline and diesel gallon sold;
19 Exhibit D, page 59. A comparison was made between U.S.
20 Department of Energy average per gallon prices to recorded
21 average per gallon prices for the January through June
22 2015 period.

23 Based on the difference, the Department
24 discounted the U.S. Department of Energy pricing by over
25 10 percent; Exhibit D, page 59, to establish the

1 Appellant's audited per gallon selling prices for the
2 audit period; Exhibit D, page 58. The audited per gallon
3 selling prices was applied to recorded gallon sold to
4 determine audited fuel sales; Exhibit D, page 57.

5 Recorded mini-mart taxable cost of goods sold
6 adjusted for both self-consumption and pilferage were
7 applied to the weighted markup computed in the Appellant's
8 prior audit; Exhibit H, page 194, to determine audited
9 taxable sales; Exhibit D, pages 69 and 70. The audited
10 gasoline sales, diesel sales, and mini-mart sales total
11 just over \$29.05 million. Recorded sales of the same
12 items totaled just over -- or excuse me.

13 The audited gasoline sales, diesel sales, and
14 mini-mart sales total just under \$29.05 million. Recorded
15 sales of the same items total just over \$29.05 million;
16 Exhibit D, page 55. The difference, which is only
17 \$27,000, is within one-tenth of a percent of the recorded
18 sales amounts; Exhibit D, page 96. The recorded sales
19 were found to be acceptable, and the Department's
20 assessment is based on the Appellant's own records, which
21 were verified using accepted alternative methods.

22 When comparing the sales reconciliation
23 difference of just under \$132,000; Exhibit D, page 73, to
24 assessed sales tax in the audit out of taxable, rebates,
25 which is just over \$132,000, the \$448 difference in sales

1 tax is within 0.35 percent, a recorded tax collected by
2 the Appellant; Exhibit D, page 97.

3 In addition, the prior audit, which covered the
4 period from October 1st, 2009, through September 30th,
5 2009 -- 2012, also assessed a vast majority of assessment
6 due to sales tax recorded versus sales tax reported
7 differences; Exhibit H, page 243.

8 Profit and loss statements disclose rebate income
9 as received from beer, soda, and tobacco vendors. The
10 rebate amount assessed for the audit period is \$60,000;
11 Exhibit D, page 54. The Appellant has not provided
12 evidence to show that the rebates were included in a
13 taxable sales amount reported to the Department, nor has
14 the Appellant provided evidence to show that the rebates
15 are of an exempt nature. As such, no adjustment is
16 warranted in this area.

17 Appellant's prior audit also assessed taxable
18 rebate income of \$125,000; Exhibit H, page 242. Again,
19 the Department used the Appellant's own records to
20 determine the unreported taxable sales and used
21 alternative records to show that the records are accurate.
22 Appellant has not shown that records specific to their
23 system are erroneous.

24 As stated earlier, this is the Appellant's second
25 audit. Appellant was aware of how to report the proper

1 amount of sales and sales tax. The same issues applied in
2 the prior audit that occurred in this audit. The
3 Appellant failed to correct errors they knew existed. The
4 amount of total unreported taxable measure is almost
5 \$2 million, which is significant. Appellant did collect
6 sales tax on items at issue.

7 Appellant would have known, based on the sales
8 tax reports and unsupported exemptions claimed of almost
9 \$1.2 million that they were not reporting correctly.
10 Therefore, the negligence penalty is warranted.

11 This concludes my presentation. I'm available to
12 answer any questions you may have.

13 JUDGE WONG: Thank you.

14 I'll turn to my co-panelists for any questions
15 for CDTFA, beginning Judge Aldrich.

16 JUDGE ALDRICH: No questions. Thank you.

17 JUDGE WONG: Thank you.

18 Judge Brown?

19 JUDGE BROWN: I may have one question for CDTFA,
20 and it's a similar question to what I asked the Appellant.
21 I was trying to understand what was going on with
22 references in, for example, the appeals decision to what
23 appeared to be a different point of sale system than
24 Retalix. And I wanted to know if CDTFA can enlighten
25 that. Is that the S -- sorry -- S2K system that Appellant

1 referred to, or is it something different?

2 MR. SUAZO: It's sort of ambiguous. I can't tell
3 you for sure. Based on what he has said today, I would
4 assume that's the case. But like he said, the Retalix
5 system gets fed into the secondary system. It can
6 only accept -- it would only spit out the same numbers
7 that it accepted.

8 JUDGE BROWN: And I guess I want to ask if CDTFA
9 can address Appellant's arguments regarding the error --
10 whether the errors with the -- the alleged errors with the
11 Retalix system would have resulted in incorrect reporting
12 or incorrect recording. Is there a reason why CDTFA isn't
13 concerned about any discrepancies in that?

14 MR. SUAZO: When we did the alternative methods,
15 we did both the markup on mini-mart sales, and we did a
16 cost of gallon sold to the average selling price based on
17 both U.S. Department of Energy and the Appellant's selling
18 price, which was discounted because he sold less than what
19 is the average for the metropolitan area. When you take
20 those two items into account, alternative methods, they
21 come out to within 0.10 of what the recorded sales are.

22 Out of the \$29 million that was sold, there's
23 only a \$27,000 difference. So basically, he -- what was
24 recorded was correct in our eyes based on an alternative
25 method. If you look at where the difference truly lies,

1 it's the mini-mart sales. The mini-mart sales reported
2 were only like \$1.3 million, I believe, or \$1.2, million.
3 But the recorded mini-mart sales, if you marked them up,
4 you would see that it's a huge difference there, and
5 that's where the majority of the liability is created.

6 Because, again, when you look at what is reported
7 versus the recorded mini-mart taxable sales, it's a
8 negative 860 -- I think it was \$862,000 gross profit,
9 which is impossible. You wouldn't be buying something for
10 a dollar and selling it for 60 cents, especially, not at a
11 ampm mini-mart. Actually, the 31 percent markup that is
12 calculated by the auditor in the previous audit is rather
13 low for a mini-mart.

14 Because normally a mini-mart is between anywhere
15 from 45 to possibly 80 percent on a -- for a gasoline
16 mini-mart. Because, basically, you're just going to the
17 items, you're grabbing them, and you're taking off. So
18 there's not much -- you're not going to go to a Safeway or
19 another -- a Costco or something like that to shop around.
20 You're just -- it's impulse -- it's an impulse buy. So
21 the markup is going to be higher. Okay.

22 So like if you need a pack of cigarettes or you
23 need a soda, whatever, you're not going to go and shop
24 around to get a 12-pack of Coke or a 24-case at Costco.
25 You're just going to go, and you're going to spend \$1.25

1 on a can of coke. Which, you know, if you go someplace
2 else, it's not going to be nearly that much.

3 So again, in a way the markup is conservative,
4 but the markup shows that the pricing on everything is --
5 based on his recorded amount is correct. And where he's
6 saying that he's getting these differences, I'm same in
7 nature as Judge Wong. Because if he's using the Retalix
8 system, there should be no differences if he's using the
9 Retalix system to report. But obviously, something
10 occurred.

11 And something else that occurred was that he has
12 these exemptions that he's taking of over \$1 million that,
13 again, he doesn't have backup for and \$100,000-some in
14 labor. Which, if you ever go to an ARCO mini-mart,
15 there's no real labor. They're not fixing cars. So
16 that's sort of -- the total sales look closer than it was,
17 but when you actually get to the taxable sales because of
18 those exemptions that were not allowed, it comes out close
19 to what -- somewhat close to what the mini-mart is.

20 Did that answer your question in a long-winded
21 way?

22 MR. PARKER: Judge Brown, I just wanted to add
23 one quick thing to this also. If you look at the recorded
24 mini-mart sales, they range somewhere around \$240,000 per
25 quarter on a consistent basis. And the reported amounts

1 for the mini-mart range from zero to about \$240,000 in the
2 later periods. But they were very low in the years 2013,
3 2014, and then in fourth quarter 2012 it was zero.

4 So just looking at those two differences, the
5 recorded remain consistent, but the reported for the
6 mini-mart varied greatly. And that's where the bulk of
7 the audit difference comes from.

8 MR. SUAZO: And if he says his reporting is
9 correct, it's like well, we did allow for \$460,000 credit
10 on the sale of the gasoline based on what he has reported
11 versus what was recorded on the gasoline. Which was also
12 verified again by the alternative method test.

13 JUDGE BROWN: I have nothing further right now.
14 Thank you.

15 JUDGE WONG: Thank you.

16 I just had a couple of questions for CDTFA
17 regarding the prior audit, which was for October 2009
18 through September 30th, 2012. Did Appellant appeal that
19 prior audit?

20 MR. SUAZO: I do not believe so. I didn't look
21 to see.

22 JUDGE WONG: Mr. Tauberg, did you appeal that?

23 MR. TAUBERG: No. No, I did not.

24 JUDGE WONG: Okay. Okay. Yeah. I was just
25 wondering if it had gone through the normal appeals

1 process and went up to the Board of Equalization and
2 whatnot, but you did not appeal that prior determination.
3 Okay. Okay.

4 I didn't have any further questions for CDTFA.

5 Mr. Tauberg, you now have 12 minutes for your
6 rebuttal and closing. You may begin. Thank you.

7 MR. TAUBERG: Okay. Thank you very much.

8
9 CLOSING STATEMENT

10 MR. TAUBERG: As far as the reportings on there,
11 the reports that I pulled out for the audit were pulled
12 from not when they actually happened, but they were pulled
13 when the audit was occurring on there. So I was going
14 through a new system, which had been reloaded with data by
15 ARCO. So I'm not sure of the values on there.

16 So what I'm saying is that there was a -- it
17 could have been -- and can't prove it -- a difference
18 between what I reported because of what I saw on the
19 reports that I got back from the Retalix system versus the
20 reports that I provided the Board when they're doing the
21 audit because they came from the new system. That's all I
22 can say about that.

23 But, you know, I cannot -- I cannot -- there's no
24 way that I can say where any -- where or how any of the
25 differences did occur, though. But as far as the other

1 stuff, I can't -- you know, right now I don't know what
2 else to say on it.

3 Thank you.

4 JUDGE WONG: Thank you, Mr. Tauberg.

5 Okay. For the final time I will turn to my
6 co-panelists for any questions for either Appellant or
7 Respondent. I'll begin with Judge Aldrich.

8 JUDGE ALDRICH: No further questions. Thank you.

9 JUDGE WONG: Judge Brown?

10 JUDGE BROWN: No further questions. Thank you.

11 JUDGE WONG: I guess one last question.

12 Mr. Tauberg, did you want to address the negligence
13 penalty at all?

14 MR. TAUBERG: The what?

15 JUDGE WONG: The negligence penalty.

16 MR. TAUBERG: Yes, I would because I don't think
17 I did anything negligent. I think, you know, what I
18 reported is what I got back from the system on there. It
19 wasn't anything that I was intentionally doing that would
20 call negligence on there. Everything was being reported
21 as it was being presented to me at the time.

22 JUDGE WONG: Thank you.

23 Okay. I think we're ready to wrap up. Just to
24 recap we do have the Form 735 that someone will provide
25 you regarding interest relief -- request for interest

1 relief and penalties. You will have 30 days to fill that
2 out and turn it in to CDTFA. Please copy us on that. And
3 CDTFA will have 30 days from when you turn that in to
4 analyze it and process that.

5 I will be issuing an order memorializing these
6 dates and deadlines. I'm going to hold the -- yeah, it
7 will be 30 days from tomorrow. Hang on just one second.
8 Oh, yes. The BOE -- I'm sorry -- CDTFA 735, the form only
9 relates to interest relief and not the negligence penalty.
10 I think we've already got your arguments regarding the
11 negligence penalty and whatnot. And so 30 days from
12 tomorrow -- you will have 30 days from tomorrow to submit
13 that. And once you submit that, CDTFA will have 30 days
14 from then to turn that in. And I will issue an order with
15 these deadlines. And let me just double check something.

16 Okay. This concludes the hearing. The record is
17 not closed. We're holding that open. And then just be on
18 the lookout for that order and that BOE -- or CDTFA 735.
19 So this will end the hearing, and we will take a recess
20 until the next hearing which is at 1:00 p.m. this
21 afternoon.

22 Let's go off the record. Thank you everybody.

23 (Proceedings adjourned at 10:29 a.m.)
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I further certify that I am in no way interested
in the outcome of said action.

I have hereunto subscribed my name this 30th day
of May, 2023.

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