

IN THE MATTER OF THE APPEAL OF:)
)
PALMS THAI, INC.,) File No. 20106818
)
) APPELLANT.
)
)

Job No. :
42730 OTA(C)

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
PALMS THAI, INC.,) File No. 20106818
)
APPELLANT.)
_____)

TRANSCRIPT OF PROCEEDINGS, taken at
12900 Park Plaza Drive, Suite 300, Cerritos,
California, commencing at 2:36 p.m. and
adjourning at 4:30 p.m. on Wednesday,
July 12, 2023, reported by HANNA JENKIN,
Hearing Reporter.

1 APPEARANCES:

2 Panel Lead: TERESA STANLEY

3 Panel Members: SUZANNE BROWN
4 ANDREW KWEE

5 For the Appellant: MICHAEL SY
6 STEVEN BOORTZ

7 For the Respondent: STATE OF CALIFORNIA
8 DEPARTMENT OF TAX AND
9 FEE ADMINISTRATION

10 RAVENDER SHARMA, HEARING REP.
11 KEVIN SMITH, TAX COUNSEL
12 JASON PARKER, HEARING REP.
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I N D E X

E X H I B I T S

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(Appellant's Exhibit 11 was received at page 8)
(Appellant's Exhibit 12 was received at page 9)
(Appellant's Exhibit 13 was received at page 12)
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APPELLANT'S WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
K. Kokimpong	24			
S. Vongpiansuksa	28			
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1 Cerritos, California, Wednesday, July 12, 2023

2 2:36 p.m.

3
4
5 JUDGE STANLEY: We are on the record in Appeal of
6 Palms Thai, Inc., Case Number 20106818. It's July 12th,
7 2023 at 2:36 p.m. in Cerritos, California.

8 Once again, I'm Judge Teresa Stanley and I have
9 Judge Suzanne Brown and Judge Andrew Kwee with me.

10 I'm going to ask the parties to identify
11 themselves for the record, please, beginning with
12 Appellant.

13 MR. SY: Your Honor, my name is Michael Sy.

14 JUDGE STANLEY: Okay. And Mr. Sy, you might need to
15 get that microphone closer to you. It does bend if you're
16 trying to read and talk at the same time. And you have
17 with you?

18 MR. BOORTZ: Good afternoon, Your Honor. Steven
19 Boortz. I am the counsel for the Palms Thai, Inc.

20 JUDGE STANLEY: Steven -- what is the last name?

21 MR. BOORTZ: Boortz -- B, as in boy -- O-O-R-T-Z. I
22 am the attorney and counsel for Palms Thai, Inc.

23 JUDGE STANLEY: Okay. And CDTFA here hearing
24 representative thank you.

25 MR. SHARMA: Ravinder Sharma, hearing representative.

1 MR. PARKER: Jason Barker, Chief of Headquarters
2 Operations Bureau.

3 MS. BERGEN: Pamela Bergen, legal division.

4 JUDGE STANLEY: Okay. Thank you.

5 Once again, I want to welcome everyone to the
6 Office of Tax Appeals and for the public, let people know
7 that the Office of Tax Appeals is not affiliated with
8 either CDTFA or any other tax agency. OTA -- that's what
9 we call it for short -- is not a court, but is an
10 independent appeals agency staffed with its own tax
11 experts. The only evidence in OTA's record is what has
12 been submitted in this appeal.

13 These proceedings are being live-streamed on
14 YouTube and will be viewable after the hearing is
15 complete.

16 The issues -- we have two issues. Whether -- the
17 first one is whether adjustments to unreported taxable
18 sales are warranted, and was the negligence penalty
19 properly imposed.

20 Mr. Sy, is that what you understand the issues to
21 be?

22 MR. SY: Yes, your Honor.

23 JUDGE STANLEY: Okay. And Mr. Sharma?

24 MR. SHARMA: That is correct. Thank you.

25 JUDGE STANLEY: So we have some things with exhibits

1 to go over. Appellant, at the prehearing conference had
2 stated that it submitted six or seven exhibits. When I
3 went through the record, I identified ten possible
4 exhibits, which we included in an exhibit binder with a
5 link to the parties. And the parties were directed to
6 contact us if at any part of the exhibit binder was
7 incorrect.

8 So since neither party alleged that there were
9 errors in there I assume, Mr. Sy, that those ten exhibits
10 were what you intended to submit initially?

11 MR. SY: Yes, your Honor. Am I allowed to add
12 additional exhibits, your Honor?

13 JUDGE STANLEY: To what?

14 MR. SY: Add additional exhibits.

15 JUDGE STANLEY: We'll talk about that, we'll talk
16 about that next. I just want to talk about the ones that
17 we dealt with at the preparing conference first.

18 CDTFA did not object to those exhibits which were
19 attached, I believe in the opening brief.

20 Is that still true Mr. Sharma?

21 MR. SHARMA: That is correct. Thank you.

22 JUDGE STANLEY: Okay. So Exhibits 1 through 10 will
23 be admitted without objection.

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

1 JUDGE STANLEY: Now, in the minutes and orders, the
2 parties were supposed to present or submit any additional
3 information, any additional evidence by June 27th.

4 On June 27th, we did get from Appellant 28 pages
5 of receipts. Is that accurate, Mr. Sy?

6 MR. SY: Yes, your Honor.

7 JUDGE STANLEY: Okay. I am going to tentatively mark
8 that as Exhibit 11.

9 Mr. Sharma, did the Department receive that 28
10 pages of receipts?

11 MR. SHARMA: Department has received those pages.

12 JUDGE STANLEY: Okay. And does Department object?

13 MR. SHARMA: Department has no objection. Thank you.

14 JUDGE STANLEY: Okay. So I will admit that as Exhibit
15 11.

16 (Appellant's Exhibit 11 was received in
17 evidence by the Administrative Law Judge.)

18 JUDGE STANLEY: Then I did grant an extension on the
19 request of Appellant to submit additional documents by
20 July 5th, but I did indicate in that -- we did indicate
21 that we had to -- we had not given CDTFA the opportunity
22 to object to any of those.

23 And so I want to turn to Mr. Sharma and make
24 sure, did the Department get what we have labeled as
25 Attachments 1 through 5, a backup report, and a live data

1 report?

2 MR. SHARMA: The Department has received those
3 documents.

4 JUDGE STANLEY: Okay. And do you have any objection
5 to those?

6 MR. SHARMA: Department has no objection. Thank you.

7 JUDGE STANLEY: Okay. Mr. Sy, I think I'm just going
8 to count Attachments 1 through 5 and the two reports as
9 one Exhibit 12, is that okay?

10 MR. SY: Yes, Judge.

11 JUDGE STANLEY: Okay. So without objection I'll allow
12 the Exhibit 12 into evidence as well.

13 (Appellant's Exhibit 12 was received in
14 evidence by the Administrative Law Judge.)

15 JUDGE STANLEY: Mr. Sy, you mentioned more.

16 MR. SY: Yes, your Honor.

17 JUDGE STANLEY: In addition to what you already
18 submitted to us?

19 MR. SY: Yes, your Honor.

20 JUDGE STANLEY: Okay. And why were these not
21 submitted by the deadline?

22 MR. SY: Your Honor, we just got the data, like late
23 yesterday morning. I had to tally them, and add them, and
24 in summarize them for each year. That's why I just got it
25 through, like late last night.

1 JUDGE STANLEY: We did our staff ask you when you
2 checked in whether you had new exhibits? Because they
3 didn't mention that to me.

4 MR. SY: I was not asked, your Honor.

5 JUDGE STANLEY: Okay. And this is something that the
6 Department also has not seen, correct?

7 MR. SHARMA: That is correct.

8 JUDGE STANLEY: In order for us to determine whether
9 or not we're going to accept these late-filed exhibits, we
10 probably need to take a recess to allow the Department to
11 review them, and allow the panel to also review them.

12 How many pages are they?

13 MR. SY: One set for three years.

14 JUDGE STANLEY: One each set for three years. Okay.
15 Do you have four copies?

16 MR. SY: I have three copies, your Honor. I can give
17 you one, one for the Department, and I can give you one
18 extra if you want.

19 JUDGE STANLEY: All right. Let's do that. Let's take
20 a -- I don't know how long to take because I don't know
21 how voluminous that is, I don't know how much there is to
22 review. So let's try a five minute break and if anybody
23 needs additional time just let our staff know.

24 We'll go off the record and recess for five
25 minutes.

1 (Recess)

2 JUDGE STANLEY: Okay. We're going back on the record
3 in Appeal of Palms Thai, Inc.

4 Mr. Sharma, has the Department at an opportunity
5 to review the documents that Appellant just presented?

6 MR. SHARMA: Yes, Judge Stanley. We looked at that
7 one and most of them have been submitted to the Department
8 before. Some of them are part of the binders, and the
9 other ones department has already reviewed and submitted
10 additional brief in October 12th, 2022. So none of these
11 documents are anything new.

12 JUDGE STANLEY: Okay. That being said, do you have
13 any objection to having them allowed into the record?

14 MR. SHARMA: Department has no objection.

15 JUDGE STANLEY: Okay. And there was questions from
16 the panel though.

17 Mr. Sy, we wanted to know what the reports are.
18 Were they pulled from some system of yours? I mean, where
19 did these reports come from?

20 MR. SY: Yes, your Honor. They were pulled from the
21 old POS system prior to the POS-2.

22 JUDGE STANLEY: Okay. So they were pulled from your
23 old POS system.

24 MR. SY: That is correct, your Honor. That was during
25 the audit period.

1 MR. BOORTZ: If I might, your honor. The taxpayer, as
2 they sit here today, has had four POS systems. And just
3 for ease of identification, we call them POS-1, 2, 3, and
4 4. POS-1 existed from roughly 2000 until August of 2017.

5 JUDGE STANLEY: Wait. Say that date again?

6 MR. BOORTZ: Approximately 2000 is when it was put
7 into operation and it crashed sometime in August of 2017.
8 August 2017 is -- if my math is right -- the 35th month of
9 the three-year audit period that ended at the end of
10 September 2017.

11 So if you notice the monthly reports look -- are
12 in one format, the first 35 are in one format, and the
13 last one, or from starting in September of 2017 are in a
14 different format. So that represents the change from
15 POS-1 to POS-2. POS-2 is the reason we are here. Is the
16 reason we're here.

17 JUDGE STANLEY: Okay. Thank you. That explains it.
18 I am -- because there was no objection from CDTFA, I'm
19 going to go ahead and mark this as Exhibit 13 and admit it
20 into the record.

21 (Appellant's Exhibit 13 was received in
22 evidence by the Administrative Law Judge.)

23 JUDGE STANLEY: Okay. Then CDTFA submitted Exhibits A
24 through F and Appellant did not object to those exhibits
25 at the prehearing conference, so those will also be

1 admitted with that objection.

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

4 Perimeters is Department of any additional
5 exhibits.

6 MR. SHARMA: No department has no additional exhibits.
7 Thank you.

8 JUDGE STANLEY: Okay. Thank you. All right.

9 Mr. Sy, you listed four witnesses that will be
10 testifying today, including Mr. Boortz.

11 Mr. Boortz, are you arguing or testifying?

12 MR. BOORTZ: Arguing, you Honor. I think that was a
13 mistake to list me as a witness.

14 JUDGE STANLEY: Okay. So are the other three
15 identified witnesses behind you there?

16 MR. SY: Yes, your Honor.

17 JUDGE STANLEY: Okay. Could you, please, the three of
18 you please introduce yourselves? Come forward to a
19 microphone so that everybody can hear you. And then I
20 will swear you in together.

21
22 MR. SY: . KOKIMPONG: Hi. I'm Kanya.

23 MR. BOORTZ: Last name.

24
25 MR. SY: . KOKIMPONG: Kokimpong.

1 JUDGE STANLEY: Okay.

2 MR. VONGPIANSUKSA: Somchai Vongpiansuksa.

3 JUDGE STANLEY: Okay.

4 MR. BOON: Sam Boon.

5 JUDGE STANLEY: Okay. Thank you.

6 Will you please raise your right hand?

7 K. KOKIMPONG,

8 Produced as a witness, and having been first duly sworn by
9 The Administrative Law Judge, was examined and testified
10 as follows:

11 S. VONGPIANSUKSA,

12 Produced as a witness, and having been first duly sworn by
13 The Administrative Law Judge, was examined and testified
14 as follows:

15 S. BOON,

16 Produced as a witness, and having been first duly sworn by
17 The Administrative Law Judge, was examined and testified
18 as follows:

19 JUDGE STANLEY: Thank you. You can go back to your
20 seats or wherever you want to go right now.

21 Mr. Sy, you have requested 60 minutes to present
22 your case. So you can proceed with either starting with
23 argument, or witness testimony, however you want to handle
24 it. You can proceed when ready for it.

25 MR. SY: I would like to have Mr. Boortz do the

1 argument, your Honor.

2 JUDGE STANLEY: Okay. You may begin.

3
4 PRESENTATION

5 MR. BOORTZ: Okay. Your honor, what the evidence is
6 going to show is that the taxpayer, as I previously
7 mentioned, had a POS system in place for the first 35
8 months of the audit period. And that POS system --
9 because in August of 2017 it was about 17 years old it
10 gave up the ghost, it crashed, it died, it took its
11 information with it. Some computer systems do completely
12 die right away, this death took a little while. It would
13 stop and start, and stop and start.

14 So beginning sometime in August of 2017, taxpayer
15 sought out a new POS system. That POS system was put into
16 operation on September 1st, 2017. So the --

17 JUDGE STANLEY: Oh. Can you -- do have the green
18 light on your microphone?

19 MR. BOORTZ: I'm so sorry. I did not.

20 JUDGE STANLEY: Okay.

21 MR. BOORTZ: Were you able to hear me?

22 THE STENOGRAPHER: Yes.

23 MR. BOORTZ: Okay. Thank you.

24 JUDGE STANLEY: She was, but you have to speak right
25 into the microphone so livestream will pick it up too.

1 MR. BOORTZ: Sure. I am sorry. I apologize for that.

2 So POS-1 existed for the first 35 months of the
3 audit period. POS-2 was put into operation on
4 September 1st. POS-1 died and prior to the taxpayer
5 having any knowledge of a sales tax audit.

6 Sometime in early October of 2017, CDTFA reached
7 out to the taxpayer to announce its intention to
8 investigate certain tax years for its sales and use tax
9 returns, that was after POS-2 was put into operation.
10 Taxpayer learned of the audit sometime in the end of --
11 middle to the end of October 2017.

12 In late -- in early 2018, the CDTFA requested
13 from the taxpayer certain data streams from the POS
14 system, and the taxpayer gave those freely to the CDTFA.
15 When the CDTFA investigated the data-streams it found that
16 there were actually two, one data stream that it calls the
17 live data-stream, and then another data-stream that it
18 calls the backup data-stream.

19 Apparently, when the CDTFA looked at the
20 data-streams it noticed that they were -- the backup
21 data-stream and the live data-stream were different, and
22 they differed in a very important way. The live data-
23 stream was missing certain cash transactions, it reduced
24 the number and amount of cash transactions, and therefore
25 reduced the total of sales for the period after September

1 1st, 2017.

2 Now, in the CDTFA's is exhibit -- I apologize, I
3 don't remember which exhibit it is, but it is the one that
4 has 1,500 pages. This exhibit contains an analysis of the
5 differences between the backup data and the live data for
6 a date in November, specifically November 4th, 2017. This
7 analysis shows the missing cash transactions from the live
8 data.

9 Now, the live data was used to produce reports of
10 monthly sales, those monthly sales were used to produce
11 the sales and use tax returns. So the numbers -- the
12 sales numbers that came off of the POS-2 system reflected
13 numbers that were from the live stream which as everybody
14 knows now, were missing certain sales transactions. So
15 11/4/17 is anywhere from a week to two weeks after a
16 taxpayer knew they were under audit for sales and use tax
17 returns.

18 So it is our contention, your Honor, that first
19 of all, that taxpayer had no idea that there were two
20 different data-streams, taxpayer had no idea that they
21 were missing cash sales from the live stream that were
22 relied on to produce the sales and use tax returns. If it
23 were true, your Honor, that the taxpayer were -- the
24 taxpayer was actively hiding, or eliminating, or
25 destroying records of cash sales on 11/4/2017, it would

1 have been after a time that they knew that they were under
2 audit.

3 So it's our contention, your Honor, that -- your
4 Honors, that neither of the individual -- I mean the
5 taxpayer is actually a corporation, but neither of the
6 individuals who actually had any control over the POS
7 system, the two individuals here, Tanya -- Kanya and Sam,
8 had no idea had no way, had no way to manipulate the
9 data-stream had no idea how to remove cash sales from the
10 data-stream.

11 And indeed, were they doing that, they would have
12 stopped when they knew they were under audit. You don't
13 continue to steal when you know somebody is looking at
14 you, if indeed they were, but this went on after the audit
15 was announced.

16 Because POS-1 crashed sometime in August of 2017,
17 the data -- underlying data for those first 35 months of
18 the audit period are gone. What we have instead are the
19 summary reports that we presented to the court this
20 morning and gave to the CDF -- this afternoon, I'm sorry
21 -- that we gave to the CDTFA this afternoon.

22 According to -- those reports were used to
23 produce the sales and use tax returns. Tanya -- I'm
24 sorry. Kanya -- I keep calling her Tanya. Kanya is the
25 person who prepared those reports, and she can testify and

1 will testify, that she faithfully prepared those,
2 basically Excel spreadsheets, based on the output from
3 POS-1.

4 Those numbers were then used to calculate the
5 total sales for the sales and use tax returns. Those
6 summary reports that she prepared are the only evidence of
7 what actually happened during those first 35 minutes -- 35
8 months of the audit period.

9 There is ample evidence, as CDTFA will attest, of
10 changes to the live data that resulted in reduced sales
11 tax liability through the elimination of certain cash
12 transactions. All of those transactions, every one of
13 them, was evidenced through reports that were generated by
14 POS-2, the POS system that was put into place on September
15 1st, 2017. There is no evidence whatsoever, your Honor,
16 of any sort of manipulation of any numbers, prior to
17 September 1st, 2017.

18 We are here because the CDTFA looked at the
19 difference between the two data streams and noted that,
20 once they noted that some cash sales were missing, they
21 went to the backup data, which presumably has everything,
22 and then just made a really simple calculation. The data
23 shows the total sales for the month, shows the total
24 credit card sales for the month, shows the total cash
25 shares for the month. Presumably that backup data was

1 correct.

2 Those numbers produce a ratio in the short time
3 that we have, which is basically one month in the audit
4 period, September of 2017 and maybe a couple days in
5 August of 2017, but those numbers were used to produce a
6 ratio, the ratio of cash sales to total sales. Cash sales
7 has a percentage of total sales.

8 And the number that the CDTFA came up with for
9 the ratio of cash sales to total sales was roughly 20 --
10 oh, boy. Twenty --

11 MR. SY: -- percent.

12 MR. BOORTZ: Twenty-three point nine-nine percent -- I
13 want to say. I don't know what exactly it is, but the
14 methodology is what's important.

15 Understanding -- taking that ratio then, they
16 went back to the bank statements from the audit period,
17 those -- the whole 36 month because we have all those bank
18 statements.

19 Every time a credit transaction was made, that
20 money went straight into the bank account, no way to
21 fudge. It so it's a very simple calculation, again, to
22 take those credit card transactions and then to divide
23 them by one minus the sales tax number, 23.99 or whatever,
24 so you get about 72 percent, divide that by 0.72, you've
25 got the total sales that they are arguing must have

1 happened, based on what happened September, these total
2 sales must have happened the rest of the time, assuming
3 that that ratio holds over time.

4 And doing that resulted in roughly 1.7 million
5 dollars of sales increased sales, different from what the
6 sales and use tax returns said, and different from what
7 the documentation that we just brought to the court says.

8 It's our position, your Honor, that all the
9 problems that the taxpayer experienced, the reason we're
10 here today is because POS-2. There is no evidence of any
11 problems with POS-1 in changing -- changing total tax
12 numbers by eliminating and cash sales.

13 Now, to get to the bottom of this, we hired an IT
14 guy, and he's here today. And I asked him to go into the
15 POS-2 and figure out how somebody could go -- how somebody
16 could change the data-stream to eliminate cash sales. He
17 was unable to replicate it, he was unable to get into the
18 system. Apparently the system has a password that no --
19 that he doesn't have, and so he was not able to access the
20 information, but more importantly, the taxpayer doesn't
21 have. The taxpayers are not IT guys. They are
22 restaurateurs.

23 Somehow, something happened with the POS-2,
24 somehow there is missing sales. But it's only -- the
25 CDTFA is arguing from the standpoint -- from its

1 standpoint, there's not enough information to calculate or
2 to back up what happened in those first 35 months, and so
3 it feels justified in taking the ratio from these months
4 after POS-2 is put into operation to apply that ratio over
5 the course of those first 35 months and bump up the total
6 sales.

7 Again, it's the taxpayer's position that there's
8 no evidence to support any sort of manipulation in the
9 numbers prior to the implementation of POS-2. Both of the
10 individuals, who are here are employees of the taxpayer
11 corporation, will testify about their dearth of computer
12 knowledge and their inability to do much with POS-2 in the
13 shape or form of changing numbers.

14 And so that's why we're here.

15 JUDGE STANLEY: Okay. Do you want to have your
16 witnesses come forward?

17 MR. SY: Your Honor, can I add something, your Honor?

18 JUDGE STANLEY: Absolutely.

19 MR. SY: In addition to what Counsel Boortz said, I
20 want to pinpoint that I reviewed the backup file of 2017,
21 and there are some flaws in the data because the pages for
22 September 2nd, it's overlapping September 3rd. So in the
23 system it just shows September 2nd, it shows September
24 3rd, and then goes back to September 2nd again. That's
25 one thing.

1 Secondly, there was cash receipt the CDTFA gave
2 us before, a cash receipt which was submitted as exhibit
3 prior. Cash receipt was numbered with a date, order
4 number, and a price. When you go back to the backup data,
5 it's converted to a credit card, with the same ticket
6 number, same price -- well, different price, different
7 price, but exact ticket number for the same date and the
8 same amount.

9 Also, I requested -- when this audit started and
10 the auditor informed me that there's a problem with the
11 POS, I requested numerous times for the Department to do
12 an observation test, they refused. I even contacted
13 Sacramento to request, they refused. I said, "Before we
14 change the POS, please come in and do observation tests."
15 And they refused.

16 Because if somebody -- as an example, let's say
17 you see somebody come up from the room with the bloody
18 knife, and you go inside the room, there's a dead person,
19 it doesn't mean that the person who came out is guilty.
20 We need to do some research, some analysis, some
21 observation, which they refused.

22 So when the Department refused to do observation
23 tests, this time we changed the POS. Thank you.

24 JUDGE STANLEY: Okay. Would you like to proceed with
25 your witnesses?

1 MR. BOORTZ: Sure.

2
3 DIRECT EXAMINATION

4 BY MR. BOORTZ:

5 Q Hi. Please state your name for the record.

6 A Kanya Kokimpong.

7 Q Can you spell your last name?

8 A K-O-K-I-M-P-O-N-G.

9 Q Are you an employee of Palms Thai, Inc?

10 A Yes.

11 Q How long have you been an employee for Palms
12 Thai, Inc?

13 A Twenty-three years.

14 Q Were you an employee of --

15 JUDGE STANLEY: Mr. Boortz, we can't hear your
16 questions now. You need to get back to your microphone.

17 MR. BOORTZ: So sorry. I asked her how long she had
18 been an employee for Palms Thai, Inc.

19 THE WITNESS: Twenty-three years.

20 BY MR. BOORTZ:

21 Q And you were an employee for Palms Thai, Inc.,
22 when POS-1 was put into operation?

23 A Yes.

24 Q And you were an employee of Palms Thai, Inc.,
25 when POS-2 failed?

1 A Yes.

2 Q The documents that we produced this morning -- or
3 excuse me, this afternoon for the court, of the monthly
4 summaries, do you know how those monthly summaries were
5 prepared?

6 A The evidence that you just submitted? From I --
7 from August it was from the POS system, which -- the
8 sales, I input that in Excel and sent it to the CPA.
9 Starting September, it's the printout, which it would be
10 easier for me just to print it out, and then scan it, and
11 send it to the CPA, which they accepted so I started doing
12 that since.

13 Q So prior to September 1st, 2017, the 35 monthly
14 reports you prepared?

15 A Before September? Yes, from the POS system that
16 we had. I would have to print it out, and then put it in
17 Excel, and print it out. It's just a hassle to do all
18 those steps.

19 Q Did you -- the documents -- did you have a chance
20 to review the documents that we submitted?

21 A Yes.

22 Q And are those the documents you prepared?

23 A Yes.

24 Q And did you faithfully transfer the sales numbers
25 from the POS system to your Excel spreadsheets?

1 A Yes.

2 Q Have you ever hidden cash sales?

3 A No.

4 Q Has anyone ever asked you to hide cash sales?

5 A No.

6 Q Do you know of anybody else has ever hidden cash
7 sales?

8 A None.

9 Q Anybody else besides you and your boss, Sam, have
10 access to the printouts that you were looking out for the
11 sales summaries?

12 A No.

13 Q Do you know how to access the backup data -- I'm
14 sorry strike that. Did you know how to access the backup
15 system in -- for POS-2?

16 A No.

17 Q Did you know one existed?

18 A I do now.

19 Q Did you know in August of 2017?

20 A Yes. Backup file.

21 Q You knew in August of 2017 there was a backup
22 file?

23 A I knew after it was audit.

24 Q When did you learn?

25 A It would be in November.

1 Q Of?

2 A Two-thousand seventeen.

3 Q Okay. Do you know if you were working in the
4 restaurant November 4th, 2017, which was a Saturday?

5 A Yes, I work on a Saturday.

6 Q Did you prepare any summary reports for November
7 -- November 4th, 2017?

8 A For whom?

9 Q For anybody.

10 A Prepare the summary for November 4th?

11 Q Yeah, just for one day.

12 A Well, the printout would be printed after the
13 shift is done, every day.

14 Q And does the POS system automatically generate
15 those numbers?

16 A It would generate the number for us and then we
17 just print it out.

18 Q I see.

19 MR. BOORTZ: I have no further questions, your Honor.

20 JUDGE STANLEY: Okay. Thank you, Ms. Kokimpong.

21 First I am going to ask Mr. Sharma if the
22 Department has any questions for this witness.

23 MR. SHARMA: Department has no questions. Thank you.

24 JUDGE STANLEY: And Judge Kwee, do you have any
25 questions?

1 JUDGE KWEE: No, I do not. Thank you.

2 JUDGE STANLEY: Judge Brown, do you have any
3 questions?

4 JUDGE BROWN: Not at this time. Thank you.

5 JUDGE STANLEY: Okay. Thank you for your testimony
6 and we can call up the next one.

7 And if it would be helpful, Mr. Boortz, we don't
8 use evidentiary rules here, so if it's easier for you to
9 ask leading questions feel free to.

10 MR. BOORTZ: Thank you, your Honor.

11 MR. SY: Your Honor can I chat with Counsel.

12 (Brief pause.)

13 MR. BOORTZ: Thank you, your Honor. If it pleases the
14 court, Appellant would like to call Sam.

15
16 DIRECT EXAMINATION

17 BY MR. BOORTZ:

18 Q Please state your --

19 A Good afternoon. My name is Somchai
20 Vongpiansuksa.

21 Q Please spell your last name for us.

22 A V-O-N-G-P-I-A-N-S-U-K-S-A.

23 Q And is it okay if I call you Sam?

24 A Sam.

25 Q Sam, what's your role at Palms Thai, Inc?

1 A I am the owner.

2 Q And as such, do you engage in any of the day to
3 day activities of the restaurant?

4 A Say that again?

5 Q What are your day to day duties at the
6 restaurant?

7 A I just go in and watch employees, watch what
8 they're doing, and that's all I do.

9 Q Are you involved in the accumulation of data for
10 the preparation of tax returns?

11 A No.

12 Q Do you know how to download data from the POS
13 system?

14 A I never touch the POS system at all, actually.
15 When they come in and set up the system, Kanya is the one
16 who took care of it. And then I don't even know how to
17 order into the POS system to make an order in there.

18 Q So you couldn't be a waiter in your own
19 restaurant?

20 A I cannot do it, no.

21 Q Have you ever actively tried to conceal cash
22 sales from the restaurant?

23 A No.

24 Q Have you ever asked any employee to actively
25 conceal cash sales from the restaurant?

1 A No.

2 Q Were you ever aware of any concealment of --
3 prior to the announcement of this audit, in roughly
4 November -- October, November of 2017, were you aware of
5 any concealment of cash sales?

6 A No.

7 Q Did you take steps to try to -- once you knew
8 about the audit, did you take steps to try to figure out
9 what was going on in POS-2?

10 A I just asked Kanya what's going on, and that's
11 all I asked her, and then she couldn't answer me what's
12 going on with the system. She doesn't know what is inside
13 there.

14 Q Did you ever go back to the vendor of POS-2 to
15 try to figure out what was going on?

16 A We tried to call him.

17 Q How did that go?

18 A He didn't answered, he just disappeared.

19 This system had a problem since day one. From
20 what I know, he came to set it up and then it took two to
21 three weeks, sit at the restaurant, try to figure out what
22 his program. That is all I know and then after that they
23 communicate, for some time we have a problem she called
24 him, which he overseas. And then finally he just turned
25 off his phone, he just don't answer.

1 Q Have you ever been able to access all of the
2 information in POS-2?

3 A No.

4 Q In the 23 years that you used -- I'm sorry. In
5 the 17 years you used POS-1, did you ever have any
6 problems about a discrepancy between the reported sales
7 and actual sales?

8 A No.

9 Q Have you ever been audited, prior to this audit,
10 for any sales tax questions?

11 A No.

12 Q As far as you know, did Kanya faithfully prepare
13 summaries of the sales numbers prior to the POS-2 system
14 being implemented?

15 A No, I don't know.

16 MR. BOORTZ: Okay. I have no further questions for
17 this witness, your Honor.

18 JUDGE STANLEY: Thank you.

19 Mr. Sharma, does the Department have any
20 questions?

21 MR. SHARMA: Department has no questions. Thank you.

22 JUDGE STANLEY: Okay. And Judge Kwee?

23 JUDGE KWEE: No, I do not. Thank you.

24 JUDGE STANLEY: And Judge Brown?

25 JUDGE BROWN: Not at this time. Thank you.

1 JUDGE STANLEY: And I don't either. So if you'd like
2 to present your final witness, you can go ahead.

3
4 DIRECT EXAMINATION

5 BY MR. BOORTZ:

6 Q Please state your name for the record.

7 A Sam Boon.

8 Q Then can you spell your last name for the record?

9 A B-O-O-N.

10 Q And Mr. Boon, what is your occupation?

11 A I'm a retired software engineer. The last
12 employer was computer Sign Corporation.

13 Q How long ago was that?

14 A Seven years ago.

15 Q What is your level of education?

16 A I obtained the bachelors degree from the Woodbury
17 University in Los Angeles. And I received the master's
18 degree, information systems from the University of
19 Phoenix.

20 Q And have you had the opportunity to examine any
21 computer equipment related to this case?

22 A Yes, I did. I did some kind of study, a little
23 bit about the system. The application here has to
24 functions, one is called front office, which is record all
25 the sales transactions, and the other function called back

1 office or administration function.

2 So the -- what we are looking at here is
3 administration function. We are unable to get into the
4 system because we don't have password. And so this system
5 here is like, when the system up and run and is connected
6 to the Internet, and it's up 24 hours a day. This system
7 here has no firewall to protect any hacker to the system.
8 I think the reason behind it is because of the vendor want
9 to be up so he can fix the problem through the remote
10 access.

11 So this means that besides the software vendor
12 can access this computer, it's open the door for anybody
13 that would come in and take over the computer. So we have
14 no idea what's going on.

15 Q Were you able to access -- now, when you're
16 talking about the system, are you talking about what we've
17 been calling POS-2?

18 A Yes.

19 Q Were you able to access any of the data-streams
20 from POS-2?

21 A None.

22 Q Were you able to access any sales numbers from
23 POS-2?

24 A No.

25 Q Any --

1 A Because of the password protection. Okay. So I
2 tried to go into like a generator report, and that's kind
3 of -- it requires a password and user ID, since we don't
4 have that information we are unable to obtain any report.

5 Q Okay. Thank you.

6 MR. BOORTZ: I have no further questions.

7 JUDGE STANLEY: Okay. Mr. Sharma, are there any
8 questions?

9 MR. SHARMA: Department has no questions. Thank you.

10 JUDGE STANLEY: Okay. Judge Kwee?

11 JUDGE KWEE: Just a question about the order numbers.
12 And I guess maybe this is not a question for the witness,
13 but just for the representative.

14 Does the taxpayer -- they're not disputing that
15 they made these sales that were missing from the cash
16 record? They don't dispute that these sales actually
17 occurred, is that a correct understanding?

18 MR. BOORTZ: I think Michael Sy would be the person to
19 ask that.

20 MR. SY: Judge Kwee, could you please clarify the
21 question because when you say we're not contesting --

22 JUDGE KWEE: My question was whether the taxpayer --
23 whether or not they're disputing that these cash sales
24 that were missing in the main data-stream showed up in the
25 backup data-stream.

1 MR. SY: That is correct, Judge.

2 JUDGE KWEE: You're not disputing --

3 MR. SY: We are disputing that those --

4 JUDGE KWEE: You are disputing that those sales
5 actually occurred?

6 MR. SY: That's correct.

7 JUDGE KWEE: During that one month period?

8 MR. SY: That's correct, your Honor.

9 JUDGE KWEE: Thank you for the clarification. I am
10 sorry that was a little off topic.

11 I will turn to Judge Stanley.

12 JUDGE STANLEY: Judge Brown, do you have any questions
13 for Mr. Boon?

14 JUDGE BROWN: No, I don't think so. Thank you.

15 JUDGE STANLEY: Okay. Thank you for your testimony,
16 Mr. Boon.

17 THE WITNESS: Thank you.

18 JUDGE STANLEY: And you can conclude your presentation
19 however you choose to do so.

20 MR. SY: Honorable Judges, we tried very hard to
21 correct the system. We tried very hard to find out the
22 facts, we're not trying to avoid anything here. We're
23 tried to dig and investigate as much as we can.

24 We requested the Department to show up for
25 observation tests, they don't want to do it. We waited

1 for about a year or so before we changed the POS system.

2 The taxpayer has always filed their returns
3 timely. They always pay their tax timely for the last --
4 ever since they're in business. They are very, as far as
5 I recall when I took over the account, they were never
6 late, they always paid their tax on time.

7 So we are out of control since we cannot
8 determine the real situation POS-2 because we couldn't get
9 ahold of the vendor. And also, the data that was provided
10 earlier, Exhibit 13, I just want to clarify that these are
11 from POS-1. I am not sure whether the Department had this
12 data before because I never submitted prior to this
13 hearing, I never submitted the data before.

14 And also, your Honor, when audit started, I'd
15 like to make clear that when Arthur called the taxpayer,
16 we only met one time in the establishment and it was the
17 time when the restaurant was closed, there was me, the
18 auditor, the owner, the manager Kanya, and Ekachai, the ID
19 person. That day we were interviewed by the auditor.

20 In the same day, Ekachai pulled the data from the
21 POS system. We don't know how he did it, but he was able
22 to pull the data out.

23 MR. BOORTZ: It should be noted, your Honor, that even
24 though our IT guy was not able to get any information out
25 of POS-2, somehow the CDTFA guy was able to get it out.

1 Subsequent to when Ekachai was at the restaurant
2 and extracted data from the machines, CDTFA asked for more
3 information in early 2018.

4 MR. SY: Late 2017.

5 MR. BOORTZ: Oh, late 2017. Excuse me. And the
6 taxpayer was not able to give that information until the
7 vendor came into the restaurant and he extracted it, gave
8 it to Michael Sy, Michael Sy gave it to CDTFA, and that's
9 how we have the November 2017 numbers. Even though my
10 client was unable to get that stuff off the computer, the
11 vendor was able to get it off that computer. CDTFA's IT
12 guy was able to get that off the computer.

13 We are still at a loss to know how, but they did
14 somehow get it. But my client was never able to do that.
15 My client's not very sophisticated when it comes to -- I
16 mean, he makes great tom kha gai, but he can't even turn a
17 computer on.

18 MR. SY: So after the thumb drive was given to the
19 auditor, the auditor came to my office with the main -- I
20 would say head honcho in the office, his name is
21 Mr. Klump.

22 Both of them came to my office saying, "We have a
23 problem here. There's some data missing that's been
24 deleted." I said, "That's fine. I'll let the taxpayer
25 know." And after, that I requested again an observation

1 test to see what's going on with the system in case
2 there's any problem with the system, they refused.

3 Now, when I heard nothing back from the CDTFA,
4 Mr. Barajas, the auditor, contacted me after a while,
5 maybe after a year or so saying, "I'm no longer with the
6 same department. I'm no longer part of this audit." So
7 it was delayed for about, I would say a year and a half to
8 two years before me knowing something that nobody was
9 following up on my requests.

10 So in my understanding, your Honor, this
11 situation or circumstance that we -- there are some things
12 that we cannot compute or determine how the Department
13 came up with those numbers because the numbers that they
14 gave us are from outside audit period. And from there,
15 they extrapolated and projected those numbers.

16 Do you have anything to add?

17 MR. BOORTZ: I would just like to add that it's
18 understandable, I guess, if it looks like somebody is
19 hiding sales. And the taxpayer requests an observation
20 test, come in and look at us, watch us do business, watch
21 how we enter the stuff, watch how we enter information in
22 the computer, and you'll see we're not stealing, seems
23 like it's kind of an empty request given nobody in the
24 right mind is going to keep stealing if they know
25 someone's looking at them, which buttresses my point that

1 the taxpayer wasn't doing this on November 4th, 2017 when
2 we have all these missing sales tax -- missing cash sales.

3 They knew about the audit on November 4th, 2017.
4 They knew CDTFA was looking. There's no way they're going
5 to keep doing that if they know CDTFA is looking. That is
6 why CDTFA didn't want to do an observation test. Why do
7 it if the taxpayer knows you think they're stealing, knows
8 you think they're cheating, knows you think they are --
9 thinks they know that you are eliminating cash sales? You
10 are just not going to do it when they are looking at you.

11 Would they keep doing it when they were under
12 audit? There's a bunch of cash sales missing from the
13 record after they knew they were under audit. These guys
14 didn't do it and these are the only two people at their
15 restaurant who had any knowledge or access to the system.

16 Now admittedly, Sam, who is the owner of Palms
17 Thai, is the only person that has a financial incentive to
18 hide cash sales, but there's no evidence he did. There is
19 no evidence he knew how, there is no evidence he asked
20 anybody else to do it. Kanya didn't do it, Kanya was
21 never asked to do it. Kanya didn't even know what's going
22 on either, she's the manager.

23 There's no evidence it happened prior to
24 September 1st, 2017. So the reports upon -- the reports
25 that Kanya prepared over the first 35 months of the audit

1 period that she testified she produced faithfully with the
2 information generated by POS-1, which information was then
3 used to produce the sales and use tax returns, were
4 accurate, as far as she knew, as far as the taxpayer knew,
5 and there's no evidence otherwise.

6 And with that, I would like to wrap up.

7 JUDGE STANLEY: Thank you.

8 Before we move to CDTFA's presentation, Judge
9 Kwee, do you have any questions?

10 JUDGE KWEE: No, I do not. Thank you.

11 JUDGE STANLEY: Judge Brown, do you have any
12 questions?

13 JUDGE BROWN: No, I do not. Thank you.

14 JUDGE STANLEY: I just want to clarify, because you've
15 got POS-1 data that we're talking about and POS-2 data.
16 Is it your position that the data that they used -- that
17 the CDTFA used for September 1st, 2017 through November
18 13th, 2017, that was all POS-2?

19 MR. BOORTZ: Yes, your Honor.

20 JUDGE STANLEY: Which was the one that was the
21 problem?

22 MR. BOORTZ: Yes, your Honor.

23 JUDGE STANLEY: And so are you asking this panel to
24 look back at the POS-1 data?

25 MR. BOORTZ: The POS-1 data covers

1 thirty-five-thirty-sixths of the audit period. Those --
2 those reports are the backup for the numbers that actually
3 hit the sales and use tax returns.

4 The first page, I believe, or first few pages of
5 the Exhibit 13 are a summary of the other 35 spreadsheets
6 -- Excel spreadsheets that Kanya prepared, just to
7 summarize them and give -- so nobody else actually has to
8 do that math, and those numbers that are on the summaries
9 of that thing are the actual sales numbers for the
10 relevant time period, 35 of the 36 months. It's the last
11 one that is suspect.

12 JUDGE STANLEY: Okay. So that clarifies your position
13 for me. And you say that -- was it because the system had
14 already crashed that CDTFA didn't try to extract any data
15 from the POS-1?

16 MR. BOORTZ: You would have to ask CDTFA that
17 question.

18 JUDGE STANLEY: Okay. Well, then --

19 MR. SY: Your Honor, can I confirm with Counsel first?

20 (Brief pause.)

21 MR. SY: No more matter your honor.

22 JUDGE STANLEY: Okay. I believe Judge Kwee has a
23 follow up question.

24 JUDGE KWEE: Yes. So I had one question about the
25 documents that were submitted today. And those were the

1 35 months of the POS system number one, is that correct?

2 MR. BOORTZ: Thirty-five months from POS-1, one month
3 from POS-2.

4 JUDGE KWEE: Okay. I'm sorry. Did you have a --

5 MR. BOORTZ: You'll notice a different format when you
6 go through them when you get to September, when you
7 compare August of 2017 to September of 2017, you'll see a
8 strikingly different format.

9 And the POS -- that different tabular, just a
10 single column of, in November 1st, 2017 is the beginning
11 of the POS-2 tender.

12 MR. SY: Judge Kwee, may I add something? What I
13 submitted today for Exhibit 13 are more than 35 months, it
14 is whole year of '14, '15, '16, '17. The audit period
15 started for October 1st, 2014 and ended September of 2017,
16 but I submitted more than 35 months.

17 JUDGE KWEE: Oh, okay. And the other question that I
18 had was, when did you first get these documents?

19 MR. SY: Yesterday, your Honor.

20 JUDGE KWEE: Okay. So the person that extracted them
21 -- that happened yesterday, is that --

22 MR. SY: No, we had to go back and dig up the records
23 many years ago. And it was -- how many years ago? It was
24 about almost nine years.

25 JUDGE KWEE: Okay. So these were extracted around the

1 time of -- shortly after the crash?

2 MR. SY: No, way before that. The records were
3 printed out as they come.

4 MR. BOORTZ: Contemporaneously.

5 MR. SY: Contemporaneously. Yeah.

6 MR. BOORTZ: So a lot of the paper records survived.
7 The electronic trail, if you will, died when POS-1 died.

8 MR. SY: Yeah, we could not extract any more data from
9 the POS-1.

10 JUDGE KWEE: Okay. That clarifies that. I was
11 getting confused at where it came from.

12 Okay. And you did not submit that to CDTFA
13 previously then?

14 MR. SY: That is correct, your Honor.

15 JUDGE KWEE: Okay. Thank you.

16 I believe also the stenographer wanted the
17 spelling of a name for one of the witnesses. I'll pause
18 just to get that.

19 (Brief pause.)

20 MR. SY: Manny Barajas -- B-A-R-A-J-A-S.

21 JUDGE KWEE: Okay. Thank you. I will urn it back to
22 Judge Stanley now. Thanks.

23 JUDGE STANLEY: You also did mention one other auditor
24 the --

25 MR. SY: Mr. Warren Klump is our auditor, he was the

1 head honcho who came to my office with Mr. Barajas.

2 JUDGE STANLEY: How do you spell that last name?

3 MR. SY: K-L-U-M-P.

4 JUDGE STANLEY: Okay. So I guess I'm referring to the
5 IT person from CDTFA. What is his name?

6 MR. SY: Ekachai is his name, I don't know his last
7 name.

8 JUDGE STANLEY: Can you spell it?

9 MR. SY: Hold on, please, your Honor.

10 MR. PARKER: Judge Stanley? I can spell that for you.
11 Ekachai is spelled E-K-A-C-H-A-I. That's his first name.

12 JUDGE STANLEY: Okay. And I think we have all the
13 names.

14 Okay. With no further -- oh, yeah. I did have
15 one follow-up question what you were just saying because,
16 Mr. Boortz, you said that the POS changed over on
17 November, 1st, but one of the --

18 MR. BOORTZ: September 1st.

19 JUDGE STANLEY: Oh. September 1st. Okay. That
20 clears that up.

21 Mr. Sharma, you can proceed when you're ready.

22
23 PRESENTATION

24 MR. SHARMA: Thank you, Judge Stanley.

25 Appellant, a corporation has a restaurant selling

1 Thai food and beverages in Los Angeles since May 1, 2000.

2 The Department performed an audit examination for
3 the period October 1, 2014 through September 30, 2017.

4 Appellant reported total sales of approximately 9.2
5 million dollars, claimed total deductions of \$50,000 for
6 nontaxable food sales, and \$371,000 for sales tax
7 included, resulting in reported taxable sales of a little
8 more than 8.7 million dollars for the audit period.
9 Exhibit A, page 7 and 8.

10 Records available for the audit. Federal Income
11 Tax Returns for 2015 and 2016, bank statements for the
12 audit period, point of sales summary reports for the audit
13 period, download of live data and backup point of sales
14 data for August 4th, 2017, August 31st, 2017, and
15 September 1, 2017 through November 13, 2017 for a total of
16 76 days.

17 During the audit process, Appellant was informed
18 that point of sales monthly sales reports were used to
19 prepare and file quarterly Sales and Use Tax Returns.
20 However, our Appellant did not provide any individual
21 sales deductions on point of sales data downloads. Due to
22 lack of the supporting sales record, the Department could
23 not verify the accuracy of reported amounts.

24 The department's analysis of bank deposits and
25 reported taxable sales shows credit card sales of

1 approximately 88 percent, which was significantly high for
2 this type of business. Exhibit A, page 1,277.

3 Further analysis shows cash deposits of
4 approximately \$92,000 for the audit period, which
5 representative approximately 1 percent of the total
6 deposits. Exhibit A, page 1,279 and 1,280.

7 It appears that Appellant deposited minimal, if
8 any, cash sales for the audit period. The Department
9 compared reported taxable sales with cost of goods sold
10 for federal income tax returns, and calculated a markup of
11 approximately 117 percent for 2015 and 2016, which appears
12 to be low for the type and location of business. Exhibit
13 A, page 1,282.

14 The Department analyzed submitted point of sales
15 live data and backup data for 76 days and noted
16 significant differences. To verify the accuracy of point
17 of sales data, the Department made three cash purchases in
18 December 1, 2017 and January 12, 2018. A review of point
19 of sales data for the same period sales show that cash
20 purchases of \$29.50 on December 1, 2017 was listed as a
21 credit card purchase of \$17.50 in live point of sales
22 data. Exhibit D, Page 1,386.

23 Cash purchase of \$60.72 on December 5, 2017 was
24 listed as a credit card purchase of \$37.19 in the live POS
25 data. Exhibit D, page 1,387.

1 And cash purchase of \$35.53 on January 12th, 2018
2 was missing in the live point of sale data. Exhibit B,
3 page 1,338.

4 Further analysis of backup data for one day on
5 November 4th, 2017 shows around 50 cash sales transactions
6 for around 2.6 thousand dollars were missing in the live
7 point of sale data. Exhibit A, pages 1,353 to 1,361.

8 Based on the department's analysis, the
9 Department determined that Appellant books and records
10 were incomplete, unreliable, and appeared to be either
11 manipulated or reindexed to exclude, or reduced cash
12 sales. So the Department used an indirect audit method to
13 verify that accuracy of reported amounts and to compute
14 audit tax of a sales.

15 Due to lack of complete and reliable sales
16 records, credit card sales method was determined to be the
17 most well-prepared audit method. The Department used the
18 76 days of point of sales backup data and determined
19 credit card sales ratio, excluding tax and tips of around
20 73 percent, mandatory service fee of around 2 percent, and
21 credit card tips ratio of around 9 percent. Exhibit A,
22 pages 14 to 301.

23 The Department used bank statements and available
24 records to calculate total credit card deposits of little
25 more than \$9,000,000 for the audit period. Exhibit A,

1 page 1,279 and 1,280.

2 The Department applied credit card tips ratio of
3 9 percent, mandatory service fee of around 2 percent, and
4 credit card sales ratio of 73 percent to the credit card
5 deposits of \$9,000,000, to arrive at taxable sales of
6 approximately 10.2 million dollar. Exhibit A, page 12.

7 During the audit process, the Department noted
8 that Appellant did not report sales tax on mandatory
9 service fee, which was determined to be around 2 percent.
10 The Department applied this ration to a taxable sales of
11 approximately 10.2 million dollars and calculated taxable
12 service fee of \$218,000. Exhibit A, page 13.

13 Further analysis of point of data shows that
14 Appellant recorded mandatory service fee of \$212,000 for
15 the audit period. Exhibit A, page 1,277 and 1,278.

16 The Department used reported amount of \$212,000
17 as taxable amount, which appears accurate and reasonable
18 based on the department's test, and also benefits
19 Appellant.

20 Based on the audit procedures, the Department
21 determined audited taxable sales of approximately 10.4
22 million dollars. Appellant reported taxable sales of 8.7
23 million dollars, resulting in unreported taxable sales of
24 approximately 1.7 million dollars for the audit period.
25 Exhibit A, page 12.

1 When the Department is not satisfied with the
2 amount of tax quoted by a taxpayer, the Department may
3 determine the amount required to be paid, based on any
4 information which is in its possession, or may come into
5 its possession. In the case of an appeal, the Department
6 has minimal initial burden of showing that its
7 determination was reasonable and rational.

8 Once the Department has met its initial burden,
9 the burden of proof shifts to the taxpayer to establish
10 that a result differing from the department's
11 determination is warranted. Unsupported assertions are
12 not sufficient to satisfy a taxpayer's burden of proof.

13 The Department used Appellant's books and records
14 to determine the audit liability, doing so produced a
15 reasonable and rational determination.

16 Appellant contends that the audit should be done
17 based on an observation test. In response the Department
18 submits that Audit Manual Section 0810.12 states in part,
19 "To use the credit card protection method, the auditor
20 should pick a representative test period. This can be
21 accomplished either during an observation test or based on
22 a review of daily sales tickets for a test period."

23 As explained earlier, departments analysis shows
24 that 76 days of point of sales backup data is accurate,
25 reasonable, and acceptable. So the Department used point

1 of sale backup data to establish credit card sales ratio
2 to the cash sales ratio.

3 In this case, Appellant's own point of sales
4 backup data for 76 days would better represent Appellant's
5 business activities for the audit period than an
6 observation test as proposed by Appellant. Appellant
7 contends that credit card sales ratio should be around 88
8 percent.

9 During the appeals process, appellant submitted
10 various sales summary reports on October 26, 2021, October
11 27, 2021, and on August 17, 2022, to the Office of Tax
12 Appeals including Exhibit 13. But again, Appellant failed
13 to provide source documents such as guest checks,
14 individual credit card slips, and points of sale data
15 download to support the sales summary reports.

16 And that excess of source documents, the
17 Department could not verify the accuracy and validity of
18 submitted sales summary reports. However, based on the
19 department's review and analysis of Appellant's
20 submissions to the Office of Tax Appeals, it appears it
21 appears that Appellants submitted two sets of sales data
22 for the period of August 2016 to April 2017. For detailed
23 analysis, please refer to the department's additional
24 brief dated October 12, 2022. Exhibit F, page 1,495 and
25 1,496.

1 Further, submitted sales summary reports appear
2 to be based on the point of sales live data, which as
3 previously explained the Department has already determined
4 to be either manipulated or reindexed to exclude, or
5 reduce cash sales.

6 Based on the foregoing, it is determined that the
7 submitted documents are incomplete, unreliable, and
8 unverifiable.

9 Appellants submitted copies of handwritten daily
10 sales summary reports for 20 days -- 28 days since
11 September 2017. Exhibit 11.

12 The Department used 28 sales summary reports and
13 calculated cash sales of \$85,171 and credit card sales of
14 \$238,964. The Department compared these totals with a
15 backup point of sales data and live point of sales data
16 and noted the following: Cash sales based on 28 daily
17 sales summary reports is \$673 less than the backup point
18 of sales data, and \$52,877 more than live point of sales
19 data.

20 Credit card sales based on 28 sales summary
21 reports is \$1,937 more than both the backup point of sales
22 data and live point of sales data. Based from a review of
23 28 daily sales summary reports, the Department determined
24 the backup point of sales data is correct, reasonable, and
25 acceptable.

1 Further, 28 sales summary reports clearly
2 demonstrates that live point of sales data was either
3 manipulated or reindexed to exclude or reduce cash sales.

4 Appellant submitted 35 pages and claimed that
5 cash sales from November 4th, 2017 is \$1,407 of the live
6 point of sale data. And 2,779 in backup point of sale
7 data. Exhibit 12.

8 But Appellant did not provide any worksheets or
9 supporting data for its calculation. However, based on
10 the previously submitted data, cash sales for live point
11 of sales data is \$1,380. Exhibit A, pages 1,239 to 1,243.

12 And for backup point of sale data it is \$3,908.
13 Exhibit A, pages is 260 to 265. Resulting in missing cash
14 sales of around 2.6 thousand dollars.

15 Based on the department's review, Appellant's
16 calculations appear to be not representative of previously
17 submitted point of sales data.

18 As of now, Appellant has not provided any
19 sufficient document evidence to show that credit card
20 deposits of little more than 9 million dollars, credit
21 card sales ratio of 73 percent, and credit card tips ratio
22 of 9 percent are not correct.

23 As regards to Appellant's contention related to
24 test period after the audit period, the Department submits
25 that it used the best available records as Appellant

1 failed to provide detailed books and records for the audit
2 period.

3 The Department says 10 percent negligence here
4 for the audit period. Understatement is 19 percent of the
5 reported taxable sales. A detailed analysis of backup
6 data and live data for 76 days shows that 2,841 line items
7 for a total of around \$144,000 in missing cash sales.

8 Further, control cash purchases comparison with
9 submitted life point of sales data reveals that the data
10 was either manipulated or reindexed to exclude or reduce
11 cash sales.

12 Even though this is Appellant's first audit, it
13 is department's position that significant amount of
14 understatement was the result of Appellant's failure to
15 maintain standard books and records as required by Revenue
16 Taxation Code 7,053 and 7,054, and regulation 1698, and
17 clearly demonstrates that Appellant was negligent in
18 reporting the correct amount of sales tax sales to the
19 Department.

20 The understatement cannot to added to a bona fide
21 and reasonable belief that the bookkeeping and reporting
22 practices were sufficiently complied with the requirements
23 of Sales and Use Tax Law. Therefore, Appellant was
24 negligent and the penalty should be approved.

25 Based on the foregoing, the Department has fully

1 explained the basis for deficiency, and proved that the
2 determination was reasonable based on available books and
3 records.

4 Further the Department has used approve audit
5 methods to determine the deficiencies. Appellant has not
6 met its burden to prove otherwise. Therefore, based on
7 the evidence presented, the Department requests that the
8 Appellant's appeal be denied.

9 This concludes my presentation. I am available
10 to answer any questions you may have. Thank you.

11 JUDGE STANLEY: Thank you, Mr. Sharma.

12 Judge Kwee, do you have any questions?

13 JUDGE KWEE: Yes, I did have one question for CDTFA.
14 So you're referring to the data potentially being
15 reindexed or modified because the order numbers were
16 sequential, both in the backup and in the live stream.
17 But I guess because of some of the orders were missing it
18 continued on without a gap, so then the numbers didn't
19 match up, is that what you were referring to?

20 MR. SHARMA: Yeah. When you compare the backup data
21 with a live data, there's lot of changes. If you look at
22 the C-1 schedule and you compare, the reference number,
23 work order, and everything has been changed and some of
24 them even the amount of sales is just like based on the
25 cash purchase we had, the Department made to determine the

1 validity of the data, we noted that the amount we
2 purchased -- cash purchase entered into the system is
3 totally a different amount, and some of them are missing.
4 And then also the referenced number has been changed,
5 which means that the live data was manipulated or
6 reindexed.

7 When you reindexed the numbers -- reference
8 number, orders numbers will be changed and the total sale
9 price will be changed. And that's why the department's
10 position is that the live data has been manipulated either
11 or reindexed to exclude the cash sales.

12 And further, live data and backup data both
13 credit card sales match, it's only the cash sales which
14 are missing.

15 JUDGE KWEE: Okay.

16 MR. PARKER: Judge Kwee, can I just make one
17 additional observation, regarding that?

18 JUDGE KWEE: Go ahead.

19 MR. PARKER: If you look at the Schedule 12 C-1, I
20 don't have the exact page numbers in the exhibits, but the
21 September 1st, 2017 -- this is the backup data -- the last
22 transaction number is 321. When you go to exhibit -- or
23 Schedule 12 E-1, the last member for the September 1st,
24 2017 is now only 287, so they reduce the total amount by
25 it appears 44 transactions on that day, and re-index the

1 number so they're all still in sequential order. So it
2 looking like nothing is missing.

3 JUDGE KWEE: And adding to that, because it also
4 includes the invoices numbers -- well, I guess that's what
5 we're talking about. Did CDTFA look at the printed sales
6 receipts to see if the invoice numbers were tracking the
7 backup stream versus the live stream? Or were the numbers
8 on the printed invoices, did they not correspond at all to
9 what was provided in either of the data streams?

10 MR. SHARMA: Yes. The Department has compared those,
11 just like for example, the purchase made on December 1,
12 2017 which is attached as Exhibit D, page 1,386. The
13 Department made a purchase of \$29.50, it's a cash purchase
14 and the reference number is 1029.

15 When you go to the live data, same reference
16 1029, it shows sales of \$17.50, so it means somebody
17 appears to reindex the data or something has been done
18 with the data to change that index number which is 1029,
19 which is the Department and they made a cash purchase and
20 we have a receipt, when you compare it with a live data,
21 same number is instead of \$29.50 cash purchase, now it's
22 \$17.50 credit card purchase.

23 JUDGE KWEE: Okay. So it wasn't there in the live
24 data because the numbers had been changed, but then in the
25 backup data it was there and the number was correct.

1 MR. SHARMA: That is correct.

2 JUDGE KWEE: Okay. And so you did have the receipt to
3 show that? Great.

4 MR. SHARMA: I'm sorry. Three receipts with this
5 representation attached to Exhibit D, page number 1,386,
6 Exhibit D, page number 1,387, and 1,388.

7 JUDGE KWEE: Okay. Thank you. That does answer my
8 question. We'll turn it back to Judge Stanley.

9 JUDGE STANLEY: Thank you.

10 Judge Brown, do you have any questions?

11 JUDGE BROWN: No, I do not. Thank you.

12 JUDGE STANLEY: Okay. And I don't have any questions
13 for the Department either.

14 So Mr Sy, you have five minutes to give any
15 rebuttal that you wish to.

16 MR. SY: Can I ask questions to the Department, your
17 Honor?

18 JUDGE STANLEY: If you have questions you can ask me
19 and I can see if we should direct them to the Department
20 for answers.

21 MR. SY: I want to find out how the Department came up
22 with 2 percent service fee. And also how did the
23 Department made a comment about cash deposit is way below
24 the cash sales without knowing actually how the business
25 operates. And how the cash being dispersed to other

1 expenses.

2 And also how the Department made a comment about
3 having inaccurate records because one of my response to
4 the Department before the taxpayer had all the daily
5 receipts of all transactions per hour, per table. And I
6 made a comment to Attorney Do at the time that we have all
7 the receipts -- we can determine, but it's very voluminous
8 and we can go over those things to cross check with
9 observation tests.

10 JUDGE STANLEY: Okay. Mr. Sy, you just said another
11 name that our stenographer --

12 MR. SY: Attorney Do was with CDTFA, your Honor.

13 JUDGE STANLEY: Can you spell it?

14 MR. SY: D-O -- Ms. Do.

15 JUDGE STANLEY: Okay. It sounds like your questions,
16 most of them were answered in the audit itself how they
17 came up with the fact that the cash deposits were less,
18 and those kind of questions that you were asking. I don't
19 know if it explains how they came up with the 2 percent
20 service fee.

21 Mr. Sharma, is that something you can answer.

22 MR. SHARMA: Yes. It's the same data we used for 76
23 days, which we use to determine the credit card sales, 73
24 percent, same data was used to come up with the 2 percent.
25 But also the Department did not use the 2 percent because

1 we used the recorded amount by Appellant which was
2 \$212,000 on taxable sales. Thank you.

3 JUDGE STANLEY: Okay. Thank you so with that, do you
4 want to give your concluding statement?

5 MR. SY: Could I confirm with Counsel, please?

6 (Brief pause)

7
8 CLOSING STATEMENT

9 MR. BOORTZ: I just have one point to make, your
10 Honor. That is just that every bit of the information
11 that CDTFA is relying on to come up with the service
12 percentages, the sales, cash sales percentages, credit
13 card sales percentages, all of that information is
14 generated by POS-2, the one that is the problem.

15 JUDGE STANLEY: You are speaking really softly.

16 MR. BOORTZ: And not into the microphone.

17 All the numbers that CDTFA is using, all of the
18 ratios that it computed, all of the credit card sales
19 ratios, cash sales ratios, services fees, tips, et cetera,
20 all based on POS-2 information.

21 And as we've already established POS-2 is the
22 problem, POS-1 was not the problem. But they're applying
23 POS-2 analysis, POS-2 to numbers to periods covered by
24 POS-1.

25 MR. SY: If I may add, Judge Stanley, I requested a

1 subpoena for Mr. Barajas and Mr. Ekachai to show up
2 because we want to find out the real truth and the way
3 they determined the audit or the procedure -- how they did
4 the audit. The Department objected, so there is no way of
5 for me to really ask them how they did the numbers.

6 Furthermore, when the auditor, Mr. Barajas and
7 Mr. Ekachai showed up in the establishment, there were no
8 employees present, so the employees wouldn't know how
9 Mr. Ekachai looks like. We know that Mr. Ekachai went to
10 the establishment at least three times, he paid cash on
11 those transactions, and we established the tickets that he
12 paid cash. And one of the tickets, I don't know how it
13 came about that it was converted into a credit card, and
14 submitted to CDTFA before as one of my exhibits.

15 JUDGE STANLEY: I am sorry. I could hardly hear you.

16 MR. SY: The tickets that Mr. Ekachai purchased in the
17 establishment was converted to cash and I don't know how
18 it came about in the POS-2.

19 MR. BOORTZ: It's the other way around.

20 MR. SY: It's the other way around?

21 MR. BOORTZ: He paid cash and it was converted to
22 card.

23 MR. SY: Yes, it's the other way around, your Honor.
24 I don't know how it happened, how it happened I don't
25 know.

1 Like I said, the taxpayer had the voluminous
2 records because he kept all sales receipts, daily and
3 table by table, hour by hour, and it's voluminous for us
4 to really determine the complete data for this audit,
5 that's why I requested the observation test to compare.
6 We really wanted to determine whether what the Department
7 did for the audit process was really accurate or not. We
8 couldn't know until -- without Mr. Barajas and Mr. Ekachai
9 being present because we couldn't ask them any questions.

10 That's all I can say, your Honor.

11 JUDGE STANLEY: Okay. Does that conclude your
12 presentation?

13 MR. SY: Your honor, the department's requesting a 10
14 percent penalty under the negligent part. This is the
15 first audit that the taxpayer experienced and generally,
16 first time penalty can be waived, I just want to point
17 out.

18 MR. BOORTZ: In addition, your Honor, the taxpayers
19 tried, they really tried. When -- when POS-1 crashed,
20 they thought they had the answer in POS-2. And POS-2
21 caused way more problems than it solved, but it wasn't
22 because they were negligent, it wasn't because they
23 weren't trying, it wasn't because they didn't do what a
24 reasonable person would have done in this situation and
25 sought out an expert to provide a POS system that worked

1 for them.

2 It's a Thai restaurant, it doesn't just --
3 operating a Thai restaurant is not the same as operating
4 an American restaurant -- American food restaurant. The
5 POS system that the employee has to take orders in English
6 and then send them to the kitchen in Thai. So it's not an
7 off-the-shelf kind of thing. It is something they worked
8 very hard to set up, worked very hard to get running, and
9 we're ultimately frustrated and had to start all over
10 again because it just didn't work.

11 On the interest side, your Honor, we are here in
12 July of 2023 for questions that arose almost six years
13 ago. And my client does understand the time value of
14 money, but very much of the delay, your Honor, was caused
15 by the CDTFA not responding to Mr. Sy's inquiries and just
16 trying to get Manny Barajas to do something on the case.

17 I think Manny Barajas dropped off the radar for
18 more than a year when he finally got back to Michael Sy
19 and explained to him that he was no longer in the
20 Department. So much of the delay was not on my client's
21 part.

22 And so in both of those points, we'd ask the
23 court to take those things into consideration when it
24 considers the amount of interest, if any, and negligence
25 penalty, if any. Thank you.

1 JUDGE STANLEY: Can I -- I would like to ask a
2 follow-up question on that because this is the first time
3 interest has been raised. Has Appellant submitted any
4 written request to the Department for relief of interest
5 for certain time periods?

6 MR. SY: No, your Honor.

7 JUDGE STANLEY: Okay. Because in order to ask for
8 interest relief, that needs to be in writing. Would you
9 request that we hold the record open to allow you to
10 submit that?

11 MR. SY: Your Honor, we are hoping that with our
12 honest effort to be really truthful through our reporting,
13 we're hoping that this can be relieved without going
14 further due for the interest or penalty, but we're just
15 waiting. If ever there will be some tax liability then I
16 think that will be the proper time to request for interest
17 relief. I hope I'm making myself clear.

18 JUDGE STANLEY: You said you would like time to
19 request for interest relief?

20 MR. SY: Your Honor, this would be moot in case the
21 judge -- the judgement would go against us, if it does
22 come then I think it's a time to request for relief. Is
23 that a proper way to say it, your Honor?

24 JUDGE STANLEY: Well, yeah. I understand that if we
25 -- if the panel finds in your favor that there won't be

1 any interest issue that needs to be relieved, but in order
2 for us -- for the Department to consider whether that's a
3 valid concern or a question of yours, and for us to then
4 determine whether relief from interest is warranted for
5 any time period, it needs to be requested in writing.

6 So that would be before the opinion is issued,
7 and keep in mind that the interest continues to accrue
8 while you brief the issue of interest. You can consider
9 that too for your client.

10 MR. SY: I'll put in writing, your Honor. Do I
11 address it to OTA?

12 JUDGE STANLEY: Yes.

13 Mr. Sharma, I think the Department has a form for
14 that.

15 MR. SHARMA: Yeah. It's a Form 735, CDTFA 735.

16 MR. SY: Mr. Sharma, how about the penalty waiver?

17 MR. SHARMA: That form is for everything, you can
18 check the box and provide the explanation.

19 MR. SY: Thank you.

20 MR. SHARMA: Thank you.

21 JUDGE STANLEY: Thank you, Mr. Sharma.

22 Okay. I also wanted to let Appellant know that
23 the questions you were asking, that you said you wanted to
24 ask of the auditors, who were not subpoenaed to be here
25 today, and the questions you wanted to ask of CDTFA, we

1 take those as rebuttal points and the panel notes that you
2 have disagreement with the way that they did things and
3 using data outside of the audit period and things like
4 that. Those issues that are all noted and we understand
5 your points.

6 How long would you like to take to submit the
7 Form 735?

8 MR. SY: Thirty days, your Honor.

9 JUDGE STANLEY: Okay. Then I'm going to hold the
10 record open for 30 days. The request is simple so I would
11 not expect there would be in a request for an extension
12 after 30 days.

13 So Mr. Sharma would the Department like an
14 additional 30 days after that to respond?

15 MR. PARKER: Yes, we would request at least 30 days or
16 30 days to respond.

17 Also, I just want to make sure that the
18 representative is very specific in what time periods they
19 are requesting and the reason for the request for a relief
20 of interest, so that we know what periods it's covering.

21 JUDGE STANLEY: Thank you. Okay.

22 Judge Kwee, do you have anything to follow up
23 with?

24 JUDGE KWEE: I don't have any further questions.
25 Thank you.

1 JUDGE STANLEY: Judge Brown?

2 JUDGE BROWN: No, I do not. Thank you.

3 JUDGE STANLEY: Okay. This concludes the hearing. We
4 are not closing the record right now, so we'll leave that
5 open for the additional briefing that will be limited
6 expressly to the interest relief, so please don't submit
7 any briefing on the issues that we've already had briefed
8 and talked about, keep it to only the interest and I will
9 issue an order after the hearing so that that's clear.

10 And then once we receive CDTFA's response, we
11 will automatically close the record and an opinion will be
12 issued within a 100 days after we close the record, a
13 written opinion.

14 MR. BOORTZ: Thank you, your Honor.

15 JUDGE STANLEY: Thank you all for your presentations
16 and we will adjourn today.

17 (Hearing adjourned at 4:30 p.m.)
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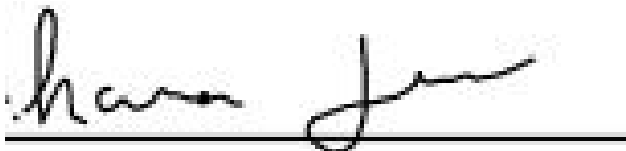
CERTIFICATE
OF
HEARING REPORTER

The undersigned hearing reporter does hereby certify:
That the foregoing was taken before me at the time and
place therein that any witnesses in the foregoing
proceedings were duly sworn; that a record was made of the
proceedings by me using a machine shorthand, recorded
stenographically, which was thereafter transcribed under
my direction.

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

Dated July 12, 2023

Hanna Jenkin

A handwritten signature in cursive script, appearing to read "Hanna Jenkin", is written over a solid horizontal line.

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