

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
TASTE AMERICA FOODS GROUP, INC.,) OTA NO. 20106809
AVA BERI RESTAURANT GROUP, INC.,) 20106824
PARTNERSHIP OF A. BERI & V. BERI,) 20106826
)
)
APPELLANT.)
)
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TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, November 8, 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 9:58 a.m.
and concluding at 11:55 a.m. on Wednesday,
November 8, 2023, reported by Ernalyn M. Alonzo,
Hearing Reporter, in and for the State of
California.

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APPEARANCES:

Panel Lead: ALJ MICHAEL GEARY

Panel Members: ALJ JOSHUA LAMBERT
ALJ RICHARD TAY

For the Appellant: KENNETH BARISH
JOHN FAUCHER
V. KAPILA

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

SUNNY PALEY
STEPHEN SMITH
KIM WILSON

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-14 were received at page 9.)

(Appellant's Exhibits 15-17 were received at page 12.)

(Department's Exhibits A-H, AA, BB, and CC were received at page 20.)

(Department's Exhibits A-M, AA, BB, and CC were received at page 20.)

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1 Cerritos, California; Wednesday, November 8, 2023

2 9:58 a.m.

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4 JUDGE GEARY: Ms. Alonzo, let's start the record,
5 please.

6 Will the parties please identify themselves by
7 stating their names and who they represent, beginning with
8 Appellants, and let's start with Mr. Barish.

9 MR. BARISH: My name is Kenneth Barish. I
10 represent Avi Beri Restaurant Group, Taste America
11 Restaurant Group and the Partnership of Aman and Vandana
12 Beri.

13 JUDGE GEARY: Thank you, Mr. Barish.

14 MR. FAUCHER: And I'm John D. Faucher, and I
15 represent Vandana Kapila. And I wanted to ask if it's
16 possible to take her testimony earlier so that she can may
17 be excused.

18 JUDGE GEARY: I think we can probably arrange
19 that.

20 MR. FAUCHER: Thank you.

21 JUDGE GEARY: Respondent.

22 MS. PALEY: I'm Sunny Paley. I'm an attorney
23 with CDTFA.

24 MR. SMITH: My name is Steve Smith. I'm also an
25 attorney with CDTFA.

1 MS. WILSON: Kim Wilson, Hearing Representative,
2 CDTFA.

3 JUDGE GEARY: Thank you.

4 The parties have submitted evidence that they
5 planned to offer today, and that proposed evidence has
6 been -- most of it at least -- has been included in an
7 electronic hearing binder. On November 2nd, OTA staff
8 notified the parties that the binder was available for
9 download, and I expect the parties have already downloaded
10 that binder. The parties were ordered to review the
11 binder and make sure it contains the evidence that each
12 plans to use -- to offer into evidence at the hearing.

13 Appellants submitted -- originally submitted
14 exhibits marked 1 through 13 for identification. Those
15 exhibits total 117 pages. And I believe Appellant
16 requests that those exhibits be admitted in each of the
17 three cases that I identified earlier.

18 Is that correct, Mr. Barish?

19 MR. BARISH: That's correct.

20 JUDGE GEARY: Thank you.

21 Appellants reviewed the binder to make sure that
22 all of the proposed evidence was included. And on
23 November 6th -- just a couple of days ago -- Appellant
24 submitted, first a replacement for Appellants' 10. And
25 then yesterday at about 5:30 p.m., Appellants submitted

1 another replacement for Exhibit 10 and asked that that
2 same page also be substituted for the first page of
3 Exhibit 8, page 73, in the hearing binder. And last night
4 at 7:31 p.m., Appellant submitted another exhibit, which
5 is an entirely new exhibit, I believe, which has been
6 marked Exhibit 14 for identification. And it's my
7 understanding that Respondent has copies of all of these
8 documents that have been submitted in the last couple of
9 days.

10 Is that correct, Ms. Paley?

11 MS. PALEY: Yes, it is.

12 JUDGE GEARY: Thank you.

13 My first question for you, Mr. Barish -- and I'll
14 get to some documents that were submitted by Mr. Faucher
15 in a minute.

16 Mr. Barish, why were these documents submitted
17 late?

18 MR. BARISH: I was preparing for the hearing and
19 I -- as far as one of the documents, I noticed that there
20 was a mistake in one of the column headings. So I wanted
21 to correct the column heading. On the second one, from
22 the one last night, at Exhibit 14, I was preparing for the
23 hearing and realized that I had this document. It is a
24 document that was generated by the CDTFA. So I didn't
25 think that the CDTFA would have an objection to it.

1 JUDGE GEARY: And this is the document? It's a
2 memo of some type, and it was a document that you received
3 originally when that memo was produced by somebody
4 employed by CDTFA; correct?

5 MR. BARISH: Yes. Oh, yes.

6 JUDGE GEARY: All right. Does Respondent have
7 any objections to the admission, first of all, of
8 Exhibits 1 through 13?

9 MS. PALEY: No. Thank you.

10 JUDGE GEARY: Does Respondent have any objection
11 to the substitution of the pages for Exhibits 8 and 10?

12 MS. PALEY: No, we do not.

13 JUDGE GEARY: Does Respondent have any objection
14 to Appellants' proposed Exhibit 14, which was disclosed
15 last evening?

16 MS. PALEY: No, we do not.

17 JUDGE GEARY: I tried to find out whether that
18 document was already contained in part of the Respondent's
19 submissions. Ms. Paley?

20 MS. PALEY: I do not believe so.

21 JUDGE GEARY: Okay. Typically, I don't admit
22 documents that have been submitted late. In this case,
23 the Exhibit 14 is a document that was created by
24 Respondent. Respondent has no objection, so I'm going to
25 allow all of those exhibits, 1 through 14, and the

1 corrected Exhibits 8 and 10 into evidence.

2 (Appellant's Exhibits 1-14 were received
3 in evidence by the Administrative Law Judge.)

4 JUDGE GEARY: This morning Mr. Faucher submitted
5 several pages of documents and I -- I'm not sure how many
6 exhibits Mr. Faucher intended these to be.

7 Mr. Faucher, why don't you tell me -- walk me
8 through these exhibits and just tell me what they are, why
9 you're submitting them on the morning of hearing as
10 opposed to 15 days prior to hearing, which our rules
11 require, and how you would purpose these documents be
12 marked, if we decide to admit them.

13 MR. FAUCHER: So there are three exhibits there.
14 These are, basically, two of them are signature pages for
15 documents that are purportedly signed by Ms. Vandana Beri.
16 And she will testify that those are not actually her
17 signatures, and those are signatures that are forged. She
18 had no knowledge of these. These are documents that were
19 provided by the CDTFA to Mr. Barish at some point to prove
20 that Ms. Beri had some involvement in these businesses.

21 The third exhibit is an interview with one of the
22 investigators from the CDTFA that talks about Ms. Beri's
23 involvement and how she'd seen Ms. Beri here, and Ms. Beri
24 wanted to challenge what that investigator had written up.
25 Again, that was a document that was provided to Mr. Barish

1 from the CDTFA.

2 I have come late into this issue -- into these
3 issues, and I had assumed that these were in the whole
4 packet of documents and exhibits. They were exhibits to
5 particular documents that were included in -- that were
6 included as exhibits for this hearing, but they weren't
7 included. So the original document was included as an
8 exhibit, but the exhibits to that original document were
9 not included as exhibits in this particular hearing. And
10 I only noticed that late last night.

11 JUDGE GEARY: Walk me through the documents so
12 that I can mark them for identification in some kind of
13 appropriate order. I have a one-page document which at
14 the bottom states, "Exhibit 1, page 2 of 12." It refers
15 to BOE Form 400 and has the names Aman Beri and Vandana
16 Beri at the top. How would you propose you want me to
17 mark that exhibit?

18 MR. FAUCHER: So I believe the next exhibit in
19 line would be Exhibit 15. Is that correct?

20 JUDGE GEARY: If you wish to mark them as part of
21 Appellants' exhibits, we can do that or we --

22 MR. FAUCHER: Yes.

23 JUDGE GEARY: Is that what you want to do?

24 MR. FAUCHER: Please. Yes.

25 JUDGE GEARY: All right. And then which one do

1 you want next? Do you want the other signature page to be
2 next, or do you want those to be the same exhibit?

3 MR. FAUCHER: They are two separate signature
4 pages, I believe. One is for an escrow instructions, and
5 I want to make that Exhibit 16.

6 JUDGE GEARY: Okay. So that must be the short
7 document that just has a few lines with a small paragraph
8 at the top?

9 MR. FAUCHER: If I can, Ken, can I borrow your
10 copy of those?

11 MR. BARISH: Yeah.

12 JUDGE GEARY: At the top it has a date of
13 September 28th, 2012, and it refers to an escrow. You
14 want that to be 16?

15 MR. FAUCHER: Yes, please.

16 JUDGE GEARY: Okay. And then the last document,
17 which is the Memorandum of Interview contact, you want to
18 be 17?

19 MR. FAUCHER: Correct.

20 JUDGE GEARY: Okay. Respondent, do you have any
21 objection to the admission of these last three exhibits
22 proposed by Ms. Kapila?

23 MS. PALEY: We do not.

24 JUDGE GEARY: All right. Again, typically, I
25 don't allow these when they're late. However, one of them

1 appears to be a Department generated document, and there
2 being no objections from Respondent to the admission of
3 those documents, I'm going to allow those three exhibits
4 to come into evidence. They're admitted.

5 (Appellant's Exhibits 15-17 were received
6 in evidence by the Administrative Law Judge.)

7 JUDGE GEARY: Turning now to the Respondent's
8 proposed evidence, Respondent submitted close to
9 16,000 pages of evidence for the Taste America Foods
10 Group, Inc., appeal. Respondent submitted exhibits marked
11 A through H, and subsequently three additional exhibits
12 marked AA, BB, and CC for identification. For the Avi
13 Beri Restaurants Group, Inc., appeal, Respondent submitted
14 exhibits marked A through M, and the same three additional
15 exhibits marked AA, BB, and CC for identification.

16 Let me just ask Ms. Paley.

17 Ms. Paley, you did want those additional three
18 exhibits to be admitted in each of the three cases?

19 MS. PALEY: Yes, please.

20 JUDGE GEARY: All right. And then finally for
21 the Partnership appeal, Respondent submitted exhibits
22 marked A through H -- a different A through H than I
23 referred to earlier and the same three additional exhibits
24 marked AA, BB, and CC for identification. Respondent,
25 have I accurately described Respondent's proposed

1 evidence?

2 MS. PALEY: Yes.

3 JUDGE GEARY: And has Respondent confirmed that
4 all of its exhibits are incorporated into the binder?

5 MS. PALEY: Yes.

6 JUDGE GEARY: Appellants filed written objections
7 to Respondent's proposed evidence on the grounds that I
8 could decipher and can identify here today are that the
9 documents submitted by Respondent are not authenticated,
10 they are hearsay, and they contain opinions that lack
11 adequate foundation, and that there may be other grounds
12 for objections that we will hear in a moment.

13 Respondent -- I mean, Appellants are interposing
14 objections as to all of Respondent's evidence. OTA
15 informed the parties that my tentative ruling on the
16 objections would be to overrule them. But I also
17 indicated that I would allow the parties a brief
18 opportunity to present argument on the admission of these
19 documents today, which we will do in a minute.

20 But before we allow Mr. Barish to state his
21 objections and a brief argument in support of his
22 objections, I should note that on October 25th, Appellant
23 identified two present or former employees of Respondent
24 as potential witnesses at this hearing. But Respondent
25 filed a generic objection to its employees or former

1 employees having to testify, and Appellants responded by
2 letter noting that it planned to object to all of
3 Respondent's proposed documentary evidence, which as I
4 indicated it did.

5 All right. Mr. Barish, do you wish to make any
6 additional comments regarding your objections before I
7 turn to Respondent and ask if it has anything to add?

8 MR. BARISH: The only thing that I would ask the
9 Court to consider is that --

10 JUDGE GEARY: Mr. Barish, if you can do me a
11 favor --

12 MR. BARISH: I'm sorry.

13 JUDGE GEARY: -- and make sure on and close to
14 you.

15 MR. BARISH: Yeah. I apologize.

16 JUDGE GEARY: Would you pull it closer to you,
17 please. It's -- there. Try to speak into it if you
18 would.

19 MR. BARISH: Okay. Usually my voice carries
20 quite well, so I'm sorry.

21 The only thing I'd ask the Court to consider is
22 that we're dealing with records that date back in some
23 years. The audit of this started in 2008. ISOB documents
24 were the genesis for this whole kind of procedural and
25 administrative process that we've gone through getting to

1 the OTA. We've had a situation where this -- the initial
2 documents were prepared by someone who were -- I'm unsure
3 who it is. It probably was the lead auditor.

4 The lead auditor said he spent 650 hours on the
5 Avi Beri Restaurants Group alone. And that was adopted, I
6 believe -- and I stand ready to be corrected -- in each
7 instance by the subsequent civil audit. And just -- I
8 think Your Honors know the history of this that in 2008
9 the audit began. By 2011 a search warrant was issued to
10 the various entities, as well as the franchisor. And,
11 eventually, that criminal investigation was turned down by
12 both the California Department of the Justice and the
13 Los Angeles District Attorney's office. I'll be speaking
14 of that more.

15 But after that, we were formally notified of the
16 continuation by, at that point, the Board of Equalization.
17 And if I keep on saying CDTFA or Board of Equalization, I
18 think it's commonly one or the other. I try to separate
19 them as much as possible. So now we've got a situation
20 where when it goes from the Investigation Department of
21 BOE through a process of administrative review, and I
22 argue, was rubber stamped. And that original document,
23 the original inquiry, the original audit preparation was
24 done not by the auditors who eventually issued the
25 findings concerning the audit, the ultimate audit that was

1 concluded.

2 In that situation it's so attenuated, that I
3 think that if you don't consider this to be objectionable,
4 at least you should consider it for the weight of the
5 evidence. And I know that the CDTFA has given great
6 latitude in what it presents during these hearings, but
7 it's almost like they're asking you to affirm, like they
8 did, the underpinning of an investigation that goes back,
9 you know, if you want to start with 2008, we're talking
10 about 15 years.

11 And that's one of the reasons why I wanted to
12 have the witness that I asked for because those two people
13 were the ultimate genesis for the records that were, you
14 know, Notices of Determination, et cetera, that we are
15 fighting in this proceeding. And I think it would be
16 helpful to know how those arose or whether there was any
17 independent review of this.

18 So that's the objection.

19 JUDGE GEARY: Mr. Barish, would you say that I've
20 accurately stated the grounds that is -- that earlier in
21 my comments that you felt they're inadequate foundation
22 for the admission -- inadequate authentication and
23 opinions for which foundations have not been laid?

24 MR. BARISH: Yeah. I think generally that's
25 true. I'm looking at my own documents, if you don't mind.

1 I think I went further with my objection but, you know,
2 giving some legal braces for it. But otherwise, it's of
3 record.

4 JUDGE GEARY: Okay. Respondent, what do you have
5 to add?

6 MS. PALEY: Yes. Appellant advances two issues.
7 One, is it objects to Department's documents being entered
8 into evidence. And the other is that it would like to
9 question two former CDTFA staff members as witnesses. As
10 for accepting the Department's documents as evidence,
11 Regulation 30124(f)(1) provides that all relevant evidence
12 is admissible. Relevant evidence means and includes any
13 evidence tending to prove or disprove any fact that is
14 significant to the appeal, Regulation 30102(t).

15 Simply put, the issue in this appeal is whether
16 Appellant owes the amount of tax the Department assessed.
17 The documents the Department wishes to submit into
18 evidence consist of items, such as the Determinations,
19 Field Billing Orders, the audit work papers, the documents
20 the Department relied on in reaching its determinations,
21 and the Reports and Decision reached by the Department as
22 part of the audit process. All these documents are
23 directly relevant to whether Appellant owes the tax in
24 dispute. And, therefore, they should be admitted into
25 evidence.

1 This panel can then evaluate the evidence
2 presented by both parties. Regulation 30124(f)(4) states
3 that the Panel may use the California Rules of Evidence
4 when evaluating the weight to give evidence presented in
5 the proceedings, and any party may provide argument on the
6 relevant weight that should be given to an item of
7 evidence.

8 Second, CDTFA objects to Appellants' desire to
9 call as witnesses former CDTFA staff Christina Trejo as
10 the auditor or David Cathy as the reviewer of the audit
11 work papers based on relevance, materiality, and undue
12 consumption of time. These appeals stem from an initial
13 audit in 2010 and subsequent investigation that began in
14 2011 with reaudits that culminated with reports and Notice
15 of Determinations issued in 2016. The audit reports and
16 audit working papers explain the Department's audit
17 methods and discoveries and are the best record of the
18 auditor's contemporaneous rationale, findings, and
19 conclusions.

20 Testimony from former audit staff many years
21 later would be repetitive, immaterial, and the probative
22 value would be substantially outweighed by undue
23 consumption of time, Evidence Code Section 352. At this
24 late date an auditor would likely be reading their audit
25 report to recall what happened in the audit. And the

1 audit report, the best available record of the audit, are
2 already submitted as evidence. We submit that our
3 exhibits are relevant and admissible and good cause has
4 not been demonstrated to require CDTFA former employees to
5 appear as witnesses at the oral hearing.

6 JUDGE GEARY: Thank you.

7 Mr. Barish, I'll give you one minute for
8 concluding remarks, if you want to make any.

9 MR. BARISH: I'm not sure it's a cognizable legal
10 objection that it consumes too much time when we're
11 talking about a situation where a person's livelihood is
12 involved. This has been an arduous situation for my
13 client. Over 15 years of failed criminal investigation,
14 which cost him lots of money and lots of anguish, and now
15 we're having an objection based on consuming time. As far
16 as Mr. -- you know, according to the records that I
17 received, she spent on Avi Beri restaurant -- which I
18 really focus on as being the main focus of the three
19 entities -- over 650 hours.

20 And I think she would remember spending -- what
21 in our parlance when, you know, as attorneys -- is about
22 four months of time on a case. And with especially this
23 type of case that had the same history that it has that
24 somewhat interesting history legally in the sense that we
25 have a criminal investigation, two administrative --

1 excuse me -- judicial entities turning it down -- you
2 know, quasi-judicial Department of justice in the L.A.
3 D.A. office. So I would expect she would be very, very
4 telling about what went into her report and how it relied
5 on the ISOB original investigation.

6 JUDGE GEARY: Thank you.

7 Respondent's proffered evidence is sufficiently
8 relevant to be admitted. We do not require this
9 Respondent or the other tax agency that appears before us
10 to authenticate documents. We don't require taxpayers,
11 Appellants to authenticate documents. So the same rules
12 apply to both the agencies and the taxpayers. Appellants
13 are free to argue weight, free to argue that the records
14 are unreliable, that the records are inaccurate, that the
15 records are undeserving of OTA's attention and
16 consideration. Those documents all go to weight. And so
17 the objections are overruled, and Respondent's exhibits
18 that I identified a moment ago in all of the three cases
19 are admitted.

20 (Department's Exhibits A-H, AA, BB, CC
21 were received in evidence by the
22 Administrative Law Judge.)

23 (Department's Exhibits A-M, AA, BB, CC
24 were received in evidence by the
25 Administrative Law Judge.)

1 JUDGE GEARY: Now, my understanding is we will
2 have testimony from Ms. Kapila only today.

3 And you've asked, Mr. Faucher, that she be
4 allowed to testify early. But in my view, the Appellants
5 are sort of driving this thing, so I'm going to ask
6 Mr. Barish how he feels about having Ms. Kapila testify
7 before he gives any of his argument.

8 MR. BARISH: I have no objection, Your Honor.

9 JUDGE GEARY: All right.

10 Then, Respondent, any objection to allowing
11 Ms. Kapila to testify at the onset?

12 MS. PALEY: No.

13 JUDGE GEARY: Mr. Faucher, did you wish to -- I
14 know during the prehearing conference you indicated that
15 you wanted to argue -- ask her about 15 minutes to argue.
16 How do you -- do you want to have her do her testimony? I
17 typically would have allowed you to argue after Mr. Barish
18 gives his argument, his argument in chief. Is that going
19 to be acceptable to allow your client to testify and then
20 you argue later?

21 MR. FAUCHER: That would be fine, Your Honor.

22 JUDGE GEARY: Okay. I wanted to just before we
23 administer an oath or affirmation, Ms. Kapila, I want to
24 mention a little bit about the issues and the timing.

25 It's been agreed by the parties following our

1 prehearing conference and during our prehearing conference
2 that the issues to be decided by the Panel are as follows:
3 The first issue, has Respondent proved Appellants' fraud
4 or intent to evade the Sales and Use Tax Law or authorized
5 rules and regulation by clear and convincing evidence.
6 This is a potentially dispositive issue in some of these
7 cases. Respondent agrees, I believe, that if OTA finds
8 that Respondent has not carried its burden to establish
9 fraud by clear and convincing evidence, that finding will
10 be dispositive as to the entirety of the Notices of
11 Determinations issued to Taste America and the Partnership
12 and to the NOD, the Notice of Determination issued to Avi
13 Beri Restaurants Group, Inc., for periods prior to
14 July 1st, 2017.

15 Is that right, Ms. Paley?

16 MS. PALEY: Yes.

17 JUDGE GEARY: Okay. So the second issue that I'm
18 about to identify will only be considered for Taste
19 America and the Partnership if OTA determines there was
20 fraud. It will however -- the second issue will be
21 considered for Avi Beri Restaurants Group for the entire
22 period asserted if there is fraud. But if there's no
23 finding of fraud, it will still be considered for periods
24 after July 1st, 2007, I believe.

25 Correct, Ms. Paley?

1 MS. PALEY: Yes.

2 JUDGE GEARY: All right. Or after July 30th --
3 June 30th, 2017 is more accurate.

4 So the second issue, which we will reach assuming
5 findings of fraud as I've just indicated, are whether
6 adjustments to the measures of unreported taxable sales --
7 or whether adjustments are warranted to the measure of
8 unreported taxable sales.

9 The third issue applies to the Avi Beri
10 Restaurants Group, Inc., only. The question is did
11 Respondent properly impose the 40 percent penalty on Avi
12 Beri Restaurants Group, Inc., for its failure to timely
13 remit sales tax reimbursement collected from customers.

14 The fourth issue, if Respondent properly imposed
15 the 40 percent penalty on Avi Beri Restaurants Group,
16 Inc., does the evidence establish that entity's failure to
17 timely remit the sales tax reimbursement collected from
18 customers was due to reasonable cause or circumstances
19 beyond that entity's control and occurred notwithstanding
20 that entity's exercise of ordinary care and its absence of
21 willful neglect.

22 The last issue -- I believe it's the last issue.
23 Yes. The last issue is relief of the finality penalty,
24 which Respondent imposed on Avi Beri Restaurants Group,
25 Inc., warranted --

1 MS. PALEY: May --

2 JUDGE GEARY: Yes, Ms. Paley?

3 MS. PALEY: I was going to address Issue Five
4 before we begin, if I may?

5 JUDGE GEARY: Yes.

6 MS. PALEY: We would recommend that finality
7 penalty be waived conditioned upon their payment of any
8 tax due within 30 days of the determination going final.

9 JUDGE GEARY: All right. Mr. Barish, I'm
10 assuming your client accepts that concession on the
11 waiver?

12 MR. BARISH: I'll accept the concession.

13 JUDGE GEARY: Okay. All right. And we will not
14 have to deal with Issue Five, and I'll address the
15 Department's concession in the decision -- in the opinion,
16 I mean.

17 We'll talk briefly about time estimates. At the
18 prehearing conference, Appellants were requesting three to
19 four hours to present their arguments and evidence. And
20 they also argued that the order of the parties' arguments
21 should be changed to require Respondent to give its only
22 argument first. OTA disagreed and stated that the
23 arguments -- the order of argument would not be changed.
24 More recently, Appellants were estimating an hour and 15
25 minutes for argument. It also had estimated time for

1 witnesses. However, those witnesses are not here.

2 And Appellants requested, I believe, 30 minutes
3 of argument and 40 minutes of rebuttal. I'm not going to
4 allow Appellants to split their arguments like that.
5 Appellants will be making their arguments as we discussed.
6 And as we do in these cases, it's typically including
7 cases where fraud is alleged, the bulk of the argument --
8 Appellants' argument will be given in the beginning.

9 We'll begin with the bulk of Appellants'
10 arguments, and I will allow Appellants 15 minutes. I
11 normally allow about five minutes on a simpler case. I'll
12 allow the Appellants 15 minutes for closing or rebuttal
13 argument after the Department gives its only argument.
14 And in addition, Mr. Faucher is going to have his 15
15 minutes of argument, which will follow the Appellants'
16 main argument. You will have your 15 minutes of argument.
17 If you need a couple of minutes of rebuttal after the
18 Department gives its arguments, just let me know, and
19 we'll allow that. Respondent requests up to an hour for
20 its argument.

21 Are you still looking at about an hour?

22 MS. PALEY: I would revise that down to perhaps a
23 half hour.

24 JUDGE GEARY: Okay. All right. Any questions,
25 before we begin with swearing in the witness and taking

1 testimony, from anybody? Seeing nothing, all right.

2 Ms. Kapila, I am going to ask you to raise your
3 right hand, please.

4

5 V. KAPILA,

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

9

10 JUDGE GEARY: Thank you.

11 Would you please make sure that microphone is
12 right between you, and that you speak right into it, both
13 of you. You'll need to put it in the middle, I think,
14 because you'll both have to lean towards that microphone.

15 Mr. Faucher, you can begin with your examination
16 of Ms. Kapila when you're ready.

17 MR. FAUCHER: Okay. Thank you.

18

19 DIRECT EXAMINATION

20 BY MR. FAUCHER:

21 Q Can you please tell the Panel your name?

22 A Vandana Kapila.

23 Q Okay. And why are you here? Do you know?

24 A Um --

25 Q Who are you, essentially? What's your role in

1 this?

2 A According to this, it's just like probably I was
3 involved in the business, which I was not.

4 Q And when you say according to this --

5 MR. FAUCHER: She's indicating a declaration that
6 I had drafted, but it's not been signed. But, basically,
7 it was just to help prepare for testimony. It's not
8 something that we intended to introduce into evidence.

9 BY MR. FAUCHER:

10 Q So -- and are you married to Aman Beri?

11 A No.

12 Q Okay. When did the divorce become final?

13 A We applied for -- we are been separated since
14 2013 and have been living separate even prior to that.
15 The case is still in the court, but it's final probably
16 yesterday.

17 Q Okay. Thank you. And were you aware of the
18 Subway Restaurants that your husband was running?

19 A Yes.

20 Q Okay. And what was your involvement in general
21 of those Subway Restaurants?

22 A None. I was not involved at all.

23 MR. FAUCHER: Okay. Now, I'm sorry, Judge Geary,
24 but I neglected to write the numbers of the exhibits. I'm
25 going to ask her about the sales tax permit request --

1 JUDGE GEARY: Well, the exhibits were marked --
2 MR. FAUCHER: -- and so I wanted to get the right
3 number.
4 JUDGE GEARY: -- 15 was the BOE Form 400
5 document.
6 MR. FAUCHER: Okay.
7 JUDGE GEARY: 16 is the one-page document that is
8 apparently related to escrow, and then 17 is the
9 Memorandum of Interview.
10 MR. FAUCHER: Thank you.
11 JUDGE GEARY: Yes.
12 JUDGE TAY: So sorry to interrupt. Can I just
13 make a quick suggestion. Perhaps Mr. Faucher would get
14 one microphone.
15 And, Mr. Barish, would you mind sliding your
16 microphone over for the witness?
17 MR. BARISH: Sure.
18 JUDGE TAY: Thank you.
19 MR. FAUCHER: Takes a lot of brain power in this
20 room to come up with a simple solution like that. Thank
21 you. All right. Okay.
22 BY MR. FAUCHER:
23 Q I'm passing you Exhibit 15, and this is the sales
24 tax permit request. Do you recognize your signature on
25 that?

1 A Yes, I do.

2 Q Okay. So that's a correct signature of yours --

3 A Yeah.

4 Q -- from 2004; correct?

5 A Yes. But have no memory in what capacity this
6 was used or -- like, I have no memory of this paper, but
7 this is my signature.

8 Q Okay. In 2004, do you know what was happening
9 with the Subway Restaurants?

10 A No.

11 Q Do you know why your husband would have given you
12 this to sign?

13 A I don't know.

14 Q Okay.

15 A No.

16 MR. FAUCHER: And, actually, I'm assuming that
17 her husband gave this to her to sign.

18 MS. KAPILA: Yeah.

19 BY MR. FAUCHER:

20 Q Do you know how you would have received this --
21 this piece of paper?

22 A I mean, he would have handed it to me and
23 probably was -- was probably signed for, you know, to
24 start a Subway or something. Yeah.

25 Q Okay. Thank you. I'm going to pass you

1 Exhibit 16, and this is the last page of escrow
2 instructions for the sale of the restaurants. Do you
3 recognize your signature on this?

4 A No.

5 Q So that is not your signature?

6 A No.

7 Q Okay. Were you aware that the restaurants were
8 being sold?

9 A No.

10 Q Okay. Do you know whether you were listed as a
11 corporate officer for any of the corporations?

12 A No. I have no idea about that.

13 Q Okay. Did you have the authority to sign checks
14 for the business?

15 A No. I -- I have never even seen the business
16 checks or anything else. I'm not given authority to sign
17 any of the checks.

18 Q Okay. Do you know who Lydia Devita is?

19 A No, I don't know.

20 Q Okay. Now, so I'm going to -- we're going to
21 Exhibit 17 here. It appears from this exhibit, which is
22 the investigation report that Ms. Devita worked for the
23 Subway Restaurants in some capacity. And it said that --
24 here she states that Vandana Beri was also authorized to
25 sign checks.

1 And so you're telling us you did not have
2 authority.

3 A Not at all. To this day, I don't think I signed
4 any business checks.

5 Q Okay. And she rarely saw Vandana work. Did you
6 ever work in these restaurants?

7 A No. No.

8 Q Would any of the employees ever have seen you?

9 A No. Maybe just to grab a sandwich or something
10 with my child because I used to visit sometimes, otherwise
11 not regarding any work or anything. At least not anymore
12 at all in any kind of work at Subways.

13 Q Okay. Did you ever dispose of any of the assets
14 of the businesses?

15 A No.

16 Q Okay. Did you ever monitor any of the employees
17 of the business?

18 A No.

19 Q How often did you actually appear at any of the
20 Subway Restaurants?

21 A Maybe three or four times. I mean, I honestly
22 don't even know the location where they are located other
23 than just one or two, which was I used to just get a
24 sandwich, and that's it.

25 Q Okay. Did you help prepare any for the tax

1 returns --

2 A No.

3 Q -- for the businesses?

4 A No.

5 MR. FAUCHER: Okay. Thank you. I have no
6 further questions.

7 JUDGE GEARY: Mr. Faucher, you understand that
8 your client's individual liability is not at issue in
9 these consolidated matters; correct?

10 MR. FAUCHER: I do understand that.

11 JUDGE GEARY: Okay.

12 MR. FAUCHER: There's some stuff in the record
13 that indicates that, you know, she was involved, and she
14 clearly was not. And we're trying to get her somehow
15 extricated from this. And this may not be the proper form
16 for that, but I don't want to jeopardize any opportunity
17 to do so here.

18 JUDGE GEARY: Okay. Mr. Barish, did you have any
19 questions?

20 MR. BARISH: No questions, Your Honor.

21 JUDGE GEARY: Respondent, any questions?

22 MS. PALEY: No. Thank you.

23 JUDGE GEARY: Let me ask my fellow judges.

24 Judge Tay, any questions?

25 JUDGE TAY: I have no questions for the witness.

1 JUDGE GEARY: Any questions, Judge Lambert?
2 JUDGE LAMBERT: No questions.
3 JUDGE GEARY: Did you wish to ask your client to
4 be excused?
5 MR. FAUCHER: Yes. I ask that she may be
6 excused.
7 JUDGE GEARY: You're excused from further
8 participation in the hearing. Thank you for coming in,
9 Ms. Kapila.
10 MS. KAPILA: Thank you.
11 MS. PALEY: Your jacket.
12 MS. KAPILA: Oh. Thank you.
13 JUDGE GEARY: Okay. Mr. Barish, are you ready to
14 give your main argument?
15 MR. BARISH: Excuse me. I'm trying to time
16 myself. Yes, I am, but I --
17 JUDGE GEARY: Do you need a few seconds?
18 MR. BARISH: One thing with these watches is
19 they're too big for your cuffs, so it's always a problem.
20 I'm just trying to give myself the one hour, unless --
21 Mr. Faucher, could keep it for me maybe?
22 MR. FAUCHER: I can certainly time you.
23 MR. BARISH: Yeah, time me. What I -- what I
24 just need is to know when it's one hour.
25 MR. FAUCHER: Okay.

1 MR. BARISH: I got it working. It may work. I
2 apologize.

3 JUDGE GEARY: It's all right. You can begin when
4 you're ready.

5

6 PRESENTATION

7 MR. BARISH: Okay. First of all, thank you for
8 the opportunity to kind of present our -- our case, and I
9 have before an independent and partial tribunal.

10 JUDGE GEARY: Is your microphone on?

11 MR. BARISH: Yes.

12 JUDGE GEARY: Okay. Pull it closer to you just
13 to make sure.

14 MR. BARISH: Let me just get it right in front of
15 my face.

16 JUDGE GEARY: Thank you.

17 MR. BARISH: I'm just so used not needing one,
18 actually.

19 But and what I -- we're going to, you know, focus
20 on -- didn't work here. Sorry about that.

21 MR. FAUCHER: I have the timer on.

22 MR. BARISH: Okay. -- is the evidence that the
23 CDTFA has with regard to fraud as well as the taxable
24 measure being wrong as reported. And, really, the CDTFA
25 relies upon the WISRs, the weekly inventory sales reports

1 and a Memorandum of Interview of one person, Andrea
2 Montoya. And that's really the extent of this evidence.

3 Now, the WISRs are particularly of interest
4 because when the dust settles, Ms. Montoya's Memorandum of
5 Interview is useless. It has no real reference to
6 anything that was taking place at any particular time.
7 She is very vague, and I believe in my additional brief
8 I've addressed Ms. Montoya as well as some of the other
9 Memorandum of Interview that have been presented.

10 I might say that the Memorandum of Interview --
11 and this is a digression to a certain extent of the
12 remainder of the Memorandum of Interview, other than
13 Ms. Montoya, have not been marked as exhibits. So I think
14 that's important. What I'd like to do is ask you to
15 review certain aspects of our exhibits, and I'll refer you
16 to pages. I know it's not maybe the form for you to look
17 at this time, but at least it'll be part of the record of
18 the pages and exhibit numbers and what we're saying as far
19 as our position with regard to the case.

20 JUDGE GEARY: Mr. Barish, just so you know, if
21 you refer to a binder page number on the electronic
22 binder, we can go to it almost instantaneously.

23 MR. BARISH: Then I will ask you to go to
24 Exhibit 1. It's a good place to start. And this is a
25 Report of Field Audit revised by -- I believe the auditor

1 was Mr. Perez. And what I'm asking you to particularly
2 look at is page 14. The paragraph that I am asking to
3 really focus on is on class of business, the last
4 sentence.

5 And this is, I take it, Mr. Perez after review is
6 stating that the restaurants do not fall under the 80/80
7 rule because of significant cold food to-go business. Hot
8 sandwiches are offered along with the option of having any
9 sandwich heated by the staff. Okay. We know that cold
10 sandwiches are not taxable, whereas, heated sandwiches
11 are. That's kind of simplistic.

12 The 80/80 rule, as I understand it, is that
13 80 percent of the sales are of sandwiches, and 80 percent
14 of those are taxable. I'm not sure who generated the
15 80/80 rule or whether is it even a rule of whom? But
16 that's from the other documents that we've been presented.
17 It seems to be the rule. So I guess if you go 80 times 80
18 is 64 percent tax measure. And he's saying that
19 64 percent is too high because there were so many
20 significant cold sandwiches.

21 Now, if you look further in this particular
22 document, he recommends a negligence penalty. He says the
23 reasons for the recommendation are the large amount of
24 total understated measure, the 180 -- excuse me --
25 148 percent error percentage, a large understated total

1 sales measure for 2006 and 2007, and many recording errors
2 committed by employees during the observation test. So
3 here he's got a negligence penalty recommended after a
4 reaudit.

5 This became a fraud case after DAI was asked to,
6 at first, voluntarily turn over its WISRs, its record of
7 WISRs, and later after a search warrant was issued to DAI
8 for the remainder of the period. If I remember correctly,
9 the period of the original voluntary submission by DAI was
10 2007 through 2009. The search warrant was supposedly
11 necessary because not all periods were given over. At the
12 time the original records, the voluntarily given ones,
13 were turned over, there was an email sent. And this has
14 been on the record for so long. It's Exhibit 5. And
15 that's from Ms. Bollettieri. I believe I pronounced her
16 name correctly.

17 And it says that -- I'll read this and give my
18 interpretation -- the data must be interpreted with
19 caution. The columns entitled, "Sales 220NN," are more --
20 are most accurate. However, the columns headed, "POS
21 Sales and Sales Tax," are less accurate. And some weeks
22 may not be represented fully with a data upload from the
23 stores. Now, what does that mean? It could mean that
24 it's incomplete, just complete. I submit that it puts in
25 disrepute all of the records that were received from DAI,

1 not just the spreadsheets that are mentioned in this --
2 you know, in this particular email because spreadsheets
3 are summaries. And what goes into summaries are the base
4 documents.

5 And we already know that when the CDTFA did its
6 analysis of the WISRs, there were missing weeks of sales
7 records, so percentages are off. And you wonder when DAI
8 gave over voluntary documents and then was later forced to
9 give over the remaining documents as a result of a search
10 warrant, what was that all about? We don't know. And
11 like I said, this has been part of the record for a long
12 time, and CDTFA did not attempt to get an explanation on
13 that or on this particular statement from Subway
14 concerning its records.

15 We submit that it's indicative of a software
16 problem at DAI that it didn't want to disclose, and was
17 having problems keeping accurate records. As a
18 consequence, these records, these WISRs that were obtained
19 are really not something that can be relied upon. Like I
20 mentioned before, the case went criminal, and the
21 investigation was three years, approximately. I can say
22 that from personal experience because I was the one who
23 represented Mr. Beri during that three-year period. I'm
24 also the one who met the California Department of justice.

25 I'll be very candid with you. Mr. Young would

1 not tell me exactly why the case was turned down. I
2 didn't even know about the L.A. District Attorney's
3 office, in an attempt to get them to pick up the case,
4 until the appeals conference in this very case, but they
5 turned it down. Obviously, I don't know why. But I can
6 only surmise, and I surmise from what happened directly
7 before that, before the July 31st, 2014, call I had with
8 Mr. Young. And it's from the records. It's in the
9 records that the Department of Justice asked Mr. -- excuse
10 me Mr. Young asked.

11 I would expect it was the DOJ asked for the ISOB,
12 the investigators, to go out and interview some of the
13 witnesses, some of the people who worked at the stores and
14 administrative office of Ava Beri and the remaining
15 entities. They were all housed together administratively.
16 And they did go out and interview four or five witnesses,
17 none of whose Memorandum of Interview are in the record
18 other than Ms. Montoya. And the reason for that is very
19 self-evidence. They don't support a fraud case.

20 If I may, I'll digress a little about MOIs. MOIs
21 are the agent's interpretation of what is being said.
22 They're notoriously, really, kind of unreliable from my
23 experience having been doing this for a long time because
24 they are the interpretation. They're not quotes. They're
25 what the agent hears and wants to hear depending on the

1 agent. Some of them are excellent and taking down what
2 people say ask some aren't, as opposed to something more
3 definite like a declaration. And that's why we presented
4 two declarations of people who work at Ava Beri and the
5 other two entities, one of whom was not an employee of
6 Mr. Beri or Ava Beri or the entities, was independent,
7 Ms. Joshi, Komal.

8 It's interesting, her interview -- Memorandum of
9 Interview, and then you look at her declaration. They're
10 similar, but it's very telling that Ms. Joshi says that
11 there was nothing done wrong that she knows, and Mr. Beri
12 never asked her to do anything wrong. Same thing for
13 Ms. Martinez, and they are part of our record as you know
14 from our exhibit list. So we get to the point now of the
15 WISRs and the amounts that are attributed as being taxable
16 through the WISRs. The WISRs come up with an
17 extraordinary percentage of taxable measure.

18 In some instances, we've done calculations which
19 seems that it's more than 100 percent of gross sales. But
20 even if that number is less than 100 percent by their own
21 records, and I'll give you a cite for this one too. I
22 think it's Exhibit 12. I better make sure before I speak.
23 Yeah. It's Exhibit 12, page 110. This is the ISOB. I
24 think it's the ISOB. Yes. ISOB memorandum to the
25 petition section dated, October 7, 2019. On page 110,

1 there's a listing to the far right in the box of summary
2 of taxable percentage. We know the 80/80 rule doesn't
3 apply, according to Mr. Perez, and it's somewhat less.

4 I'll show you another reference that shows that
5 it was somewhat less. But this says that the third
6 quarter of 2005 was 96 percent, 95.98 percent. Going
7 higher through the third quarter of '06 for the three
8 years, the lowest is about 94 -- excuse me -- 93 percent,
9 93.28 percent. That's for approximately three years of
10 first inquiry, then they go down. Maybe the software got
11 a little better. I don't know. But still they're high in
12 comparison to what I'm about to present to you.

13 So how does the 80/80 rule get busted by the
14 ISOB, and why is it -- is it really possible for an entity
15 to have a 96, 97 percent taxable measure and be in this
16 business when cold sandwiches are not taxable. They are
17 taxable if they are consumed on the premises, but still,
18 people -- Subways are notorious. First of all, their
19 premises are not that nice to sit at, and they're not that
20 large. It's not a restaurant. It's a take-out. Purely
21 take out.

22 So, I mean, if you have those numbers and you
23 actually believe those numbers, are you rational in your
24 approach to this case? I submit that the CDTFA -- BOE at
25 that point -- was not. I also would like to point out to

1 you on this issue of the WISRs, Exhibit No. 9. And this
2 is something I'd like to spend a little time with because
3 it's so important. Exhibit 9 is a memo. I don't know the
4 exact background of this memo, but I can assure you it has
5 to do with a controversy between the BOE, and this is what
6 it says.

7 The BOE and Subway franchisees in L.A. and Orange
8 County concerning what is a correct taxable measure.
9 Obviously, at that point in time, this goes back in the
10 period 2007 through 2010, I believe. They were having
11 problems where the audits were coming out skewed,
12 according the franchisees. They met with the BOE. Very
13 nice of the BOE to meet with them. And this memo, at
14 first, is just a memo between the group that represented
15 the franchisees and the franchisees themselves to say that
16 the -- referring to the letter that's also attached and
17 what percentages are going to be used for audits for 2007
18 through 2010.

19 Page 87 of exhibits is a July 14, 2011, letter
20 from BOE to a gentleman by the name of Grewal, who was one
21 of the -- I think one of the representatives for the
22 franchisees. And it talks about our audit approach in
23 recent audits of Subway franchises. What it does is it
24 says that the taxable sales and nontaxable sales that they
25 will agree to as the most for 2008 through 2010 is given

1 and 2007 is the same on 88. Taxable sales are 40 percent
2 for 2007 and '08. 2009 is 45 percent. 2010 is 55
3 percent.

4 And you compare that with the numbers and the
5 percentages that WISRs has interpreted by ISOB came out
6 with. There's a great disparity here. Now, is this a
7 contract between the franchisees and the BOE that this is
8 what is going to be done? It's a clear indication similar
9 to a kind of directive. This is the way the audits are
10 going to be handled. The audit here was not handled that
11 way. And they came up with such extraordinary numbers
12 that just they can't be believed. These are independent.

13 This is independent evidence that the numbers are
14 a factor, not only breaking the 80/80 rule, but breaking
15 open a taxable sales figure that is double what they
16 agreed to. Now, there are caveats listed in the letter.
17 You'll read the letter. But what does this tell us? That
18 definitely -- definitely there was a problem with audits
19 at that time. Franchisees were having problems complying
20 with the sales tax rules, that it was necessary to have a
21 study group -- for lack of a -- an industry group meet
22 with the BOE, that the BOE recognized the problem and
23 agreed that for these audits of franchisees, of Subway, in
24 Orange County and the L.A. County, which it's all of the
25 franchises that Mr. Beri had, they would be in these

1 percentages.

2 Now, Exhibit 10, page -- well, it's 91. It's
3 also included in 73. This is the one I had to change the
4 column because the date on the letter was wrong. I
5 apologize. This gives you what we believe to be the
6 audited taxable sales as collect -- excuse me --
7 calculated by us. Not that much different from what the
8 ISOB says it was, by the way. So we're not going to argue
9 whether our numbers are correct or their numbers are
10 correct. It's clear ISOB has admitted that these
11 percentages exist of taxable sales and what the changes
12 are for proposed taxable sales. And that is really what
13 we had expected.

14 Now, I should add as a kind of explanation, the
15 CDTFA does not impose a fraud penalty for the second
16 quarter for 2010, nor does it say that any tax --
17 additional taxes owed for the second, third, and fourth
18 quarter of 2010. All of the alterations, changes are in
19 the first quarter of 2010. Now, this is a case where the
20 type of liability has to do with solely the taxable
21 percentage. It's not a gross income case. It's -- and
22 that's important.

23 It's not something that he was taking money out
24 of -- although, the CDTFA would like to say it -- taking
25 money out of the till. He wasn't taking money out of the

1 till. Ms. Devita said that. In fact, the money that goes
2 into the bank accounts are deposited by the actual
3 managers of each franchise, and that's what Ms. Devita
4 said. So the money goes in and the -- and then it,
5 obviously, is recorded as a deposit.

6 One of the arguments I had with the CDTFA is
7 why -- why didn't you look at the bank statements? Why
8 didn't you do the extra little mile here? Because as far
9 as I know there's nothing that has been produced in this
10 case that's new as far as evidence, real evidence, not
11 summaries, not opinions since those Memorandum of
12 Interview in April and May of 2014? Nothing. So they
13 could have had time to analyze the bank statements. What
14 would they have found? They should have found millions
15 and millions of dollars. Because according to CDTFA,
16 there's millions and millions of dollars that was not
17 reported, not turned over to the CDTFA, and should have
18 been in the bank account.

19 If the money is deposited by the manager, the
20 manager is responsible for the control sheets as well, and
21 submitting those to the CDTFA -- excuse me -- to the
22 corporate office of -- the Beri's corporate office. You
23 would think that a bank deposits analysis -- easiest thing
24 to do in the world is a bank deposits analysis. The
25 documents are bank statements. They're authenticated.

1 You'll look at them. You come up with information
2 concerning gross income.

3 Now, when the CDTFA, I take it, didn't like the
4 result from the criminal investigation being denied, it
5 gave information to the IRS, which made -- had it start an
6 audit, an income tax audit for the years 2008 and 2009. I
7 direct you to Exhibit 7 in regard to that, and that's
8 page 87. Going back to my original statement that there
9 was no -- nothing more than an argument about what
10 percentage taxable sales would be of total gross sales, I
11 point you to the results of that audit, which are at
12 page 68.

13 In the 4549 -- I don't know how much you're
14 familiar were the 4549. That's what's called the Revenue
15 Agent's report, income tax examination changes. You'll
16 see there is a balance owed of about \$12,000. Far less
17 than CDTFA would have you believe for 2008. But for 2009,
18 there is an overpayment of \$13,000. So that's hardly
19 numbers that would indicate that there was a -- an
20 underreporting of gross income. This is not that kind of
21 case. And it makes all the more important how the CDTFA
22 distorted the percentages of taxable sales in its reports
23 in going forward.

24 I kind of said earlier in my objection to some of
25 the evidence that the CDTFA kind of rubber stamped its way

1 up the chain to the point we're here. And Exhibit 14 is
2 kind of -- what I -- why I included it. And this was
3 presented to me during the appeal process. The appeals
4 officer actually asked the CDTFA to present it -- this
5 information. And they're saying in the CDTFA -- excuse me
6 the CDTFA is saying that the exhibits that it relied upon,
7 of course, were the -- I take the WISRs. I don't know if
8 this was even dealt with. This was in relation to a
9 specific question, so it wouldn't have necessarily
10 included WISR information.

11 But it said that they relied upon Memorandum of
12 Interview from Lydia Devita, Komal Joshi, Andrea Montoya,
13 and Jeannine Mayo. Of these, Komal Joshi's was not
14 presented. We presented her declaration. Andrea
15 Montoya's was presented, and I again direct you to my
16 additional brief where I discuss her. Jeannine Moya --
17 Mayo -- I'm sorry -- was not -- M-a-y-o -- I'm sorry --
18 was not presented. Lydia Devita is not part of the
19 exhibits that the CDTFA has listed. So please recognize
20 that, although, they relied upon them, they're not relying
21 upon them anymore and for obvious reasons.

22 They just don't prove their case of fraud. Fraud
23 requires clear and convincing evidence. It requires --
24 I'll -- excuse me. Oh, here. Sorry. I just wanted to
25 get the exact wording correct.

1 JUDGE GEARY: While you're doing that, I just
2 want to give you a heads up. You're about 50 percent
3 through your time.

4 MR. BARISH: Okay. I'm sure I'll come within the
5 hour then, Your Honor.

6 Here's -- I took this from the, I think, the
7 Audit Manual for -- yeah. It's under Invasion -- Invasion
8 Penalties 0509.00. Yeah. It's the Audit Manual
9 Chapter 5. This is what the CDTFA says. Clear and
10 convincing evidence requires evidence so clear as to leave
11 no substantial doubt as to the truth of the assertion of
12 fraud. That is there's a high probability that assertion
13 of fraud is true. A taxpayer's intent to evade the taxes
14 is the key element to proving fraud.

15 Then it says later, in all cases where a fraud
16 penalty is recommended, the District Administrator must
17 submit evidence of a substantial nature that the taxpayer
18 knowingly committed specific acts with the intention of
19 defrauding the State of tax which was legally do. Again,
20 specific acts. There are no specific acts mentioned here.
21 We know that Mr. Beri, who is the alleged fraudulent
22 person, did not sign tax returns, was really not that
23 involved in the bookkeeping.

24 He did review the sales tax returns before they
25 went out but, you know, that could be a precursory review

1 because he required -- excuse me. He had other people
2 prepare the actual tax returns from records that came from
3 the managers. Now, the managers we know could have very
4 well been embezzling. It's hard to imagine they would
5 embezzle this amount of money. But I did conclude as
6 one -- I should say an exhibit, Exhibit 11, which are
7 examples of theft cases. These are all that Mr. Beri
8 could find. It's been a long time.

9 As you know in 2010 that there were items
10 occurring. And these are fairly substantial, close to
11 \$100,000 of theft. So I'm afraid Mr. Beri wasn't the best
12 of businesspeople, and he should have looked over his
13 establishment and his business better. Maybe perhaps he
14 wouldn't be in bankruptcy at this point. I should not say
15 he, but the entities wouldn't be in bankruptcy.

16 If you don't mind, I just want to check on -- if
17 I mentioned something that I wanted to mention.

18 Oh, yes. I did want to include a little talk
19 about the supposed double set of books that they call a
20 double set of books, which are not double set of books.
21 They have made an exhibit certain control sheets. These
22 control sheets are for a period in 2007. I think it's
23 three quarters, maybe two quarters, in the last part of
24 2007. There are, I guess, 12 of them that they say are
25 double sets. And they have previously submitted documents

1 that show that -- well, let me describe them.

2 As understand it, one document is I WISR from --
3 that was received from DAI. One was a control sheet that
4 supposedly was obtained during the search warrant from one
5 of the computers. We don't know which one, or whose
6 computer it was, or that whether Mr. Beri used that
7 computer. And earlier they actually had a third document,
8 and they're using it for the purpose of saying that this
9 is a document that was somehow integral in underreporting
10 sales tax.

11 The WISRs are for approximately \$11,000 of tax.
12 The control sheet that they refer to and as part of the
13 exhibits is for \$9,000. So there's a disparity. Of
14 course if you believe a WISR, it's about a \$3,000
15 disparity. But there's a second control sheet they gave
16 me earlier that was for \$12,000 for that same period. And
17 it's the period ending -- I think it's November 13th of
18 2007. That's -- that's one of them I just picked up.

19 So -- and that particular control sheet is for
20 more money than it's reporting on the WISR. I'm not sure
21 where they got that one from, or they think that makes it
22 a triple set of books but that -- first of all, when you
23 have books and you say there's a double set of books, it's
24 the same document, not a different document. You don't
25 call it a double set of books if it is a WISR versus a

1 control sheet. They're two different documents.

2 So I -- I guess that's just the terminology that
3 I object to of calling it a double set of books. But in
4 addition, I question whether this had anything to do with
5 preparation of tax returns because there are three of
6 them. There's the WISR, the control sheet, and the second
7 control sheet that CDTFA produced. I'm not sorry. I had
8 the cite for that. I can't find it. It's in the 2,700s,
9 but you -- it's in their exhibits, and it's for that
10 period. So there's no double set of books.

11 And when Ms. Montoya said that though, she was
12 asked to change to make it so it's within \$500 of gross
13 sales. I don't know what that means actually, and
14 there's -- first of all, she wasn't there in 2007. So it
15 can't relate to these documents. She says she was there
16 in 2009, 2010. She doesn't remember exactly when. So we
17 have a Memorandum of Interview, which is really lacking in
18 any concrete information that would lead you to believe
19 that Mr. Beri was fraudulent.

20 I guess that's the extent of my argument for
21 this. I think I've come within 45 minutes at least.

22 JUDGE GEARY: Thank you, Mr. Barish.

23 Let me just make sure that our Stenographer is
24 doing okay.

25 All right. And I believe, Mr. Faucher, you said

1 you had about 15 minutes of argument?

2 MR. FAUCHER: Yes. I'm not sure I'll even take
3 that much time.

4 JUDGE GEARY: All right. You may proceed.

5 MR. FAUCHER: All right. Thank you.

6

7 PRESENTATION

8 MR. FAUCHER: The CDTFA is trying to assert fraud
9 against these entities, and I think that the evidence that
10 Ms. Kapila provided that she had no knowledge of
11 whatsoever was going on in the business operations of
12 these Subway restaurants shows that she for herself could
13 not have had any kind of fraudulent intent because she had
14 no -- she had nothing to do with this whatsoever. This is
15 something where, you know, my entire argument here is that
16 she had nothing to do with these businesses and that the
17 liabilities for any alleged unpaid sales taxes should not
18 be falling on her.

19 And fraud, as Mr. Barish explained at length,
20 requires a certain intent, and there's just no way to show
21 any kind of intent on the part of Vandana Kapila to
22 defraud the CDTFA with regard to the sales taxes. So
23 that's really the extent of my argument.

24 JUDGE GEARY: Thank you, Mr. Faucher.

25 Mr. Faucher, you're familiar with innocent spouse relief

1 and things like that?

2 MR. FAUCHER: I am, and we are also pursuing that
3 avenue as well.

4 JUDGE GEARY: All right. Thank you.

5 MR. FAUCHER: This -- like I said, this is belt
6 and suspenders. We're trying to be redundant.

7 JUDGE GEARY: Understood. Let me ask my
8 colleagues if they have any questions for Mr. Barish
9 before we move to the next phase.

10 Judge Tay?

11 JUDGE TAY: No questions at this time. Thank
12 you.

13 JUDGE GEARY: Judge Lambert?

14 JUDGE LAMBERT: No questions at this time.
15 Thanks.

16 JUDGE GEARY: All right. Ms. Paley, you
17 indicated that it would be about 30 minutes. I'll once
18 again check with my Stenographer.

19 Can we go another 30 minutes without a break?

20 THE STENOGRAPHER: May we take a five-minute
21 break?

22 JUDGE GEARY: Let's take a break. Rather than
23 interrupt Ms. Paley's argument, let's take a five-minute
24 recess. I have 11:17. Let's try to come back at 11:22,
25 roughly. And make sure your mics are off when you step

1 away from your seats, and we will reconvene here in five
2 minutes.

3 (There is a pause in the proceedings.)

4 JUDGE GEARY: Let's go back on the record,
5 please.

6 Before I allow Respondent to begin its argument,
7 I have a couple of questions for Mr. Barish I wanted to
8 get through.

9 Mr. Barish, did you say that there were
10 periods -- reporting periods, quarters for which the
11 Respondent has conceded there was no fraud? Did you say
12 that?

13 MR. BARISH: Yeah. There was one -- there was
14 one quarter. Second quarter of 2010, I think.

15 JUDGE GEARY: Okay. I think you may have
16 indicated first quarter of 2010, but I'll ask Ms. Paley to
17 address that in her argument. And you also, in that same
18 discussion, you said that there were also other quarters
19 and maybe you said for which there was no liability. Is
20 that what you --

21 MR. BARISH: Yeah. I believe that they had no --

22 JUDGE TAY: I'm sorry.

23 MR. BARISH: -- liability for the second, third,
24 and fourth quarter of 2010.

25 JUDGE GEARY: Hold on.

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Judge?

JUDGE TAY: Mr. Barish, would you mind turning on your microphone.

MR. BARISH: Oh, I'm sorry.

JUDGE GEARY: Sorry. I was not aware of that.

MR. BARISH: I'm sorry.

JUDGE GEARY: Pull it nice and close to you.

All right. Then I'll ask the Department to address that after in their closing, in their argument. The only other question I had to deal with the second control sheet that you made reference to --

MR. BARISH: Right.

JUDGE GEARY: -- in your argument. You did say that your belief is that document is in our record --

MR. BARISH: Yes.

JUDGE GEARY: -- and has been admitted?

MR. BARISH: Yes.

JUDGE GEARY: All right. Those are my only questions. Thank you.

MR. BARISH: If you allow me, when I get back to my office, I have that page number in my office, and I can send it to you and everyone by email, you know, like through the evidence portal.

JUDGE GEARY: Probably not -- I think we'll find it.

1 MR. BARISH: Okay.

2 JUDGE GEARY: I made a note of it. I'll be able
3 to find it.

4 MR. BARISH: Okay.

5 JUDGE GEARY: All right. Those are the only
6 questions that I had. Let's see. It's 11:26.

7 Ms. Paley, you may begin when you are ready.

8 MS. PALEY: Thank you.

9

10 PRESENTATION

11 MS. PALEY: The three Appellants in this hearing,
12 Taste America Food Groups Incorporated, Partnership of
13 Aman Beri and Vandana Beri, and the Ava Beri Restaurants
14 Group Incorporated, or ABRG, owned and operated Subway
15 franchises in Los Angeles County. Aman Beri and Vandana
16 Beri were the corporate officers and/or owners or
17 partnerships to all three legal entities, which I will
18 refer to collectively as Appellants.

19 Per the Subway Franchise agreements with Doctors
20 Associates, Inc., or DAI, Appellant utilized a specified
21 point of sale or POS system. The POS system allowed for
22 the compilation of sales information, including
23 itemization of the types of food sold, number of units
24 sold, and the amount of tax reimbursement collected. This
25 information was compiled into weekly reports called Weekly

1 Inventory and Sales Reports, WISRs, and transmitted weekly
2 to DAI. The WISRs for Taste America are at Exhibit H,
3 Partnership at its Exhibit H, and for ABRG, Exhibits K, L,
4 and M for the different liability periods.

5 The crux of the matter for these cases is whether
6 the Department has proven fraud or intent to evade the
7 Sales and Use Tax Law by clear and convincing evidence.
8 The timeliness of all but one of the Notices of
9 Determination, or, NODs, is contingent on finding the
10 deficiencies were due to fraud or intent to evade the
11 payment of tax. The NOD to Taste America is at its
12 Exhibit D, for Partnership, Exhibit C, and ABRG, the NODs
13 is Exhibit C.

14 Pursuant to Revenue & Taxation Code Section 6487,
15 the Statute of Limitations for NOD is generally three
16 years. There's an exception, however, in the case of
17 fraud. There is no statute of limitations in case of
18 fraud. If CDTFA is not satisfied with the amount of tax
19 reported on a person's returns, it may compute and
20 determine the tax required to be paid on the basis of any
21 information within CDTFA's possession or that it may come
22 into its possession, Revenue & Taxation Code Section 6481.

23 It is retailer's responsibility to maintain and
24 make available for examination on request all records
25 necessary to determine the correct tax liability,

1 including bills, receipts, invoices, or other documents of
2 original entry supporting the entries in the books of
3 account, Revenue & Taxation Code Sections 7053, 7054, and
4 Regulation 1698 subsection(b) (1). The Department
5 initially audited ABRG and discovered that ABRG had
6 significantly underreported the amount of tax
7 reimbursement collected.

8 The Department timely issued ABRG's first NOD in
9 2010, Exhibit C-2, and also broadened the scope of the
10 investigation to include the related entities. In 2011,
11 Investigations and CHP executed lawful search warrants
12 following findings of probable cause to believe that
13 Appellants had committed felony tax evasion. As a result
14 of the search warrants, the Department obtained the WISRs
15 for all three entities. The Department used those WISRs
16 to compute the audit deficiencies because they were the
17 most accurate documentation of Appellants' sales, since
18 the WISRs are a contemporaneous reports of Appellants' POS
19 system sales information, and they were sent and preserved
20 near in time to an independent party.

21 As noticed in additional briefing, subsequently,
22 a cell phone examination report lawfully obtained pursuant
23 to search warrants revealed Mr. Aman Beri had coordinated
24 via text messages to have employees bring in additional
25 individuals to act as customers and purchase nontaxable

1 items to corrupt results of an audit test. It was also
2 found that Appellants maintained a double set of books.
3 The Department's additional briefing in this appeal
4 contained examples of duplicate control sheets,
5 Exhibit AA, Duplicate Sales Reports, Exhibit BB, an
6 interview with Andrea Montoya, an employee who left her
7 job because she wasn't comfortable changing the numbers
8 and manipulating the records at the behest and training of
9 Aman Beri, Exhibit CC.

10 The evasion penalty memorandums for each entity
11 are attached to the appeals decision, Exhibits A-2, and
12 spell out Appellants' knowledge, intent, and acts that
13 satisfy the elements of fraud or intent to evade payment
14 of the use tax collected. The evidence clearly and
15 convincingly shows that Appellants had the requisite
16 knowledge of the Sales and Use Tax Law based upon the many
17 years in business, as well as guidance and information
18 provided when seller's permits were repeatedly obtained.

19 Since 2001, Mr. Beri had an ownership interest in
20 over 19 Subways, 15 for Ms. Beri. Appellants
21 intentionally evaded payment of tax, for they were aware
22 of the amount of tax collected but chose to pay a
23 different and significantly lower amount. Appellants have
24 access to and knowledge of the correct amounts from the
25 POS records but repeatedly reported a fraction of sales

1 tax collected. Combined, Appellants collected a
2 noticeable and significant amount in sales tax
3 reimbursement, over \$1.2 million, and kept it for their
4 own use instead of remitting it to the State as required
5 by law.

6 Fraud, as held by *Bradford versus Commissioner* in
7 1986, is the intentional wrongdoing on the part of the
8 taxpayer with the specific intent to avoid a tax known to
9 be owing. Fraud must be established by clear and
10 convincing evidence. Fraud may not be presumed, but it's
11 rare to find direct evidence that fraud has occurred. And
12 so it's often necessary to make the determination based on
13 circumstantial evidence.

14 As cited in the OTA precedential Opinion, *Appeal*
15 *of ISIF Madfish Incorporated*, in 2019, badges of fraud may
16 include understatement of income, inadequate records,
17 failure to file tax returns, implausible or inconsistent
18 explanations of behavior, concealment of assets, failure
19 to cooperate with tax authorities, lack of credibility in
20 the taxpayer's testimony, falsified records, especially,
21 when, more than one set of records was maintained, a
22 substantial discrepancy between recorded and reported
23 amounts that cannot be explained, and tax or tax
24 reimbursement properly charged evidencing knowledge of the
25 requirements of the law but not reported.

1 As stated in Madfish, a finding that any part of
2 the deficiency determination was due to fraud is
3 sufficient to suspend the statute of limitations to issue
4 a deficiency determination as to the entire reporting
5 period in which any part of the deficiency was due to
6 fraud, Madfish, page 9.

7 Revenue & Taxation Code Section 6485 imposes a
8 25 percent penalty if any part of a deficiency
9 determination was due to fraud or intent to evade the law
10 or authorized rules or regulations. The evidence before
11 us establishes that all three Appellants knowingly and
12 consistently understated their taxable sales and kept for
13 their own use over \$1.2 million in sales tax they
14 collected as discussed in the field billing orders. For
15 Taste America, that is found at Exhibit C, for
16 Partnership, Exhibit D, and for ABRG at its Exhibit E.

17 Comparison of the WISRs obtained from the
18 franchiser showed consistently higher sales and tax than
19 reported to the Department, then BOE. The audit work
20 papers for Taste America are found at Exhibit G, for
21 Partnership at Exhibit G, and the audit work papers for
22 ABRG are Exhibits H, I, and J. For Taste America from
23 March 31st, 2004, to December 31st, 2010, they
24 underreported close to \$4.9 million in taxable sales. The
25 percentage of error for '04 to '09, prior to being

1 notified of the sales and use tax audit, was over
2 250 percent. For 2010, after being notified of the audit,
3 the percentage error went down to 5.76 percent.

4 For Partnership, the liability period of one
5 year, calendar year 2003, since they subsequently closed
6 out and reorganized under ABRG, they underreported
7 approximately \$820,000 in taxable measure, a 322 percent
8 error rate for that year. For ABRG's three periods, first
9 quarter '04 to second quarter '05, understated taxable
10 measure was over \$2.3 million, a 314 percent error rate.
11 For third quarter '05 through 2009, understated taxable
12 measure was over \$6.7 million, an error rate of
13 131.69 percent.

14 First quarter 2010, the quarter in which
15 Appellant was notified of the audit, had an understated
16 taxable measure of approximately \$173,000, a 30.67 percent
17 error rate. The rest of 2010 had a zero percent error
18 rate. Appellant intentionally understated the tax
19 liability so large and consistently, that there was no
20 other explanation besides fraud. In addition, we have the
21 indicators of double sets of books and efforts to corrupt
22 audit tests by instructing employees to have people by
23 nontaxable items during the test periods.

24 While Appellants were not themselves prosecuted
25 for criminal fraud, which carries a different statute of

1 limitations, the higher burden of proof beyond a
2 reasonable doubt and is subject to the discretion of the
3 prosecuting offices to file charges, in position of civil
4 penalties does not hinge upon that factor. We have
5 demonstrated that the deficiency determinations were
6 satisfactorily shown to be from fraud or an intent to
7 evade the Sales and Use Tax Law by clear and convincing
8 evidence for the applicable liability periods.

9 Additionally, Revenue & Taxation Code
10 Section 6597 applies a 40 percent penalty for knowingly
11 collecting sales tax reimbursement and not remitting it to
12 the Department when the liability for unremitted tax
13 reimbursement averages \$1,000 or more a month for the
14 reporting period and exceeds 5 percent of the total tax
15 collected. As demonstrated in the evasion penalty memos
16 at Exhibit A-2 for all three entities and the audit work
17 papers, the requirements for imposition of the 40 percent
18 penalty are met.

19 The evidence shows that the 40 percent penalty
20 was properly imposed on Appellants for their failure to
21 timely remit sales tax reimbursement collected from
22 customers. 40 percent penalties may be relieved pursuant
23 to Revenue & Taxation Code 6597 subdivision (a)(2)(b), if
24 the failure to make a timely remittance of sales tax
25 reimbursement is due to a reasonable cause or

1 circumstances beyond the person's control and occurred
2 regardless of the person's exercise of ordinary care and
3 in the absence of willful neglect.

4 Revenue & Taxation Code Section 6597 subdivisions
5 (b) (1) (a) through (f) enumerates six examples of
6 reasonable cause or circumstances beyond that person's
7 control, none of which apply here. There's no evidence of
8 a credible explanation for Appellants' failure to comply
9 with the sales and use tax reporting requirements. No
10 showing of reasonable cause or circumstances beyond their
11 control. Also, based on the evidentiary record and law,
12 there are no adjustments warranted. The audited amount of
13 the tax due is based on what the WISRs show -- is based
14 upon what the WISRs show that Appellant collected in tax
15 reimbursement from its customers.

16 The measures are reasonable, grounded in fact,
17 and rest upon the most reliable data available, the WISRs.
18 And Appellant has not met its burden of proof to show that
19 the deficiency measures are not valid. As held in the OTA
20 precedential opinion in the Appeal of TFCG Incorporated,
21 the Department has a minimal and initial burden of showing
22 that its determination was reasonable and rational, and
23 the burden of proof then rests with Appellant to establish
24 that a different result is warranted. Riley B's
25 Incorporated versus State Board of Equalization,

1 unsupported assertions are not sufficient to satisfy
2 Appellants' burden of proof.

3 And finally as indicated before the hearing, on
4 October 25th Appellant submitted Form 735, Exhibit 13,
5 requesting relief from Revenue & Taxation Code 6565, 10
6 percent finality penalty for ABRG, and the Department
7 agrees to relieve the finality penalty contingent upon
8 payment in full.

9 As for Vandana Beri's liability, Aman Beri and
10 Vandana Beri obtained a seller's permit as married
11 co-owners. The seller's permit had a start date of
12 February 21st, 2001, and was closed out on December 31st,
13 2003, when they reorganized its store locations under the
14 Ava Beri -- excuse me -- under ABRG. Appellants'
15 restructuring of the ownership of the stores operating
16 under the permit demonstrates further that Appellants were
17 aware that they held a seller's permit as married
18 co-owners. The Department's practice is to bill a married
19 co-ownership as a partnership. Married co-owners are
20 jointly and separately liable for the tax liabilities of
21 the business.

22 Further, as the person holding a seller's permit
23 as married co-owners of the business, per Regulation
24 1699(f) (2), Vandana Beri is liable for any taxes,
25 interest, and penalties occurred by the business, and it

1 was correct for the Department to bill her accordingly.

2 We submit to the Panel that fraud has been
3 demonstrated by clear and convincing evidence, that no
4 adjustments are warranted, and that the 25 and 40 percent
5 penalties should be upheld.

6 Thank you.

7 JUDGE GEARY: Thank you, Ms. Paley. I may have a
8 couple of questions for you. The Appellants' exhibits
9 include letters, memos, something like that between a
10 group of owners of restaurants, and I believe it was the
11 Board of Equalization that was a party of those
12 communications. Does any of Respondent's evidence relate
13 to those communications?

14 MR. SMITH: No. This audit was just based off of
15 what the WISRs show the Appellants collected in tax
16 reimbursement from their customers.

17 JUDGE GEARY: Okay. So none of the Exhibits,
18 16,000-odd pages of exhibits that have been admitted at
19 Respondent's request have anything to do with those
20 communications between this owner's group and BOE?

21 MR. SMITH: Correct.

22 JUDGE GEARY: Okay. Ms. Paley, in order to avoid
23 the bar of the statute of limitations, some fraud must be
24 shown in every reporting period. And is it the
25 Respondent's position and argument that the evidence

1 that's been admitted establishes fraud in every reporting
2 period that would otherwise be barred by the statute of
3 limitations?

4 MS. PALEY: Correct.

5 JUDGE GEARY: Okay. Those are the only questions
6 that I had for Mr. Barish's benefit.

7 And for the benefit perhaps for viewers on
8 YouTube, you are not testifying, that's why I don't open
9 up questioning of you to the representatives of the
10 Appellants. But I on the Panel -- I and my fellow panel
11 members do get to ask questions of the representatives.

12 Judge Tay, do you have any questions for either
13 of the representatives?

14 JUDGE TAY: No, not at this time.

15 JUDGE GEARY: Thank you.

16 Judge Lambert, any questions?

17 JUDGE LAMBERT: No questions. Thanks.

18 JUDGE GEARY: All right. Mr. Barish, I said I'd
19 give you up to 15 minutes if you want to give some
20 concluding remarks, a rebuttal, and remarks. And I will
21 also offer Mr. Faucher, when you've completed your closing
22 remarks, an opportunity -- a very brief opportunity to
23 make some closing remarks. You may proceed when you're
24 ready.

25 MR. BARISH: Yes.

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1 time I want to show to the Court the -- Ms. Paley said
2 that it's reasonable and rational basis. There's no
3 reasonable and rational basis for this case against either
4 of the Beris, and this is an example of how overstretched
5 the present -- excuse me -- the assertions are.

6 ISOB started this. It was at BOE. The
7 information all collected prepared and transmitted. I --
8 I surmise that the calculations are correct based on what
9 has been presented. But they may not be. We don't know
10 that because the calculations weren't done by any present
11 employee of CDTFA. Well, I take that back. They were
12 done by people who I don't know, whether they are
13 employees now. But they weren't involved in the ultimate
14 determination. It's all fine and dandy to cite case law
15 and criteria.

16 I'm -- I'm fully aware of the badges of fraud.
17 It's a -- it really comes from Spies versus United States,
18 which was a United States Supreme Court decision of what
19 are the badges of fraud. There was no concealment here.
20 I daresay there was cooperation during, not only the first
21 audit, but the second audit, the third audit, until this
22 became criminal, and then the lines were drawn as you
23 might expect. That's rational to contest the criminality
24 for -- for this action.

25 So I say that, using Ms. Paley's words, there is

1 no reasonable or rational basis for this. I would -- I --
2 you know, let's look at what's missing here. We don't
3 have witnesses that explain what we're saying. It's been
4 well known our position since I don't know how many years.
5 What caused this -- this problem? The Bollettieri email
6 was well known, discussed, and basically discounted. They
7 just discounted it. Anything that was present was
8 discounted.

9 When it came to the Memorandum of Interview, some
10 of them are missing. There was no bank -- bank statement
11 analysis to show where this -- I'm not sure if the total
12 amount they say is taxes, \$1.2 million, are just from one
13 entity. But whatever it is, it's a lot of money. It
14 should have been in the bank accounts because the bank
15 accounts had all the money that was collected by the
16 managers, deposited by the managers, and accounted for by
17 the managers.

18 So, you know, what else is missing? I guess a
19 rational basis for pursuing this while knowing that there
20 was problems. An organization, a fairly big organization,
21 DAI is the franchisor for Subway. I read in the Wall
22 Street Journal just recently -- partly because of this
23 case, but I read the journal sometimes -- that DAI was
24 selling his interest in Subway for something like
25 \$6 billion. So it's a big company. It's a substantial

1 company, and it admits that some of its software was not
2 correct and that things were missing.

3 And the CDTFA also has, as part of its
4 presentation, weeks when WISRs were not provided.
5 Documents were missing. In some instances for some
6 stores, it was fairly significant, and then they
7 extrapolated. Which is they love to do that because then
8 they get a great percentage, and then they make it look
9 bad. So I submit this is not a case where fraud has been
10 proven by clear and convincing evidence.

11 That the reason -- the importance of the criminal
12 case -- I'm not trying to say that we're dealing with the
13 same burden of proof. It's not a beyond a reasonable
14 doubt, but it's still why was the Department of -- excuse
15 me -- the Department of Justice requesting additional
16 information, was supplied that information, couldn't go
17 forward with the case. I was informed after all these
18 Memorandum of Interview and after the California
19 Department of Justice asked for it from the CDTFA.

20 So CDTFA, you know -- again, ISOB, they are
21 advocates. And I think they have over advocated in this
22 case. It got picked up, never really looked at with
23 sagacity and as consequence that this case is really a
24 travesty. With that in mind, I think I've ended my
25 argument, and I'm ready for any questions.

1 JUDGE GEARY: Thank you, Mr. Barber.
2 Judge Lambert, any questions for Mr. Barish?
3 JUDGE LAMBERT: No questions. Thanks.
4 JUDGE GEARY: Judge Tay?
5 JUDGE TAY: No. I think I have all my questions
6 answered. Thank you.
7 JUDGE GEARY: Mr. Faucher, would you like to
8 speak for a few minutes or --
9 MR. FAUCHER: Sure.

10

11 CLOSING STATEMENT

12 MR. FAUCHER: So Ms. Kapila would love to be able
13 to join and buttress Mr. Barish's very able defense in
14 this matter. But, of, course, because she has, you know,
15 pretty credibly testified, she has absolutely no
16 involvement with this business. You know, if you --
17 there's no -- there's no way to pin fraud on her because
18 she -- she had no intent because she had nothing to do
19 with the whole business. So she had no knowledge of what
20 was going on. She had no involvement in it. Fraud cannot
21 stick to her because of this. There could be no intent.

22 So -- and with that, I close.

23 JUDGE GEARY: Thank you.

24 All right. I take the matter is submitted by the
25 parties. It is 11:54 a.m., and the record is now closed

1 in these consolidated appeals.

2 Thank you everybody for your participation.

3 In the coming weeks the Panel will consider the
4 matter, and OTA will send a written opinion to the parties
5 within 100 days.

6 This hearing is now concluded. And this also
7 concludes OTA's hearing calendar for today.

8 Thank you, everybody.

9 (Proceedings adjourned at 11:55 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was
taken before me at the time and place set forth, that the
testimony and proceedings were reported stenographically
by me and later transcribed by computer-aided
transcription under my direction and supervision, that the
foregoing is a true record of the testimony and
proceedings taken at that time.

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

I have hereunto subscribed my name this 4th day
of December, 2023.

ERNALYN M. ALONZO
HEARING REPORTER