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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
A. ABAYA, ) OTA NO. 230112414  
 )  
 )  
 ) APPELLANT.  
 )  
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 )  
\_\_\_\_\_ )

Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 1:55 p.m. and concluding at 4:23 p.m. on  
Wednesday, August 14, 2024, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW WONG

Panel Members: ALJ NATASHA RALSTON  
ALJ MICHAEL GEARY

For the Appellant: A. ABAYA  
AHMAD ERIKAT

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
NALAN SAMARAWICKREMA  
CHRISTOPHER BROOKS  
JASON PARKER

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I N D E X

E X H I B I T S

(Department's Exhibits A-I were received into evidence at page 16.)

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California; Wednesday, August 14, 2024

1:55 p.m.

JUDGE WONG: Let us go on the record.

This is the Appeal of Abaya before the Office of Tax Appeals, OTA Case Number 230112414. Today is Wednesday, August 14th, 2024, and the time is 1:55 p.m. We're holding this hearing electronically via Zoom. I'm lead Administrative Law Judge Andrew Wong, and with me today are Judges Natasha Ralston and Michael Geary.

Persons representing the Appellant, Mr. Abaya, can you please introduce yourselves for the record.

You're muted, Mr. Abaya.

MR. ABAYA: Hello. My name is Auny. Can you hear me better now?

JUDGE WONG: Yes.

MR. ABAYA: Okay. My name is Auny. I am the owner of Jerusalem Organic Kitchen.

JUDGE WONG: Okay. Thank you. Is it okay if I -- your last name is Abaya; is that correct?

MR. ABAYA: Yeah. A-b-a-y-a.

JUDGE WONG: Thank you. I'll just refer to you as Mr. Abaya, if that's okay.

MR. ABAYA: Thank you, sir.

JUDGE WONG: Okay. And Mr. Erikat, could you

1 please introduce yourself for the record.

2 MR. ERIKAT: Yes. My name is Ahmad Erikat. I'm  
3 Auny's bookkeeper. So I took the case from previous  
4 accounting. He passed away on 2023. So right now I'm on  
5 his case working on it until right now.

6 JUDGE WONG: Okay. Thank you, Mr. Erikat.

7 And the individuals representing CDTFA, could you  
8 please introduce yourselves for the record.

9 MR. SAMARAWICKREMA: Yeah. I'm Nalan  
10 Samarawickrema, Hearing Representative for the CDTFA.

11 MR. PARKER: I'm Jason Parker, Chief of  
12 Headquarters Operations Bureau with CDTFA.

13 MR. BROOKS: Good afternoon. I'm Christopher  
14 Brooks, attorney for CDTFA.

15 JUDGE WONG: Good afternoon.

16 We are considering two issues today. Issue  
17 Number One, is whether the amount of unreported taxable  
18 sales should be further reduced; and then the second issue  
19 I have is whether Appellant was negligent.

20 Mr. Erikat, does that sound like an accurate  
21 description of the issues?

22 MR. ERIKAT: Yes. And also, maybe you can add  
23 more information about this case.

24 JUDGE WONG: You will have that chance when you  
25 make your arguments.

1 MR. ERIKAT: Okay.

2 JUDGE WONG: So we're just going over the issues  
3 right now.

4 CDTFA, does that sound like an accurate  
5 description of the issues?

6 MR. SAMARAWICKREMA: Yes, Judge.

7 JUDGE WONG: Okay. Appellant Mr. Abaya has not  
8 identified or proposed or submitted any exhibits as  
9 evidence.

10 Mr. Erikat, did you have any documents that you  
11 had --

12 MR. ERIKAT: I did. I just submitted police  
13 department reports today. And also, I submitted many  
14 receipts showing the percentage of the tax during --  
15 several times, actually, which is the previous auditor, he  
16 did not make it right. He counted 1.5 percent but --

17 JUDGE WONG: Just a second, Mr. Erikat. You have  
18 a chance to make your arguments --

19 MR. ERIKAT: Okay. Got it.

20 JUDGE WONG: -- during your time. So you just  
21 submitted today, you said --

22 MR. ERIKAT: Today, yes. I emailed it. I  
23 emailed it.

24 JUDGE WONG: You mailed it today.

25 MR. ERIKAT: I emailed it.

1 JUDGE WONG: Oh, emailed it today.

2 MR. ERIKAT: Yes.

3 JUDGE WONG: Why wasn't this submitted earlier?

4 I think we had a --

5 MR. ERIKAT: I just got it from him and --  
6 because with police report, he went to the -- to the  
7 police department. They talk many -- like a lot of time  
8 to figure out, and he just got the report recently, and he  
9 pass it to me. That's why I -- I -- we were late for  
10 submit the evidence. This was just a police department  
11 issue. They were -- were ready for the report.

12 JUDGE WONG: Okay. Two things. Could you please  
13 wait when other people -- because I think our stenographer  
14 is having a little trouble gathering --

15 MR. ERIKAT: I don't hear the other people.

16 JUDGE WONG: I mean when I'm talking, could  
17 you wait until I --

18 MR. ERIKAT: Oh, sorry.

19 JUDGE WONG: Just like right --

20 MR. ERIKAT: Oh, yes.

21 JUDGE WONG: Just like what you did right now.  
22 Don't do that, please. When I'm talking just -- when  
23 someone else is talking, just let them talk. Let them  
24 finish.

25 MR. ERIKAT: Sorry.



1 JUDGE WONG: Pause. And then if you have  
2 something to say, talk, please. Okay. Got it?

3 MR. ERIKAT: Got it.

4 JUDGE WONG: Okay. So we did have a prehearing  
5 conference. There were deadlines set. So I'm just  
6 wondering why this was submitted at the last minute.

7 MR. ABAYA: Can I say something, sir?

8 JUDGE WONG: Sure.

9 MR. ABAYA: Okay. I went to the police  
10 department almost -- since this accident happened. So I  
11 went one time, two time, three times, and unfortunately  
12 the report is not ready, not ready, not ready. So  
13 recently I went after you guys request again for the  
14 police report. Him said me, you know, it's not ready yet.  
15 And after that, I -- I give it to my new bookkeeper. I  
16 give him the receipt. It say the report is not ready.  
17 And all of a sudden him called me and him say, look, your  
18 report is ready. Come pick it up.

19 So I pick it up just recently, and I give it to  
20 the bookkeeper. So delay is not from the -- not from the  
21 bookkeeper. Delay was from the Department of Berkley. So  
22 I went like during -- during that, I went like 5, 6, 10  
23 times there to get the report. And if -- and you have two  
24 paper. I give it to the police -- from the police report  
25 immediately. One say it's not ready, and all of a sudden

1 him call me. He said, okay, come pick up your report.

2 JUDGE WONG: Okay. Thanks.

3 I will turn to CDTFA.

4 Do you have objections to these late-submitted  
5 documents?

6 MR. SAMARAWICKREMA: This is Nalan  
7 Samarawickrema. We didn't receive those documents, Judge.

8 JUDGE WONG: Okay. Mr. Erikat, when did you  
9 submit these? And I'm not sure if OTA, we have received  
10 them either.

11 MR. ERIKAT: I send it -- I emailed it just  
12 today. Today the email -- the one of the email we -- we  
13 just connect to each other from the Appeal Court, and I  
14 just respond. I send all the document just about 2 hours  
15 3 hours ago, because he give me the first time the case  
16 number, which is not enough. And when he went to the  
17 police department, he got the -- the actual report, and  
18 I -- I sent it back, that, to you guys.

19 JUDGE WONG: Okay. Mr. Erikat?

20 MR. ERIKAT: Yeah. I'm right here.

21 JUDGE WONG: Okay. So I'm not sure -- I'm not  
22 sure if OTA has received those documents either. So I'm  
23 not --

24 MR. ERIKAT: Actually, I send it to -- let me --  
25 let me tell you where I send it to. I send it to Nia

1 Vaughan, Nia dot Vaughan at OTA.

2 JUDGE WONG: Okay. Okay. Okay. You don't have  
3 to mention the email address but okay. Let us -- all  
4 right.

5 We're going to take a look and see if these  
6 documents have been received.

7 On CDTFA's side, do you know who you sent the  
8 documents to? Did you send them to a CDTFA individual or  
9 just to Nia -- Ms. Vaughan?

10 You're muted, Mr. Erikat.

11 MR. ERIKAT: Nia's email address.

12 JUDGE WONG: So you just sent it to Nia; is that  
13 right?

14 MR. ERIKAT: Yes, that's correct.

15 JUDGE WONG: Okay. We're going to take a  
16 five-minute break. I'm going to consult with my Panel,  
17 and we're going to take a look and check the inbox and see  
18 if these documents have been received, and we'll  
19 circulate, and then we'll figure out what to do with them.  
20 We'll see what CDTFA wants to do with them. So let us  
21 take a five-minute break until 2:08. Please mute  
22 yourselves and turnoff your camera, and we will be back.

23 The parties will be placed in the waiting room.

24 So we're going to put the parties in the waiting room.

25 And let's go off the record.

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(There is a pause in the proceedings.)

JUDGE WONG: Let go back on the record.

So we looked through the emails. We received some of the documents, specifically, the police report. The receipts we haven't exactly received them, but we asked Appellant to resend them. This is what the Panel is going to do. There are additional documents that we are going to request from CDTFA as well. So what we're going to do today, we're going to hold the record open after the hearing. We're going to ask the parties to submit those additional documents, and then we're also going to let them respond to each of them to object or to respond to those additional documents.

So it'll be like somewhere between 30 -- we'll give each side 30 days and 30 days. So we're not going to close the record today. Does that make sense to everyone?

Okay. Mr. Erikat, we did receive a copy of the police report. It looks like it's a photograph. Do you happen to have like a -- it's not a photo? Cause the --

MR. ERIKAT: This is -- this is only the paper he gave it to me.

JUDGE WONG: Okay. Mr. Erikat, do you have like a printer or a -- sorry. Do you have a scanner or could you make a copy of that and send it to OTA and CDTFA?

MR. ERIKAT: Only he just sent me by email this

1 copy, and I forwarded it to -- to the -- to you guys. I  
2 think he has the hard copy.

3 JUDGE WONG: Mr. Abaya, you have the hard copy?  
4 You're muted.

5 You're muted Mr. Abaya.

6 We can't hear you.

7 Still can't hear you.

8 Still muted.

9 MR. ABAYA: Can you hear me now?

10 JUDGE WONG: Yes.

11 MR. ABAYA: Oh, okay. So I get the copy from the  
12 police, the original copy. They say the cash resister is  
13 stalling, and they give it to the bookkeeper. They have  
14 the copy, and the bookkeeper have the copy. So --

15 JUDGE WONG: So Mr. Erikat has a hardcopy copy?

16 MR. ERIKAT: No.

17 MR. ABAYA: I mean, no. By email I send it to  
18 him. So the original paper what I receive from the police  
19 department was me.

20 JUDGE WONG: It looks like someone took a picture  
21 of it and that's --

22 MR. ABAYA: Yeah. Yeah. I take it a picture,  
23 and I send it to him.

24 JUDGE WONG: Do you have a scanner where you  
25 could actually scan the document and send us like a PDF of

1 it?

2 MR. ABAYA: You know, I will ask somebody do it  
3 for me, and I will do that. Send it directly to you? Or  
4 for who I'm supposed to send it?

5 JUDGE WONG: Send the document directly or a scan  
6 of the document?

7 MR. ABAYA: I will ask someone to scan it for me  
8 and send it anywhere you want, guys.

9 JUDGE WONG: Or what you could do is make a copy  
10 of it and just send us a copy of that.

11 MR. ABAYA: Okay. I will. By fax or how?

12 JUDGE WONG: You could fax it, or you can mail  
13 it.

14 MR. ABAYA: Oh, by the -- by email? I can -- I  
15 can send it to you right now.

16 JUDGE WONG: We got a picture of the document.  
17 What we want is kind of a better representation of the  
18 document, a better copy.

19 MR. ABAYA: Okay. Okay. I will do that.

20 JUDGE WONG: I will let you and Mr. Erikat figure  
21 out how to do that. Like I said, after the hearing, we'll  
22 set a deadline, 30 days. You'll have ample time. And  
23 then you'll send it in to us, along with the additional  
24 receipts that you have. And then CDTFA will have a chance  
25 to respond to those. Okay.

1           MR. ABAYA: Yeah. You know, the only reason, you  
2 know, what it bother me, three people sit there. We're  
3 working hard here, you know, in the restaurant. And this  
4 if for me, this is crazy. This is the -- I mean, that's  
5 law, but this is taxpayer go -- go away. You know, this  
6 is not right. Three people lawyer and another guy,  
7 another guy.

8           JUDGE WONG: Mr. Abaya.

9           MR. ABAYA: Yes, sir.

10          JUDGE WONG: You'll have a chance to argue your  
11 case. We're -- yes, we're trying give you as much  
12 opportunity to provide what you need and give CDTFE --  
13 also be fair to CDTFE to respond to what you're  
14 submitting. So you'll have a chance to do that.

15          MR. ABAYA: Thank you. Okay. Thank you so much.  
16 I appreciate it.

17          JUDGE WONG: Okay. Now, CDTFE, you have  
18 identified and submitted proposed Exhibits A through I as  
19 evidence. Did you have any additional documents at this  
20 time?

21          MR. SAMARAWICKREMA: This is Nalan  
22 Samarawickrema. We don't, Judge.

23          JUDGE WONG: Okay. And as I alluded to earlier,  
24 the Panel does have some requests as far as additional  
25 documents, and we'll get to that later.

1           Mr. Erikat, did you have any objections to the  
2 proposed Exhibits A through I from CDTFA?

3           MR. ERIKAT: The one I objected, the -- the  
4 report made by the auditor, which is the -- all of it  
5 doesn't make sense.

6           JUDGE WONG: Okay. You can make an argument why  
7 it doesn't make sense during your time. Do you have any  
8 objection -- okay.

9           MR. ERIKAT: No.

10          JUDGE WONG: Okay. Thank you. So -- okay.  
11 We're going to admit CDTFA's Exhibits A through I into the  
12 record as evidence.

13           (Department's Exhibits A-I were received in  
14 evidence by the Administrative Law Judge.)

15          Mr. Erikat, Mr. Abaya will be testifying today;  
16 is that correct?

17          MR. ABAYA: Yes.

18          JUDGE WONG: Okay. And, CDTFA, you have no  
19 witnesses; is that correct?

20          MR. SAMARAWICKREMA: This is Nalan  
21 Samarawickrema. We don't have any witnesses, Judge.

22          JUDGE WONG: Okay. All right. When we turn it  
23 over to Appellant for your presentation, I will swear in  
24 Mr. Abaya.

25           So it was anticipated that this oral hearing



1 would take approximately 105 minutes. Appellant has  
2 requested 60 minutes for their presentation, witness  
3 testimony, and closing argument, and CDTFA has requested  
4 30 minutes.

5 Appellant, is that correct?

6 Mr. Erikat, is that correct, 60 minutes? Okay.  
7 And you're nodding.

8 For the record, he's saying yes.

9 And then, CDTFA, 30 minutes; is that correct?

10 MR. SAMARAWICKREMA: Judge, we are requesting  
11 35 minutes.

12 JUDGE WONG: 35 minutes. Okay. I think that  
13 should be fine.

14 All right. Any final questions before we turn it  
15 over to Appellant? Hearing none. Okay. We will turn it  
16 over to Appellant. CDTFA will then have a chance to  
17 respond, and then Appellant will have the closing and  
18 rebuttal.

19 Before we turn it over to Appellant for their  
20 60 minutes, Mr. Abaya, if you could raise your right hand,  
21 I will swear you in.

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A. ABAYA,

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

JUDGE WONG: Thank you.

Mr. Erikat, turn it over to you for 60 minutes, however you want to divide that. Go ahead, please.

PRESENTATION

MR. ERIKAT: Okay. So, first of all, after I just went through the all the case, and since the auditor he came to his store, we have some points we have just discussed. We disagree with him. The first -- first point, which is the percentage, I went through all the receipts he made in his restaurant since 2018 until now. Most of the receipts it's percentage for the tip. It's between 8 to 10 percent. But when the auditor came to his restaurant, he just counted 1.51 percent from the specific day when he came to his restaurant for the whole day from 8:00 to 6:00 or to 7:00 p.m. And he just counted whatever he got on the specific date, but he didn't go through for the whole receipts since 2018 until he made the report.

This is the -- the first point. That's mean told me the percentage he made is incorrect. He should go

1 through all the receipts and take the percentage from  
2 the -- the receipt from 2018 until 2022, which is the  
3 one -- the years for auditing. But he, unfortunately, he  
4 did not do that. And I -- I need to object that and ask  
5 the -- the Court and the California Department of Tax to  
6 go through all these receipts to make sure he did it  
7 correct or not. Because, for -- for my opinion, he did  
8 not do it correctly.

9 This is the first one about -- and also, I have  
10 all the receipts. I checked some of them 7 percent, some  
11 of them 8, some of them 10 percent. So at least he had to  
12 take the average for these receipts, but he did not. He  
13 took the percentage from the same day he went to -- to his  
14 restaurant for auditing, which is unacceptable. It  
15 doesn't make any sense to me. This is for the receipts --  
16 the tips.

17 Also, he did not take the percentage for the --  
18 which is one taxable or nontaxable. So for his business,  
19 almost 45 percent of his product nontaxable. He didn't  
20 consider that. He just made his report and the percentage  
21 on the gross receipt, which is he has to take away the  
22 nontaxable product from the gross income. I'm not sure  
23 what he did exactly the right way or not, but it seems  
24 likely he did not do it the right way.

25 For the -- Abaya, he has disability before this

1 case open, and he has almost 73-percent disability, and he  
2 take medicine. He has also, heart problem. He take  
3 medicine. He go to the hospital. So when they send him  
4 the first report in 2022, it was -- oh, not the report --  
5 the bill or the statement amount was \$106,260, he got  
6 shocked. He went to the hospital for a couple of days  
7 because of this report or statement, which he -- he was  
8 like shocked and surprised for that. So that means he  
9 make, like, this report very sick for couple days, and  
10 this is also had to be considered when you guys make the  
11 decision for that.

12 For the other thing, the previous auditor when he  
13 came the first time to the store, he did many things like  
14 on -- illegally, because he made the report for not the  
15 right way. Like the first time he came he did not go,  
16 like, go through and talk to him directly and -- and do  
17 the right way. He went to the neighborhood and make the  
18 report what they made, how much they make for the day, and  
19 how many client come to the restaurant in the same  
20 neighborhood, which is unacceptable. Every store has or  
21 restaurant has different -- different rules, different --  
22 different financial situation. So he cannot go to the  
23 neighborhood to ask about the business, what's going on of  
24 the business.

25 Also he was undercover for the first day as a --

1 as a client, not as an auditor. Which is this  
2 unacceptable by the law. He should go directly to him and  
3 ask him what he want, not to come for couple days  
4 undercover and ask the -- the neighborhood and to check  
5 what's going on in the same neighborhood restaurant if  
6 they are making money or not. You cannot compare this  
7 restaurant with other the other company -- restaurant how  
8 they make money, how much they make money. This -- I  
9 don't know if he did it the right way too.

10 I think you should understand what I'm saying --  
11 what I'm trying to say for this particular point. This --  
12 what I need to do to say right now, but if Abaya he want  
13 to say something else, I know he can do it. So for me,  
14 that's it for now.

15 JUDGE WONG: Thank you, Mr. Erikat.

16 Mr. Abaya, did you want to make any statements?

17 MR. ABAYA: Yes.

18 JUDGE WONG: You're still under oath. So I just  
19 want to remind you of that, and you will be subject to  
20 cross-examination from CDTFA.

21 MR. ABAYA: Thank you, sir.

22

23 WITNESS TESTIMONY

24 MR. ABAYA: You know, how -- how all this thing  
25 happen, basically. So one day this auditor he come, you

1 know, to front of my -- my customer. And my wife, she  
2 told me some guy he go back and forth, back and forth, and  
3 they don't know what's up with him. I said maybe. I  
4 don't know. I said maybe. And after the next day he  
5 come. And after that, he come buy something again and go  
6 back. And after that we find out he's a auditor.

7 So we -- my bookkeeper he fight -- you know, God  
8 bless his soul. He fight a lot for this case. And  
9 what -- what I do -- what I do the same what I do with  
10 this bookkeeper. End of the month I give him all the  
11 receipt, what -- what taxable, what not taxable, and what  
12 we want, what we sell, and he take care of it. And when--  
13 when the auditor come, he tell me, okay. Don't worry  
14 about it. You -- you pay what you're supposed to pay. I  
15 said -- I said, okay. I don't want any problem. He said,  
16 no, you don't have no problem. I have -- I am --  
17 absolutely, you don't owe him nothing.

18 We went -- we went for two hearing, and we  
19 argument on this and that, and this and that. And the  
20 guy -- the guy he have cancer, basically. No, he don't  
21 figure it out as cancer yet. But during the hearing he  
22 take too much, you know, painkiller. But those guys still  
23 [PROFANITY], and he told me you don't owe him nothing. I  
24 said -- I said, this is the paper. This what -- what we  
25 pay. This what we owe. I said okay. So he -- he tell me

1 I have all the paper. I have everything, and we'll take  
2 care of it. Don't worry about. I said okay.

3 The first hearing, second hearing, okay. Him  
4 decide, you know, my -- God bless his soul -- my  
5 bookkeeper -- my old bookkeeper and the auditor to come to  
6 the store, you know, to sit in the store, how long he  
7 work. So in the morning he come early in the morning. He  
8 comes sit all day, and after each customer, check the  
9 receipt and check what he -- what taxable, what not  
10 taxable. End of the day -- end of the day when he see the  
11 result, it's like 55 or 44 percent. I don't remember  
12 exactly what it was in those days. And I ask him. I  
13 said, you see in your eye, you know, this is what we sell.

14 He said -- he said, you know, I see it, but the  
15 problem is not me.

16 JUDGE WONG: Mr. Abaya.

17 MR. ABAYA: Yes, sir.

18 JUDGE WONG: Could you just slow down just a  
19 little bit, please.

20 MR. ABAYA: Yes.

21 JUDGE WONG: Thank you.

22 MR. ABAYA: So he come to the store, after  
23 agreement my bookkeeper and the auditor, to come to sit in  
24 the restaurant. So he come sit all day. He come after  
25 each customer, run after him, check the receipt.

1 Everything is fine. End of the day, yeah, I told him,  
2 okay. So what now?

3 He said, "Yeah, it looks -- it looks like 55 or  
4 45 percent or whatever, you know. It's reasonable."

5 I say, "What you think about that?" I tell him,  
6 "This is what we do."

7 And he tell me, "It's not me."

8 I said, "Who is it then?"

9 He said, "No, this is from the office."

10 I said, "Office or not office."

11 So I call the bookkeeper, my bookkeeper -- my old  
12 bookkeeper, and I tell him this is what's happened. And  
13 all of a sudden he said, "Don't worry. We can appeal it.  
14 We can go to court."

15 I said it's fine when he said, "I promise. You  
16 don't owe nothing."

17 I said, "Okay. Fine."

18 And all of a sudden, you know, he say -- he tell  
19 me, you know, "Next week, you know, I have to go to  
20 therapy. Well, after one week, I will come back, and we  
21 take care of it. Don't worry about it."

22 Why he was worry about it so much because what's  
23 happened, before the Christmas two days. Two days before  
24 the Christmas him send me sent receipt for \$102,000 I have  
25 to pay. And my wife she ask me, "What's the matter with



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you?"

I said, "Nothing. It's just my chest hurt."

So I -- I had end up in the emergency room for a stroke. They give me pills to -- to don't get to -- to don't be dead. How people like this send you something like that two days -- two days before the Christmas. You know, just for the neighborhood, you don't have no feeling. You cannot wait like two or three days for the Christmas be out, you know. And this what we sell and what -- what killing me the most -- the most bad thing, you know. What killing me, those people don't care about nobody.

After the COVID my business become very slow. So I start to bring vegetable, sell vegetable, and orange juice, and tomato, and everything, basically; banana, the cherry, everything. More cheap and safe to survive in business. And he see it with his own eye when he come. Now, you know, all the food it was to go. Nothing -- nobody can say. Everybody panic. So I say -- I have to stay in business. So I start to sell vegetable and I sell everything, and this is how it was. And him say, no, this is this.

And after above that, somebody broke the -- my restaurant and take the cash register and take lot of stuff from my restaurant. Why I start -- now, I'm panic

1 from the sales tax. I pay even more, whatever, whatever.  
2 Just leave me alone, you know. And they're -- I don't  
3 know, you know. I pay what you're supposed to pay. I  
4 don't try to, you know, take a dollar from taxpayer or  
5 something. And I'm not much with reading and writing, but  
6 I did the best I can, basically.

7 That's it.

8 JUDGE WONG: Thank you, Mr. Abaya.

9 MR. ABAYA: You're welcome.

10 JUDGE WONG: I will now turn it over to CDTFA to  
11 see if they have any questions on cross-examination.

12 MR. SAMARAWICKREMA: This is Nalan  
13 Samarawickrema. We don't have any questions for the  
14 witness, Judge.

15 JUDGE WONG: Okay. Thank you.

16 Mr. Erikat?

17 MR. ERIKAT: Yeah, I want to add something about  
18 his restaurant financial situation. When I'm doing his  
19 tax return for the last two years, he didn't get any  
20 income because he most likely just paying the expenses for  
21 his employees or his expenses for the -- the rent and  
22 bills. He didn't make any money. And he, after the  
23 COVID-19, he made a lot -- he had a lot of bad situation,  
24 financial. Hardship so he couldn't make money, and almost  
25 he about to close his business. And beside that, the

1 Sales Tax Department just pushing him hard to pay the  
2 money for nothing.

3 And when I checked, he didn't make any money.  
4 Right now he's thinking -- not for now -- for about two  
5 years to close his business because he -- he's losing  
6 money, not making money and Sales Tax Department send him  
7 the bills with interest and fees, plus the estimated tax  
8 for -- since 2018, which is making -- make his -- make it  
9 like very hard for him to -- to respond or even to pay  
10 anything. So I don't know if this the right thing to do,  
11 because he still has the very bad situation for his  
12 business, and he's not making money. He didn't make money  
13 before, and he will not make money in the future.

14 So with this case, they should just correct this  
15 decision for the -- the statement to make, like, a justice  
16 for -- for him. Because for the real, his business  
17 doesn't make any money. It doesn't make any, like,  
18 benefits for him. And he right now try -- trying to make  
19 the right decision to close this business. This is the  
20 point I need just to -- represent.

21 JUDGE WONG: Thank you, Mr. Erikat.

22 All right. So now I will turn to my Co-Panelists  
23 to see if they have any questions for Mr. Abaya with  
24 regards to his testimony or Mr. Erikat with regards to  
25 their case or argument, starting with Judge Geary.

1 JUDGE GEARY: Thank you, Judge Wong.

2 Mr. Abaya, can you hear me okay?

3 MR. ABAYA: Yes, sir.

4 JUDGE GEARY: All right. I want to ask you a  
5 little bit about general questions about how the  
6 restaurant operated. The audit file indicates that you  
7 were open from 11:00 a.m. to 8:30 p.m., 7 days a week; is  
8 that correct?

9 MR. ABAYA: Now, we start to close one day. We  
10 close one day.

11 JUDGE GEARY: When did you start that?

12 MR. ABAYA: We start it like about -- I don't  
13 remember exactly. About a year. Almost a year now. Less  
14 than a year. I don't remember exactly when.

15 JUDGE GEARY: But after the period that we're  
16 talking about?

17 MR. ABAYA: Yeah.

18 JUDGE GEARY: Okay. How would you describe your  
19 client base? I don't know where your -- your restaurant  
20 is located or --

21 MR. ABAYA: Oh, my -- my restaurant is -- is in  
22 the North Berkeley. I have been there -- here more than  
23 20 years, and this is neighborhood restaurant. It's  
24 basically -- it's very nice people, you know. All the  
25 neighborhood, you know, very nice people, and I make it.

1 I -- I did the best because the situation right now is  
2 very bad. So I drop the prices to make, you know -- you  
3 know, people are having a hard time. So I -- I -- my  
4 profit is very small, you know, to make sure everybody,  
5 you know, get, you know, reasonable prices for the -- for  
6 the neighborhood, you know. It's hard for me. I work  
7 hard, but it's fine. You know, at least I keep going, you  
8 know. I --

9 JUDGE GEARY: Mr. Abaya, let me -- let me  
10 interrupt you. I was just trying to get an idea about  
11 your client base. Is your client base essentially people  
12 who live in the neighborhood?

13 MR. ABAYA: Yes. And sometimes -- sometimes  
14 people come from all over, from anywhere. Some people  
15 come to visit from New York sometimes come eat at my  
16 restaurant to visit neighborhood here. You know, some  
17 neighborhoods --

18 JUDGE GEARY: It's not mostly students?

19 MR. ABAYA: No. We far away students. Students  
20 like 1 percent, less than 1 percent even. It's -- it's  
21 families. Family. Families.

22 JUDGE GEARY: Okay.

23 MR. ABAYA: It's healthy -- healthy choice we  
24 have everything. We use a lot of organic. So this is  
25 a -- basically, most of my restaurant 50 and up, you know.

1 Because people watch what they eat, basically.

2 JUDGE GEARY: Mr. Abaya, try to listen to my  
3 question and just answer the question, or this hearing is  
4 going to last --

5 MR. ABAYA: Sorry. Sorry.

6 JUDGE GEARY: -- much longer than we all want it  
7 to.

8 MR. ABAYA: Thank -- thank you for your time.

9 JUDGE GEARY: And try not to interrupt when  
10 somebody else is speaking. Let me ask you this. How does  
11 it work when you order at your restaurant? Do people  
12 order from the table? Do -- do servers come around and  
13 take orders, or do they order from the counter?

14 MR. ABAYA: Okay. People order from the counter.

15 JUDGE GEARY: And did you, during the period of  
16 time that -- that CDTFA was auditing the restaurant for,  
17 which was May of 2018 through March of 2021, did you use a  
18 point of sale system?

19 MR. ABAYA: I don't know what -- what's point of  
20 sale.

21 JUDGE GEARY: How did you ring up or record your  
22 sales? Or did you have the cash --

23 MR. ABAYA: Oh, we have cash register. We have  
24 cash register.

25 JUDGE GEARY: All right. And the cash register

1 produced tapes?

2 MR. ABAYA: Yes. Yeah. Tapes and everything,  
3 yeah.

4 JUDGE GEARY: What would you estimate to have  
5 been the typical percentage of sales that you made to go?

6 MR. ABAYA: You know, during -- during 2018, '19,  
7 this is was 100 percent to go. It's all the food; it was  
8 to go.

9 JUDGE GEARY: And why was that?

10 MR. ABAYA: Because after COVID and -- and  
11 nobody -- nobody want to sit. Everybody panic. So for me  
12 it's better, you know, for me and for the customer.  
13 Everybody take their food to go because I don't -- you  
14 know, this is a lot of people don't want use even  
15 silverware, plastic. So we decide everybody to go. After  
16 COVID, three years -- three years during this time, all  
17 the food was to go.

18 JUDGE GEARY: Okay. Do you --

19 MR. ABAYA: Sort -- some is -- sorry.

20 JUDGE GEARY: Did you mean -- are you saying that  
21 COVID is why you --

22 MR. ABAYA: Yes.

23 JUDGE GEARY: The COVID -- the pandemic is what  
24 caused --

25 MR. ABAYA: Yeah, during -- yeah. Yeah. Yeah.

1 Yes, sir.

2 JUDGE GEARY: So during the COVID pandemic, all  
3 your food was to go?

4 MR. ABAYA: Yes, sir.

5 JUDGE GEARY: Would you allow people to sit in  
6 your restaurant and eat?

7 MR. ABAYA: You know, now yes. But before, I --  
8 I don't allow nobody to sit. Because some people panic,  
9 don't want to sit. No people sit. So same amount of food  
10 to go. Same as --

11 JUDGE GEARY: So during -- during COVID, all of  
12 your sales were to go?

13 MR. ABAYA: Yes, sir.

14 JUDGE GEARY: And you said 2018. I believe COVID  
15 was later, 2019 and early 2020. Before COVID became a  
16 problem and before restaurants started having difficulty  
17 serving on-site, what percentage of your sales were to-go  
18 sales?

19 MR. ABAYA: Before -- before COVID?

20 JUDGE GEARY: Yes.

21 MR. ABAYA: It's like -- like 50/50, sir.

22 JUDGE GEARY: Okay. Now let's talk about how you  
23 would do a to-go sale before COVID. Somebody comes to the  
24 counter, orders. You -- you put the --

25 MR. ABAYA: No. Him --



1           JUDGE GEARY: Let me just finish. You would put  
2 your order in. You would ring it up. You would take  
3 their money, hand them the food, and they'd leave. Is  
4 that fair?

5           MR. ABAYA: Yes. Yes. This is how is work.  
6 By --

7           JUDGE GEARY: And did you -- did you charge sales  
8 tax on those to-go orders?

9           MR. ABAYA: Depends. Depends what him take.

10          JUDGE GEARY: Okay. So --

11          MR. ABAYA: We have cold food. We have cold  
12 food, and we have hot food. So cold food we don't -- we  
13 cannot charge tax on it.

14          JUDGE GEARY: Okay.

15          MR. ABAYA: We have salad. We have hummus. We  
16 have a lot of things we cannot. We have pastry. We have  
17 a lot of -- a lot of things we cannot charge tax on it.

18          JUDGE GEARY: So you --

19          MR. ABAYA: And the only hot food -- hot food and  
20 sodas.

21          JUDGE GEARY: Okay.

22          MR. ABAYA: But the juice we make we don't charge  
23 tax on it.

24          JUDGE GEARY: All right. So you charge tax on  
25 hot food to go --

1 MR. ABAYA: Yeah.

2 JUDGE GEARY: -- and on carbonated beverages?

3 MR. ABAYA: Yeah. Beverages, depends, you know,  
4 what if -- if can of coke, we charge you. But if you  
5 take -- if you take orange juice or you take, you know,  
6 there's something we make, lemonade and all this,  
7 lemonade, strawberry, any -- any drink we make -- we make,  
8 we don't charge.

9 JUDGE GEARY: Okay. I said carbonated beverages.  
10 You did charge --

11 MR. ABAYA: Yes.

12 JUDGE GEARY: -- for carbonated beverages.

13 MR. ABAYA: Yes. Yes.

14 JUDGE GEARY: Okay. Did you report to the  
15 auditor that the explanation, for the difference between  
16 gross sales reported on your federal income tax returns  
17 and sales reported on your sales and use tax returns, that  
18 difference was your nontaxable sales?

19 MR. ABAYA: Yeah. This is they have taxable or  
20 not taxable, you know.

21 JUDGE GEARY: Is that what you told the auditor?

22 MR. ABAYA: Yes. No. The auditor come here --  
23 come to the restaurant and see by his own eye what  
24 taxable, what not taxable. He sit all day, and he did  
25 come day before. He see with his own eye what taxable,

1 what not taxable, and he knows. And he sees.

2 JUDGE GEARY: Listen to my question.

3 MR. ABAYA: I'm sorry.

4 JUDGE GEARY: Listen to my question, please. The  
5 audit report indicates that you explain the difference  
6 between your federal income tax return gross sales and  
7 your state sales and use tax returns by saying that  
8 difference was your nontaxable sales. Is that what you  
9 told that person?

10 MR. ABAYA: I don't understand your question  
11 100 percent. Sorry about that. But the reality what we  
12 sell, hot food is taxable, what cold food not taxable.  
13 What -- what the law allowed us to charge tax, we charge  
14 tax on it. With what the law say don't charge tax on this  
15 thing, we don't charge tax. We don't charge tax on  
16 vegetable on this time. We don't charge tax on a lot of  
17 thing, you know; Pastry, all these thing, you know.

18 JUDGE GEARY: After you attended an appeals  
19 conference and CDTFA issued its decision, there was a  
20 one-day observation at your restaurant. Do you remember  
21 that?

22 MR. ABAYA: Yes.

23 JUDGE GEARY: And did you agree to a one-day  
24 observation? Did you --

25 MR. ABAYA: I -- I was agree, yes. Yes. We make

1 decision, so he come. He's supposed to come week before.  
2 He don't show up. He called me and said, "I cannot come."  
3 I said, "That's fine. Come any time you want."  
4 He say, "Okay. I come next week."  
5 I said, "Okay. You welcome to come any time you  
6 want."  
7 And he come --  
8 JUDGE GEARY: Okay. And did you -- did he tell  
9 you the results of that observation?  
10 MR. ABAYA: Yes.  
11 JUDGE GEARY: Did you agree with them?  
12 MR. ABAYA: Yes, I agree.  
13 JUDGE GEARY: The results of that observation  
14 were taxable sales of 76 percent of the sales you made  
15 indicated were taxable. Do you agree with that?  
16 MR. ABAYA: The day he was in the restaurant,  
17 right?  
18 JUDGE GEARY: The day he was there.  
19 MR. ABAYA: It's not true. You can -- he can  
20 show the receipt from the cash register what he take. It  
21 not was 76 percent tax -- not taxable, and 24 percent not  
22 taxable.  
23 JUDGE GEARY: Weren't you there watching what  
24 they were writing down as far as what was taxable and what  
25 was not taxable?

1 MR. ABAYA: Yeah. He take off -- he ran after  
2 each of the customer, take the receipt and write it down.  
3 At end of the day he said print for me the receipt. We  
4 print it for him, and we give it to him.

5 JUDGE GEARY: And did the results reported by the  
6 auditor agree or disagree with what your cash register  
7 said?

8 MR. ABAYA: He was agree. He was agree.

9 JUDGE GEARY: Okay.

10 MR. ABAYA: And he -- yeah.

11 JUDGE GEARY: As a result of that same day's  
12 observation, the auditor reported that over 99 percent of  
13 your sales were charged on a credit card. Do you agree  
14 with that?

15 MR. ABAYA: Yes, sir.

16 JUDGE GEARY: So there, essentially, almost no  
17 cash sales that day?

18 MR. ABAYA: You know, that day or another day,  
19 most the people use now credit card, you know.

20 JUDGE GEARY: What would you say -- what would  
21 you say during the audit period, May of 2018 through March  
22 of 2021, what was the average percentage of bills that  
23 were paid with credit card?

24 MR. ABAYA: You know, at this time, I cannot  
25 remember, but it's about 90 percent, 95 percent it's all

1 credit card. Because nobody want to touch money, you  
2 know. Don't want to even, you know, this is -- even the  
3 credit card. When him use credit card, him put some  
4 gloves or something. And even I cannot touch his credit  
5 card.

6 JUDGE GEARY: Okay.

7 MR. ABAYA: Some customer don't allow to get, to  
8 touch it even.

9 JUDGE GEARY: Thank you, Mr. Abaya.

10 Thank you --

11 MR. ABAYA: You're welcome, sir.

12 JUDGE GEARY: -- Mr. Erikat.

13 Judge Wong, those are the only questions that I  
14 have.

15 MR. ABAYA: Thank you. I appreciate it. Thank  
16 you.

17 JUDGE WONG: Thank you.

18 I'll now turn to Judge Ralston for any questions  
19 for the witness or his representative.

20 JUDGE RALSTON: Not at this time. Thank you.

21 MR. ABAYA: Thank you, ma'am.

22 JUDGE WONG: Thank you.

23 I did have a few questions. Mr. -- or sorry.  
24 For the receipts that you were going to submit today,  
25 those are with respect to the tip percentage. Is that

1 correct, Mr. Erikat?

2 MR. ERIKAT: That's correct.

3 JUDGE WONG: Okay. And where did these receipts  
4 come from?

5 MR. ERIKAT: The receipt he give it to me from  
6 his record, cash register record. And I -- I sent not all  
7 of them because he have a lot of receipts. We cannot pass  
8 all the receipts. But we just give you a sample of the  
9 receipts showing the -- the tip percentage it's between 7  
10 to 10 percent. It depends on the -- if you check the  
11 receipt, you see some of them 10, some of them 9 percent,  
12 some of them 7 percent. We take -- the average is going  
13 to be about 8 to 9 percent, not 1.51 as he -- he mentioned  
14 in his report, which is it doesn't make any sense. I  
15 go -- I went through all the receipts. I found the  
16 10 percent. It's -- it's very, very high compared to what  
17 he reported on his report.

18 JUDGE WONG: Were these receipts provided to  
19 CDTFA at the time of the audit?

20 MR. ERIKAT: I think he's -- I'm not sure. You  
21 have to ask him the question where he just -- I ask him  
22 for the receipt, because you guys request the receipts  
23 for -- as evidence. He passed me the receipts, and I  
24 check all of them. I took the percentage. I found almost  
25 between 7 to 10 percent all the receipts. But then he

1 mention the auditor on his report is 1.51 percent, which  
2 just doesn't make any sense. Because nobody pay -- nobody  
3 pays 1 or 2 percent tip.

4 JUDGE WONG: Okay. Mr. Erikat, I'll ask  
5 Mr. Abaya.

6 MR. ERIKAT: Oh, go ahead.

7 JUDGE WONG: Mr. Abaya, so the receipts --

8 MR. ABAYA: Yeah.

9 JUDGE WONG: -- that you want to submit to us  
10 today, were those provided to the auditor at the time of  
11 the audit?

12 MR. ABAYA: You know, I give him -- I give it to  
13 my -- my old bookkeeper. You know, I give him all the  
14 receipt about the tip. So I don't have nothing -- nothing  
15 on me. Basically, I give it away. But I -- when -- when  
16 during, you know, the last months, the last two months, I  
17 have the receipt for the new, you know, for the new  
18 bookkeeper. So he tell -- I tell him, if you want, I show  
19 you. You know, at the end of the day, we'll bring the  
20 receipt how much tip and how much we -- we make. So I  
21 send it to him, and -- and he sees. Like right now, it's  
22 about 10 percent, sometimes 7, you know, the minimum goes  
23 7 percent. From 10 to 7 percent, sometimes it go higher,  
24 15, sometimes 12 percent. So the old receipt -- the old  
25 receipt I don't know what's happen to them. I give it to



1 my -- my old bookkeeper.

2 JUDGE WONG: I understand.

3 MR. ABAYA: Sorry.

4 JUDGE WONG: So Mr. Abaya, I understand. So  
5 Mr. Abaya, you gave these receipts -- from what time  
6 periods are these receipts from? Is this from --

7 MR. ABAYA: This is -- those -- those are the new  
8 ones. Recently those. Those receipts recently with  
9 average tip. Recently.

10 JUDGE WONG: When you say -- when you say  
11 recently, like, this year, 2024?

12 MR. ABAYA: Yes. Yes, sir. Yes, sir. Yes.

13 JUDGE WONG: Do you have any receipts from the  
14 audit period, meaning 2018 --

15 MR. ABAYA: I have. I -- yeah. Yeah. I give  
16 it -- I give it to my bookkeeper the receipt I have. And  
17 I hope -- I think he give it -- send it to the, you know,  
18 the audit, to the people in the, you know. He have it. I  
19 have it. I give it to him. I have old receipt. I give  
20 it to my bookkeeper. And during the -- during the audit,  
21 he give it -- he give it to the auditor.

22 JUDGE WONG: Okay. Do you -- did they -- did you  
23 ever receive those receipts back from your bookkeeper that  
24 you provide --

25 MR. ABAYA: Oh, no. No.

1 JUDGE WONG: No. Okay. Thank you. Okay. So I  
2 wanted to ask you about the operations of your restaurant  
3 in 2020 when the pandemic COVID-19 was occurring. And you  
4 had mentioned -- did you -- were there any dine-in  
5 services at that time from March 2020 to --

6 MR. ABAYA: What year?

7 JUDGE WONG: 2020.

8 MR. ABAYA: No.

9 JUDGE WONG: March 2020 to --

10 MR. ABAYA: No. No. I don't remember date. I  
11 don't remember even when the COVID was.

12 JUDGE WONG: Okay. Do you know when you start --  
13 restarted dine-in services? Do you happen to know?

14 MR. ABAYA: Yeah. It's about -- about a  
15 little -- about a year. One year already. I'm not sure,  
16 but maybe year -- maybe more than one year, little bit.  
17 But exactly I don't know.

18 JUDGE WONG: Okay. Thank you.

19 And I also had a question for Mr. Erikat. During  
20 your argument, you had referred to undercover purchases by  
21 the auditor, I believe; is that correct?

22 MR. ERIKAT: He told me -- Abaya told me he came  
23 the first time was -- wasn't mention it himself, or  
24 presented himself as an auditor. He came as a client. He  
25 was just monitor what he was doing during the day, but he

1 didn't mention he is an auditor from the Sales Tax  
2 Department. But he told him that after one week, and  
3 he --

4 JUDGE WONG: And you had mentioned that this  
5 was -- I believe your words were "unacceptable by the  
6 law."

7 MR. ERIKAT: I cannot say. I'm not sure if it's  
8 by the law unacceptable. I see for it cannot be -- it  
9 cannot be like real auditing or make sense if you did not  
10 mention yourself as an auditor and -- and you came as a  
11 client. So is that can be counting as auditing by the  
12 Sales Tax Department?

13 JUDGE WONG: So is that your opinion, or do you  
14 have some authority for that?

15 MR. ERIKAT: It's -- it's a question about it.  
16 Is -- is -- if this can be counted as an auditing from the  
17 Sales Tax Department to come and did not mention yourself  
18 as auditor and make the report, like, undercover report?  
19 Does that make sense to the -- and consider auditing for  
20 the Sales Tax Department or not?

21 JUDGE WONG: Do you know of any authority that  
22 says that they can't do that? I'm just quest -- I'm just  
23 wondering about from your perspective.

24 MR. ERIKAT: No.

25 JUDGE WONG: Okay. Okay. Just curious. All

1 right. That's all the questions I had at this point. You  
2 have about 45 minutes left that you can use on your  
3 rebuttal and closing.

4 I'm going to turn it over now to CDTF for their  
5 presentation. They have 35 minutes. Please proceed.

6 MR. SAMARAWICKREMA: Thank you, Judge.

7

8 PRESENTATION

9 MR. SAMARAWICKREMA: This is Nalan  
10 Samarawickrema.

11 Appellant, a sole proprietor doing business as  
12 Jerusalem Organic Kitchen operates a restaurant in  
13 Berkeley, California, serving Middle Eastern  
14 Mediterranean-style fast-food. Appellant has a capacity  
15 for 20 customers and opens business every day of the week.  
16 The Department audited Appellant's business for the period  
17 May 1st, 2018, through March 31st, 2021. During the audit  
18 period, Appellant reported around \$419,000 as total sales  
19 and claimed around \$35,000 as sales tax included,  
20 resulting in reported taxable sales of around \$384,000 for  
21 the audit period; and this is on Exhibit B, page 52.

22 During our presentation, we will explain why the  
23 Department rejected Appellant's reported taxable sales;  
24 why the Department use an indirect audit approach; how the  
25 Department determined Appellant's unreported taxable sales

1 for the audit period; and why the Department recommended a  
2 10 percent negligence penalty for this Appellant. During  
3 the audit, Appellant failed to provide complete sales  
4 records. Appellant did not provide complete documents of  
5 original entry, such as sales receipts, guest checks,  
6 credit card sales receipts, sales journals, or sales  
7 summaries to support his reported taxable sale for the  
8 audit period.

9 In addition, Appellant failed to provide any  
10 purchase invoices or purchase journals for the audit  
11 period. Appellant was unable to explain how he reported  
12 his sales on his sales and use tax returns. Appellant was  
13 also unable to explain what sources he relied upon to  
14 complete his sales and use tax returns. The Department  
15 did not accept Appellant's reported taxable sales due to  
16 lack of reliable records. The Department also determined  
17 that Appellant did not provide complete books and records  
18 that could be used to verify his reported taxable sales  
19 for the audit period.

20 The Department completed four verification  
21 methods to verify the reasonableness of Appellant's  
22 reported taxable sales. First, the Department analyzed  
23 Appellant's reported taxable sales for the audit period  
24 and noted average daily reported taxable sales of \$359,  
25 ranging from as low as \$211 to as high as \$522 for the

1       audit period. And these calculations are shown on  
2       Exhibit A, page 39.

3               Based on the restaurant's capacity, location of  
4       the restaurant, and the number of days open for business,  
5       the Department viewed this as a very low daily taxable  
6       sales for this business. For comparison, Appellant's  
7       average taxable daily sales, based on auditor taxable  
8       sales, were \$892; and these calculations are on Exhibit A,  
9       page 39.

10              Second, the Department reviewed Appellant's  
11       federal income tax return for years 2018 through 2020, and  
12       compared the sales reflected on federal income tax return  
13       of around \$1 million with Appellant's reported total sales  
14       for the same period. The Department calculated an overall  
15       difference of around \$650,000; and this calculation is on  
16       Exhibit A, page 41. The Department also compared reported  
17       total sales with a cost of goods sold of around \$435,000  
18       reflected on Appellant's federal income tax returns, and  
19       calculated an overall negative reported book markup of  
20       over 10 percent; and this calculation is on Exhibit A,  
21       page 41.

22              This means Appellant was losing money every time  
23       it made a sale. Accordingly, the Department did not  
24       accept Appellant's reported sales for the audit period.  
25       However, based on audited sales and cost of goods sold

1 reflected on Appellant's 2019 and 2020 federal income tax  
2 returns, the Appellant's post-audited markup was close to  
3 180 percent; and this calculation is on Exhibit A,  
4 page 41.

5 Third, the Department compared reported total  
6 sales of around \$254,000 to the rent of around \$75,000  
7 reflected on Appellant's 2019 and 2020 federal income tax  
8 returns, and calculated an overall rent ratio of around  
9 30 percent; and this calculation is on Exhibit A, page 41.  
10 Based on this high rent ratio, the Department determined  
11 that Appellant did not report all his sales in its sales  
12 and use tax returns. Based on his experience in audits of  
13 similar restaurant in Appellant's area, the Department  
14 expected to see a lower rent ratio for this restaurant.  
15 In comparison, using the audited sales for years 2019 and  
16 2020, the overall rent ratio is reflected at around  
17 8 percent; and this calculation is on Exhibit A, page 41.

18 Fourth, the Appellant did not provide complete  
19 sales information for the audit period. Therefore, the  
20 Department obtained Appellant's credit card sales  
21 information for the audit period from his internal  
22 sources; and this information is on Exhibit A, page 40.  
23 The Department compared the reported total sales with  
24 credit card sales and calculated an overall credit card  
25 sales ratio of around 246 percent, ranging from as low as

1 161 percent to as high as 358 percent for the audit  
2 period; and these calculations are on Exhibit A, page 40.

3 The credit card sales for the audit period are  
4 more than twice the amount of the reported total sales;  
5 and this is shown on Exhibit A, page 40. This is an  
6 indication that not all of Appellant's cash and credit  
7 card sales transactions had been reported in its sales and  
8 use tax returns. Appellant was unable to explain the low  
9 reported average daily taxable sales, federal income tax  
10 return sales differences, negative reported book markups,  
11 and high reported credit card sales percentages, and high  
12 reported rent ratios. Therefore, the Department conducted  
13 further investigations.

14 The Department decided to use a credit card sales  
15 ratio method to calculate Appellant's taxable sales, but  
16 Appellant did not provide complete cash and credit card  
17 sales information to determine his credit card sales  
18 percentage. So the Department reviewed three similar  
19 restaurants to determine a reasonable credit card sales  
20 ratios in the area.

21 These three restaurants were located in the same  
22 general region as Appellant's business and were audited by  
23 the Department for similar periods. The first restaurant  
24 is an Indian restaurant and audited for the period  
25 January 2015 through December 2017. This restaurant



1 serves various types of Indian food, carbonated and  
2 noncarbonated beverages.

3 MR. ABAYA: How big? How big this restaurant?  
4 He sell liquor. He sell --

5 JUDGE WONG: Mr. Abaya. Mr. Abaya, sorry. Mr.  
6 Abaya, sorry.

7 MR. ABAYA: Because he don't 00 --

8 JUDGE WONG: Mr. Abaya. Mr. Abaya, sorry. This  
9 is the CDTFA's time to make a presentation. It's not a  
10 time for you to --

11 MR. ABAYA: You're talking about bar restaurant.  
12 Sorry.

13 JUDGE WONG: Thank you. You'll have a chance to  
14 address their arguments on your rebuttal and closing, not  
15 during their presentation. Okay. Thank you.

16 CDTFA, please proceed.

17 MR. SAMARAWICKREMA: This restaurant has a  
18 capacity for 60 customers and open every day of the week  
19 except Tuesdays. Based on first quarter 2018 and second  
20 quarter 2018 POS sales summaries, the Department  
21 determined the credit card sales percentage of around  
22 85 percent for this restaurant.

23 The second restaurant is a Mediterranean  
24 restaurant and audited for the period January 2018 through  
25 March 2021. This restaurant serves various types of

1 Mediterranean food, carbonated and noncarbonated  
2 beverages. This restaurant has a capacity for 20 --  
3 sorry -- 40 customers and opens every day. Based on  
4 second quarter 2019 through first quarter 2021 POS sales  
5 data, the Department determined the credit card sales  
6 percentage of around 74 percent for this restaurant.

7 The third restaurant is also Mediterranean  
8 restaurant and audited for the period April 2016 through  
9 December 2018. This restaurant serves various types of  
10 Mediterranean food, carbonated and noncarbonated  
11 beverages. This restaurant had less than 1 percent of  
12 nontaxable food sales and opens every day of the week,  
13 except Mondays. Based on June 11, 2019, through  
14 September 10, 2019, POS sales data, the Department  
15 determined the credit card sales percentage of around  
16 71 percent for this restaurant. Based on these three  
17 similar restaurants the Department calculated an average  
18 credit card sales percentage of around 75 percent; and  
19 this calculation is on Exhibit C, page 129.

20 During the audit field work, Appellant failed to  
21 provide credit card merchant statements to calculate his  
22 credit card sales for the audit period. Therefore, the  
23 Department obtained Appellant's complete credit card sales  
24 information for the audit period from his internal  
25 sources; and the result is on Exhibit A, pages 34 to 38.

1 Then the Department used the total credit card sales, 75  
2 percent credit card sales percentage, and applicable sales  
3 tax rate factors to determine audited total sales for the  
4 audit period.

5 Appellant claim that his restaurant is not a  
6 typical restaurant, but it is more like a cafe and deli.  
7 Appellant asserts that approximately 50 percent of the  
8 sales made were nontaxable sale of fruits, pastries, and  
9 hummus, specifically, during the COVID-19 pandemic where  
10 he also sold packages of pastries and refrigerated juices,  
11 fruits, vegetables, and cold salad on a to-go basis. As  
12 support Appellant provided undated pictures of fruits,  
13 vegetables, snacks, and pastries he claims were displayed  
14 in the restaurant for sale during the audit period; and  
15 these pictures are on Exhibit D.

16 Appellant argues that the credit card sales  
17 should not be used to determine audited taxable sales  
18 because the credit card sales also include nontaxable  
19 sales on/or around May 24, 2022. Appellant asserts there  
20 has not been any sales sold on a dine-in basis for the  
21 last four to five years. Thereafter, only the taxable  
22 sales are reported on the sales and use tax returns.

23 At the Appeal Conference, Appellant agreed to a  
24 one-day site observation at his restaurant to verify the  
25 nontaxable sales and the accuracy of the recorded sales.

1 With Appellant's permission, the Department conducted a  
2 site observation on Tuesday, June 14, 2022. Appellant  
3 also agreed to provide the Department detail daily cash  
4 register Z-Tapes for July 2021 through December 2021 on  
5 the day of the site observation.

6 After the observation date, by email dated  
7 June 15, 2022, Appellant submitted a copy of the summary  
8 cash register Z-Tapes for September 2021 through  
9 December 2021, a summary of Z-Tapes for the observation  
10 test date, cash register Z-Tapes showing summaries of  
11 credit card sales and credit card tapes for 10 days, and a  
12 copy of the police report notice and police case report  
13 dated August 1st, 2024; and this information is on Exhibit  
14 B, pages 63 through 98, and Appellant's today's exhibit.

15 Appellant advised the Department that he does not  
16 have the cash register Z-Tapes for July 2021 and  
17 August 2021 because the cash register was stolen on  
18 July 25th, 2021. Appellant also asserts that he's unable  
19 to provide detailed daily sales reports since the cash  
20 register resets the total sales to zero if he runs the  
21 reports. Therefore, Appellant only runs the sales report  
22 at the end of the month. The Department reviewed and  
23 analyzed this information and ultimately rejected it.  
24 Specifically, the Department determined Appellant operated  
25 a full-service restaurant, even though Appellant claims

1 that he mainly sold nontaxable food items during the  
2 COVID-19 pandemic. He continued to sell the food items on  
3 the menu by telephone or through over-the-counter orders.

4 The Department also determined that although it  
5 is understandable that the nontaxable sales percentage  
6 would increase during the pandemic. Appellant did not  
7 provide detailed purchase and sales records to support his  
8 nontaxable food transactions for the audit period. Based  
9 on the site observation test, the Department calculates a  
10 nontaxable sales percentage of around 52 percent of which  
11 84 percent of the nontaxable sales were attributed to the  
12 highest nontaxable sale of Halva boxes and Baklava boxes  
13 that are not on the menu; and this information is on  
14 Exhibit B, page 62, and Exhibit C, pages 134 through 136.

15 Appellant did not provide any purchase records to  
16 support that the majority of his purchases were relating  
17 to nontaxable food sales for the audit period. On the  
18 contrary, information from Yelp shows the most popular  
19 menu choices were items such as wraps, lamb and chicken  
20 shawarma, and chicken soup, which are all taxable as  
21 prepared hot food; and this information is on Exhibit B,  
22 pages 141 through 143. Therefore, the Department  
23 continued to question the Appellant's nontaxable sales  
24 percentage of 52 percent.

25 The Department observed that although Appellant

1 provided the cash register Z-Tapes for September 2021  
2 through December 2021, the cash register Z-Tapes did not  
3 have detailed information to verify the reasonableness of  
4 the nontaxable sales. Based on the observation test, one  
5 cold food item was consumed at the restaurant's location,  
6 but the sales tax reimbursement was not charged. And  
7 another nontaxable food order sold on a to-go basis was  
8 charged the sales tax reimbursement. Therefore, the  
9 Department added these two items to the audited taxable  
10 sales to calculate adjusted audited nontaxable sales  
11 percentage of around 24 percent; and this calculation is  
12 on Exhibit B, page 61.

13 The Department also notes that Appellant provided  
14 the cash register Z-Tapes for September 2021 through  
15 December 2021 and pictures of nontaxable food items to  
16 supports 50 percent nontaxable sales percentage. The  
17 Department however, is unable to verify the accuracy of  
18 the taxable and nontaxable sales since the cash register  
19 Z-Tapes contain summary amounts of the sale for this  
20 period. Additionally, pictures do not serve as sufficient  
21 evidence to support the nontaxable sales percentage or to  
22 determine the time period in which they were sold.

23 Appellant did not provide complete purchase  
24 invoices relating to fruits, vegetables, pastries, other  
25 nontaxable food items, and total restaurant purchases to

1 determine his purchase categories. Based on Appellant's  
2 provided non-verifiable information and site test  
3 observation, the Department determined that the site test  
4 results are not representative for the audit period.  
5 However, the Department used this site test information to  
6 determine Appellant's nontaxable sales percentage and  
7 credit card tip percentage.

8 Then the Department used a total credit card sale  
9 of around \$1 million for the audit period, 75 percent  
10 credit card sales ratio, audited credit card tip ratio,  
11 adjusted audited nontaxable sales percentage, and  
12 applicable sales tax rate factors to determine audited  
13 taxable sale of around \$951,000; and these calculations  
14 are on Exhibit A, pages 29 and 30. The Department then  
15 compared the audited taxable sales to reported taxable  
16 sale of around \$384,000 to determine unreported taxable  
17 sales of around \$568,000 for the audit period; and these  
18 calculations are on Exhibit A, page 28.

19 The Department then compared the unreported  
20 taxable sales with the reported taxable sales of around  
21 \$384,000 to calculate an error rate of around 148 percent  
22 for the audit period. In determining the unreported  
23 taxable sales for the audit period, the Department did not  
24 make an adjustment for credit card sales percentage for  
25 the COVID-19 pandemic affected period of April 2020

1 through March 2021 because Appellant did not provide  
2 complete cash and credit card sales information for this  
3 period.

4 Also, based on the information from the similar  
5 restaurants and Appellant's own sales record for the  
6 period September 2021 through December 2021, the  
7 Department determined that it is not necessary to make a  
8 special adjustment for the credit card sales percentage  
9 derived from the three similar restaurants for the  
10 COVID-19 affected period for this Appellant. However, the  
11 Department allow nontaxable sales adjustment for the audit  
12 period, even though Appellant did not provide documentary  
13 evidence to support nontaxable sales for the period  
14 May 2018 through March 2020. Therefore, the Department  
15 determined that the resulting unreported taxable sales  
16 amount in this audit is not only fair and reasonable, but  
17 also benefits the Appellant.

18 When the -- when the Department is not satisfied  
19 with the accuracy or the sales and use tax return file, it  
20 may rely upon any facts contained in the return or upon  
21 any information that comes into the Department's  
22 possession to determine if any tax liability exist. The  
23 taxpayer shall maintain and make available, for  
24 examination upon request by the Department, all records  
25 necessary to determine the correct tax liability under the



1 sales and use tax laws, and all records necessary for the  
2 proper completion of the sale and use tax returns.

3 When a taxpayer challenges a Notice of  
4 Determination, the Department has the burden to explain  
5 the basis for the deficiency. When the Department's  
6 explanation appears reasonable, the burden of proof shifts  
7 to the taxpayer to explain why the Department's asserted  
8 deficiency is not valid. According to the Minutes and  
9 Orders from the prehearing conference, this Appellant also  
10 request the Department to address why the Department used  
11 only one-day observation test instead of three  
12 observations to determine its credit card tip percentage  
13 and nontaxable food sales percentage.

14 JUDGE WONG: Mr. Samarawickrema, you have 5  
15 minutes, just to let you know.

16 MR. SAMARAWICKREMA: The audit field work was  
17 completed on/or around October 18th, 2021, and Appeal  
18 Conference was conducted on May 24, 2022. During the  
19 Appeal Conference, Appellant gave permission for the  
20 Department to conduct one observation and agreed to  
21 provide detailed daily cash register Z-Tapes for July 2021  
22 through December 2021. Therefore, the Department accepted  
23 this opportunity to verify the reasonableness of the audit  
24 findings.

25 Since the audit field work had concluded in late

1 2021, and the Department had enough information to  
2 determine Appellant's taxable sales for the audit period,  
3 it was not necessary for the Department to conduct any  
4 additional site observations. The Department only relied  
5 on the observation day to determine the reasonableness of  
6 the audit finding. After the site observation, Appellant  
7 also informed the Department about the inconvenience it  
8 presented to his customers and his staff; and this is on  
9 Exhibit B, page 84. The audit calculation of unreported  
10 taxable sales based on the best available information was  
11 fair and reasonable.

12 Finally, the Department imposed a negligence  
13 penalty based upon its determination that Appellant's  
14 books and records were incomplete and inadequate for sales  
15 and use tax purposes, and because Appellant failed to  
16 accurately report his taxable sales. Specifically, the  
17 Department noted that Appellant provided limited records  
18 for the audit period, and Appellant failed to provide  
19 documents of original entry to support his reported sales  
20 tax liability. As a result, the Department had to  
21 determine Appellant's taxable sales based on the best  
22 available information.

23 In addition, the audit examination disclosed  
24 unreported taxable sales of around \$568,000, which when  
25 compared with reported taxable sale of around \$384,000 for

1 the audit period, resulted in an error rate of around  
2 148 percent. This high error rate is additional evidence  
3 of negligence.

4 Appellant has not provided any reasonable  
5 documentation or evidence to support an adjustment to the  
6 audit finding or provided any documentary evidence to  
7 establish a more accurate determination. Therefore, the  
8 Department requests the appeal be denied.

9 This concludes our presentation. We are  
10 available to answer any questions the Panel may have.

11 Thank you.

12 JUDGE WONG: Thank you, Mr. Samarawickrema.

13 I'll now turn to my Panel to see if they have any  
14 questions, beginning Judge Geary.

15 JUDGE GEARY: Thank you, Judge Wong. Would you  
16 want to -- never mind.

17 Mr. Samarawickrema, I've got a couple of  
18 questions. The book markup that were computed by the  
19 original -- the auditor who did the original audit, it  
20 looks like that auditor used cost of goods sold from  
21 federal income tax returns, but sales from sales and use  
22 tax returns. Is that what that person did?

23 MR. SAMARAWICKREMA: This is Nalan  
24 Samarawickrema. That is a book markup, yes, Judge.

25 JUDGE GEARY: Am I correct that the taxpayer

1 claimed that the difference between gross sales reported  
2 on federal income tax returns and sales reported on sales  
3 and use tax returns, the difference was the nontaxable  
4 sales?

5 MR. SAMARAWICKREMA: Yeah. Yes, Judge. That was  
6 the claim that they made at the time of the field work,  
7 and the Department requested support for that difference;  
8 you know, like what other support that the taxpayer has to  
9 support nontaxable sales based on the initial discussion  
10 and initial field visits. The Department determined that  
11 the taxpayer comes under the 80/80 rule.

12 JUDGE GEARY: But when calculating a markup, does  
13 it make sense to simply ignore those other sales, the ones  
14 that were reported on -- ones which, according to  
15 Appellant, were nontaxable sales. Whether they were  
16 taxable or not taxable, they were some kind of -- they  
17 were sales. Does it make sense to exclude those from the  
18 calculation of the markup?

19 MR. SAMARAWICKREMA: Judge Geary, at the initial  
20 stage, the -- the Department verify whether the reported  
21 total sales -- reported total sales to the Department is  
22 reasonable. And, you know, the initial computation is  
23 comparing reported total sales to the claimed cost of  
24 goods sold to calculate and see whether that is  
25 reasonable. So after that, you know, we -- the Department

1 found there's a \$650,000 difference. And if -- if you  
2 consider that \$650,000 difference, then, yeah, the -- the  
3 book markup is close to 180 percent.

4 JUDGE GEARY: The Department made a decision  
5 early in the audit -- I'm assuming it was early in the  
6 audit -- that the 80/80 rule applied, the rule that you're  
7 familiar with. And I believe I saw a statement in the  
8 audit work papers that said that decision was made per  
9 site visit and menu. Is there a menu in the documents  
10 that have been submitted as evidence in this case by the  
11 Department?

12 MR. SAMARAWICKREMA: Yes, Judge. I can give you  
13 the menu page number; Exhibit C, pages 134 through 136.

14 JUDGE GEARY: When you give these page  
15 references, I --

16 MR. SAMARAWICKREMA: That's the page number. I'm  
17 sorry.

18 JUDGE GEARY: When you give these page number  
19 references, I'm confused because Exhibit C is two pages  
20 long. So by any chance, are these the page numbers from a  
21 combination of all the Department's exhibits?

22 MR. SAMARAWICKREMA: Yes. Yes.

23 JUDGE GEARY: Okay. Because my Exhibit C  
24 consistent only of a Notice of Determination that's two  
25 page long. So you're saying that somewhere in these

1 exhibits is a copy of that menu?

2 MR. SAMARAWICKREMA: Yes, Judge. So if you -- if  
3 you -- if you refer to the exhibit that we submitted with  
4 the prehearing conference, the exhibits, there are  
5 205 pages total.

6 JUDGE GEARY: Okay.

7 MR. SAMARAWICKREMA: Yeah. So the Bates number  
8 134 to 136 refers to the menu.

9 JUDGE GEARY: Okay.

10 MR. PARKER: Judge Geary, this is Jason Parker.  
11 I just wanted to clarify that we did conduct an additional  
12 reaudit on July 9th of 2024, right before the prehearing  
13 conference statement was due. So we had updated our  
14 exhibits. So the exhibits changed from -- you know, like,  
15 C was the Notice of Determination. Now it's Exhibit D.  
16 So those were all included with the prehearing conference  
17 statement.

18 JUDGE GEARY: Okay. Thank you.

19 Let me just check and make sure I didn't have any  
20 other -- about the one-day site visit, Mr. Samarawickrema,  
21 am I calculating this right that the credit card ratio was  
22 99.84 percent on that date?

23 MR. SAMARAWICKREMA: The 92; right?

24 JUDGE GEARY: Well, I had -- let me go to -- that  
25 was Exhibit D, correct, was the original --

1 MR. SAMARAWICKREMA: 4.

2 JUDGE GEARY: For me, it's the Exhibit D from my  
3 original. And the observation test, that didn't change.  
4 So Schedule 12 R1 12A-8 shows total credit card sales of  
5 \$132,265 and total sales ex-tax of \$132,476. Did the  
6 calculation -- your calculation come out to 92 percent?  
7 Is that what you're saying?

8 MR. SAMARAWICKREMA: Okay. Hold on. Let's see.  
9 Yeah, 92.49.

10 JUDGE GEARY: So what does the Department make of  
11 that percentage -- credit card percentage, of which is so  
12 much higher than the percentage that it used in its  
13 calculations?

14 MR. SAMARAWICKREMA: Yes, Judge. And if you --  
15 if you -- may I have a few moments?

16 JUDGE GEARY: Yes.

17 MR. SAMARAWICKREMA: Judge Geary, if you refer to  
18 the latest exhibits, page 77 in the original -- in the  
19 second -- in the first reaudits, the Department calculated  
20 the September 2021 through December 2021 taxpayer's own  
21 sales summaries. Based on that, the credit card ratio is  
22 76.36.

23 JUDGE GEARY: Okay. And did the Department ever  
24 calculate a tip ratio for noncredit card sales?

25 MR. SAMARAWICKREMA: No, we did not.

1 JUDGE GEARY: Okay. Those are all the questions  
2 I have. Thank you very much.

3 And thank you, Judge Wong.

4 JUDGE WONG: Thank you, Judge Geary.

5 I'll turn it over to Judge Ralston for any  
6 questions for CDTFA.

7 JUDGE RALSTON: I have no questions for CDTFA.

8 JUDGE WONG: Thank you.

9 I did have a few questions for CDTFA. Starting  
10 with the three businesses that CDTFA used to formulate the  
11 credit card ratio, you had mentioned that they were all in  
12 the same general area. What does that mean?

13 MR. SAMARAWICKREMA: Oh, yeah. So the first --  
14 the first restaurant is 2 miles away, and -- and the  
15 second one, the 41 -- the 41 miles away, and the third  
16 one, 8 miles away.

17 JUDGE WONG: Okay. And for the third one, how  
18 many seats did that restaurant have?

19 MR. SAMARAWICKREMA: We don't have that  
20 information, Judge.

21 JUDGE WONG: Okay.

22 MR. SAMARAWICKREMA: Yeah.

23 JUDGE WONG: So just to review, the first  
24 restaurant that you used for this credit card ratio was an  
25 Indian restaurant, 60 seats, and the audit period was from



1 2015 to 2017; is that correct?

2 MR. SAMARAWICKREMA: Yes.

3 JUDGE WONG: So that doesn't include when the  
4 pandemic started; is that correct?

5 MR. SAMARAWICKREMA: That's correct. And our --  
6 the credit card ratio for that restaurant is based on  
7 first quarter 2018 and the second quarter 2018 POS sales  
8 summaries.

9 JUDGE WONG: Okay. And you said that was two  
10 miles away from -- okay.

11 MR. SAMARAWICKREMA: Yeah.

12 JUDGE WONG: So Appellant is in Berkeley. When  
13 you say two miles, is it on the same side of the San  
14 Francisco Bay as Appellant's, that particular restaurant?

15 MR. SAMARAWICKREMA: Basically, from the  
16 taxpayer's location to this location added to -- I'm  
17 sorry. The first is restaurant is only two miles.

18 JUDGE WONG: Right. But is it like on the same  
19 side of the Bay. I'm not too familiar with Bay --

20 MR. SAMARAWICKREMA: Right now we don't have that  
21 information, but we can get that information if the Panel  
22 require that.

23 JUDGE WONG: Okay.

24 MR. SAMARAWICKREMA: Because, you know, like if I  
25 give you -- if the Department gives that kind of

1 information, it may indirectly disclose --

2 JUDGE WONG: Right. Understood. Okay. So we  
3 could -- yeah, that's -- I guess we could ask for maybe  
4 some of those details in a submission and not reveal  
5 confidential taxpayer information. Okay. So that'll be  
6 one of the things we'll be asking from the Department.

7 Another question I had was with regards to the  
8 site visit. Initially, on the site visit you determined  
9 that the taxable sales ratio was 52 percent, but then  
10 increased that to about 76 percent. Can you just go over  
11 again how and why that took place.

12 MR. SAMARAWICKREMA: The taxpayer report --  
13 taxpayer. Yeah, let's go to the -- the Schedule 12A-9,  
14 the reaudit Schedule 12A9, page number -- okay.

15 MR. PARKER: Judge Wong, this is Jason Parker.  
16 It's Bates page 62 --

17 MR. SAMARAWICKREMA: Page 62.

18 MR. PARKER: -- part of Exhibit B.

19 MR. SAMARAWICKREMA: Yeah.

20 JUDGE WONG: Thank you.

21 MR. SAMARAWICKREMA: And the line item -- the  
22 line Item 14 -- sorry -- the reference number -- the 14.  
23 And if you go to Column S, that transaction, it says that,  
24 "Cold food consumed at the premises is subject to tax."  
25 So that transaction was adjusted as a taxable transaction.

1 And the other one, the -- yeah. So the other one is  
2 reference number 32, same page. The sales tax was  
3 collected on a nontaxable transaction. It was considered  
4 as taxable.

5 JUDGE WONG: Okay. Got it. And, ultimately, so  
6 the taxable sales ratio is about 76 percent; is that  
7 correct?

8 MR. SAMARAWICKREMA: Yes, Judge.

9 JUDGE WONG: Okay. How was the 80 -- so the  
10 80/80 rule, CDTFA determined that that was satisfied. How  
11 was that determined that the Appellant would satisfy the  
12 80/80 rule?

13 MR. SAMARAWICKREMA: Based on the site visit and  
14 based on the menu. Because the taxpayer did not have  
15 any -- any nontaxable -- I mean, nontaxable fruits,  
16 vegetables as a menu item, and the taxpayer, he's a --  
17 he's a restaurant, not a grocery store. So the -- at the  
18 initial stage, the auditor determined that taxpayer meets  
19 80/80 rule and everything is taxable, unless taxpayer  
20 keeps separate records to -- to claim exempt sales.

21 JUDGE WONG: Okay. I was just wondering because  
22 if the taxable sales percentage was 76 percent, that seems  
23 to be under 80 -- one of the 80s, right? 80 percent --

24 MR. SAMARAWICKREMA: You can't -- yes.

25 JUDGE WONG: So I'm just wondering how that was

1 determined.

2 MR. SAMARAWICKREMA: It appears that the taxpayer  
3 changed the business model after the COVID, and he  
4 included fruits and vegetables. And it gave -- you know,  
5 at that time, it was a -- taxable percentage is 76 percent  
6 at that time in 2020 at the time the Department did the  
7 site observation. And that's why the Department believe  
8 that it is not representative for the audit period. And  
9 the -- and during the audit period before COVID and -- or  
10 before that site observation, that the -- the Department  
11 did not find that the taxpayer is in the business of  
12 selling vegetables and fruits.

13 JUDGE WONG: Okay. And so how was it -- so how  
14 did they determine that the 80/80 was satisfied during the  
15 audit period?

16 MR. SAMARAWICKREMA: Based on the menu. And  
17 everything is the taxable food items -- most of them are  
18 taxable food items. And the based on the -- the visit and  
19 maybe the -- you know, if you -- if you check the  
20 Exhibit C, page 122. Yeah, so it specifically says,  
21 "Based on the site visit and menu, 80/80 rule applies to  
22 the taxpayer."

23 JUDGE WONG: Okay. But you said that for the  
24 site visit it was 76 percent.

25 MR. SAMARAWICKREMA: The site visit after the

1 Appeal -- Appeal Conference.

2 MR. PARKER: So, Judge Wong, I just wanted to  
3 clarify. This is Jason Parker, again. In the initial  
4 audit evaluation with, really, limited books and records  
5 provided, the auditor made the determination based on the  
6 menu items and their, you know, knowledge of how other  
7 businesses like that operate, that it appeared they were  
8 under the 80/80 rule, and they didn't have records to  
9 present otherwise.

10 JUDGE WONG: Okay.

11 MR. PARKER: So it was part of the initial audit.  
12 Obviously, with the site test, we came up with 76 percent  
13 taxable. So it's not under the 80/80 rule. Otherwise,  
14 the nontaxable would be taxable.

15 JUDGE WONG: Okay. I guess even if they did not  
16 satisfy the 80/80 rule, they'd still have -- need to prove  
17 up their claimed nontaxable sales with books and records.  
18 Is that a fair -- like, if they didn't qualify for the  
19 80/80 rule?

20 MR. PARKER: So, Judge Wong, are you asking if  
21 they did qualify under the 80/80 rule?

22 JUDGE WONG: No, if they did not meet the 80/80  
23 rule. If they had claimed nontaxable sales it would still  
24 need to have books and records to support that. Is  
25 that --

1 MR. PARKER: Yes, that's absolutely correct.

2 JUDGE WONG: Okay. Okay. And I had another -- I  
3 think this is the last question. So in the Decision and  
4 Recommendation that was in -- let me see -- let me check.  
5 I think it's exhibit G, page 185. So there's a line in  
6 the Decision that mentions -- let's see. It says -- I'll  
7 quote it -- "Furthermore, based on the site observation  
8 test, the Department computes a nontaxable and taxable  
9 sales ratio, a 52.03 percent," blah, blah, blah, "of which  
10 84 percent of the nontaxable sales were attributed to the  
11 five highest nontaxable sales of Halva boxes and Baklava  
12 boxes that are not menu, nor mentioned on customers'  
13 reviews on Yelp.com."

14 So it seems like the auditor or the Department  
15 reviewed Yelp reviews; is that correct?

16 MR. SAMARAWICKREMA: Yes, Judge. Not -- not --  
17 not Yelp reviews, Yelp pictures.

18 JUDGE WONG: Okay. It was just the pictures. It  
19 was not the Yelp reviews themselves?

20 MR. SAMARAWICKREMA: According to the audit  
21 working papers or the audit file, we didn't -- we didn't  
22 see any Yelp comments.

23 JUDGE WONG: Okay.

24 MR. SAMARAWICKREMA: Yeah.

25 JUDGE WONG: Okay. Because if they did, I would

1 want to see copies of those same Yelp reviews that the  
2 auditor reviewed. But you're saying that was not the  
3 case; is that correct?

4 MR. SAMARAWICKREMA: Yes, Judge. Because we --  
5 the -- we only saw the pictures.

6 JUDGE WONG: Okay. All right. Okay. Thank you.  
7 That's all the questions I had at this time.

8 I'm now going to turn it over back to Appellant,  
9 Mr. Erikat and Mr. Abaya, for their rebuttal and their  
10 closing remarks.

11 You can address anything you would like that  
12 CDTFA had mentioned. You have 44 minutes. Please  
13 proceed.

14

15 CLOSING STATEMENT

16 MR. ERIKAT: Yes. My objection about the he --  
17 his presentation about three points. One of them, you  
18 cannot make an estimate for the operation of the other  
19 restaurant based on -- I mean, his restaurant, based on  
20 the other restaurants in this area because every -- every  
21 restaurant has specific client and products, some of them,  
22 you know, taxable or nontaxable. Also, some of -- I know  
23 this area very well.

24 JUDGE WONG: Sorry, Mr. Erikat. I apologize for  
25 interrupting. We're going to take a 10-minute break. You

1       could continue after the break.

2               MR. ERIKAT:   Okay.

3               JUDGE WONG:   So let's go off the record, and then  
4 we'll come back at 4:07.  Let's just say 4:10.  Okay.  
5 Please mute yourselves and close your video or turn off  
6 your camera, and you'll be going to the waiting room.

7               Thank you.

8               (There is a pause in the proceedings.)

9               JUDGE WONG:   We're back from the break, and now  
10 we're going to go on the record officially.  So your words  
11 are going to be recorded now and transcribed.

12              So, Appellant Mr. Erikat, please continue with  
13 your rebuttal and closing.  Thank you.

14              Sorry.  Mr. Erikat, you're muted.

15              MR. ERIKAT:   Can you hear me now?

16              JUDGE WONG:   Yes.  Thank you.

17              MR. ERIKAT:   Okay.  So, I mean, what I'm trying  
18 to say about his comparing Auny's restaurant with the  
19 other restaurant in the same neighborhood, I don't know  
20 how he can compare or make an estimate for other  
21 restaurant.  They sell bar -- beer or wine or other  
22 beverage, and they making more money, which is the -- this  
23 kind of restaurant they can increase their income with  
24 that.  His restaurant he doesn't make or sell this kind of  
25 beverage.  And -- and because the only way you can make



1 money when you have a -- more money than the other  
2 restaurant is if you have -- selling beverage like wine or  
3 beer, or you have a bar inside the restaurant like with  
4 other restaurant in the same neighborhood.

5 I know this area very well, and it's almost dead  
6 area. It's very far away from the downtown, very far away  
7 from the University of California Berkeley, also far  
8 out -- there is no customer coming from different, like  
9 tourist or client out of the state or out of the city. So  
10 that means, just the only come to this area the people  
11 from the same neighborhood or surrounding. How he can  
12 compare these restaurant with his restaurant.

13 Second thing, during the pandemic COVID-19, he  
14 never sell any product with cash, because there was no  
15 cash at that time we can -- we can offer because of the  
16 disease. Also, the restaurant was closed. He was selling  
17 behind the window, and was in no -- there was no open for  
18 public at that time. Above the percentage of the taxable  
19 or nontaxable, can he tell me how he count or estimated  
20 the taxable or nontaxable? Because he used to sell  
21 vegetables and the fruit and the cold drink, which is  
22 considered nontaxable. But how he count 73 percent or  
23 whatever, which is the taxable selling.

24 This is, like, I need to know how he made this  
25 percentage. Is there any way or method he -- he did use

1 for that? Because what Abaya told me, most of his  
2 percentage for taxable just about 50 to 60 percent, and  
3 the other selling it was not taxable for product.

4 That's my concern about what he mentioned in his  
5 presentation.

6 JUDGE WONG: Thank you for your rebuttal and  
7 closing.

8 So I will now for the final time turn it over to  
9 my Co-Panelists to see if they have any questions for  
10 either CDTFAs or Appellant, beginning with Judge Geary.

11 JUDGE GEARY: I have no further questions. Thank  
12 you, Judge Wong.

13 JUDGE WONG: Judge Ralston?

14 JUDGE RALSTON: This is Judge Ralston. I just  
15 have a quick question for Mr. Abaya. When the -- when the  
16 cash register was stolen and you were without a cash  
17 register for about a month or so, how did you keep track  
18 of your sales?

19 MR. ABAYA: You know, it was -- I take from the  
20 neighborhood, you know. We have very, very old cash  
21 register. And we use this very old cash register even  
22 when it doesn't print no receipt, no nothing just to --  
23 you know, until we receive new cash register. And this  
24 time it was impossible to buy cash register in this time.  
25 It take -- it take more than two months to get cash

1 register. It was impossible. During the -- I try to buy  
2 from anywhere. It was impossible to get cash register for  
3 the restaurant. Take me awhile. Take me two months that  
4 I get cash register. And before that, we use very, very  
5 old cash register, you know, from the -- from Office Max,  
6 you know. I used to have one very old. You know, the old  
7 cash register it was just to keep going, basically. At  
8 the end of the day, we see what the total, and we write it  
9 in the paper, and that's it.

10 JUDGE RALSTON: Okay. Thank you.

11 MR. ABAYA: You're welcome.

12 JUDGE WONG: Mr. Abaya, did you -- were you about  
13 to say something? Do you want to say something after  
14 your --

15 MR. ABAYA: Yes. Yes. You know, about the  
16 number -- about the number, maybe my bookkeeper -- the new  
17 bookkeeper, you know, he don't know exactly the number,  
18 how is -- how the -- this is auditor, he make the number.  
19 But, unfortunately, I have really bad luck, you know.  
20 My -- my bookkeeper passed away. If my bookkeeper don't  
21 pass way, he was positive. I don't owe him a penny. Even  
22 this is my new bookkeeper, he offer \$10,000 without my  
23 authorization, because I believe I pay what I supposed to  
24 pay.

25 And if my bookkeeper he's still around, you know,

1 he have all the paper. He have all the number. He have  
2 everything. But, unfortunately -- God bless his soul --  
3 he's gone. But I -- nothing I can do. I'm not much with  
4 number, but he have all the Z-report, and he can argument.  
5 He was so upset and so mad, and those guys know. I -- I  
6 pay what I supposed to pay, and I leave it. I cannot do,  
7 you know. My bookkeeper, he's fine, but he don't reach  
8 the number what this guy he talking about. That's the  
9 problem here, you know, the calculation. If my bookkeeper  
10 still around, it's going to be a different story. But I  
11 did the best I can, you know.

12 JUDGE WONG: Thank you, Mr. Abaya.

13 MR. ABAYA: You're welcome.

14 JUDGE WONG: All right. So that concludes the  
15 hearing for today. We are not going to be closing the  
16 record. We're going to leave it open, the evidentiary,  
17 record to allow Appellant to submit the police report and  
18 receipts, apparently, from 2024 that are relevant to the  
19 tip percentage.

20 Is that correct, Mr. Erikat?

21 MR. ABAYA: Yes. This is -- this is what, you  
22 know, what average people pay tip every day. I print  
23 receipt end of the day. I give it to the -- my new  
24 bookkeeper, and they said that's it, basically.

25 JUDGE WONG: Okay. So we're going to hold --

1           MR. ABAYA: And if you -- I want to ask a  
2 question. Anybody go to the restaurant, did ever you put  
3 1 percent or 2 percent tip? This is -- nobody do that,  
4 you know. I mean, but anybody go to the restaurant, even  
5 this guy he put one-and-a-half percent. I never see  
6 people in my life go to the restaurant and put tip 1  
7 percent. It's no such thing to tip 1 percent.

8           JUDGE WONG: Okay. Thank you, Mr. Abaya. So --

9           MR. ABAYA: You're welcome. Have a wonderful  
10 day, and I appreciate whatever you guys did.

11          JUDGE WONG: Just a second.

12          So we're not closing the record. We're going to  
13 give both parties 30 days to provide some additional  
14 submissions; on the Appellant's side the police report,  
15 maybe a better copy instead of a photograph of it --

16          MR. ABAYA: I will do it. I will do it here.

17          JUDGE WONG: -- as well as the receipts with  
18 regards to the tip percentage.

19          On CDTFA's side, some more information with  
20 regards to the businesses that they compared Appellant to  
21 formulate the credit card sales -- credit card ratio.

22          So I'm going to be issuing an order later this  
23 week. We'll give each party 30 days to submit those  
24 additional submissions. I'll include -- in my order, I'll  
25 mention what those are, describe what those are. 30 days

1 we'll set a deadline. And then after those 30 days, the  
2 other party, CDTFA will have a chance to respond and  
3 address the police report, as well as the receipts with  
4 regards to the tip percentage. And Appellant will have a  
5 chance to address the submission from CDTFA with regards  
6 to these other businesses that they were being compared  
7 to. You could make your arguments, address relevance,  
8 admissibility, anything you want. So 30 days, another  
9 30 days, and then we're going to close the record from  
10 there. I'll include this --

11 MR. ABAYA: Thank you, sir.

12 JUDGE WONG: I'll include this in an order that  
13 I'll be issuing later this week. Okay.

14 MR. ABAYA: Okay. I will send you the copy, you  
15 know, the way you -- the way you request, the copy for  
16 police report.

17 JUDGE WONG: Is there any questions from anybody?

18 Mr. Erikat?

19 MR. ERIKAT: Yes. What is the -- the period  
20 you're looking for, for the receipt exactly? Specific  
21 dates or year?

22 JUDGE WONG: You said that you had sent some  
23 receipts to a staff member at OTA today. If you could  
24 submit those to both -- to OTA, that's what we're looking  
25 for.

1           MR. ERIKAT: I mean, doesn't matter what the date  
2 is or just --

3           JUDGE WONG: My understanding is -- well, if you  
4 have any receipts, I guess, from the audit period --

5           MR. ERIKAT: Oh, those.

6           JUDGE WONG: -- that would be the best. But  
7 we'll take whatever you --

8           MR. ERIKAT: Okay. Got it.

9           JUDGE WONG: -- you had intended to submit today.

10          MR. ERIKAT: Got it. Thank you.

11          JUDGE WONG: CDTFA, any questions about that?

12          MR. SAMARAWICKREMA: This is Nalan  
13 Samarawickrema. No, Judge, we don't have any questions.

14          JUDGE WONG: Okay. My Co-Panelists, did you want  
15 to input about anything? Okay. Okay.

16                 So all right. So that concludes the hearing.  
17 We're leaving the record open, and then so the oral  
18 hearing in this case is now adjourned.

19                         (Proceedings adjourned at 4:23 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the 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 5th day of September, 2024.

\_\_\_\_\_  
ERNALYN M. ALONZO  
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