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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
PHONG H. PHAM dba TEMESCAL AUTO) OTA NO. 230713789
CARE,)
)
)
APPELLANT.)
)
)
_____)

Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 2:16 p.m. and concluding at 2:41 p.m. on
Wednesday, December 18, 2024, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ TERESA A. STANLEY

Panel Members: ALJ KIM WILSON
ALJ KEITH T. LONG

For the Appellant: HOANG LE

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

RANDY SUAZO
CHRISTOPHER BROOKS
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1 were received into evidence at page 7.)

(Department's Exhibits A-K were received into evidence at page 7.)

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California; Wednesday, December 18, 2024

2:16 p.m.

JUDGE STANLEY: Okay. We're going on the record in the Appeal of Phong Pham, DBA Temescal Auto Care. It's OTA Case No. 230713789. The date is December 18th, 2024, and the time is 2:16 p.m. The hearing is being held electronically with the agreement of the parties.

I am Judge Teresa Stanley. I will be the lead for purposes of conducting this hearing. My co-panelists Judge Keith Long and Hearing Officer Kim Wilson and I are equal participants in deliberating and determining the outcome of the appeal.

Now, I'd like to ask the parties to introduce themselves for the record, starting with Appellant.

MR. LE: Hi. This the Hoang Le. I represent Phong Pham.

JUDGE STANLEY: And CDTFA.

I'm having difficulty hearing you, Mr. Suazo.

MR. SUAZO: Randy Suazo, Hearing Represent, CDTFA.

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

MR. BROOKS: Good afternoon. This is Christopher Brooks, attorney for CDTFA.

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JUDGE STANLEY: Thank you.

The issue for this hearing as stated in the Minutes and Orders is whether adjustments are warranted to the audited taxable measure determined for the liability period October 1st, 2017, through December 31st, 2020. And more, specifically, Appellant is questioning was it improper for CDTFA to use the cost of goods from Appellant's 2018 federal income tax return, which Appellant subsequently attempted to amend; and whether the vendor surveys support the cost of goods recorded on the original federal income tax return.

Mr. Le, do you agree that this is the issue today?

MR. LE: Correct.

JUDGE STANLEY: And Mr. Suazo?

Okay. I didn't hear an audible yes. I just heard a -- just an "s".

MR. SUAZO: Yes.

JUDGE STANLEY: Okay. For the exhibits, Appellant submitted four Schedule C forms for 2018 through 2021, which the Office of Tax Appeals marked as Exhibit 1. CDTFA did not object to the admissibility of the exhibit at the prehearing conference. Therefore, Exhibit 1 is admitted into evidence.

///

1 (Appellant's Exhibit 1 was received
2 into evidence by the Administrative Law Judge.)

3 JUDGE STANLEY: CDTFA submitted Exhibits A
4 through K, and Appellant did not object to the
5 admissibility of these exhibits. Therefore, Exhibits A
6 through K are admitted into evidence.

7 (Department's Exhibits A-K were received into
8 evidence by the Administrative Law Judge.)

9 JUDGE STANLEY: Are there any questions or issues
10 related to exhibits at this point? Mr. Le?

11 MR. LE: Sorry. Yes.

12 JUDGE STANLEY: Okay. I see that nobody is
13 raising any issues, so we will move on.

14 Neither party has identified any witnesses who
15 will testify today under oath or affirmation.

16 Is that still correct, Mr. Le?

17 MR. LE: Correct.

18 JUDGE STANLEY: Okay. And Mr. Suazo?

19 I'm still having -- I can't hear. We can't hear
20 you.

21 MR. SUAZO: Correct.

22 JUDGE STANLEY: There you go.

23 Okay. Mr. Le, you requested 15 minutes for your
24 presentation, so you may proceed when you're ready.

25 MR. LE: Yeah. I'm ready.

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PRESENTATION

MR. LE: Basically, what I want to dispute is the fact that CDTFA in the end, using the cost of goods sold on the tax return of the client's to calculate the additional sales tax assessment. And when we said that we amended it, and eventually we amended it. And then they just -- I think they denied that. They go ahead, and they use the original number. So I think that incorrect. That's not accurate because the point is, if you rely on that number and not on the other method of the audit. And when we said those numbers incorrect, and we -- we fixed it, they keep using it.

If you look at the survey, you want to see the work part. That's represented about 70 percent of the -- of the cost of goods sold. And then that very consistent over the years from the first audit 2014 to 2017, which I did not represent him, like for '18, for the 20. So I think that's the survey look like numbers much better with our final number cost of goods sold. So that -- that's what my goal for today. So I think the survey very good, but somehow they -- they don't use it.

So the survey, that number -- some number, true number based on record they pull from the vendors. Right. And -- and what partially represent about 70 percent more

1 than 70, 75 percent over the year. So those numbers, if
2 you look at the whole at the thing --

3 JUDGE STANLEY: I'm going to stop you for a
4 second. You started talking kind of fast, Mr. Le, and our
5 stenographer needs you to slow it down a little bit so she
6 can catch everything you're saying.

7 MR. LE: Okay.

8 So -- so the survey showed us, you know, the --
9 the numbers from work products. One of the vendors, the
10 key vendors 70, they represent about 70 percent of cost of
11 goods sold. So I think that those number is very good for
12 look at the whole case and not to look at the cost of
13 goods sold based on our number. And then when we said
14 those number incorrect, so why is the point of keep using
15 that one? So they did not consider any other matter, any
16 other ways to look at the whole case even though they
17 already did the survey from the previous audit and also
18 this audit also. So I think that our final number, after
19 we amended the return, those number are more accurate
20 reflex -- reflect this situation.

21 JUDGE STANLEY: Okay. Does that conclude your
22 presentation, Mr. Le?

23 MR. LE: Yeah. What I'm saying, if original, we
24 did not make that kind of mistake, so what number is CDTFA
25 going to use? They're not going to have that number to

1 rely on and keep using that one number and argue with us;
2 that's how we assess the tax. And we did amend it. We
3 amend it, and we pay additional tax for the IRS -- I mean,
4 for my clients and also Franchise Tax Board too. So those
5 number already in the record.

6 So 2021, '22, '23 we did correctly. We did not
7 amend anything, but '18 and '19 we correct it, but we make
8 mistake. Because it was a -- I took over the case, you
9 know, from the previous tax accountant. And this
10 customer, he doesn't have good recordkeeping, you know,
11 habits. So it kind of difficult. Anyway 2020, '21, '22,
12 '23, we did, you know, do correctly -- everything
13 correctly. So only we went back, and we amended '18 and
14 '19.

15 So that gonna conclude my -- my dispute for
16 today, yeah, my argument.

17 JUDGE STANLEY: Okay. This is Judge Stanley
18 speaking. Thank you, Mr. Le.

19 Judge Long, do you have any questions?

20 JUDGE LONG: No questions. Thank you.

21 JUDGE STANLEY: Hearing Officer Wilson, do you
22 have any questions?

23 HEARING OFFICER WILSON: I do not have any
24 questions. Thank you.

25 JUDGE STANLEY: Okay. Then let's move to CDTFA's

1 presentation.

2 Mr. Suazo, you requested 20 minutes, and you may
3 proceed when you're ready.

4

5 PRESENTATION

6 MR. SUAZO: Appellant is a sole proprietor
7 operating an auto shop in Oakland, California. A previous
8 audit was performed on Appellant's business, Exhibit E.
9 Records provided during the audit process included 2018
10 federal income tax returns, bank statements for 2018 and
11 2019, and miscellaneous periods of sales and purchase
12 invoices. No general ledgers or purchase journals were
13 provided. A comparison of the 2018 federal income tax
14 returns cost of goods sold of \$314,772, Exhibit D,
15 page 43, to 2018 reported taxable sales of \$259,034,
16 Exhibit D, page 26, disclose a gross profit of negative
17 \$55,738. The markup was negative 17.71 percent, Exhibit
18 K, page 273.

19 Due to the negative markup, Appellant's reported
20 taxable sales were impeached, and the Department attempted
21 an indirect audit approach using a markup on cost of goods
22 sold. Because no records were provided to verify the
23 recorded cost of goods sold, and since the prior audit
24 disclosed cost of goods sold were understated, the auditor
25 attempted to conduct a vendor survey. The vendor survey

1 was unsuccessful, as many vendors could not be contacted,
2 and the Department abandoned the survey as an audit
3 approach, Exhibit D, pages 46 to 158 and Exhibit H,
4 page 266.

5 The 2018 federal income tax returns cost of goods
6 sold were adjusted by the correction factor used in the
7 prior audit of 14.42 percent, Exhibit D, page 37. A
8 recorded cost of goods sold was increased to an
9 established audited cost of goods sold for 2018,
10 Exhibit D, page 31. The prior audited markup of
11 54.61 percent, Exhibit D, page 32, was applied to the
12 audited cost of goods sold to compute taxable sales.
13 Audited taxable sales for 2018 were compared to reported
14 taxable sales of 2018. A difference was noted, and a
15 percentage of error calculated, Exhibit D, page 31. The
16 percentage of error was applied to reported taxable sales
17 for each quarter in the audit period to determine
18 additional taxable sales, Exhibit D, page 30.

19 Appellant disagrees with the audited taxable
20 measure. Appellant provided amended 2018 and 2019 federal
21 income tax returns in the original 2020 federal income tax
22 return to the Department following the appeals conference
23 contending that the audited cost of goods sold was
24 overstated. However, the Department's incomplete vendor
25 survey shows purchases of \$158,000 for 2018. And

1 Appellant's 2018 amended returns only show cost of goods
2 sold for \$135,000. Based on the difference, the amended
3 return was determined to be inaccurate, Exhibit I,
4 pages 267 through 269.

5 Appellant provided a second amended return --
6 amended federal income tax return for 2018 after the
7 Department did not consider the first amended return to be
8 accurate. The second amended return listed cost of goods
9 sold of \$200,000, Exhibit J, pages 270 through 272.

10 Detail data for the original federal income tax returns
11 cost of goods sold has not been provided to determine how
12 the amount was derived and that the changes in the second
13 amended returns cost of good sold are valid. Because of
14 cost of goods sold amounts could not be confirmed. No
15 adjustments were made to the audit findings, Exhibit G,
16 pages 264 and 265.

17 Review of the prior audit's federal income tax
18 for 2014, 2015, and 2016, that's Exhibit F, pages 262 and
19 263, disclose that the recorded cost of goods sold average
20 \$250,000. Recorded sales average \$468,000. The prior
21 audit's cost of goods sold were confirmed to be
22 understated, and the correction factor previously
23 discussed was applied to the recorded cost of goods sold
24 to arrive at audited cost of goods sold. Comparison of
25 the federal income tax returns in the prior audit and the

1 federal income tax returns for the current audit, which
2 included amended 2018 and 2019 returns and the original
3 2020 return, will show a steep decline in cost of goods
4 sold when sales have increased over the time frame,
5 Exhibit F, page 262 and 263.

6 Federal income tax returns averaged \$180,000 for
7 the three years. A drop on average of \$70,000 for cost of
8 goods sold, while sales average \$539,000, an increase
9 \$71,000 compared to the average sales of the prior audit.
10 The Department contends this decline in cost of goods sold
11 is not reasonable as increased repair sales would
12 translate to increased cost of goods sold to repair the
13 vehicles. The Department's approach, based on the
14 verified cost of goods sold from the last audit, inclusive
15 of an adjustment, is reasonable and appropriate.

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

18 JUDGE STANLEY: Thank you.

19 This is Judge Stanley speaking. Judge Long, do
20 you have any questions for CDTFA?

21 JUDGE LONG: No questions. Thank you.

22 JUDGE STANLEY: Hearing Officer Wilson, do you
23 have any questions?

24 HEARING OFFICER WILSON: No, I do not. Thanks.

25 JUDGE STANLEY: Okay. And I also do not.

1 good for us or for the additional tax. And regarding the
2 amended return for 2018, at first we did provide -- I
3 think 135 for the cost of goods sold for the reason we
4 pulled the bank statement information from the customer
5 convert Excel some data drop off. So after we figured out
6 that's the problem, we went back, and we -- we correct it.
7 We look for more document, and we pull out in the end the
8 number 185. And also, if you look at -- I -- I don't
9 remember. I provide you with the -- the image of the
10 check from the vendors. Because later on we put -- pull
11 the record from Chase. Because after the COVID, we could
12 contact the bank more easily, and they did provide the
13 check image for the vendors. If you look at "No Missing
14 Vendor" from the survey, CDTFA said those are very few
15 vendor and very few purchases.

16 So, again, those purchase, they put -- they could
17 pull the record. It represent most of the purchase of
18 this customer, you know, especially Worldpac. I would say
19 70 percent of the purchase consistent over the years. So,
20 again, I don't think that they way use the measure is --
21 is reasonable as on in this case. Or maybe they've been
22 using that for some other case too, but I don't think it's
23 good. Use the own record -- the own record or method from
24 previous audit, '14 to '17, and now they use the same
25 thing in our number. And then they say okay, we have to

1 use your number. Because look more to us -- look more
2 accurate to us.

3 So what -- what -- you know, what argument they
4 base on, because they just use the same number that the
5 tax preparer presented. And they say okay. Nothing. But
6 we would. So I don't think that's a good argument for --
7 for this kind of case or maybe in the future case too.

8 So that's all from me.

9 JUDGE STANLEY: This is Judge Stanley speaking.
10 Judge Long, do you have any questions at this
11 point?

12 JUDGE LONG: No questions. Thank you.

13 JUDGE STANLEY: Hearing Officer Wilson, what
14 about you?

15 HEARING OFFICER WILSON: No questions. Thanks.

16 JUDGE STANLEY: Okay. I did have one follow-up
17 question. Mr. Le, you said that when you figured out that
18 the numbers for cost of goods sold on the tax returns were
19 incorrect, that you went looking for some more documents
20 to correct it. What kind of documents did you find that
21 would -- that helped you to redo the tax returns?

22 MR. LE: Oh, because basically it is the work of
23 my key employees. It's once they pull the data, I ask,
24 can you double check again? Because CDTFA said that the
25 survey showed up to him way more than \$135,000. And as

1 she came back, I say look at the number once you pull the
2 record. It's more than bookkeeping work. And also, later
3 on we got the check image from the vendors.

4 So after the COVID, we went to the bank, and then
5 the bank bring out, like, many boxes of -- of check image.
6 So those number, we -- we have check image to support.
7 So, again, if you look at the whole -- those surveys that
8 say no vendor, that means very, very small number. So I
9 would say they still consider some number they -- they
10 pull from survey rather than just rely on the cost of
11 goods sold.

12 JUDGE STANLEY: So this is Judge Stanley speaking
13 again. Mr. Le, did you say that you got the information
14 from the bank keeper -- bookkeeper because they were able
15 to pull bank statements?

16 MR. LE: No. No. Those are the banker. The
17 banker provide me with the image of the -- of the canceled
18 check -- I mean, of the check date the customer wrote.
19 Before we did not have it. We just pull based on the --
20 the information from the Excel work or from the bank
21 statements. It's not fully reflect everything. So when
22 we have the check image, it's more -- the check of
23 customer, he did not provide all the records. But from
24 the bank we had all the records.

25 JUDGE STANLEY: This is Judge Stanley speaking.

1 Did you -- or could you provide bank statements to CDTFA
2 and to the Office of Tax Appeals?

3 MR. LE: During the audit time, we did provide,
4 but I don't think that the bank statement we provide it.
5 So the check image, because that's a separate service. If
6 you did not pay for it or you didn't pay for it, they --
7 they don't provide, you know, currently. So the record
8 is, you know, not that good until later on. But when we
9 did the audit, we did use everything we got. Because
10 before very hard for you to contact the bank during the
11 COVID time. Because they went back they go to the
12 storage. And they bring down and they pay, pay, pay.
13 They bring box, many boxes for each year.

14 JUDGE STANLEY: Okay. This is Judge Stanley
15 speaking. I do see that Appellant provided bank
16 statements for 2018 and 2019.

17 Mr. Suazo, do you happen no know whether the
18 audited cost of goods sold for those years were compared
19 to debits on the bank statement?

20 MR. SUAZO: -- play in this because you have --
21 the bank statements don't really play in this because you
22 have repair labor, along with the sales of TPP. So the
23 bank statements are always going to be higher -- or should
24 be higher than TPP. Because, you know, when you go to get
25 your car fixed, at least half, if not more than -- or --

1 is going to be the repair labor. So bank statements is
2 not really going to be as accurate as, like, in another
3 type of business.

4 JUDGE STANLEY: What I'm talking about -- I'm
5 sorry if I wasn't clear. I'm talking about the expenses
6 that are coming out of the bank account. Because that --
7 that wouldn't be for repair -- that wouldn't be for paying
8 for repairs, right? Well, it might. I'm sorry. I take
9 that back it might be for labor.

10 MR. SUAZO: So -- and the other thing is if he
11 bought stuff with cash, it wouldn't be in the bank
12 statements. And then if he had more than one credit card
13 and he's using credit cards to buy, we wouldn't have that
14 either. Plus the fact that if you look at his own federal
15 income tax returns, I think if you look back at the
16 original or the prior period of the recorded sales,
17 52 percent of it -- of cost of goods sold is recorded is
18 the ratio that you use for cost of goods sold.

19 So, like, basically let's say if he had \$50 worth
20 of -- worth of cost of goods sold, his sales translated to
21 around one \$100 roughly. Okay. On his new -- on his
22 amended returns, it's roughly about 33 percent of recorded
23 sales. So it's like, well, how did you have sales
24 increase and your cost of goods sold decrease, especially,
25 by that amount? Especially, if everything -- if you read

1 the -- on the actual audit, it states that the business --
2 when the auditor asked is the business changed? The owner
3 said the business had not changed.

4 JUDGE STANLEY: Okay. Thank you both.

5 I don't have any additional questions at this
6 time. So we're going to close the record in this matter.
7 Thank you everyone for joining us and participating today.

8 The panel will meet and decide your appeal, and
9 we will issue a written opinion within 100 days of today.

10 So the Appeal of Phong Pham, DBA Temescal Auto
11 Care is now concluded, and the hearing is adjourned.

12 Thank you.

13 (Proceedings adjourned at 2:41 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 8th day of January, 2025.

ERNALYN M. ALONZO
HEARING REPORTER