

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
EXCEL FOOD SERVICES, INC.,) OTA NO. 221111940
)
)
APPELLANT.)
)
)
_____)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, June 26, 2025

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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APPEARANCES:

Panel Lead: ALJ NATASHA RALSTON

Panel Members: ALJ SUZANNE B. BROWN
ALJ STEVEN KIM

For the Appellant: NADER SHAHATIT

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

NALAN SAMRAWICKREMA
CHAD BACCHUS
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received into evidence at page 6.)

(Department's Exhibits A-H were received into evidence at page 6.)

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California; Thursday, June 26, 2025

1:52 p.m.

JUDGE RALSTON: We are now on the record in the Appeal of Excel Food Services, Inc. This matter is being heard before the Office of Tax Appeals. The OTA Case Number is 221111940. Today's date is Thursday, June 26, 2025, and the time is approximately 1:52 p.m.

First, I'm going to start by asking the parties to please introduce themselves for the record. Please state your name and who you represent, starting with Mr. Shahatit.

MR. SHAHATIT: My name is Nader Shahatit. I am representing the business of Excel Food Services.

JUDGE RALSTON: Thank you.

MR. SAMARAWICKREMA: Nalan Samarawickrema, Hearing Representative for the Department.

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

MR. BACCHUS: Chad Bacchus, attorney with CDTFA's legal Department.

JUDGE RALSTON: Thank you.

As stated, the prehearing conference in this matter was held on May 19th, 2025. Appellant has submitted Exhibits 1 through 3, and Respondent had

1 submitted Exhibits A through H. Appellant's Exhibits 1
2 through 3 and Respondent's Exhibits A through H are
3 admitted without objection.

4 (Appellant's Exhibits 1-3 were received into
5 evidence by the Administrative Law Judge.)

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

8 JUDGE RALSTON: Neither party intends to call any
9 witnesses. The time estimates, each party will have 30
10 minutes for their opening presentation, and then
11 Mr. Shahatit will have 5 minutes for his rebuttal.

12 Looks like we are ready to proceed with the
13 opening presentation.

14 So, Mr. Shahatit, you have 30 minutes. Please
15 begin when you are ready.

16 MR. SHAHATIT: Yes, ma'am.

17

18 PRESENTATION

19 MR. SHAHATIT: Let me start with what is the
20 purpose of sales and use tax audit. And I was researching
21 this, and they say the main purpose of sales and use tax
22 audit is to verify the accuracy of a business sales and
23 use tax records, payment, and compliance, and the
24 applicable tax and laws. I think my client meet these
25 three issues, which is he filed sales and use tax return

1 on time. He paid whatever he collect from his clients,
2 and he was with the compliance all the regulations and tax
3 laws when it comes to the sale and use tax.

4 I don't know, but when an auditor come to a
5 business and then you start doing the audit,
6 automatically, whatever the audit -- the auditor puts,
7 automatically, he will charge 10 percent interest for
8 three years and 10 percent penalty that applies to the
9 tax -- all the estimated tax.

10 This is a very small business. It has only one
11 cash register tape, two employees, and basically a
12 refrigerator. And it comes out to total sales with the
13 credit card around \$800 to \$900,000. Now, this is a three
14 years period. Now, the auditor assume that all these
15 sales are taxable. The other thing is he assume that the
16 credit card sale is not enough. So it's only 60 percent
17 of the tax liability; which is, from my point of view, is
18 inaccurate. Because with two employees, how much sales
19 you will make? How many sandwiches or how much products
20 you will have to generate a million-and-a-half in sales.
21 So an estimation of this liability is inaccurate, and I
22 think the auditor make a big mistakes when he estimate the
23 sales to be a million-and-a-half or whatever the numbers
24 in -- in the exhibit.

25 I believe my client's report, the taxable sales,

1 that -- that he sells and he collects the tax. Any other
2 numbers, I don't -- we do not agree with, and I don't
3 think that it is fair from the tax agency to put
4 hundred-thousand dollars and more on the client just
5 because the auditor choose to make an estimate on it. I
6 think if you go with the information that we have on the
7 records, which is basically they say they want all the
8 books and records.

9 For sales and use tax, I don't think you need all
10 books and records. I think the only thing you need is how
11 many sales you do, how much taxable sales you have, and
12 how much tax you collect. These are the three means --
13 the three means that you can accurately find out how much
14 tax the business supposed to report. Any other thing
15 should be a supplement. I put -- I mean, I was reading
16 that the information that the auditor make is only an
17 estimated information. It's not based on the accurate
18 information that is in the record. And I think any
19 estimation should not be admitted by the court.

20 My clients reported the right information, and I
21 think we should take whatever record that report, not the
22 estimated things. Plus, the penalty and the interest
23 should be waived because, you know, this is first time
24 audit. We supposed to educate people. We are not
25 supposed just say oh, now, you owe \$100,000, and now, you

1 pay 10 percent penalty. And now, if you don't have the
2 money, you are out of business. And if you are out of
3 business, we don't care because it is what it is.

4 Thank you.

5 JUDGE RALSTON: Okay. Thank you. Does that
6 conclude your presentation?

7 MR. SHAHATIT: Yes, ma'am.

8 JUDGE RALSTON: Judge Brown, did you have any
9 questions for the Appellant?

10 JUDGE BROWN: I may have a question. If I can
11 ask, one of the issues concerns the fixed assets that were
12 transferred to the new owner. I wanted to ask about --
13 and I understand that Appellant disputes the estimate of
14 the cost of the fixed assets that were transferred. I
15 wanted to ask what evidence you can point us to in the
16 record that shows what the fixed assets consisted of.
17 Like, I'm looking, for example, at the photos that the
18 Appellant submitted. Are those part of the fixed assets?

19 MR. SHAHATIT: These are the only fixed asset
20 they have. They have only one refrigerator, a big one,
21 for display, and the other refrigerator is a small one.
22 It does not cost less than \$1,000 if it's used. And I
23 don't know why they are caring too much about a small
24 business that has asset like that when it come to the
25 transfer. Usually, when there is a big asset -- we're

1 talking \$100,000 asset, then we care about it. But a very
2 small business like this, you can see that these
3 estimate is -- is -- the only thing is I say it's -- it's
4 inaccurate. That's all. So, basically, it's less than
5 \$1,000.

6 JUDGE BROWN: I also wanted to ask about your
7 request for relief of interest. In CDTFA's exhibits,
8 their Exhibit H has a timeline of all of the course of how
9 long the audit took. Did you review that document in,
10 Exhibit H?

11 MR. SHAHATIT: No. But I know now it's already 6
12 or 7 years in interest, and I think it will equal almost
13 half the tax liability. And I don't know. They say by
14 law they cannot do anything about the interest, but I
15 think this is -- I mean, it's basically a tax liability
16 but another tax liability.

17 JUDGE BROWN: Okay. That's all I have right now.
18 Thank you.

19 MR. SHAHATIT: Thank you, ma'am.

20 JUDGE RALSTON: Thank you, Judge Brown.

21 Judge Kim, did you have any questions for the
22 Appellant?

23 JUDGE KIM: I don't have any questions at this
24 time.

25 JUDGE RALSTON: Okay. Thank you.

1 So we are going to move on to CDTFA's opening
2 presentation.

3 Mr. Samarawickrema, you have 30 minutes. Please
4 begin when you are ready.

5 MR. SAMARAWICKREMA: Thank you, Judge.

6

7

PRESENTATION

8 MR. SAMARAWICKREMA: Appellant is a California
9 corporation that operated a restaurant in Concord,
10 California, serving food and beverages. Appellant
11 commenced business on March 22nd, 2014, and ceased
12 operations on November 15th, 2018, when the business was
13 transferred. The restaurant was opened daily with a
14 seating capacity for approximately 20 customers.

15 The Department audited Appellant's business for
16 periods April 1st, 2015, through September 30th, 2018, and
17 October 1st, 2018, through November 15th, 2018. During
18 audit periods, Appellant reported total sale of around
19 \$341,000, and claimed sales tax reimbursement included in
20 total sales of around \$28,000, resulting in reported
21 taxable sale of around \$314,000; and this is shown on
22 Exhibit A, page 45, and Exhibit B, page 27.

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

1 Department determined Appellant's unreported taxable sales
2 for both audit periods; why the Department recommended a
3 10 percent negligence penalty for both audit periods; and
4 whether the Department is recommending relief of interest
5 for any periods.

6 During audits, Appellant failed to provide
7 complete sales records. Appellant did not provide
8 complete documents of original entry, such as cash
9 register Z-tapes, guest receipts, credit card sales
10 receipts, or sales journals for either audit period. In
11 addition, Appellant failed to provide complete purchase
12 invoices or purchase journals. Appellant was unable to
13 explain how it reported its sales on its sales and use tax
14 returns. Appellant was also unable to explain what
15 sources it rely upon to file its sales and use tax
16 returns. Therefore, the Department did not accept
17 Appellant's reported taxable sales and determined that
18 Appellant's record was such that sales could not be
19 verified by a direct audit approach.

20 The Department completed four verification
21 methods to verify the accuracy of Appellant's reported
22 taxable sales. First, the Department noted Appellant's
23 average daily sales during the first audit were very low;
24 and this is shown on Exhibit A, page 55.

25 Second, the Department obtained Appellant's

1 federal income tax return for years 2015 and 2016 from the
2 Franchise Tax Board and found that the Appellant did not
3 report 75 percent of the sales listed on the federal
4 income tax returns. And when comparing reported sales to
5 cost of goods sold, the Department calculated a negative
6 reported book markup.

7 Third, the Department calculated a rent ratio of
8 around 60 percent, which is unusually high; and this
9 information is shown on Exhibit A, page 58.

10 Finally, the Department obtained Appellant's
11 credit card sales data for the period April 2005 through
12 December 2005 and found that the Appellant did not report
13 more than \$600,000 of credit card sales during that
14 period; and this is shown on Exhibit A, page 61.

15 Appellant was unable to explain the reasons for
16 low daily sales, federal income tax return sales
17 differences, negative reported book markups, high rent
18 ratios, and credit card sales differences. Therefore, the
19 Department used a credit card sales ratio method to
20 determine audited taxable sales for both audit periods.
21 Because Appellant did not provide complete sales
22 information, the Department was unable to determine
23 Appellant's credit card tapes and credit card sales
24 percentages.

25 Moreover, Appellant refused to allow the

1 Department to conduct site observations, which the
2 Department could have used to obtain this information, as
3 well as analyzing Appellant's business practices and
4 determining whether Appellant made nontaxable sales; and
5 this is shown on Exhibit A, pages 10, 24, and 25. The
6 Department used Appellant's customer base, location of the
7 business, items sold, selling prices, and federal income
8 tax return data to determine a very conservative credit
9 card tip ratio of 5 percent and credit card sales ratio of
10 60 percent.

11 Appellant did not provide any reasonable
12 information to determine a higher credit card tip and
13 credit card sales percentage. Appellant failed to provide
14 credit card merchant statements or 1099-K forms to
15 establish credit card sales for both audit periods.
16 Therefore, the Department obtained Appellant's credit card
17 sales information, for the period April 2015 through
18 December 2017, from his internal sources; and these are
19 shown on Exhibit A, page 52. The Department used a total
20 credit card sale of around \$892,000, the estimated credit
21 card tip percentage of 5 percent, the estimated credit
22 card sales ratio of 60 percent, and applicable sales tax
23 rate factors to determine audited total sale of around
24 \$1.3 million; and these calculations are shown on
25 Exhibit A, page 51.

1 The Department had no reasonable information to
2 determine that Appellant made any nontaxable food sales.
3 Also, Appellant did not provide any reasonable documents
4 to demonstrate that it sold any nontaxable food items in
5 its restaurant. Therefore, the Department determined that
6 none of Appellant's sales qualifies as exempt food sales
7 to go because more than 80 percent of his sales were food
8 products, and more than 80 percent of his foods were
9 taxable.

10 Appellant failed to provide documentation
11 separately accounting for nontaxable sale of cold food for
12 all premises consumption in a form suitable for
13 consumption on its premises. As such, the Department
14 considered the audited total sale of around \$1.3 million
15 to be Appellant's audited taxable sales for the period
16 April 2015 through December 2017; and this is shown on
17 Exhibit A, page 51. The Department then compared the
18 audited taxable sales with reported taxable sale of around
19 \$24,300 to determine unreported taxable sales of around
20 \$1 million and corresponding error rate of around 434
21 percent for the period April 1st, 2015, through
22 December 31, 2017; and this is shown on Exhibit A,
23 page 51.

24 For the period January 2018 through
25 September 2018, the Department used the overall reported

1 taxable sales and an error rate of around 434 percent to
2 determine unreported taxable sales of around \$264,000; and
3 this is shown on Exhibit A, page 50. In total, the
4 Department determined unreported taxable sales of around
5 \$1.3 million for the first audit period, April 1st, 2015,
6 through September 30th, 2018; and this is shown on
7 Exhibit A, page 50. Appellant also did not provide any
8 information for the second audit period. Therefore, the
9 Department used a reported taxable sales and an error rate
10 of around 434 percent to determine unreported taxable
11 sales of around \$43,000 for the period October 1st, 2018,
12 through November 15, 2018; and this is shown on Exhibit B,
13 page 33.

14 Appellant filed a Notice of Close Out on
15 December 19, 2018, requesting closure of his seller's
16 permit effective November 15th, 2018. Since Appellant did
17 not provide escrow information, the Department determined
18 the fair market value of \$20,000 for sale of fixed assets
19 based on the size of Appellant's business; and this is
20 shown on Exhibit B, page 34. In total, the Department
21 determined unreported taxable sale of around \$1.4 million
22 for both audit periods; and these are shown on Exhibit A,
23 page 47, and Exhibit B, page 32.

24 The Department found that the determined
25 unreported taxable sales was reasonable based on

1 information reported on Appellant's federal income tax
2 returns. In 2015, the ratio of daily expenses to reported
3 daily sales was 325 percent, in 2016, 552 percent; and
4 these calculations are shown on Exhibit, A page 58. This
5 clearly indicates that Appellant did not report all its
6 sales on its sales and use tax returns for both audit
7 periods; and this is shown on Exhibit A, page 58.

8 A similar analysis was made comparing daily
9 expenses to average audited daily sales. In 2016, the
10 ratio of daily expenses to audited daily sales was
11 94 percent; and this is shown on Exhibit A, page 58.
12 Based on these analyses, the Department concluded that the
13 audited taxable sales were reasonable. When the
14 Department is not satisfied with the accuracy or the sales
15 and use tax return filed, it may rely upon any facts
16 contained in the return, or upon any information that
17 comes into the Department's possession to determine if any
18 tax liability exist.

19 A taxpayer shall maintain and make available for
20 examination upon request by the Department, all records
21 necessary to determine the correct tax liability under the
22 sales and use tax laws and all records necessary for the
23 proper completion of the sales and use tax returns. When
24 a taxpayer challenge a Notice of Determination, the
25 Department has the burden to explain the basis for their

1 deficiency. When the Department's explanation appears
2 reasonable, the burden of proof shift to the taxpayer to
3 explain why the Department's asserted deficiency is not
4 valid.

5 The audit calculation of unreported taxable sales
6 based on the best available information was reasonable.
7 Appellant did not agree with the audit finding for either
8 audit period. During appeal process, Appellant claimed
9 that it is entitled to an adjustment for all food to go
10 for both audit periods. As support, Appellant provided
11 three sales summary tapes for three days and two pictures;
12 and these are shown on Exhibit A, pages 68 and 69, and
13 Appellant's Exhibit 2 and 3. The Department analyzed the
14 information and ultimately rejected it. Upon examination
15 of those sales summary tapes, the Department noted that
16 the Appellant did not provide any individual sales
17 receipts or any of the information to collaborate the
18 figures listed on those sales summary tapes.

19 Regarding two pictures Appellant submitted as
20 evidence of their cold food to go during audit periods,
21 Appellant did not provide any corresponding sales receipts
22 or evidence that customers purchased any of those cold
23 foods to go. Further, Appellant's pictures alone do not
24 prove that Appellant is not subject to the 80/80 rule.
25 Therefore, the Department find that these documents do not

1 support Appellant's contentions.

2 Appellant also contends that the unreported
3 taxable sales of fixed assets is overstated. Appellant
4 did not provide any documentary evidence to the Department
5 to support that the transfer of business to new owner did
6 not include the sale of fixed assets. Additionally,
7 Appellant did not provide any information to support that
8 the unreported sale of fixed assets is overstated.
9 Therefore, the Department rejected this contention.

10 The Department imposed a negligence penalty based
11 upon its determination that Appellant's books and records
12 were incomplete and inadequate for sales and use tax
13 purposes, and because Appellant failed to accurately
14 report its taxable sales. The Department generally does
15 not impose a negligence penalty when the taxpayer has not
16 been previously audited. Nevertheless, even in connection
17 with the first audit, imposition of a negligence penalty
18 is warranted if there's evidence established that an --
19 that any bookkeeping and reporting errors cannot be
20 attributable to the taxpayer's good faith and reasonable
21 belief that its bookkeeping and reporting practices were
22 in substantial compliance with the requirement, or the
23 sales and use tax law, or regulations.

24 Relevant factors, such as general state of the
25 books and records and the Appellant's business experience

1 must be considered. And when the evidence clearly shows
2 that the understatement is due to negligence, then the
3 penalty applies, even when the Appellant has not been
4 previously audited. Specifically, the Department noted
5 that the Appellant did not provide complete records for
6 both audit periods, and Appellant failed to provide
7 documents of original entry to support his reported
8 taxable sales. Appellant's failure to provide complete
9 books and records for the audit periods are evidence of
10 negligence.

11 In addition, the audit examination disclosed
12 unreported taxable sales of around \$1.4 million, which
13 when compared with the reported taxable sales of around
14 \$314,000 for both audit periods, resulted in an error rate
15 of around 440 percent. This high error rate is additional
16 evidence of negligence.

17 Finally, Appellant is requesting relief of
18 interest for audit periods due to unreasonable delay in
19 processing of these audits. The Department performed an
20 analysis of these cases and the specific time during
21 audits, appeals, and settlement process; and this is on
22 Exhibit H. Pursuant to this review, the Department
23 determined a relief of interest for -- the Department
24 recommends a relief of interest for the month of
25 October 2019. In addition to October 2019, the Department

1 also granted an automatic interest relief for the
2 periods -- for March 2020 through June 2020 for COVID-19
3 pandemic impacted periods.

4 Based on the foregoing, the Department determined
5 the unreported taxable sales based upon the best available
6 information, the evidence shows that the audit produced
7 reasonable results. Appellant has not provided any
8 reasonable documentation or evidence to support adjustment
9 to audit findings. Therefore, the Department request
10 appeals be denied.

11 This concludes our presentation. We are
12 available to answer any question the panel may have.

13 Thank you.

14 JUDGE RALSTON: Thank you for your presentation.

15 I don't have any questions at this point. Let me
16 check with my co-panelists.

17 Judge Brown, did you have any questions for
18 CDTFA?

19 JUDGE BROWN: I suppose I will just ask the same
20 question -- or on the same topic that I asked Appellant
21 about the \$20,000 estimate for the transfer of sale of
22 fixed assets. I want to ask CDTFA if there's anything in
23 the evidence that we can look at that indicates what fixed
24 assets were transferred and, you know, that would support
25 that amount.

1 MR. SAMARAWICKREMA: Judge Brown, if you refer to
2 Appellant's Exhibit 2 and 3, it listed -- give me one
3 minute. Based on the pictures, it's basically two
4 refrigerators, a large one and a small one; and also
5 toaster I can see; and also a rice cooker; and also the
6 capacity -- because this restaurant has a capacity for
7 20 -- 20 customers, so the tables, chairs, and cooking
8 equipment. So the taxpayer never provided documents. So
9 these are the only information that we have in the -- in
10 the exhibits.

11 And based on the size -- based on the size -- I'm
12 sorry. Based on the size of the restaurant and based on
13 the capacity and based on the credit card sales that they
14 made, you know, 25 -- sorry -- \$20,000 is a -- is a
15 reasonable amount for this taxpayer.

16 JUDGE BROWN: I think that's all I have right
17 now. Thank you.

18 JUDGE RALSTON: Thank you, Judge Brown.

19 Judge Kim, did you have any questions for CDTFA?

20 JUDGE KIM: I have no questions for CDTFA. Thank
21 you.

22 JUDGE RALSTON: Okay. Thank you.

23 Mr. Shahatit, you have 5 minutes for your
24 rebuttal.

25 MR. SHAHATIT: Yes, ma'am.

1 I think that is unfair for any businesses retail
2 in California that deals with the CDTFA. If there is an
3 issue, you should address it. You don't need to wait. If
4 I -- if somebody owe me money, I don't wait three years
5 before I tell him, oh, by the way, you owe money. I need
6 to collect it. I think this audit is all estimation. I
7 think my taxpayer paid the right amount of taxes that he
8 collect, and I think -- just look at the furniture. They
9 assume it's \$20,000. A refrigerator -- a used
10 refrigerator doesn't cost even \$300. They want to make it
11 \$20,000. That does not make any sense.

12 That conclude my rebuttal.

13 JUDGE RALSTON: Okay. Thank you. Mr. Shahatit,
14 you stated your client didn't report total sales, but the
15 client just reported the taxable sales.

16 MR. SHAHATIT: Yes, ma'am.

17 JUDGE RALSTON: Did your client keep track of all
18 their sales somewhere?

19 MR. SHAHATIT: Yeah.

20 JUDGE RALSTON: And you have those documents?

21 MR. SHAHATIT: He only has one cash -- he has
22 only one register tape. It's not like a big business,
23 that's what they think. It's only cash register tape, one
24 credit card that he has in his business. We're not
25 talking about businesses that have 5, 6, cash register

1 tape. And this is a very small corner business that has a
2 very limited, like, sit down. Because majority of the
3 sales are to go. You can see the credit card sales. It's
4 a very small business. I don't know why they think it is
5 just making it as a big. It means they owe that much
6 money.

7 JUDGE RALSTON: Okay. Thank you.

8 MR. SHAHATIT: Thank you.

9 JUDGE RALSTON: Judge Brown, did you have any
10 questions for either party?

11 JUDGE BROWN: I don't have anything further.
12 Thank you.

13 JUDGE RALSTON: Thank you.

14 And Judge Kim, did you have any questions for
15 either party?

16 JUDGE KIM: No questions. Thank you.

17 JUDGE RALSTON: Thank you.

18 We are ready to conclude this hearing. Today's
19 hearing in the matter of Excel Food Services, Inc., is now
20 adjourned, and the record is now closed.

21 The judges will meet and decide your case later
22 on, and we will send you a written opinion of our decision
23 within 100 days.

24 Thank you, everyone, for all for attending.

25 (Proceedings concluded at 2:29 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 23rd day of July, 2025.

ERNALYN M. ALONZO
HEARING REPORTER