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STATE OF CALIFORNIA
OFFICE OF TAX APPEALS
400 R STREET
SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT
JANUARY 22, 2018
CORPORATE FRANCHISE AND PERSONAL INCOME TAX HEARING
APPEAL OF
MARGARET ELIZABETH CROWELL
996942
AGAINST PROPOSED ASSESSMENT OF
ADDITIONAL INCOME TAX

Reported by: Kathleen Skidgel
CSR No. 9039

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P R E S E N T

Panel Lead: Neil Robinson
Administrative Law Judge

Panel Members: Sara Hosey
Administrative Law Judge

John Johnson
Administrative Law Judge

Office of Tax
Appeals Staff: Claudia Lopez
Staff Services Manager II

Dana Holmes
Ombudsperson

Appearing for Taxpayer: Lynn Wubbels
CPA

Michael Fjelstad
Attorney

Appearing for Franchise
Tax Board: Marguerite Mosnier
Tax Counsel

Ray Rouse
Tax Counsel

Brad Coutinho
Tax Counsel

---oOo---

1 400 R STREET, HEARING ROOM

2 SACRAMENTO, CALIFORNIA

3 JANUARY 22, 2018

4 ---oOo---

5 JUDGE ROBINSON: We are opening the record
6 in the appeal of Margaret Elizabeth Crowell, before
7 the Office of Tax Appeals, in OTA case number
8 18011044. Today's date is January 22nd, and the
9 time is 9:25 a.m. This hearing is being convened at
10 Sacramento, California.

11 For the record will the parties please
12 state their appearances.

13 MR. WUBBELS: I am Lynn Wubbels, and I'm
14 appearing for Margaret Crowell.

15 JUDGE ROBINSON: And Mr. Wubbels, could you
16 please spell your name?

17 MR. WUBBELS: First name is Lynn, L-y-n-n.
18 Last name is Wubbels, W-u-b-b-e-l-s.

19 JUDGE ROBINSON: Thank you.

20 MR. FJELSTAD: I am Michael Fjelstad. I'm
21 appearing here, part of the case, for Elizabeth
22 Crowell. I was the preparer of this particular
23 return. And Liz Crowell's been a client of mine for
24 multiple years, both before and after this event.

25 JUDGE ROBINSON: Mr. Fjelstad, could you
26 please spell your name for the record?

27 MR. FJELSTAD: Pardon me?

28 JUDGE ROBINSON: Would you please spell

1 your name for the record?

2 MR. FJELSTAD: Okay. It's Michael,
3 M-i-c-h-a-e-l. Last name is F-j-e-l-s-t-a-d.

4 JUDGE ROBINSON: Thank you.
5 Respondent?

6 MS. MOSNIER: Good morning. Marguerite
7 Mosnier for Franchise Tax Board. It's
8 M-a-r-g-u-e-r-i-t-e. Mosnier is M-o-s-n-i-e-r.

9 MR. ROUSE: Ray Rouse appearing on behalf
10 of Franchise Tax Board. First name's R-a-y, last
11 name R-o-u-s-e.

12 MR. COUTINHO: And Brad Coutinho, also
13 appearing for respondent. My last name is spelled
14 C-o-u-t-i-n-h-o.

15 JUDGE ROBINSON: Thank you.

16 Today's case is being heard by a panel of
17 three judges. My name is Judge Robinson and I will
18 be acting as the lead judge for the purpose of
19 conducting this hearing. Judge Johnson and Judge
20 Hosey will also be participating in this hearing.
21 All three judges will be tasked with making a
22 decision in this matter as equal participants.
23 Although the lead judge will conduct the hearing,
24 any judge on this panel may ask questions or
25 otherwise participate to ensure that we have all of
26 the information needed to make a fair decision.

27 Okay. Once again, can I ask if there are
28 any questions at this part of the process?

1 We are going to now put the exhibits into
2 evidence. Appellants marked for identification --

3 MR. WUBBELS: Your Honor, I do have one
4 question. Do we have any water here?

5 JUDGE ROBINSON: Water.

6 MS. HOLMES: I'll see if I can locate
7 some.

8 JUDGE ROBINSON: Thank you very much. We
9 tried to think of everything.

10 MR. WUBBELS: Anyone else?

11 JUDGE ROBINSON: Would it be okay if we
12 continued while we're waiting for the water?

13 MR. WUBBELS: Yes.

14 JUDGE ROBINSON: Or would you want to wait?

15 MR. WUBBELS: No, we can continue.

16 JUDGE ROBINSON: Okay. So appellants have
17 marked for identification the following exhibits:

18 Exhibit 1 is the 2/13/2017 supplemental
19 declaration by Mr. Fjelstad.

20 Exhibit 2 is a Notice of Action dated
21 11/15/2017.

22 Exhibit 3, October 15, 2013 filing
23 information.

24 Exhibit 4, FTB account statement letter
25 dated 6/26/17.

26 Exhibit 5, FTB Web Pay confirmations for
27 2012 tax year.

28 Exhibit 6 IRS tax return transcript for

1 2012 tax year dated 10/23/2017.

2 Does that accurately reflect the exhibits
3 that you would like to see in evidence?

4 MR. WUBBELS: Yes.

5 JUDGE ROBINSON: And there are no
6 objections to that evidence?

7 MS. MOSNIER: No objections.

8 JUDGE ROBINSON: Okay. Then we shall admit
9 into evidence Appellant's Exhibits 1 through 6.

10 Respondents exhibits:

11 Exhibit A, the 2012 California tax return,
12 dated 12/31/2017.

13 Exhibit B, the 2012 tax year current values
14 display, dated 4/25/2017.

15 Exhibit C, claim for refund dated
16 6/21/2016.

17 Exhibit D, the law summary dated 2/13/2017.

18 And Exhibit E, the IRS account transcript
19 dated 4/26/2017.

20 Does that accurately describe the
21 respondent's exhibits?

22 MS. MOSNIER: Yes.

23 JUDGE ROBINSON: Okay. Are there any
24 objections to respondent's exhibits?

25 MR. WUBBELS: No.

26 JUDGE ROBINSON: Then we shall enter into
27 evidence respondent's Exhibits A through E.

28 The parties have graciously agreed to the

1 following stipulations:

2 Stipulation number one is, before April
3 15th, 2013 appellant made a \$500 estimated tax
4 payment;

5 And stipulation number two, all other
6 payments for the tax year were received after April
7 15th, 2013.

8 Appellant, does that agree with your
9 understanding of the stipulations?

10 MR. WUBBELS: Yes.

11 JUDGE ROBINSON: And respondent?

12 MS. MOSNIER: Yes.

13 JUDGE ROBINSON: Thank you. The proposed
14 issue statement -- I'm sorry.

15 The issue statement -- I guess it's no
16 longer proposed, we've gone over it -- has appellant
17 showing that the late filing of her California tax
18 return for the tax year 2012 was due to reasonable
19 cause and not due to willful neglect.

20 Appellant, does that accurately reflect the
21 issue we're going to hear today?

22 MR. WUBBELS: Yes.

23 JUDGE ROBINSON: And respondent?

24 MS. MOSNIER: Yes.

25 JUDGE ROBINSON: Thank you so much.

26 At this point we would like to invite
27 appellant to make its opening statement.

28 MR. WUBBELS: Thank you, Your Honor.

1 My name is Lynn Wubbels. I am the CPA,
2 local firm, practiced in San Jose, California for
3 roughly the last 40 years.

4 Also here today, on my right, is Michael
5 Fjelstad, an attorney and CPA from Los Gatos.

6 I appreciate the opportunity to be here
7 today to represent the taxpayer Margaret Crowell and
8 to have an opportunity to rebut the penalty
9 assessments for willful late filing of taxes and
10 willful late filing of her payments.

11 Before I get into the details of this
12 matter, I respectfully suggest that a fundamental
13 aspect of this matter has to do with fairness. Tax
14 penalties serve the dual purpose of retribution in
15 the form of financial and even possibly criminal
16 punishment to the offender, and by example to
17 provide returns to other taxpayers who might
18 otherwise be inclined to play fast and loose with
19 the tax code.

20 It's important to be mindful that the
21 linchpin of willfulness goes to intent. Whether
22 someone willfully fails to comply with tax
23 obligations is ultimately a subjective finding, and
24 the facts of this case will bear out that there was
25 no willful failure to pay tax and there was no
26 willful failure to file.

27 My objective will be to show that this
28 taxpayer and her professional preparer, while not

1 strictly following the letter of the law as the
2 matter's beyond their control, did in fact file and
3 pay tax for 2012 in a manner that did not willfully
4 jeopardize the interests of the State of California.

5 Additionally, my objective will be to argue
6 that a penalty of roughly \$90,000 on a late-paid tax
7 liability, outstanding for eight months and nine
8 days, in the amount of 117,000 is excessive and
9 inappropriate for the purpose of why penalties exist
10 in the law in the first place and when they are
11 appropriate to assess.

12 That concludes my opening remarks.

13 JUDGE ROBINSON: Thank you, Mr. Wubbels.
14 Respondent.

15 MS. MOSNIER: Thank you. Good morning.

16 The evidence in this appeal will show you
17 that the appellant filed her 2012 return more than
18 eight months late, that Franchise Tax Board properly
19 imposed a delinquent filing penalty pursuant to
20 section 19131 of the Revenue and Taxation Code and
21 that she has not shown reasonable cause and the lack
22 of willful intent for penalty abatement.

23 Her explanation that her tax preparer
24 mistakenly did not direct the tax software company
25 to e-file the California return and that she then
26 chose to wait for the conclusion of some then
27 pending litigation do not establish reasonable
28 cause.

1 FTB's denial of her refund claim should be
2 sustained.

3 Thank you.

4 JUDGE ROBINSON: Thank you.

5 Okay. At this point, appellant, would you
6 please call your first witness.

7 MR. WUBBELS: My first witness will be me,
8 Your Honor.

9 JUDGE ROBINSON: Okay. Could you please
10 stand and raise your right hand.

11 Do you solemnly swear or affirm that the
12 testimony you will give today will be the truth, the
13 whole truth and nothing but the truth?

14 MR. WUBBELS: I do.

15 JUDGE ROBINSON: Okay. Please proceed.

16 MR. WUBBELS: I will begin by outlining the
17 Franchise Tax Board position as represented by Don
18 West, specialist collection advisory team, as stated
19 in his November 8th, 2017 reply brief to our request
20 for penalty abatement. His statement outlines
21 requirements to grant penalty abatement. And I
22 quote his summary as follows:

23 Revenue and Taxation Code allows for
24 penalty abatement if reasonable cause is
25 established. The burden of proof is on the taxpayer
26 to show that reasonable cause exists to support
27 abatement of the penalty. Reasonable cause is
28 established if the taxpayer can show that the

1 failure to timely file or timely pay the amounts due
2 shown on return and/or reply to notice and demand
3 occurred despite the exercise of ordinary business
4 care and prudence.

5 That cause will not allow an abatement of
6 penalty -- the cause that will allow an abatement of
7 penalty must be a cause that would prompt an
8 ordinary person to have so acted under similar
9 circumstances.

10 Don West concludes in this reply that the
11 taxpayer's information does not explain why the
12 extension return payments were paid late and why the
13 return was filed over 60 days from the time the
14 representative was notified that the electronic
15 return was rejected.

16 He concludes by saying, based on the facts
17 presented and since your request does not meet the
18 requirements of Revenue and Taxation Code 19131,
19 we're unable to grant your request for abatement of
20 penalties.

21 So I want to present the background detail
22 for the filing year in question 2012. The
23 taxpayer's timely extension, reasonably timely
24 payment of expected taxes with her extension, and
25 reasonably timely return filing, when taken
26 together, is cause that would prompt an ordinary
27 person to have so acted under similar circumstances.

28 I think it bears repeating that what we

1 need to focus on here is whether it's reasonable
2 that these facts, which I'll more fully discuss, be
3 viewed as not being a willful failure to pay or
4 file.

5 The timeline events for this California
6 filing year for Ms. Crowell include, first, the
7 taxpayer filed timely 2013 extensions for her three
8 2012 returns which included federal, California and
9 Oregon.

10 The California extension showed a payment
11 to be made of \$243,555 for what she reasonably
12 estimated would be her California tax liability. To
13 cover this payment she deposited funds via check on
14 Friday, April 12, 2013 to cover the electronic
15 payment expected to be transmitted the following
16 Monday. Unbeknownst to Ms. Crowell, the bank put a
17 hold on her deposited funds which resulted in the
18 electronic transmission not timely transmitting on
19 Monday, April 15th, 2013.

20 That day was a Monday and Ms. Crowell was
21 able to clear the hold and finally transmit the
22 payment by April 19th, four days later. However,
23 the payment was now late and she was later assessed
24 a late payment penalty for the four-day delay.

25 I will point out that had she simply posted
26 the check by United States Postal Service on Monday,
27 she may not have been subject to the one percent
28 penalty since this was the first year that her tax

1 liability exceeded, or her tax payment exceeded
2 \$20,000.

3 But for the unreasonable and possibly
4 unlawful withholding by Ms. Crowell's bank with
5 respect to funds in a demand deposit account,
6 payment could have executed as directed by Ms.
7 Crowell.

8 I submit that an ordinary person would
9 agree that Ms. Crowell reasonably attempted to pay
10 timely and that circumstances beyond her control
11 operated to subvert her intention.

12 It is instructed to be mindful of Don
13 West's stated position, that late payment penalties
14 can be mitigated upon a showing of reasonable cause.
15 I submit that the failure to pay electronically was
16 for reasonable cause and not willful neglect, which
17 arguably is the case here with respect to the
18 payment penalty.

19 The timeline now advances to October 15th,
20 2013 when the taxpayer's preparer Michael Fjelstad,
21 who meets the definition of a tax professional, who
22 Ms. Crowell reasonably and justifiably relied on,
23 electronically filed all three returns, which for
24 California --

25 No, I'm not going to make that comment.

26 Federal and California were successfully
27 transmitted and timely filed at the extended due
28 date of October 15th, 2013. The California return,

1 also electronically filed on that date, was
2 rejected. The attempt to file California was a
3 willful attempt to file and cannot be construed as a
4 willful failure to file. That attempted filing
5 showed a total tax of \$360,315 and a balance due of
6 117,260, \$117,260 more accurately.

7 The California return that was rejected
8 pursuant to the attempted filing on October 15th is
9 the same return that was subsequently paper filed
10 presumably on December 24th, 2013 by delivery to the
11 United States Postal Service. That return was the
12 same return that failed to file on the October 15th
13 due date.

14 The reason for this delay of 70 days from
15 October 15th to the presumed United States Postal
16 Service postmark filing date of December 24th raises
17 the subjective question of willfulness, and I
18 understand that this can be considered detrimental
19 to this pleading for mitigation and I will advise.

20 At the end of 2012 the taxpayer held an
21 investment in a company whose sole value is
22 predicated on a patent that it owned. That
23 investment was \$830,000, which was being challenged;
24 that is, the validity of the patent was being
25 challenged. Whether or not this investment had any
26 value would be contingent on the outcome of active
27 litigation ongoing on October 15, 2013.

28 After the California return rejected, the

1 taxpayer felt it was necessary and prudent to wait
2 out the pending imminent litigation verdict as the
3 verdict invalidating the patent would support
4 write-off and accordingly eliminate tax beyond the
5 amount that had been paid with the extension.
6 Moreover, the taxpayer had a reasonable expectation
7 during this hiatus period that her extension payment
8 paid all of her tax due.

9 In late 2013, the trial court verdict came
10 down obviating any value in the patent investment.
11 Unfortunately for Ms. Crowell, that decision was
12 appealed in December; and with the valuation matter
13 not resolved, the taxpayer immediately took a
14 conservative position determining not to write off
15 the investment as worthless.

16 Accordingly, on December -- presumably
17 December 24th, Ms. Crowell paper filed the
18 California return, showing a balance due of
19 liability of 117,260 and also contemporaneously paid
20 that balance. The investment of 830,000 was
21 eventually written off in 2014 when the court of
22 appeals upheld the trial court's decision from
23 December of '13, invalidating the patent.

24 I understand that penalties are a clear
25 metric and I'm not arguing that the penalties have
26 not been correctly calculated. What I argue is that
27 the facts and circumstances of this case operate to
28 mitigate the assumption of willfulness. What is

1 clear to me is that the taxpayer willfully attempted
2 to timely file -- excuse me, to timely pay the full
3 amount of tax that she reasonably expected to incur
4 for 2012 to April 15th, 2013.

5 It is also clear to me that her
6 representative made a willful attempt to file the
7 California return on October 15th. Had that return
8 been paper filed, there would be no failure to file.

9 In this fact pattern the taxpayer's actions
10 demonstrate a concerted effort to accurately file
11 and to pay her 2012 income tax; 2012 is the first
12 year that the taxpayer's liability exceeded \$20,000,
13 requiring an electronic payment.

14 As to the reasonableness of the penalties,
15 while I understand that penalties operate pursuant
16 to the mechanics of the statute, I want to outline
17 for you the extremely harsh result of these
18 penalties to this case.

19 The final tax liability for the year 2012
20 was \$360,315 of which \$253,045 was arguably timely
21 paid, including interest -- excuse me, excluding
22 interest there resulted a balance then due of
23 117,260, upon which the combined failure to file and
24 failure to -- excuse me, combined failure to pay and
25 failure to file penalties amounted to \$89,953.

26 Expressed as an interest charge in the
27 final tax payment, it would take an interest rate of
28 roughly 114 percent per annum on funds outstanding

1 eight months and nine days to generate the \$89,953
2 penalty. I will argue that the size of the penalty
3 related to California's tax entitlement in this case
4 is morbidly unfair, grossly unreasonable, and does
5 not fit the purposes for which penalties are
6 intended.

7 Finally, I ask that you be mindful that the
8 extension payment of \$243,055 reflected a hundred
9 percent of the estimated California tax liability
10 Ms. Crowell reasonably expected to be required to
11 pay after deduction of worthless investment of
12 approximately \$130,000.

13 If the patent value was confirmed by the
14 court, she would have had additional tax to pay, of
15 course, but would also have a much more significant
16 investment to enjoy.

17 As to the taxpayer's filing record, prior
18 to and since 2012 the taxpayer's maintained an
19 exemplary record of timely filing and payment. In
20 2012 the taxpayer was new to electronic payment of
21 FTB balances exceeding \$20,000 and encountered an
22 unexpected delay due to a bank hold and transferred
23 funds. This caused a small delay in the payment of
24 her extension, which was not her fault and should
25 not be -- and should be considered when weighing the
26 merits to support abatement of penalty.

27 That concludes my testimony.

28 JUDGE ROBINSON: Respondent.

1 MR. ROUSE: I just have a couple
2 questions.

3 JUDGE ROBINSON: Let's take a break before
4 we start your questioning so that we can get
5 Mr. Fjelstad some water. Thank you.

6 (Whereupon a break was taken from 9:44 a.m.
7 until 9:46 a.m.)

8 JUDGE ROBINSON: Are we ready to proceed?
9 There's no hurry. If you want to take a little
10 longer, that's fine.

11 MR. ROUSE: No, we're fine.

12 JUDGE ROBINSON: Respondent, do you have
13 any questions for Mr. Wubbels?

14 MR. ROUSE: Just a couple questions.

15 Mr. Wubbels, on October 15th you were able
16 to file the federal and Oregon returns; is that
17 correct?

18 MR. WUBBELS: Correct.

19 MR. ROUSE: And was the litigation that you
20 referenced in your testimony, was that pending on
21 October 15th?

22 MR. FJELSTAD: Excuse me, I think you might
23 be wanting to be directing --

24 JUDGE ROBINSON: Mr. Fjelstad, you will
25 have an opportunity to testify, and this is the
26 questioning of the witness.

27 MR. FJELSTAD: Okay.

28 JUDGE ROBINSON: So if you could hold on to

1 that thought for your testimony, that would be
2 helpful.

3 MR. FJELSTAD: Okay. Sorry.

4 MR. WUBBELS: Yes, that is my
5 understanding.

6 MR. ROUSE: Okay. And can you tell me
7 whether the litigation also affected the proper
8 reporting of the investment on the federal return?

9 MR. WUBBELS: All the returns were filed
10 without taking a deduction for that investment.

11 MR. ROUSE: Okay. No further questions.

12 JUDGE ROBINSON: Okay. Appellant, do you
13 have any other witnesses?

14 MR. WUBBELS: No.

15 MR. FJELSTAD: Ask me --

16 MR. WUBBELS: Oh, the only other witness I
17 would have would be Michael Fjelstad. And I would
18 suggest that if anyone has questions for him, does
19 he need to be sworn, Your Honor?

20 JUDGE ROBINSON: Yes.

21 MR. FJELSTAD: I can be sworn in.

22 JUDGE ROBINSON: Okay. Do you solemnly
23 swear or affirm that the testimony you will give
24 today will be the truth, the whole truth and nothing
25 but the truth?

26 MR. FJELSTAD: I do.

27 JUDGE ROBINSON: Okay. Please be seated.

28 Mr. Wubbels, are you going to ask

1 Mr. Fjelstad questions or would you like him to
2 testify?

3 MR. WUBBELS: No, I would just invite
4 anyone who has questions of Mr. Fjelstad to speak
5 up.

6 JUDGE ROBINSON: Respondent, do you have
7 questions of Mr. Fjelstad?

8 MR. ROUSE: Prior to his testimony?

9 JUDGE ROBINSON: Mr. Fjelstad, when we
10 were -- a moment or two ago you started to say
11 something in response to a question that was asked
12 of Mr. Wubbels. Would you like to just tell us what
13 you had in mind?

14 MR. FJELSTAD: Well, I was thinking that
15 some of the questions as to events that took place,
16 and since I was the percipient witness and
17 participant in those activities, such as, you know,
18 notifying my client the need to file the extension
19 and the problems that I encountered when I was
20 attempting to electronically file, you know, those
21 are things within the purview of my knowledge
22 directly. And I thought that if there was any
23 questions as to what took place, although I think
24 I've covered pretty much everything in the
25 declaration, I felt if there was any clarification
26 that was needed.

27 And I would add that at the time this was
28 done, I was -- I sent loose the extension forms and

1 I just sent her by e-mail, and I said here's the
2 extension forms that you need to submit and here's
3 the amounts that are due, and you need to take care
4 of that. And I gave her a link to the electronic
5 filing section for the State of California and how
6 to go through that process.

7 And, quite frankly, I was not aware -- in
8 fact, well, not until well into this entire process
9 appeal here -- that she encountered any kind of a
10 difficulty in making the payment of that original
11 estimated tax. For whatever reason it was never
12 brought to my attention.

13 So at the time I was operating under the
14 assumption that all taxes had been timely paid and
15 that, you know, there was no issue other than
16 whether, you know, we were going to go ahead and
17 claim this loss or not claim it and perhaps file an
18 amended return once it became a little bit clearer.
19 Because I knew -- I had read the case files. I had
20 gone on Pacer. I was well aware of it.

21 I have a working familiarity with patents
22 because my brother has about 140 of them and mostly
23 involving electronic packaging and he's a
24 well-respected inventor. And I took a patent course
25 when I was in law school, so I had a basic
26 understanding of what makes it as a patent or not
27 and having read a lot of the pleadings and the
28 papers that were filed in the case, yeah, I was

1 pretty comfortable that this was not going to
2 prevail as far as winning this case, because in this
3 instance the company was suing Microsoft and Capital
4 One. Those are the big dogs in the kennel. And
5 they ultimately prevailed, and prevailed on the
6 appellate level and that was it.

7 JUDGE ROBINSON: So when you say that you
8 didn't have confidence that you would win this case,
9 you're talking about the patent case?

10 MR. FJELSTAD: Yeah.

11 JUDGE ROBINSON: Okay.

12 MR. FJELSTAD: Yeah, you know, I have a
13 fairly good working knowledge just because of
14 talking to my brother, you know. He's a pretty
15 well-renowned and international lecturer on
16 electronic packaging and what goes into the concept
17 of patents, and he probably could write a better
18 patent than most patent attorneys.

19 So I was able to read the situation for
20 what it was, and it isn't the first time I've seen a
21 situation where you have some kind of a
22 Svengali-type investor who promotes a magic
23 beanstalk and everybody buys into it and then
24 they'll kind of push it along and shout out more
25 sizzle than stain.

26 And I was correct in my assumption here.
27 But, you know, Liz made a decision that she would
28 rather wait. And I think if you were in her shoes

1 and looking at the prospect of writing off an
2 \$800,000 investment, it was almost like being
3 diagnosed with cancer. You know, your first
4 impression is, you know, go into denial, it can't be
5 happening.

6 And so there is that human consciousness
7 and you don't have that cold reflection of an
8 attorney or CPA that has seen these types of things
9 because it's not your money. You're trying to make
10 the diagnosis.

11 And so that was sort of part of the
12 background that was going on. And even in the face
13 of the defeat, you know, Liz took the high road and
14 said, well, let's wait and see. And I said, okay
15 fine, you know, because the other alternative was to
16 file -- amend the two returns that had been filed,
17 that did not claim the loss. And I was going to
18 file it, not claiming a loss, and figured I'd come
19 back and amend them later.

20 So there was a bit of a dynamic going on
21 here that really wasn't intended to harm anybody or
22 do anything that was nefarious, you know, it was
23 just the circumstances. And I never had this kind
24 of situation in my 40 years of doing these. It's
25 just what I call it's a unicorn. You know, it's a
26 set of circumstances and facts that are so unique
27 that they're likely never to be seen again. And so
28 I'm not trying to, you know, say, make a precedence.

1 And on the issue of the concept of
2 willfulness and in these kinds of situations, I'm
3 cognizant of the fact that there has been some
4 movement, you know, that this is where the IRS would
5 have been a totally different situation. They would
6 have had sort of the one free bite, you know. And I
7 realize that this is not the law in California, yet,
8 although that -- it is moving in that direction.

9 But, you know, in these issues that are so
10 subjective as to the question of somebody really
11 doing something bad here or trying to, you know,
12 game the system or anything like that, you know,
13 this is a statute that's never been -- you know,
14 never been litigated and there's no citations on
15 this statute. And the whole idea of the concept of
16 conformity between the Franchise Tax Board and the
17 IRS, again, there are areas of nonconformity. But
18 for the most part you would think on something like
19 this, you know, kind of an administrative or just,
20 you know, common sense, looking at the totality of
21 the facts would, you know, give a result that
22 there's no -- there's no bad people here. There's
23 no bad guys. There was no bad intent. There was no
24 intent to skate the tax liability.

25 And I think, you know, ultimately this
26 issue will probably merge at both the, you know,
27 state and federal level because there is pending
28 legislation, has been for years, but it just never

1 seems to get up to the point of having a vote and
2 there's no opposition.

3 But, again, pointing out that there was
4 no -- you know, this was all in good faith. And,
5 again, the one that really shocked me was finding
6 out this -- this bank hold, because I was completely
7 unaware of it. And at the time when I realized that
8 the return did not process electronically, even
9 though I was given indications that it was, I
10 figured, well, you know, we've already paid the tax
11 and the penalty's based on the unpaid tax and that's
12 what made the erroneous assumption that there were
13 no problems with that. And we found out about it
14 years later.

15 So, again, I kind of see this as the
16 unicorn that it is. It's once in a million, it's
17 really -- the idea of this getting any kind of
18 questions for some kind of a factual whatever, it's
19 not even citable, it's so weird.

20 JUDGE ROBINSON: Okay.

21 Respondent, would you like to ask
22 Mr. Fjelstad any questions?

23 MR. ROUSE: No.

24 JUDGE ROBINSON: Judge Johnson, do you have
25 a question?

26 JUDGE JOHNSON: Good morning, Mr. Fjelstad.
27 Thanks for being here.

28 MR. FJELSTAD: Good morning.

1 JUDGE JOHNSON: And thanks for the
2 background information. It's all very helpful,
3 enlightening.

4 I did have a few questions, just to sort of
5 fill in some gaps factually that as I was going
6 through the file kind of raised questions in my
7 mind.

8 MR. FJELSTAD: Okay.

9 JUDGE JOHNSON: I believe that, according
10 to the briefs and Mr. Wubbels' testimony, the
11 attempt to file the return was on October 15th,
12 2013. And then when did you find out that the
13 filing attempt had failed?

14 MR. FJELSTAD: The filing attempt had
15 failed?

16 JUDGE JOHNSON: Mm-hmm.

17 MR. FJELSTAD: I found out the next
18 morning, and it just popped up. And it was late,
19 you know, I was done.

20 I made probably -- there was some
21 peculiarity because I was continually resubmitting
22 it and it would say, "Run diagnostics." I'd run the
23 diagnostics, it'd come back no problem.

24 And then I'd say, okay fine, let's upload.

25 And then it would come kicking back again
26 saying you need to run diagnostics. And it was very
27 frustrating because I think when I pulled the log --
28 you know, and I didn't realize there was even a log,

1 but Lynn alerted me and I went in and I looked at
2 the log and there were probably 13 or 15 attempts to
3 process this return, and it kept getting rejected
4 without any indication of what the problem was.

5 So I keep looking at it and I can't find
6 any problems. And then ultimately, you know, I
7 ran the -- I went through, I looked at all the
8 forms. I ran it through and I said, okay, let's go.
9 And then, boom, it said, "Passed diagnostics,
10 uploading." And then I said, "Hurray."

11 You know, this has been a real struggle.
12 And then I get up the next day and I find out it
13 gets rejected. And my simple way of looking at
14 things is that when something's late, you know, you
15 can't un-late it. I mean it was late. There's no
16 question.

17 Let's say, it did not get filed as it
18 should have been. But the reasons had somewhere to
19 do with the software. And I, to this day, do not
20 have a clear view of what happened. But I do know
21 that I did talk to Intuit, talked to their people.
22 They surmised that perhaps it had to do with that I
23 did not click a box, you know, for electronic
24 filing. But then I realized subsequent to my
25 conversation with them that, wait a second, I would
26 have unclicked that box if I was going to file a
27 paper return. So, you know, that made no sense. I
28 said, well, that couldn't have been it.

1 Then later on, even after I filed, up to
2 the point I filed I think this declaration, later
3 out of just sheer curiosity, I said let me go back
4 and try to do this again, see if I can figure out
5 what's going on. And then I ran the electronic
6 diagnostics, and what pops up? It says you have an
7 extra K-1.

8 And, mind you, in this particular case
9 there was a whole flood of K-1's that were coming
10 in. And again, when you're talking about the
11 differentials between state and fed, that when you
12 go from the federal return to the state return, you
13 know, it creates its own set of forms. And for some
14 reason or somehow the program created a blank K-1,
15 but it was not telling me that that was the problem.
16 And I think the only reason that it popped up
17 subsequently is that the tax preparers or at least
18 the programers for these tax programs, in many ways
19 they do a great job, but a lot of beta testing is on
20 the clients themselves who bring to the attention of
21 the programmer, flaws as they materialize. And
22 apparently I must have had this weird thing that
23 somehow in the process of transferring from the fed
24 to the state that it generated this wildcard K-1
25 that had no information on it. And as a
26 consequence, that's why it was continually getting
27 rejected because, you know, there was no information
28 on it.

1 But now this is highly speculative, but I
2 think it's a reasonable explanation why this thing
3 did not go through when I made every conceivable
4 effort. And it was too late for me to try to get in
5 my car and drive miles and try to beat it to the
6 post office. And I will tell you that in the past I
7 have had situations where I've been down at the post
8 office in the line getting a postmark, you know,
9 just before midnight on the last day of filing.

10 So, you know, it's not that I wouldn't.
11 You know, if I thought I had the time, I would have
12 done it. But it was, you know, at that point I had
13 never anticipated this to be such a weird situation.

14 And then afterwards you say, well, you
15 know, if we -- if we go ahead and file a return the
16 way I wanted it, claiming this loss, no additional
17 tax due, all taxes have been paid timely, therefore
18 there is no penalties, you know, but I was operating
19 on a -- you know, a mistake of not being aware of
20 the difficulties that Liz encountered as the
21 consequences of the actions of the bank.

22 So this is, again, this is such an unusual
23 set of facts and circumstances where there was -- at
24 no time was there any intent to try to, you know,
25 game the system. It was just strictly a combination
26 of -- I guess if you really want to have a classic
27 example of Murphy's law, this would be it. I mean
28 everything that could have gone wrong, went wrong.

1 And again, there was a bit of a delay, you
2 know. And yeah, in retrospect I probably should've
3 said, yeah, let's just go ahead and shoot something
4 in in paper, you know, but it was sort of the shock
5 of the situation. And the question of I'm going to
6 file something that I'm now going to amend, and plus
7 a little bit of indecision, you know.

8 But it was never a question that this
9 return was going to be filed. And if things went
10 right, it would have been filed on time. But I
11 don't run Intuit, and I don't know what they do to
12 the returns. I mean they shoot them over to the
13 Franchise Tax Board. I don't know how their system
14 works. I don't run it, I just use it.

15 JUDGE JOHNSON: Some of the comments there
16 lead to my next question. Once you found out that
17 the filing attempt had failed, I know in the
18 declaration you talk about at that point and you
19 just talked about now about waiting for litigation
20 to end. I was curious what date, if you remember,
21 did you actually notify Ms. Crowell that the filing
22 had failed? And what date did you prepare a paper
23 return, thinking that you might have to file paper?

24 MR. FJELSTAD: You know, I notified her
25 when I found out about the situation. I think it
26 was within a day or two. She was in town, so I
27 would've notified her. So we definitely knew it.

28 But at the time the question was, you know,

1 if we claim this loss, as I wanted to and I felt was
2 appropriate based on my professional opinion, that
3 all taxes have been paid on a timely basis and that
4 there would be nothing to have a penalty on, so that
5 I didn't see the urgency because of my
6 misunderstanding of what took place when the
7 original extension payment was made. Because I
8 fully intended to just go ahead and amend these
9 returns, claim that loss, and say, look, let's just
10 do it because, you know, this is going nowhere and
11 might as well take it this year.

12 But she took the conservative road, coupled
13 with, as I suggest, probably a point of denial, you
14 know, of just psychological effect of, you know,
15 writing something off of that magnitude has to, you
16 know -- for me, it's easy for me to say that because
17 it's not my money. But for her, I'm sure her frame
18 of reference -- you know, hope springs eternal. And
19 I'll tell you, the guy that was running this
20 operation was quite a Svengali himself. So he was
21 persuasive.

22 But like I always told her, I said all I
23 see here is sizzle, not steak. And that sort of is
24 the magic elixir of people that are running sort of
25 these magic beanstalk investment proposals. It's
26 always high, big, huge, gigantic returns. Just give
27 me a little more money and I can keep it going.

28 I've been doing this a long time, so I've

1 seen it over and over and over. And look at --
2 Bernie Madoff's a classic example.

3 JUDGE JOHNSON: Thank you.

4 JUDGE ROBINSON: Judge Hosey, do you have
5 any questions?

6 JUDGE HOSEY: No, thank you.

7 JUDGE ROBINSON: And respondent, do you
8 have any questions for the --

9 MR. ROUSE: No, Judge.

10 JUDGE ROBINSON: -- for the witness. All
11 right.

12 Does appellant have any other witnesses?

13 MR. WUBBELS: No.

14 JUDGE ROBINSON: Okay. Respondent, are you
15 going to call any witnesses?

16 MS. MOSNIER: We have no witnesses.

17 JUDGE ROBINSON: Okay. Before we conclude
18 today's hearing, I'm wondering if there are any
19 questions at this stage?

20 MS. MOSNIER: I have a question. At this
21 stage here, presentation of evidence, although
22 Exhibits 1 through 6 and A through E have been
23 admitted as evidence, did you want FTB to point out
24 any specific pieces of evidence that it would look
25 to in relying on in its argument? And should that
26 be made now or in the closing argument portion of
27 the proceeding?

28 JUDGE ROBINSON: I think in the closing

1 argument portion of the proceeding would you fine.

2 MS. MOSNIER: Thank you.

3 JUDGE ROBINSON: Are there any other
4 questions before we do closing arguments?

5 Okay. Appellant, this is your opportunity
6 to give us a closing statement.

7 MR. WUBBELS: Thank you, Your Honor.

8 Franchise Tax Board states delay in filing
9 the 2012 return after the extended due date supports
10 their conclusion to deny penalty abatement and that
11 the taxpayer fail to provide sufficient evidence to
12 support the penalty abatement.

13 We respectfully disagree and request that
14 you abate these penalties for the reason that the
15 actions here do not rise to the level of willful
16 neglect which is the necessary requisite to impose
17 willful failure to file and willful failure to pay
18 tax penalties. That clearly was not the case with
19 this matter.

20 We also ask you to be mindful that the
21 California Franchise Tax Board, as well as other
22 taxing authorities, mandate electronic filing and
23 payment. The taxpayer tried to comply with
24 electronic filing to his detriment. Had he
25 paper-filed, which he could have done, had he taken
26 that action on October 15th rather than attempting
27 to assist -- accede to the request of the filing
28 authority, there would be no failure-to-file

1 penalty.

2 That concludes my remarks here today, Your
3 Honor.

4 JUDGE ROBINSON: Thank you.
5 Respondent?

6 MS. MOSNIER: Thank you. Can you hear me
7 okay?

8 JUDGE ROBINSON: Yes.

9 MS. MOSNIER: Okay. Franchise Tax Board,
10 FTB, properly imposed a delinquent filing penalty
11 pursuant to section 19131 of the Revenue and
12 Taxation Code because, as appellant has conceded,
13 her 2012 return was filed more than eight months
14 late. And, although there was a stipulation as to
15 this fact, I would point to page one, Exhibit A, at
16 the top 12/1/13, that would be the date FTB's
17 records show that the return was received.

18 Imposition of this penalty is mandatory
19 unless the plaintiff -- excuse me, appellant
20 establishes reasonable cause and a lack of willful
21 neglect for filing late.

22 Section 19131 conforms to the federal late
23 filing statute, Internal Revenue Code section 6651
24 and FTB looks to federal rulings and guidance to
25 interpret its own late filing penalty statute. And
26 at the federal level there is a Treasury Regulation
27 26 CFR 301.6651-1(c) that defines reasonable cause
28 as the exercise of ordinary business, care and

1 prudence, which I think is similar to the
2 description of reasonable cause appellant has used
3 in her argument.

4 The facts and circumstances in this appeal
5 do not establish that the appellant had reasonable
6 cause and a lack of willful neglect for filing her
7 return late.

8 And we would look to Mr. Fjelstad's
9 declaration, which is Exhibit 1, and certain
10 statements in there I think the salient facts in
11 this analysis. And according to his testimony in
12 the declaration, due to a keying error when
13 inputting e-filing instructions, it appears that
14 Intuit didn't receive instructions, he filed the
15 California return on October 15th. From his
16 testimony today, it appears that he thinks now that
17 may not have been reasonable.

18 But I think no matter what it was that
19 caused that return not to be e-filed with California
20 on October 15th, I think unfortunately it's a term
21 we can just all agree that it was some kind of a
22 computer glitch; we're all familiar with those. And
23 his testimony today is that after he learned of that
24 e-filing failure the morning of October 16th, that
25 within a day he contacted the appellant and
26 discussed that with her.

27 In fact, I think it is paragraph 13 --
28 that'd be page 3 of Exhibit 1 -- he says after

1 discovering rejection of the e-filing, I discussed
2 with the client the subject of amending the accepted
3 federal and Oregon returns by claiming the loss and
4 submitting the paper California return that
5 conformed to the amended returns. The taxpayer
6 contemplated this.

7 JUDGE ROBINSON: And you were referring to
8 Appellant's Exhibit 1?

9 MS. MOSNIER: Yes. Appellant's Exhibit 1,
10 page 3; that was the first sentence of paragraph 13.

11 That is evidence that, notwithstanding her
12 understanding that there had not been a successful
13 filing, timely filing of her return, she
14 affirmatively chose to wait to file that return.
15 She chose because she wanted to wait on the outcome
16 of the then pending patent litigation because she
17 believed it would help her determine whether she was
18 entitled to claim a specific deduction on that tax
19 year return. That is not reasonable cause for
20 filing late.

21 When we look at federal guidance on section
22 19131 and we look to the Internal Revenue Manual,
23 that manual provides guidance and taxing authority
24 about the factors to consider when making a
25 reasonable cause determination. One of those
26 factors is the length of time. And the direction is
27 specifically to consider the length of time between
28 the event cited as a reason for the noncompliance

1 and the time of subsequent compliance. In this case
2 there is an approximate two-and-a-half-month span of
3 time between those events.

4 There is another factor the taxing
5 authority's directed to consider, and that is
6 whether the circumstances were beyond the taxpayer's
7 control. And it says consider whether the taxpayer
8 could have anticipated the noncompliance. Perhaps
9 not; it was a computer glitch. However, if the
10 taxpayer cannot timely meet the obligation, the
11 Internal Revenue Manual provides specifically that
12 ordinary business care and prudence requires that
13 the taxpayer continue to attempt to meet the
14 requirements even though late.

15 In other words, it is not a sufficient
16 defense to a late filing penalty to say that
17 computer glitch prevented the timely filing and then
18 filed two and a half months late or two and a half
19 years late or at any point in the future and have
20 that be reasonable cause simply because you are
21 unable to comply at the initial deadline, the filing
22 deadline.

23 Additionally, and with respect to the lack
24 of willful neglect -- because the abatement of the
25 penalty turns on two things. It turns on both the
26 existence of reasonable cause and the lack of
27 willful neglect. And so a decision by a taxpayer,
28 an affirmative choice not immediately to file a

1 paper return or to attempt another e-filing when
2 told within a day or two after October 15th, that in
3 and of itself is not reasonable cause.

4 The Internal Revenue Manual also tells us
5 that a continued failure to file may be evidence
6 that the underlying reason for the failure to file
7 is willful neglect. And so the failure to comply at
8 the soonest possible opportunity goes both to the
9 reasonable cause analysis and to the willful
10 neglect analysis. But it is sufficient, if she
11 fails to establish either of those, not to abate the
12 penalty.

13 In this case her -- knowing her conscious
14 decision to wait, means that FTB's determination to
15 deny her request for abatement of that penalty and
16 deny the refund claim is proper. And we request
17 that you sustain our action.

18 Thank you.

19 JUDGE ROBINSON: Appellant, do you have
20 anything in response?

21 MR. FJELSTAD: Response to the -- I'd like
22 to, again, go back to my statement that every effort
23 was made to file this return in a timely fashion.
24 It was not -- again, Murphy's law came into play.
25 Multiple attempts. There was never any
26 contemplation that this return would not be filed.

27 To be honest with you, at the time -- you
28 know, I've never experienced this in my entire

1 career, a situation like this. So this is, again, a
2 unicorn for myself. And, as I always say, when the
3 return is late, you know, the lateness and the
4 reason for it should be viewed at the time the
5 return was due. You know, what is it that caused
6 the return to be late? And if in this instance I
7 had taken the position that she suggested, which I
8 think, you know, would be unreasonable with the idea
9 that, oh, I will wait to file a return until I find
10 out what the judicial outcome is, then in that case
11 it would clearly be, in my view, a late-filed return
12 subject to the penalty because you have to make a
13 move.

14 So that move was made. And had the system
15 functioned as I expected it to, that return would
16 have been filed and the only issue would have been
17 would we amend that return and claim that loss at
18 some other point when we had a clearer vision as to
19 what was going to be the outcome?

20 I kind of knew it intuitively, but my
21 client didn't. And, again, my client, she had, you
22 know, substantial stake in this thing, both in terms
23 of financial and psychological.

24 So, I think when you look into the idea of
25 a failure to file a return and what caused the
26 lateness, which was -- and that determination takes
27 place at the time that the return was due. And
28 granted it was, you know, a little bit of time, but

1 it did not un-late the return.

2 The event that caused the return to be late
3 took place on October 15th. And I think you have to
4 view the lateness at that moment. Not, you know --
5 I mean not the fact that there was a little bit of a
6 delay to go ahead and get the return in. That's not
7 what I would consider a positive fact. But it
8 wasn't the fact that brought about the lateness in
9 the first place.

10 If that return process -- you know, we
11 probably had some penalties with the larger tax
12 liability. But if I amended the return and the
13 amended return was accepted with the loss being
14 claimed, then of course that tax would have gone
15 away and been abated. In some respects it's almost
16 a safer way to deal with authority issue where
17 you've got this concept of worthlessness. Again,
18 those two are very subjective. You know you can
19 have people believe, you know, in miracles and --
20 but, you know, with a greater level of knowledge
21 that they're really wishful thinking.

22 So I just want to make the point that I
23 don't think that you can view acts after the event
24 with as much, you know, as if they were things that
25 took place before and were part of the decision or
26 some decision to not file. And in this case every
27 motion here was to file that return.

28 I was going to file one way or the other.

1 Boom, I wanted it done and we'll deal with it
2 afterwards. Because I'm very sensitive to statutes,
3 and I've never had a situation of blowing a statute.
4 And coming out of law school, that's the first thing
5 they teach you. That's the first thing you learn.
6 Whatever you do, don't blow the statute of
7 limitations; that's a big no-no, you know.

8 So I was sensitive to that. And why I took
9 to go ahead and e-file, regardless of my best
10 efforts, I couldn't get it to go through.

11 JUDGE ROBINSON: Thank you, Mr. Fjelstad.

12 MR. FJELSTAD: Okay.

13 JUDGE ROBINSON: If there are no further
14 questions or concerns, I think it's time that we do
15 a submission. Is everybody okay with that?

16 MR. WUBBELS: Yes, Your Honor.

17 MS. MOSNIER: Yes.

18 JUDGE ROBINSON: Okay. Then this matter is
19 submitted today. And that concludes our hearing
20 today. And I want to thank all parties for their
21 participation today. This went very well.

22 And we're going to take a 15-minute recess
23 while we reset for the next case.

24 MR. WUBBELS: What will be the timeline,
25 Your Honor?

26 JUDGE ROBINSON: Hundred days or less.

27 Thank you.

28 (Whereupon the proceedings concluded at

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