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2 OFFICE OF TAX APPEALS
3 400 R STREET
4 SACRAMENTO, CALIFORNIA
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9 REPORTER'S TRANSCRIPT
10 MAY 30, 2018
11 CORPORATE FRANCHISE AND PERSONAL INCOME TAX HEARING
12 APPEAL OF
13 TAO XIE
14 18010798
15 AGAINST PROPOSED ASSESSMENT OF
16 ADDITIONAL INCOME TAX
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27 Reported by: Kathleen Skidgel
28 CSR No. 9039

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P R E S E N T

Panel Lead: John Johnson
Administrative Law Judge

Panel Members: Tommy Leung
Administrative Law Judge

Office of Tax Jeff Angeja
Appeals Staff: Administrative Law Judge

Dana Holmes
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Appearing for Taxpayer: Tao Xie
Taxpayer

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Representative

Appearing for Franchise Tax Board: Eric Yadao
Tax Counsel

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EXHIBIT INDEX

(Appellant's Exhibits 1 and 2 were admitted into
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(Respondent's Exhibits A through H were admitted
into evidence at page 6.)

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400 R STREET, HEARING ROOM

SACRAMENTO, CALIFORNIA

MAY 30, 2018

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JUDGE JOHNSON: Good morning. We'll officially go on the record right now.

This is the appeal of Tao Xie, and we have Mr. Xie on the phone.

Mr. Xie, am I saying that name correct?

MR. XIE: That's good enough, yes.

JUDGE JOHNSON: Good enough. All right, we'll go with that. Thank you.

It is T-a-o X-i-e. It's our case number 18010798. It is Wednesday, May 30th, 2018. The time is 9:05 a.m. It is a brisk but beautiful day here in Sacramento, California.

I'm the lead ALJ of this hearing, John O. Johnson.

Let me say good morning to my fellow co-panelists today. Good morning, Mr. Angeja.

JUDGE ANGEJA: Good morning.

JUDGE JOHNSON: Good morning, Mr. Leung.

JUDGE LEUNG: Good morning.

JUDGE JOHNSON: Let me ask the parties to state their names and the representative, who they're representing.

Let's start with the appellant on the phone. Please state your name for the record.

1 MR. XIE: First name Tao, T-a-o, last name
2 Xie, X-i-e.

3 JUDGE JOHNSON: Thank you. Let me get the
4 representatives to introduce themselves as well,
5 starting with the appellant.

6 MR. CURRY: Kenneth Curry for the
7 appellant.

8 JUDGE JOHNSON: And respondent?

9 MR. YADAO: Eric Yadao, counsel for
10 respondents, Franchise Tax Board.

11 JUDGE JOHNSON: Thank you. The issue on
12 appeal is whether appellant has shown reasonable
13 cause for the late filing of his 2014 tax return.

14 We have exhibits provided to us, Appellant's
15 Exhibits 1 and 2 and Respondent's Exhibits A through
16 H.

17 Are there any objections to these exhibits
18 from either party?

19 MR. CURRY: No objection.

20 MR. YADAO: No objections from respondent.

21 JOHN JOHNSON: We'll admit those into the
22 record then.

23 (Appellant's Exhibits 1 and 2 and
24 Respondent's Exhibits A through H were
25 admitted into evidence.)

26 JUDGE JOHNSON: We'll start today with
27 opening statements from the parties. We'll have
28 appellant go first with their opening statement.

1 Just a reminder, for an appeal of this complexity,
2 probably no more than 10 minutes would be sufficient
3 for an opening statement.

4 We don't need to introduce any facts here.
5 As I mentioned before, the panel members have read
6 all the exhibits, read briefs, so we don't need a
7 detailed retelling of the facts. Just hit the key
8 points that are important.

9 And if you could start off with what you'd
10 like the panel to find in this appeal, and then the
11 key points that you're going to discuss today to lead
12 us to that finding.

13 Mr. Curry, are you ready to go?

14 MR. CURRY: I'm ready.

15 JUDGE JOHNSON: All right. Please
16 proceed.

17 MR. CURRY: Well, my hope is that the panel
18 will find that there was reasonable cause for the
19 delay in the filing of appellant's 2014 tax return.

20 When the appellant realized that he needed
21 to amend his 2012 and 2013 returns and that that
22 would have a direct impact on the 2014 return, he
23 reached a decision point and he had to make a
24 decision whether to delay the filing -- which he did,
25 as you know -- or to file based on -- an estimated
26 return based on the best available information to him
27 that he had at the time.

28 The best available information at the time

1 that he did file, or the best available information
2 that he had in order to file timely, a timely
3 estimated return, would have been based on incomplete
4 information because he had to amend his '12 and '13
5 returns. Because his information was incomplete, IRS
6 deadlines tell him to look to previous returns to
7 guide his future decision. Right?

8 So in his 2012 and '13 amended returns he
9 received refunds. So, using that as his guide, it
10 would have been reasonable, prudent, to assume the
11 same result with his 2014 return. And in fact at the
12 federal level he did receive a return. So that seems
13 to be -- seems to point to a reasonable prudent
14 action.

15 From what I can tell, it seems that FTB
16 asserts that it cannot consider the filing history.
17 He has a good filing history in the previous returns.
18 And those are elements that the Internal Revenue
19 Manual determined are elements that can be considered
20 for reasonable cause.

21 As far as I can tell, FTB asserts that it
22 can't consider past payment history as evidence to
23 consider reasonable cause because the State of
24 California hasn't passed into law the authority to
25 abate the filing penalty for first-time offenders as
26 the IRS has done at the federal level. But this is a
27 misunderstanding of the first-time abatement at the
28 federal level.

1 The first-time abatement, first-time
2 offender of abatement at the federal level is
3 available for taxpayers who have a -- we'll call it a
4 clean filing history, with no late filing in the
5 last previous several years before the one that is
6 late. That's an automatic abatement. The taxpayer
7 doesn't need to show reasonable cause for that
8 first-time late filing.

9 That's different than -- that's different
10 than other opportunities to receive an abatement. In
11 other words, if it's not a first-time late filing,
12 they can still make a "reasonable cause" argument at
13 that point and still receive an abatement. The
14 difference here is that at the federal level the
15 first-time abatement is available without having to
16 show the reasonable cause.

17 The State of California hasn't granted that
18 authority, but that doesn't mean that it has not
19 granted the authority for a lack of showing of
20 reasonable cause for a first-time abatement. I hope
21 that makes sense. But that doesn't mean that the
22 filing history cannot be considered in making a
23 reasonable cause determination.

24 Without going through all the details -- as
25 you say, you've read all of the files -- just with
26 regard to the cite of authorities, the appellant's
27 cited authorities support the conclusion, again, that
28 the filing history can be a relevant factor. The

1 cited cases were decided based on other factors. In
2 several of them it was whether or not the taxpayer
3 legitimately relied on another person, an employee or
4 another agent, to properly act on that taxpayer's
5 behalf.

6 The *Boyle* case, it seems, may overturn some
7 of those or may cause the decision to be decided
8 differently. But none of them preclude the
9 consideration of the filing history as an element in
10 determining reasonable cause.

11 The other thing that I would say about the
12 authorities that are cited, the respondent's
13 authorities state the conclusions of the decisions --
14 for instance, difficulty in obtaining information,
15 the complexities of law, the difficulty in
16 determining income with exactitude -- but they do not
17 constitute reasonable cause.

18 But, the respondent fails to look into the
19 facts that support those conclusions. And in some
20 cases the facts from the authorities cited, in fact,
21 do more to support the appellant's arguments than to
22 dispute them.

23 For one example, in the *Appeal of Roger*
24 *Sleight*, respondent correctly states the conclusions
25 that the alleged difficulty encountered by the
26 appellant in determining its income with exactitude
27 does not negate the requirement to make --

28 HEARING REPORTER: Can you slow down just a

1 little bit?

2 MR. CURRY: Sorry, okay.

3 So, in the *Appeal of Roger Sleight* the
4 respondent correctly states the conclusion that the
5 alleged difficulty encountered by appellant in
6 determining the income with exactitude does not
7 negate the requirement that he make payments based on
8 a reasonably accurate estimate of the tax liability.

9 But the circumstances for Mr. Sleight were
10 different than Appellant's circumstances. In
11 Mr. Sleight's case, and this is quoting from the
12 case:

13 "All events which would determine
14 the tax treatment of the disposition had
15 occurred by October 1980. Nevertheless,
16 appellant contends that it took 'several
17 months' to determine that gain had to be
18 recognized in 1980. However, appellant has
19 introduced no evidence indicating what, if
20 any, difficulty caused this delay in
21 computing the gain to be recognized."

22 And that's the key point. The mere fact
23 that appellant apparently did not compute the gain
24 until September of 1981 does not constitute
25 reasonable cause for the late payment of his 1980 tax
26 liability.

27 In this case, however, appellant has not
28 made bare assertions. He has provided a reasonable

1 explanation of the events which caused him to delay
2 the completion and filing of his 2014 return. So the
3 two cases are a little bit different.

4 Furthermore, the events which contributed to
5 Mr. Sleight's tax liability were concluded well
6 before the filing deadline. In other words, he had
7 the information in plenty of time and offered no
8 explanation as to why it took so long to act on it.

9 In the current appeal, the appellant did not
10 have the necessary information but did act on it as
11 soon as practical; in fact, the 2014 return was filed
12 at the same time as the 2012 and '13 amended returns.
13 So there's no wronged way in making that return or in
14 filing that return.

15 And again, with Boyle, Boyle does seem to
16 reverse prior decisions with regards to whether or
17 not an agent can be relied upon to act on behalf of
18 the taxpayer. But Boyle found that the issue at hand
19 was a nondelegable tax. It should be pretty simple
20 to figure out what is the filing deadline, and that
21 responsibility is not delegable to an agent.

22 In this particular case, appellant makes no
23 such claims as to relying on other persons. As soon
24 as he discovered that he needed to amend the previous
25 returns and that those would impact the 2014 return,
26 he was diligent in getting those amended returns
27 filed and completing the 2014 return with the most
28 accurate information, even though it was a little bit

1 late.

2 So, again, we come back to that decision
3 point. Do you go ahead with inaccurate information
4 and, for instance, risk underpayment penalty?
5 Because there are consequences to filing without the
6 full and accurate information. Or does he wait for
7 the best information and file an accurate return and
8 not further compound the issues that were related to
9 the 2012 and '13 returns?

10 That's it for my opening.

11 JUDGE JOHNSON: Thank you, Mr. Curry.

12 Mr. Yadao, would you like to provide an
13 opening statement?

14 MR. YADAO: Yes, thank you.

15 It's undisputed that appellant filed a late
16 return. Respondent will present case law supporting
17 the conclusion that appellant's explanation for his
18 failure to file a timely return is not reasonable
19 cause to abate the late filing penalty.

20 That conclusion stands regardless if it is
21 appellant's explanation that his residency change
22 complicated his return, if he believed he would have
23 an overpayment and therefore no penalty would apply,
24 or if he pleaded he did not file timely because he
25 was in the process of amending prior year returns.
26 Neither of these reasons meet the legal standard
27 which require appellant to show, in spite of his
28 efforts, he was continuously prevented from filing a

1 timely return due to circumstances beyond his
2 control.

3 Thank you.

4 JUDGE JOHNSON: Thank you.

5 At this time let's go ahead and proceed with
6 testimony that we have for today. And then after we
7 hear testimony, the panel might have questions for
8 the representatives.

9 Mr. Curry, you just have one person
10 testifying today; is that correct?

11 MR. CURRY: Correct. Mr. Xie.

12 JUDGE JOHNSON: Okay. And, Mr. Xie, are you
13 ready to testify?

14 MR. XIE: Yes, I am, although I don't have a
15 prepared statement.

16 JUDGE JOHNSON: Oh. So no prepared
17 statement; is that what you said?

18 MR. XIE: Yes.

19 JUDGE JOHNSON: Okay. So you can testify by
20 a narrative if you'd like to. But if you don't have
21 a prepared statement, then Mr. Curry can also ask you
22 questions and you can testify that way.

23 We will swear you in before you testify, if
24 that's all right?

25 MR. XIE: Yes.

26 JUDGE JOHNSON: Okay. If you can raise your
27 right hand. And do you solemnly swear or affirm to
28 tell the truth, the whole truth and nothing but the

1 truth?

2 MR. XIE: Yes, I do.

3 JUDGE JOHNSON: All right, thank you.

4 Mr. Curry, would you like to begin with your
5 questions? Or would you rather have him talk
6 about something, that's fine as well.

7 MR. CURRY: No, I don't really have any
8 questions for him.

9 JUDGE JOHNSON: Okay.

10 Mr. Xie, is there anything that you'd like
11 to say or discuss? Or are you just open for
12 questions?

13 MR. XIE: I'm open for questions.

14 JUDGE JOHNSON: Okay. Let me ask,
15 Mr. Yadao, do you have any questions?

16 MR. YADAO: No questions. Thank you.

17 JUDGE JOHNSON: Let me go then to the panel.

18 Mr. Leung, do you have any questions?

19 JUDGE LEUNG: Yeah, I do have some questions
20 of Mr. Xie.

21 You mentioned that there were things that
22 you needed to -- information you needed to gather in
23 order to properly file not only 2014, but 2013 and
24 2012 returns. What was that information that you
25 needed?

26 MR. XIE: It was hopefully to go back to my
27 documents and letters. The amendments were centered
28 around the income and loss calculations for the

1 rental property and stock trading equity.

2 So I did the issues related to the
3 calculation depreciation. And it took me time to
4 calculate determination for some of the taxation
5 because some of the documentation for options-based
6 were actually pretty complicated, not very
7 well-documented on the -- on the 1099 forms that I
8 got from my stock broker.

9 So, like in 2014 when I filed my original
10 return, I realized that there were actually things
11 that I didn't do accurately, so I went back and redid
12 a lot of -- redid those calculations.

13 I think -- I'm not sure if my 2012 and '13
14 tax returns are in the exhibits, but I can show that
15 my Schedule D and E are very complicated. So it took
16 me a while to get through those so that I could have
17 the correct rental loss and capital loss carry over
18 two consecutive years. That's why I wanted to have
19 those cleared up, so that I could have accurate
20 information; because if there was a loss carryover,
21 that would affect my 2014 tax liability.

22 JUDGE LEUNG: And when did you file the 2014
23 federal return?

24 MR. XIE: It was -- I believe it was around
25 the same time as the California return. They were
26 both filed by paper because they were late. I think
27 they were -- they were mailed at the same time, on
28 the same day.

1 JUDGE LEUNG: Okay. So would you say the
2 majority, or the bulk of your corrections or
3 unanswered questions related to your option trading
4 or related to your rental property?

5 MR. XIE: It's a little bit hard to say due
6 to the amount of time. But I think it was probably
7 around the back trading, I believe, option trading, I
8 believe. But I think maybe in terms of the amounts
9 that were amended, it was more on the trading
10 calculation side.

11 JUDGE LEUNG: There was a mention of a
12 change of residency to California; when did that
13 happen?

14 MR. XIE: That happened in the 2014 tax
15 year. I think it was in August, or around August.

16 JUDGE LEUNG: August of 2014?

17 MR. XIE: August of 2014, yes.

18 JUDGE LEUNG: Okay. And this isn't your
19 first California return, is it? Or is it your first
20 California return?

21 MR. XIE: This is my first California return
22 as a California resident.

23 It says half in 2012 and '13. I filed a
24 California return because, even though I was a
25 Washington resident but I traveled in California, and
26 to meet California tax law for the portion that you
27 work inside of California you must pay proportional
28 personal income tax during that period of time. So I

1 worked at Facebook, and so we follow those records
2 and law, so the company and I had to file tax records
3 first for 2012 and '13.

4 2014 was the first time because I'm a
5 resident. And that's my underestimation of the
6 amount of tax liability, because in the past I could
7 always get a refund, but this time I probably, you
8 know, should have -- should have done my homework.

9 JUDGE LEUNG: Okay, thank you.

10 JUDGE JOHNSON: Thank you. And let me turn
11 to my other panelists.

12 Mr. Angeja, do you have any questions?

13 JUDGE ANGEJA: One quick question. I
14 understand the argument is that the failure to file
15 timely for 2014 was based on the calculations
16 necessary for the amendments for 2012 and '13.

17 My understanding is that there's no
18 allegation or evidence that there was any physical
19 limitations, such as being out of the country or an
20 illness or an other factor that would have prevented
21 a timely filing, other than these calculations; or is
22 there something of that nature that would have
23 stopped him from timely filing?

24 MR. XIE: That's correct. There was no
25 physical limitation from filing. It was more my
26 judgment call.

27 JUDGE ANGEJA: Okay. I have no other
28 questions.

1 JUDGE JOHNSON: Thank you.

2 Mr. Xie, this is John Johnson again. I have
3 a question for you. Regarding the timeline, were
4 your 2012 and 2013, were the original returns timely
5 filed?

6 MR. XIE: Yes, they were, for both federal
7 and California.

8 JUDGE JOHNSON: Okay. And when did you
9 discover that there were changes that you needed to
10 make to the 2012 and 2013 returns?

11 MR. XIE: I'm -- I'm not sure, but I believe
12 it was during my calculations for the 2014 filing
13 period.

14 I did file an extension for the 2014 return.
15 So I can't quite remember whether I discovered that
16 when I was originally trying to file in April and
17 then I had to file an extension, or if it was when I
18 went to file later. I just can't quite remember.

19 JUDGE JOHNSON: I think I got most of that,
20 but let me just make sure I did. It could have been
21 perhaps during the original filing due date, prior to
22 April 15th, or it could have been during the
23 extension, before October 15th; is that what you're
24 saying?

25 MR. XIE: Yes, that's correct.

26 JUDGE JOHNSON: Okay, thank you.

27 One more question. After you did the
28 amended returns for 2012 and 2013, did you find that

1 they changed how you would have filed your 2014
2 return had you filed it with the best information on
3 April 15th -- or 2015?

4 MR. XIE: I -- I'm not sure I quite remember
5 the numbers. I think the rental loss carryover was
6 different, but I'm not sure I remember what the
7 actual loss carryover was.

8 So I couldn't quite remember net, whether
9 there was a different in my notes. Actually, I think
10 net, I think the rental loss, it ended up also being
11 a loss. So it was probably the magnitude of the loss
12 I remember. I don't think it changed the tax
13 liability.

14 JUDGE JOHNSON: Okay, thank you.

15 And since the representatives didn't have
16 any questions the first go-around, let me ask again.
17 Franchise Tax Board, do you have any questions now,
18 based on that testimony?

19 MR. YADAO: No questions. Thank you.

20 JUDGE JOHNSON: All right. Mr. Curry, any
21 questions?

22 MR. CURRY: No questions.

23 JUDGE JOHNSON: All right. Thank you, Mr.
24 Xie, for your testimony.

25 Appellant has no other witnesses.

26 Respondent, did you have any witnesses or
27 evidence to present?

28 MR. YADAO: No witnesses.

1 JUDGE JOHNSON: Okay, thank you.

2 We will move on to closing statements. But,
3 first, let me ask the panel members if they have any
4 questions of the representatives regarding their
5 positions; Mr. Leung?

6 JUDGE LEUNG: Yes. Questions for the
7 Franchise Tax Board.

8 Mr. Curry mentioned the *Boyle* decision.
9 Didn't really address this first-time filing
10 situation. Refresh my recollection. At the time of
11 *Boyle*, was there already an exception on the books,
12 Internal Revenue Code and the Rev. and Tax Code,
13 reasonable cause exception in there?

14 MR. YADAO: I do not know the answer to that
15 question.

16 The purpose of citation to the *Boyle* case is
17 because the cases appellant cited in, I believe, his
18 reply brief stated that -- the common fiber between
19 those cases cited was that the taxpayer's agent or
20 representative made an error, and the case -- those
21 cases looked at that fact and then talked about the
22 taxpayer's good intent to file a timely return.

23 And then *Boyle* explicitly overrules, I
24 believe, the *Willis* case on that fact. Whereas, the
25 *Boyle* case stated that a taxpayer's reliance on an
26 agent or representative to perform the administrative
27 duty of filing a timely return is not reasonable
28 cause.

1 JUDGE LEUNG: But my basic question is, in
2 your opinion, whether the reasonable cause exception
3 was meant to restrict *Boyle*, or was it there already
4 and *Boyle* just overrode reasonable cause?

5 MR. YADAO: Well, I don't think *Boyle*
6 overrode reasonable cause. I think *Boyle* clearly
7 defined -- I think one of the statements made in the
8 *Boyle* case was, it was time for a brightline rule.
9 Because I think the lower courts -- *Boyle* being a
10 U.S. Supreme Court case -- I think there were
11 different district courts applying the law
12 differently, applying and interpreting reasonable
13 cause differently. And so *Boyle* foreclosed the
14 "reliance on an agent" argument.

15 JUDGE LEUNG: So in your travels through the
16 penalties and reasonable cause cases, have you run
17 across situations where a taxpayer changes residency,
18 whether it's from state-to-state or from foreign to
19 U.S. or other direction, has that ever thought to be
20 a cause for reasonable cause when there's a change in
21 domicile residency?

22 MR. YADAO: No. Case law on those points
23 basically talks about unavailability of information
24 or complexity in law, and neither one of those are --
25 unless there's some sort of physical impediment --
26 unavailability, you know, you're prevented from
27 filing a timely return -- the law basically
28 forecloses on that as well and requires the taxpayer

1 to file a timely return based on the best available
2 information.

3 If there's a taxpayer who receives -- you
4 know, if there's an additional period of time that
5 they can file an extension, but that's not the --
6 those aren't the fact here.

7 JUDGE LEUNG: Mr. Curry, the same question
8 to you. In your travels, have you ever seen a case
9 where -- whether in federal or California, where the
10 change of residency, whether inbound/outbound,
11 foreign or out-of-state that gave rise to reasonable
12 cause events?

13 MR. CURRY: No, Judge.

14 MR. YADAO: Judge Leung, can I add, please?

15 JUDGE LEUNG: Yes.

16 MR. YADAO: So the appellant has three years
17 of filing history, just for your panel's information.
18 Three years of filing history up to the appeal year.
19 The appeal year's his third year. All three of those
20 years he filed a form 540NR, so it's not a foreign
21 territory for the appellant. But that's argument.

22 JUDGE LEUNG: Thank you.

23 JUDGE JOHNSON: Thank you.

24 Mr. Angeja, do you have any questions?

25 JUDGE ANGEJA: No further questions.

26 JUDGE JOHNSON: Okay. I do have a question
27 here.

28 Mr. Yadao, I asked the appellant regarding

1 any affect the 2012 and 2013 returns had on the 2014
2 tax year as far as preparing the return and the
3 numbers involved.

4 From your research and looking into the
5 returns, is it your understanding that the amended
6 returns needed to be calculated first in order to
7 file 2014, or was there sufficient information
8 available at the time that he should've filed the
9 2014 returns?

10 MR. YADAO: It's respondent's understanding
11 that he had the information available to file an
12 accurate California return at the time. His
13 California wages, all of his taxes on his wages and
14 arguably he had that W-2, it's W-2 income, he had
15 that W-2 as early as February 2015, and he didn't
16 file his return until January 2016. So he actually
17 had correct information prior to the original filing
18 deadline.

19 And as far as the amended returns, my review
20 of those suggests the adjustments were limited to
21 eliminating depreciation expense for his rental
22 property, and that had zero tax effect on his appeal
23 year return because he had sufficient other
24 deductions and expenses to offset rental income. So
25 the net change tax liability from those two amended
26 returns on his appeal year return is zero.

27 JUDGE JOHNSON: All right, thank you.

28 And again, Mr. Yadao, appellant argued that

1 there was a choice to be made to file the return
2 April 15th with what information was available or
3 wait until there was more of a complete record from
4 prior years in order to file the return. And there
5 was an argument that filing on April 15th with
6 inaccurate information could've led to more penalties
7 and that's why, you know, the decision was made to
8 wait until they had a more accurate return.

9 In your opinion, was filing at that time or
10 waiting to file more likely to incur penalties?

11 MR. YADAO: He would have, at a minimum,
12 mitigated his -- the penalties by filing on time, by
13 the original due date. Because, of course, if he
14 would have filed within the extension period and
15 still reported a tax due, there would have been a
16 late payment penalty on that. But had he calculated
17 that with information that he had, by the original
18 due date, then he could have ascertained what his
19 liability is, made an extension payment by April
20 15th, or whatever the payment deadline, April 18th
21 that year, and completely avoided any penalty.

22 JUDGE JOHNSON: And let me go back to
23 Mr. Curry about this issue as well.

24 What were the dangers of filing the return
25 at that time on April 18th or October 15th, doing an
26 extension, and then filing an amended return the
27 following six months when the other returns were
28 amended and filed?

1 MR. CURRY: Good question. You know, any
2 dangers could have been overcome by another penalty,
3 right? So, you know, nothing life-threatening. But
4 what you've got then is now you got another amended
5 return to file and then the following year.

6 So rather than continue this cycle of
7 compounding amended return after amended return after
8 amended return, he made the decision to put a stop to
9 that and complete the amendments for 2012 and 2013
10 before completing 2014, rather than, as I said,
11 continue that cycle.

12 As far as the conclusions, though, it's easy
13 to look back and say there were no material
14 differences and he could have used the information
15 available to file the 2014 returns timely. You can
16 say that looking back, knowing the results after it's
17 all completed. But when you're looking at that
18 decision point, when you reach that decision point,
19 you're looking at the information available to you,
20 it may not be quite so crystal clear.

21 So, again, what do you do? If you look at
22 the IRS guidelines, they tell you to look at the
23 past, and he received refunds. It was natural then
24 for him to think, "I'm going to receive a refund
25 again in 2014." And in fact he was right at the
26 federal level; he did receive a refund.

27 So the operation here is the tax return for
28 the state, at the state level, that was where he got

1 hung up. But, again, it's easy to see that looking
2 back, knowing all the facts, rather than at that
3 decision point, looking into the future, how it's
4 going to turn out.

5 JUDGE JOHNSON: All right. Thank you.

6 I believe that's all the questions we have
7 from the panel.

8 Let's go into closing statements. And,
9 appellant, have you prepared a closing statement
10 today?

11 MR. CURRY: Yes, sir.

12 JUDGE JOHNSON: All right. Closing
13 statement's going to summarize the facts and really
14 argue, state the main points and leave us with a good
15 feeling of what your decision is. Again, should be
16 no longer than ten minutes for a case of this
17 complexity.

18 If you are ready, you can go ahead and
19 start.

20 MR. CURRY: I'll just take a moment just to
21 sort of summarize the points I've probably already
22 made.

23 Again, I would go back to that decision
24 point. It's easier to look back and know after
25 you've discovered all the facts that you could have
26 made a different decision that would have avoided the
27 penalty. But looking forward, it may not be quite
28 that clear.

1 And looking at the guidelines for a
2 situation such as that, he did follow the rules. He
3 did look at his past returns for guidance to the
4 future. And those rules from the IRS told him he
5 could rely -- at least be guided by the previous
6 experience which did result in refunds.

7 So, is that reasonable cause? The
8 authorities that have been cited, including *Boyle*,
9 they don't preclude a determination of reasonable
10 cause based on his payment history, his filing
11 history. And that is without fault.

12 All of those cases depend on other
13 circumstances. So I see it as sort of a two-fold
14 approach. Is there a good payment history? If yes,
15 then that can be an element. Not entirely
16 conclusive, but an element of a determination as to
17 reasonable cause.

18 But there are other considerations, arguably
19 more important considerations. And the other cited
20 cases, including *Boyle*, all relate to whether it's
21 reasonable to delegate activity, requirements,
22 duties. And in some of those cases, obviously the
23 Supreme Court decided no, you can't delegate some
24 responsibilities.

25 But those are not the same circumstances as
26 we have here. So, with no disrespect intended to the
27 Supreme Court, it's not really relevant. It's not
28 that relevant to our situation.

1 When the appellant discovered he needed to
2 make amendments to the '12 and '13 returns, he acted
3 with diligence at that point. He acted with
4 diligence and completed 2014 as soon as he could, as
5 soon as was practicable, and he filed them at about
6 the same time as the '12 and '13 returns, which shows
7 he was not sitting around, waiting for something to
8 happen, taking vacations or whatever.

9 He acted with diligence and filed the 2014,
10 solved the problem as soon as he could. These facts
11 and circumstances, different from the other cases
12 cited, to me suggest that that was prudent. That was
13 what a prudent business person would do; rather than
14 compound the problem, solve it for all the returns
15 going forward.

16 JUDGE JOHNSON: Thank you.

17 Mr. Yadao, you have a closing statement?

18 MR. YADAO: Yes, thank you.

19 Just to reflect, again, on the *Boyle* court
20 decision. That was just to explain why the
21 appellant's authorities didn't apply, because they
22 relied on a preparer to file a return and there was
23 an inadvertent error.

24 And clearly here the appellant didn't rely
25 on a representative. He prepared and filed his own
26 returns. And his late return did not flow from an
27 inadvertent mistake like those cases. Rather, it
28 flowed from his deliberate decision to file late.

1 Pointing to part of the appellant's
2 pleadings, they suggested that we can follow the IRS
3 first-time abatement. They pointed to a Chief
4 Counsel roundtable article from our website, where it
5 states that Franchise Tax Board can follow an IRS
6 determination of reasonable cause, assuming the same
7 penalty is imposed and the same circumstances apply.
8 Then the appellant proceeded to state that the IRS
9 would have abated based on first-time abatement and,
10 therefore, FTB should follow that.

11 Well, the FTB -- the only basis the FTB has
12 to follow the IRS is on reasonable cause because
13 that's where our law conforms to the IRS, is it's
14 limited to a reasonable cause showing. For the
15 reasons I've stated previously and for the remainder
16 of my closing argument, there's no reasonable cause
17 here.

18 As to appellant's possible belief he
19 received a refund as he had in prior years and
20 therefore no penalty would apply for filing late,
21 there are published Tax Court cases, namely *Beck*
22 *Chemical versus Commissioner* and *Shomaker versus*
23 *Commissioner*. Those two taxpayers believed they
24 didn't need to file a return because either they
25 didn't think there was going to be a liability or
26 they didn't have a return filing requirement. And
27 the Tax Court held that taxpayers who deliberately
28 omit to file returns must use reasonable care to

1 ascertain that no returns are necessary, and this is
2 something that the appellant didn't do.

3 He had his W-2 prior to April 15th to file a
4 timely return or at least within the extended period,
5 and he didn't do that.

6 As we had stated in our pleadings, in
7 respondent's pleadings, where taxpayers argue they
8 filed late or paid late because they were waiting for
9 information or because information was unavailable,
10 case law requires those taxpayers to file timely
11 returns based on a reasonable accurate estimate of
12 their liability and later file amended returns if
13 necessary.

14 But again, the appellant here had that
15 information timely, but he chose not to file timely.
16 So his decision to wait to file his 2014 return until
17 he amended his '12 and '13 returns, even if those
18 amendments would have had an impact to his 2014 tax,
19 which they didn't, is not reasonable cause.

20 The law and the policy behind these
21 authorities can be summarized in a recent Tax Court
22 decision, which upheld the late filing penalty. That
23 case stated:

24 "To hold otherwise would be to make
25 penalties optional for any taxpayer who
26 claims to have delayed filing based on the
27 advice or belief that the return must be
28 true, correct and complete."

1 The name of that Tax Court is *Mileham v.*
2 *Commissioner*, decided in 2017. And notably *Mileham*
3 cites to *Boyle* and mirrors the *Boyle* Court's
4 explanation of the importance of the filing
5 deadlines, where *Boyle* stated:

6 "The deadlines are inherently
7 arbitrary. These statements, however, are
8 often essential to accomplish necessary
9 results. The government has millions of
10 taxpayers to monitor and our system of
11 self-assessment in the initial calculation
12 of a tax simply cannot work on any other
13 basis than one of strict filing standards.
14 Any less rigid standard would risk
15 encouraging a lax attitude toward filing
16 dates."

17 In sum, appellant elected to file his return
18 late, eight months late. He was not prevented from
19 filing his return timely due to circumstances beyond
20 his control. When applying the law to appellant's
21 facts and circumstances, he has not established
22 reasonable cause to abate penalty. Therefore,
23 respondent respectfully requests that your panel
24 sustain the late-filing penalty here.

25 JUDGE JOHNSON: Thank you.

26 Mr. Curry, do you have any final statements
27 you'd like to present, rebuttal to that closing
28 argument?

1 MR. CURRY: I'd like to rebut just a couple
2 of points.

3 Again, with the cited authorities, we're
4 addressing the conclusions separate from the facts of
5 those cases. I don't disagree with the conclusions
6 and no one in this case is arguing that he had no
7 responsibility or no liability to, uh --
8 responsibility to file the tax return. He did file
9 it.

10 The questions are, do these facts separate
11 from those other cases, do these facts constitute
12 reasonable cause? And he looked to the guidelines,
13 he followed the rules. He followed the rules.

14 And because in hindsight we can see that
15 perhaps he had the right information and could have
16 filed timely, that doesn't mean at the time that he
17 had to make that decision he knew that. That does
18 not imply he had a lax attitude. In fact during the
19 time that he could or should have been preparing his
20 2014 return, he was attempting to correct the 2012
21 and '13 so that he could file an accurate return. So
22 there's no lax attitude.

23 Did he have the information? In hindsight
24 we can see that perhaps he did. But again, at the
25 front end of that decision, that's not necessarily a
26 crystal clear determination.

27 And as far as events beyond his control,
28 without going too much into the pleadings that you've

1 already read, he discovered the need to amend the '12
2 and '13 returns when he was looking at the 2014
3 return.

4 Could he have discovered that earlier?
5 Perhaps. But think about -- I compare it to the
6 statute of limitations. Typically a statute of
7 limitations would begin when an error or an expense
8 was discovered. Could that have been discovered
9 earlier? Sure, if you were looking for it earlier.
10 But the fact that it wasn't discovered earlier
11 shouldn't make the statute of limitations start
12 earlier.

13 I don't know if that's a great analogy.
14 But, in other words, the clock begins when you
15 discover it, and you shouldn't be penalized for not
16 discovering it earlier.

17 And I think that's all that I have.

18 JUDGE JOHNSON: Thank you, Mr. Curry.

19 Now we have your evidence, we have your
20 briefs, your testimony, your questions today and we
21 have your argument you presented today at the
22 hearing.

23 With that, we are ready to submit the case
24 for a decision. So the record is now closed. This
25 concludes our hearing, and the judges will meet and
26 decide the case based on documents and testimony
27 presented. We'll send out to both parties a written
28 decision no later than 100 days from today.

1 I want to thank you, Mr. Xie, for appearing
2 telephonically.

3 MR. XIE: Thank you.

4 JUDGE JOHNSON: And thank you, Mr. Curry and
5 Mr. Yadao, and my co-panelists as well.

6 And we are adjourned. Thank you.

7 (The proceedings concluded at 9:48 a.m.)

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