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BEFORE THE STATE OF CALIFORNIA

OFFICE OF TAX APPEALS

IN THE MATTER OF:)	
)	
Keith J. Ponthieux)	
)	OTA Case No.: 18011126
)	
Tax Years:)	
2013, 2014)	
)	
_____)	

TRANSCRIPT OF PROCEEDINGS
September 25, 2018

9:23 a.m.

SACRAMENTO, CALIFORNIA

Brittany Flores, CSR 13460

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APPEARANCES

TAX APPEAL PANEL MEMBERS:

Administrative Law Judge Andrew Kwee, lead
Administrative Law Judge Sara Hosey
Administrative Law Judge Grant Thompson

FOR THE FRANCHISE TAX BOARD:

Andy Amara, tax counsel
Cynthia Kent, tax counsel

FOR THE TAX PAYER:

Keith J. Ponthieux, appellant

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1 SACRAMENTO, CALIFORNIA
2 Tuesday, September 25, 2018
3 9:23 a.m.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I'll
5 start by opening the record in the appeal of Keith
6 Ponthieux before the Office of Tax Appeals. This is OTA
7 case number 18011126, and today's date is Tuesday,
8 September 25th, 2018. The time is approximately 9:25
9 a.m. in the morning. This hearing is being convened in
10 Sacramento, California. Today's hearing is being heard
11 by a panel of three administrative law judges. My name
12 is Andrew Kwee, and I will be the lead judge. Judge
13 Hosey and Judge Thompson are other members of this tax
14 appeal panel. All three judges will meet after the
15 hearing and produce a written decision as equal
16 participants. Although the lead judge will conduct
17 today's hearing, any judge on this panel may ask
18 questions or otherwise participate to ensure that we
19 have all the information that we need to decide today's
20 appeal.

21 The exhibit index in front of you identifies
22 Exhibits 1 to 19 for appellant, Mr. Ponthieux, and A
23 through Q for the Franchise Tax Board and in addition,
24 Exhibits J-1 and J-2, which are the protest documents of
25 2013 and 2014. These exhibits are in the exhibit binder

1 in front of you, and the first two pages are the exhibit
2 index. This index is the same document that was mailed
3 out to the parties after the prehearing conference a
4 couple weeks ago.

5 And FTB, for the record, I understand you do not
6 have any objection to bringing the exhibit binder into
7 evidence?

8 MR. AMARA: That's correct.

9 ADMINISTRATIVE LAW JUDGE KWEE: And,
10 Mr. Ponthieux, I understand you do not have any
11 objections to entering the exhibit binder.

12 MR. PONTHEUX: Correct.

13 ADMINISTRATIVE LAW JUDGE KWEE: Okay. The
14 exhibit binder is admitted into evidence. That includes
15 all the exhibits listed on the exhibit index. And the
16 issues in today's appeal are whether appellant has
17 established error in FTB's proposed tax assessment for
18 2013 and 2014, which estimated income pursuant to
19 Revenue and Taxation Code section 19087; whether the
20 filing enforcement cost recovery fee, late-filing
21 penalties, and the demand penalties were properly
22 imposed; and whether OTA should impose a frivolous
23 appeal penalty.

24 So we are now ready to proceed with
25 Mr. Ponthieux's presentation and testimony regarding

1 these issues.

2 Mr. Ponthieux, before you proceed, I'm going to
3 ask that you swear or affirm that the testimony that
4 you're going to give today is going to be the truth.
5 Would you please raise your hand.

6 Do you swear or affirm to tell the truth, the
7 whole truth, and nothing but the truth today?

8 MR. PONTHEUX: I do.

9 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank
10 you. Please proceed with your testimony.

11 MR. PONTHEUX: Well, I received a demand
12 for tax return for the years 2013 and 2014. If there's
13 any validity to the form, which -- that's one of my
14 questions I want to pose before the panel. Is there
15 validity to this form? If there is, I followed the
16 government's instructions, specifically on page two,
17 where it lists the amount of gross income. And once
18 income is below the specific threshold, then you do not
19 have a filing requirement. I attested on the demand for
20 tax return for years 2013 and 2014 under penalty of
21 perjury that I did not have any income for those two
22 years. The Franchise Tax Board finds that's
23 unreasonable to live in the world without having income.
24 There are plenty of people who can volunteer services;
25 maybe live, live a frugal life; maybe live with your

1 children; maybe do not take income for specific
2 purposes. But Franchise Tax Board finds that that's
3 hard to believe. Well, I produced exhibits. Mark
4 Zuckerberg, he doesn't take an income. He's a
5 billionaire. He has no income. He takes loans against
6 his assets. There are other Silicon Valley billionaires
7 who do the same thing. I'm not in that league, mind
8 you, but I do volunteer my services.

9 Well, how do I support myself? Very frugally. I
10 live with my daughter. I do assist, help in the
11 business. The income that's not coming to me is passed
12 on to the other members of the company, and they find
13 that hard to believe. Well, I attested under penalty of
14 perjury. So I want to make more -- make the record
15 reflect I did not have income for those two years. If I
16 had income for those two years, I would be happy to file
17 a tax return, but if I filed a tax return without having
18 income, that's just a waste of my time and a waste of
19 money that I don't have. So why bother when the demand
20 for tax return gives you the option to specify under
21 penalty of perjury that you don't have any income. If
22 that is the actual case, and then well, there's no
23 filing requirements. So therefore, I did not file a tax
24 return following the government's instructions on tax
25 return. So that's point, point one.

1 The other point I want to make is that, you know,
2 state legislature having established some administrative
3 review and appeals institutionally binds the Franchise
4 Tax Board to amend the, the alleged system established
5 with the established concepts of due process. The
6 primary policy of the Franchise Tax Board is to make
7 sure that Revenue and Taxation Code tax policy for
8 raising revenue is determined by elected officials. It
9 is the Franchise Tax Board's duty to correctly apply the
10 laws enacted by the legislature to determine reasonable
11 meaning of various code provisions and perform in a fair
12 and impartial manner. Interpretation of the code is the
13 heart of administration. It's the responsibility of
14 each person in the Franchise Tax Board charged with
15 their duty of interpreting the law to try to find the
16 true meaning of the statutory provision and not to adopt
17 a strange construction in the belief that he or she is
18 protecting the revenue. In the brief that I filed in
19 the exhibits that support my position, much of the above
20 that I just paraphrased flies in the face of the
21 legislative intent.

22 What is different between years 2013 and 2014?
23 What is different from the year twenty oh five -- two oh
24 five, two oh three, two oh one, two thousand, two
25 twelve, in which I submitted under penalty of perjury

1 the demand for tax return. I produced the same evidence
2 as I did in 2013 and 2014. And for those years, I was
3 exonerated. What's different between 2013 and 2014 and
4 those other years? The only difference is the person
5 who handled the form. It's total arbitrary and
6 capricious that they are insisting that I have income.
7 I don't have income. I attested under penalty of
8 perjury. It's a felony. That's my position.

9 So I'd like for you to answer me. Okay. Does
10 the demand for tax return, does that government form
11 have any validity at all?

12 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank
13 you. Um, we're not here to give advice, um, but, um,
14 I'm going to turn it over at this point to the Franchise
15 Tax Board and they might -- for questioning and when
16 they go to presentation, if they choose, they might
17 choose to answer your question. That's up to them, but
18 at this point, I'm going to see if the Franchise Tax
19 Board has questions for you.

20 Any question from you?

21 MR. AMARA: No questions.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I do
23 have a couple questions for you. In your opening
24 statement, you just mentioned a couple prior tax years,
25 I believe 2012, 2000, 2001, 2003, and 2005. And I'm

1 looking at your exhibits on the index, Exhibits 3
2 through 7, and are entitled Demand for Tax Return for
3 each of those five years with letters of exoneration.
4 Is your position or are you contending that for these
5 prior five tax years, FTB did not mail you but instead
6 they accepted your Social Security statement as, as
7 proof that you didn't have income for those years? Was
8 that -- is that your testimony here? Is that what
9 you're arguing?

10 MR. PONTHEUX: Well, for some of those
11 years, I did provide a Social Security statement which
12 is a record of the potential earnings, and for some of
13 those years, I did not provide that statement. But I
14 did answer the demand for tax return for those years
15 identically to how I answered it for 2013 and 2014. So
16 for the years 2005, 2003, 2001, 2000, 2012, the
17 Franchise Tax Board accepted my answer, and they honored
18 it, and for 2013-2014, they didn't. Why didn't they?
19 It was identical. What's the difference? The only
20 difference is the person who handled the demand for tax
21 return. That's the only difference.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I
23 did have one question about the -- that company, Asset
24 Preservation and Associated Insurance Services, LLC,
25 which I believe is at the center of the dispute between

1 the estimated income at issue and, um, I, I believe --
2 if I'm understanding your position correctly is -- your
3 contention is that you work for this company without
4 receiving a salary, and in exchange, your daughter
5 provides you food, housing, transportation, and
6 essentials. And so then, therefore, you do not receive
7 a salary for working for the -- is that what --
8 essentially, what your contention is?

9 MR. PONTHEUX: Right. I, I, I feel like I
10 did not take a salary for those particular years.

11 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank
12 you. I'm going to --

13 MR. PONTHEUX: And let me just, just add
14 this; if the income was passed on to another member of
15 the company, the Franchise Tax Board actually got
16 more -- received more tax than if it had been divided
17 among more members because it threw that taxpayer into a
18 higher tax bracket. For example, I mean, if there was
19 \$50,000 that was going to be distributed for that year
20 after all expenses and if that was spread among two or
21 three people, the tax bracket would be much lower.

22 ADMINISTRATIVE LAW JUDGE THOMPSON: Let
23 me -- can I ask a question here. Question for Franchise
24 Tax Board, Asset Preservation and Associate Services,
25 LLC and what was the business income reported on the

1 K-1?

2 MR. AMARA: On the -- as to the daughter for
3 2013, um, I believe it was \$10,500. As to 2014, it was
4 a loss of \$22,000 roughly.

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And
6 that's the entity we're talking about today?

7 MR. PONTHEUX: Yes. So the point I'm
8 trying to make is this; you know, some years, the
9 company does well. Some company -- some years, the
10 company does poorly. I mean, it's just like every
11 business, right.

12 ADMINISTRATIVE LAW JUDGE THOMPSON: Were
13 these good years for the company?

14 MR. PONTHEUX: Pardon me?

15 ADMINISTRATIVE LAW JUDGE THOMPSON: Were
16 these good years for the company?

17 MR. PONTHEUX: I'm sorry?

18 ADMINISTRATIVE LAW JUDGE THOMPSON: Were
19 these good years for the company?

20 MR. PONTHEUX: I don't understand the
21 question.

22 ADMINISTRATIVE LAW JUDGE THOMPSON: Were
23 these good years for the company?

24 MR. PONTHEUX: Good years for the company,
25 yes. There's, there's good years. All right. I, I

1 believe -- let's see here. Twenty -- 2015 and 2016.

2 ADMINISTRATIVE LAW JUDGE THOMPSON: No, no,
3 no, no. The years at issue were 2013 and 14.

4 MR. PONTHEUX: And what about those years?

5 ADMINISTRATIVE LAW JUDGE THOMPSON: Ah, yes.
6 It's my understanding that the company, for those years,
7 considered together, lost \$20,000, and my understanding
8 from your testimony is that through the earnings from
9 the company, your daughter has supported you, and you
10 did not draw a salary because you elected to volunteer
11 your services.

12 MR. PONTHEUX: Right. I live with my
13 daughter. So I, I don't -- I don't require much to
14 support myself if I live with her and if I eat her --
15 eat at her table.

16 ADMINISTRATIVE LAW JUDGE THOMPSON: Uh-huh.

17 MR. PONTHEUX: And, and if I ride with her
18 to work or if I use her car.

19 ADMINISTRATIVE LAW JUDGE THOMPSON: So your
20 testimony is that yourself and your daughter support
21 yourselves on a loss of, of -- across the two years --
22 \$20,000?

23 MR. PONTHEUX: No, because my daughter's
24 married and her husband makes a pretty good salary of
25 \$150,000 or more.

1 ADMINISTRATIVE LAW JUDGE THOMPSON: Can you
2 provide any evidence in the record today of the salary
3 and his paid experiences?

4 MR. PONTHEUX: I don't have that.

5 ADMINISTRATIVE LAW JUDGE THOMPSON: Okay.
6 No further questions.

7 MR. PONTHEUX: Pardon me?

8 ADMINISTRATIVE LAW JUDGE THOMPSON: No
9 further questions.

10 ADMINISTRATIVE LAW JUDGE KWEE: I do have
11 one question. So does the Franchise Tax Board dispute
12 or do they agree that the copies of the schedule K-1s in
13 Exhibit 12 and Exhibit 13 that that's a true and correct
14 copy of appellant's Exhibit 12 and 13?

15 ADMINISTRATIVE LAW JUDGE THOMPSON: While
16 you continue looking, Mr. Ponthieux, who prepared these
17 K-1s?

18 MR. PONTHEUX: CPA Dan Rolands.

19 ADMINISTRATIVE LAW JUDGE THOMPSON: Uh-huh,
20 and who signed them?

21 MR. PONTHEUX: Um, my daughter.

22 ADMINISTRATIVE LAW JUDGE THOMPSON: Thank
23 you.

24 ADMINISTRATIVE LAW JUDGE KWEE: Judge Hosey,
25 did you have any questions?

1 ADMINISTRATIVE LAW JUDGE HOSEY: No. I'm
2 good. Thank you.

3 MR. PONTHEUX: I'd like to make one other
4 additional comment.

5 ADMINISTRATIVE LAW JUDGE KWEE: Please
6 proceed.

7 MR. PONTHEUX: You know, you asked me,
8 "Does the company have good years?" I said, "Yes, it
9 does have good years," and I believe it was either 2015
10 or 2016, it had a very good year. And that year, my
11 daughter, she received a distribution of -- I think it
12 was like a hundred to a hundred and twenty thousand
13 dollars.

14 ADMINISTRATIVE LAW JUDGE THOMPSON: Could
15 you point me to the evidence in the record of that.

16 MR. PONTHEUX: Do you want me to have that
17 on the record?

18 ADMINISTRATIVE LAW JUDGE THOMPSON: Well,
19 that year is not before us. So, um, have you brought
20 any evidence to show that?

21 MR. PONTHEUX: I don't have it with me, no,
22 but I mean, I can submit it. I'd have to get a copy of
23 the tax return, but the point I'm trying to make is:
24 Okay. In -- for that year that the -- which was a very
25 good year -- all right. I think my daughter actually

1 received a, a distribution of \$180,000. Now, when you
2 add that to her husband's salary, they ended up paying
3 an extremely large amount of tax, federal and state.
4 Had some of that distribution been spread among the
5 other members of the LLC, the Franchise Tax Board would
6 have actually received less money because it would have
7 thrown the individual taxpayers into a lower tax
8 bracket -- okay -- because lesser income. So in
9 essence, the tax -- the Franchise Tax Board received
10 more by some of the members not electing to take an
11 income for that year, take a distribution. So I don't
12 know where the Franchise Tax Board is coming from.
13 They're getting more than their fair share of what they
14 feel that they're due.

15 In addition, I did submit some exhibits where the
16 company's actually always overpaying, and it seemed like
17 every other year, we get a, a refund from the State
18 Controller 800, 900 dollars and so on.

19 ADMINISTRATIVE LAW JUDGE THOMPSON: And so
20 you've been talking about now for the years at issue?

21 MR. PONTHEUX: Um, well, probably for one
22 of those years, we did get a refund because it's almost
23 every other year, and I always address this with the
24 CPA, you know, why is it some years when we're sending
25 in the tax return or we're sending in the funds, we

1 always get money back. Some years, we get a request
2 saying, "Well, you didn't pay enough." So we pay them
3 what they request. At other times, they say we sent
4 them too much. The point I'm trying to make is this;
5 the Franchise Tax Board think that we're trying to cheat
6 them. We're not trying to cheat them. Okay. I have
7 the election -- I have the option to take an income or
8 not take an income. Okay. I chose not to take one, and
9 they want to crucify me because I choose to not take an
10 income. I attest under penalty of perjury, I did not
11 have an income. I substantiate for some years, through
12 Social Security earnings record, that I did not have any
13 earnings for that year, but they tend to not believe
14 that. They want me to try to prove a negative, which is
15 an impossibility.

16 ADMINISTRATIVE LAW JUDGE THOMPSON: I
17 understand. Your testimony I think is this; that you
18 are trying to assist your daughter and so you're
19 volunteering and you're electing not to receive any
20 money, right? That's what you're saying, correct?

21 MR. PONTHEUX: Yeah, and there's some
22 reasons for that. Okay. You know, if she takes a
23 majority of the income or takes it all the time, well,
24 her Social Security earnings record's going to be
25 substantial. It's going to help her in her retirement.

1 I'm done. I'm 66. It doesn't matter anymore to me.
2 Okay. You know, my record's already finished. All
3 right. So the same thing would apply to Pacific Equity,
4 which is one of the exhibits in here, in which the
5 Franchise Tax Board brought that up. They said, "Well,
6 I see that you, you know, you would -- you did this or
7 you had this income from Pacific Equity." And I said,
8 "No. Okay. My, my, my grandson received the bulk of
9 those earnings." Well, why is that? Again, that helps
10 him establish his Social Security base earnings. Mine's
11 already established. So I do have a right -- I do have
12 the option to not elect to have income if I don't want
13 to, you know, and so that's my position.

14 ADMINISTRATIVE LAW JUDGE THOMPSON: Thank
15 you for that information.

16 MR. AMARA: Can I just clarify. The -- so
17 Exhibit 12 is the K-1 for asset preservation. It shows
18 \$9,713 in income to appellant's daughter. And then for
19 2014, the K-1 shows a loss of \$23,413 dollars. That's
20 all contained in Exhibit 12.

21 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

22 MR. AMARA: So we don't have any reason to
23 dispute those figures.

24 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And
25 before I proceed with the Franchise Tax Board's

1 presentation, do any -- are there any other questions
2 from the panel?

3 Okay. Well, the Franchise Tax Board may proceed
4 with their presentation.

5 MR. AMARA: Sure. Thank you. As discussed
6 in FTB's review of this, the filing for this case was
7 the 2013 and 2014 tax years. FTB received information
8 indicating the appellant maintains an occupational
9 license that's not been disputed in those years but
10 failed to file a return. Accordingly, FTB issued
11 appellant filing enforcement notices demanding that he
12 file returns. The figures are specifically driven --
13 the figures that FTB used statistic -- statistically
14 driven based on industry averages people have
15 maintained. In this case, it was a license of the
16 Department of Insurance. Appellant responded to FTB's
17 notices by asserting he didn't receive income of the
18 filing threshold as he just testified. He attached
19 Social Security Administration statements purporting to
20 show internal income, and he further claimed that he
21 lived with his daughter. FTB determined those
22 assertions were insufficient because they were
23 unsupported and uncorroborated and sustained appellant's
24 appeal. As you just heard, appellant continues to
25 maintain he didn't receive income above the filing

1 threshold in 2013, 2014 tax years and seems to be
2 claiming that his daughter covers his cost of living
3 expenses.

4 With respect to the applicable law and the legal
5 standards, as you noted, the statutory support for these
6 assessments here under Revenue Taxation Code section
7 19087, which provides that FTB may make an estimate for
8 net income through any available information to propose,
9 to assess tax, interest, and penalties. Once FTB makes
10 such an assessment, it must demonstrate that it's --
11 that the assessments are reasonable and rational and
12 occupational licenses based on assessments that occurred
13 here been determined to be that standard. Accordingly,
14 FTB's assessments are entitled to the presumption of
15 correctness, and the burden is shifted to appellant to
16 demonstrate error.

17 Now, as you just heard, in attempting to show
18 error merely offers uncorroborated, unsubstantiated
19 testimony that he may not have received sufficient
20 income 2013 and 2014 despite maintaining his license,
21 it's Department of Insurance license. That testimony is
22 simply insufficient. That's especially true in this
23 case in light of the appellant's filing history and more
24 significantly, in light of the fact that he's failed to
25 offer any additional evidence to substantiate his

1 claims, which could include but is not limited to,
2 testimony from his daughter that she, indeed, supported
3 him; his wife that, that such an arrangement was in
4 place; or the son-in-law, who allegedly participated in
5 the support. In addition, there would be ample
6 documentary proof in support of appellant's claims if
7 those were true that he's failed to provide. Based on
8 all of that and the evidence that's already in the
9 record, the assessments should be sustained here.

10 And then I'll also note that there's late-filing
11 penalties and demand penalties in this case. Appellant
12 has not specifically disputed those penalties. There's
13 nothing in the record that would justify abating the
14 penalties. Accordingly, those should be sustained as
15 well. At this point, I'd be happy to take any questions
16 that you may have.

17 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I had
18 another question for Mr. Ponthieux, and I'm looking at
19 the Franchise Tax Board Exhibit I, and that's titled
20 Investment Advisor Representative Public Disclosure
21 Report, and on that report on page six of Exhibit I, it
22 indicates that from May 2013 onward that you were -- I'm
23 just going to read from the report. It says, "Engaged
24 in teaching adult financial education to seniors through
25 a DBA by the name of Nor California Financial

1 Education."

2 MR. PONTHEUX: Right.

3 ADMINISTRATIVE LAW JUDGE KWEE: Could you
4 describe the nature of the business and any compensation
5 that you would provide or receive for services that you
6 provided.

7 MR. PONTHEUX: Nor Cal Financial Education,
8 what I do, I conduct financial education of adult
9 workshops at community college, and it's based on
10 several things; how to maximize one's Social Security
11 income, basics of medicare, retirement planning. So we
12 do that under the DBA of Nor Cal Financial Education.
13 There's a small tuition that's charged for the
14 attendees, \$29 up to, maybe, \$35. That tuition is to --
15 it pays for the workbook that each attendee is given,
16 and it pays for the rental of the classroom from the
17 community college. There's no income derived from that
18 workshop. The purpose of that workshop is that those
19 attendees can follow up with a one-on-one consultation,
20 in which insurance products, perhaps, or security
21 products would be discussed and offered. And that's
22 where the income would be derived, but there's no income
23 derived from the Nor Cal Financial Education. It's just
24 a means of prospecting and having the public get to know
25 us and explaining things; taking the mystery and

1 confusion out of filing for Social Security; how to
2 claim to get the maximum benefit; taking the, the maze
3 out of medicare. So it's basically all educational and
4 any income derived from that goes to pay for the
5 classroom and the workbook materials that are given to
6 the attendees.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So
8 basically, any of the fees that's charged are offset by
9 expenses that you incur? Is that basically what you're
10 saying?

11 MR. PONTHEUX: Well, there's actually --
12 any, any income from those workshops, there is no
13 income. Either the workbooks consume any additional
14 profit and the rental of the community college -- for
15 example, Solano Community College in Fairfield,
16 Vacaville, when we started doing workshops with that
17 college, we donated every -- donated all the proceeds
18 that, that were taken in for -- by attendance fees to
19 the community college. You can -- I can prove that. I
20 don't have that with me, but you can check with the
21 people that schedule my classes and the checks that I
22 would give them. They only wanted a percentage. We
23 voluntarily gave all of it to the community college to
24 help them.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

1 ADMINISTRATIVE LAW JUDGE THOMPSON: So --

2 ADMINISTRATIVE LAW JUDGE KWEE: Oh, go
3 ahead.

4 ADMINISTRATIVE LAW JUDGE THOMPSON:
5 Mr. Ponthieux, how long have you been a licensed
6 insurance agent?

7 MR. PONTHEUX: 28 years.

8 ADMINISTRATIVE LAW JUDGE THOMPSON: Uh-huh.
9 How many companies have you represented?

10 MR. PONTHEUX: Well, presently right now,
11 the, the company represent about four or five. Over the
12 years, if you would go to the Department of Insurance
13 website, you'll see that over the years, we were
14 appointed with probably close to 30 different companies.
15 Okay.

16 ADMINISTRATIVE LAW JUDGE THOMPSON: Okay.
17 Now, you mentioned, you stated that you just had
18 reimbursement of expenses from your classes. This
19 ledger form says that you also offered clients advice or
20 products. Can, can you explain what advice or products
21 you also offered.

22 MR. PONTHEUX: It would be the life
23 insurance annuities or investments.

24 ADMINISTRATIVE LAW JUDGE THOMPSON: Okay.
25 Thank you. Franchise Tax Board -- forgive me if I

1 missed it -- but you mentioned the filing history.
2 Could you state for the record the filing and appeal
3 history.

4 MR. AMARA: Sure. This was discussed in
5 FTB's opening brief on page nine in connection with the
6 frivolous penalty discussion. He's never filed a
7 California tax return as far as our records indicate.

8 And what was the other question? I'm sorry.

9 ADMINISTRATIVE LAW JUDGE THOMPSON: And the
10 appeal history, please.

11 MR. AMARA: Um, there was a prior frivolous
12 appeal penalty imposed for the 2008 tax year, um, that
13 was imposed in 2013, and there were prior appeals, um,
14 for similar actions, filing enforcement actions from
15 1990 to '94, 1998, 2000 and 2004 and in 2008.

16 ADMINISTRATIVE LAW JUDGE THOMPSON: Thank
17 you.

18 ADMINISTRATIVE LAW JUDGE KWEE: Just a
19 clarification on that, so when I was reading Franchise
20 Tax Board's opening brief, um, I thought it had said
21 that, um, there was a WOB penalty imposed for ten prior
22 tax years including 2000 through 2004. Did I -- did I
23 misread that or was that -- is that correct?

24 MR. AMARA: I stand corrected. I think
25 that -- I believe that's accurate. That's what the

1 briefing indicates, um, and I believe that's -- that is
2 the case.

3 ADMINISTRATIVE LAW JUDGE KWEE: Okay.
4 Because I had questions specifically about that because
5 as I recall Mr. Ponthieux's testimony today, he
6 indicated that he had received exonerations for 2000,
7 2001, 2003. Those were his Exhibits, I think, 3, 4, 5,
8 and 6, but then your opening brief indicated that there
9 was a frivolous appeal penalty for those years and I --
10 that just seemed to be a conflict to me. I'm wondering
11 if you can provide some clarification whether it was hit
12 with a frivolous appeal penalty for that year or whether
13 the Franchise Tax Board did not bill him for that year.

14 MR. AMARA: I don't have that record in
15 front of me. It seems like based on the, the evidence
16 that's in the record, that it may have been just 2013
17 that included the frivolous appeal penalty but --

18 ADMINISTRATIVE LAW JUDGE KWEE: This is 2013
19 that's at issue right --

20 MR. AMARA: I'm sorry. Twenty -- 2008. It
21 was imposed in 2013.

22 I'd be happy to provide some clarification in a
23 post-hearing brief to, to clear that up because I'm
24 not -- I'm not clear on -- based on what's in front of
25 me, if, if those penalties were already imposed for

1 those years.

2 ADMINISTRATIVE LAW JUDGE KWEE: I think, um,
3 as the successor to the board were able to review our --
4 the prior appeal probation, we could check that after
5 this hearing. Um, but I guess I'll just turn to
6 Mr. Ponthieux.

7 Do you agree that you had a frivolous appeal
8 penalty in some prior years, or are you disputing that
9 you -- that you ever had a frivolous appeal penalty
10 before?

11 MR. PONTHEUX: Well, first of all, I have
12 filed tax returns, California tax returns, and, and in
13 answer to that question, there are years in which I
14 received a demand for tax return and the FTB ruled
15 against me and they assessed penalties and interest and
16 all that.

17 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I
18 guess what is different in the appeal before us, 2013
19 and 2014, are the -- are the arguments different from
20 this appeal than in the appeals that you had where you
21 were billed and --

22 MR. PONTHEUX: Exonerated.

23 ADMINISTRATIVE LAW JUDGE KWEE: It's -- I'm
24 sorry?

25 MR. PONTHEUX: Are you asking -- just to

1 clarify, what you're asking me, are you asking me what's
2 the difference between the years 2013, 2014 and two oh
3 three, two oh one, two thousand, two oh five, and 2012?

4 ADMINISTRATIVE LAW JUDGE KWEE: I would --
5 so one of the factors that we consider -- FTB has asked
6 us to impose frivolous appeal penalties, and one of the
7 factors that we consider is if the same arguments are
8 raised in this appeal that were raised in, in prior
9 appeals. And I think FTB's position is that you have
10 raised this -- I guess you have been hit with a
11 frivolous appeal penalty before because you're making
12 similar arguments, and I'm just wondering if you agree
13 with that.

14 MR. PONTHEUX: Well, yes. I made
15 similar -- I've made pretty much similar identical
16 arguments for all those years, and for some years, the
17 Franchise Tax Board honors it, and says, "Fine. No, no
18 return due. No tax due. No further information unless
19 we -- unless you hear from us." And then some years,
20 answer the demand for tax return identically and they
21 come back and say, "No. We don't believe you, and you
22 owe this and you owe that." There is no difference.
23 That's why I mentioned earlier that the only difference
24 is who in the Franchise Tax Board handles the demand for
25 tax return that I send back, and that's why I said it's

1 arbitrary and capricious because if you look at the
2 record, you'll see for those years that I answered it
3 the same way and some years, it comes back and says,
4 "Fine. No problem." Other years, it comes back and
5 says, "Oh, no, no, no. You got income. You're hiding.
6 You're cheating. You're doing all this kind of stuff."
7 There's no difference.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

9 MR. AMARA: Can I just respond briefly to
10 the prior years discussion. There was an -- that's,
11 that's in direct to FTB's opening brief on page seven,
12 and there's a US Supreme Court Case, standard
13 proposition that every tax year stand on its own, and
14 there's BOE precedent that, that indicates that there's
15 no express or implied determination made by FTB's
16 failure to assess additional tax for a -- for a prior
17 year or a subsequent year. So those prior year
18 determinations that may have been incorrect on FTB's
19 part, they have no bearing on today's case.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Judge
21 Thompson, do you have any questions?

22 Judge Hosey?

23 ADMINISTRATIVE LAW JUDGE HOSEY: No. Thank
24 you.

25 ADMINISTRATIVE LAW JUDGE KWEE: I, I have

1 one last question. I was looking at the Secretary of
2 State information --

3 MR. PONTHEUX: Uh-huh.

4 ADMINISTRATIVE LAW JUDGE KWEE: -- and
5 comparing that to the information on the Schedule K-1,
6 and according to the Secretary of State information,
7 which I believe is Exhibit D of FTB's materials, it
8 indicated that the company, Asset Preservation, LLC --
9 it indicated that you were one of three managing members
10 of this company as of 2015, but then the Schedule K-1
11 that you attached indicates that there's only two
12 members, and you're not one of those members. And I'm
13 wondering if you could explain the discrepancies between
14 the Secretary of State's records and the K-1 filed with
15 FTB.

16 MR. PONTHEUX: I think you're asking me --
17 correct me if I'm wrong -- that for one of those
18 statement of informations -- okay -- it lists certain
19 members and then subsequent one doesn't list the other
20 members. Is that what you're asking?

21 ADMINISTRATIVE LAW JUDGE KWEE: Right. I
22 believe the form that FTB provided -- and it was updated
23 in 2015 and it indicated you're one of three managing
24 members. And, and I was just asking you to explain is
25 that -- is that correct, or is that not correct?

1 MR. PONTHEIUX: I don't understand your
2 question. I'm sorry.

3 ADMINISTRATIVE LAW JUDGE KWEE: How about I
4 rephrase it. Are, are you a managing member of Asset
5 Preservation, LLC?

6 MR. PONTHEIUX: Yes, yes.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I'm
8 sorry. I must have misunderstood something. Thank you.

9 Then, um, if there's no further questions, I'm
10 going to, um, turn it over to the parties to offer any
11 additional closing remarks that they had or anything
12 that they'd like to say or anything that they'd like to
13 respond to in response to questions that were raised,
14 and I'll start with Mr. Ponthieux.

15 Would you like this opportunity to make any final
16 statements?

17 MR. PONTHEIUX: I have no further statements
18 or questions.

19 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Would
20 the Franchise Tax Board like to make any final comment?

21 MR. AMARA: Nothing further.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Then
23 I think we're ready to conclude this hearing today.
24 This case is submitted September 25th, 2018 at 10:00
25 o'clock a.m. The record is now closed.

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(Whereupon the proceedings adjourned at 10:02 a.m.)

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I, Brittany Flores, a Certified Shorthand Reporter of the State of California, duly authorized to administer oaths, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney of party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated:

Brittany Flores CSR 13460