

STATE OF CALIFORNIA
OFFICE OF TAX APPEALS

In the Matter of:

Peter R. Small and) Case No.: 18011159
Tracey Tyree-Small)
_____)

FRANCHISE AND INCOME TAX APPEALS HEARING

OFFICE OF TAX APPEALS HEARINGS

HEARING ROOM

1400 R. STREET

SACRAMENTO, CALIFORNIA

TUESDAY, DECEMBER 18, 2018

9:00 A.M.

Reported by:

Peter Petty

APPEARANCES

ADMINISTRATIVE LAW JUDGES

Teresa Stanley, Lead

Grant Thompson

Jeffrey Margolis

CLERK

Claudia Lopez

APPEARING FOR FRANCHISE TAX BOARD

David Kowalczyk, Tax Counsel

Nancy Parker, Tax Counsel

APPEARING FOR TAXPAYER

Peter Small, Taxpayer

Tracey Tyree-Small, Taxpayer

I N D E X

EXHIBITS

RECEIVED

Appellant

1 through 12

5

Respondent

A through J

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P R O C E E D I N G S

9:18 A.M.

SACRAMENTO, CALIFORNIA

TUESDAY, DECEMBER 18, 2018

LEAD ADMIN. LAW JUDGE STANLEY: Okay,

this is the appeal of Peter Small and Tracey Tyree-Small, Case 18011159. This is December 18th, 2018. We're beginning about 9:18 a.m. in Sacramento, California.

And just a little preliminary thing, mostly for the Appellants who haven't done this before, is that the Office of Tax Appeals is an independent organization. We're not affiliated with the Franchise Tax Board or any other tax agency. So we'll be making an independent analysis of the case that you've already submitted or the facts that you'll submit today, the argument that each side will give, and then we'll make a decision after that.

Do you have any questions?

MR. SMALL: No.

LEAD ADMIN. LAW JUDGE STANLEY: No?

MR. SMALL: Very well.

LEAD ADMIN. LAW JUDGE STANLEY: Okay. We

1 will restate the appearances today. We're going
2 to state your appearances on the record this
3 time.

4 MR. SMALL: Oh. My name is Peter Small.

5 MS. SMALL: And I'm Tracey Tyree-Small.

6 MR. KOWALCZYK: David Kowalczyk for
7 Respondent.

8 MS. PARKER: Nancy Parker for Respondent.

9 LEAD ADMIN. LAW JUDGE STANLEY: Thank
10 you. And once again, I am Lead Administrative
11 Law Judge Teresa Stanley. And I have Judge Jeff
12 Margolis and Judge Grant Thompson with me today.

13 The issue for today is whether Appellants
14 have shown error in the Franchise Tax Board's
15 determination that they are not entitled to their
16 claimed mortgage interest deduction for the
17 residence in Gilbert, Arizona for the taxable
18 year 2011.

19 We will admit into evidence exhibits,
20 Appellant's Exhibits 1 through 12 and
21 Respondent's Exhibits A through J. So they're
22 all admitted without objection.

23 (Appellant Exhibits 1 through 12 are
24 admitted.)

25 (Respondent Exhibits A through J are

1 admitted.)

2 LEAD ADMIN. LAW JUDGE STANLEY: At this
3 time, I believe when we had our prehearing
4 conference we discussed the fact that since
5 you're not having any witnesses other than
6 yourselves here today, that we would not need to
7 do opening arguments which is just, you know, a
8 way of telling us what you're going to tell us.
9 So, you know, if you're still okay with it, I'd
10 say let's jump into the testimony. That's all
11 right with you both?

12 MR. SMALL: Yes, Your Honor.

13 LEAD ADMIN. LAW JUDGE STANLEY: Okay. So
14 I'm going to ask, just in case Mr. Small
15 testifies, as well, or chimes in, I'm going to
16 ask that both of you stand and raise your right
17 hand.

18 Whereupon,

19 PETER SMALL and TRACEY TYREE-SMALL,
20 having been first duly sworn, testified as
21 follows:

22 LEAD ADMIN. LAW JUDGE STANLEY: And you
23 can sit down. I'm just going to point out that
24 our stenographer records as words, so I need to
25 hear you guys when you respond to me, okay? Is

1 your microphone on?

2 MS. SMALL: It's not working?

3 LEAD ADMIN. LAW JUDGE STANLEY: I don't
4 know.

5 MR. SMALL: Your microphone.

6 COURT REPORTER: Leave that one alone.

7 It's the green button. Press the green button in
8 front of the microphone and that will activate
9 it.

10 MS. SMALL: This one?

11 COURT REPORTER: I believe so.

12 MS. SMALL: Okay. Can you hear me?

13 COURT REPORTER: No.

14 MS. SMALL: No?

15 LEAD ADMIN. LAW JUDGE STANLEY: Mr.

16 Small, is your microphone working? Maybe you
17 need to slide down.

18 MR. SMALL: Hello?

19 LEAD ADMIN. LAW JUDGE STANLEY: Okay.

20 Yours is working. If you want to slide over,
21 Mrs. Small?

22 MR. KOWALCZYK: Just slide a little
23 closer.

24 LEAD ADMIN. LAW JUDGE STANLEY: Okay.

25 Swap. That will work. Okay.

1 You can -- we're not going to be really
2 formal with this, Mrs. Small. You can just tell
3 us why you think that you should win this appeal
4 and maybe describe and explain the new exhibits
5 that you've submitted to the panel.

6 MS. SMALL: So I have to hold the button
7 down?

8 MR. KOWALCZYK: No.

9 LEAD ADMIN. LAW JUDGE STANLEY: No. No.

10 MS. SMALL: Can you hear me?

11 LEAD ADMIN. LAW JUDGE STANLEY: No. We
12 hear you when Mr. Small talked, but now you've
13 done something to it.

14 COURT REPORTER: You just need to press
15 the button. Don't hold it.

16 MS. SMALL: Okay. How about now?

17 LEAD ADMIN. LAW JUDGE STANLEY: You can
18 bring the microphone a little closer.

19 MR. KOWALCZYK: Yes.

20 MS. SMALL: Okay. Good? All right. So
21 in 2011, myself, my husband and my sister-and-law
22 bought, well, we brought a property prior to 2011
23 together. And we made an agreement with
24 ourselves that we would take the tax -- we would
25 do the tax return and she

1 would -- she basically lived in the house. So
2 we've all shared and paid mortgage and things
3 like that. But we've gotten the agreement
4 between us that it would be okay. And without
5 some information supporting that (indiscernible),
6 you know, so that's what we did, basically.

7 And we have the -- I think the reason
8 that we were turned down is because it showed her
9 name on the --

10 MR. SMALL: The 1098.

11 MS. SMALL: -- the 1098, and it didn't
12 show ours. And so we went back to them and we
13 talked to them and they were able to put all
14 three names on it, which is one of the things
15 that we submitted, along with the package.

16 And so that's why think that it was an
17 error and, possibly, because they didn't see all
18 three names. And that's why we're here.

19 LEAD ADMIN. LAW JUDGE STANLEY: Okay.
20 Mr. Small, do you have anything to add to that?

21 MR. SMALL: Yeah, I don't -- well,
22 exactly what she's saying is 2011, we -- I think
23 there is -- there's a document that's missing
24 that we couldn't get. We tried to get it from
25 the bank. And basically, when the bank submitted

1 the 1098, the original 1098 that they submitted
2 to us, I think that only one name was on there,
3 and it was my sister's name. But the bank, I
4 went back to the bank and they said the only
5 document they had was this. And I think that's
6 where this whole thing -- mistake came in to
7 being. They're basically saying we're not
8 entitled to this, to the claim, paying interest
9 on the property, for which we're making payments,
10 all three of us.

11 We came here, like she said, and we
12 decided that we'll get the tax write-off, my
13 sister will live in the property, she'll take
14 care of the property. In the end, whether we
15 sell it or get rid of it, that's what it's going
16 to be. We'll just share the --

17 MS. SMALL: The costs.

18 MR. SMALL: Yes. And we shared the costs
19 on that property.

20 LEAD ADMIN. LAW JUDGE STANLEY: Okay.
21 Anything else? I'm just giving you --

22 MR. SMALL: No, nothing else.

23 LEAD ADMIN. LAW JUDGE STANLEY: -- enough
24 opportunity. I don't want to force you to speak,
25 if you're done.

1 MR. SMALL: No.

2 LEAD ADMIN. LAW JUDGE STANLEY: Okay.

3 Mr. Kowalczyk, do you have questions?

4 MR. KOWALCZYK: No questions.

5 LEAD ADMIN. LAW JUDGE STANLEY: Mr.

6 Margolis, do you have any questions?

7 ADMIN. LAW JUDGE MARGOLIS: Yes, I have
8 two questions. One is the IRS audited you
9 regarding this, I believe. And what was the
10 result of the IRS audit and did that disallowance
11 stand?

12 MS. SMALL: No. They didn't reject us,
13 only the State.

14 ADMIN. LAW JUDGE MARGOLIS: Okay. And on
15 paper, you know, are you a co-owner of the
16 property, like on the title?

17 MS. SMALL: Yes.

18 ADMIN. LAW JUDGE MARGOLIS: And did you
19 bring any documents to show that or --

20 MR. SMALL: It should be listed on the
21 1098, all their names. And there should be some
22 information in here that supports all three
23 names.

24 ADMIN. LAW JUDGE MARGOLIS: Okay. The
25 1098, it goes to the interest. I'm just

1 wondering, when you went to the Recorder's Office
2 and when you purchased the property, were your
3 names on those documents, as well?

4 MS. SMALL: Yes.

5 ADMIN. LAW JUDGE MARGOLIS: Okay. I
6 think that's it for me.

7 LEAD ADMIN. LAW JUDGE STANLEY: Mr.
8 Thompson, anything at all?

9 ADMIN. LAW JUDGE THOMPSON: No questions.

10 LEAD ADMIN. LAW JUDGE STANLEY: Okay. If
11 there -- if after following the questions, you
12 have anything else to add? No? I'm just giving
13 you ample opportunity.

14 MR. SMALL: Oh, okay.

15 LEAD ADMIN. LAW JUDGE STANLEY: And I'm
16 not forcing you to make a statement. Okay.

17 Then let's turn to the Franchise Tax
18 Board and reaffirm that they have no witnesses
19 that they are going to present today in their
20 case?

21 MR. KOWALCZYK: That's correct.

22 MS. PARKER: No.

23 LEAD ADMIN. LAW JUDGE STANLEY: Okay.
24 Then we have an opportunity for you to speak. If
25 you have anything else to add to what you've

1 already said, you can do that in a conclusion
2 statement. But you know, I will let you know
3 that we do have all your exhibits now. We've
4 reviewed them, probably a little more cursory for
5 the ones that were just submitted, but we will
6 certainly review all of them before we make a
7 decision.

8 So if you don't have anything else that
9 you think you need to add, we can move to the
10 Franchise Tax Board.

11 MR. SMALL: In basics, I think that the
12 documents that are all supported and what we're
13 saying should show the matter that it's clear cut
14 it was three owners. We only were allowed to
15 make the decision amongst the three of us how we
16 want to, you know, take care of the property, and
17 I think we have enough supporting evidence.

18 MR. SMALL: On, also, on the 1098, the
19 bank told us that in the -- in the place where
20 they have the taxpayer's I.D., that they could
21 not put all of us in that block, so they could
22 only put one person and they chose -- they chose
23 Jackie, my sister, for that Tax I.D. Number. But
24 they didn't list the other, myself and my wife,
25 down on the bottom of that document.

1 LEAD ADMIN. LAW JUDGE STANLEY: Yes. And
2 the one that you submitted, though, I believe it
3 does have all three names on it. They're -- the
4 2011 --

5 MR. SMALL: Yeah.

6 LEAD ADMIN. LAW JUDGE STANLEY: --
7 mortgage loan statement, which would be Exhibit
8 number 12 at this point, even though it's not
9 marked. And then there was another statement in
10 there. So we don't need to focus on the 2012
11 statement that is irrelevant to this year and
12 only has one name on it.

13 And Judge Margolis has one more question,
14 if you don't mind.

15 ADMIN. LAW JUDGE MARGOLIS: Since these
16 documents just came in, do the new documents you
17 brought in, they actually show that you -- that
18 these payments for the property were by you as
19 opposed to by our sister; is that correct?

20 LEAD ADMIN. LAW JUDGE STANLEY: Well,
21 they --

22 MR. SMALL: No. No. It was actually a
23 combination of the three of us.

24 Now, I went back to the bank and asked
25 them for -- because some of the payments were

1 made in cash and some were made by check. I went
2 back to the bank and I asked them for -- if we
3 can obtain that and he says they don't store that
4 kind of information for that period of time, and
5 so it wasn't available to us.

6 MS. SMALL: I just have a summary of all
7 the payments listed but they don't have a summary
8 of (indiscernible).

9 ADMIN. LAW JUDGE MARGOLIS: So between
10 the three of you was there -- who -- how much of
11 the payments did you make versus your sister
12 made?

13 MS. SMALL: Well, I mean, it was 2011,
14 but there were different things that -- for
15 example, not just mortgage, but there was
16 probably, let's see --

17 MR. SMALL: Well -- well, basically, it's
18 a convenience. At some times, she would make the
19 payments because the convenience on her. She
20 would call and she says, hey, you guys make the
21 payments this month, or she would do it sometimes
22 from Arizona. So it would be mailed in both
23 locations, California and --

24 MS. SMALL: And also, what I was going to
25 add is there's been like issues, like termites

1 and things like that. We would take care of it
2 or -- just different things throughout the whole
3 life of this home. And all of us share
4 responsibility in paying into those kinds of
5 things. So it was like a give and take on
6 different matters, mortgage, termites, whatever
7 the case that came up, we would share the
8 responsibility, so --

9 ADMIN. LAW JUDGE MARGOLIS: But some of
10 the payments, you did send in by check?

11 MS. SMALL: Um-hmm.

12 ADMIN. LAW JUDGE MARGOLIS: You did pay
13 some of the mortgage payments by check?

14 MR. SMALL: Yes.

15 MS. SMALL: Yes.

16 MR. SMALL: We did.

17 ADMIN. LAW JUDGE THOMPSON: Just a quick
18 question. When you submit your payments by cash,
19 did you physically walk down the cash to the
20 office, or how did that work?

21 MR. SMALL: No, no. Basically, I took
22 the money out of the -- out of the bank, but I
23 had different accounts.

24 ADMIN. LAW JUDGE THOMPSON: Um-hmm.

25 MR. SMALL: I basically took it from my

1 credit union.

2 ADMIN. LAW JUDGE THOMPSON: Um-hmm.

3 MR. SMALL: I would actually take the
4 money from my credit union and then I would go to
5 the ATM machine, take the money, and then go to
6 the bank and pay them, the bank the actual money.

7 ADMIN. LAW JUDGE THOMPSON: So you'd
8 actual withdraw that (indiscernible)?

9 MR. SMALL: Yeah, because I only -- I
10 only have one account and I have a credit union
11 account, and that's how I did it, because it was
12 more convenient for me to do it that way.

13 ADMIN. LAW JUDGE THOMPSON: Thank you.

14 LEAD ADMIN. LAW JUDGE STANLEY: Did you
15 ever try to go back and get the bank statements
16 to show which payments you made?

17 MS. SMALL: And all they --

18 MR. SMALL: Yeah.

19 MS. SMALL: -- all they were able to give
20 us was the summary of the payments. It didn't
21 break down on who paid what. It just was a
22 summary of just payments. And that's submitted
23 also. But we did ask for that information and we
24 couldn't get it.

25 LEAD ADMIN. LAW JUDGE STANLEY: Yeah. I

1 mean, like your own bank statements. Like, Mr.
2 Small, you said that you'd go to your credit
3 union and sometimes withdraw payments. Did you
4 ever try to get those bank statements?

5 MR. SMALL: Yeah. I did not -- I tried
6 to pull that up, also, and I couldn't -- I
7 couldn't get to that. I actually asked the
8 credit union if they could help me at the site
9 and I couldn't -- they could not pull up, for
10 some reason, I don't know, maybe I didn't go to
11 the right person or whatever, but we could not
12 get them to get that far back. They said
13 something in the effect that they don't keep
14 records for that period of time to show, you
15 know?

16 But I went in there personally and I
17 looked. And I went as far back as the system
18 would allow me to go and I got to that point and
19 that was it. There was nothing showing 2011. It
20 was too far back. And I called them and I asked
21 them and they says, no, we don't do any kind of
22 transaction. We don't track that all the way
23 back to that date. So that's the only thing that
24 got on that.

25 LEAD ADMIN. LAW JUDGE STANLEY: Okay.

1 Any other questions?

2 ADMIN. LAW JUDGE MARGOLIS: No. I think
3 I'm all right.

4 ADMIN. LAW JUDGE THOMPSON: Just one more
5 background question.

6 So this is one of two properties you own;
7 is that correct?

8 MS. SMALL: Yes.

9 ADMIN. LAW JUDGE THOMPSON: I was just
10 making sure.

11 MS. SMALL: Yes.

12 LEAD ADMIN. LAW JUDGE STANLEY: And given
13 the questions that we've had, do you have any
14 follow-up questions, Mr. Kowalczyk?

15 MR. KOWALCZYK: No follow-up questions.
16 But Respondent requests a recess to discuss this,
17 the new information.

18 LEAD ADMIN. LAW JUDGE STANLEY: Okay.
19 Fifteen minutes good?

20 MR. KOWALCZYK: Yes. Thank you.

21 LEAD ADMIN. LAW JUDGE STANLEY: Okay.
22 We'll take a 15-minute recess.

23 (Off the record at 9:34 a.m.)

24 (On the record at 10:05 a.m.)

25 LEAD ADMIN. LAW JUDGE STANLEY: The

1 appeal of Small.

2 But first, I want to ask the Appellants
3 one question. And then I understand that based
4 on the answer, there may be a stipulation in this
5 case.

6 So Mr. and Mrs. Small, can you please
7 describe how much of the payment you -- how much
8 of the mortgage payments you believe you made in
9 2011?

10 MS. SMALL: So it's just an estimate but
11 we're estimating we paid at least 50 percent.
12 And just to be fair to my sister-in-law, we just
13 wanted to make sure we split it. So I don't have
14 any detail though detail.

15 LEAD ADMIN. LAW JUDGE STANLEY: So you're
16 saying at least 50 percent?

17 MS. SMALL: Yes.

18 LEAD ADMIN. LAW JUDGE STANLEY: Okay. Do
19 you have any follow-up questions for them, Mr.
20 Kowalczyk?

21 MR. KOWALCZYK: No. Just that Respondent
22 agrees that Appellant's should get 50 percent
23 now.

24 LEAD ADMIN. LAW JUDGE STANLEY: Okay. So
25 the stipulation is that the Franchise Tax Board

1 is going to allow 50 percent mortgage interest
2 deduction for tax year 2011 to the Smalls
3 themselves.

4 MR. KOWALCZYK: Correct.

5 LEAD ADMIN. LAW JUDGE STANLEY: Okay.
6 The is there any other detail that needs to be
7 addressed? I mean, that is the sole issue in the
8 case, is whether they're entitled to get a
9 deduction. Do you agree with that and accept
10 that you can get a 50 percent deduction?

11 MS. SMALL: Yes.

12 LEAD ADMIN. LAW JUDGE STANLEY: Mrs.
13 Small says yes.

14 MR. SMALL: Yes.

15 MS. SMUTNY-JONES: And Mr. Small says
16 yes. Okay. And Franchise Tax Board, you say --

17 MR. KOWALCZYK: Yeah.

18 LEAD ADMIN. LAW JUDGE STANLEY: -- yes?
19 Okay. And I don't see the need for closing
20 arguments, unless either of you does.

21 Then we'll adjourn this appeal and we
22 will issue a decision that will reflect on the
23 agreement of the parties. Okay?

24 MR. KOWALCZYK: Thank you.

25 LEAD ADMIN. LAW JUDGE STANLEY: Thank

1 you. And thank you both, both sides.

2 (There hearing concluded at 10:07 a.m.)

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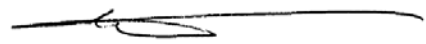
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REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of January, 2019.



PETER PETTY
CER**D-493
Notary Public

CERTIFICATE OF TRANSCRIBER

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.



MARTHA L. NELSON, CERT**367

January 15, 2019