

BEFORE THE OFFICE OF TAX APPEALS
DANIEL CHO, PANEL LEAD
NGUYEN DANG AND LINDA CHENG, PANEL MEMBERS

In the Matter of:)
)
DENNIS MCCOY AND KARIN MCCOY,) Case No. 18011435
)
Appellant,)
)
OFFICE OF TAX APPEALS)
STATE OF CALIFORNIA,)
)
Respondent.)
_____)

TRANSCRIPT OF PROCEEDINGS
Van Nuys, California
Tuesday, December 11, 2018

Reported by:
SAVAUNA L. WINN
Hearing Reporter

Job No.:
21188CA Reporting-NET

BEFORE THE OFFICE OF TAX APPEALS
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 NGUYEN DANG AND LINDA CHENG, PANEL MEMBERS

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 Appellant,)
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 OFFICE OF TAX APPEALS)
 STATE OF CALIFORNIA,)
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 Respondent.)
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TRANSCRIPT OF PROCEEDINGS, taken at
 6150 Van Nuys Boulevard, Van Nuys,
 California, commencing at 10:05 a.m. and
 concluding at 10:35 a.m. on Tuesday,
 December 11, 2018, heard before DANIEL CHO,
 Panel Lead, Nguyen Dang, Panel Member,
 Linda Cheng, Panel Member, reported by
 Savauna L. Winn, Hearing Reporter.

1 APPEARANCES:

2
3 For the DEPARTMENT:

4 FRANCHISE TAX BOARD

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12
13 Also Present:

14 Natasha Page

I N D E X

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E X H I B I T S

(None)

1 Van Nuys, California; Tuesday, December 11, 2018

2 10:05 a.m.

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5 JUDGE CHO: Good morning. Welcome.

6 This is the appeal of Dennis McCoy and
7 Karin McCoy. O.T.A. Case No. 18011435.

8 Today is December 11th, 2018, and the time is
9 approximately 10:05 a.m. We are holding this hearing in
10 Van Nuys, California.

11 My name is Daniel Cho, and I'll be the lead
12 Administrative Law Judge, and with me I have
13 Administrative Law Judge Nguyen Dang to my left and Linda
14 Cheng to my right.

15 Can the parties please introduce and identify
16 themselves for the record? Beginning with Appellant.

17 MR. DALE HANGER: Appellant, Dale Hanger, CPA,
18 representing Dennis McCoy and Karin McCoy.

19 MS. MIRA PATEL: Good morning. Mira Patel for
20 Respondent, Franchise Tax Board.

21 MS. NATASHA PAGE: Natasha Page, Franchise Tax
22 Board.

23 JUDGE CHO: Good morning and welcome.

24 The issues in this appeal are one, whether
25 appellants have established reasonable cause to abate the

1 late-filing penalty for the 2015 tax year; and two,
2 whether appellants have demonstrated that the underpayment
3 of estimated tax penalty can be abated.

4 With respect to the F.T.B.'s exhibits, F.T.B. has
5 provided Exhibits A through P, and Appellant has not
6 objected to these exhibits. Therefore, we will be
7 admitting these exhibits into evidence for this appeal.

8 Appellant has submitted Exhibits 1 through 4.
9 F.T.B. has objected to Exhibits 1, 3 and 4. However,
10 after looking at the objection and looking at the
11 evidence, the O.T.A. has overruled the objection. We're
12 going to be submitting the exhibits into evidence in this
13 appeal with the understanding that all exhibits will be
14 given their appropriate weight in this appeal.

15 So, are there any questions at this time?

16 MR. DALE HANGER: No. I don't have any
17 questions.

18 MS. MIRA PATEL: No questions.

19 JUDGE CHO: Thank you. All right.

20 As we previously discussed in our prehearing
21 conference, Mr. Hanger, you'll have 15 minutes to provide
22 your presentation. Afterwards, the Franchise Tax Board
23 will be given 15 minutes for their presentation. The
24 panel will ask questions to both parties at that time if
25 we have questions to either party, and then, Mr. Hanger,

1 you'll be given five minutes on rebuttal.

2 With that in mind, Mr. Hanger please begin
3 whenever you're ready.

4 MR. DALE HANGER: Thank you.

5 As presented to the evidence, we believe that
6 there is sufficient evidence to abate the penalties based
7 upon reasonable cause. Reasonable cause that we have
8 submitted in regards to the McCoy's using reasonable
9 judgment, prudent business judgment, in filing and
10 preparing the tax returns that relied upon the tax
11 preparer, a very experienced individual, to prepare the
12 returns and file them on time.

13 They contacted the preparer numerous times and
14 were assured numerous times that the return had been
15 prepared accurately and filed on time. It wasn't until
16 sometime quite -- I would say towards the beginning of
17 '17, 2017, that the tax payers did receive copies of the
18 tax returns and realized at that point in time that the
19 error was made.

20 The preparer used 2014 tax information in order
21 to prepare the 2015 tax return; of course, there were some
22 major differences between the two. The tax payers, again,
23 after acknowledging the error, contacted the tax preparer.
24 He acknowledged that there was an error. At that point in
25 time, the tax payers requested copies of the E-file

1 certification from the preparer. The preparer sent out an
2 E-file certification for a different tax payer, not the
3 McCoys.

4 It was sometime after that that the actual
5 preparer, finally, acknowledged that the return had not
6 been filed. He did prepare an amended tax return, which
7 was kind of unusual because it seemed like if he took care
8 of the 540-ES and then the normal tax return, he would
9 have presumed, of course, that the original 540 was filed
10 on time. Otherwise, he wouldn't have prepared a 540
11 amended return.

12 After several assurances, numerous assurances by
13 the tax preparer that the return had been filed, prepared
14 accurately, and filed on time, the tax payers did send in
15 the tax that was due based upon the original calculation,
16 which was erroneous. So, the tax payers did send in the
17 payment in a timely fashion for the original anticipated
18 tax due. At the time that the amended return had been
19 prepared and filed, which was in the beginning of '17,
20 once that was processed and the tax determined, again the
21 tax payers prepared a check and paid the full amount of
22 \$37,000 due at that time based upon the amended return.

23 So, we're asking for not only abatement of the
24 late-filing but also the late-payment penalties. I think
25 the regulations do accept an error in a tax return that

1 has been prepared erroneously for additional taxes due as
2 justification for filing -- for abating the late-payment
3 penalty. So, we're asking for the abatement of the
4 late-payment penalties and the late-filing penalties as
5 well.

6 In the declarations that we had, we also admitted
7 that -- submitted that the tax preparer admitted after the
8 fact that the returns had not been filed and that it was
9 prepared erroneously. Mr. Fernandez, who was the
10 preparer, acknowledged that the E-file had not gone
11 through. They confirmed he did not have a signed 8879,
12 the E-file authorization, for his file, nor did he have a
13 signed 540 for the tax payer. So, the documentation he
14 had did not support his acknowledgement that the return
15 had been prepared accurately and filed on time. So, we're
16 submitting that the tax payer's acted in prudent judgment
17 as they contacted Fernandez many, many times.

18 They also tried to contact the Franchise Tax
19 Board to confirm the E-filing. They were not able to get
20 through. Apparently, there was a two or three-hour hold.
21 They were put on hold for quite some time. So, that was
22 again an acknowledgement that the tax payers were very
23 concerned about the filing of the tax return. They wanted
24 to get assurances that the return had been filed, and, of
25 course, based upon the assurances of the tax preparer

1 numerous times, relied on the tax preparer and presumed
2 that the return had been filed and prepared accurately and
3 filed on time.

4 JUDGE CHO: Does that complete your presentation,
5 Mr. Hanger?

6 MR. DALE HANGER: Yes. I think that's it.

7 JUDGE CHO: Thank you very much.

8 MR. DALE HANGER: Okay. Thank you.

9 JUDGE CHO: F.T.B., you may go when you're ready.

10 MS. MIRA PATEL: Respondent properly imposed the
11 delinquent filing penalty and the estimated tax penalty
12 for the 2015 tax year, and Appellant has not established
13 grounds to abate these liabilities.

14 When Respondent did not receive a timely 2015 tax
15 return from Appellant, Respondent issued a request for tax
16 return based on information indicating Appellant had a
17 filing requirement. Appellate called Respondent
18 indicating that the amended return that was filed in
19 February of 2017 should be used. Respondent processed the
20 late amended return and then issued a notice of tax return
21 change that imposed a delinquent filing penalty and
22 estimated tax penalties.

23 After taking into account Appellant's payments,
24 Appellant's balance due was about \$37,000. The delinquent
25 penalty was properly imposed under California Law because

1 Appellant failed to file their 2015 tax return by the
2 April 15, 2016 due date, and Appellant has not established
3 reasonable cause to abate this penalty.

4 Under Revenue and Taxation Code, Section 19.131,
5 If a tax payer fails to file a return by the April 15th
6 due date then a delinquent filing penalty is imposed
7 unless tax payers show that the failure was due to
8 reasonable cause and not willful neglect. Appellants
9 argue that they establish reasonable cause because they
10 relied on their tax preparer to file their return and
11 there was no negligence or disregard on their part.

12 Furthermore, Appellants argue that the tax payer
13 mistakenly used 2014 information when preparing their 2015
14 return.

15 Lastly, appellant is arguing that their good
16 filing and payment history are grounds to abate the
17 penalty.

18 First, Appellant's reliance on their tax preparer
19 does not constitute reasonable cause because courts upheld
20 that tax payers have a personal, nondelegable duty to file
21 their return by the due date. As such, Appellant's
22 reliance on their tax preparer to have noticed whether or
23 not the return was filed is misplaced. An ordinary,
24 prudent business person would have checked themselves to
25 see if their return had been filed. Consequently,

1 Appellants have not established reasonable cause.

2 Second, the fact that Appellant's preparer used
3 the incorrect information does not establish reasonable
4 cause. Given the substantial difference between
5 Appellant's 2014 and 2015 information, Appellant would
6 have noticed or questioned the amounts on the original
7 return. Not reviewing their return before signing it
8 shows that Appellant did not act as ordinary, prudent
9 business persons. Because they failed to review their
10 original return, Appellant failed to pay the correct
11 amount of tax by the April 15, 2016, deadline resulting in
12 an outstanding balance and a delinquent filing penalty.
13 This oversight does not establish reasonable cause.

14 Third, Appellant cited their good filing and
15 payment history as grounds to abate the penalty. However,
16 Respondent does not have the authority to abate the
17 delinquent filing penalty due to a tax payer's good filing
18 history.

19 In sum, Respondent properly imposed the
20 delinquent filing penalty and Appellants have not
21 established reasonable cause to abate it. The estimated
22 tax penalty was properly imposed under California Law and
23 Appellant has not established grounds to abate it.

24 Under Revenue and Taxation Code, Section 19.136,
25 Appellants are required to make estimated tax payments

1 even if the full amount of tax was paid on the due date of
2 the return. Failure to make the estimated tax payments
3 results in an estimated tax penalty that is equal to the
4 interest that would have accrued on the estimated tax
5 payment had it been made on time. In this case, Appellant
6 did not make any tax payments during the 2015 tax year;
7 therefore, there was an underpayment of estimated tax
8 based on their tax liability.

9 Appellant made the same arguments as stated
10 earlier in order to abate the estimated tax payments,
11 however, there was no reasonable cause exception to the
12 estimated tax penalties. Therefore, Appellant has not
13 established grounds to abate. On the facts and evidence
14 in the record, Respondent respectfully request that you
15 sustain its position.

16 Thank you.

17 JUDGE CHO: Thank you.

18 Right now, I'm going on open it up to my co-panel
19 if you have questions to either party.

20 JUDGE DANG: I have questions for Appellant.

21 In your opening presentation, you had mentioned
22 that you're requesting abatement of the late-payment
23 penalty. I believe from the issues that Judge Cho had
24 stated are at issue in this appeal as well as F.T.B.'s
25 presentation that no late-payment penalty was assessed.

1 In fact, it is actually the underpayment of estimated tax
2 that was assessed in this case.

3 Would you like an opportunity to address that
4 penalty and whether or not you're going to make the same
5 arguments with respect to abatement of that penalty?

6 MR. DALE HANGER: No, that penalty is fine. No
7 objection.

8 JUDGE DANG: No objection to that penalty?

9 MR. DALE HANGER: Correct.

10 JUDGE DANG: So, it's the late-filing penalty
11 that you're disputing?

12 MR. DALE HANGER: Late-filing penalty is what
13 we're addressing here.

14 JUDGE DANG: I also have another follow-up
15 question.

16 Can you give me an explanation as to -- you had
17 asserted in your opening presentation that the tax payers
18 were aware -- and if I'm mistaken, please correct me --
19 that tax payers were not aware that their return had not
20 been filed until sometime in 2017?

21 MR. DALE HANGER: I believe the first time in
22 '17. Yes.

23 JUDGE DANG: Do you have an explanation as to why
24 they were not aware of the non-filing until that time
25 period?

1 MR. DALE HANGER: They had numerous assurances
2 from the tax preparer that the return had been correctly
3 prepared and filed on time.

4 They did not receive a copy of that until the
5 beginning of '17, so that was the reason why there was
6 such a delay because the tax preparer did not prepare a
7 copy as the law requires.

8 The only time that they received a copy of the
9 tax return is when they acknowledged there were errors
10 made at that point in time, and then they followed up
11 again with the tax preparer.

12 Even before that time, they tried to get some
13 assurances, you know, confirmation that the E-file had
14 gone through, that there was a confirmation, that the 8879
15 had been filed. None of that existed.

16 JUDGE DANG: Were they ever given any indication
17 by this return preparer at this point that he had not
18 filed the return? That, in fact, he may not have been
19 truthful in his responses?

20 MR. DALE HANGER: No. All along the tax preparer
21 assured them that the return had been filed.

22 He indicated to my client that he files all
23 E-files, over 1,200 tax returns a year. He mentioned that
24 possibly one may have slipped through the cracks. So, I'm
25 not sure if there was a justification for not following up

1 for the tax payers confirmation on the E-filing
2 requirements.

3 JUDGE DANG: Okay. Is there some reason that the
4 tax payers didn't contact the Franchise Tax Board, or
5 visit their web site to verify the filing of their return?

6 MR. DALE HANGER: They did. They did contact
7 them.

8 JUDGE DANG: And do you know during what time
9 that was?

10 MR. DALE HANGER: That I don't want know.

11 JUDGE DANG: But you're saying at some point they
12 did try to verify for themselves

13 MR. DALE HANGER: They did try to verify through
14 the F.T.B. Yes.

15 JUDGE DANG: Thank you very much.

16 MR. DALE HANGER: You bet.

17 JUDGE CHO: Judge Cheng, do you have any
18 questions?

19 JUDGE CHENG: Yes.

20 Following up on that train of thought, is there
21 any evidence, other than Karin McCoy's declaration, that
22 they tried to contact the F.T.B.?

23 MR. DALE HANGER: There is no notations of
24 anytime they tried to contact the F.T.B. Just the
25 acknowledgement by Ms. McCoy that she did try to contact

1 the F.T.B.

2 JUDGE CHENG: Okay.

3 And in it terms of reasonable cause, are you
4 asserting that the tax payers, basically, relied on their
5 tax preparer to file the return timely -- in a timely
6 manner?

7 MR. DALE HANGER: Well, they relied on the tax
8 preparer to give them assurances that the return had been
9 filed in a timely basis, had been electrically filed.

10 And after numerous times contacting the tax
11 preparer and then after numerous times of assurances that
12 it had been filed and requesting a confirmation, which
13 they did not get, they didn't really -- they didn't
14 transfer their responsibilities to the tax preparer, but
15 they acted in a prudent, businesslike judgment in
16 exercising their responsibilities in trying to get a
17 confirmation that the return had been filed and through
18 the tax preparer. He is the one who had assured them that
19 the return had been filed.

20 JUDGE CHENG: Did the tax preparer ever explain
21 why he gave them that assurance that the return had been
22 filed when it hadn't been filed?

23 MR. DALE HANGER: I think he was, basically,
24 lying to them.

25 JUDGE CHENG: Okay. Thank you.

1 MR. DALE HANGER: Of course, I don't think he
2 really wanted to accept the responsibility. In some of
3 the conversations that I had with him, he also
4 acknowledged that, "I make mistakes, but I don't really
5 make that many mistakes, and I don't really acknowledge
6 that I'm responsible in this situation." So --

7 JUDGE CHO: Thank you. I think, I just have one
8 quick question. Hopefully, either party can help me see
9 the answer to this question.

10 We discussed a little bit about the usage of the
11 2014 figures for the 2015 return, how does that correlate
12 or how does that indicate reasonable cause as to a
13 late-filing penalty? Whether it's -- does it matter
14 what's on the return at this point in time, other than the
15 fact this return was just filed late?

16 MR. DALE HANGER: Well, the information on the
17 return isn't justification for the late filing. No.
18 That's not what we're saying.

19 We're saying that the assurances that the tax
20 preparer gave my clients in assuring that the return had
21 been prepared and filed is better justification for the
22 reasonable cause if they exercised prudent, business
23 judgment in following up and trying to confirm and get the
24 copies of E-file confirmation.

25 So, it's not necessarily the errors on the

1 return, but the follow-up in the preservation of the tax
2 payer's calls and confirmations. And, you know, that
3 we're saying is reasonable judgment for abatement.

4 JUDGE CHO: Okay. Thank you for clarifying that
5 for me.

6 And a follow-up on what you just stated, do you
7 know whether -- and in your conversations with the
8 appellants -- do you know whether they requested those
9 assurances prior to the April 15, 2016 deadline or the
10 extended deadline?

11 MR. DALE HANGER: Yes, they did.

12 JUDGE CHO: I'm sorry.

13 MR. DALE HANGER: Yes, they did.

14 JUDGE CHO: So they did request those assurances
15 prior to the filing dead lines?

16 MR. DALE HANGER: Absolutely.

17 JUDGE CHO: And would you have evidence of that
18 by any chance? Other than her declaration because her
19 declaration stated that she requested assurances but
20 nothing about the timing as to when she requested those
21 assurances.

22 MR. DALE HANGER: I didn't get into that
23 discussion with her, but I could do so if it's relevant.

24 JUDGE CHO: That's fine.

25 All right. I don't have any more questions.

1 JUDGE DANG: One follow-up question, and this,
2 kind of, plays off of Judge Cheng's earlier question.

3 You mentioned many times that the tax payer in
4 this case took many steps to confirm the filing return of
5 the tax preparer. My question is aside from that, did
6 they take any other steps to make sure that their return
7 was timely filed?

8 MR. DALE HANGER: They tried to contact the
9 F.T.B. directly.

10 JUDGE DANG: And this was prior to the filing
11 deadline?

12 MR. DALE HANGER: It was probably after the
13 filing deadline.

14 JUDGE DANG: After the filing deadline.

15 So, prior to the filing deadline, other than
16 going to the return preparer and asking about it, did they
17 take any other steps during that time to ensure the filing
18 of the return -- the timely filing of the return?

19 MR. DALE HANGER: She had indicated to me that
20 she had followed up with the tax preparer probably in
21 September and October, prior to the due date of the return
22 -- the filing of the return, trying to get assurances and
23 confirmations of the E-file. None of that came through,
24 so I presume after the October 15th date, she tried to
25 call the F.T.B. directly to confirm that filing.

1 JUDGE DANG: Thank you.

2 JUDGE CHO: All right.

3 Hearing no further questions, now we'll give
4 Mr. Hanger five minutes for your final rebuttal
5 presentation.

6 MS. MIRA PATEL: Excuse me.

7 I wanted to draw the panel's attention to Exhibit
8 C of Respondent's opening brief. It is a list of
9 communications that we have had with the tax payers, and I
10 know there was a question about when Ms. McCoy contacted
11 F.T.B.

12 Any phone call made to the tax payer or received
13 from the tax payer is logged in our comments list. And
14 so, on Exhibit C, page 1 there is no phone call after the
15 April 15th deadline regarding their 2015 tax return. The
16 first phone call made to F.T.B. is from Mr. McCoy on
17 May 9, 2017 and then there were conversations after that
18 date.

19 So, we don't have any record of Ms. McCoy calling
20 in to check with the F.T.B. until after our request for
21 tax return was sent out.

22 JUDGE CHO: Thank you for that clarification.

23 Mr. Hanger, you will have five minutes on
24 rebuttal.

25 MR. DALE HANGER: Okay. Reasonable cause, I

1 think we have provided reasonable justification for that.
2 The tax payers acted in a very prudent, businesslike
3 manner to work with the tax preparer in trying to get the
4 return accurately prepared and filed on time.

5 I don't think there was anything that the tax
6 payers did incorrectly. They didn't show any kind of
7 erroneous judgment, I don't think, in this situation.
8 They did use their best business judgment in trying to
9 follow up and confirm that the tax return had been filed.

10 After many assurances from the preparer that it
11 had been, it was finally discovered that he had not filed
12 the return. And why he prepared a 540-ES return presuming
13 that the original return was filed, I presume that that
14 would have been pretty good justification for them to
15 assure the tax payers that the presumption was that the
16 original return was filed on time.

17 Thank you.

18 JUDGE CHO: Thank you very much.

19 Well, this concludes the hearing. The three of
20 us will meet and confer on the case based on documents and
21 the testimony and the arguments presented today.

22 We will issue our written decision within
23 100 days of today. The case is submitted. The record is
24 now closed, and the hearing is now concluded.

25 Thank you for your time.

(Hearing concluded at 11:30 a.m.)

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1 HEARING REPORTER'S CERTIFICATE

2
3 I, Savauna L. Winn, Hearing Reporter in and for
4 the State of California, do hereby certify:

5 That the foregoing transcript of proceedings was
6 taken before me at the time and place set forth, that the
7 testimony and proceedings were reported stenographically
8 by me and later transcribed by computer-aided
9 transcription under my direction and supervision, that the
10 foregoing is a true record of the testimony and
11 proceedings taken at that time.

12 I further certify that I am in no way interested
13 in the outcome of said action.

14 I have hereunto subscribed my name this 20th day
15 of December, 2018.
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22 SAVAUNA L. WINN

23 HEARING REPORTER
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25