

BEFORE THE OFFICE OF TAX APPEALS  
GRANT THOMPSON, PANEL LEAD  
DOUG BRAMHALL AND LINDA CHENG, PANEL MEMBERS

In the Matter of )  
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 )  
TECHNICORP INTERNATIONAL II, INC., )  
Appellants, )  
 )  
 ) No. 18011726  
Office of Tax Appeals )  
State of California )  
Respondent )  
 )  
 )  
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TRANSCRIPT OF PROCEEDINGS  
Van Nuys, California  
Monday, October 22, 2018

Reported by:  
SUSAN GALLAGHER  
Hearing Reporter

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TRANSCRIPT OF PROCEEDINGS, taken at  
 California State Building Offices, Van Nuys  
 6150 Van Nuys Boulevard, Van Nuys,  
 California, Monday, October 22, 2018, commencing at  
 2:06 p.m. and concluding at 31:19 p.m. on Monday,  
 October 23, 2018, heard by  
 GRANT THOMPSON, PANEL LEAD,  
 LINDA CHENG, PANEL MEMBER  
 DOUG BRAMHALL, PANEL MEMBER

Reported by SUSAN GALLAGHER

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APPEARANCES:4  
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FOR THE DEPARTMENT OF  
6 TAX AND FEE  
ADMINISTRATION:BY: BRAD COUTINHO  
7 MARGUERITE MOSNIER  
LEGAL DIVISION  
8 450 N Street, MIC:82  
PO BOX 942879  
9 Sacramento, California 94279-0082

10 FOR THE APPELLANT:

BRIAN T. MCCARTHY  
11 MARK ANDRUS  
REPRESENTATIVES  
TECHNICORP INTERNATIONAL II, INC.  
12 512 North Main Street  
Orange, California 92868-1102  
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# I N D E X

Witnesses:                      Direct              Cross

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# E X H I B I T S

	MARKED FOR	RECEIVED
	IDENTIFICATION	IN EVIDENCE

APPELLANT'S

Filed in brief

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Submissions on October 4th

And October 17th, 2018

6

DEPARTMENT'S

Filed in brief

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1  
2 Van Nuys, California, Monday, October 22, 2018

3 2:10 p.m.  
4

5 JUDGE THOMPSON: We are now on the record in the Office of  
6 Tax Appeals oral hearing for the appeal of Technicorp  
7 International II, Inc., Case No. 18011726. We are in Van Nuys,  
8 California. It's Monday, October 22nd, 2018, and the time is  
9 approximately 2:10. My name is Grant S. Thompson, and I am the  
10 lead administrative law judge for this hearing, and my fellow  
11 co-panelists today are Linda Cheng and Doug Bramhall.

12 Franchise Tax Board, could you introduce yourself again for  
13 the record and both counsel, please.

14 MR. COUTINHO: Yes. Brad Coutinho for respondent as well as  
15 Margaret Mosnier.

16 JUDGE THOMPSON: And same for you, Mr. Andrus.

17 MR. ANDRUS: This is Mark Andrus, and I represent Brian  
18 McCarthy.

19 JUDGE THOMPSON: Could you state Mr. McCarthy's role for the  
20 taxpayer?

21 MR. ANDRUS: He's the chief financial officer for the  
22 taxpayer.

23 JUDGE THOMPSON: The issues in this appeal are whether the  
24 appellant filed a timely appeal such that the Office of Tax  
25 Appeal, OTA, has jurisdiction, including any related notice

1 issues and if they have jurisdiction, whether appellant timely  
2 filed the refund claim and has shown error in FTB's termination  
3 of interest, a late payment penalty for 2006, estimated tax  
4 penalty, and electronic funds transfer the of penalties.

5 Without objection, all the of the exhibits that the parties  
6 filed in their briefing are accepted into the record with the  
7 small footnote that FTB's Exhibit N, its law summary, is more in  
8 the nature of legal argument and will be considered as such.

9 Also appellant's submissions on October 4th and  
10 October 17th, 2018, will also be admitted into the record and are  
11 admitted into the record.

12 (Appellant's Exhibits filed in their briefing and  
13 Appellant's submission on October 4th and October 17th, 2018  
14 admitted into evidence.

15 (Department's Exhibits filed in their briefing admitted  
16 into evidence.)

17 As I mentioned, we're going to allow 30 minutes for each  
18 party to present argument, and then after FTB's argument, we'll  
19 give of appellant about ten minutes to respond. This is  
20 approximate. Feel free to go on a little longer, and don't feel  
21 obligated to use up every minute either.

22 With that, I think we're ready to begin.

23 Mr. Andrus, are you ready to start?

24 MR. ANDRUS: Yes.

25 THE COURT: All right. Please proceed.

1 MR. ANDRUS: Okay. Thank you.

2 So today there essentially are two matters. Penalties and  
3 interest is first the matter, and the second matter is the  
4 computation of the interest on the refunds. So we'll begin with  
5 the first matter, the penalties and interest that was accessed,  
6 and we're going to talk about a lot of documents and so forth,  
7 and so I'll refer to the presentation that I handed out with page  
8 numbers which are on the bottom so you can follow along.

9 So on page 3, we summarized our position, and that is that  
10 appellant filed amended returns for tax years 2001 to 2004, which  
11 generated an overpayment carried forward into the subsequent  
12 years. That becomes key because of the assessment of the  
13 penalty. Appellant properly applied those overpayments when  
14 filing the 2005 through the 20088 tax returns, and we'll show  
15 that a penalty should have never been accessed because there was  
16 no overpayment.

17 Respondent made an initial adjustment to the 2001 to 2004  
18 carry forwards during an audit, and those initial audit  
19 adjustments are what caused respondent's system to generate the  
20 penalties. At the conclusion of the audits for 2001 and 2004,  
21 both parties agreed that appellant's overpayment from those  
22 years, 2001 and 2004, they were computed correctly. Appellant  
23 then requested that the penalty and interest charges be abated,  
24 and respondent refused to abate those.

25 And, then, additionally, the second issue is we're going to

1 talk about interest computations on the refunds. So on page 5  
2 what we hope to be able to show is that appellant was, indeed,  
3 under an FTB audit when appellant filed the amended returns from  
4 2004 to 2004. That becomes critical to the way that those are  
5 processed. The amended returns increased appellant's tax  
6 overpayments carrying forward with the research credit,  
7 generating \$335,000 of that carry forward, which carried it into  
8 2006, which is the largest year. So we can kind of talk about  
9 2006, kind of focus there.

10 Respondent failed, we think, to properly record these carry  
11 forwards. And from the records that we have, it looks like the  
12 2002 and 2003 credits were not recorded until August of 2013. It  
13 looks like this processing issue is what generated the penalties.  
14 Appellant believes that the proper carry forward matter was  
15 resolved prior to filing the 2006 return. So we're going to talk  
16 about the 2006 return looked like and whether or not it was  
17 reasonable to assess these penalties.

18 Also, as soon as appellant realized that the carry forward  
19 matter was still unresolved, appellant appropriately raised the  
20 matter of the resulting penalties and interest during the exam  
21 prior to the closing process. Respondent did not agree with  
22 appellant, and we believe that this misled appellant as to what  
23 the appeal procedure should be.

24 Okay. So that's where we're headed. So on page 7 -- and we  
25 can go through some of these pretty quickly -- our first point is



1 that appellant the under an FTB audio when filing the 2001 to  
2 2004 amended returns. The exhibit here is that letter, which is  
3 from May 9th of 2005, and the taxable years under audit are 2002  
4 to 2003. Now, 2002 and 2003, the reason being in 2001 there was  
5 no tax due so all of that credit carried into 2002. So the audit  
6 was only looking at the years that had -- was utilizing the  
7 credit; so that's the 2002/2003.

8 Okay. If we go to page 8, this is the information request  
9 issued in April of 2006 before appellant prepared their tax  
10 return, and it shows that FTB was indeed auditing the R and D  
11 credit for those years. So the whole issue here is R and D  
12 credits.

13 On page 10, we include what we understand to be the rules  
14 around what happens when appellant files an amended tax return  
15 during an exam, and appellant gave the exam team a copy of those  
16 returns and also filed those returns, he mailed them in and filed  
17 them, and from the -- from the FTB audit manual, Section 2- --  
18 8.2.3 says down on No. 4, that when the examiner receives those,  
19 those need to be processed. So those returns should have been  
20 processed, and the credits should have shown up in the system.

21 On page 11 -- there's a lot of numbers here, but there's  
22 only a couple key ones here -- page 11 shows appellant's  
23 overpayment history from this period of time. In the column  
24 towards the left, there is an original column, which was  
25 originally filed. There's the amended column, and then we've

1 over on the far right hand, we've shown and reconciled what is  
2 generating that carry forward.

3 The key numbers there in the orange circle in the middle of  
4 the page is that -- it's the 2001, 2002, 2003 R and D credits  
5 that make up a majority of that carry forward amount.

6 From these returns -- so 2001, 2002, 2003, 2004 -- all were  
7 amended on December 16, 2005, in the middle of the exam. Those  
8 returns generated a carry forward into 2005 of \$641,000. So that  
9 shows up on the 2005 year under the original amount. So in 2005  
10 return was originally filed, there was tax -- appellant had made  
11 some payments of 150,000, had a carry forward of 640,000, and was  
12 overpaid almost \$800,000. They then applied that to the tax of  
13 \$429,000, and there was another \$362,000 carry forward that went  
14 in to the 2006 money to. So then when taxpayer, in the middle of  
15 this exam when taxpayer's preparing the 2006 return, the question  
16 is, and in 2007 how much of this overpayment can the taxpayer  
17 rely on reasonably and taxpayer did all the computations, and you  
18 can see that out of -- by that time there had been some other  
19 amendments and some adjustments, out of \$335,000 overpayment,  
20 appellant owed out \$234,000. So appellant was overpaid in 2006  
21 by \$100,000. So accordingly, appellant didn't make any estimated  
22 payments for that year because of all this carry forward coming  
23 in. So that's the point here.

24 JUDGE THOMPSON: That goes for the penalty argument?

25 MR. ANDRUS: Yes.

1 JUDGE THOMPSON: Okay.

2 MR. ANDRUS: So the question of why would there be an  
3 underpayment penalty for these years, because the appellant  
4 wasn't underpaid. They were overpaid by a lot. Okay. On page  
5 12, and this is the original return from 2006, and down at the  
6 bottom you can see taxpayer correctly filed, and there was --  
7 they were overpaid. There was overpayment.

8 And some of respondent's briefs, it mentions that there was  
9 tax due, and thus, you know, that's first why they accessed the  
10 penalty. So the question is why the disconnect between what  
11 respondent had in their system and taxpayer's records. And we're  
12 not sure because what respondent talks about in their briefs and  
13 their explanations is referring to respondent's records. So  
14 something probably happened in respondent's system. We're not  
15 sure. And then on page 13, here is the transcript of that  
16 account, and circled in the middle, these -- the 100,011, the  
17 45,000 these are essentially those R and D credits carried  
18 forward, and they were not reported in the record until 2013 and  
19 2014.

20 So this generates -- this is the core of the issue. This  
21 tracking in the record is what generated in the system the  
22 underpayment penalties.

23 On page 15, kind of continuing the story here, appellant  
24 believed that there was a proper carry forward. Now, on page 15  
25 is a notice from February of 2007 for the 2005 tax return, and it

1 shows down at the bottom that this notice says, "Hey, we think  
2 that there was mistake. And the \$362,000 overpayment goes to  
3 zero. So the important part here, then, is to say, okay, the  
4 paragraph codes, what's generating that amount?

5 On page 17, the code for DA is, we've revised the prior year  
6 overpayment shown on your return. Okay. So the question then is  
7 in 2007 we are still in an exam. We've getting this notice.  
8 Taxpayer is getting ready to prepare the tax return, and taxpayer  
9 see that, oh, they've made this adjustment for the R and D  
10 credit. Now, they're in the middle of exam. They're  
11 transferring IDRs and information.

12 So that brings us to page 18. When taxpayer received that  
13 notice a few days later, taxpayer responds to FTB and says, "Hey,  
14 your system, there's an error here."

15 And on page 19 this is the response that appellant sent that  
16 says, "Here's the overpayments. Here's how this works and does  
17 all the math." On page 20, which is a continuation of that  
18 communication, appellant shows similar to the schedule that I  
19 showed before of where these overpayments come from.

20 So this is February. On page 21 we look at the next piece  
21 of information, and that is respondent sends a letter on June 11,  
22 2007, and the next pages are the letter, and we're going to talk  
23 about that. The key to this letter is that at the point in June  
24 of 2007 FTB is communicating to the appellant saying, "This is  
25 what we think of the R and D credits."

1           Okay. So let's look at that letter. On page 22, this is in  
2           June of 2007, the letter says, and it's kind of down at the  
3           bottom and that paragraph on page 22, the second to the last  
4           sentence says, "Hypothetically, this is what the calculation is  
5           going to look like assuming that you give us all the information  
6           we want in IDR No. 30. So this is the state of affairs the  
7           credit at this point in time. On page 23, with this letter, is a  
8           calculation that shows appellant's original as reported  
9           calculation. If you notice that highlighted there in the middle  
10          of the page is a net research credit available. And if you add  
11          those up, that's like \$332,000 of credit.

12          When you turn the page, let's go the page 24. This now is  
13          the revised credit. So FTB is saying, "However, we may revise  
14          your credit." But look at the net research credit available  
15          line. It's the same. And at this point in time on page 25, the  
16          whole issue being discussed was whether or not some of the sales  
17          for some of the subsidiaries that appellant has if the sales  
18          number was appropriate. There's other communications, but the  
19          whole point of this point of the exam was we're saying there's  
20          adjustment. The sales issues is such a nonmaterial matter that  
21          there would be no adjustment to the credit. So taxpayer is now  
22          going to prepare the 2006 tax return in 2007, is in the middle of  
23          an exam. Exam had at one point said, hey, if the carry forwards  
24          don't work -- appellant had shown them the accounting, and then  
25          we get this communication saying, hey, we might make and

1 adjustment, but the adjustment's not going to change the carry  
2 forward. So all the information that appellant had indicated  
3 that appellant had is this carry forward coming into 2006.

4 So that's really that first issue, and the key takeaway that  
5 we want to make there is that appellant reasonably filed a tax  
6 return in 2006 for 2005. The taxpayer was cooperating with the  
7 exam, and during that process, all the information available to  
8 the taxpayer showed that were a carry forward of \$332,000, which  
9 would completely offset any tax.

10 Okay. The second part of this issue is the issue of: Did  
11 appellant appropriately raise the matter and deal with the issue  
12 during the exam? So now on page 27 we moved forward to 2014. So  
13 we've got seven years of audit appeals protest with the Board of  
14 Equalization and all this kind of stuff with 2002/2003, and we  
15 get to the tail end of the beginning of 2014. And at this point  
16 appellant had received a notice about -- or had some  
17 communication about these penalties. So this January 15th letter  
18 from appellant to respondent was addressing, now, those  
19 penalties. Because now is the time to talk about it because we  
20 had to resolve the matter of the credits which generated the  
21 penalty.

22 So in January 2014 appellant sends a letter. Here's the  
23 letter. It says, hey, you know, please, we need to make  
24 adjustments to these penalties and the interest.

25 On page 29 in March of 2014 is the response from FTB. And

1 as highlighted here in the middle of the page, there is the  
2 statement of, "As we discussed the audit staff is not responsible  
3 for the application of these charges, nor do we have the  
4 authority to reverse, waive, or abate them anyway."

5 It goes on to say, "We understand that you think that this  
6 is the result of the R and D credit exam. However, we disagree."

7 Well, there's a couple things wrong with it. First of all,  
8 they clearly were part of the exam as we've shown, and at this  
9 point now all these years later to just say, yeah, we don't --  
10 we're not going to address them. That was the key issue.

11 Also, there is a number of things happening. We believe  
12 that the time element caused a lot of this trouble. In  
13 respondent's opening brief in one of the footnotes, respondent  
14 states that hey, by the time all this happened, we had already  
15 destroyed the 2005 return. Respondent goes back and says, based  
16 on our records, there is no carry forward.

17 Well, so that's really the crux of the matter is, you know,  
18 all of this time respondent really didn't know what the credits  
19 were or what should be happening in the system is what we believe  
20 based on what we see. Also the key part of this is that we're  
21 still in this exam and we're raising the matter of penalties and  
22 interest. So it is part of the exam.

23 On page 31, like I said, we believe that respondent's  
24 statements are inaccurate and inconsistent with the code when  
25 they said, hey, we can't do anything about the this too bad.

1 You've got penalties and interest. We can't do anything about  
2 it. Well, the Revenue Code it talks about, you know, what has to  
3 be shown for the failure to file and to -- and the penalty  
4 assessment right here, and it says, "Unless it is shown," so you  
5 have to show you that the failure is due to a reasonable cause,  
6 you know, not due to willful neglect. So we had a reasonable  
7 cause for what we're doing. We had communicated. We tried to  
8 work this out. We tried to correct the system.

9 And so appellant's position is that any of this would be --  
10 there was reasonable cause for what was filed and what was shown  
11 on the returns. And as you look at that schedule later, you'll  
12 see that most of the tax years, taxpayer overpaid. So taxpayer  
13 is working very hard to be sure that they're complying with all  
14 the payments of their taxes. Also in the manual of the audit  
15 procedures, it talks about underpaying penalties, and it talks  
16 about that they may be decreased. So the audit manual itself  
17 says that, hey, during the audit you can decrease these  
18 penalties.

19 So we're not sure why FTB would send a letter that says,  
20 yeah, to bad. We have no authority to do anything about these  
21 whatsoever -- or in any way, is their language.

22 But we're saying, well, wait a minute. This happened in the  
23 exam. We're in the exam. Let's keep addressing this.

24 On page 32, we show here just the returns. There's a  
25 statement the respondent makes that, hey, we processed these



1 returns, and these returns are a function of what happened in the  
2 system and when the returns were originally filed. So we go back  
3 to what's originally filed. So on page 32 is the original 2004  
4 return, which was an overpayment; the 2005 amended return, which  
5 was amended on -- appellant filed the return and then right away  
6 filed an amended return. So this 100-X is the official or final  
7 return for 2005. Again, here's the overpayment, way overpaid.  
8 And in 2006, I believe this is the same one that we've already  
9 shown earlier, again overpaid. So we don't believe that the  
10 system triggered because of the original returns the original  
11 returns all showed that there was overpayments. Appellant's  
12 record showed that there were overpayments. And at the end of  
13 the exam -- at the end of the audit, FTB agreed that those over  
14 payments were correct.

15 That brings us to the issue that respondent has raised which  
16 is, hey, too bad. The statute has somehow run on addressing the  
17 penalty issue because those are separate issues. We believe that  
18 because -- and this is all in the briefs that we've sent -- but  
19 we believe that respondent misled appellant as to what the  
20 appropriate appeal procedure should be.

21 So on these letters on page 36, in March of 2014, it looked,  
22 you know, in this sentence here from Franchise Tax Board pulls  
23 both of the issues together, right? It says, okay, the audit is  
24 now closed, and we will be submitting to Sacramento. Once in  
25 Sacramento, you're going to get a notice of proposed assessment,

1 over assessment you're going to get a carry forward. So there's  
2 a number of things that you're going to receive.

3 So okay. Then we received that information together in the  
4 same envelope on the same date. Well, before that here in March  
5 of 2014 on page 39 when we received that information we filed a  
6 protest as directed, timely we understood. The -- there's the  
7 matter of the October -- in the briefs we've been talking about  
8 the October 22nd, 2014, letters. Those are the letters that --  
9 there was -- there is a number of notices that come together.  
10 There's a cover letter from the same exam person. There's two  
11 different notices, but they're all in the same envelope. So  
12 since we had been talking about this matter as part of the exam  
13 and we got the notice as part of the closing of the exam and the  
14 appeal instructions are combined together, the letter addresses  
15 in detail how to appeal one of the matters, and we talked about  
16 this in the briefing, but apparently we were -- the second matter  
17 is so supposed to be to appealed differently, but after, you  
18 know, ten plus years of doing this, we're bringing all this  
19 together. So that's it.

20 JUDGE THOMPSON: Just for clarity, so you mentioned the  
21 letter advised on how to file an appeal. Which letter were  
22 you -- think I know, but don't make me guess.

23 MR. ANDRUS: Yeah. So I questioned putting it in here  
24 again. It's the October 14th letter. It's not in my  
25 presentation. I apologize. But it's in all of the other

1 information that was sent, so October 22nd, 2014 letter.

2 MR. COUTINHO: It's Exhibit A of appellant's -- the letter.

3 JUDGE BRAMHALL: What exhibit?

4 MR. COUTINHO: Exhibit A of appellant's appeal letter is the  
5 NPACA dated October 22nd, 2014.

6 JUDGE THOMPSON: Does it just make sense for us to pause a  
7 moment to pull that up real quick?

8 MR. ANDRUS: Sure.

9 JUDGE THOMPSON: To appellant's appeal letter?

10 MR. COUTINHO: Yes.

11 JUDGE THOMPSON: All right. So attached to that Exhibit A,  
12 there are several documents. I just want to make sure we're  
13 clear on what we're talking about. The first document is Notice  
14 of Action on credit or refund dated October 22nd, 2014, for  
15 December 31st, 2005.

16 The second document is another Notice of Action for 2006.  
17 The third document is a Notice of Account Adjustment, also dated  
18 October 22nd, 2014, and that is for the 2007 tax year. And then  
19 the next document is another Notice of Action on cancellation,  
20 credit, or refund also dated October 22nd, 2014, and that is for  
21 the 2008 tax year. And the next document that I see in my record  
22 is Exhibit B, the Notice of Proposed Adjusted Carryover Amount.  
23 So that document is also dated October 22, 2014, and that is  
24 Notice of Proposed Adjusted Carryover Amount for taxable years  
25 December '05. That's been amended to December '08.

1           And it described this notice of opposed adjusted carry over  
2           amount in issued pursuant to Revenue and Taxation Code  
3           Section 1904345, and it continues to describe the protest  
4           procedure.

5           So I guess any questions -- I think you mentioned one of the  
6           documents in that package received October 2014 provided  
7           instructions to you. I just want to make you're looking at the  
8           right document.

9           MR. ANDRUS: Okay. So the cover letter, which is what I  
10          think you were just reading from.

11          JUDGE THOMPSON: I'm just reading from the --

12          MR. ANDRUS: October 22nd, 2014.

13          JUDGE THOMPSON: Notice for opposed adjusted carryover  
14          payment.

15          MR. ANDRUS: Right. The way that it came was the cover  
16          letter, as we understood from exam, and says, you know -- and  
17          because earlier they said we're going to send you bunch of  
18          notices. We're going to tell you what to do. So here's the  
19          cover letter saying here's what to do. Mail your protest right  
20          here. It explains what to do. And then we have these notices,  
21          which looks like the just the paperwork with the amounts on it  
22          coming from the system. So we understood this to be that in  
23          order to protest, we followed the terms of the cover letter and  
24          we protested to address that's included in letter here.

25          The -- on the notice of action, which the letter doesn't

1 address that necessarily, it says, yes, you need to file an  
2 appeal with the Board of Equalization, but that's down here in  
3 the middle of the notice. Since they all came together and they  
4 were all the amounts that we had been discussing as one matter  
5 before when we received this letter, we followed what the letter  
6 said, which is, okay. Protest it to this section. So that's  
7 what we did.

8 So appellant believes that appellant did everything  
9 reasonably that it could to raise -- to protest that issue and  
10 filed the protest on December 15, 2014. And that's -- so that's  
11 the whole -- that's our position on the first matter, that  
12 penalties were because of the exam. When we concluded the exam,  
13 we asked for the penalties to be abated, and for whatever reason  
14 that whole issue was begin ignored, and we were doing what we  
15 thought we could do.

16 As to the second matter, and we sent some briefs back and  
17 forth. We'll keep this -- this is mostly a math issue. But  
18 we -- appellant believes that there are some inaccuracies with  
19 the computations of interest, and we've provided some alternative  
20 computations. And appellant will note that any of these other  
21 adjustments because of penalties would also mean that we need to  
22 recalculate some of this also because it all rolls together.  
23 Thank you.

24 JUDGE THOMPSON: Thank you. Franchise Tax Board, you just  
25 received this from appellant, this document, which is helpful,

1 but I wanted to make sure you had time to look at it.

2 MR. COUTINHO: Yes. I think most of these documents have  
3 been provided from the appellant. So I don't believe there's  
4 anything new substantively, just the arguments laid out in a  
5 different manner.

6 JUDGE THOMPSON: Okay. Do you need few minutes to gather  
7 your thoughts?

8 MR. COUTINHO: I think we're ready to proceed.

9 JUDGE THOMPSON: Okay. Proceed when you're ready.

10 MR. COUTINHO: In closing I have four points to make. The  
11 first is that the Office of Tax Appeals doe not have jurisdiction  
12 to hear this appeal.

13 The second is that if the OTA does have jurisdiction --  
14 properly calculated interest on appellant's overpayments.

15 Third, appellant's claims for refund for penalties and fees  
16 were filed untimely.

17 And fourth, even if appellant's claims for refund and/or  
18 credit were timely, appellant has not established that those  
19 penalties and fees should be abated.

20 To respondent's first point, in October 2014, respondent  
21 sent appellant notices of action on cancellation, credit, or  
22 refund, which stated its determination of the taxes, penalties,  
23 and interest for the years at issue. Under Revenue and Taxation  
24 Code Section 19324, FTB's action upon the claim is final unless a  
25 tax payer appeals within 90 days of the notice.

1 Appellant did not file its appeal until January 2016, a year  
2 after respondent issued its NOAs. Under California Code of  
3 Regulations Section 30102, the Office of Tax Appeal only has and  
4 jurisdiction to hear and decide timely submitted appeals.  
5 Because appellant's appeal was not timely filed, respondent's  
6 action upon appellant's claim is final, and the Office of Tax  
7 Appeals does not have jurisdiction over this appeal.

8 To respondent's second point, even if your office does have  
9 jurisdiction respondent correctly calculated the amount of  
10 interest appellant was allowed on corporate overpayments.  
11 Appellant incorrectly contends that respondent did not properly  
12 calculate interest on overpayments made for the tax years at  
13 issue.

14 Appellant asserts that the interest rate is determined by  
15 what the interest rate was for tax year at issue. And remains  
16 static until respondent pays the overpayment at issue.

17 However, under Revenue and Taxation Code Section 19521, the  
18 corporate overpayment rate is not static, but it adjusts every  
19 six months by statute. Most noticeably, the corporate  
20 overpayment interest rate was 0 percent from July 2009 to  
21 July 2017.

22 Attached as an enclosure to its opening brief is  
23 respondent's calculation of interest that details what the  
24 interest rate was for the relevant years and how much interest  
25 accrued on appellant's overpayments.

1           To respondent's third point, if it is determined that your  
2 office does have jurisdiction over the claim for refund issue,  
3 appellant's claim for refunds at issue are still untimely under  
4 California law. Under Revenue and Taxation Code Section 19306,  
5 the claim for refund can only be allowed if file within either of  
6 the following two time frames, Either four years from the  
7 original due date of the return or one year from the date of the  
8 last overpayment, whichever time frame is the is later.

9           In this case the four-year statute of limitations period  
10 expired prior to receiving appellant's claim for refund. For the  
11 latest year on appeal, the 2008 tax year, the four years statute  
12 of limitations period expired in April 2013. Appellant's claim  
13 for refund were not filed until January 2014, a little under a  
14 year after the four-year statute of limitations period expired.  
15 Accordingly, appellant's claims cannot be considered timely under  
16 the four-year statute of limitations period.

17           Further, the one year statute of limitations period also  
18 expired for both tax years prior to the appellant's claims for  
19 refund.

20           The one year statute of limitations period is measured as  
21 one year from the date of the last overpayment. The last payment  
22 respondent received for all tax years was in September 2010.  
23 Again, appellant's claims for refund were received in January  
24 2014. Accordingly, appellant's claim for re^ if you find ^ fund  
25 are untimely under the one year statute of limitations period.



1           To respondent's fourth and final point, even if it is  
2           determined that appellant's claims for refund were timely, the  
3           penalties and fees at issue were correctly imposed. I believe  
4           some of the disconnect here in this case is that there were two  
5           separate audits that took place. There were audits for 2004 and  
6           2003 tax years, as well as audits for the 2005 through 2008 tax  
7           years.

8           For the first audit that took place for the 2002 and 2003  
9           tax years, if you would note in respondent's -- I'm sorry --  
10          appellant's appeal letter, Exhibit D, the audits for those the  
11          years, the 2002 and 2003 tax years were not resolved until the  
12          beginning of 2014.

13          Accordingly, while appellant did receive research and  
14          development tax credits for those years, because it was the not  
15          resolved until January 2014, those credits had in not been  
16          determined when appellant filed its 2005, 2006, and 2008 tax  
17          returns.

18          JUDGE THOMPSON: The document is in Exhibit D?

19          MR. COUTINHO: Yes. It's the agreement page between the  
20          Franchise Tax Board and appellant on appellant's appeal letter.

21          JUDGE THOMPSON: Okay. So that's the January 27th, 2014,  
22          letter with tax agreement page.

23          MR. COUTINHO: Correct. And I believe Exhibit D is also a  
24          request for dismissal in regards to the 2002 and 2003 tax years.

25          Appellant did file for the second audit that took place for

1 the 2005 to 2008 tax years. Appellant did file amendment return  
2 the reduced its tax liability. But as stated by the Board of  
3 Equalization, the predecessor to the Office of Tax Appeals, an  
4 appeal -- an amended return filed after the due date does not  
5 reduce the estimated tax penalty. Once that estimate tax penalty  
6 is imposed, it is mandatory. There is no reasonable cause  
7 exception. Thus the estimate tax penalties for the years at  
8 issue should not be reduced nor abated.

9 With regards to later payment penalty, appellant did not  
10 make any payment before the due date of the return for the 2006  
11 tax year. Respondent has reduced the penalty based on  
12 appellant's amended return and respondent's audit. However,  
13 appellant has not established reasonable cause to further reduce  
14 or abate the late payment penalty.

15 In regards to the electronic funds transfer penalty, Revenue  
16 and Taxation Code Section 19011 requires corporate taxpayers with  
17 estimate tax payments exceeding 20,000 in tax liability or in  
18 excess of \$80,000 to submit payments by electronic funds  
19 transfer. Corporations that have an EFT payment requirement that  
20 submit payment by other means are subject to a 10 percent  
21 penalty.

22 In this case appellant paid made a non-EFT payment for the  
23 2005 tax years, and thus respondent imposed a 10 percent penalty.  
24 Appellant has failed to offer any justification to further reduce  
25 or abate the EFT penalty.

1           Contrary to appellant's assertion, besides the late payment  
2           penalty, the penalties imposed were prior to and unaffected by  
3           appellant's amended returns for the years at issue. As such,  
4           there are not grounds to abate or further reduce the penalties  
5           imposed, and respondent's action should be sustained.

6           My cocounsel would like to say something.

7           MS. MOSNIER I wanted to clarify just a couple of things that  
8           we've said in our argumentative here. The first is with respect  
9           to jurisdiction, it's FTB's position that your office does not  
10          have jurisdiction over the issue of the correct calculation of  
11          interest paid on the refunds that are evidenced by the notices of  
12          action for '05, '6, and '8 that are dated October 22, 2014. And  
13          because they -- because they did, as the appellant noted in its  
14          brief that your predecessor received December 20, 2016, it's the  
15          documented dated December 14, 2016, and appellant said the  
16          purported notice, and referring to the notices of action on  
17          cancellation, credit, and refunds, thus required the taxpayer to  
18          read the NOA, and that, in fact, would be FTB's position. It did  
19          require the appellant to read those notices of actions, recognize  
20          that they were separate matters from the ongoing audit,  
21          understand that they represented final determination rather than  
22          initial of intermediary communications, and then conclude that an  
23          appeal deadline had been triggered. So that's with respect to  
24          the issue of the interest calculation.

25          With respect to the penalties and fees, FTB does not

1 challenge your office's jurisdiction over that issue. Those  
2 issues -- the issues of penalties and fee abatement were raised  
3 in the January 2014 communication from the appellant to FTB. FTB  
4 has not issued a decision document on the penalty and fee  
5 abatement request. And therefore pursuant to Section 19331, your  
6 offers would have jurisdiction over a deemed denial of appeal.  
7 It is, however, FTB's position, as Mr. Coutinho explained, that  
8 the refund claim dated January 2014 was untimely under Section  
9 193406.

10 And then the last thing, and it really is -- it's a minor  
11 thing with respect to the four-year statute of limitations in  
12 that SOL analysis of the penalty of fees, I think we accidentally  
13 misstated what that four-year SOL would be. It would have run  
14 four years after the return for that date was filed. So it would  
15 have run the September 11, 2013, and I think we were off by a  
16 little bit, but it doesn't matter because the refund claim wasn't  
17 made until January of 2014. Thank you.

18 JUDGE THOMPSON: Thank you. Before we turn back to  
19 appellant, I was hoping the Franchise Tax Board could talk about  
20 the appellant's reasonable cause argument a little more. As I  
21 understand appellant's argumentative, at the time that they filed  
22 the 2006 return, they thought they had overpayments that were  
23 more than sufficient to cover the tax, and they they thought that  
24 filing that return they made overpayments at that time reflected  
25 the exercise of ordinary diligence. And I think you touched upon

1     it briefly -- Franchise Tax Board's argument, but I was wondering  
2     if you might elaborate.

3           MR. COUTINHO: Respondent finds that there's not reasonable  
4     cause to abate the late payment penalty any further. I think  
5     it's part of appellant's additional documents for October that  
6     they sent in October 4th where there was a return information  
7     notice sent for the 2005 tax year explaining to taxpayer that the  
8     credits they had claimed for the 2005 tax year had been revised  
9     to be reduced, and our position was that they had sufficient  
10    notice and information that the credits for the 2002/2003 and tax  
11    years they were claiming had not been determined yet and were  
12    still under audit, and that the overpayments that they had  
13    requested to be applied to the 2006 tax year were not available  
14    at that time, the credits for the 2002 and 2003 tax years because  
15    those years had not been determined yet.

16          JUDGE THOMPSON: And you're referring to the February 6,  
17    2007, return information notice.

18          MR. COUTINHO: Correct.

19          JUDGE THOMPSON: Let me just find that before we move on.  
20    So that's for the tax year end for the 2005 tax year.

21          MR. COUTINHO: Correct.

22          JUDGE THOMPSON: Okay. So appellant would you like to  
23    address that now, or you can address it as part of your response,  
24    whichever you prefer the is fine with me.

25          MR. ANDRUS: Yeah. I was taking notes. So the 2005 notice,

1 I think, is what we were talking about. So that was issued in  
2 February of 2007, but then all the subsequent discussion, you  
3 know, on our presentation, on page 19 we responded and explained  
4 about the carry forward amounts. And then the other key part of  
5 that is on page 22, our June 11th, 2007, letter later from FTB  
6 explains what the adjusted credit was going to be at that time,  
7 and the adjustments had no impact on the credit. It was merely a  
8 base amount computation issue, and as they show on page 24 of  
9 what we provided to you, their revised number is the same number  
10 as our original calculations. So at the time of filing that  
11 return, all of the communication we have had from FTB would say  
12 that, you know, even we're still in this exam, the proposed  
13 adjustments are not going to change the number.

14 JUDGE THOMPSON: So your point is to June 11, 2007,  
15 respondent's --

16 MR. ANDRUS: Yes.

17 JUDGE THOMPSON: Okay.

18 MR. ANDRUS: Because I just heard respondent say that based  
19 on the February 2007 notice, appellant should have known that  
20 there is no carry forward. Well, from June until when the  
21 returns are filed later in the year -- or from February till the  
22 returns are filed, we have this June communication. So the exam  
23 had progressed to a point that the only open item at the time was  
24 this issue of the gross receipts and if it might make an impact.  
25 And so -- and there has been a lot of discussions, but this is

1 sufficient here to show that what they proposed as their revised  
2 number is the same as the original claimed number.

3 JUDGE BRAMHALL: Did you get your question answered?

4 JUDGE THOMPSON: Yeah.

5 JUDGE BRAMHALL: Because I have a question. So you stated  
6 that estimated taxes can't be -- penalties based on estimated  
7 taxes can't be adjusted because of amended returns and instead  
8 are to be computed based on original returns. And the taxpayer  
9 provided the original returns showing overpayments. So what is  
10 the original return that you're saying showed an underpayment?

11 MS. MOSNIER: The position of the estimate penalty doesn't  
12 necessarily depend on whether the taxpayer reports either a  
13 balance owed or an overpayment. It has to do with simply the  
14 amount of the tax liability that is reported, and then sussed out  
15 over the statutory percentages of that liability that have to be  
16 paid in by specific dates.

17 Does that answer -- is that responsive to your question?

18 JUDGE BRAMHALL: That would go to computation, but I don't  
19 think anybody's questioned the computation. What I heard the  
20 question was, I filed an original return that showed the amount  
21 of tax due. It showed credits for overpayments, and then it  
22 showed a net overpayment. So the original return didn't show any  
23 tax due. FTB adjusted their tax, but that's an adjustment to the  
24 original return. That's not the original return.

25 So I'd like you to speak to what original return did you

1 base your estimated tax penalty point on.

2 MS. MOSNIER: Are you is asking for a specific tax year or  
3 for all of them?

4 JUDGE BRAMHALL: Well, '06 is the biggest one, one but they  
5 all three have the same issue.

6 MS. MOSNIER: Well, to start with -- chronologically to  
7 start with the 2005 tax year, Exhibit A to FTB's opening brief  
8 shows -- oh, excuse me. It is Exhibit B as in "bravo," shows  
9 that the taxpayer reported tax of \$429,000, and Exhibit C to the  
10 opening brief shows that the appellant made timely payments of  
11 \$390,435, so approximately -- what is that for the quick math?  
12 40,000 less paid in than was due. So there was an underpayment  
13 of the self-assessed tax that was shown on the return.

14 Subsequently -- so moving -- and on 2006 tax years, the  
15 taxpayer -- and this would be, I'm looking at Exhibits E and F to  
16 FTB's opening brief. The taxpayer self-assessed \$234,804 tax and  
17 reported a \$335,629 overpayment credit. And when FTB processed  
18 that return, since its records did not show that amount of a  
19 credit overpayment, FTB adjusted the taxpayer's account to  
20 reflect -- or adjusted the return to reflect the amount of  
21 credits that FTB's records showed. And that resulted in an  
22 estimated tax penalty of approximately \$10,000. So that's for  
23 the 2006 --

24 JUDGE BRAMHALL: So that's based on your adjusted original  
25 return, not on the original returned as filed.



1 MS. MOSNIER: I'm sorry, Mr. Bramhall I don't understand  
2 that question.

3 MR. BRAMHALL: So you assessed the penalty based on the  
4 adjustment to the original return, not on the original return as  
5 filed?

6 MS. MOSNIER: Well, we based it on the tax of \$234,804.  
7 However, if the taxpayer would not have received credit for  
8 having paid in the \$335,629 --

9 JUDGE BRAMHALL: You've answered.

10 MS. MOSNIER: Did I answer that question?

11 JUDGE BRAMHALL: Um-hmm. Thank you.

12 MS. MOSNIER: Did you want to hear about 2008 or are you  
13 good?

14 JUDGE BRAMHALL: I'll look at 2008 given that answer. Thank  
15 you.

16 MS. MOSNIER: Terrific. Thanks.

17 JUDGE BRAMHALL: Don't get me wrong. We still have to get  
18 past the statute of limitations on that. So I'm not suggesting  
19 that we just blew by that.

20 Thank you.

21 JUDGE BRAMHALL: Just briefly on that point to the  
22 jurisdictional issues, I wonder if Franchise Tax Board addressed  
23 taxpayer made sort of, as I understood it, we were looking at the  
24 whole ball of wax, and we understood that the next step was to  
25 follow up with the Franchise Tax Board, and I think they actually

1     said that they feel they had been misled. And so I wondered if  
2     you could address that argument a little farther in terms of the  
3     jurisdictional issue.

4           MR. COUTINHO: Yes. So we don't doubt appellant's argument  
5     they were in the same envelope, the NPACA and the Notice of  
6     Action for the tax years. Respondent's position is that we're  
7     not aware of any legal requirement that requires us to send them  
8     in two separate envelopes, the NPACA and the NOA.

9           It's incumbent upon the taxpayer, I believe our NOAs state  
10    that to file a timely appeal, they would have to fill out, I  
11    think, the FTB Form 10887 in order to file an appeal before the  
12    Board of Equalization.

13          JUDGE THOMPSON: Just give us a moment, please.

14          JUDGE BRAMHALL: We're going to recess for five minutes.

15                 (Recess)

16          JUDGE THOMPSON: Thank you. And I think where we are now is  
17    it's time for appellant to make your response, and I think we had  
18    estimated approximately ten minutes for that, but feel free the  
19    go longer if it's needed.

20          MR. ANDRUS: Okay. So we hear a couple things from  
21    respondent. Primarily, respondent is looking at respondent's  
22    records. Well, appellant has no control. We file our tax  
23    returns. We do our computations. We have shown from the tax  
24    returns that are filed and what goes into respondent's records  
25    and how they track things, we have no the visibility to that.

1           So the second thing we hear is that respondent essentially  
2           is completely ignoring the 2002/2003 carry forwards and makes the  
3           comment that, hey, since that exam was resolved in 2014, you  
4           don't get an account for these credits at all until the end of  
5           that exam, the appeal process, the Board of Equalization hearing.

6           That's not what the manual says, the public information that  
7           we are apprised to does not say that. It says file the amended  
8           returns, and you can go ahead and include that into your  
9           computations.

10          And then this last matter of -- as they were saying, these  
11          are separate matters. We sent as part of this process there was  
12          the brief, our response to response, I think, from December 14th,  
13          2016, where we address this issue of, you know, I think the term  
14          is "constitutionally inadequate." You know, what is proper  
15          notice?

16          And the court cases that we see and that we cite there  
17          indicate that separate matters need to be sent in separate  
18          envelopes so that it gives clear notice that these are separate  
19          amounts. So it's really, as we've been talking though this  
20          process, it's really that October 22nd, 2014, letter that said,  
21          hey, here's how to deal with it all, which kind of got this whole  
22          thing upside down. Had we -- had that been sent differently and  
23          had that been more clear, we would have moved forward with the  
24          Board of Equalization.

25          We had just wrapped up 2002/2003 wit the Board of

1 Equalization, and that's what got the 2002 and 2003 years closed.  
2 And when these notices were coming, there was a lot of  
3 communications between the representative, you know, who helped  
4 us through the Board appeal and exam and everything else. So  
5 there's -- all parties were talking together about the same  
6 issue. This one big ball of wax is where we were. So that's  
7 where we were. We appreciate your attention, and we would like  
8 the penalty.

9 JUDGE THOMPSON: Thank you very much. And what you've  
10 brought today was very helpful, and I would say to both sides  
11 that your presentations, the dates, the documents, the years it  
12 spans, can be confusing. You guys did great. Both sides were  
13 very clearly presented.

14 MR. ANDRUS: Thank you.

15 JUDGE THOMPSON: All right. Well, that will conclude our  
16 hearing. We'll issue a written opinion to both parties within a  
17 hundred days. Thank you very much. The hearing is now closed.

18 (Hearing concluded at 3:19 p.m.)  
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## REPORTER'S CERTIFICATION

I, the undersigned, a Hearing Reporter for the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; 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.

Further, that if the foregoing pertains to the original transcript of a deposition in a federal case, before completion of the proceedings, review of the transcript [] was [] was not requested.

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

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

Dated: November 19, 2018

A handwritten signature in blue ink, appearing to read "Susan Balla", is written over a horizontal line.