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BEFORE THE OFFICE OF TAX APPEALS

GRANT THOMPSON, PANEL LEAD

DOUG BRAMHALL AND LINDA CHENG, PANEL MEMBERS

In the Matter of:)	
)	
DAVID W. SWANSON)	
and CONNIE L. SWANSON,)	
)	
Appellants,)	
)	No. 18011807
OFFICE OF TAX APPEALS)	
STATE OF CALIFORNIA,)	
)	
Respondent.)	
_____)	

TRANSCRIPT OF PROCEEDINGS

Van Nuys, California

Monday, October 22, 2018

Reported by:
SUSAN GALLAGHER
Hearing Reporter

BEFORE THE OFFICE OF TAX APPEALS

GRANT THOMPSON, PANEL LEAD

DOUG BRAMHALL AND LINDA CHENG, PANEL MEMBERS

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In the Matter of:)
)
DAVID W. SWANSON)
and CONNIE L. SWANSON,)
)
Appellants,)
) No. 18011807
OFFICE OF TAX APPEALS)
STATE OF CALIFORNIA,)
)
Respondent.)
_____)

TRANSCRIPT OF PROCEEDINGS, taken at
California State Building Offices,
6150 Van Nuys Boulevard, Van Nuys, California,
commencing at 10:30 a.m. and concluding at
11:51 p.m. on Monday, October 23, 2018,
heard before GRANT THOMPSON, Panel Lead,
DOUG BRAMHALL, Panel Member, and LINDA CHENG,
Panel Member, reported by SUSAN GALLAGHER,
Hearing Reporter.

1 APPEARANCES:

2

3

For the DEPARTMENT OF ERIC YADAO, NATASHA PAGE
TAX AND FEE and MICHAEL CORNEZ

4

ADMINISTRATION: LEGAL DIVISION

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I N D E X

APPELLANT'S

Witnesses:	Direct	Cross	Redirect	Recross
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David W. Swanson	18			
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Connie L. Swanson	39			
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E X H I B I T S

DEPARTMENT'S:	Marked for identification	Received in evidence
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Attached to brief with the exception of Q W through Z, AA, DD		7 7
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APPELLANT'S:

Attached to brief		6
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1 Van Nuys, California, Monday, October 22, 2018

2 10:30 a.m.

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4
5 JUDGE THOMPSON: We are now on the record in the Office of
6 Tax Appeals. We're here for the appeal of David W. Swanson and
7 Connie L. Swanson, Case No. 18011807. We are in Van Nuys. It's
8 Monday, February [sic] 22, 2018, and the time is about 10:30. My
9 name is Grant Thompson, and I am the lead administrative judge
10 for this hearing, and my fellow co-panelists today are Judge
11 Cheng and Judge Bramhall.

12 I want to remind everybody, including myself, to speak at a
13 reasonable pace so the hearing reporter can get everything down.
14 She is only human.

15 Franchise Tax Board, could you please identify yourself for
16 the record.

17 MR. YADAO: I am counsel for the Franchise Tax Board.
18 Sitting to my left are cocounsel Natasha Page, and Michael
19 Cornez.

20 JUDGE THOMPSON: And Mr. Yadao, will you be primarily
21 presenting arguments today?

22 MR. YADAO: That's correct.

23 JUDGE THOMPSON: Okay. And appellants, if you would just
24 introduce yourselves for the record.

25 MR. IZEN: I'm Joe Alfred Izen, Jr. I'm the designated

1 taxpayer representative, counsel for the taxpayers -- California
2 taxpayers in this proceeding, who are David Swanson and Connie
3 Swanson, seated to my right. And they can identify themselves.

4 JUDGE THOMPSON: Thank you. The issues on appeal are, one,
5 whether appellants have shown error enough to be subject to
6 additional tax and related penalties for the years of issue,
7 which are 1993 through 1995, which proposed assessments were
8 based on federal actions.

9 Two, whether the office of tax appeals, which I will refer
10 to as OTA, has jurisdiction to review the post amnesty penalties,
11 and if so, whether penalties apply.

12 Three, whether appellants Offer and Compromise with the IRS
13 entitled appellants to a reduction in FTB's proposed assessment.

14 Four, whether the office of tax appeals may consider the due
15 process issues raised by appellants, and if so, whether FTB
16 provided due process to them.

17 Without objection we are admitting into the evidentiary
18 record all the exhibits attached to the party's briefing in the
19 appeal, with a footnote that FTB's Exhibit Q is lost. We're
20 admitting into evidence all of the exhibits of the party's
21 briefing filed with the appeal, with the exception of FTB's
22 Exhibit Q, its law summary, which we'll be treating as legal
23 argument.

24 (Appellant's Exhibits attached to briefing admitted
25 into evidence.)

1 (Department's Exhibits attached to briefing admitted
2 into evidence with the exception of Exhibit Q.)

3 JUDGE THOMPSON: Also we have in the evidentiary record and
4 are accepting into the record federal account transcripts
5 committed by Franchise Tax Board following the close of briefing,
6 and those are Exhibits W through Z and AA and DD.

7 (Department's Exhibits W through Z, AA and DD
8 admitted into evidence.)

9 JUDGE THOMPSON: FTB is not offering any witnesses today.

10 I understand, Mr. Izen, that Mr. and Mrs. Swanson will both
11 be testifying today.

12 MR. IZEN: Yes, sir. I think so.

13 JUDGE THOMPSON: Okay. Who is going to go first, just so I
14 know.

15 MR. IZEN: I intend to give an opening argument attempting
16 to address the issues you just stated. I've laid it along to
17 1993 until we wind up here. I'm going to try to do that in a
18 timely way. I've been provided --

19 Mr. and Mrs. Swanson have details of what was considered
20 from the standpoint of deductions and how we wound up with a
21 federal OIC from the taxpayer standpoint. So that's what they
22 will be testifying to.

23 JUDGE THOMPSON: And you don't have to -- you can tell me
24 later, but I'm just wondering, is Mr. Swanson going to go first
25 or is Mrs. Swanson going to go first?

1 MR. YADAO: I anticipate bringing Mr. Swanson first.

2 JUDGE THOMPSON: Okay. You might want to pull the mike a
3 little closer to you.

4 As Mr. Izen mentioned, we're going to start with opening
5 statements from each party, which should not exceed approximately
6 10 to 15 minutes. I'm given an approximate time frame for all
7 these things. I'm not going to hold you to the exact minute, but
8 I want everybody to have expectations about how long you expect
9 this to take.

10 Appellants for Mr. Izen will present their opening statement
11 first, followed by FTB. Then we will swear in appellants' first
12 witness, and that witness will offer testimony with an
13 opportunity for questions from Franchise Tax Board and also from
14 myself and the other co-panelists.

15 Then we'll swear in the second witness, which sounds like it
16 will probably be you, Mrs. Swanson.

17 And we have allowed approximately 30 to 45 minutes for what
18 we call Mr. Swanson's "direct testimony," and then we will have a
19 time for questioning after that by Franchise Tax Board if they
20 have questions and also by the judges.

21 And then for your testimony, Mrs. Swanson, we had
22 estimated -- I've actually forgotten -- a shorter period. I
23 think approximately 10 to 15 minutes, right? And again if you
24 all go a little longer, that will be fine. And don't feel like
25 you have to fill up the time.

1 So after we get done with the testimony of the parties,
2 we'll have the closing arguments from each side, about 15 to
3 20 minutes.

4 And appellants, again, you'll have about 5 minutes to rebut,
5 respond to FTB's argument. So that's the general outline of what
6 I expect today.

7 MR. SWANSON: Before we proceed may I discuss -- we had the
8 telephonic prehearing conference with you involved, and minutes
9 were taken. And so I just want to straighten out some issue in
10 the minutes because it wasn't how I recalled.

11 JUDGE THOMPSON: Okay. Pull the mike a little closer to
12 you.

13 MR. SWANSON: Okay. There was a discussion on the phone,
14 and I don't know if you had a record of that or not, but in here
15 it stated that, in essence, how we ended up with the last set of
16 documents from the FTB is I said that we were noticed by the IRS
17 that we had fulfilled the contractual obligations of our Offer
18 and Compromise, and they had accepted the Offer and Compromise as
19 a completed contract.

20 I said something to the words of that effect, and I believe
21 I said it twice on that phone conference. This is recorded as
22 "Swanson making the final payment."

23 JUDGE THOMPSON: Okay.

24 MR. SWANSON: And then I also stated, too, that we had the
25 document from the IRS stating that we met the obligation of the

1 OIC, and I offered and said I will be bringing it to the hearing
2 today. So I want to get that in the record when I'm giving my
3 testimony.

4 JUDGE THOMPSON: Okay. I appreciate that, and you're
5 welcome to talk about that --

6 MR. SWANSON: So that's just --

7 JUDGE THOMPSON: Excuse me. Excuse me. Don't interrupt me.

8 MR. SWANSON: Sorry about that.

9 JUDGE THOMPSON: I appreciate that, and you're welcome to
10 talk about that in your testimony if you want. So that's on the
11 record. Is there anything else you'd like to add?

12 MR. SWANSON: No, just that point.

13 JUDGE THOMPSON: Okay. Mr. Izen, are you ready to begin
14 with your opening statement?

15 MR. IZEN: Yes, I am.

16 JUDGE THOMPSON: Please proceed.

17 MR. IZEN: This case arises out of events taking place 1992,
18 1993, when an organization, a business trust, under California
19 law was formed, which is entitled FSH Trusts. That's what the
20 name of it is. And throughout all these years from '93 up until
21 the current date, the question becomes: Who is responsible for
22 FSH's income they received? And we have three years we
23 concentrate on, '93, '94 and '95. That's what we're on.

24 This case went through a long delay because there was a
25 criminal investigation of the trust promoters who put the trust

1 organization together, the business trust organization. For
2 those unaware, California recognized business trusts as an entity
3 separate and apart from corporations and separate and apart from
4 individuals who ran it back in the 1800's. There's Texas Supreme
5 Court authority on that.

6 But basically you could run a trust -- I think of San
7 Fernando Valley. A bunch of real estate was developed that way
8 in the state, but they found -- they fell into disuse and it
9 became used less and less frequently stretching up into the '60s
10 and '70s, and then finally you have this FSH Trust, which the IRS
11 challenged the ownership of the income.

12 So the issue we would have today arises out of a sham
13 transaction claim by IRS and an alleged claim that the trust
14 could not earn income, that it might be able to own property, but
15 if it earned income, the income had to be taxed to whoever was
16 operating the trust or in control of the trust. There was a man
17 named Richard Evans (phonetic) who -- and this was all documented
18 in the tax court case of the Swansons on which the tenet arose.

19 This part of the case here, Mr. Evans was the trustee with
20 the sole power to dispose of the assets. So in the tax court --
21 U.S. tax court case, you have the issue raised of attribution of
22 income as well as ownership of income. And that attribution
23 comes from the idea that whoever benefits from the income would
24 have to pay the tax on it.

25 But it's not a clean home-run defense, and the IRS can claim

1 various other exceptions to who enjoyed the income, who
2 benefited from it. There's a Latin phrase on that. It's
3 "follow the money" is where it comes from.

4 But in any event, ultimately there was a criminal
5 investigation of Mr. Evans on unrelated matters. They're not
6 charging on the FSH income and not having reported it properly.
7 Because of the inter-lapse, though, and some of the witnesses and
8 people, there was like a ten-year delay and a 15-year delay and
9 it was all in the Swansons' tax bill, see.

10 Because what happened is the IRS filed a tax court case --
11 that's actually inaccurate. What happened they filed a
12 deficiency. They issued a deficiency based on the theory that
13 the Swansons owned approximately 450,000 --

14 JUDGE BRAMHALL: Can I just interrupt a minute? Is this
15 really relevant to the issues that we have before us? Because
16 all these issues, as I understand it, have been tried at the
17 federal level all the way through to the court of claims, and the
18 taxpayers lost on the issue. And so the issue is, as I
19 understand it, a final federal determination, is there a
20 difference in California law from the federal determination?

21 Not the whole history of the federal litigation. We
22 understand that that has been fully briefed. We're good on that.
23 So can we keep our introductory comments on the issues that we're
24 here to decide today.

25 MR. IZEN: The reason why I bring this up as the background

1 is that the other side of the coin, and that is that should this
2 case be audited? It should have been audited and it should --
3 the taxpayer had a chance to show --

4 JUDGE BRAMHALL: But it was.

5 MR. IZEN: My recollection of the record, I dispute that. I
6 don't think they ever received a California audit after they
7 filed an amended tax return, which the California authority
8 showed the federal adjustments.

9 JUDGE BRAMHALL: And that's the issue. I appreciate that.

10 MR. IZEN: Well, that's what I'm trying to get to. That's
11 why I gave the background. I'm going to be arguing at the end,
12 why go through all that again when the IRS has an OIC, you see.
13 But, again, I'll abide by whatever the orders are.

14 JUDGE THOMPSON: I have a small question. If you could move
15 the microphone a little closer to you again.

16 MR. IZEN: Okay. I won't belabor it long because it is in
17 evidence. I'm giving it by way of background. I'm not trying to
18 say the IRS didn't decide it when they did decide.

19 So that was a tax court case which finally ended in
20 2006/2007. We had the issue that could be re-examined in
21 California audit of who owned the income. But the IRS ruled that
22 the taxpayers for whatever reason owned the income, whether you
23 say it's attribution, whether you're saying they were responsible
24 persons, whatever the theory you get out of reading out of the
25 tax court decision, they became liable for that income.

1 Now, we do have testimony today to show that the tax -- the
2 Swansons did not benefit to any great degree from that income.
3 They paid taxes already to the IRS on income that they did not
4 beneficially enjoy. You can argue that they received it.

5 So now we get to the issue of what we have in this
6 California situation. We did not get another audit after we
7 filed the required adjusted amended return showing federal
8 action. Okay. So we didn't get that. So we didn't get to have
9 the opportunity of arguing that California should make some
10 different decision in the tax code.

11 We've got the OIC that we attempted to raise and the
12 Franchise Tax Board claims, without me having seen any briefing
13 on it, that they have the authority to do their own OICs.
14 They're not -- they don't have to use the federal, that
15 Mr. Swanson should go file separately for that, and we can't get
16 an adjustment taking the percentage figures from the federal OIC
17 and making the Swansons liable for those.

18 So we have two possibilities the way this hearing -- that we
19 are directing and the relief that we are requesting. We
20 primarily want the federal OIC adjustments and pay California a
21 percentage of those. We are making a public policy argument that
22 it was never intended by the California legislature for the FTB
23 to strike down on its own an OIC, and if there's an available OIC
24 that you can plug in to the State, then at the very least the
25 issue ought to be: Why should the federal OIC not apply? Why

1 should there be deviation federal OIC? Why should there be extra
2 money spent on that?

3 But going beyond that, if California wants to reject the
4 federal OIC and give it no application at all, which I don't see
5 the authority for their position supporting that, but that's
6 really what the legislature intended to give them that kind of
7 authority outside of the statute. Because of the -- their powers
8 to interpret the statute and their administrative powers, and the
9 issue is whether the taxpayer should get an audit. We should be
10 able to get an audit on our request to determine the issue of
11 whether California should look at that issue differently than
12 what the federal court did.

13 And the FTB itself cited authority saying that, strangely,
14 that we have a right to do that, but then on the other hand they
15 said that we had to do it as part of an audit. And then on the
16 other hand they said that we weren't entitled to an audit. So
17 I'm not sure what their position is.

18 But we're going to be arguing in this case and producing
19 evidence that we did not get an opportunity for an audit after we
20 filed the California amended returns that we're required to do
21 after federal action was taken.

22 So I think that more or less addresses all the major issues.
23 The issue of whether or not the penalty should apply because of
24 taxpayer -- it was brought up that problem that they had. That's
25 a technical one, and the dates will be important and your

1 interpretation of the dates. As far as the penalty was
2 concerned, the taxpayer penalty was involved in this, it had to
3 do with a -- there was a frivolous penalty served against the
4 Swansons on the issues of the trust, but I don't know that it
5 really applies in California. I think as far as that penalty was
6 concerned, you can just take that and address it as part of the
7 federal OIC, which is what they did.

8 So that's my presentation. I've more or less given a
9 roadmap of what I intend to try to present. Thank you.

10 JUDGE THOMPSON: Okay. Franchise Tax Board, are you ready?

11 MR. YADAO: Yes. Thanks.

12 So as you had mentioned earlier, this appeal involves
13 deficiency assessments and tax and penalties that flow from the
14 final federal adjustments on the taxpayers' 1993, 1994, and 1995
15 accounts. FTB will set forth the facts and law to show
16 appellants have been afforded opportunities to show error in the
17 federal adjustments or in FTB's assessments that followed these
18 adjustments. Yet, appellants have failed to provide any evidence
19 during protest and during appeal. Instead they stated that they
20 are meticulously retained, but overburdensome to produce.
21 Because appellants have failed to show any error. The law, as
22 FTB will argue, will support that your panel should sustain the
23 assessments of tax and penalties.

24 JUDGE THOMPSON: Okay. Thank you. All right. So are we
25 ready to begin with the testimony?

1 MR. IZEN: I'm ready.

2 JUDGE THOMPSON: Okay. I'm comfortable if the parties are.
3 If Mr. Swanson stays seated beside you, and it is just simple.
4 All right.

5 Mr. Swanson, raise your right hand.

6 MR. IZEN: Excuse me. Before we proceed, I have an initial
7 objection. I know this is an administrative proceeding, and I
8 know the legal objections, but to the extent that the Swansons
9 can demand the full opening from Mr. FTB over here, we would like
10 his position on the OIC and what they intend to present to show
11 that they have statutory legislative authority for anything else
12 other than legal argument, that they can strike their own way and
13 make their own OIC without considering the federal.

14 JUDGE THOMPSON: Would you like to respond to that?

15 MR. YADAO: We're prepared to address that in our closing.

16 MR. IZEN: We have a right to have it before opening because
17 I'm fixing to put on evidence. To the extent that there's any
18 evidence relevant to that, I'm sure you can compel. That's the
19 purpose of the full opening request, but that's in your
20 discretion.

21 JUDGE THOMPSON: I note the objection. I'm not going to
22 compel them to expand their opening. They set forth their
23 arguments in the briefing. They are not providing any new
24 exhibits today or any new testimony today. So I expect that they
25 will address such issues in the closing arguments.

1 Some of that may come out during questions from the
2 Franchise Tax Board to the witnesses and both from myself and the
3 other judges.

4 Okay. Mr. Swanson, raise your right hand.

5

6 DAVID W. SWANSON,
7 called as a witness, and having been first duly sworn by the
8 Hearing Officer, was examined and testified as follows:

9 JUDGE THOMPSON: You can begin.

10 MR. IZEN: I'm ready to proceed.

11

12 DIRECT EXAMINATION

13 BY MR. IZEN:

14 Q Would you state your name for the record, please.

15 A David William Swanson.

16 Q Where do you currently reside?

17 A In Fallbrook, California.

18 Q I'm going to try to keep your questioning short and
19 start off from where the federal adjustment was made to your
20 return. Do you recall the date, if you can give it to us,
21 approximately when you became aware that there was a federal
22 action in the form of a final tax court decision, which adjusted
23 the tax liability of Dave Swanson and Connie Swanson for the tax
24 years '93, '94, and '95?

25 A The opinion date, I believe, was December 1, 2008, and

1 then the decision date when the opinion became decision, there
2 was the motion for reconsideration, and that was denied. And
3 that would have been -- and then after the opinion, we went
4 through 155 -- let's call it 155 calculations with the council
5 trying to get the numbers. And so that would have been '98,
6 summer of '98, I believe. It was probably sometime around then.

7 Q That was summer of 2008?

8 A No. So that's what, 2008? The decision from the tax
9 board?

10 Q Yes.

11 A So at first it was an opinion, and then the opinion
12 became the decision. So it was the 155 calculations, and we had
13 a couple of motions in there. We had the motion to reconsider
14 the civil penalty, and we had a motion to reconsider the
15 decision. So I believe that would have been 2009. That would be
16 summer of 2009, maybe August 2009.

17 Q During the tax years 2008/2009, where did you reside?

18 A 2008/2009 we lived in Fallbrook, California.

19 Q So you can see that at that time you were responsible
20 for California income taxes on earnings during the '92 -- I'm
21 sorry. '93, '94, and '95 and during 2008/2009; is that correct?

22 A Yes.

23 Q What steps did you take, if any, to comply with any kind
24 of California income tax liability requirements after the federal
25 action?

1 A Well, after the federal action, there was an appeal to
2 the Ninth Circuit, and then after the decision date of the Ninth
3 Circuit, which was -- 2011 I believe that was. It was 2011. It
4 would've been June 15th, 2011, I think it was the Ninth Circuit's
5 decision date against us, and on the very same date and by the
6 mail we received the notice from the California Franchise Tax
7 Board of taxes due that was postdated past that date. So somehow
8 they receive it in the mail before the date of the actual
9 document if you look at the document on its face.

10 Q Was there any amended tax returns filed by the Swansons
11 for California -- for California state income tax for tax years
12 '93, '94, and '95 after the federal action?

13 A No, none filed.

14 Q But you did receive an assessment?

15 A Yes.

16 Q From the Franchise Tax Board for tax years '93, '94, and
17 '95 declaring the same liability you could have put on the
18 amended return?

19 A Right. I believe it was a notice of proposed
20 assessment.

21 Q What did you do when you received the notice of proposed
22 assessment?

23 A So, well, we first wrote back, I believe, and said that
24 the thing is before the Ninth Circuit, and then -- let me see. I
25 don't recall all the response back. And then they responded

1 back, I believe, and then I wrote back and asked for a hearing.
2 I asked for a production of their audit transcript and documents
3 so that I may prepare for a hearing with an auditor.

4 Q And what was their response, if any?

5 A Later on they wrote back and they put it in an -- I
6 believe it was called a "pending status" while they were waiting
7 for the outcome of -- because at that time once the --

8 What happened is after the Ninth Circuit ruled against
9 us, then fairly soon after that then the federals were after us
10 to start trying to collect a huge amount of money on money we
11 never received, and so we then started a request for collection
12 to be processed with the federal.

13 And so one of my letters to the FTB put it -- basically,
14 informed them that that was underway, and then I believe at that
15 point they put it in suspension while they were waiting for the
16 outcome of the federal OIC on the one OIC. And these letters
17 back and forth are in the exhibit, either attached to your brief
18 or to the FTB's brief, and I could point them out specifically if
19 someone wants me to.

20 Q Okay. Now, you informed them that there was now a
21 collection due process hearing going on after FTB had given you a
22 notice of proposed assessment under state law for '93, '94, and
23 '95?

24 A Yes.

25 Q Based on the federal adjustments?

1 A Yes.

2 Q And they took that collection due process information
3 and they abated or stayed the case. What was their next contact
4 after that?

5 A Let's see.

6 Q If I use the wrong words, let me know. I want it in
7 your words, what you understand it to be.

8 A So the California -- so the collection due process
9 really started with the feds. Let's see. That took from 2011
10 all the way to 2016.

11 Q What notices did you receive from FTB during that period
12 of time?

13 A There was a couple back and forth where they said --
14 where they hurried us on the status of the case. In 2013 they
15 wrote a letter saying we believe they ruled against, but yet it
16 was still an ongoing thing. So that was an error, and then we
17 would respond back with what was going on in the case. So as I
18 said before, it ran all the way until we got the notice that the
19 final OIC was accepted in 6/17/2016.

20 Q Was there any kind of FTB contact between the time they
21 were informed the collection due process hearing and they finally
22 were informed that the collection due process hearing was at an
23 end?

24 A So, no. The answer is no, but then after the collection
25 of due process was at an end, we received, I think, a notice of

1 taxes due is what we received. I believe that's what it was was
2 from the FTB soon after the June date.

3 Q What did you do when you received a notice of taxes due,
4 if anything?

5 A You wrote them. Mr. Izen, as our representative wrote
6 to the FTB. It's in evidence and sent a copy of the OIC that was
7 agreed to and sent it to the FTB. I believe that's how it went
8 down.

9 Q Now, as far as the issues that were considered from the
10 federal FTB and as far as the volume of documents was concerned,
11 how many volumes of documents or how many documents were
12 available for the federal OIC consideration that you had to make
13 available?

14 A Okay. So when we were going through the tax court case,
15 when it first started, the IRS disallowed all deductions on
16 roughly gross income on the trust, which had 13 engineers working
17 through it. That's with everything, but it was 13 engineers. We
18 gave testimony in court, and they disallowed all deductions.
19 There was zero deductions. So we to put every expense into the
20 record.

21 So when we showed up at the Braderton (phonetic)
22 Conference, which was in 2001, we had 48,000 documents. Okay.
23 So -- but then in the tax court case, we went through a number of
24 stipulations. I brought copies of the stipulations to pass out
25 here today, the actual stipulations from the tax court, which

1 references all the different documents. And those represent
2 about 36,000 pages of documents.

3 So the same number of documents and those same
4 documents, as well as some others, were requested, strangely, by
5 the Ninth Circuit on 5 -- I think it was 5/24/2011, 7 days before
6 our Ninth Circuit oral arguments.

7 They requested that we produced to them four sets of the
8 exhibits. We checked the transcript from the tax court, and they
9 said they had sent them the volumes. But so we had to produce
10 stacks of documents this high, four of them in a fire drill, cost
11 us \$5,000 and they got it the day before or two days before the
12 oral argument. So they were unfamiliar with the record.

13 But those are the same documents, and it was also -- so
14 that also shows it was roughly 36,000 documents. And so -- plus
15 it was the transcript of the trial in there, and there was maybe
16 some other couple other items in there. But basically, that's
17 the volume of the records we're talking about as set at the time
18 of the tax court.

19 Q Okay. Now let me step in here and get back to the
20 direct relevance of the California. If California's FTB had to
21 give you an audit to parse over this to determine whether or not
22 they were going to go by the '93, '94, '95 tax court decision and
23 then in this regards how many records would have had to produce
24 and what would have had to have gone on? Same amount --

25 A Same amount and it would take -- the audit would take at

1 least 80 to 120 hours of face time with auditors.

2 Q Why do you say that?

3 A Because that number -- that's basically how much time we
4 spent going back and forth with the IRS.

5 Q So that would have put a time that you spent with the
6 IRS either with counsel or their auditors and counsel?

7 A Right. So basically at the time of -- right before the
8 trial, we had at that time they allowed -- remember they allowed
9 zero deductions, and then they allowed at that time about
10 \$715,000 of deductions. Then there was -- I'm sorry. Some of
11 those were after the 155 calculations, which was after -- you get
12 your opinion and you go through this 155 process where you go
13 back and forth, and then -- so at that point there was about
14 \$750,000, I believe, of deductions that they disallowed, and then
15 still there was -- there's more that were never allowed for about
16 \$215,000.

17 MR. BRAMHALL: How many times have you been asked by the FTB
18 to provide these documents?

19 THE WITNESS: To provide these documents?

20 MR. BRAMHALL: Yeah. How many times have we as a panel
21 invited you to provide these documents to us for this the
22 hearing?

23 THE WITNESS: At this hearing you invited us to submit
24 documents, and then Mr. Izen asked a question because part of his
25 -- of his brief was that we believe it's best to actually have an

1 audit to not burden this panel --

2 MR. BRAMHALL: So you had the opportunity to provide them to
3 us. Have you had the opportunity to provide them to FTB's legal
4 staff in the context of this appeal?

5 THE WITNESS: Yes, but with the caveat --

6 MR. BRAMHALL: Okay. That's good --

7 THE WITNESS: -- with the caveat that we have a pending
8 question on. Because what we're trying to do with is remand this
9 back for an audit to not burden this -- this level with it so we
10 can go through these documents.

11 MR. BRAMHALL: Thank you. You've answered my question.

12 THE WITNESS: One more thing, there's also more data since
13 the time of the trial with the IRS because since that time when
14 the trustee who was convicted -- criminally convicted was forced
15 to resign by the federal court, a new trustee came in. Then we
16 were able to discover where many of the moneys went.

17 So there was a number of lawsuits involved trying to collect
18 the moneys from parties. And then there was a 1099C issued for
19 two -- the people, parties, who basically didn't make payments on
20 loans and things of that nature to the tune of \$470,000. So
21 that -- those documents, too, we would like to discuss in audit
22 with the FTB.

23 MR. BRAMHALL: Okay. Thank you.

24 BY MR. IZEN:

25 Q Well, let's get to the part about the FTB requesting an

1 audit. Describe for us any of the documents that we have
2 placed -- attached the briefs from the FTB has put in. We have
3 seen in these the proceedings or in discussions from this panel
4 or anybody else that indicates that FTB was offering you an
5 audit. Think about that question carefully, and tell us when was
6 the first time, if ever, you picked up that the FTB was offering
7 you an audit for 36,000 or more pages of documents could be
8 brought so that they would spend the time to review them?

9 A That's never happened.

10 Q Are you sure of that?

11 A It has not happened. It has not.

12 Q Okay. Well, what about a deal of them talking to you
13 about going through some of hearing or something else not called
14 an audit. Were you ever offered, as far as you understood it, a
15 place and time where you could carry 36,000 pages of documents?
16 Are you sure they didn't tell to bring them to Sacramento or some
17 other place physically so they could examine them?

18 A No.

19 Q Did you ever get a document request from the FTB
20 requesting that you produce these documents and put the burden on
21 you as a taxpayer to produce them?

22 A No. Although I made a request of them to provide their
23 audit transcript.

24 Q Now, you understand you're going to be examined on --
25 cross examined on the all these documents and letters that were

1 exchanged?

2 A Yes.

3 Q You could have brought 36,000 pages of documents to this
4 hearing, correct?

5 A Yes.

6 Q You could have tried to dump 36,000 pages of documents
7 in an administrative record of this hearing, correct?

8 A Right.

9 Q And you could have sent them to the FTB counsel,
10 correct?

11 A Correct.

12 Q Now, if you had delivered 36,000 pages of documents to
13 the FTB counsel, do you have any knowledge of what they would
14 have done with them? Did anybody tell you the FTB's counsel was
15 waiting to do an audit on this and that you should produce that
16 volume of documents?

17 A No.

18 Q Now, moving along to the collection of due process. You
19 want all these documents with the IRS. Did you actually sit down
20 and have those documents available for the IRS?

21 A During the collection of due process?

22 Q Yes.

23 A The 36,000 pages.

24 Q Yeah.

25 A Well, they were available because we had the previous

1 trial transcript, but they were never reviewed during the
2 collection of due process.

3 Q I didn't ask that. I said, "Were they available?"

4 A Yes.

5 Q That's what I said. And did you carry those documents
6 in your car from Houston?

7 A Yes, I sure did. I carried the whole lot.

8 Q Okay. So the documents can be carried and whatever
9 they're on, they're heavy, and somebody's got to review them?

10 A Yes, the five totes worth, yes.

11 Q Now, what would be the only benefit of reviewing those
12 documents in this particular case if you weren't trying to get
13 the FTB to reconsider what the IRS decided?

14 A Well, if you read the tax court opinion, the judge -- we
15 had many stipulations. There was 197 stipulations, and I brought
16 copies of those, which I would like to give to the judges too.
17 And, then, in her opinion she argued against 12 of the
18 stipulations.

19 Q But, again, let me stop you. If all of the monies that
20 the IRS said you personally benefited from, if all of them had
21 been discounted, if there was still the money Mr. Evans had
22 embezzled, the Swansons never handled, never wrote, or never
23 bought anything with --

24 A Right.

25 Q The questions you're raising about the deductions has to

1 do with what you handled personally. Like you would go buy
2 something, but you hadn't didn't signed the checks for anything.

3 A I signed the operating account check only, but I didn't
4 sign all the checks, no. And many of the deductions not allowed
5 were checks that the trustee -- that he wrote.

6 Q Do you stand willing to meet with FTB or their
7 representatives at any physical location to go over all of these
8 things?

9 A Yes, yes.

10 Q Have you always stood ready to do that if it was
11 necessary?

12 A Yes.

13 Q What is your primary position on this appeal? You're
14 attempting to get the FTB to redo all this IRS work and rearguing
15 all the tax. Are you trying to get them to rely on the federal
16 OIC?

17 A Well, my goal is always justice. And so the underlying
18 thing is the tax -- the federal only showed that the Swansons
19 received 8K of income not reported on our return. \$8,000. And
20 for that they taxed us with an organization running 13 engineers
21 and hit us with this massive amount and said the trust was a
22 sham, and they were arguing against their stipulations in order
23 to do so. So justice could be served in this case where we could
24 actually show what they did in order to come up with this opinion
25 which it does not agree with the written record.

1 But, of course, that would take a lot of everybody's
2 time. And as I stated earlier, it took in 2011 to 2016 to
3 finally do the collection of due process and get an OIC that was
4 finalized. And so if the Franchise Tax Board wants to go through
5 that process on their own, it's a waste of People's resources and
6 time, that could be done. But right now we have an offer on the
7 table that can take a percentage of the federal, and then we
8 would all be done with this situation.

9 Q Did you make full disclosure in the federal?

10 A Yes.

11 Q Since the --

12 A That's -- that's the federal though. We've -- like I
13 said, since the tax court case in 2007, much more light has been
14 shown on where Richard Evans ratted the money off to and who he
15 ratted it to, and we issued -- the new trustee issued a 1099C of
16 \$470,000 and none of that has been challenged by any of the
17 parties, the parties who received, and that's the actual 1099-C
18 is the principle, not the return, not interest due.

19 The principle portion of hard cash is \$470,000. That
20 information's come about since the tax court trial and also that
21 information was asked about specifically by the IRS in their OIC
22 acceptance process. It shows that we did not benefit from this
23 income, and they showed us not -- including on our returns was
24 \$8,000 and \$8,000 was for employee health benefits.

25 Because the trust did not have what that called a

1 "qualified plan." They disallowed the managers employees health
2 benefit. So basically your health care was disallowed, and then
3 the kids were beneficiaries of the trust and so it was paying for
4 the kids' education expense. They allowed it in 1993 and they
5 disallowed it in '94 and '95. There were none. That's what we
6 benefited from. That wasn't from our federal returns.

7 Q Okay. I'm going to concentrate from here on in, if I
8 can, on this OIC, and we're going to go back to the rearview
9 mirror and I'm going to the federal and have it be reconsidered,
10 the audit with FTB. But if FTB were going to do an OIC on this
11 case, have you looked at their the form for OIC?

12 A Yes, yes. They sent me a form. It's in the record
13 attached to their own brief, I believe.

14 Q So they've never told you that this appeal's going
15 forward here and we're going to ram this adjustment onto you and
16 your family, and you're not going to get a chance for an OIC.
17 They haven't told you that?

18 A They have not told me.

19 Q Okay. Now -- and the OIC you had to sort of turn
20 yourself upside down and have your pockets empty and all that.
21 You had to show the IRS all the property you had; is that
22 correct?

23 A Right. And all the companies and associates and income
24 in the companies I'm associated with.

25 Q You started out with a liability of what with the

1 federal people? Before you got an OIC, what was the liability?

2 A I think it was \$1.2 million or something like that.

3 Q And then this was the what? the 160,000?

4 A 165,000.

5 Q And how did they arrive at that?

6 A Well, they go through a process where they look at
7 what's called a "responsible collection potential." So they look
8 at your income, your assets, and what's the chances that they can
9 collect from you given your status right now?

10 Q Do you recall I mentioned a person by the name of Dean,
11 D-E-A-N, Chaklis, C-H-A-K-L-I-S?

12 A Yes.

13 Q Who is Dean Chaklis?

14 A Okay. So when we got the CPD hearing in Houston, we ran
15 into -- first person contact was Bart Hill (phonetic). Bart Hill
16 introduced Dean Chaklis as a revenue collections specialist I
17 believe was his title.

18 Q Did he have anything to do with your OIC?

19 A He is the one who accepted the OIC that we went back and
20 forth. We had a meeting with him, other parties. He's the one
21 who asked specifically about the 1099C issue.

22 Q Did he evaluate any interest you had in real estate?
23 You or your wife, Connie?

24 A Yes. He evaluated -- we had a full financial -- we had
25 to do a full financial disclosure statement under penalty of

1 perjury, and he evaluated that and then asked more questions. We
2 produced more information.

3 Q Now, as far as going through an FTB audit from your
4 side, your expenses, you couldn't do that for less than \$16,000,
5 could you?

6 A Well, like I said, it would take -- no, no.

7 Q What I'm getting at is this: One of the positions in
8 this appeal was that you were willing to accept the adjustments
9 from the federals on their OIC from your California tax, which I
10 would estimate to be somewhere between 16- and \$20,000 to just
11 pay it out; is that correct?

12 A That's correct.

13 Q Okay. Now, as far as any increases in value of your
14 assets or anything of that sort, has there been any increases
15 since you you did the federal OIC?

16 A Well, one of the things that we have is we run -- we
17 sell automation products through a corporation, Radix Automation.
18 Connie and I own 16 percent of the stock. Unfortunately, since
19 that time, our products got the attention of the Chinese who have
20 copied our products 100 percent and are producing our products
21 and selling them to all of our customers, and they have driven
22 our income to virtually zero since that time. Our position has
23 become more worse since we started the OIC processes in 2011.

24 Q But you're --

25 A These are our patented products, United States patent.

1 By the way they're being copied by the Chinese all around the
2 world. They are using manufacturing plants around the world to
3 produce products that are being shipped into the United States
4 against the -- in deference to the United States patent
5 protection.

6 Q With the State there's a process with the federal OIC
7 when they accepted by FTB, but they wanted to do their own
8 rundown and to make sure there haven't been any changes in
9 conditions that warranted any further actions and be willing to
10 cooperate with that. We had the financial records to be able to
11 respond to that.

12 A That's correct.

13 Q As far as OIC is concerned, you have not filed one
14 outside this proceeding yet?

15 A Not yet.

16 Q Okay. And you wanted to make your consideration of OIC
17 part of the this appeal, correct?

18 A Correct.

19 Q And really from just a financial standpoint, it's better
20 off for you to go ahead and make the payment to California and
21 get it behind you rather than have to go through another audit
22 with 80 man hours and 36,000 pages of documents.

23 A Well, that's just the face time. Then you have back and
24 forth too. It takes forever.

25 Q I need a direct positive answer to the question.

1 A Okay. Ask the question again.

2 Q When you get an appeal sometimes you have alternative
3 remedies, which is you tell the panel and other people that you
4 want to try to proceed with from a financial standpoint, this is
5 your best remedy federal OIC with adjustments. Whatever the
6 California wants to do to make sure there haven't been any
7 changes in condition. You don't propose that?

8 A No.

9 Q But your position on this appeal is that you've already
10 been through the federal wringer, and you couldn't wring much
11 more out for California?

12 A They squeeze pretty tight, I tell you. California's not
13 going to get anything more out of it because the conditions have
14 gotten worse.

15 Q How have they gotten worse?

16 A Like I said, Radix Automation.

17 Q Okay. It was never your intention to avoid any audit or
18 avoid producing the same papers you produced for the IRS?

19 A No, no. In fact, like I said when I started this, we
20 would like to have justice, and we can show in our audit what was
21 done to us by the federal system where they argued against their
22 own stipulation, and then they tried to show that we -- the trust
23 was operated as a sham, and the words of the tax court judge is,
24 "Mr. Evans was a mere figurehead."

25 And yet we produced witnesses, direct witnesses. We

1 produced thousands of documents where his interactions had
2 nothing to do with us. We brought witnesses involved in loans he
3 was making who had no idea who the Swansons were.

4 JUDGE BRAMHALL: Could I ask briefly?

5 JUDGE THOMPSON: Sure.

6 JUDGE BRAMHALL: You've spoken a lot about errors of the tax
7 court level, but in the case of appeals, in the Ninth Circuit
8 there was a case several years later. Is this information that
9 is, say, new from the tax court, or wasn't that information
10 considered by the court of appeals? So it's information that
11 came even subsequent to the court of appeals essentially?

12 THE WITNESS: Yes.

13 BY MR. IZEN:

14 Q I want to make sure you are clear on that. The Ninth
15 Circuit was looking at a closed record that had to do with
16 happened at the tax court; is that correct?

17 A Correct.

18 Q If something happened while you were on the Ninth
19 Circuit of the tax court had been closed, you put that in?

20 A Correct.

21 Q Okay.

22 JUDGE BRAMHALL: Thank you.

23 THE WITNESS: Let's see the 1099-Cs I believe were issued
24 from 2010 to 2015. I believe that's the date.

25 MR. IZEN: I think I'm fully exhausted. I'm going to pass

1 the witness.

2 JUDGE THOMPSON: Thank you, Mr. Swanson. I appreciate that.

3 So at this point Franchise Tax Board will have the chance to
4 ask you some questions.

5 THE WITNESS: Okay. So I did mention I brought several
6 documents for the panel. I brought the stipulations in the
7 underlying tax court case, and I brought the -- I'm sorry --
8 summary documents that showed stipulations allowed, some
9 disallowed. I brought the statement --

10 JUDGE THOMPSON: Okay. That's enough. So appellant's
11 provided no substantive evidence with their appeal. They were
12 advised to file substantive evidence. They did not. We provided
13 another opportunity for them to provide exhibits. They did not.

14 Now, I have twice informed the parties that this record is
15 closed. So you're not going to be providing those today.

16 Any questions?

17 MR. IZEN: No questions.

18 JUDGE THOMPSON: All right. Any questions?

19 JUDGE BRAMHALL: No.

20 JUDGE THOMPSON: All right.

21 Mrs. Swanson, are you ready?

22 THE WITNESS: Yes, I'm ready.

23 THE COURT: Okay. So raise your right hand.

24 ///

25 ///

1 CONNIE L. SWANSON,
2 called as a witness, and having been first duly sworn by the
3 Hearing Officer, was examined and testified as follows:

4 JUDGE THOMPSON: You may proceed.

5

6 DIRECT EXAMINATION

7 BY MR. IZEN:

8 Q Will you state your full name for the record, please,
9 Ma'am?

10 A Connie Lynn Swanson.

11 Q Now, are you married?

12 A Yes.

13 Q Who is your husband?

14 A David Swanson sitting to my right.

15 Q During tax years '92, '93, '94, and '95 where did you
16 reside.

17 A We lived at during those tax years Escondido.

18 Q That would be in the state of California?

19 A It would be in California.

20 Q So you were responsible for California income tax at
21 that time?

22 A Yes.

23 Q And moving along to tax years 2007, -8, and -9, were you
24 still residing in California?

25 A Yes.

1 Q And you were responsible for California income taxes at
2 that time?

3 A Yes.

4 Q Okay. Now, are you familiar with an entity known as
5 FSH?

6 A Yes.

7 Q What was that FSH?

8 A FSH services for the trust.

9 Q When did you first become involved with them?

10 A 1992.

11 Q What did you do, if anything, for FSH from the
12 standpoint of work or services?

13 A I assisted the trustee with bookkeeping.

14 Q All right. And as far as the bookkeeping is concerned,
15 where were the books and records kept?

16 A They were kept at Hartzel Drive in La Mesa.

17 Q Okay. Did there come a time when FSH ceased doing
18 business? When did it stop its business?

19 A Around -- it still is assisting the trustee.

20 Q So FSH is still going on?

21 A It exists, but it doesn't do any business. It's just
22 bank accounts, keeping track of -- well, there's no bank accounts
23 anymore either. So there's really nothing. There's the trustee.

24 Q Okay. As far as the U.S. Tax Court is concerned, did
25 you ever participate in a tax court case that was brought against

1 you and David Swanson?

2 A Yes.

3 Q And did that end up in a final federal decision?

4 A You're talking about the appeal or just the IRS?

5 Q I am talking about the tax court. Did they finally make
6 a decision?

7 A The tax court made a decision.

8 Q In the Ninth Circuit they finally made a decision?

9 A Yes, they did.

10 Q Now, as far as the decision of the Ninth Circuit was
11 concerned and the tax court's decision, did you participate with
12 your husband in preparing for presentations on the Offer and
13 Compromise to the IRS to settle an outstanding tax liability?

14 A Yes. We gave them original documents and gave them
15 copies, any kind of deeds to properties or any of those things.
16 That's all that I have.

17 Q What part did you play in preparing those documents?

18 A A lot of photocopying. Also, there was even receipts on
19 just showing daily expenses. They wanted to know how much we
20 spent just on life so that with the Offer and Compromise they
21 would know how much money we needed just to live and how much
22 extras.

23 Q A budget?

24 A Yes, they wanted a budget.

25 Q Did you participate in preparing the paperwork?

1 A Yes.

2 Q Now, as far as the number of documents that were
3 considered, what is your estimate of the number of documents that
4 were made available to consider in the OIC?

5 A Probably at least as thick as this book, three inches.

6 Q What about the documents that had been made available to
7 the tax court case previously?

8 A Well, that was boxes. We had -- 36,000 comes up, but I
9 don't know how many exactly, but it was boxes and boxes.

10 Q Okay. And you're currently on appeal. Were you aware
11 of any requests specifically by FTB when you're participating in
12 an audit or hearing in which you would carry all these documents
13 to the audit that have been considered in the tax court?

14 A No.

15 Q Were you aware of any hearing that was offered with
16 respect to any of the documents that had to do with the OIC at
17 their request?

18 A The documents were never requested that we know of.

19 Q Those documents still remain available?

20 A Yes.

21 Q Where are those documents kept?

22 A In Fallbrook, California.

23 Q Okay. Fallbrook is there near San Diego?

24 A Yes.

25 Q In the same county?

1 A Yes.

2 Q As far as the relief that is being requested here, from
3 your standpoint, one the taxpayers, do you want to go through
4 another audit with the California and FTB seeing the same thing
5 with the federal tax people saw, or do you want to have the
6 benefits of the federal OIC, or what's your primary argument? I
7 should say benefit of the federal OIC, the calculation of the
8 taxes you still owe California?

9 A I'm like him in the sense that having fresh, new eyes
10 looking at it and actually getting a fair trial would be
11 exciting, but yet I know that it's just too much time and effort.
12 At this point I think going from the federal OIC where we went
13 through everything that we own, it's already been done, it seems
14 too repetitive to do it again. I think that would be my
15 preferable one, the option that --

16 Q Now, you mind the budget for the family?

17 A Yeah.

18 Q You budget for the family? Can you afford another 16-
19 to \$20,000 cost of a proceeding of an OIC?

20 A We'll have to borrow money. We'll have to do it.
21 That's the way it is.

22 Q You would have to borrow money to pay a California OIC,
23 to the extent it would be adjusted from the federal?

24 A I believe so.

25 Q As far as the federal one being paid, that one is --

1 what's the status of that? Is it paid off?

2 A It's paid off.

3 Q Okay. That was borrowed money?

4 A It was borrowed money. It wasn't paid off so we'd have
5 to add on to that somehow and make room in our budget for another
6 payment.

7 MR. IZEN: I'm going to pass this witness.

8 JUDGE THOMPSON: That's fine.

9 Franchise Tax Board has a chance to ask some questions if
10 they have any.

11 MR. YADAO: No questions for the witness. Thank you.

12 JUDGE THOMPSON: Co-panelists, any questions?

13 MS. CHENG: No.

14 MR. BRAMHALL: No.

15 JUDGE THOMPSON: All right. Before we move on to closing
16 argument, I had a question for Franchise Tax Board. Franchise
17 Tax Board, could you provide your perspective on this OIC
18 argument and on how Franchise Tax Board's Offer and Compromise
19 process works.

20 MR. YADAO: It's -- our authority to do that is found under
21 19443, and it authorizes FTB to consider Offers and Compromise a
22 final liability. This liability is not final; so it it's
23 premature for consideration of an Offer and Compromise. And with
24 respect to following the federal Offer and Compromise, there's no
25 authority compelling us to do that. And part of the reason for

1 that is because they consider a taxpayer's assets and income at
2 that time when the liability is filed, as well as considering the
3 future prospects.

4 And that's likely what the IRS did when they finalized their
5 assessment. And that's what we would do if the appellants here
6 apply. We would consider their then present assets and income
7 and their future income prospects.

8 JUDGE THOMPSON: Thank you.

9 Mr. Izen, do you have any comments you would like to make to
10 the Franchise Tax Board?

11 MR. IZEN: I have a comment. The legislature never intended
12 for them to go off on their own on these administrative junkets.
13 The whole intention legislatively in California -- luckily in
14 Texas we don't have any income tax. So we must deduct this
15 number because the other states need it. And we have the highest
16 tax in the country practically. So it's is pick your poison.
17 But in this particular case I'm certain that if you read the
18 legislative authority, you'll find a statute that says, "Yeah,
19 you can accept Offer and Compromise," but it doesn't say anything
20 else.

21 What about the guy that was here this morning, and they're
22 saying, "We have a declination statute." Meaning that we
23 specifically state that we're not going to let anyone deduct
24 their taxes under California income taxes. That's a deviation
25 from the federal.

1 So this guy gets all upset about it. So at least he got a
2 clear declination. There's no clear declination here. They are
3 not bound by federal OIC to the fullest extent possible to say
4 administrative resources, judicial economy, and all the rest of
5 it.

6 So that's my argument, and I think anybody that sees that in
7 the state legislature will not want to have to pay the extra
8 money necessary to support that when they already have a federal
9 OIC in place.

10 Now, there may be cases where they don't have one in place.
11 And we're not contesting the fact that they can go do their own
12 thing then because they no choice. They got no federal work they
13 can borrow from. They can use federal authorities to try to
14 decide what's fair, but they don't have to -- they don't have any
15 federal work that they can use to reduce the budget that's
16 necessary to administer California taxes.

17 So with all due respect to the FTB, they're wrong on that
18 the point in my opinion. The legislative authority heavily
19 favors us. We're just awaiting the decision for it to come up,
20 and here it is.

21 JUDGE THOMPSON: Do you have any documentation on your
22 statement that legislative intent is specifically as you state
23 it, or is that just your opinion?

24 MR. IZEN: You caught me on that except for this: I embrace
25 the full legislative history of the -- all the comments of how,

1 gee, we pass this California State tax act --

2 JUDGE THOMPSON: I'm just wondering if you have evidence to
3 submit on legislative intent.

4 MR. IZEN: No, no. What you do is you look at the statute,
5 and the statute will have the comments, when it was passed, and
6 there's plenty of that in the state income tax if you look at it
7 on that declination section that was referred to previously. But
8 they can opt out. They can opt out and say, "We're not going to
9 go by this federal law."

10 JUDGE BRAMHALL: Thank you.

11 JUDGE THOMPSON: Thank you.

12 So, Mr. Izen, are you ready to go to the closing now, or
13 would you like a brief recess?

14 MR. IZEN: I'll go ahead and do the closing.

15 JUDGE THOMPSON: Okay. Whenever you're ready, let's go
16 ahead and begin with that.

17 MR. IZEN: Remind me of my time.

18 JUDGE THOMPSON: Approximately 15 to 20 minutes. I'm going
19 to allow some flexibility.

20 MR. IZEN: Thank you. I understand that the -- in a hearing
21 here like this the desire is to keep it narrow and to give a full
22 hearing where necessary, but not retry and regurgitate stuff
23 that's already been decided in all the tribunals. I realize
24 there is an administrative economy consideration here, and I
25 certainly agree with it. I apologize for making comments --

1 (phone interruption) I'm sorry. Let me turn that off.

2 Mr. Swanson, like most taxpayers, doesn't understand the
3 difference between the law and administrative arguments and
4 deadlines and things of that sort. I had the option in this case
5 of producing 36,000 pages of documents, which would be extensive
6 in this record.

7 I had written a letter previously that you can take could
8 administrative judicial notice of, and I think it may have been
9 misinterpreted by the panel that somehow I was trying to avoid
10 producing my exhibits. I made a choice, and I would still do the
11 same thing with all due respect today. I wouldn't dump records
12 this high on you, which we couldn't go through in any meaningful
13 way in this type of hearing with this limited amount of time.

14 Now, that being said, it will be up to the panel to look
15 at -- administrative judges to look at the letters that were
16 exchanged, and did they really put Mr. Swanson on notice of a
17 hearing that he thumbed his nose at and didn't come to like the
18 FTB wants you to believe. Well, the answer to that can be found
19 in this man; you can't shut him up. He's not the kind that
20 wouldn't show up at a hearing and produce records and do anything
21 else necessary to reduce his position. He's an engineer. They
22 can tend to be, pardon the expression, "anal" about keeping their
23 records and other things. So it's not a question of them trying
24 to put over anything on anybody. And we also always realize that
25 the IRS has records, and if FTB felt threatened in any way or

1 wanted to get records, although we have the responsibility of
2 producing them, a complete copy of all these records you've heard
3 about is in the possession of the IRS, and they share information
4 all the time.

5 So I implore the panel not to make the decision on these
6 impressions unless you get the impression looking at Mr. Swanson
7 and eyeballing him that he's a person who would not avail himself
8 of his administrative remedies and try to play some kind of game.

9 Now, moving beyond that, then we have two choices here. FTB
10 says that they want him to apply for his OIC outside of this.
11 And what they want is they was a proceeding approved by you where
12 a large tax liability is approved already without the federal OIC
13 being considered. I didn't make that clear previously in oral
14 argument, but it's come to me -- in the briefing, but it's come
15 to me now that that's an important principle.

16 In IRS due process, one of the defenses you can raise is
17 Offer and Compromise. And so a defense to the issuance of that
18 deficiency and collecting, I believe, should be interpreted as
19 being partly -- part of the defense, the OIC. So we should be
20 able to consider it at this time. Now, that being said, there is
21 no way we can -- if you take adjustments --

22 And I'm from Texas, and I don't do these cases that often.
23 That's for California people and the tax court if the tax
24 shelters fell out. And I've done work in California resulting
25 in -- left over from the feds, federal income tax disallowing the

1 tax shelter deductions.

2 But there's not a situation here where you're going to
3 get -- him being able to afford the same extensive audit that he
4 had in the federal case. He'd have to do the same extensive
5 audit at the same costs, but the tax -- potential tax liability
6 is what? 16- to 20,000? maybe 25,000? And if you go by the
7 federal OICs and \$160,000 debt. So that's where we're at, you
8 know. And we also have monetary considerations.

9 So I think the best thing to do is to state that the --
10 bring back a decision that says that the federal OIC has to be
11 applied. I can see where they can have adjustments. That could
12 be a new precedent. But it's certainly a needed precedent. They
13 can have their adjustments that have to do with making sure that
14 there's been no substantial change between that and the federal
15 OIC, but it ought to figure in some way and there ought to be
16 some kind of economies where you don't have to redo the same work
17 twice.

18 I'm not enthusiastic about retrying this case and winning it
19 and then getting the value of the California tax. Because even
20 if it was a California tax at 2- or \$300,000 there was that much
21 money spent on the federal, and this is a smaller amount of
22 assessment.

23 So that's basically where we are, and that presents our
24 case. As far as the others, I think the legal matter of the
25 taxpayer's forgiveness, whatever that is, to the cancellations or

1 whatever.

2 I will point out that this was not a case where
3 Mr. Swanson, filed any amended returns. We went straight through
4 from the federal, and they just issued an assessment. Many times
5 the assessments lag and they haven't issued their assessment
6 quickly after the federal tax court, but this is not one of those
7 cases.

8 So we had to ought to clean the line all the way form the
9 federal cases to them trying to impose the federal tax law, and
10 then we wind up here. So that's all I have to say for my
11 opening. Thank you.

12 JUDGE THOMPSON: Thank you. Okay.

13 So, Franchise Tax Board, are you ready for your closing?

14 MR. YADAO: Yes. Thank you.

15 Appellant's arguments are unsupported by any evidence or
16 law. When we issued our notice of processed assessments, they
17 are accompanied by a form 7275, which is listed as reference to
18 our MPAs, and it invites a protest, invites evidence. When we
19 affirm those notices of proposed assessments to precede our
20 notices of action, those NOAs are accompanied by Form 7277 that
21 invites evidence that they disagree. In our opening brief we
22 invited evidence and the record's clear that that has happened a
23 couple of times since then.

24 Appellants previously argued that they should be entitled to
25 an independent audit, but Revenue and Taxation Code 18622 does

1 not require that. Rather that section states that taxpayers
2 shall concede the accuracy of the determination or state wherein
3 it was erroneous. And that's where evidence is required, and we
4 have none here.

5 And for those reasons we ask that you affirm the assessments
6 of tax. With respect to appellants' argument that FTB is somehow
7 bound to follow the federal Offer and Compromise with reference
8 to legislative intent, that is specifically and precisely spelled
9 out in section 19443 where it authorizes FTB to consider an Offer
10 and Compromise on a final liability, and, again, it's being
11 final. We're not there yet.

12 Appellants argue in the absence of an independent audit an
13 opportunity to present evidence off the record suggests just the
14 opposite, but your panel should refuse to consider that for one
15 important reason, and that is by Regulation Section 30102B5. The
16 Office of Tax Appeal has declined to consider whether a taxpayer
17 has been deprived of a substantive procedural right.

18 And there are two final points I would like to make
19 regarding the accuracy related penalties and the amnesty
20 penalties. First, we waived the penalty for tax year 1993
21 because our -- the understatement of tax for '93 did not fit the
22 definition of substantial understatement. So, therefore, that
23 penalty was closed. For the remaining two years, tax years '94
24 and '95, those penalties can be abated by a showing of
25 substantial authority or adequate disclosure and reasonable basis

1 for the position taken. It can also with be waived it the
2 taxpayer shows reasonable cause and good faith.

3 To the extent that appellants alleged substantial by
4 attributing that income to the trustee of FSH Services, their
5 former trustee. If you look at the tax court record, which is in
6 exhibit in our brief, Exhibit E, it references twice on page 5 of
7 11, paragraph 6, and page 9 of 11 paragraph five. It says, "Any
8 investment by the former trustees occurred after the years
9 issued, and, therefore," and I had a comment here, "with or
10 without any applicable authority to support to the substantial
11 authority argument, the fact of any embezzlement and attribution
12 of income did not occur until after they had already filed their
13 return. So they can not rely on substantial authority just based
14 simply on the timing issue. And, again, any argument that they
15 would suggest they knew at an earlier date, unsupported by
16 evidence, as well as law.

17 Finally, with respect to the amnesty penalty, the law
18 provides the penalty can only be challenged after payment and
19 only on the limited basis that it has been improperly calculated,
20 which being unpaid in this appeal presents a threshold
21 jurisdictional issue. As FTB's NPAs reflect, the amnesty
22 penalties are included for information only. They are not part
23 of the deficiency assessment and will be recomputed when the
24 deficiency assessment becomes final.

25 Along those lines, FTB requests that you sustain the

1 penalties as set forth. And I'll shorten my presentation and
2 invite any questions from the panel. Thank you.

3 JUDGE THOMPSON: So Mr. Izen, you have an opportunity to
4 respond. Would you like to?

5 MR. IZEN: Yeah, I would like to respond. We'll see where
6 we are when we the read the letters that were exchanged. There
7 seems to be a lot of beating around the bush by FTB about this
8 issue of due process and audit. They argue on one hand in their
9 brief that we need to show these things, and then they argue that
10 we should have had an audit and shown them an audit. And then
11 they say that we didn't get an audit, that we didn't avail
12 ourselves of it.

13 Now, I think they're saying, if I understand it correctly,
14 that there's no requirement for an audit. And whatever you want
15 to call it, a due process opportunity to present the evidence,
16 the 36,000 pages, looks to me from this record that they didn't
17 want to see it. Because the idea of availed, you know, you've
18 got the statute and you can produce evidence.

19 The way the administrative process runs is they write a
20 letter. They say "We're imposing this assessment," and they
21 deliver it to you. You write them back and say you want an
22 audit, which is what he did, and then you look at the
23 correspondence after this. I'm confident if you look at that
24 you'll make the decision -- can see from the record that
25 Mr. Swanson didn't deny the opportunity. He didn't refuse any

1 opportunity, and that they didn't avail him of any opportunity.

2 And finally it's very disturbing to hear arguments that due
3 process points can be ignored by any taxable income and in
4 violation of due process. That would only be possible if that
5 due process should have been addressed in some other place or can
6 be later on appeal.

7 So we have a problem with that and we think that that's an
8 argument that if that is an actually authority to be cited, it's
9 not a good authority. You need to look and see what the
10 limitations are in the California Constitution and the United
11 States Constitution on due process.

12 The taxpayer's entitled to a due process hearing before his
13 property's levied on and he's subjected to income tax payments,
14 no matter where you are in this country. I don't think
15 California permits that. Authority cites there must have been
16 looked toward some other opportunity the taxpayer had that the
17 taxpayer did not avail himself of.

18 That's it for us.

19 JUDGE THOMPSON: Okay. Thank you very much.

20 MR. BRAMHALL: Thank you.

21 JUDGE THOMPSON: Any questions from my co-panelists?

22 JUDGE CHENG: Just one.

23 Mr. Izen, did you represent the Swansons during the protest
24 stage of this case?

25 MR. IZEN: I wrote a letter, and the letter speaks for

1 itself, what I asked and the direction I asked and all that, and
2 at that stage I would have been representing them. I don't think
3 I represented them fully through the whole proceeding, if not
4 from the very first contact. They brought me in after they had
5 corresponded, and I wrote a letter addressing some of these
6 issues. I don't have it memorized, but I think it's in the
7 record.

8 JUDGE CHENG: Do you remember approximately the year, the
9 date?

10 MR. IZEN: I have to rely on Mr. Swanson for that date.

11 MR. SWANSON: It's in the record. It's in the record.

12 MR. IZEN: She wanted the date, approximately.

13 JUDGE CHENG: Do you remember what letter --

14 MR. SWANSON: I think it was 10/13/2011. Without looking at
15 it, that's what's written on my timeline, but let me see if I can
16 find that. It looks like it's Exhibit F -- Exhibit F on the -- I
17 think F, that would be FTB's brief; is that correct? No.
18 That's -- it's in here though. Oh, okay. I'm sorry. That,
19 oh --

20 The Izen letter to the FTB representatives is
21 September 29th, 2016. Look at the FTB brief, Exhibit O.

22 MR. IZEN: And as a followup to your question, one wonders
23 where you would produce 36,000 pages of records in this context
24 without an audit or something where people actually scheduled
25 something and they were all going to attend, and they had a

1 physical location.

2 JUDGE THOMPSON: Okay. I think we have it.

3 MR. SWANSON: Let me check one more thing, just a second.
4 Because I did check Exhibit F. Exhibit F, Mr. Izen's brief, is
5 my letter when he was not representing me before the FTB where I
6 requested work papers and an audit narrative so that I may have
7 an audit, Exhibit F. Yeah. That was before Izen. That was the
8 one October 13th, 2011.

9 JUDGE THOMPSON: Thank you for addressing that. All right.
10 With that, I'm going to close the record and conclude the
11 hearing. I want to thank both sides for coming in today.

12 Mr. Izen, I wish and everybody safe travels back home. From
13 here, we need to get the transcript from the hearing reporter,
14 and I'll discuss it with my co-panelists and see if we can come
15 to an agreement. And then we'll issue a written opinion to both
16 parties. And we have a hundred days to do that.

17 So that concludes this hearing. Thank you for coming in.

18 (Hearing concluded at 11:51 a.m.)

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1 REPORTER'S CERTIFICATION

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

5 That the foregoing proceedings were taken before
6 me at the time and place herein set forth; that any
7 witnesses in the foregoing proceedings, prior to
8 testifying, were duly sworn; that a record of the
9 proceedings was made by me using machine shorthand, which
10 was thereafter transcribed under my direction; that the
11 foregoing transcript is a true record of the testimony
12 given.

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

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

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

22 Dated: November 19, 2018

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