BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,	
JANELLE R. ROBERTS,	OTA NO. 18011256
APPELLANT.	

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, February 20, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at 355 South Grand Avenue, South Tower, 23rd Floor, Los Angeles, California, 90021, commencing at 11:45 a.m. and concluding at 12:45 p.m. on Wednesday, February 20, 2019, reported by Ernalyn M. Alonzo, Hearing Reporter, in and for the State of California.

APPEARANCES:

Panel Lead:	Hon. DOUGLAS BRAMHALL
Panel Members:	Hon. JEFFREY MARGOLIS Hon. LINDA CHENG
For the Appellant:	DAVID POLK RENEE THRESHER
For the Respondent:	State of California Franchise Tax Board By: ANDY AMARA MARGUERITE MOSNIER TAX COUNSEL Legal Division P.O. Box 1720 Rancho Cordova, CA 95741 916-845-2498

I N D E X

OPENING STATEMENT

E X H I B I T S

(Appellant's Exhibits were received at page 6.)

(Franchise Tax Board's Exhibits were received at 7.)

CLOSING STATEMENT

Los Angeles, California; Wednesday, February 20, 2019

9:00 a.m.

ADMINISTRATIVE LAW JUDGE BRAMHALL: We're now going on the record.

This is the appeal of Janelle R. Roberts, OTA Case No. 18011256. Janelle Roberts is now Janelle Roberts Polk. It's Wednesday, February 20th at 11:45 a.m. Again, for the record, I'm Doug Bramhall, lead judge for this hearing. And the panel with me is Linda Chang and Jeffrey Margolis.

And for the record, will the parties please introduce yourselves.

MR. POLK: David Polk representative for the Appellant.

MRS. POLK: Janelle Roberts, formally Janelle Polk.

MR. AMARA: Andrew Amara for the Franchise Tax Board.

MS. MOSNIER: Margaret Mosnier, for the Franchise Tax Board.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. Thank you. So the issues in this appeal are whether Appellant established error in FTB's proposed assessment for tax years 2011, 2013 through '15; whether Appellant

established any basis for abatement of delinquent filing penalties for tax years 2011, 2013 through '15; whether Appellant has establish any basis to support abatement of the demand penalties for tax years 2013 and 2014; and whether OTA should impose frivolous appeal penalties pursuant to Revenue and Taxation Code 19174, and if so, in what amount.

The parties have been provided and exchanged a combination of the two exhibits. For the Appellant I'm going to identify the exhibits that are coming in as evidence, as 1 through 29, and those are admitted without objection.

(Appellant's Exhibits 1-29 were received in evidence by the Administrative Law Judge.)

ADMINISTRATIVE LAW JUDGE BRAMHALL: I'll note for the record that proposed evidence Exhibits 30 through 34 are not admitted as evidence but are entered into the record as additional argument on behalf of the Appellant.

For the Franchise Tax Board, we are admitting into evidence Exhibits marked A through BB and Exhibit DD. And we have sustained the objection to Exhibit CC, although, that document will be admitted into the record as argument. These documents are admitted over objections from the Appellant as to Exhibits A, B, D, F, O, T, Y, AA, BB, DD. Okay. So as summarized, the exhibits are now

part of the record.

(Department's Exhibits A-BB and DD were received in evidence by the Administrative Law Judge.)

ADMINISTRATIVE LAW JUDGE BRAMHALL: Mr. Polk, I believe you indicated you'd like to make a brief opening statement?

MR. POLK: Yes.

ADMINISTRATIVE LAW JUDGE BRAMHALL: I believe Mr. Amara you passed on an opening statement and will defer for you argument; correct?

MR. AMARA: Correct, Judge.

ADMINISTRATIVE LAW JUDGE BRAMHALL: So with that, I'm going to note the time. We're starting 10 minutes till.

OPENING STATEMENT

MR. POLK: Okay. We do have 13 new exhibits. I'm not going to waste your time going over a lot of things that are in the briefs, but there are some new points to make regarding some of these exhibits, 'cause we took a closer look at what went on. The record is pretty extensive. We're talking about four different tax years. And we just took a closer look at what the FTB have put in their opening briefs as exhibits, and we found some things

missing that we want to bring to your attention.

So I understand you're familiar with what's in the briefs. I'm not going to try to spend -- I'm going to try not to spend too much time rehashing those things except for some highlights. So what I want to do is go through the particulars of each tax year first to make sure I cover the points that are unique to each tax year. And then there's a lot of things that are in common -- that's why these cases are consolidated -- that I'll talk about after that.

The Appellant's position on each of these proposed assessment is that there are a lot of problems with them. Problem No. 1 is that the NP -- can I say NPA?

ADMINISTRATIVE LAW JUDGE BRAMHALL: Yes.

MR. POLK: You know what I'm talking about. Okay. The first problem is that the NPA in each case is not valid. Because in each case, the NPA is not authorized under Revenue and Taxation Code, R&TC, Section 19087. I'm going to show you why that is as we go through each tax year.

The second problem is that in each case, the proposed assessment is, in any case, arbitrary. The FTB, therefore, has not met its initial burden in any of these cases to establish reasonable or rational phases for the proposed assessment. And FTB is, therefore, on entitled

with the presumption of correctness for any of these proposed assessments. I'm going to show you why that is as we go through each tax year.

The third problem in any case, even if FTB were entitled to the presumption of correctness, in each case, the Appellant has rebutted that presumption with credible evidence in this appeal. It indicates that the proposed assessment is wrong, and I'm going to show you why that is as we go through each tax year.

So for many, many reasons that will explained in detail, this Board would not sustain any of these proposed assessments. Also regarding the proposed penalties, those are not warranted either. I will address those as we go through each tax year. So with that, I'm going to start with 2011.

The 2011 NPA is invalid and should never have been issued in the first place. R&TC Section 19087 authorizes a proposed assessment --

ADMINISTRATIVE LAW JUDGE BRAMHALL: Excuse me. Was that an overview of your opening statement, and now you're in arguments?

MR. POLK: Yeah, that was the opening. Yeah, I'm kicking into the --

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. I just want to make sure.

MR. POLK: -- overview, thus ends the opening statement.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. Thank you.

MR. POLK: Sorry about that. And while we're stopped, I just want to ask it. Can I just mention the exhibit and move on? If you want me to stop so you can look at the exhibit, just please let me know. But I'd like to --

ADMINISTRATIVE LAW JUDGE BRAMHALL: No. We'll have it in the record --

MR. POLK: It'll be in the in the --

ADMINISTRATIVE LAW JUDGE BRAMHALL: -- in the reference.

MR. POLK: -- reference. I don't want that to slow us down.

ADMINISTRATIVE LAW JUDGE BRAMHALL: And we'll do that as we --

MR. POLK: Okay. Great. So 2011 R&TC Section 19087 authorizes a proposed assessment only if the taxpayer fails to file a return or files a false or fraudulent return with intent to evade the tax. In this case, FTB used as their bases for the second NPA -- that's their Exhibit E -- a claim that the Appellant had failed to file a valid return.

The FTB is just making up their own authority to issue an NPA there, because the provision in 19087 does not authorize a proposed assessment based on FTB merely claiming that a file return is not valid. The words "not valid" do not appear in that provision.

When a return has been files, as in this case. R&TC 19087 authorizes a proposed assessment only when a return has been found to be false or fraudulent with intent to evade tax. That's all one phrase. So there's been no such fining in this case. The FTB does not claim there's been any such finding.

The FTB instead claims that the 2011 return is frivolous, and thus invalid, which is not the same thing as false or fraudulent with intent to evade tax. If the legislature intended for frivolous return to be included, they could have included that language in the provision. They did not.

So again, this claim that a return is not valid simply does not meet the conditions of 19087 for issuing an NPA. The FTB acknowledges a 2011 return was filed in 2014. That's their Exhibit C. And FTB acknowledges that return was accepted in 2014. Two years later the FTB, in 2016, suddenly decided that return is invalid as their excuse for issuing the NPA.

The NPA for 2011, the second one, Exhibit E,

states on its face that a demand notice for a valid return was sent by FTB on July 7th, 2016. Appellant did receive a notice, and that notice stated that the Appellant's 2011 return was frivolous and there was a demand she send in a valid return.

Again, just because FTB sent a notice does not mean they were authorized to issue the NPA under R&TC 19087. That provision does not contain the words frivolous or invalid. So the FTB seems to have read into that provision the authority to issue and NPA, but is simply not there in the language of that provision.

In any case, even if 19087 does permit a proposed assessment where a return is deemed frivolous or invalid, the FTB cannot make a return invalid just by calling it invalid. There is an objective standard that's established by the federal courts. It's called the Beard Test. I assume you're familiar with the Beard Test, but I'll cite the case. It's Beard v Commissioner 82 TC 766, affirmed by the 6th Circuit in 1986. That's 793 F.2d 139.

It's commonly standard. It's a four-part test. To save time I'm not going to go into it, but you can look at this return yourself and see that it objectively meets the standards for the Beard Test. It must have sufficient data to calculate a tax liability. This return does. The FTB may not agree that data is correct, but that does not

mean that the return is invalid. It does contain sufficient data to calculate a tax liability.

The return in Exhibit C objectively meets all four parts of the Beard Test standards. The Beard Test is only about whether the return is processable (sic), and not whether it is correct, per se. Clearly, in this case, the FTB themselves found the return processable in 2014, since the obviously did process the return.

And it took two years rater the FTB suddenly, along with all these other notice of proposed assessment that it was not valid and sent this notice, July 7th, 2016, demanding that a valid return be filed. Exhibit 21 shows the Appellant's MY FTB records, and that indicates that as of August 2nd, 2016, that 2011 return she filed in 2014 was still recorded as a valid and processed return in FTB's records.

This is nearly a month after the July 7th, 2016, demand notice was sent out claiming that no valid return had been file. So clearly, FTB had no basis for claiming that the return at Exhibit C is not a valid return. Therefore, FTB had no basis for issuing a demand for a valid return on July 7th, 2016, when at that time there was already a valid return on file, even according to FTB's own records.

Further, the FTB records, oddly, do not show any

indication that any formal demand notice for a return was sent out, July 7th, 2016. That is Exhibit 20. And you will note when you look at that, that those records do show demand notices were issued for 2013 and 2014 tax years. But according to those records, there are no such notices issued for 2011 and also not for 2015, which we will get into a little.

So the demand notice should never have been issued. And it's not clear that what was sent out on July 7th, 2016, by the FTB actually qualifies as a demand notice under section 19087. In any case, the Appellant made a timely response to the purported demand notice she received dated, July 7th, 2016. But the FTB has conveniently neglected to mention that in its briefs.

And the FTB did not include the Appellant's response in their exhibits. So we have produced that evidence in Appellant's Exhibit 22. Exhibit 22 establishes that the Appellant made a timely response dated, August 6, 2016 -- I believe there's proof of mailing in there -- to that demand notice, and the FTB was therefore, precluded from taking any further action.

The FTB did not respond to the Appellant's timely response to their demand notice, and the FTB did not even acknowledge the response.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Hold on one

second.

MR. POLK: Okay. Go ahead.

ADMINISTRATIVE LAW JUDGE MARGOLIS: Which exhibit?

MR. POLK: 22.

ADMINISTRATIVE LAW JUDGE MARGOLIS: So Exhibit 22 is your response to the demand notice?

MR. POLK: Yes. It's the timely response to the demand notice. And while you are looking at that, you will see a new 2011 state tax return was enclosed with that response. So just as the FTB demanded, the Appellant provided a new return.

ADMINISTRATIVE LAW JUDGE MARGOLIS: Okay. Thank you. Continue.

MR. POLK: You're welcome. The FTB had not explained in their demand notice what they thought was wrong with the return they already had. So the Appellant was left to guess, and she did the best she could to comply with the demand for a new valid return. So the --

ADMINISTRATIVE LAW JUDGE CHENG: Mr. Polk?

MR. POLK: Yes.

ADMINISTRATIVE LAW JUDGE CHENG: Can you slow down a little bit for the hearing reporter.

MR. POLK: Yes. I'm sorry. I warned you about that. I've been told by many court reporters to slow

down. I will do my best. Sorry. Please just yell at me again if I do that. I don't look up much, so you'll just have to throw something at me.

The NPA for 2011 is invalid because there's no authority under R&TC Section 19087 issue, this NPA. The Appellant did not fail to file a return for 2011. She had a valid return on file already that was still acknowledged as valid when the FTB sent the demand for a new return. In any case, the Appellant timely respond to the demand for a new for return.

So to cite a -- I'm going to cite a case here, Walter Bailey. The appeal of Walter Bailey, I think, it's an often cited case in these things. I got this out of her. The appeal of Walter R. Bailey says, "The FTB's use of income information from the EDD to estimate a taxpayer's taxable income when taxpayer fails to file a return is a reasonable and rational method of estimating taxable income.

However, when the taxpayer has not failed to file a return, that would be, apparently, an arbitrary basis for returning the tax. And an arbitrary basis enjoys no presumption of correctness, per the Supreme Court in Helvering v. Taylor. That's in -- that's from 1935, if I can find that. It's 293 US 507 (1935). Just one second.

All right. So the FTB said we failed to do what

they should have done, and they issued this NPA anyway with no authority under R&TC 19087 to do so. So this board should find that the 2011 NPA not valid and, therefore, cannot be sustain.

In any case, the FTB has not met its initial burden to establish reasonable rational basis, because there's nothing reasonable or rational about FTB ignoring a timely response to the demand notice from the Appellant. And it is especially irrational and unreasonable for FTB to ignore a new return the Appellant filed in response to the demand notice.

So key word is arbitrary here. The FTB in this appeal has even failed to acknowledge this timely response from the Appellant or the new 2011 return the Appellant filed in response to the demand notice.

ADMINISTRATIVE LAW JUDGE BRAMHALL: One more time.

MR. POLK: Quiet? Slow down? Sorry.

I'll back up a little bit. The FTB has failed to acknowledge that response and let alone address the response and return, or explain why it was not sufficient. Because they have ignored the new return, it's plainly arbitrary. They're not entitled to presumption of correctness. In any case, even if there were presumption of correctness, the Appellant has rebutted that

presumption with all the evidence that is within her power to produce.

The preponderance of evidence said the proposed assessment is wrong. The Appellant produced her 2011 federal return for this appeal establishing that her federal AGI for 2011 is one dollar. It's exhibit 2. She produced her federal account transcript, Exhibit 15, establishing as a settled legal fact that her 2011 federal AGI is $1.

The Appellant has put a signed and dated -- oh, yeah. This is a little -- there was an exhibit of ours, 11, that had an undated, unsigned conforming copy of the return. But we've replaced that in Exhibit 18 with a signed and dated conforming copy of the new state return the Appellant filed in May 2018.

The return shows on line 13 that federal AGI is $1. That's the same amount shown on the original return the Appellant filed in 2014, Exhibit C, and on the new return Appellant furnished on demand in August 2016. That's Exhibit 22. And the federal transcript at Exhibit 15 proves that that's the correct federal AGI.

The FTB has arbitrarily and self-servingly refused to process this new 2011 return. See Exhibit 19 that shows the My FTB Records dated just last week, February 13, 2019. The FTB acknowledges receiving this

new 2011 return filed on 5/31/2018, yet does not show this return is processed. The federal records establish that her federal AGI is $1.

The state return calls for her to put down her federal AGI in that return. She did that. She completed the return and signed it under penalty of perjury that its contents are true and correct to the best of her belief and knowledge. The FTB has no basis in law for refusing to process this return.

FTB determinations that are based on federal audit determinations enjoy a presumption of correctness. So effectively, federal determinations are presumed correct for state income tax purposes. That's a rebuttal presumption of course. I understand FTB is not bound by federal determinations, but we're talking about something else. We're talking about a presumption of correctness.

I believe federal records should at least be entitled to a presumption of correctness. That's why the state return calls for the taxpayer on line 13 to report their federal AGI on state return. The federal records indicate that amount is correct. Now, if these federal records said what the FTB wanted them to say, the FTB would be talking about nothing else in the appeal, because those federal records would be presumed correct.

But in this case, since the FTB clearly is not

happy with what the federal records say, the FTB has not even acknowledged these federal records in this appeal, let alone address them.

ADMINISTRATIVE LAW JUDGE BRAMHALL: I'm going to stop you for about a minute. You're 15 minutes in, you're on 2011.

MR. POLK: Well, a lot happened there. I'm going to move more quickly through the other ones. Thank you for pacing me here.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay.

ADMINISTRATIVE LAW JUDGE MARGOLIS: Mr. Polk, can I ask you a real quick question.

MR. POLK: Yes.

ADMINISTRATIVE LAW JUDGE MARGOLIS: So did the IRS adjust or audit the --

MR. POLK: They have not. The do have the opportunity to -- let me see. They do have the opportunity to do that, and at that time the FTB will in that event have ample opportunity at that point to adjust Appellant's state tax.

ADMINISTRATIVE LAW JUDGE MARGOLIS: There's been no federal adjustments that's --

MR. POLK: No federal adjustment.

ADMINISTRATIVE LAW JUDGE MARGOLIS: Okay.

MR. POLK: But for now the FTB has overstepped

their bounds. The NPA is not valid. In any case, the proposed assessment is arbitrary, and FTB is not entitled to presumption of correctness. And in any case, the Appellant has rebutted any presumption of correctness by providing the federal records.

I'm going to move onto -- well, delinquent filing penalty. The Appellant's position is that no state return was ever actually required. Her position is supported by the preponderance of evidence, thus, this penalty is inapplicable. R&TC 18501 establishes that a state return is required when adjusted gross income exceeds $8,000 for single taxpayer or gross income exceeds $10,000.

In this case, the federal transcripts establish the AGI is $1, well below the threshold for filing state tax returns. And for the same reason that the filing enforcement fee under 1924 -- 19254 is inapplicable. Okay. 2013, also NPA is invalid. In this case, the FTB does dispute that the Appellant did make a timely response to the demand notice. That's Exhibit I.

FTB admits that the FTB initially decided they would preclude from taking any further action. But FTB claims in their opening briefs that they subsequently determined Appellant did indeed receive taxable income. They give no explanation whatsoever as to how or why that was determine.

The FTB admits that Appellant made a timely response to the second demand notice. There was a third demand notice, which the Appellant responded to. That's Exhibit M. The FTB has failed to acknowledge that response. No. They failed to acknowledge that the response in Exhibit M included the Appellant's IRS account transcript for 2013. And that is at page 14 of Exhibit M, establishing that her gross income for 2013 is zero dollars and federal AGI is zero dollars.

This evidence indicates that Appellant had no state filing requirement for 2013. Plus the 2013 NPA is invalid because it does not authorize under Section 19087. The NPA on its face at Exhibit N, you can see on its face, it shows it was issued under a false pretense that the FTB claimed they had no record of receiving Appellant's tax return or information indicating that you do not have a filing requirement.

But the FTB's own Exhibit M shows that claim is false. The FTB did have information indicating there was no filing requirement. They just chose to ignore that information and issue an NPA anyway. So the Appellant did not fail to file a 2013 return. She timely responded to demand notice. She provided incredible evidence in the form of IRS account transcript to indicate that no return was required.

The FTB was thus precluded from taking any further action. In any case, the FTB has not met its initial burden to establish a reasonable or rational reason for its proposed assessment. They failed to even knowledge the federal records in this appeal, let alone address that evidence or explain why it was not sufficient.

The FTB arbitrarily attributed veracity the third party reporting while arbitrarily ignoring the contrary evidence in the IRS account transcript. In any case, even if there was a presumption of correctness, the Appellant has rebutted that presumption with all the evidence that's within her power to produce.

The FTB also in 2013 has arbitrarily and self-servingly refused to process a file return submitted June 7th, 2018, Exhibit 19. Again, it shows My FTB Records as of last week, February 13th. The FTB acknowledges receiving the return, yet it says not processed in FTB records.

I'm going to move on to 2014. Oh, I'm sorry. Delinquent filing penalty on 2013. Appellant's position is no state return was ever actually required. The preponderance of evidence supports that position, thus this penalty is inapplicable.

In any case, regarding the delinquent filing

penalty, the Appellant had reasonable cause at the time of the FTB's demand for believing that she was not required to file a 2013 return based on her federal adjusted gross income, as seen in her IRS account transcript. Her federal return was filed in 2015 and had been accepted well before this demand for a state return was made.

Now, the demand penalty under 19133. 19133 requires that for the penalty to be imposed, the taxpayer must have failed or refused to file a return upon demand. Subsection(b)(1) clarifies that the penalty will only be imposed if the taxpayer fails to timely respond to a current demand for a tax return.

FTB admits there was a timely response to the demand notice. They even put it in their exhibits, Exhibit M. So the penalty is clearly not applicable because the required condition of a failure to respond to a demand notice is not met.

2014, again, NPA is invalid. It should never have been issued in the first place. In this case, again, the FTB does not dispute the Appellant did make a timely response to the demand notice. And FTB even included this response in their exhibits, Exhibit R. The FTB has failed to knowledge that response.

The response in Exhibit R included the Appellant's IRS return transcript and account transcript.

That's page 5 and 7 of that Exhibit R, which established that her 2014 gross income is zero dollars, and federal AGI is zero dollars. This indicates that the Appellant had no filing requirement for 2014. Thus, the NPA is invalid because it's not authorized under Section 19087.

The Appellant did not fail to file a 2014 return. She provided credible evidence indicating that no state return is required. The FTB was thus precluded from taking any further action. In any case, the FTB is not met its initial burden to establish a reasonable or rational basis for the proposed assessment.

Nothing reasonable or rational that ignoring a timely response to the demand notice, especially when it includes federal records indicating that there's no requirement to file a return. FTB in this appeal has failed to even knowledge the federal record Appellant provided in response to the demand notice, let alone address that evidence or explain why it was not sufficient.

They arbitrarily attributed a third-party reporting while ignoring that evidence. They're not entitled to a presumption of correctness for the 2014 proposed assessment. In any case, even if there were a presumption, that's been rebutted by the federal records.

Delinquent filing penalty on 2014, Appellant's

position is that no state return was ever actually required. Preponderance of evidence supports that finding. Thus, the penalty is inapplicable. In any case, the respondent -- I'm sorry. The Appellant had reasonable cause for believing she was not required to file a 2014 return based on federal AGI as shown in the federal account transcript. She filed her federal 2014 return in 2015, and that was well before this demand notice was issued.

Demand penalty under 19133, 193133 requires that the penalty to be imposed, the taxpayer must have failed or refused to file a return upon demand. Again, I mentioned this before. (B)(1) clarifies that the penalty will only be imposed if the taxpayer fails to timely respond to a current demand for tax return. FTB admits there was a timely response to the demand notice, and even exhibited that timely response at Exhibit R.

So I'm going to move on to 2015. How are we doing on time?

ADMINISTRATIVE LAW JUDGE BRAMHALL: All right.

MR. POLK: Okay. NPA for 2015 is invalid. And this one is going to be a little different from the other ones. NPA is invalid. It should never have been issued in the first place. In this case, FTB used as their basis for the NPA at Exhibit X, a claim that the Appellant

failed to file a valid return.

Well, just like with 2011, the FTB is making up their own authority to issue an NPA there. And I won't rehash what I've already said about 2011, but the same argument applies. The words frivolous, invalid do not appear in R&TC 19087. The conditions were not met. In any case, even if 19087 authorizes a proposed assessment when a return is frivolous or invalid, FTB cannot make a return invalid just by calling it invalid.

The return -- you can see the return there in the exhibits. It meets the Beard Test for a valid return. Now, here's another very significant issue with this particular NPA that I want to bring to your attention. The FTB admits that a notice was sent to Appellant making changes to her 2015 return. That's Exhibit W.

In that notice the FTB inexplicably changed the withholding amount claim from $7,555 on a return to zero dollars. The Appellant responded to that notice to object to the changes. The FTB conveniently failed to mention that the FTB also sent a notice dated July 18, 2016, to the Appellant. And that's Exhibit 6. It is called Second Notice of Tax Return Change for 2015.

Now, this was 11 days after the demand notice was sent. Exhibit 26, yes, that is the second notice of tax return change for 2015 that the FTB issued 11 days after

sending the demand notice demanding a valid 2015tax return. In that notice in Exhibit 26, you can see that the FTB informed the Appellant they had reevaluated the 2015 return, and that they were allowing the withholding credits the Appellant had claimed.

FTB also told the Appellant in that notice that no further action on her part was required. The Appellant relied on that notice to conclude that the FTB was no longer claiming her 2015 return was invalid. That's a perfectly reasonable conclusion to make. Well, the FTB, for some reason, went ahead and issued an NPA for 2015 after that, Exhibit X, claiming the Appellant did not respond to the demand notice from July 7th, 2016.

So this is what you call a bait and switch, it looks like. This NPA is not authorized under Section 19087. The law clearly does not contemplate that the FTB is permitted to send a misleading notice to a taxpayer in order to prevent the taxpayer from responding to a previously sent demand notice.

It was perfectly reasonable for the Appellant to rely on that July 18th, 2016 notice from the FTB to determine she was no longer being required to respond to the previous demand notice. And it was patently unreasonable for the FTB to issue this NPA. In any case, they've not met their initial burden to establish a

reasonable or rational basis for the proposed assessment.

The FTB in this appeal has failed to knowledge that second notice of tax return change, whereby, the Appellant was informed that her 2015 return had been accepted as filed after the demand notice had been sent. And because they've not established a rational or reasonable basis for them to propose assessment, the FTB is not entitled to presumption of correctness.

The FTB clearly contradicted themselves as the validity of the 2015 return and mislead the Appellant. In any case, even if there was a presumption of correctness, the Appellant has rebutted that presumption with the IRS transcripts. She put a copy of the new state return -- we put a copy of the new state return the Appellant filed on June 15, 2018, into the record as Exhibit 18. That return shows on line 13 the federal AGI is $2,013. I think that might be a typo. Actually, that's correct, $2,103. Yeah, that's a typo.

The FTB has arbitrarily and self-servingly refused to process this return. The FTB acknowledges receiving the return on June 15th, 2018. You can see that in Exhibit 19. Yet it does not show this return is processed.

Delinquent filing penalty, the Appellant's position is no state return was actually required. In any

case, the Appellant had reasonable cause for believing she was not required to file a 2015 return having already filed one, and having been led to believe by the FTB that they decided to accept that return as file.

Now, as for all the years the frivolous appeal penalty. I think the FTB has a lot of nerve to suggest in its opening brief that the Appellant's appeals are frivolous. These proposed assessments are all frivolous. The FTB is fortunate the Appellant cannot impose and collect penalties against the FTB for these lawless and plainly meritless proposed assessments.

The FTB's conduct in these cases is inexcusable. They have shown little or no regard for lawful limits on their authority. And they, frankly, abuse their power and abuse process rubber stamping these proposed assessments every step of the way. I hope that stops today. It's ridiculous that we've had to take things this far with these proposed assessments. None of these NPA's should have been issued in the first place.

It is your role as the review board to help rein in this kind of abuse of process. The FTB should be reprimanded for wasting this Board's time and ours. The Appellant has reasonable grounds for appealing all of these NPA's. They are all apparently invalid and not authorized by law. They're all clearly arbitrary. And

the Appellant has federal records that agree with her position on every one of these years.

Those federal records are at entitled to a rebuttable presumption of correctness. The FTB has produced no substantive evidence whatsoever to rebut the federal determinations. And with that, I think I will let FTB have their say.

ADMINISTRATIVE LAW JUDGE BRAMHALL: The only year that you're claiming that there was a -- not a response to the demand letter in the record was with respect to 2011; correct? The other years there --

MR. POLK: No. There was a response to -- well, there was a response to the demand notice for 2011. They ignored it.

ADMINISTRATIVE LAW JUDGE MARGOLIS: That's the one you put in the records?

MR. POLK: Yes. That's the one in today's exhibits.

ADMINISTRATIVE LAW JUDGE MARGOLIS: I just want to make sure our record is complete.

MR. POLK: Yeah.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Other than that, it's complete?

MR. POLK: Yes. There was a response for 2011, and for 2013, and for 2014. The only one there wasn't a

response to was for 2015 because of the subsequent notice that she received 11 days later saying, "We've decided to accept the return as filed. You don't need to take any further action."

ADMINISTRATIVE LAW JUDGE BRAMHALL: Before FTB goes, Linda any questions?

ADMINISTRATIVE LAW JUDGE CHENG: No questions.

ADMINISTRATIVE LAW JUDGE MARGOLIS: None from me.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay.

MR. AMARA: Judge before I proceed with my closing I just want to address a couple of things that came up there. First of all, there was some discussion about tax returns that were submitted for 2011. And there's also a tax return submitted for 2015 or purported tax returns. Those were zero returns.

I just want to get the authority on the record for how those are to be treated. There's a 2002 BOE presidential opinion called the appeal of LaVonne Hodgson.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Can you spell that, please?

MR. AMARA: H-o-d-g-s-o-n. The cite is 02-SBE-001, February 6, 2002. In that case the BOE endeavored to determine how to treat zero returns. And there was a lengthy analysis, a very thoughtful analysis where they ultimately concluded that zero returns do not

constitute valid tax returns, and they do meet the filing obligation.

So I want to put that on the record. And I'll read directly from the opinion in the conclusion: "Returns do not contain sufficient data from which respondent can compute and assess a tax liability of a particular taxpayer that do not demonstrate and honest and genuine endeavor to satisfy the requirements of California's tax law."

And in parenthesis, "including zero returns are not valid returns. Filing such a return places the filer at risk of the sanctions adopted by the legislature to enforce compliance of the tax laws."

There was mention of federal changes in the account transcripts or wage and income transcripts. I just wanted to address those briefly too. The same amended W-2's purportedly from the employer seem to have been submitted to the IRS. The IRS seems to not have caught on to the, for the lack of s better term, the scheme here and made the changes.

FTB is not required to follow those IRS changes. I'll address some of that further in our closing, but I just want to put that out there. And then finally with respect to the demand notice in Appellant's response to the demand notice, permissible response to the demand

notices are demonstration that the Appellant has already filed; demonstration an Appellant or taxpayer does not have a filing obligation. Or, I guess for purposes of this hearing, those are the only two that are really applicable.

So interposing frivolous arguments in a lengthy letter in response to demand is not considered a valid response in FTB's view, and it doesn't meet the response requirement.

ADMINISTRATIVE LAW JUDGE MARGOLIS: What's your authority for that, that you can ignore a response that a taxpayer gives to a demand letter?

MR. AMARA: Well, I would just note that there's in terms of administering 19133, that's an administrative determination that FTB has made. I'd be happy to maybe delve into that further if there's, you know, additional questions for further authority that's needed in some sort of post-hearing briefing if that's necessary. But that is our view on how we treat responses to demand notices.

MS. MOSNIER: And if you would look at Exhibit H submitted by FTB, this happens to be a demand for tax return that was issued for tax year 2013. Right on the face of the demand it says, "How do I respond to this notice," and there are three categories listed off to the side.

One says, "Filed already?" In other words, have you already filed a return? "No filing requirement?" In other words, show us you don't have to file. Or the third one is, "Haven't filed yet?" Then the response would be, okay I'm filing right now. So those are in response, Judge Margolis, to your question about where would the authority be for that. An example of that would be in Exhibit H --

ADMINISTRATIVE LAW JUDGE MARGOLIS: Okay. Thanks.

MS. MOSNIER: -- what can be considered appropriate responses.

MR. AMARA: Shall I proceed with our closing at this time?

ADMINISTRATIVE LAW JUDGE BRAMHALL: Please.

MR. AMARA: Okay.

CLOSING STATEMENT

MR. AMARA: This is a classic non-filer case where Appellant is asserting that her wage income does not actually constitute taxable income in attempting to avoid an obligation that every similarly situated Californian must undertake.

The evidence in the record establishes that Appellant, Ms. Roberts, receives sufficient income to

trigger the tax return filing obligation for the appeal years failed to file valid returns or didn't file returns at all. The evidentiary record further establishes that FTB correctly imposed penalties in this case.

With respect to the legal standards and burden of proof here, FTB proposed assessments for each year based on third-party payer information in this case. Appellant having challenged those assessments bears the burden of demonstrating error. Appellant also bears the burden of establishing a basis for abating penalties in this case.

I just want to go through some of the significant evidence or information in this case and try to distill it down to the most key pieces of evidence. First, as I noted, FTB received third-party payer information showing that Appellant received sufficient income to trigger the following obligation in the appeal years.

FTB both requested and demanded that Appellant file tax returns. Appellant either failed to file returns in response or filed zero returns, which does not meet the filing requirement. Now, throughout the process, Appellant's argument has been fairly basic.

She claimed that the third-party payer information is inaccurate. And she basis that argument on her own incorrect -- what can also be referred to as frivolous interpretation of what constitutes income and

that wage income does not constitute tax income. You can't create a filing obligation.

Now, Appellant has gone even further in this case in attempting to support her argument by submitting amended forms W-2 -- form W-2's purportedly from her employer showing zero dollars of income in the appeal years. That evidence or information has been shown false or inaccurate through several pieces of evidence in the record here.

First, there's a declaration from Appellant's employer. A payroll administrator at Appellant's employer attesting to the inaccuracy of the amended W-2's, and to the fact that there were no changes to Appellant's income, and the income upon which FTB's assessment based.

Second, FTB's own third-party information shows that the employer didn't initiate any changes to the Appellant's income in the appeal years. Finally, and maybe most significantly, the employer has submitted their current records regarding Appellant's income. That's in evidence in this case. And it shows no changes were made from the original assessment figures.

The original assessment figures are accurate. In some the record clearly supports the proposition that Appellant received the income at issue and failed to file as required. Therefore, Appellant has failed to meet her

burden in demonstrating error in FTB's assessment. Along those lines, Appellant has also failed to demonstrate any basis to abate the penalties in this case.

I also take an opportunity to just address a frivolous appeal penalty. A couple of points there. First of all, Appellant's entire case rest on a frivolous position that wage income is somehow not taxable. You cannot form the basis for a filing requirement. Beyond that, Appellant took a rather brazen step in submitting altered forms W-2, purportedly from the employer showing zero income.

As a result of the voluminous correspondence Appellant submitted in this case, significant FTB resources has been consumed, as well as your time and resources. Based on that, the frivolous appeal penalties are appropriate and should be imposed in the maximum amount allowable. Thank you.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. Any questions of Mr. Amara?

ADMINISTRATIVE LAW JUDGE CHENG: No questions.

ADMINISTRATIVE LAW JUDGE MARGOLIS: No. I don't have any questions.

ADMINISTRATIVE LAW JUDGE BRAMHALL: None here either.

MR. POLK: Well, I have some things to say.

ADMINISTRATIVE LAW JUDGE BRAMHALL: You have an opportunity for about 10 minutes for closing statements.

MR. POLK: All right.

CLOSING STATEMENT

MR. POLK: This is well covered in the briefs already, but FTB is just repeating things we have already shot down. The 2011 and 2015 returns are not zero returns. A zero return is a return that purports zero dollar income. These reports -- these returns contain sufficient data. They do actually report some income.

The math happens to results in zero taxable income. Many returns do that. It does not make them frivolous. The amended documents were never relied on in this appeal. The amended W-2 documents were not relied on in this appeal by the Appellant. They were put into evidence just so that FTB can try to change the subject away from what they've done wrong here and try to smear the Appellant.

She never reported that the amended documents came from the employer. Nor does it matter whether they came from the employer. The employer is not the final word on whether the payments constitute wages. Which there's another thing I want to say.

The FTB continually refuses to acknowledge what

the real issue is in this case. They pretend that the -- they keep putting a straw man argument up here for them to tear down that the Appellant has claimed that wages are not income. We covered this in the brief. We agree that wages are income. What we don't agree with is that the remuneration she received constitutes wages. And that is a reasonable --

ADMINISTRATIVE LAW JUDGE MARGOLIS: You agree she received remuneration for her work at Warner Bros?

MR. POLK: Well, I don't think it's relevant because it's none of your concern whether she received remuneration for her work unless you have jurisdictional facts to connect that to a taxable income producing activity. And you don't have that. They haven't introduced that.

So remuneration is -- you know, I cite this in -- I'm going to cite some cases that I have in the brief because it bears repeating. Supreme Court in Eisner v. Macomber in 1920 said it becomes essential to distinguish between what is and what is not income as the term is in the Constitution used, and to apply that distinction as cases arise according to truth and substance without regard to form. You have to apply a distinction between what is and what is not income according to truth and substance. You cannot just arbitrarily assume that any

money paid to a person is income.

FTB cannot just assume its way into claiming jurisdiction by imposing income tax on the Appellant. United States Tax Court in Len v. Commission. This is in the briefs. It's well settled that the mere receipt and possession of money does not by itself constitute taxable income.

They keep assuming facts not in evidence. They insist on calling the remuneration wages because they don't want to have the discussion about what actually constitutes wages or how this third party determined it was wages. And that's the reason for the pay stubs and the letter that we wrote to Employee Connection, which is the payroll company for Warner Bros.

We said, "Hey, we would like to see your evidence because we have a declaration from this payroll employee, Renee Thresher, claiming that she checked the records and the W-2 forms accurately reflect wages."

Well, I don't think she even knows what wages mean or understands it's a statutory term. So we said, "All right. Why don't you produce these records that you relied on to report?" And if you look at these pay stubs, they contain absolutely no information representing any facts that you could use as a foundation to make that determination. So it's an arbitrary determination.

They just decided -- and I realize this is a, you know, it's probably a very unusual case where you haven't had this put before you before. But people just generally assume that wages -- you know, people that are filing this paperwork to the FTB and to the IRS, they see wages. They just assume the common use of the word. They just assume the common definition. They're not aware that has a statutory definition in Unemployment and Insurance Code.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Do you dispute that these payroll records reflect remuneration?

MR. POLK: Well, remuneration I don't know what your definition is of that term. I don't know what your definition -- it's none of your concern.

ADMINISTRATIVE LAW JUDGE BRAMHALL: A payment for services.

MR. POLK: It's none of your concern whether someone received payment for their services unless you have jurisdictional facts to connect that to a taxable income producing activity. You don't have that.

ADMINISTRATIVE LAW JUDGE BRAMHALL: I have a pay stub.

MR. POLK: Yeah. A pay stub is not a taxable activity. I just read you the case. It says it is well established the mere receipt and possession of money does not itself constitute taxable income.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Well, what it says is that we have to make a determination if there is or isn't a connection. All right.

MR. POLK: Yes. And you don't have any the facts on which to make that determination. All you have is a conjecture. You have a lay witness testifying as --

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. I understand your position. Understood.

MR. POLK: Yeah. They lay witness is testifying to legal conclusions they don't even have any comprehension that they're testifying legal conclusions. One of the exhibits that we put in there is a declaration used by the FTB in another case. It just shows that they use a boiler plate declaration form.

It's a fill in the blank form. It has the term wages already selected. They just have the payroll person fill in the numbers. There's no thought given whatsoever to whether or not the payment constitutes wages. You can't -- another case I'm going to quote from this -- from the briefs is, "That which is not income cannot be made into income by calling it income."

Let me find that case. That's Supreme Court in Hope v. Tax Commissioner. This is in the brief. In Hope v. Tax Commissioner of Wisconsin, "That which is not fact the taxpayer's income cannot be made such by calling

it income. And that applies to income in any form, whatever you call it, including wages."

In this case that which is not wages cannot be made such just because you got a declaration and got somebody to fill it in. Oh, yeah, yeah. It was wages. That doesn't prove anything. You don't have facts. And if -- here's the thing.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Who is -- I'm interested. This is not -- I'm not arguing here. But who is capable of making the determination that remuneration is a wage? Who is capable of making that determination?

MR. POLK: Someone with personal knowledge of the jurisdictional facts required to make that determination.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Well, what is a jurisdictional fact?

MR. POLK: Well, I'm not teaching a law class here. Okay. Your job is to decide --

ADMINISTRATIVE LAW JUDGE BRAMHALL: You're arguing that it doesn't exist. So I'm asking you what --

MR. POLK: Well, here's the thing. The Appellant doesn't have to prove she's not liable for a tax. If you're going to say she's liable for tax, you have to have evidence to support that, and you don't have it. We're not going to reverse the burden of proof and force her to prove a negative.

That's exactly why they are required to -- that they can't -- the courts have said they cannot rely on third-party reporting as conclusive evidence. They are required to gather probative information. They have not done that. They could have done that. They should have done. And they would have done that if that evidence existed.

But that evidence doesn't exist, and they know it. And that's why they didn't ask for it. They just threw their declaration on the table. Oh, this person says it's wages. That proves it's wages. That doesn't prove it's wages. And it doesn't overcome the IRS determinations that are already in the Appellant's favor.

Again, if the IRS changes their determinations, the FTB will get another bite at this apple. They can add their state income tax if federal -- but I think the federal determination are correct. They understand the legalities here and jurisdictional determinations that are represented on a W-2 form. You're not just reporting that money was paid, even though that's the common belief.

You're making jurisdictional determinations when you file a W-2, and that's unfortunately the way this system works. You have millions of people every day reporting these things. They have no idea what they're talking about, but it's good enough. As long as nobody

disputes it that evidence is on the table. Okay. Good enough.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay.

MR. POLK: Sorry.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Anything further?

ADMINISTRATIVE LAW JUDGE MARGOLIS: No.

MR. POLK: I have a couple of things I wanted to mention just to rebut what they said. There was no frivolous argument made whatsoever at any point in this appeal. The Appellant never charged -- never claimed that wages are not income.

The IRS records are not reflections of changes. They are determinations. And they are not based on any amended W-2 record. They are based on tax returns, which were filed by -- and accepted. They were filed by the Appellant and accepted. I think that's everything.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. Did you find that authority you were looking for?

MR. AMARA: Which authority is that, Judge?

MS. MOSNIER: Yes.

ADMINISTRATIVE LAW JUDGE BRAMHALL: You were looking for your position on whether a -- what constitutes a valid response to a demand penalty.

MR. AMARA: Well, I would just point out the

language of the statute Section 19133 says, you know, in operative part, "If any taxpayer fails or refuses to make or file a return required by this part upon notice and demand."

So administratively FTB gives taxpayers an opportunity to respond in a -- respond and maybe assert they don't have a filing obligation. There's a risk that's being run there. And that risk is if there is indeed a filing obligation, then they haven't submitted a correct response. A response would avoid the demand penalty, and that's what occurred here.

There was a protestation from the taxpayer that they didn't have a filing obligation. In our view it's inaccurate. And we're sustaining here that if indeed found that they had a filing obligation, then their assertion that they didn't in response to the demand is not a valid response.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay.

ADMINISTRATIVE LAW JUDGE MARGOLIS: Did you send them another letter saying that, "We find your response inadequate. Please file your return."

MR. AMARA: I don't know that occurred in this case. I don't want to speak more broadly, but I guess, you know, the evidentiary record doesn't support that we responded with another letter, I don't believe.

ADMINISTRATIVE LAW JUDGE MARGOLIS: Okay.

MR. AMARA: And I'll just limit my discussion to while we're here.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Thank you.

MR. AMARA: Sure.

MR. POLK: I'd like to respond to that if I could?

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay.

MR. POLK: Again, this shows they didn't respond to say, "Hey, what you said was not sufficient." They just went ahead and arbitrarily -- this is exactly -- I cite Portillo v. Commissioner in the briefs, and it's very applicable here where you have a return or other credible information.

And they just arbitrarily attribute voracity the third-party information. And because that's what they wanted to believe. And they decided not to believe the information they had in their hand. So these are arbitrarily --

ADMINISTRATIVE LAW JUDGE BRAMHALL: I read it. That was a 1099-case. It's not a W-2 case.

MR. POLK: I'm sorry?

ADMINISTRATIVE LAW JUDGE BRAMHALL: I said I read that case.

MR. POLK: But they broadly say an information

return filed by third party. That principle applies. There's no difference in that principle between W-2 and a 1099. It's still a third-party reporting. And I cite a case where the court says broadly, "Information returns are reporting by a third party of income as that third party believes it be."

That's why it's not conclusive evidence here, because it's just someone belief and they may or may not be mistaken in that belief.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Right. It's just evidence.

MR. POLK: And we don't even have to reach the merits of the wages because of all the technical problems with their -- they made arbitrary assessment. They're not entitled to a presumption of correctness to begin with. And as we argued in the beginning, the NPA's are all invalid because they were not authorized under 19087. I think you can conclude this case just -- if you want to make it easy on yourselves, just conclude it based on that.

The last thing I want to say, there's no law that prevents anyone from filing the corrected form. The Appellant never purported that it never came from the employer. There's corrective forms like 3525, that the FTB uses, a W2C. There's no law that prevents anyone from

issuing that form provided it contains the information that they believe to be correct.

Now, of course, if they issued one that they didn't believe was correct, that would be fraud. But the same thing happens if you file a tax return that has something that you don't believe is correct. There's no law that prevents anyone from anyone issuing a correct form.

And the Internal Revenue Manual actually used to have a provision where if you received a corrected form from a taxpayer, they were instructed to accept the corrected form. Because they can't just rely on these forms in the first place. If they really think that something is wrong, their job is to investigate. Go talk to the filer and see what that filer has to back up their claim.

In this case we have the same conclusory information in that declaration that was on the W-2. There's really no difference. It's just another way of saying the same thing. So there's nothing probative there. And not only did they not prove anything, they didn't even try to prove anything.

That's what -- that's what just shows that they know they better, you know, tap dance around this and try not to get into the conversation of how it was determined

it was wages, because it's inevitably an arbitrary determination.

In this case, the Appellant has asserted that this is negligent misrepresentation. The WB when we wrote to them, they we wrote back. It's in the exhibits. They demonstrated no inclination to even try to answer those questions that were raised. They don't know or care what trade or business mean or wages. They just -- this is an emperor has no clothes type of deal.

ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. Thank you. This concludes the appeal hearing. The record is now closed. The case is submitted for decision on February 20th, 2019, at 12:45 p.m.

Thank you.

(Proceedings adjourned at 12:45 p.m.)

HEARING REPORTER'S CERTIFICATE

I, Ernalyn M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

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

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

I have hereunto subscribed my name this 15th day of March, 2019.

_____

ERNALYN M. ALONZO
HEARING REPORTER