

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
RICARDO BIRCHER,) OTA NO. 18032403
)
)
 APPELLANT.)
)
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TRANSCRIPT OF PROCEEDINGS

Van Nuys, California

Friday, January 25, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE OF,)
RICARDO BIRCHER,) OTA NO. 18032403
APPELLANT.)
_____)

Transcript of Proceedings, taken at
6150 Van Nuys Blvd., Van Nuys, California, 91401,
commencing at 12:57 p.m. and concluding
at 1:22 p.m. on Friday, January 25, 2019,
reported by Ernaly M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: Hon. DANIEL CHO

Panel Members: Hon. KENNY GAST
Hon. LINDA CHENG

For the Appellant: RICARDO BIRCHER, Taxpayer

For the Respondent: State of California
Franchise Tax Board
By: BRIAN WERKING
NATASHA PAGE

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I N D E X

OPENING STATEMENT

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E X H I B I T S

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

(Franchise Tax Board's Exhibits were received at 6.)

CLOSING STATEMENT

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Van Nuys, California; Friday, January 25, 2019

12:57 p.m.

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

This is the appeal of Ricardo Bircher, OTA Case No. 18032403. Today is January 25th, 2019, and the time is approximately 12:57 p.m. We're holding this hearing in Van Nuys, California. My name is Daniel Cho. I'll be the lead administrative law judge for this appeal. With me are Administrative Law Judges Linda Chang and Kenny Gast.

Can the parties please introduce and identify yourselves for the record, beginning with Appellant.

MR. BIRCHER: I'm Ricardo Bircher, taxpayer.

ADMINISTRATIVE LAW JUDGE CHO: Thank you.

MR. WERKING: Bran Werking and Natasha Page for respondent, Franchise Tax Board.

ADMINISTRATIVE LAW JUDGE CHO: Thank you. So the issue in this appeal is whether Appellant's claim for refund was filed within the statute of limitations for the 2007 tax year. Is that still your understanding, Mr. Bircher?

MR. BIRCHER: Yes. Yes.

ADMINISTRATIVE LAW JUDGE CHO: Is that also your understanding, Mr. Werking?

1 MR. WERKING: That is correct.

2 ADMINISTRATIVE LAW JUDGE CHO: Okay. With
3 respect to the exhibits, Appellant has submitted exhibits
4 1 through 8. It's my understanding that FTB has no
5 objections to these exhibits; is that correct?

6 MR. WERKING: That is correct.

7 ADMINISTRATIVE LAW JUDGE CHO: Therefore, we will
8 enter these exhibits into the evidentiary record. In
9 addition, FTB has provided Exhibits A through H. And it's
10 my understanding that Appellant has not objected to these
11 exhibits as well; is that correct, Mr. Bircher?

12 MR. BIRCHER: Yes.

13 ADMINISTRATIVE LAW JUDGE CHO: Thank you.
14 Therefore, we will enter these exhibits into the record as
15 well.

16 (Appellant's Exhibits 1-8 were received
17 in evidence by the Administrative Law Judge.)

18 (Respondent's Exhibits A-H were received
19 in evidence by the Administrative Law Judge.)

20 ADMINISTRATIVE LAW JUDGE CHO: As a reminder to
21 both parties, although we've entered all the evidence into
22 the record, we'll give the exhibits their appropriate
23 weight. All right. Do you guys have any questions at
24 this point in time?

25 MR. WERKING: No.

1 MR. BIRCHER: I've comprised a brief summary to
2 help me explain the situation. Can I read that?

3 ADMINISTRATIVE LAW JUDGE CHO: Sure. You can
4 read that. Just as a reminder, though, generally when
5 people tend to read off of a document, they tend to read a
6 little bit faster than they would normally talk. So try
7 to remember to speak a little bit slower. I think that's
8 the only thing I would request. It's to help us get a
9 really clear transcript today.

10 Okay. In that case, we'll go along with our
11 previously agreed upon schedule. Mr. Bircher, we'll give
12 you ten minutes to do your open testimony and your closing
13 arguments, followed by any questions that the panel or FTB
14 may have as to your testimony just to clarify what you
15 have stated. Afterwards we'll give the FTB ten minutes to
16 present their closing arguments followed by a five-minute
17 rebuttal.

18 But before you begin your testimony, Mr. Bircher,
19 I'm going to place you under oath in affirmation and
20 accordance with the rules and regulations. Would you mind
21 standing and raising your right hand?

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RICARDO BIRCHER,

produced as a witness by and on behalf of himself, and having been first duly sworn by the Administrative Law Judge, was examined and testified as follows:

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE CHO: Thank you. You may sit down. So you can testify in the narrative, which means you can just give your testimony freely and informally. Feel free to use just regular terms. And I guess just tell us why you believe your claim for refund should be granted when you're ready.

OPENING STATEMENT

MR. BIRCHER: Okay. The facts of this matter, it's a 2007 estimated tax liability that was assessed and found to be incorrect by Franchise Tax Board, and the efforts of Franchise Tax Board employees to keep funds taken from me through a bank levy.

In January of 2017, upon following up on my 2006 tax liability disposition, I found that my 2007 tax liability had been considered paid in full. Upon receiving that information on March 15th, 2017, I requested that funds taken through bank levy be refunded. Franchise Tax Board denied refund, stating statute of

1 limitation issues.

2 It was my understanding that in respective tax
3 years, liability must first be fully paid before a refund
4 or credit or payment of overpaid liability can be claimed.
5 My 2007 tax liability was considered paid in full in
6 January 2017, and claim for refund was filed on
7 March 15th, 2017. That's basically it.

8 Now, I had the opportunity to go through the
9 issues that were sent to me from the Franchise Tax Board.
10 And I was looking at this, and in here it states that --
11 where is it? On the second page it says, "As a result of
12 our collection actions, Franchise Tax Board received a
13 \$577.99 payment on October 10, 2013."

14 Exhibit E is a copy of Franchise Tax Board record
15 of 2007 tax year account line 3. It says, "After FTB
16 applied that payment for 2007, your account was paid in
17 full."

18 I guess just to say that the beginning of this
19 thing was, from the start I told them there was no tax
20 liability. There was a mistake. This was -- this was in
21 2007. And this thing has been dogging me ever since.
22 Now, I sent them letters stating the reasons why. I
23 didn't have no, you know, I had no tax liability. I sent
24 them copies of my tax returns. And still -- I was still
25 receiving notices that I needed to pay, you know, had a

1 tax liability.

2 The problem here that, you know, I didn't owe the
3 taxes in the first place, okay. They agreed upon that.
4 But then they want to turn around and say, well, we're
5 gonna keep your money, you know, because of the statute of
6 limitations. How can I have -- if I don't have a tax
7 liability, why don't you want to refund the money that
8 you've taken?

9 This is my problem. Initially, I was a victim of
10 a predatory loan deal. That's how all this got started.
11 The lender fabricated some stuff, sent it in. Franchise
12 Tax Board got wind of it. They're saying they didn't get
13 an estimated tax liability on me. At the time, the
14 address that they sent this to was just a mailing address.
15 I didn't live there anymore.

16 So I didn't think anything of it. You know, I
17 haven't come by to check the mail. They said they'll
18 figure out this mistake, and they'll deal with it. Okay.
19 But it didn't end there. They kept dogging me. Even this
20 exhibit, I have an exhibit here. I sent in the tax -- my
21 tax return on -- I mailed it in. It was 3/21/2016.

22 I received a notice of income tax due 12/27/2016.
23 So I sent in the tax return, and I'm still getting notices
24 that, you know, I owe this money. I sent in letters to
25 them explaining why. My tax liability -- I didn't owe any

1 taxes. It didn't matter to them. It was in the system.
2 So I get these computer generated notices that, "You need
3 to pay us. And if you don't, we're gonna attach interest
4 to it."

5 I didn't have 5 -- \$6,000 to give them. It was a
6 mistake. They didn't want to accept that. So here we
7 are. I'm trying to put this to bed now. They agreed that
8 it wasn't a tax liability. Okay. So why not give me the
9 funds back? That's the only reason I'm here. So I really
10 don't know to much more to add to that, other than it was
11 a mistake.

12 You know, just do the right thing. I didn't have
13 a tax liability, refund the money. It's simple, you know.
14 It's such a small amount. Why are we wasting time? You
15 know, the last case was millions of dollars. I'm just a
16 little small man. You know, return the money. That's all
17 I'm asking. So you know, thank you.

18 ADMINISTRATIVE LAW JUDGE CHO: All right. Thank
19 you very much. Do you have anything further to add?

20 MR. BIRCHER: That's pretty much it.

21 ADMINISTRATIVE LAW JUDGE CHO: All right. Thank
22 you. Franchise Tax Board, do you have any questions for
23 Appellant based on testimony?

24 MR. WERKING: I do not.

25 ADMINISTRATIVE LAW JUDGE CHO: Judge Cheng, do

1 you have any questions?

2 ADMINISTRATIVE LAW JUDGE CHENG: No.

3 ADMINISTRATIVE LAW JUDGE CHO: Judge Gast?

4 ADMINISTRATIVE LAW JUDGE GAST: No.

5 ADMINISTRATIVE LAW JUDGE CHO: I don't have any
6 questions either.

7 MR. BIRCHER: This is pretty straightforward, you
8 know.

9 ADMINISTRATIVE LAW JUDGE CHO: All right. Thank
10 you. So why don't we move on to Franchise Tax Board's
11 presentation. You will have ten minutes for your
12 presentation.

13

14 OPENING STATEMENT

15 MR. WERKING: Thank you. The issue in this case
16 is whether Appellant has established that he filed a claim
17 for refund for the 2007 tax year within an applicable
18 statute of limitations. Appellant has not established
19 that he filed his 2007 claim for refund within the general
20 statute of limitations provisions pursuant to Revenue and
21 Taxation Code 19306.

22 And Appellant has not asserted any facts and all
23 information available to respondent, and does not indicate
24 an alternative statute of limitations apply. Revenue and
25 Taxation Code Section 19306 prohibits respondent from

1 crediting or refunding an overpayment when a claim for
2 refund was not filed within four years of the due date of
3 the return or one year from the date of over payment,
4 whichever is later.

5 Respondent does not dispute that Appellant is
6 entitled to an overpayment for the 2007 tax year.

7 However, respondent is prohibited by law from crediting or
8 refunding his overpayment because his claim for refund was
9 received by respondent in 2015, more than four years after
10 the due date of the 2007 return, which was due in 2008,
11 and more than one year after receipt of his overpayment,
12 which was received in 2013.

13 Accordingly respondent's denial of Mr. Bircher's
14 2007 claim for refund is proper and should be sustained.
15 Thank you.

16 ADMINISTRATIVE LAW JUDGE CHO: Thank you.
17 Judge Cheng, did you have any questions for FTB?

18 ADMINISTRATIVE LAW JUDGE CHENG: No, I don't have
19 any questions.

20 ADMINISTRATIVE LAW JUDGE CHO: Judge Gast?

21 ADMINISTRATIVE LAW JUDGE GAST: No questions.

22 ADMINISTRATIVE LAW JUDGE CHO: Same here. So
23 Mr. Bircher, you'll have five minutes on rebuttal. You
24 can just wrap up your case, and let us know why you are
25 entitled to a refund.

1 CLOSING STATEMENT

2 MR. BIRCHER: Okay. On Exhibit E, it states here
3 that it has a collection date of 10/10/2013 for \$577.99.
4 In looking at -- now there is -- there's also not --
5 there's not a date that actually states when the tax
6 liability was actually paid in full. I kind of stumbled
7 upon that in January of 2017. I don't think that was
8 something that was going to be told to me.

9 I think it was probably to let the statute of
10 limitations time run out. Anyhow, I was looking at
11 Exhibit H. And in here it was talking about the statute
12 of limitations. It says, "The respective tax year, tax
13 year's liability must first be fully paid before a refund
14 or credit or payment of that overpayment liability can be
15 claimed."

16 And it goes down further, "Refund or credit can
17 be allowed for only those overpayments that were received
18 or were effected within one year of the date of the
19 taxpayer's claim," let's see -- "the date the taxpayer's
20 claim was files with FTB."

21 Now, my claim was filed March 15, 2017.

22 ADMINISTRATIVE LAW JUDGE CHO: I'm sorry. I'm
23 going to have to interrupt you. I believe the FTB has
24 determined that your letter, dated January 18, 2015, is
25 your claim for refund. Let me just confirm that with FTB.

1 Is that correct?

2 MR. BIRCHER: Actually, the letter here,
3 Exhibit G, is my request for refunds.

4 ADMINISTRATIVE LAW JUDGE CHO: That's true, but I
5 think they chose an earlier letter to try to assist you.
6 Let me confirm that with FTB.

7 MR. WERKING: Yes. The Franchise Tax Board
8 looked at the earliest documents in light most favorable
9 to Appellant, in which he implied he may have been
10 entitled to an overpayment for the 2007 tax year. And so
11 that was -- that is respondent's Exhibit F, the 2015
12 letter in which -- although, Appellant didn't specifically
13 indicate that he was entitled to an overpayment,
14 respondent accepted that document as Appellant's informal
15 claim for refund.

16 ADMINISTRATIVE LAW JUDGE CHO: Okay. Thank you.
17 Mr. Bircher, do you understand what they just told you?
18 They chose an earlier document to try to assist you.

19 MR. BIRCHER: Well, all that does is take me out
20 of -- takes me out of my -- how do I say this -- statute
21 of limitation. It takes me out of that range, if we go by
22 the actual letter that I sent to them, the March 15, 2017,
23 letter. Then that takes me within my statute of
24 limitations.

25 See the point that I'm trying to make? I don't

1 understand why -- why would they do that when the letter
2 here states, Exhibit G, that states what I requested. So
3 why are we using an earlier letter? That's -- that's
4 not -- I'm not understanding that --

5 ADMINISTRATIVE LAW JUDGE CHO: Let me see if --

6 MR. BIRCHER: -- because this is the letter I was
7 going for. Exhibit G is the letter that I was asking for
8 the refund.

9 ADMINISTRATIVE LAW JUDGE CHO: I believe that the
10 FTB has, at least according to the briefs that were
11 written, they were willing to accept the January 18th
12 letter and subsequent letters as part of the claim for
13 refund.

14 Is that correct, FTB?

15 MR. WERKING: That is correct. We accepted that
16 2015 letter, that earlier as Appellant's informal claim
17 for refund, that was then perfected when Appellant filed
18 his 2007 return indicating that he had zero tax liability.

19 ADMINISTRATIVE LAW JUDGE CHO: Okay. So I
20 believe then that Mr. Bircher's statement that you would
21 like your March -- I forgot the date.

22 MR. BIRCHER: That was March 15, 2017.

23 ADMINISTRATIVE LAW JUDGE CHO: -- your
24 March 15th, 2017, letter to be your claim for refund?

25 MR. BIRCHER: That's the letter that I sent in

1 after I found that the tax liability was fully paid. Once
2 I found out it was paid, then I put in the request for a
3 refund. Because I knew -- I found that there was a
4 statute of limitations within a year, so I had to -- you
5 know, once I found out it was paid, then I requested the
6 refund. So, you know, I don't get this other thing that
7 they're doing.

8 ADMINISTRATIVE LAW JUDGE CHO: Okay. I see your
9 argument now. Okay. Thank you. You can continue if
10 you'd like.

11 MR. BIRCHER: Oh, as I was saying with that --
12 with that said, my tax liability was paid in January 2017,
13 and my refund -- my claim for refund was done
14 March 15, 2017. So I'm within that year as far as statute
15 of limitations are concerned. And on this Exhibit H, it
16 says the same thing. I was within that year.

17 Now, this says, "Payments made by a taxpayer
18 received through FTB's collection efforts are effected the
19 date the payments are received."

20 Now, the thing I don't understand is they have a
21 collection date, dated October -- it was 10/10/2013. So
22 when I look at this, the date on this document is
23 5/30/2018. That's when it shows me having a credit. The
24 collection was done on the '13, and the credit was done on
25 the '18. I don't know the time here is -- and I still

1 don't have a clear date of when the actual tax liability
2 was paid -- considered paid.

3 On here my understanding is that it was
4 considered paid by 5/30/2018, the \$577.99, but I never
5 received a letter from Franchise Tax Board stating that it
6 was paid. This is something that I had kind of stumbled
7 into. So as far as I'm concerned, I followed the
8 procedure, the timeline to stay within that year. I sent
9 them the letter. Using the information that I received
10 through phone calls from the Franchise Tax Board, and
11 finding out that my tax liability was paid.

12 I don't have any other records stating the dates
13 of when it was paid, other than, you know, this exhibit
14 here for 12/27/2016 stating that my tax liability had
15 changed. When I received this, I checked into the 2007
16 and found that it was paid. That's the only way that I
17 found out this tax liability was satisfied.

18 So I'm using this as a guide. I mean, I
19 understand the point they're trying to make. They got the
20 money. They want to keep it. It's good. But technically
21 it wasn't owed, and I'm just asking for a refund.

22 ADMINISTRATIVE LAW JUDGE CHO: All right. Thank
23 you very much. The judges will meet, and we'll decide
24 this matter. We'll issue our decision within at least 100
25 days from today.

1 Is there any other questions from the panel?
2 What about FTB? Do you have any questions? It looks like
3 you want to say something.

4 MR. WERKING: I -- I kind of would like to
5 clarify, if I may?

6 ADMINISTRATIVE LAW JUDGE CHO: Sure. You can
7 clarify.

8 MR. WERKING: For taxpayer's benefit, I know
9 you're referencing my Exhibit E, and looking at the date
10 at the top of that document -- and that's actually the
11 date which that -- that page was print. That's not the
12 date of the overpayment. That \$577.99 payment is
13 actually -- the effective date is October 10th, 2013.

14 And for purposes of determining the effective
15 date of an overpayment, you would look to Treasury
16 Regulation 301-6611-1 subsection(d), in which the date of
17 the overpayment is the date of payment of the first amount
18 that is in excess of the tax liability.

19 And that is the date that payment was received
20 because there is no tax liability other than the lien fee
21 for \$16 for Appellant's 2007 tax year. So I hope that
22 helps the panel and is informational.

23 ADMINISTRATIVE LAW JUDGE CHO: Thank you. So
24 after that, does the panel have any questions?

25 ADMINISTRATIVE LAW JUDGE CHENG: No.

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ADMINISTRATIVE LAW JUDGE CHO: All right. So as I stated earlier, this concludes the hearing. The judges will meet and confer on the matter and discuss the issue; and we'll issue a decision within 100 days from today; so the case is now submitted, and the record is now closed.

(Proceedings adjourned at 1:22 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne 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 16th day of February, 2019.

ERNALYN M. ALONZO
HEARING REPORTER