

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE CONSOLIDATED)
APPEALS OF,)
)
CONSOLIDATED APPEALS OF CENTURY) OTA NO. 18010039
WEST PARTNERSHIP XXVIII, et al,)
)
APPELLANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, April 25, 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, 91401,
commencing at 1:05 p.m. and concluding
at 1:53 p.m., on Thursday, April 25, 2019,
reported by Ernalyne M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: Hon. GRANT THOMPSON

Panel Members: Hon. DANIEL CHO
Hon. NGUYEN DANG

For the Appellant: TIMOTHY THOMPSON
ANA VOGEL

For the Respondent: State of California
Franchise Tax Board
By: MICHAEL CORNEZ
NANCY PARKER

TAX COUNSEL
Legal Division
P.O. Box 1720
Rancho Cordova, CA 95741
916-845-2498

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	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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E X H I B I T S

(Exhibit Index, excluding Exhibit 7, were received into evidence at page 6.)

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1 Los Angeles, California; Thursday, April 25, 2019

2 9:00 a.m.

3
4 ADMINISTRATIVE JUDGE THOMPSON: We're going on
5 the record now in the Office of Tax Appeals oral hearing
6 for the consolidated appeals of Century West XXVIII,
7 et al, Case No. 18010039, versus the Consolidated Appeal
8 of 28 Related Partnerships.

9 We're in Los Angeles, California. It's Thursday
10 April 25th, about 1:05 p.m., and my name is Grant
11 Thompson. I'm the lead administrative law judge for this
12 appeal. Myself and my co-panelist will look at all this
13 as equal members of the panel. So I have, as you can see,
14 Nguyen Dang and Daniel Cho with me today on the panel.

15 So first I would just like to ask the parties to
16 introduce themselves for the record. I think I know who
17 everybody is, but we want it on the record. And maybe
18 spell your names as well for the sake of the reporter. So
19 Franchise Tax Board, will you introduce yourselves.

20 MR. CORNEZ: Michael Cornez, C-o-r-n-e-z.

21 MS. PARKER: Nancy Parker, P-a-r-k-e-r.

22 MR. THOMPSON: Tim Thompson, T-i-m,
23 T-h-o-m-p-s-o-n.

24 MS. VOGEL: Ana Vogel, A-n-a, V-o-g-e-l.

25 ADMINISTRATIVE JUDGE THOMPSON: One thing I

1 wanted to mention is myself and the other judges may ask
2 questions during the hearing, and we don't want that to be
3 intimidating in any way. You know, we're just trying to
4 make sure we understand it, and I don't want either side
5 to read too much into that. We could just be working
6 through it in our minds.

7 All right. The only issue on appeal as the
8 parties have agreed is whether Appellant's have shown
9 reasonable cause for the late filing of the partnership
10 returns. And without objection, the exhibits reflected in
11 the exhibit index are admitted into the evidence except
12 that -- with regard to Exhibit 7, the timeline.

13 (Exhibit Index, excluding Exhibit 7
14 were received in evidence by the
15 Administrative Law Judge.)

16 We're going to look at that as an aid to
17 understanding Appellant's arguments. And we'll look to
18 the actual documentary evidence and the testimony to
19 understand when events occurred. But the timeline will
20 help us understand that.

21 So I think you all know this, but just briefly, I
22 believe we're going to start with some testimony from
23 Ms. Vogel. And then we'll have presentation from
24 Mr. Thompson that will -- may include some factual
25 components as well as argument, maybe up to approximately

1 an hour. And then Franchise Tax Board will present their
2 arguments, and Franchise Tax Board will have an equal
3 amount of time. But my understanding is they're not
4 expecting to take -- need that much time. So we'll see
5 what they need.

6 And then Mr. Thompson and Ms. Vogel, you'll have
7 a chance to apply to FTB's argument towards the close.
8 And during the process, like I said, myself and the other
9 judges may have questions to the extent that we're hearing
10 factual testimony. In other words, Ms. Vogel or
11 Mr. Thompson, if you're offering your memory of events as
12 testimony for us rely on as facts, we're going to have
13 that taken under oath as part of our rules so that we can
14 consider it as evidence rather than just sort of argument.

15 Franchise Tax Board does not have any witness
16 testimony. So we'll be dealing with whatever they say as
17 argument, not as evidence of any facts they mention. So
18 that's how that works. All right. So I think we can get
19 started.

20 Mr. Thompson and Ms. Vogel, if you're ready for
21 her presentation, I'll go ahead and swear her in.

22 MR. THOMPSON: Yes, we're ready.

23 ADMINISTRATIVE JUDGE THOMPSON: Okay. Please
24 stand and raise your right hand.

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ANA VOGEL,

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

THE WITNESS: Yes, I do.

ADMINISTRATIVE JUDGE THOMPSON: Thank you.

And Mr. Thompson, I want you to feel comfortable.
You can ask her questions however you want to elicit her
testimony. If you want to ask something open-ended just
to describe the events that went on, that's fine, or if
you want to be more specific. I don't want you to feel
that you have to do anything overly formal. Just proceed
as it works best for you.

MR. THOMPSON: Should I be sworn it at this time
as well too?

ADMINISTRATIVE JUDGE THOMPSON: You know, we can.
I thought I'd wait until after her testimony before your
presentation.

MR. THOMPSON: Okay.

ADMINISTRATIVE JUDGE THOMPSON: I appreciate
that.

MR. THOMPSON: I'm just worried some of my
questions may have a factual background to them.

ADMINISTRATIVE JUDGE THOMPSON: Yeah. Sure.

1 Let's go ahead and swear you in.

2 MR. THOMPSON: Okay.

3 ADMINISTRATIVE JUDGE THOMPSON: We might as well
4 get it done now.

5

6 TIMOTHY THOMPSON,

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

10

11 MR. THOMPSON: I do.

12 ADMINISTRATIVE JUDGE THOMPSON: Okay. Thank you.
13 All right. Please proceed with Ms. Vogel's testimony when
14 you're ready.

15 MR. THOMPSON: Yes.

16

17 DIRECT EXAMINATION

18 BY MR. THOMPSON:

19 Q Good afternoon.

20 A Good afternoon.

21 Q Could you state for the Appeals panel who your
22 current employer is?

23 A Century West Development and Century West
24 Properties.

25 Q What's your current title?

1 A Chief Financial Officer.

2 Q And how long have you been there?

3 A 14 -- oh, coming on 14 years in about a month and
4 a half.

5 Q Do your duties include accounting and overseeing
6 tax preparation?

7 A Yes, it does.

8 Q Can you tell us about your educational
9 background?

10 A Well, high school, of course. In college I went
11 to UCLA for three years, Bio degree and got a job on
12 campus. I continued my education through extension. All
13 the accounting classes they had there to get -- we talked
14 about this. It's like a certificate program, but I never
15 got the certificate. I didn't realize I could do it until
16 later.

17 Q Okay.

18 A That's about it for education.

19 Q Okay. So let's talk about now the cycle of tax
20 preparation and how Century West goes about getting
21 returns prepared. Can you just briefly talk about the
22 time frame, like, every partnership has a December year
23 end?

24 A Yes. Yes.

25 Q And then could you talk briefly about getting the

1 accounts the information?

2 A The partnerships are all December year ends. So
3 beginning in January, after the review process in our
4 internal offices for those partnerships, then I review
5 them quite diligently and thoroughly. And then I prepare
6 a package that I send electronically to our tax preparer.
7 They are, you know, include trial balances, the general
8 ledger, any changes in investors that had happened during
9 the year. Detail general ledgers -- yeah, I think I said
10 that.

11 But it's quite complete so that they can then
12 review the process. So we send it electronically,
13 probably beginning the third week of January. And I try
14 and send them all by the second week of February. We have
15 three tiers so that there are some properties that -- the
16 properties start first. And then they go into these other
17 numbered or lettered property -- partnerships.

18 And then -- so that process takes maybe until the
19 end of February beginning of March, the whole cycle. Then
20 they send everything back to me to review it again with
21 the K-1s and then mail out what needs to be mailed out for
22 them, for the K-1s, to the partners. Then at some point
23 in time towards this whole process, I get the e-file form
24 signed by the general partner. Return that to them also
25 by -- everything is electronic. And then the process for

1 me is done.

2 Q All right. So let me just summarize here
3 quickly. So basically sometime towards the end of
4 January 1st part of February, the accounting information
5 is submitted to, usually a CPA firm. They prepare the
6 returns by due date.

7 A Yes.

8 Q You review the returns for correctness, sometimes
9 changes sometimes not. E-file approval forms are given
10 back to the accountants by the due date of the returns.

11 A Yes.

12 Q The \$800 payments are made.

13 A Correct. For that process, yes. As soon as we
14 get the returns back for the first time, the \$800 are
15 paid.

16 Q And K-1s are delivered to the partners by the
17 original due date of the returns?

18 A Yes.

19 Q Okay. Now, over the course of this -- let's talk
20 about 2013 specifically. You returned the e-file approval
21 forms on April 10th to the CPA firm of 2014?

22 A Correct.

23 Q All right. So in that point in time, I believe
24 the e-file approval forms were signed by the general
25 partner?

1 A Yes.

2 Q Now, at that point you had assumed that the
3 returns were, in fact, delivered to the tax authorities?

4 A Yes.

5 Q When did you find out that the 2013 returns were
6 not delivered to the tax authorities?

7 A I don't know an exact date. I'm thinking it was
8 probably when we got the notice.

9 Q Well, let me -- let me just --

10 A Or there was an e-mail.

11 Q Let me back up here. This is why I wanted to be
12 sworn in. I think you were notified when I called you --

13 A You did call me.

14 Q -- and told you that the returns, in fact, had
15 not been filed. What do you want to do? You said --
16 well, I won't tell you exactly what you said -- but file
17 the returns.

18 A Correct.

19 Q Okay. This was in January 2015?

20 A That sounds correct.

21 Q Okay. Did you receive any notices from the
22 Franchise Tax Board prior to that date?

23 A No.

24 Q Did you receive any notices from the IRS prior to
25 that date?

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A No.

Q Did the FTB call you and say, "Hey, where are your returns?"

A No.

Q No. So you really had no indications that those returns had not been filed?

A Correct.

Q Okay. Did they -- the CPA firm that prepared the returns send you an e-file acknowledgment?

A No.

Q Now, over the course of -- I believe you started e-filing in 2007 up through the current year?

A Correct.

Q And have you not used three different distinct CPA firms?

A Yes.

Q I believe the one CPA firm was a small local firm?

A Yes.

Q Another firm was a large California firm with offices in San Francisco, Los Angeles, Encino, Orange County, San Diego?

A Yes.

Q And the other firm that you're currently using is in Century City?

1 A Correct.

2 Q And around 30 employees?

3 A Yes.

4 Q Have any of those firms ever sent you an e-file
5 acknowledgment?

6 A No.

7 Q So I think you started filing mid-2000 -- 2008
8 until today. You never received an e-file acknowledgment?

9 A No.

10 Q Okay. Has the FTB ever told you that you should
11 receive an e-file acknowledgment?

12 A No.

13 Q Have they sent you literature that you should
14 receive an e-file acknowledgment?

15 A Not that I know of.

16 Q So your understanding is that once you turn over
17 that e-file signature form to the CPA firm, it's their
18 responsibility to deliver the return to the taxing
19 authority?

20 A Correct. Yes.

21 Q At all times do you think you acted as an
22 ordinary prudent intelligent business person?

23 A I hope so.

24 Q Okay. Okay. In prior years were there any
25 issues with not filing your late file returns?

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A No.

Q Have there been any issues since the year 2013?

A No.

MR. THOMPSON: Your Honors, I think that concludes our testimony of Ms. Vogel.

ADMINISTRATIVE JUDGE THOMPSON: Thank you.

Franchise Tax Board, do you have any questions for Ms. Vogel?

MR. CORNEZ: I do not.

ADMINISTRATIVE JUDGE THOMPSON: Co-panelist, do you have any questions?

ADMINISTRATIVE LAW JUDGE CHO: I do not either.

ADMINISTRATIVE LAW JUDGE DANG: I just have one question for Ms. Vogel. I noticed you mentioned that you had believed that your task was complete when you had finished with the package and you had sent everything electronically to your return preparer.

Once you've done that, do you ever follow up with them regarding whether or not a return was actually filed? Or did you just -- it's assumed that you hire these professions, and they'll take care of the timely filing for you.

THE WITNESS: Yeah, I did.

ADMINISTRATIVE LAW JUDGE DANG: Yes. Okay.
Thank you.

1 MR. THOMPSON: I just want to make it clear.
2 Century West received copies of the returns for her to
3 review. The information just doesn't go over. The CPA
4 firms, all three of them, gave her copies of the returns
5 to review. So even before they get e-file approval forms,
6 the returns are reviewed. And then the e-file approval
7 form is signed. Then it goes to the -- then it's
8 delivered to the taxing authorities.

9 I just want to make it clear that they actually
10 get -- the tax returns are prepared while before any due
11 date and before the signing of the e-file approval forms.

12 ADMINISTRATIVE JUDGE THOMPSON: Let me ask you.
13 In your presentation, are you going to talk a little bit
14 about what happened at the firm in terms of how they ended
15 up not being filed?

16 MR. THOMPSON: I can go into detail. I think
17 that's distraction. I will definitely bring that up, but
18 I think in our letter of November 25, 2000, we go into
19 detail what happened. But I think when you take a step
20 back, I don't think it's really necessary to know why it
21 happened.

22 ADMINISTRATIVE JUDGE THOMPSON: I understand.

23 MR. THOMPSON: I'd be more than happy to go into
24 it.

25 ADMINISTRATIVE JUDGE THOMPSON: That's fine.

1 Okay. So then I think we can start with your
2 presentation, Mr. Thompson. You've already been sworn in.
3 And, you know, like I said, I know you're going to have
4 some portions, maybe argument, and some maybe in the
5 nature of factual testimony. And that's fine, if you
6 could distinguish between the two.

7 MR. THOMPSON: Right. I think most of my --
8 almost all of it is argument as opposed to actual
9 testimony, but if I cross the line --

10 ADMINISTRATIVE JUDGE THOMPSON: There's no line.
11 Just don't worry about it.

12 MR. THOMPSON: If I could tip toe up to the line?

13 ADMINISTRATIVE JUDGE THOMPSON: Yeah. We don't
14 have jury, and so we can figure it out.

15 MR. THOMPSON: All right. Thank you.

16

17 OPENING STATEMENT

18 MR. THOMPSON: Okay. We have several arguments
19 that we would like to make here. And I think our first
20 argument is reasonable cause and late filing penalty
21 applies only to the taxpayer. It only applies to what the
22 taxpayer did. What were the taxpayer's actions?

23 It doesn't apply to the accounting firm. It
24 doesn't apply to the delivering agent. It applies to what
25 did the taxpayer do. Were they reasonable? Were they

1 prudent? Were they a carefully businessperson? So -- and
2 I believe that's what the Revenue and Taxation Code
3 requires.

4 At this point I'd like to talk about filing of
5 tax returns. Our position is that if you look over time,
6 the tax process has not changed. It's still basically tax
7 preparation, tax filing, tax delivery. I want to repeat
8 that: Tax preparation, tax filing, tax delivery. We may
9 go into e-filing, and say, "Oh, it's changed." The
10 reality it hasn't changed.

11 So tax preparation, tax filing, tax delivery, and
12 it has to be in that order. I can't put it in tax filing
13 before preparation -- before tax filing. It has to be tax
14 preparation, tax filing, tax delivery. So we have to say
15 what did the taxpayer do during this situation? I think
16 e-filing tends to confuse the situation, but there's a
17 true distinction in each of these wants between tax
18 preparation, tax filing, and tax delivery.

19 Let's go way back, what happened in the 50s.
20 Returns were prepared. They were either self-prepared or
21 you hired somebody to do it. Non-delegable duty. I think
22 everybody would agree with that, but you oversee the
23 preparation. Next is the tax filing process. What
24 happens? Taxpayer signs the return. Clearly distinct
25 from tax preparation. What's the next step tax? Tax

1 delivery. The taxpayer signs the return, and gives that
2 return to an approved-authorized agent to deliver the
3 return to taxing authorities.

4 Years ago what was it? It was only the United
5 States Post Office. There's one exception to that. You
6 could walk it to the Franchise Tax Board. You could have
7 walked it to the IRS. But most people did what? Used the
8 United States Post Office to deliver the returns. That
9 was approved. This changed in the mid-90s when they had
10 designated private delivery services.

11 And if you go to the instructions of 1997,
12 there's a list of designated private delivery services. A
13 list comes out in 1997: Airborne Express, Overnite, DHL,
14 Federal Express. Nobody would ever suggest that taxpayer
15 gets into a DHL airplane and make sure their return is, in
16 fact, delivered to Sacramento. That's ridiculous. But
17 these are designated delivery services, fundamentally.

18 I want to go back. There's a distinction between
19 tax preparation, tax filing, and tax delivery. With
20 e-filing nothing has changed. Take FTB Publication 1345.
21 This is a 2018 handbook for what? Authorized e-filers.
22 Somebody has to be authorized to e-file. I can't go to
23 just anybody to get my returned e-filed. I have to be
24 authorized. I'm designated approved. I'm approved.

25 I want to go back. There's a distinction between

1 tax preparation, tax filing, and tax delivery. When you
2 read the FTB's arguments about -- you don't hear this,
3 prepare and file. Prepare and file. Keep in mind what
4 they're talking about. They're talking about the first
5 two-thirds of that process, not the last third about tax
6 delivery. So I want to be clear here. These are distinct
7 functions. And when they say, "You have a non-delegable
8 duty for tax preparation and for tax filing," we agree
9 with that. We agree. Tax preparation, tax filing.

10 Tax filing, that's when the taxpayer signs the
11 return under penalty of perjury that that return is
12 correct. All right. That's our argument, but I would
13 like to just indulge you for a minute. I'd like to go the
14 Boehm case for a second. And the FTB mentions this in
15 their argument.

16 And so I think when you read their brief, they
17 have several cases in which they say -- again, bear with
18 me for one second. On page of 3 of their brief they say,
19 "Taxpayers have non-delegable duty and responsibility to
20 timely file its return." They mention three cases
21 specifically there. One is the Boehm case. The other is
22 the Miller case. The other one is Boyle case.

23 If you go to the Boehm case, and I think they
24 talk about preparation and filing. And I think they take
25 text out of context. And you really read the case, you'll

1 find out they're talking about different things here and
2 applying it to this case. In the Boehm case -- bear with
3 me for one second, please.

4 ADMINISTRATIVE JUDGE THOMPSON: Take your time.

5 MR. THOMPSON: The Boehm case is a very
6 interesting case. Professor Boehm taught at UC Santa
7 Barbara in 1977. In 1977 he takes a position in Egypt, a
8 two-year contract. So from mid-77 to mid-79, he's in
9 Egypt. He says, "I gave my information to my accountant
10 to prepare and file the tax returns for 1977 and 1978."

11 Well, the first thing that comes to mind is --
12 and I'm skipping the part about there's a residency issue
13 here. Did he have to file or not? He's taking -- what I
14 would say in our professional vernacular -- very
15 aggressive positions. But to cut to the bottom line here,
16 he says, "I gave my information to my accountant to
17 prepare and file the returns."

18 How is that possible? How is that possible?
19 What do you need to file a return? Two things: Either
20 you have to sign the return, or the preparer whoever has
21 to have power of authority to sign that return. The only
22 time that really can happen is if you are incapacitated.
23 The Boehms weren't incapacitated. They were in Egypt.
24 They were teaching for the University of California.

25 I would suggest this, that preparation and

1 filing, they're two distinct things. And Mr. Boehm
2 clearly didn't meet his minimum standard. He filed the
3 returns in 1979. He didn't have copies of the returns by
4 the due dates of the returns. He came back from Egypt,
5 and says, "Oh, I have to file returns. I gave everything
6 to the accountant to prepare and file."

7 How is that even possible? He wasn't -- the
8 accountant didn't have power of attorney. He wasn't
9 incapacitated. Clearly there's a distinction here,
10 prepare and file. These facts do not even apply to our
11 case. And I think if you went through each of these
12 cases, you would find that to be true. That's the first
13 step of our argument.

14 ADMINISTRATIVE JUDGE THOMPSON: Okay.

15 MR. THOMPSON: Okay. We have a second stage to
16 our argument. And I want to be -- first of all, I want to
17 be clear here. I don't want to sit and -- me to be making
18 any personal attacks or anything like that. I want to
19 just -- making observations, and I want to be clear this
20 is not personal in nature.

21 ADMINISTRATIVE JUDGE THOMPSON: Okay.

22 MR. THOMPSON: The other party in this case is
23 the Franchise Tax Board. We have to look. Were they
24 reasonable in their denying the taxpayer's claims? Did
25 they spend time? Did they spend their due diligence to

1 say, "Wait a minute. Is this taxpayer correct or not?
2 Are their arguments valid?"

3 We reach the conclusion that, in fact, the FTB
4 was hasty in their judgment. They did not even consider
5 the case. And like I say, this is not personal. This is
6 an observation. The first thing, I'd like you to go to
7 their brief, if you have it. I would like you to go to
8 page 1 of the brief. And you'll see it's actually your
9 page 2, but it's actually page 1 at the bottom of their
10 brief.

11 ADMINISTRATIVE JUDGE THOMPSON: Yes, I see.

12 MR. THOMPSON: Okay. If you go to the top
13 sentence, the first sentence says, "Taxpayer's 28. All
14 late years tax returns filed for the year 2103." This is
15 the first sentence. This is something that should have
16 been caught on review. You may say this is a typo. I'll
17 say it's an error.

18 I would like you to go down to line 22, "On
19 March 29th, 2107." We don't even know that the FTB has
20 the right year in mind on this. I'd like to turn the page
21 to page 2, the first sentence, "Due to late filing of
22 their returns on February 20th, 2105."

23 Now, I could see if there's one mistake. There's
24 numerous mistakes. There is also mistakes of fact. If
25 you go down to line 22 on page 1, "On March 29" -- and

1 let's assume for right now they mean 2017 not 2107 --
2 "respondent mailed letters denying all claims to 21 of the
3 partnerships." That's not true. They mailed two. That
4 was it.

5 These letters went out -- two, I think, before
6 March 29. The rest went out in April and May. So we even
7 disagree on the facts that they're not even telling you
8 the correct facts. They did all this work on March 29 and
9 sent out all these letters. That's not true. Okay.

10 Another thing I'd just like to address, the
11 rounding of some of the comments that are made here.
12 Taxpayer's appeal, the denials, of all 28 entities to the
13 Board of Equalization. The board accepted the appeals
14 from the 21 entities who received denial letters, and did
15 not for the remaining 7. Some entities which no denial
16 letters were sent, the claims have been pending for more
17 than six months.

18 Actually, that's -- they've actually been pending
19 since November 25, 2015, when the appeals were filed.
20 It's not six months. It's closer to a year and a half.
21 So even on page 1 we say we have significant issues with
22 just their facts, and are they even addressing the right
23 year. I'd also next like to say we brought this to the
24 attention of people. We said, "Hey, there are errors in
25 this." We could have been resubmit documents to correct

1 these errors and not waste people's time. I feel so
2 strongly about this.

3 Judge Thompson, you let us submit documents on
4 the March 28th phone call. The timeline was submitted.
5 This could have -- this should have been changed. It
6 wasn't. So you have to think that the FTB may not even be
7 appealing the right year here, judging the right year.
8 Okay. I'd like to go further here.

9 I'd like to go through the FTB arguments in their
10 brief. And whether you can say they are arguments,
11 they're something. But the burden of proof is on the
12 taxpayer to establish reasonable cause for the abatement
13 of the penalty. We believe we've done that. Taxpayer,
14 ordinary intelligent prudent business person acted at all
15 times as you would expect somebody to act in these
16 circumstances.

17 Number two, taxpayers have a non-delegable duty
18 and responsible for timely file its return. Well, these
19 cases don't mention timely filing. What they mention is
20 prepare. Prepare and file. If you go to the Boehm case,
21 you go to the Miller case, and you go to the Boyle case,
22 that's what we're talking about. Preparing a file. These
23 don't talk about the delivery.

24 Number three, taxpayers rely on their CPA to
25 timely file tax returns constitute reasonable cause. We

1 agree with that. The question here isn't about
2 preparation of filing. It's about delivery of the
3 returns.

4 Number four, the IRS abated Appellant's penalties
5 under the First Time Abatement Provision, a provision
6 California does not have. Which means respondent cannot
7 follow the federal determination. This is just FTB's
8 policy. It's really not an argument. The FTB has an
9 argument -- a point where if the IRS doesn't abate the
10 penalty for whatever reason, the FTB doesn't abate the
11 penalty. So if there's no abatement from the IRS, it's
12 dead on arrival at the FTB.

13 So you have to get the penalty abated at IRS
14 level to step up to the plate with the FTB. I would also
15 like to bring to your attention Exhibit 6 in the handout.

16 ADMINISTRATIVE JUDGE THOMPSON: This would be the
17 October 16th letter?

18 MR. THOMPSON: Yes. And with the letterhead
19 background. In this Exhibit 6 is a letter that we wrote
20 to the California Department of Tax and Fee
21 Administration. As noted earlier, we appealed 28 late
22 filing penalties. The Franchise Tax Board denied 21 of
23 the 28. The other 7 were deemed denials. This comes into
24 play -- and when I first read it, I thought it was to our
25 advantage. Because the difference is when you file an

1 appeal with FTB and they deny it, that starts the clock
2 ticking on your response time.

3 What if they don't do anything? What if they do
4 nothing? The clock doesn't tick. I thought that's a
5 great advantage to the taxpayer. I never thought for a
6 second that it would work to the FTB's advantage not to
7 issue denial letters. This is exactly what happened in
8 this case.

9 In this case, on July 24, 2017, the Department of
10 Tax and Fee Administration gave the FTB until
11 October 22nd, 2017, to respond to our appeal. And they
12 mentioned that there's still 7 denial notices out there.
13 Okay. October 3rd, which is your Exhibit 6, the
14 Department of Tax Administration grants the other seven
15 and says, "They are now giving FTB until December 22nd to
16 respond."

17 I would say two things. I don't know whether the
18 FTB even asked for the extension of an additional two
19 months. I can't -- I -- it's not in any letter. It was
20 never communicated to us. They should not even have been
21 granted this extension. Their response, in my mind, is
22 late. The very act of them not issuing denial letters
23 gave them an additional extension of time. That doesn't
24 seem fair.

25 I want to say another thing. These appeals all

1 went in at the same time. This is not haphazard. It's
2 not like we went to one post office box and sent them, and
3 then went to another post office box. They all went in
4 the same envelope. And for them to get an extension of
5 time, they were all the same. It seems like it's not
6 right. It's not reasonable.

7 I would also like to say did the FTB rush --
8 hastily rush their judgment? If you go to the FTB
9 Exhibit A, these are the IRS transcripts, and these are
10 the only exhibit that the FTB speaks about. If you look
11 at the top middle page, there's in fact a date, a
12 transcript date which they pull the transcript from the
13 IRS.

14 If you go to Exhibit A go to page 1 of 58, it
15 says, "November 2nd," and it's right above the dotted
16 line.

17 ADMINISTRATIVE JUDGE THOMPSON: On which page?

18 MR. THOMPSON: This is Exhibit A, page 1.

19 ADMINISTRATIVE JUDGE THOMPSON: Okay.

20 MR. THOMPSON: Okay. Do you see that? You can
21 flip through these, and you'll say they almost all say,
22 "September 11."

23 This is after the original due date of October
24 22nd. They didn't even begin their work until after this
25 extension. Only one of these is before the extended due

1 date. I mean before the original due date of
2 September 22nd, only one. I would suggest to you that
3 they never intended to respond by the original due date of
4 September 22. Somehow this doesn't seem right. You go
5 through each of one of these, they are pulled after that
6 original due date.

7 Your Honor, bear with me for one second, please.

8 ADMINISTRATIVE JUDGE THOMPSON: Take your time.

9 MR. THOMPSON: I would like to also go back to
10 the denial notices that they issued. On the denial
11 notices, in their haste, on exhibit -- go back to
12 Exhibit 2. And that's a copy of all the denial notices
13 that went out.

14 ADMINISTRATIVE JUDGE THOMPSON: Yes.

15 MR. THOMPSON: I would like to go to page 6 and
16 page 7. They don't even have the right date of our
17 letter. Page 6 says, "Thank you for your letter received
18 August 31st, 2016." It wasn't 2016. It was
19 November 25th, 2015.

20 Turn the next page. "Thank you for your letter
21 received February 15th, 2017." It wasn't
22 February 5th, 2017. It was November 25th, 2015. They
23 rushed to judgment. They didn't even consider the
24 taxpayer's claim. So I would just like to say in
25 conclusion, you know, we believe, based on the facts and

1 in-depth analysis of those facts that we've shown, the
2 delay filing penalties assessed by and paid to the
3 Franchise Tax Board should be abated due to reasonable
4 cause that at all times the taxpayers acted in a manner
5 that were an ordinarily intelligent prudent business
6 person would have acted similar under the circumstances.

7 ADMINISTRATIVE JUDGE THOMPSON: Thank you. Okay.
8 With that, I think Franchise Tax Board, are you ready for
9 your presentation?

10 MR. CORNEZ: Sure.

11 ADMINISTRATIVE JUDGE THOMPSON: To the extent
12 there was factual testimony, I guess you have the right to
13 question. I didn't really feel like I heard factual
14 testimony.

15 MR. CORNEZ: I have no questions for
16 Mr. Thompson.

17 ADMINISTRATIVE JUDGE THOMPSON: Okay. So please
18 proceed when you're ready.

19

20 OPENING STATEMENT

21 MR. CORNEZ: So there's a number of attacks on my
22 brief. I'm not going to address most of them. But there
23 was one attack that was on a legal point, which is what's
24 not legally correct. And we did not say that the claims
25 were deemed denied after six months. We said pending more

1 than six months. And so he's correct that they were
2 pending a year and a half. But that does give this panel
3 jurisdiction over the 28 appeals, which is what's before
4 us.

5 There are 28 partnerships that failed to file
6 their returns timely for the 2013 tax year. In fact, they
7 weren't filed until January 2015. That's not in dispute.
8 It's a fundamental tax law that the taxpayer has a
9 non-delegable duty to file a tax return, not to prepare,
10 not to sign an e-file document, but to file the tax return
11 with the taxing agency.

12 The failure to do so triggers a penalty. And in
13 this case, the penalty was properly calculated. That's
14 not in dispute. So they seek -- the taxpayer here seeks
15 to abate the penalty on the grounds that they had
16 reasonable cause for the late filing. That argument must
17 be rejected.

18 As the 1985 U.S. Supreme Court decision in Boyle
19 makes very clear, a decision that's been followed by the
20 Office of Tax Appeals in Quality and Tax -- Quality in Tax
21 and Financial Services, a precedential decisions, and many
22 precedential decisions by the Board of Equalization. The
23 taxpayer's duty to file a return is non-delegable. They
24 may not -- a taxpayer may not rely on an agent to file the
25 return for it or him or her.

1 Boyle holds that reliance on the taxpayer's agent
2 to file is not reasonable cause. The taxpayer's claim
3 that they relied on their taxpayer preparer to file the
4 return, and this constitutes reasonable cause. Boyle
5 forecloses this argument, and its rule is determinative in
6 this case.

7 Taxpayers have not been demonstrated a
8 reasonable cause and the penalty should not be abated.
9 The taxpayer seem to claim here that this case is
10 different. They assert that they did everything they were
11 supposed to do. That is, they reviewed the returns. The
12 returns looked correct, and they signed the e-file
13 authorization. But that's not filing of a return. That's
14 simply approval by the taxpayer. The taxpayer's duty was
15 to file the return, not to simply give an e-file document
16 to their CPA.

17 Furthermore, the testimony of the taxpayer was
18 there was no follow up to see if, in fact, the returns
19 were delivered to the taxing agency as the taxpayer keeps
20 emphasizing the word delivery. One of the arguments that
21 the taxpayer made was years ago we would mail a return.
22 And nowadays we have delivery services such as FedEx or we
23 have e-filing, but that doesn't change the law.

24 We agree the law has not changed. It's still the
25 taxpayer's non-delegable duty to file a return. Just as

1 in the past they could not rely CPA putting a stamp on it
2 and mailing it. They can't rely on a CPA today e-filing
3 their return. It's a non-delegable duty. In fact, the
4 CPA here acknowledges that they didn't file it. That's
5 also not in dispute. They said that the filing -- the
6 failure to timely file the return was a, quote,
7 "administrative error." And it was quote, "Clearly an
8 error by the CPA." That is not reasonable prudent
9 business practice by the CPA to file the return.

10 There's nothing in the record to indicate the
11 taxpayer's follow up to see if their returns are filed.
12 There's nothing in the record to indicate that the CPA
13 checked to see if the returns were filed and accepted by
14 the IRS or FTB. In fact, it wasn't. We know that.

15 As stated in the FTB's Publication 1345 reference
16 in our briefing, "An acknowledgment is sent by the FTB to
17 the e-filing indicating that the return has been accepted
18 or rejected." Obviously, none was sent here because no
19 return was filed. Yet, the CPA never followed up with the
20 CPA. I'm sorry. The CPA never followed up with the FTB
21 or its e-file service provider to determine why no
22 response was received from FTB about the returns.

23 This is hardly how a prudent business person
24 would have acted when filing 28 partnership returns. The
25 taxpayers had a duty to file a return. The duty may not

1 be delegated and reliance on a professional to file does
2 not constitute reasonable cause. The fact that the
3 returns were to be e-filed as opposed to mailed, does not
4 change under the law. No reasonable cause existed here,
5 and the penalty should not be evaded. Thank you.

6 ADMINISTRATIVE JUDGE THOMPSON: Okay. Thank you.
7 I will take a moment see if there's any questions from my
8 co-panelist at this point.

9 ADMINISTRATIVE LAW JUDGE CHO: I don't have any
10 questions at this point.

11 ADMINISTRATIVE LAW JUDGE DANG: No questions
12 either.

13 ADMINISTRATIVE JUDGE THOMPSON: Okay. I don't
14 think I have any questions, but Appellant you do have an
15 opportunity for a ten-minute rebuttal if you would like to
16 do that.

17 MR. THOMPSON: May I have a second?

18 ADMINISTRATIVE JUDGE THOMPSON: Yes.

19 (There is a pause in the proceedings.)

20 MR. THOMPSON: Your Honors, I'm ready.

21 ADMINISTRATIVE JUDGE THOMPSON: Okay.

22

23 CLOSING STATEMENT

24 MR. THOMPSON: Okay. First of all, I'd like to
25 address Boyle for a second. Once again, it's prepare and

1 file. The Franchise Tax Board is using this as a cover
2 all by not looking at the facts of Boyle. I would like to
3 ask the FTB, when did the attorney in that case -- it was
4 a state attorney -- have power of attorney to actually
5 file a return on behalf of the taxpayers. Returns in
6 those cases were prepared well after the due dates of the
7 return.

8 The taxpayer in question, the executor, knew the
9 due dates. He didn't have a copy of the return. He kept
10 going to the attorney, "Are you going to file it?" The
11 attorney never had power of attorney to sign and file the
12 returns begin with. The FTB would make it sound like the
13 preparer there could sign and file for the estate. That
14 was not the case.

15 The other thing I would like to say is the FTB
16 makes it sound like a reasonable taxpayer -- I mean
17 reasonable cause. Every taxpayer has to go and read now
18 Publication 1345, 2018 handbook for authorized e-filing
19 providers. Reasonable cause is assessed -- I mean, late
20 filing penalties are assessed against the taxpayer. It's
21 the taxpayer you have to look at, not CPA firm they keep
22 talking about.

23 How many reasonable cause penalties have been
24 abated for the post office or DHL? You have to look at
25 the actions of the taxpayer. That's who the penalties are

1 assessed about. Were their actions reasonable?

2 That's -- that's my rebuttal to what the
3 Franchise Tax Board has said.

4 ADMINISTRATIVE JUDGE THOMPSON: Thank you. Well,
5 let me ask. What would you say about the situation with
6 there was not e-filing. And I think FTB references this
7 in their argument. If the taxpayer acted completely
8 reasonably and diligently in giving the returns to the
9 preparer with direction that they be mailed and sign the
10 returns, and then the preparer for whatever reason did not
11 get the returns in the mail, maybe -- could you talk a
12 little more about how you do that I think as different
13 from a situation where there's e-filing involved.

14 MR. THOMPSON: Yes, I will. First of all, under
15 e-filing what are firms? They're now authorized. They're
16 authorized providers. It says it right in their
17 publication. Under the mailing example by the FTB, CPA
18 firm wasn't a -- authorized to mail. The taxpayers now,
19 when you have publication, they have reason to believe
20 that a CPA firm is an authorized e-file provider. They
21 are going to deliver the product to the taxing authority.
22 Reasonable people.

23 It's -- it's right in the publication they're
24 authorized. In his example, the CPA firm was not
25 authorized to mail the return. The taxpayer said, "Hey,

1 can you do this for me?" CPA firm did it.

2 ADMINISTRATIVE JUDGE THOMPSON: So it's a -- in
3 your mind -- in your arguments analogous to a common
4 carrier is --

5 MR. THOMPSON: A designated approved common
6 carrier. I want to go back to that because if you get to
7 the designated private delivery companies, there were
8 standards they had to follow. They had to write
9 electronic records. They didn't do this. It wasn't --
10 you couldn't use Main Street Delivery Service to deliver
11 your returns. There was designated list, and they had to
12 meet the qualifications to get on the list.

13 ADMINISTRATIVE JUDGE THOMPSON: Okay. I don't
14 have any more questions. Again, I want to give an
15 opportunity for my co-panelist. Do you have any
16 questions?

17 ADMINISTRATIVE LAW JUDGE CHO: No everything is
18 clear with your arguments I understand everything at this
19 point. Thank you.

20 ADMINISTRATIVE LAW JUDGE DANG: Thank you. I
21 have no further questions.

22 ADMINISTRATIVE JUDGE THOMPSON: Then unless the
23 parties have anything further, I think we're ready to
24 close the hearing. Is everybody satisfied that they had
25 the chance just to make their peace?

1 MR. CORNEZ: We made our complete presentation.
2 Thank you.

3 ADMINISTRATIVE JUDGE THOMPSON: Okay. And
4 Appellants, everything okay?

5 MR. THOMPSON: You validate parking? Could we go
6 off the record for a second, if you don't mind?

7 ADMINISTRATIVE JUDGE THOMPSON: Let me suggest
8 this. Let me go ahead and close it, and then we'll be off
9 the record. It'll just take me two seconds. I got my
10 little three sentence spiel. All right.

11 So at this point I'm closing the record and
12 concluding the hearing. We're going to take this case
13 under submission. I do want to thank both parties
14 sincerely for coming and making very clear and respectful
15 arguments. I feel like we had a good proceeding today.

16 And I don't remember if we talked about this in
17 the prehearing conference, but in terms of next steps, we
18 the panel will get together and discuss it. And then we
19 draft an opinion that's mailed to the parties. And we
20 have to get that out within one days. I'm hopefully get
21 it out quicker than that but certainly within 100 days.
22 I'm hopeful we'll get it out much quicker than that, and
23 that's certainly within 100 days.

24 That's it. So thank you very much. The hearing
25 is now closed.

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(Proceedings adjourned at 1:53 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 17 day of May, 2019.

ERNALYN M. ALONZO
HEARING REPORTER