

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
ALICIA GAMARRA,) OTA NO. 18010924
)
)
 APPELLANT.)
)
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TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, April 25, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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IN THE MATTER OF THE OF,)
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Transcript of Proceedings, taken at
355 South Grand Avenue, South Tower, 23rd Floor,
Los Angeles, California, 91401,
commencing at 11:22 a.m. and concluding
at 11:46 a.m., on Thursday, April 25, 2019,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: Hon. NGUYEN DANG

Panel Members: Hon. LINDA CHENG
Hon. KENNY GAST

For the Appellant: FRANK BELLOSPIRITO

For the Respondent: State of California
Franchise Tax Board
By: DAVID KOWALCZYK
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I N D E X

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

2 9:00 a.m.

3
4 ADMINISTRATIVE JUDGE DANG: Good morning,
5 everyone.

6 We're opening the record in the appeal of Alicia
7 Gamarra before the Office of Tax Appeals. The Case No. is
8 18010924. This hearing is being convened in Los Angeles
9 on April 25th, 2019. The time is 11:22 a.m.

10 Today's case is being heard and decided coequally
11 by a panel of three judges. My name is Nguyen Dang. I am
12 the lead Administrative Law Judge for this case. Also on
13 the panel with me today is Judge Linda Cheng and
14 Judge Kenneth Gast.

15 At this time will the parties please introduce
16 themselves, beginning with the Appellant. Please spell
17 your name and include any titles, if you would like, for
18 the record.

19 MR. BELLOSPIRITO: Good morning. My name is
20 Frank Bellospirito. It's B-e-l-l-o-s-p-i-r-i-t-o, and I'm
21 the power of attorney for Ms. Alicia Gamarra.

22 ADMINISTRATIVE JUDGE DANG: Thank you.

23 MR. KOWALCZYK: David Kowalczyk for the Franchise
24 Tax Board. My last name is spelled, K-o-w-a-l-c-z-y-k.

25 MS. PARKER: I'm Nancy Parker for the Franchise

1 Tax Board. My last name is, P-a-r-k-e-r.

2 ADMINISTRATIVE JUDGE DANG: Thank you. The
3 issues I have for today is whether Appellant has
4 established that she is entitled to a refund of \$1,157 for
5 the 2015 tax year. The second issue I have is whether the
6 Office of Tax Appeals has jurisdiction to decide the
7 propriety of Internal Revenue Service intercepts of
8 Appellant's state tax refunds for the 2014 and 2016 tax
9 years, and if so, whether those intercepts were proper.

10 This is going to be a little awkward for me, but
11 Frank do those issues sounds correct to you in terms of --
12 let me rephrase. We're here because your client is
13 seeking a refund for the 2014 and 2016 tax years.

14 MR. BELLOSPIRITO: Not so.

15 ADMINISTRATIVE JUDGE DANG: Okay.

16 MR. BELLOSPIRITO: And the reason why it's not so
17 is we had an issue -- an ongoing issue which I was not
18 able to communicate with the Franchise Tax Board -- no
19 fault with the present company -- from June of 2014 all
20 the way to December of '17. And the original issues, I
21 went back to find them, started out as a withholding order
22 back in 2014.

23 That's what started the whole issue, which is
24 here. And then it was -- then there was the ACTA which is
25 the refund transmission to the IRS.

1 ADMINISTRATIVE JUDGE DANG: If I can just
2 interrupt you for a second. Not to get too technical
3 here, but what is the ultimate aim, the ultimate purpose
4 of your client being here. She's looking to retrieve this
5 money that was --

6 MR. BELLOSPIRITO: Well, we're looking to
7 retrieve that and there was some other money that was lost
8 in there. So -- and that can be presented on paper, not
9 discussed.

10 ADMINISTRATIVE JUDGE DANG: Okay. So we'll hear
11 your arguments.

12 MR. BELLOSPIRITO: Yeah. I just listen to this,
13 and then we'll take it from there in the interest of time.

14 ADMINISTRATIVE JUDGE DANG: Okay. Thank you.
15 Mr. Kowalczyk, do those issues sound correct to you? Is
16 there any --

17 MR. KOWALCZYK: Oh, yes. They sound correct, but
18 I'd like to clarify that the tax years at issue are '14,
19 '15 and '16.

20 ADMINISTRATIVE JUDGE DANG: Correct. I believe
21 that's what I have. Okay. I did have one sort of
22 clarification for the Franchise Tax Board. The situation
23 is a bit unique to me in that it was originally an amended
24 return that was filed and treated as a claim for refund.
25 It was later determined to be erroneous. The funds were

1 levied and retrieved. Then a claim for refund was filed
2 for the levied funds. In this case, where does the
3 jurisdiction lay? What are we addressing? Are we
4 addressing a deem denial of the original, and then in
5 return that was filed as a claim for refund, or the claim
6 for refund subsequent to the levy -- Franchise Tax Board's
7 levy?

8 MR. KOWALCZYK: So we're addressing the
9 subsequent, the latter claim for refund. And just to
10 clarify, there were about four tax returns that were
11 submitted. And because there are three identical ones,
12 and then one with a zero return, there was some confusion
13 and the zero return got processed accidentally.

14 And that's why we got to the erroneous refund --
15 or the withholding was erroneously refunded. And then we
16 retrieved the refund through our collection action, and
17 Appellant submitted their additional claim for refund.
18 And that's where we're at.

19 ADMINISTRATIVE JUDGE DANG: Was a notice sent
20 with respect to the claim for refund filed on the levy
21 denying the claim?

22 MR. KOWALCZYK: I believe not.

23 ADMINISTRATIVE JUDGE DANG: Has Franchise Tax
24 Board board acted on that?

25 MR. KOWALCZYK: I believe not. But it would also

1 be a deemed denial because I believe it was six months
2 after. We didn't act on the claim for refund within six
3 months.

4 ADMINISTRATIVE LAW JUDGE DANG: Okay. Thank you.

5 MR. BELLOSPIRITO: May I make a comment?

6 ADMINISTRATIVE JUDGE DANG: Sure.

7 MR. BELLOSPIRITO: Yeah. We're looking at the --
8 we're coming to the basis of the tax liability, which is
9 any liability and tax lien. So we're looking at from
10 federal level if there is a federal tax liability, and if
11 there's a state tax liability.

12 ADMINISTRATIVE JUDGE DANG: Okay. Thank you. At
13 the prehearing conference it was discussed that you would
14 like to enter what you have previously submitted as
15 evidence, and that would be combined into an electronic
16 file for your review.

17 You've indicated, just prior to going on the
18 record, that file, after I explained to you that I did see
19 your attachments from your recent submission included in
20 that file, that it appeared complete to you. Do you have
21 any issue with that file and the correctness of it.

22 MR. BELLOSPIRITO: No, sir.

23 ADMINISTRATIVE JUDGE DANG: Okay. Thank you.

24 Franchise Tax Board, is there any objection to
25 having that admitted to the extent that it would be

1 considered as evidence?

2 MR. KOWALCZYK: No objection.

3 ADMINISTRATIVE JUDGE DANG: Okay. Likewise,
4 Franchise Tax Board has indicated they would like exhibits
5 that were previously attached to their briefs, which you
6 have been provided a copy of during the briefing phase, as
7 evidence in this matter. Did you have a chance to review
8 the electronic file that includes those exhibits? Did you
9 have any issues?

10 MR. KOWALCZYK: No issues, Judge.

11 ADMINISTRATIVE JUDGE DANG: Okay. Thank you.
12 And, Frank, do you have any objection to the admission of
13 that into evidence?

14 MR. BELLOSPIRITO: I would have an objection
15 because we -- Congress has not established IRS as
16 non-positive law. So it's not, you know, it's not
17 recognizable. We're talking about positive law, and not
18 positive law under Title 1 Section 204 and statutes at
19 large.

20 That's what my client is responsible for. State
21 law, statutes at large, United States Code Title 1 Section
22 204, and all Supreme Court rulings and nothing lower. And
23 that's also supported or referenced in the IRS manual,
24 section 4, 2, 7, 2 and 8. So --

25 ADMINISTRATIVE JUDGE DANG: Under the rules that

1 govern the admissibility of evidence in our hearing today,
2 generally all relevant evidence is admissible. But that's
3 not to say they won't be given its proper weight when
4 we're considering rendering our decision. So with that
5 being said, it is tax returns and the evidence, the other
6 exhibits have been attached, Franchise Tax Board's brief,
7 they do bear on the relevance of the issue here.

8 So I'm going to go ahead and allow those into the
9 record. So with that said, we're going to go ahead and
10 admit the electronic briefing file in its entirety into
11 the record.

12 (Electron Briefing File was received in
13 evidence by the Administrative Law Juge.)

14 I also believe that Franchise Tax Board had
15 submitted a stipulation as to the interest and penalty --
16 I'm sorry -- the collection cost recovery fee for, I
17 believe, the 2015 tax year.

18 MR. KOWALCZYK: That's correct.

19 ADMINISTRATIVE JUDGE DANG: Okay. I believe you
20 probably could ask us that faster than me. Would you mind
21 restating that for the record?

22 MR. KOWALCZYK: Yes. The Franchise Tax Board
23 will be canceling the collection cost recovery fee. It
24 will also be abating interest as it's related to the
25 erroneous refund from April 29th, 2016, to

1 November 15, 2017.

2 ADMINISTRATIVE JUDGE DANG: Great. Thank you,
3 Mr. Kowalczyk.

4 Okay. Frank, if you're ready to begin with your
5 presentation --

6 MR. BELLOSPIRITO: Sure. I'll start with --

7 ADMINISTRATIVE LAW JUDGE DANG: -- you'll have 10
8 minutes to begin.

9 MR. BELLOSPIRITO: That's why I'm --

10 ADMINISTRATIVE LAW JUDGE DANG: Go ahead.

11

12 OPENING STATEMENT

13 MR. BELLOSPIRITO: I'll start with admissible
14 evidence and tax hearings, state law, rulings of the
15 Supreme Court and not lower, and it's supported by the
16 Internal Revenue Manual 4.10.7.2.8. We want stay within
17 the statutes at large after 1939 United States Code
18 Section 1204.

19 Authorities on the source of jurisdiction are the
20 federal and Civil Procedure 17(b) and The Rules of
21 Decision Act 28. State law says California Constitutions
22 Article One Section(7) California Constitution Declaration
23 of Rights states a person may not be deprived of life,
24 liberty without due process of law. Cited in a court
25 case, Dye versus the City Council of Compton, reenforces

1 that.

2 It states that the constitution is a fundamental
3 supreme law of the state and as all matters within its
4 scope, understanding that collection of taxes,
5 assessments, fines, penalties, and interest by the State
6 from private citizens within the scope of the
7 constitution. However, Mahoney versus Houlihan, the
8 obligation to guard and enforce the right of every person
9 secured by the federal constitution rest on the state
10 courts equally with the federal courts. Code of Civil
11 Procedure Section 706.070(b) we find the State's
12 definition for liability, tax liability.

13 State tax liability means an amount in which the
14 state has a tax lien as defined in Section 7162 of the
15 government code, excluding a tax lien created pursuant to
16 the Fish and Game code. State tax lien must exist before
17 there could be a state tax liability. Furthermore,
18 Revenue and Taxation Code Sections 19221 says, "A lien is
19 subject to Chapter 14 commencing with Section 7150 of
20 Division 7 of Title One of the government code."

21 Government Code Section 7162 says, "A state tax
22 lien means a lien created pursuant to section 8048 of the
23 Fish and Game Code. Sections 34233772 of the Public
24 Resources Code Section 67577, 87289, 96160, 63818, 81221,
25 61303, 22323, 63 or 38532 of the Revenue and Taxation Code

1 of Section 1708 of the unemployment code 1703."

2 State tax lien must be created pursuant to one of
3 these codes or else it is not a lien. Now, we reference
4 various Revenue and Taxation Codes. Under section cited
5 in the Government Code 7162 we find following: Revenue
6 and Taxation Code 76757 applies to sales and use tax.
7 Section 7872 applies to motor vehicle license text.
8 Section 8996 applies to the use and fuel tax. Section
9 16063 applies to the gift tax repealed by an initiative.

10 Revenue and Taxation Code Section 18881 applies
11 to personal income tax but was repealed by State"s 193.
12 Section 26161 applies to banking corporation law. 30322
13 applies to cigarette tax. 32363 applies to alcohol and
14 beverage tax, and 38532 refers to timber tax.

15 No provision in the state tax lien exist in the
16 Revenue and Taxation code with regards to income tax,
17 unless the requirements in Government Code Section 7162
18 can be met. None of the other code sections regarding
19 liens apply. Code section -- Civil Code of Civil
20 Procedure Section 706.072(a) says, "Withholding order
21 taxes is issued to collect state tax liability." But a
22 state tax liability is defined in section 706.070(b). It
23 says, "The state tax lien has to be filed in order for a
24 state liability to exist."

25 Since a state tax lien cannot be legally filed in

1 connection with income tax as already shown above, the
2 earnings withholding order for a state -- for taxes cannot
3 be legally issued. Referring back to the Civil Code
4 Procedure 76706.011(f) and the State's definition of
5 judgement debtor, it is now easily to be seen. The
6 extended definition cannot possible apply to a person in
7 the term, "judgment debtor", which is a party who is
8 obligated to pay money as a results of a court order.

9 The term judgment debtor appears no less than 54
10 times in the Civil Code of Procedures 706.052 through
11 706.052 and 706.102 through 706.129. Revenue and Taxation
12 Code 19503(a) says, "Franchise Tax Board shall prescribe
13 to rules and regulations necessary for the enforcement of
14 part 10. No regulation exist to support the liens with
15 regards to personal income tax or taxes on wages and
16 salaries. But if the FTB believes such a regulation
17 exist, I would like to see it.

18 We move on to the California Code of Civil
19 Procedure Section 487.022020. We find the following:
20 Except as provided in paragraph 2 of subdivision (a) of
21 subsection 3439.07 of the Civil Code, the following
22 properties are exempt from attachment all property exempt
23 of attachment of a money judgment, (a) properties
24 necessary for the support of the defendant who is a
25 natural person or a family of such dependent supported in

1 whole or in part by defendant, (b) earnings as defined in
2 section 706.711 emphasis added, (c) all property not
3 subject to attach in pursuing section 487.010.

4 When we research further to 706.121 of the
5 California Civil Code of Procedures for the State's
6 definition of earnings, we find the following which reads
7 in part as used in the chapter: (A) earnings means
8 compensation payable by an employer to an employee for
9 personal services performed by such employee, whether
10 denominated by as wages, salary, commission, bonus or
11 otherwise.

12 So here we have a clear definition that
13 definitive statement of the California State law that
14 wages, salaries, and earnings may not be attached by
15 statutes at large after 1939. Statute 53 Section 14
16 refers to cotton, distilled spirits, and firearms are
17 methods of the strength on taxes. Rulings of the Supreme
18 Court and not lower and also supported in the Internal
19 Revenue Manual and again, 4.10.7.8.2.8 -- excuse me. Let
20 me read that again. 4.10.7.2.8.

21 Done.

22 ADMINISTRATIVE JUDGE DANG: Thank you. I was
23 following along as you were reading. Did you want to
24 complete that or --

25 MR. BELLOSPIRITO: No. I'm trying -- like I

1 said, I tried to shorten it 'cause it is quite lengthy.
2 And I have that in my opening statement, but I think I
3 really nailed the parts that are important to this issue.

4 ADMINISTRATIVE JUDGE DANG: Okay. Thank you. I
5 appreciate that.

6 Mr. Kowalczyk, you have 10 minutes for your
7 opening statement.

8

9

OPENING STATEMENT

10 MR. KOWALCZYK: Thank you. There are two issues
11 before us today. The first issue is whether the Office of
12 Tax Appeals has jurisdiction to hear the matter regarding
13 the interagency offset for tax years 2014 and 2016. The
14 second issue is whether Appellant has established she is
15 entitled for claim for refund for tax year 2015.

16 First, the Office of Tax Appeals does not have
17 jurisdiction to hear the matters related to the
18 interagency offset because there are no grounds under the
19 California Code of Regulation that would allow the OTA to
20 hear this matter. The Franchise Tax Board properly
21 processed Appellant's claims for refund. And before they
22 were issued to Appellant, they were intercepted by the
23 Internal Revenue Service. The appropriate form for
24 Appellant to contest the interagency offset is with the
25 Internal Revenue Service.

1 The second issue, Appellant argues she's entitled
2 to her claim for refund for a multitude of reasons.
3 However, all of Appellant's arguments are a variation of
4 the theme that wages are untaxable. The Office of Tax
5 Appeals, the State Board of Equalization, and the federal
6 courts have all consistently, uniformly, and emphatically
7 have held for many years that wages are taxable.

8 According to the forms, W2s, appellant provided,
9 she received \$43,118 in wages from Trinity Care, LLC, and
10 \$307.00 in wages from Lopez and Arias. Appellant has not
11 denied that she received these wages for work for these
12 companies. Accordingly, the Office of Tax Appeals does
13 not have jurisdiction to hear the matters related to
14 interagency offset, and appellant has not established
15 she's entitled to her claim for refund.

16 Therefore, the Franchise Tax Board's action must
17 be sustained. Thank you.

18 ADMINISTRATIVE JUDGE DANG: Thank you. At this
19 time I'd like to ask my panel members if they have any
20 questions for the parties.

21 Judge Gast, do you have any questions?

22 ADMINISTRATIVE JUDGE GAST: No questions.

23 ADMINISTRATIVE JUDGE DANG: Judge Cheng?

24 ADMINISTRATIVE JUDGE CHENG: No questions.

25 ADMINISTRATIVE JUDGE DANG: Thank you. I don't

1 have any questions either. I think at this time I'd like
2 to proceed to closing statements.

3 MR. BELLOSPIRITO: Oh, okay. I was waiting for
4 that.

5 ADMINISTRATIVE JUDGE DANG: Yes. So Frank, you
6 may begin. You have five minutes for your closing.

7 MR. BELLOSPIRITO: Sure.

8

9 CLOSING STATEMENT

10 MR. BELLOSPIRITO: I object because, again, we're
11 talking -- he's referencing material that's in -- that
12 Congress has not passed into positive law. Title 26 in
13 the FTB is a non-positive law, and it's referenced in
14 the -- let's see. It's referenced in Title 1 Section 204
15 of the titles that are allowable that are in positive law.
16 Here we go. Sorry.

17 You have this as part of your evidence. Title 26
18 is not -- does not have a star in front of it. It's not
19 positive law, and we're subject to positive law, statutes
20 at large. So anything he can reference within statutes at
21 large and under positive law my client is responsible for.

22 FTB erred by withholding money in the absence of
23 a legal obligation. All state income tax withholdings is
24 dependent on the federal withholding. So the question
25 would be -- you have a copy of the federal assessment

1 creating the federal tax liability. That would be --

2 ADMINISTRATIVE JUDGE DANG: I'm sorry. Please
3 don't direct any questions to them.

4 MR. BELLOSPIRITO: Oh, I'm sorry. I didn't mean
5 to direct questions at him.

6 ADMINISTRATIVE JUDGE DANG: Is it hypothetical?

7 MR. BELLOSPIRITO: No. Well, the question would
8 be to the --

9 ADMINISTRATIVE JUDGE DANG: Rhetorical.

10 MR. BELLOSPIRITO: Do they have a federal
11 assessment creating federal tax liability? And I've --
12 it's in your reports. So in order to have a state tax
13 liability, you have to have a federal libeling. States
14 adopted the personal income tax to operate under the Buck
15 Act, which starts from the Public Salary Tax Act. It
16 comes into the Buck Act, and it comes down into the State.
17 And it's all mandated into federal territory, federal
18 zones. Ms. Gamarra does not live in the federal zone.
19 Ms. Gamarra lives in the Republic of California.

20 Federal zones are described in Title 48. You
21 have a copy of this also. We do not see the Union --
22 States of Union California or States of the Union in
23 Title 48 withholding of income tax. However, the State
24 mentioned in 4 of the federal state defined in the Buck
25 Act means territories in possessions as described in the

1 Title 1 Section 204, the federal territories in 48 and
2 section -- U.S. Code 5 Section 5517, withholding state
3 income taxes, which also refers to the State as -- State
4 means territory, possessions, and commonwealth of the
5 United States.

6 And we're talking about federal employees. And
7 federal employees are defined in the Public Salary Tax Act
8 and also in the Buck Act. And when you talk about wages
9 and salaries, they are defined, again, under Title 26
10 Section 3401, sections A, B, C, and D. And wages do not
11 apply to a natural person.

12 The Franchise Tax Board asked to
13 provide verify -- was asked to provide verifiable proof,
14 understanding that Title 1 Section 204 statutes at large
15 positive law provides Ms. Gamarra legal foundation on
16 jurisdiction, tax liability, penalties, collection. And
17 is there a contract that connects her with a state -- with
18 a trade or business connected with the federal government?

19 The State Action Doctrine also supported by the
20 Supreme Court confirms all civil statutory law is for
21 government and not private individuals. Ms. Gamarra is a
22 private individual, and it's offset by Strantons versus
23 Independence LTD versus Hoover. Income tax defined by the
24 U.S. Supreme Court is an excise tax upon the particular
25 privilege of doing business in a corporate capacity and/or

1 a public officer of an employee of the government.

2 So FTB erred by withholding money in absence of a
3 legal obligation. Since my client, Ms. Gamarra, is not
4 attached to the -- by the disclosure -- by the IRS, the
5 disclosure office has given her a clean bill of health.
6 When they transferred that money over, it becomes an issue
7 with the FTB and not the IRS. We have no issues with the
8 IRS as stated in the codes.

9 But when we have the issues with the FTB, they
10 just, you know, they in the absence of a legal obligation
11 and it's -- that's the basis of our position with them.

12 ADMINISTRATIVE JUDGE DANG: Thank you. I
13 appreciate your closing and staying within the time
14 limits.

15 MR. BELLOSPIRITO: It was hard.

16 ADMINISTRATIVE JUDGE DANG: Thank you. I
17 appreciate it. I understand the difficulties.

18 Mr. Kowalczyk, you have five minutes for your
19 closing.

20 MR. KOWALCZYK: Respondent will waive its closing
21 statement.

22 ADMINISTRATIVE JUDGE DANG: Okay. Thank you,
23 everyone. That concludes the hearing for today. We're
24 going to go ahead and close the record. This appeal will
25 be submitted for decision, and we will deliberate and

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review the record one more time. And we'll endeavor to
get you a written decision within 100 days.

Again, thank you, everyone, for coming.

(Proceedings adjourned at 11:46 a.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 17th day of May, 2019.

ERNALYN M. ALONZO
HEARING REPORTER