

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

DOUGLAS BRAMHALL, HEARING JUDGE

In the Matter of the Appeal of:)
FARHAD YAZDINIAN,) OTA No. 18032454
Appellant.)
_____)

TRANSCRIPT OF PROCEEDINGS, taken at
PBC - Wells Fargo Center, 355 South Grand Avenue,
Suite 2450, Los Angeles, California,
commencing at 9:35 a.m. on Tuesday,
March 19, 2019, heard before DOUG BRAMHALL,
Hearing Judge, reported by Lisa V. Berryhill,
CSR No. 7926, a Certified Shorthand Reporter
in and for the State of California.

1 APPEARANCES:

2 PANEL LEAD: DOUGLAS BRAMHALL

3 PANEL MEMBERS: SARA HOSEY
4 DANIEL CHO

5 For the APPELLANT: WITHERS BERGMAN
6 BY: CHARLES S. KOLSTAD, ESQ.
7 1925 Century Park East
8 Suite 400
Los Angeles, California 90067
(310) 277-9930

9 For the RESPONDENT: STATE OF CALIFORNIA
10 FRANCHISE TAX BOARD
11 BY: BRADLEY COUTINHO, ESQ.
12 Tax Counsel III
Legal Division
MS A260
13 P.O. Box 1720
Sacramento, California 95812-1468
14 (916) 845-2061
bradley.coutinho@ftb.ca.gov

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1 Los Angeles, California; Tuesday, March 19, 2019

2 9:35 a.m.

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4
5 JUDGE BRAMHALL: This is the appeal of Farhad
6 Yazdininian, OTA Case No. 18032454. It's Tuesday, March 19,
7 at 9:39 a.m. I am Doug Bramhall, again, and lead judge on
8 this panel. With me are Sara Hosey and Daniel Cho and we
9 are co-equal decision makers. Again, for the record at
10 this time will the parties please introduce yourselves.

11 MR. KOLSTAD: Charles Kolstad, on behalf of
12 Farhad Yazdininian.

13 MR. COUTINHO: Brad Coutinho, for the Franchise
14 Tax Board.

15 MS. MOSNIER: Marguerite Mosnier, for the
16 Franchise Tax Board.

17 JUDGE BRAMHALL: Thank you. Parties agreed that
18 the issue of subpoena or whether the FTB issued its notice
19 of proposed assessment for 2003 tax year within an
20 applicable statute of limitation and also whether the
21 appellant has established a basis for abatement of the
22 penalty and also to note for the record that the parties
23 have stipulated that should FTB prevail on those issues,
24 the penalty and tax are undisputed. Okay.

25 The parties have also agreed that the exhibit

1 index showing Appellant's Exhibit 1 and additional records
2 noted thereon will be entered as argument and FTB's
3 Exhibit A through G and J will be admitted into evidence
4 and additional records marked H and I will be entered as
5 argument without objection of either party; is that
6 correct?

7 MR. KOLSTAD: No objections.

8 JUDGE BRAMHALL: Great. Accordingly, I'm hereby
9 admitting into evidence Exhibit 1 for the Appellant, A
10 through G and J for the Franchise Tax Board.

11 (Appellant's Exhibit 1 received into
12 evidence.)

13 (Respondent's Exhibits A through G and
14 J received into evidence.)

15 JUDGE BRAMHALL: Neither party will be calling
16 witness. The FTB has waived its opening statement. So
17 we're ready to begin.

18 MR. KOLSTAD: Thank you, Your Honor.

19
20 OPENING STATEMENT

21 MR. KOLSTAD: We are here today for a very
22 simple reason. From the beginning of this whole process,
23 when the notice of deficiency was issued, we raised the
24 issue that the notice that the Franchise Tax Board
25 received from the IRS did not constitute a final federal

1 determination because the statute of limitations for both
2 federal and state purposes had expired.

3 Despite a number of correspondences in writing
4 and several phone calls with the field agent, the
5 Franchise Tax Board has yet to address the issue of why
6 our argument is incorrect. Their position has been we
7 have a letter from the IRS; we get two years. And the
8 fact that the statute for 2003, the year in question, had
9 expired for both federal and state purposes has never been
10 addressed by them and that's why we're here today, to
11 discuss why their position is incorrect.

12 JUDGE BRAMHALL: Okay.

13 MR. KOLSTAD: So that's my opening. If you'd
14 like, I can get into the details.

15 JUDGE BRAMHALL: Do you have any questions? I
16 understand your final federal determination argument based
17 on statute of limitations.

18 MR. KOLSTAD: Okay. Shall I begin?

19 JUDGE BRAMHALL: Yeah.

20 MR. KOLSTAD: Okay.

21 In order to understand why we're here today,
22 it's helpful to go back a little bit in time. So
23 Mr. Yazdininian is from Iran. He had bank accounts in
24 Israel, which he had failed to disclose on the appropriate
25 federal international information returns for the years --

1 for the year 2003.

2 In 2011 the IRS had a 2011 offshore voluntary
3 disclosure program and they said, to paraphrase, if you
4 want to play in our sandbox, here are the rules. And the
5 sandbox, if you play in it, you will not be assessed the
6 range of penalties and interest that you would otherwise
7 potentially be subject to if you come forward voluntarily
8 and you follow the outline set out in the 2011 FAQs,
9 frequently asked questions.

10 In order to play in the sandbox, you had to
11 agree to file amended tax returns for the period 2003
12 through 2010, regardless of the fact that the statute may
13 have expired. And there was no legal basis for that
14 requirement. But the IRS said again, if you want to play
15 in our sandbox and qualify for reduced penalties, here is
16 what you have to do.

17 And the penalties for failure to file the
18 treasury department form 90-22.1 -- which was the form in
19 question for that year -- was potentially 50 percent of
20 the high balance in the account each year for a six-year
21 period, so potentially 300 percent of the amount in the
22 account. Because of that my client decided that it was
23 appropriate for him to participate in the 2011 voluntary
24 disclosure program.

25 Accordingly, even though the statute of

1 limitations for 2003 had expired, he voluntarily filed an
2 amended tax return for 2003 and voluntarily paid the
3 taxes. What is interesting to know is that the IRS, to
4 paraphrase again, took the approach of heads, I win,
5 tails, you lose. If an amount was due, then even though
6 the statute had expired, you had to pay the tax and the
7 penalties in order to be in the program.

8 However, if a refund was due, the IRS's position
9 is that the statute had expired and therefore you did not
10 get the refund. So if you owed taxes, you had to pay even
11 though the statute was closed. But if you do a refund,
12 they would not give it to you because the statute had
13 closed.

14 So in the predecessor to 18622, which was 18451,
15 and as amended over a number of different periods of
16 time -- the requirement for the Franchise Tax Board to get
17 additional time to assess penalties is triggered by the
18 receipt from the IRS of a final federal determination.

19 In legal ruling 280, issue No. 2 dealt with
20 whether a final federal determination, those words,
21 covered a situation where the taxpayer voluntarily made a
22 payment of tax after the statute of limitations had
23 expired and in that legal ruling, it was concluded that
24 where the statute had expired and the payment was
25 voluntary, there was no final federal determination.

1 That legal ruling has been declared obsolete,
2 not because of issue No. 2 but because of issue No. 3.
3 Issue No. 3 went to the issue of what constituted taxable
4 income. There was a change in the revenue taxation code
5 that made that particular issue obsolete, which is why the
6 legal ruling was declared obsolete. But it was declared
7 obsolete not because of the issue at hand here as to what
8 constitutes a final federal determination.

9 Furthermore, if you look at Section 6401 of the
10 Internal Revenue Code -- and I believe it's regulation
11 1.6401-1(a)1 -- it is clear that for federal purposes a
12 payment of tax by a taxpayer after the statute of
13 limitations has expired is considered an overpayment. It
14 is not considered to be a tax. And if the taxpayer files
15 a refund claim within the appropriate statute, he can get
16 a refund for that voluntary overpayment.

17 If you look at Section 18622 -- and I will quote
18 briefly -- it says "If any item required to be shown on
19 the federal tax return included any gross income
20 deductions, penalties, credit or tax for any year."
21 Well, in this particular case, the payment by my client,
22 Mr. Yazdininian, on the amended return of the tax due
23 voluntarily constitutes an overpayment. It doesn't
24 constitute a tax.

25 Therefore, that overpayment, since it's not a

1 tax, can't fall under 18622 and therefore the fact that
2 there was a notice by the IRS to the Franchise Tax Board
3 is irrelevant. There is no additional tax due on that
4 notice. There is an overpayment under 6401.

5 So based on all of that, it is clear from the
6 analysis and the legal ruling and in the Robert Kerr case,
7 that -- the mere fact that a letter -- a notice is
8 received by the Franchise Tax Board from the IRS, if the
9 statute of limitations has expired, does not rise to the
10 level of a final federal determination and therefore the
11 additional time under 18622, 19059 and 19060 are not
12 triggered and therefore, the assessment by the Franchise
13 Tax Board in I believe it was '17 -- '16 was untimely and
14 therefore should not be required to be paid.

15 JUDGE BRAMHALL: Okay. I followed that.

16 Any questions?

17 JUDGE CHO: If it's okay, I would like to
18 reserve questions and talk about everything at one time.

19 JUDGE HOSEY: Yeah.

20 JUDGE BRAMHALL: You may proceed, Mr. Coutinho.

21 MR. COUTINHO: Yes.

22 JUDGE BRAMHALL: Please do.

23 MR. COUTINHO: Good morning. In this appeal FTB
24 issued a timely notice of proposed assessment for the 2003
25 tax year. In June 2015 FTB received information from the

1 IRS that Appellant's federal 2003 tax year savings account
2 had been adjusted due to an examination. Pursuant to
3 Revenue and Taxation Code Section 19059, FTB has two years
4 from when it is notified of a federal judgment to issue a
5 notice of proposed assessment.

6 Accordingly, FTB timely issued a notice of
7 proposed assessment to Appellant in September 2016. After
8 receiving Appellant's timely protest FTB affirmed M.P.A.
9 and Appellant has filed a timely appeal. Appellant
10 incorrectly contends today that there was no final federal
11 determination in 2015 because the statute of limitations
12 to assess additional tax expired in 2007.

13 Appellant also contends today that the payments
14 were voluntary, that they were an overpayment on the 2003
15 tax year account; however, IRS records contradict
16 Appellant's assertion and show that there was a final
17 federal determination in June 2015. Revenue and Taxation
18 Code Section 18622(d), defines a final federal
19 determination as the date on which an adjustment resulting
20 from an IRS examination is assessed.

21 As explained in FTB's opening brief, the
22 Internal Revenue Service, through a revenue ruling,
23 determined that a master file transcript, both the literal
24 and plain language versions, are to be relied upon to
25 verify the validity of an IRS assessment.

1 In this case Exhibit E of FTB's opening brief is
2 the plain language version of the master file transcript,
3 otherwise known as the account transcript. The account
4 transcript shows a tax assessment on June 8, 2015.
5 Accordingly, under subdivision D of Section 18622, the
6 final federal determination date for the 2003 tax year is
7 June 8, 2015, the date the IRS assessed additional tax.

8 Appellants did make payments on their federal
9 account, account transcript shows; however, the account
10 transcript shows there's no overpayment to Appellant's
11 account, federal account. Rather, it appears the payments
12 were made in regards to the additional tax that was
13 assessed for the 2003 tax year.

14 FTB was notified of the federal assessment by
15 the IRS on June 11, 2015. Accordingly, FTB's assessment
16 in September 2016 was issued timely, within two years of
17 the final federal determination under Revenue and Taxation
18 Code Section 19059. Appellant today has cited to FTB
19 legal ruling to support his position that the federal
20 statute of limitations expired prior to FTB's assessment.

21 However, FTB's legal ruling does not apply in
22 this appeal for three reasons -- the first, as Appellant
23 concedes today, legal ruling 280 was withdrawn in 1998;
24 two, the set of facts applied in legal ruling 280 are
25 different than that are at issue in this appeal;

1 and three, the statutory language articulated in legal
2 ruling 280, which was drafted in 1964, was changed in 1999
3 to include subdivision D to Section 18622, which defines
4 what a final federal determination date is.

5 Nonetheless, even if legal ruling 280 applies,
6 it does not avail Appellant of this case because IRS
7 records reflect that the federal statute of limitations to
8 assess additional tax had not expired prior to the IRS
9 assessing additional tax. As explained in FTB's reply
10 brief, the IRS's individual master file shows that the IRS
11 had until March 15, 2016 to assess additional tax and thus
12 the IRS's June 8, 2015 assessment was timely.

13 Accordingly, FTB respectfully requests it be sustained in
14 this matter and FTB's assessment be affirmed.

15 Regarding the accuracy related penalty issue,
16 FTB rests on its opening brief and requests that the
17 penalty be sustained. I'd be happy to address any
18 concerns the panel may have.

19 MS. MOSNIER: In response to Mr. Yazdininian's
20 discussion of legal ruling 280 and what a federal
21 determination is -- his argument that the language in
22 legal ruling 280 and the precursor to 18622 -- 18451 --
23 that this rates federal determination remains static since
24 the date that the legal ruling 280 had been promulgated,
25 it's simply incorrect.

1 And the reason 18622(d) was added in 1999 was
2 precisely because there had been confusion over the years
3 as to precisely what a federal determination was. In
4 fact, at the time legal ruling 280 was written, the phrase
5 was federal determination; it wasn't final federal
6 determination. That was added I think in '80, '82, maybe.

7 We have B.O.E. decisions. I pulled up a few
8 last week and looked at them. Starting in 1982, you have
9 a decision saying well, the date of the taxpayer and IRS
10 tax court settlement. Well, that's your final federal
11 determination date. And then you had, in 1985, the date
12 of the examination, of federal changes, the IRS form 4549.
13 The date that was signed, fully executed -- that would be
14 the final federal determination date.

15 Then you had the decision in August of '95,
16 Ralph Lewis, saying the date the IRS form 870(p), which
17 was a settlement agreement for partnerships, that that was
18 fully executed -- that would be the final federal
19 determination date. And a few months later you had the
20 decision, the last one from the Board of Equalization on
21 this issue, on the Evelyn decision in December of 1995,
22 saying that the date the deficiency is assessed is the
23 final federal determination date and that preceded the
24 addition in 1999 of 18622(d). And that is -- that
25 addition is clear, that the final federal determination

1 date is the date the tax is assessed pursuant to Revenue
2 Code Section 6203.

3 That statute in turn says it's assessed as set
4 out in the attendant treasury regulation. The attendant
5 treasury regulation tells you that the assessment is the
6 IRS record that includes the name of the taxpayer, the
7 character of the adjustment, the amount of the assessment
8 and that is signed by a revenue officer or other official
9 at the IRS.

10 And then in 2007 you have the revenue ruling
11 2007-21 that says well, if you look, as Mr. Coutinho
12 explained, at the master file transcript, either the
13 heavily coded certification -- which is Exhibit J -- FTB's
14 opening brief sets out the assessment statute expiration
15 date or the easy to read version -- the account
16 transcript, which is Exhibit E to FTB's opening brief --
17 they are clear that there was an assessment, the date of
18 the assessment and that is the final federal
19 determination.

20 We would note also on the transcript it's very
21 clear there was an examination. There was coding on the
22 account transcript; examination opened; then there are the
23 entries that show the additional assessments, penalties,
24 interest, tax, and then there is the closing entry --
25 that's transaction Code 47271 -- that shows the closing of

1 the return. That is the official record.

2 And those are the records on which FTB relies in
3 accordance with 18622(d) to determine the starting point
4 for an assessment under 19059 or 19060. Thank you.

5 JUDGE BRAMHALL: Just a point of clarification
6 along with all of that?

7 MS. MOSNIER: Sure.

8 JUDGE BRAMHALL: Your view that the addition of
9 a definition of a date includes the definition of a final
10 federal determination.

11 I read the verdicts and when I read the argument
12 about D -- D to me is a date certain but it isn't a
13 definition of final federal determination. So help me
14 understand why your argument that it is a definition of
15 the final -- it doesn't have anything to do with the rest
16 of your argument --

17 MS. MOSNIER: Sure.

18 JUDGE BRAMHALL: -- just a point of
19 clarification --

20 MS. MOSNIER: Sure. Because 18622(d) does say
21 that the date -- the final federal determination is the
22 date the tax is assessed. And so I think you cannot
23 decouple the date from the activity to which the date
24 applies.

25 JUDGE BRAMHALL: Okay. All right.

1 MS. MOSNIER: Not only that, that would be
2 consistent with the Adelman decision of the Board of
3 Equalization that says the final federal determination
4 date is the date that the deficiency tax is assessed.

5 JUDGE BRAMHALL: Now, Judge Cho, any questions?

6 JUDGE CHO: Yes. So I just wanted to get some
7 clarification on some documents that's before us here. In
8 Exhibit -- just first with the Franchise Tax Board --
9 Exhibit J, I believe you said, is the heavily coded master
10 transcript for the Appellant's account; is that correct?

11 MR. COUTINHO: That's correct.

12 JUDGE CHO: And on there -- I believe it's
13 page 4 out of 5 -- that he has the -- FTB has argued the
14 statute of limitations for the 2003 taxable year; is that
15 correct?

16 MR. COUTINHO: That is correct.

17 JUDGE CHO: Is it the one that's circled, that
18 "ASVD0315716"?

19 MR. COUTINHO: That is correct.

20 JUDGE CHO: So is that your position, that this
21 demonstrates that the statute of limitations is March 15,
22 2016; is that correct?

23 MR. COUTINHO: Yes, for the IRS.

24 JUDGE CHO: Thank you.

25 So now question to Appellant -- do you have any

1 reason to doubt that or can you explain your position --
2 because you stated that -- I believe that the statute of
3 limitations had already expired but according to FTB, this
4 shows the statute of limitations is still open until 2016.

5 MR. KOLSTAD: Well, I cannot speak to the
6 intricacies of the IRS's computer system. What I can tell
7 you is that the statute for 2003 would have expired for
8 federal purposes in 2007. Under the normal statute, if it
9 was a six-year statute, it would have expired 2010.

10 So the statute itself for the year in question
11 clearly expired long before my client voluntarily filed an
12 amended tax return and made a tax payment. I suspect that
13 the IRS did not want to redo their computer system merely
14 to deal with 4- or 5,000 people who decided to participate
15 in the voluntary disclosure program to provide for
16 different coding.

17 So why that is in there, I don't know, but it is
18 clear under federal law once statute has expired, you
19 cannot voluntarily -- the IRS cannot extend it and the tax
20 taxpayer cannot voluntarily extend it. Once the statute
21 is expired, it's gone. And so the -- as to why it's in
22 there, I don't know. But it's very clear that there was
23 no ability on the part of the IRS to come in in 2015 and
24 assess a tax with respect to 2003.

25 The only reason I think it's there is because

1 there was a voluntarily payment and they needed to put it
2 somewhere.

3 JUDGE CHO: Okay. Thank you.

4 JUDGE BRAMHALL: When did Mr. Yazdinian -- or
5 you with Mr. Yazdinian -- begin your negotiations on the
6 voluntary disclosure program?

7 MR. KOLSTAD: I forget the exact window. There
8 was a six-month window in 2011. I believe it expired
9 September of 2011. There was a window of time in which to
10 do three things -- one was to file with the Criminal
11 Investigation Bureau in Philadelphia to make sure that you
12 weren't already being audited and you didn't know about it
13 because you were, then you couldn't participate.

14 Then there were some forms you had to file,
15 indicating which banks were involved and so on and so
16 forth, and then there were the amended returns and the
17 penalty calculation and bank statements and a whole bunch
18 of supporting documentation. So all of that would have
19 been filed in 2011.

20 JUDGE BRAMHALL: Okay.

21 MR. KOLSTAD: And then once that was filed, then
22 at some point --I forget exactly when -- Ms. Joyce
23 Cerangeli (phonetic) at the IRS went back and forth
24 looking at the penalty calculations, asking some
25 questions, and then eventually there was a closing

1 agreement and another check -- a couple checks were
2 written --

3 JUDGE BRAMHALL: Okay.

4 MR. KOLSTAD: -- to pay for the penalty.

5 JUDGE HOSEY: So this is in 2011. So the 2003
6 tax year had already -- the statute of limitations had
7 already run.

8 MR. KOLSTAD: Yes.

9 JUDGE HOSEY: So the IRS -- even though the
10 statute had run on some of these years, they required a
11 filing for the years that had already run?

12 MR. KOLSTAD: Yes.

13 JUDGE HOSEY: Okay.

14 MR. KOLSTAD: The FAQ -- the way the 2011 and
15 all of these voluntary -- offshore voluntary disclosure
16 programs had been run is the IRS publishes these
17 frequently asked questions on their website and then they
18 change it from time to time but they don't tell you; so I
19 can't check it -- and it's very clear in the FAQs for the
20 2011 OBDP that in order to participate, you had to file
21 2003 to 2010, which is interesting, for two reasons --
22 one, it's not the sort of six-year extended statute that
23 you might have thought they were.

24 In addition, there's a form, the 90-21
25 (inaudible) form, which is the foreign bank report form --

1 where it's a treasury department form and not a tax
2 department form -- that you're required to file if you
3 have more than \$10,000 in foreign bank accounts. There's
4 a separate section in the U.S. Code that deals with that
5 filing requirement that's not in the tax code section.
6 It's in a different section. And that form has a six-year
7 rolling statute of limitations. So even if you don't file
8 it, there's only six years.

9 So why the IRS picked eight years as opposed to
10 six years is unclear, but that's what the FAQ said.
11 That's why we filed 2003 through 2010.

12 JUDGE HOSEY: Thank you. Thank you for
13 explaining that. The argument regarding IRC 6401 and the
14 payment of tax after the statute of limitations is
15 considered an overpayment -- can you explain how that goes
16 into your argument about 18622(d) a little more for me
17 please.

18 MR. COUTINHO: Yes. The IRS account transcript
19 does not show that there has been an overpayment of tax
20 for the 2003 tax year. The IRS account transcript has
21 Exhibit E, April, reflects that there was a payment made
22 but it looks like it was applied to the additional tax
23 assessed by the IRS for the 2003. So we believe that the
24 IRC tax code section does not apply to this case.

25 JUDGE HOSEY: Okay. So the code itself says

1 payment or -- not overpayment?

2 MR. COUTINHO: I think the IRC code section
3 talks about -- applies if there's been an overpayment made
4 for that federal tax year; however, the account transcript
5 does not reflect that there has been overpayment made.
6 There's no balance; there's no -- it does not reflect that
7 there has been overpayment for that 2023 federal.

8 JUDGE HOSEY: I understand.

9 MS. MOSNIER: An account transcript would not
10 have a line item called "Overpayment." What it would have
11 is a line item noting a refund and/or credit of an
12 overpayment. The payment made by Mr. Yazdinian in 2014 is
13 not characterized as an overpayment. It is characterized
14 on Exhibit E as advanced payment of tax owed.

15 JUDGE HOSEY: No other questions for me. Thank
16 you.

17 JUDGE CHO: Mind if I ask a quick question?

18 JUDGE BRAMHALL: Please.

19 JUDGE CHO: Since we're talking about Exhibit E,
20 again, I just wanted to ask the Appellant, on Exhibit E,
21 page 2 of 2 -- it's the last page of Exhibit E -- it
22 starts with Code 420, "Examination of Tax Return." The
23 date was August 16, 2013. Do you know if Appellants were
24 ever notified by the IRS that their 2003 tax return was
25 being amended by the IRS?

1 MR. KOLSTAD: The process was -- the amended tax
2 returns that were required to be filed by the FAQ were
3 filed in 2011. They were then (inaudible) and put at the
4 bottom of a stack, a very large stack. And the top of the
5 stack was then assigned to agents across the United
6 States, many of them unhappily, to deal with.

7 Eventually, Ms. Joyce Cerangeli, at the IRS, was
8 assigned my client's pile of amended tax returns. She
9 looked at them, did whatever she felt was appropriate.
10 The discussions that we had had to do with the eventual
11 issues of were the bank deposits right and they were
12 transferred between the different accounts and did we make
13 appropriate adjustments so there's no double accounting
14 and all of that to come up with the 25 percent penalty
15 that had to be paid as part of participating in the
16 voluntary disclosure program.

17 So in the OBDP for 2011, there were four
18 payments that got made. There was the left side of the
19 page, which was the tax side, and you pay whatever
20 additional taxes. There was a penalty on the taxes that
21 hadn't been paid and there was interest on the penalty and
22 the taxes. And that was it. There were no penalties for
23 failure to file other forms that potentially could have
24 been filed that would have had penalties.

25 On the right side, was what they call the "In

1 lieu of penalty," which was in lieu of all the things they
2 could have potentially assessed as penalties; they took a
3 penalty of -- and again, there's no statutory basis for
4 this. They just made this up. They took a penalty of 25
5 percent of the highest balance in the accounts during the
6 period 2003 through 2010.

7 And so that was the big number. The rest of the
8 numbers were little. As you can see, in 2003 the amount
9 of additional tax owed was de minimus. The penalty was
10 very significant. It was six digits, high six digits. So
11 the discussion that I had with Ms. Cerangeli focused on
12 the computation in lieu of penalty.

13 JUDGE CHO: Okay. So it sounds like you were
14 aware that a tax return of some sort was being examined by
15 the IRS; correct?

16 MR. KOLSTAD: Absolutely. But it was a
17 voluntarily filed tax return, so that he could participate
18 in the program. And voluntarily filing an amended tax
19 return after the statute has expired does not reopen the
20 statute. The only reason we filed this was to get the
21 benefits of the -- both 2001 and OBDP.

22 JUDGE CHO: Thank you. So it's kind of similar
23 to your previous statement to my further questions, which
24 was even though the IRS shows a statute of limitations
25 date of 2016, you still believe that is the statute had

1 expired earlier and there was nothing that could have been
2 done to open and you're not sure why the IRS had that
3 date; is that correct?

4 MR. KOLSTAD: Yes. The entries by the IRS in
5 the transcript cannot determine whether or not the IRS had
6 the ability to open the statute of limitations.

7 JUDGE CHO: Thank you very much for the
8 clarification.

9 JUDGE BRAMHALL: One last question, I think.
10 You cited a case, Robert Kerr?

11 MR. KOLSTAD: Yes, in our brief.

12 JUDGE BRAMHALL: Is that in your brief?

13 MR. KOLSTAD: Yeah.

14 JUDGE BRAMHALL: I'll find it in your brief.
15 Thank you.

16 MR. COUTINHO: I'll just note that he -- I think
17 it's in Appellant's required brief, that citation is.

18 And then also the account transcript as
19 Exhibit E does not reflect that there was an amended
20 return filed by the appellant for the 2003 tax return.

21 MR. KOLSTAD: Happy to provide a copy. And
22 actually, that's incorrect. If you look at the
23 transcript, shows that there was a return filed on a
24 timely basis in 2004. So if there was a return filed in
25 2004 and something happened in 2015, it has to have been

1 on the amended return.

2 JUDGE BRAMHALL: Okay. So closing statement?

3 MR. KOLSTAD: Okay. The Franchise Tax Board
4 appears to be relying on 18622 (d) to say that the
5 federal -- the final federal determination occurred when
6 the entries were made in '15 and I think they're failing
7 to focus on the fact that says "is assessed pursuant to
8 Section 6203 of the Internal Revenue Code." 6203 of the
9 Internal Revenue Code, I believe, allows them to assess
10 taxes within an open statute of limitations.

11 That's why, if you look at 6401 and the
12 regulation that we cited and you read the regulation, you
13 will see that it deals with a voluntary payment of tax by
14 the taxpayer and it's treated as an overpayment. So if we
15 have a payment of tax after the statute of limitations
16 expired and the regulation under 6401 says it's an
17 overpayment of tax, then it can't be a tax payment that
18 triggers 18622(a) in the first place.

19 So if we don't have a payment of tax for
20 purposes of 18622(a) in the first part of the sentence,
21 you never get to the second part of the sentence that says
22 "final federal determination." So we don't have to keep
23 reading because we don't have a tax. We have an
24 overpayment. And overpayment is not a tax.

25 JUDGE BRAMHALL: Okay. Closing?

1 MR. COUTINHO: Yes.

2 MR. COUTINHO: I'd just add that it is entitled
3 under IRS revenue ruling 207-21 to rely on official
4 records from the Internal Revenue Service and that it was
5 entitled to rely on the plain language version, which is
6 the account transcript. Thank you.

7 MS. MOSNIER: We'd also add there's no evidence
8 in the record to support the statements concerning the
9 offshore disclosure program, the filing of any amended
10 return for this year or regarding the authority of the
11 circumstances under which the payment was made, which
12 dovetails with FTB's position that it is entitled to -- in
13 fact, instructed to -- rely on the official IRS account
14 record in the discharge of its duties pursuant to the
15 revenue taxation code.

16 JUDGE BRAMHALL: Just -- I recall when this case
17 originated, it was 2003 through 2010, and 2003 was
18 separated out, but in the record prior to being separated
19 out, there was quite a bit of references to the voluntary
20 disclosure program. So I'll just point that out. But I
21 hear your point on 2007.

22 MR. KOLSTAD: Actually, if you look at the
23 protest letter that we filed on November 1, 2016, in the
24 statement of facts on page 2, it says "Taxpayers
25 participated in the 2011 offshore voluntary exposure

1 program," and on and on and on. So this also deals more
2 with the years 2006 through '10 rather than 2003. But you
3 made it clear from the beginning that the whole reason
4 this happened was because of the participation in the 2011
5 voluntary disclosure program.

6 JUDGE BRAMHALL: Okay. Anything further?

7 MR. COUTINHO: No.

8 MR. KOLSTAD: No, Your Honor.

9 JUDGE BRAMHALL: Okay. Then at 10:21 I'm going
10 to close the record in this case. Thank you all very
11 much. This case will now be submitted for decision.
12 Mr. Kolstad, Mr. Coutinho, I thank you very much both for
13 your presentations. We will take this matter under
14 consideration and it is our intention that we will mail
15 our written decision within 100 days of today. Thank you.

16 MR. COUTINHO: Thank you.

17 MR. KOLSTAD: Thank you.

18 (Proceedings concluded at 10:21 a.m.)
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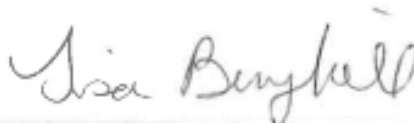
1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF LOS ANGELES)

4 I, Lisa V. Berryhill, C.S.R. No. 7926, in and for the
5 State of California, do hereby certify:

6 That the foregoing 29-page Hearing was taken down by
7 me in shorthand at the time and place therein named, and
8 thereafter reduced to typewriting under my direction, and
9 the same is a true, correct and complete transcript of
10 said proceedings;

11 I further certify that I am not interested in
12 the event of the action.

13 Witness my hand this _____ day of
14 _____, 2019.

15
16 
17 _____

18 LISA V. BERRYHILL, CSR NO. 7926
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