

DOUGLAS BRAMHALL, HEARING JUDGE

In the Matter of the Appeal of:)
)
 GENUINE ROSE, INC.,) OTA No. 18042850
)
 Appellant.)
)

TRANSCRIPT OF PROCEEDINGS, taken at
PBC - Wells Fargo Center, 355 South Grand Avenue,
Suite 2450, Los Angeles, California,
commencing at 9:00 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.

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3 PANEL MEMBERS: SARA HOSEY
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1 Los Angeles, California; Tuesday, March 19, 2019

2 9:00 a.m.

3
4
5 JUDGE BRAMHALL: I'm Doug Bramhall, and will be
6 lead judge on this panel. With me on the panel is Sara
7 Hosey and Nguyen Dang and we are co-equal decision makers.
8 And again, for the record, will the parties please
9 introduce yourselves.

10 MR. KAHEN: My name is Arash Kahen, attorney for
11 Genuine Rose.

12 MR. KOWALCZYK: David Kowalczyk, with the
13 Franchise Tax Board.

14 MS. PAGE: Natasha Page, Franchise Tax Board.

15 JUDGE BRAMHALL: Thank you. Parties have agreed
16 that the record reflects the issues in this appeal are
17 whether the Appellant has established that the late filing
18 penalty under Section 19131 imposed for a fiscal year
19 ended November 30, 2010 should be abated due to reasonable
20 cause in the absence of willful neglect, and secondly, if
21 not abated, whether the penalty was correctly computed.

22 The parties also agreed that the exhibit index,
23 showing Appellants' Exhibits marked 1 through 7 and
24 Franchise Tax Board Exhibits marked A through O and Q, are
25 acceptable for the record without objections and,

1 accordingly, I'm admitting those exhibits into evidence at
2 this time.

3 (Appellants' Exhibits marked 1 through 7
4 and Respondent's Exhibits marked A through O
5 and Q received into evidence.)

6 JUDGE BRAMHALL: FTB's Exhibit marked P will be
7 entered into the record for argument purposes only.

8 (Respondent's Exhibit P received into
9 evidence.)

10 JUDGE BRAMHALL: Since neither party will be
11 calling witnesses and the FTB has waived its opening
12 statement, I think we're ready to begin.

13 Mr. Kahen?

14 MR. KAHEN: Yes, Your Honor.

15 JUDGE BRAMHALL: Go ahead and proceed with your
16 opening statement and then continue right on into your
17 arguments on behalf of the taxpayer.

18
19 OPENING STATEMENT

20 MR. KAHEN: Certainly.

21 In this case my client, Genuine Rose -- original
22 return was due in September. Original return, without any
23 extension to file, was due on November. Extension to file
24 was filed. Petitioner submitted one of the exhibits that
25 was IRS transcripts as part of the response, which

1 actually shows in there that an extension was filed
2 because they used it as evidence to show that the tax
3 return was filed late.

4 At the time that the petitioner in this case was
5 filing this, there was no taxes due. Therefore, there was
6 only \$800 for the corporation and maybe that was the
7 reason why they were about two months late -- not eight
8 months -- as the respondents alleged in their work papers
9 that my client has filed late.

10 Even at that time there were no taxes due. My
11 client had no reason to note that there were additional
12 taxes to be done because originally the C.P.A. has used a
13 tax shelter that later on, after the IRS audit came about,
14 they show that they -- they didn't qualify for such a
15 thing; therefore, they were supposed to -- they assessed
16 additional income because of that and created a liability
17 with the IRS.

18 Later on, Franchise Tax Board stepped in,
19 requested the documents to be sent out. They made this
20 request to Mr. -- C.P.A., which is Mr. Michael Brody
21 (phonetic), which HPE is the name of their firm. The
22 cooperation went really well during the audits. They just
23 presented with their amended tax return. The C.P.A.
24 requested to know when should we make a payment? There
25 was no issue with regards to if there were additional

1 taxes to be done and the auditor basically advised
2 Mr. Brody "Wait until the amended return gets processed;
3 then we will give you with the additional interest that's
4 going to be -- we're going to give you the balance to be
5 paid."

6 Mr. Brody waited for FTB for a very long time
7 during this process. I do believe that they were
8 submitted around -- if I'm not mistaken, they were
9 submitted originally on -- for the review to FTB, was done
10 on December 10, 2015. December 10, 2015 it was sent to
11 the auditor and then a year passed. Right around December
12 2016, there's still nothing.

13 My client calls the auditor; "What's going on?"
14 Well, we have time to process it but, you know, because
15 Mr. Brody was actually looking for a way to pay off this
16 liability that was created as a part of the amended
17 return.

18 "No; there's nothing going on for now. We'll
19 let you know as soon as it happens." Then right around
20 March it turns out that -- March 9 -- right around
21 February -- my apologies -- the balance came about with
22 the penalties on there. When my client contacted the FTB,
23 they notified "Well, we issued the notice to you and we
24 had processed the amended return and this is the penalty
25 because you didn't make a payment at the time that we sent

1 you the notice."

2 When my client requested "Where did you guys
3 send it to, the notice," they're like "We sent it to the
4 previous address that was marked, on Broadway Street."
5 Keep in mind that my client had a P.O.A. on file
6 throughout the whole audit; they've been known to be the
7 P.O.A. for this taxpayer since the beginning of the audit.
8 P.O.A. never received that notice; client never received
9 that notice. FTB claims that we sent it out to the
10 previous addresses, updated -- Petitioner -- to update
11 their addresses.

12 But they still never talked about why they never
13 furnished one copy or one notice to the CPA in this
14 matter. Having said that, then even in the response they
15 showed us on exhibit. . . I apologize. One second. I'm a
16 little nervous. It's escaping my mind.

17 JUDGE BRAMHALL: It's all right.

18 MR. KAHEN: On Exhibit G, page 1 through 4 --
19 yes. Page 3, under "Response," they said that we sent
20 this notice and they're using that as -- because the
21 status -- notice status says on the top "Sent," but they
22 still never furnished a copy of what notice was sent out,
23 dated on February, that my client would have had the
24 chance to basically full pay the balance.

25 After that Mr. Brody went ahead and made a claim

1 for refund, thinking okay, it took FTB such a long time to
2 process it, especially at the time he called and he says
3 "Well, you didn't make the payment at this time;
4 therefore, we're going to assess the delinquent penalty
5 because you didn't submit the payment when the taxes
6 became due," which Mr. Brody again protests we never got
7 it. Until that moment there was no talk of "Your original
8 return was late." Until that moment, even Mr. Brody --
9 then Mr. Brody came to us, asked us "Can we appeal this?"

10 So we went ahead and appealed it and as soon
11 as we submitted our writing as to well, this is what
12 happened, you couldn't even show us where you sent the
13 notice and basically your records, we've requested them
14 many times like whether through FTB's website, their
15 online services basically provides you all the information
16 you need, all the notices that has been sent out.

17 There were no records of such notice. They just
18 said we had sent it on February. Again, we couldn't find
19 it. Then when we made the appeal, FTB and Respondent in
20 this case, Respondent back saying the original return was
21 about eight months past due anyway; so that's why we
22 assess this penalty. It wasn't because of the fact that
23 the notice that was sent to you was not received or
24 received or you didn't get it.

25 Basically, in their response to us their entire

1 argument was well, your original return has been late;
2 therefore, this is the situation. There's two issues with
3 that. The reasonable clause applies here because at the
4 time they file the tax returns, they had no reason to
5 believe there were going to be additional taxes to be
6 done. FTB originally never assessed penalties at the time
7 that the original return was filed, like maybe two months
8 or in their case, as they're saying, eight months late.

9 There were no penalties assessed at that time.
10 It's only subsequently, after this audit, that they came
11 back with this heavy penalty. Even if FTB's case, as
12 they're saying, is true, they should have qualified for
13 the 5 percent penalty because they were only two months
14 late at the time of filing the original tax return.

15 Because they filed on October 10, the due date
16 would have been September, according to them, and have
17 submitted evidence from a IRS transcript that says the
18 extension was filed because they used it as evidence to
19 show that the tax return was filed late.

20 Throughout this the taxpayer in here definitely
21 was not willful. They were not willfully trying to avoid
22 taxes or be late or be delinquent. The reason is because
23 as soon as they discovered that there is a tax liability
24 with a notice on it, within days they paid off the entire
25 balance -- 300-something-thousand. It was completely paid

1 off. They were not trying to forego or take their time in
2 terms of paying. They were waiting for the return to be
3 processed. And at the same time the entire process
4 were relied upon on this C.P.A. here that used,
5 unfortunately, not a good tax shelter and that's why the
6 liability came about.

7 So as we see in here, the taxpayer relied on the
8 expert. The taxpayer was not willful in their act. They
9 took every step possible in order for them to make sure
10 that the liability after the audit is paid on time. And
11 they made phone calls, reached out to the auditor,
12 Mr. Brody did, and throughout this whole process, they got
13 hit with 99,000 of penalties in here.

14 If FTB's position is that the original tax
15 return was late, then in that case how come they never
16 assess penalty when the original tax return became due or
17 was processed? We couldn't find any records of any
18 penalties ever being assessed anywhere.

19 Secondly, even if the tax return was late, it
20 was only late I would say three months, max. It wasn't
21 eight months, as they're claiming. Third, as I've said it
22 in here, taxpayer does qualify for a reasonable cause due
23 to the fact that they really relied upon a C.P.A. to get
24 this thing done. It was a very complex tax matter that a
25 layperson would not have been able to do it in a way that

1 they were trying to be willful in their act or they were
2 trying to avoid the issue in here.

3 So based on everything I've presented -- I do
4 believe everything should be in here -- I do believe that
5 this penalty should be abated.

6 JUDGE BRAMHALL: Okay. Questions?

7 JUDGE DANG: One brief question for the
8 appellant.

9 Do you know the reason for why the original
10 return was filed late?

11 MR. KAHEN: The reason that the original return
12 was late -- and I spoke actually with the C.P.A. last
13 night about it -- had to do with the fact that at the time
14 they were doing it, there were credits on the file, that
15 they were not going to owe any taxes on it. And he was
16 trying to figure out whether they could get this thing
17 done in time with the tax issue that they had at the time,
18 whether it will qualify for the program or not.

19 Unfortunately, it didn't. And that's why it
20 happened.

21 JUDGE DANG: I guess I'm trying to understand
22 why it was filed late, not why he took so long to do it, I
23 guess. The C.P.A., I'm assuming, was aware of the filing
24 deadline?

25 MR. KAHEN: Yes.

1 JUDGE DANG: But he did not file in time because
2 he was trying to compute these credit amounts?

3 MR. KAHEN: Compute the credit amounts based on
4 the shelter that they were using and if there were not
5 going to be any tax liability, there wouldn't have been
6 penalties or anything like that, and delinquency penalty
7 on that. That was the problem at that time.

8 JUDGE DANG: Okay. Thank you.

9 MR. KAHEN: One more thing -- I apologize to cut
10 you short -- by the way, the original tax shows it too --
11 there's no balance on it, the original taxes that was
12 filed. I do believe we've included them in the evidence.
13 So that's there for you guys to look at.

14 JUDGE BRAMHALL: So the \$800 minimum was a
15 credit for -- a prepayment that was credited when the
16 original term was filed?

17 MR. KAHEN: Yes, Your Honor.

18 JUDGE BRAMHALL: Correct?

19 MR. KAHEN: Yes, Your Honor.

20 JUDGE BRAMHALL: And then part of your argument
21 was that if the penalty is properly assessed, the amount
22 of it is incorrect. So I wasn't clear on what your amount
23 argument was.

24 MR. KAHEN: 5 percent penalty as opposed to
25 25 percent penalty that has been assessed now. 5 percent

1 for each month.

2 JUDGE BRAMHALL: And you're saying two --

3 MR. KAHEN: Two months. But they went ahead and
4 assessed maximum amount penalty, 25 percent.

5 JUDGE BRAMHALL: Got it. Okay. Got it. Thank
6 you for clarifying that.

7 Any questions?

8 JUDGE HOSEY: No. I think I'm good. Thank you.

9 JUDGE BRAMHALL: Thank you.

10 Mr. Kowalczyk?

11 MR. KOWALCZYK: Thank you, Your Honor.

12
13 OPENING STATEMENT

14 MR. KOWALCZYK: Good morning. The issues before
15 us today is whether Appellant has met its burden of proof
16 to establish reasonable cause to pay the delinquent filing
17 penalty and Respondent improperly calculated the
18 delinquent filing penalty for tax year ending November 30,
19 2010.

20 Appellant makes a few arguments for why he
21 established reasonable cause to abate the delinquent
22 filing penalty. First, Appellant argues that Respondent
23 improperly mailed the notice -- one of its notices to the
24 taxpayer, two, that there was some complexity in computing
25 the tax due on the return, which led them to filing the

1 tax return late, and third, there was no tax due on the
2 original return.

3 However, none of these arguments establish
4 reasonable cause. To establish reasonable cause, the
5 taxpayer must show that failure to file its original tax
6 return occurred despite the exercise of ordinary care and
7 business prudence; however, Appellant does not explain why
8 it failed to file the original tax return eight months
9 past the original due date and complexity involved in
10 computing the amount of tax due or not owing any
11 additional tax at the time the tax return is due is not
12 reasonable cause.

13 The delinquent filing penalty is calculated by
14 multiplying the amount of tax required to be shown on the
15 return, reduced by timely payments, by 5 percent for each
16 month the tax return was not filed by the original due
17 date up to a maximum of 25 percent. The amount of tax
18 returned to be shown on Appellant's tax return was
19 \$399,723, which was recorded on Appellant's amended tax
20 return, reduced by \$800 of timely payments and credits.
21 The maximum 25 percent penalty applies because Appellant
22 filed its original tax return eight months after the
23 original due date, which would be 40 percent.

24 Accordingly, Appellant has not met its burden of
25 proof to establish reasonable cause to abate the

1 delinquent filing penalty and Respondent has properly
2 computed the delinquent filing penalty. Therefore, the
3 Franchise Tax Board's action must be sustained. Thank
4 you.

5 JUDGE BRAMHALL: Any questions?

6 JUDGE DANG: No questions.

7 JUDGE HOSEY: No questions.

8 JUDGE BRAMHALL: I do.

9 So there was in the record, in the exhibits,
10 there was some confusion between -- between the taxpayer
11 and the Franchise Tax Board auditor as to the basis of the
12 penalty. The auditor's advice -- and it's in your exhibit
13 of the phone conversation -- where the taxpayer's
14 accountant was advised that the penalty was based on the
15 late payment of the tax shown on the amended return.

16 And I heard that issue raised and then in the
17 appeal -- and I see you're arguing in the appeal the
18 original return was asserting eight months late, not two
19 or three. So first of all, I want you to explain why
20 eight and not two or three.

21 MR. KOWALCZYK: Okay. So the original due date
22 for the tax return was on February 15, 2011. Respondent
23 has an automatic extension due date for corporations. So
24 corporations are allowed to file their tax return -- and
25 in this case up until September 15, 2011 -- and so the

1 appellant filed his tax return though on October 11, 2011.

2 So eight months is from February 2015 to October
3 2011.

4 JUDGE BRAMHALL: So the extension period doesn't
5 count?

6 MR. KOWALCZYK: It counts for imposing the
7 penalty but when calculating the penalty, you have to go
8 from the original due date.

9 MR. KAHEN: Your Honor --

10 JUDGE BRAMHALL: When you get to rebuttal, you
11 can deal with that. I wanted to make that clear that
12 that's the Franchise Tax Board's position.

13 So in the appeal, as the appellant has pointed
14 out, the argument is that the original return was late?

15 MR. KOWALCZYK: Correct.

16 JUDGE BRAMHALL: Will you clarify for me why
17 it's the tax on the amended return and not the tax on the
18 original return that serves as the basis for the penalty?

19 MR. KOWALCZYK: So in the statute, the statute
20 clearly says that the amount of tax required to be shown
21 on the return. And after the audit the FTB determined
22 that the amount required to be on the return was the
23 amount that the appellant provided in their amended
24 return, not on. . .

25 JUDGE BRAMHALL: I just want to be real clear in

1 my notes here.

2 Any further questions?

3 JUDGE DANG: No questions.

4 JUDGE BRAMHALL: Closing statement?

5 MR. KAHEN: One rebuttal, Your Honor.

6 JUDGE BRAMHALL: Yeah.

7 MR. KAHEN: Respondents like to beat on the fact
8 that there's no reasonable cause on here and they're
9 saying, despite ordinary care, what could my client have
10 done in this case to have avoided the situation? What
11 could they have possibly done if he didn't exercise
12 ordinary care?

13 I really would like to know because my client or
14 the C.P.A. were not prophets. They could have not
15 foretold this was going to come down three or four years
16 later and they did everything in their power, as a matter
17 of fact -- everything -- phone calls after phone calls
18 after phone calls, trying to make sure everything is paid
19 on time. If that's not ordinary care, I really don't know
20 what else would qualify as exercising ordinary care.
21 That's one thing.

22 Moving on to my closing argument in here -- FTB
23 changes position throughout this process through the
24 auditor to after they requested for penalty payment. At
25 the time, as you saw during the conversation in here, Your

1 Honor, or in the evidence as it shows, the question was
2 never about the original tax return; otherwise, we would
3 have actually addressed it in our first clinical refunds
4 for that.

5 The question was always about "We sent you this
6 notice. You never got it. This is your fault." And then
7 when we came down hard on it and we showed, "You never
8 sent this notice out; this notice hasn't left your office;
9 your record shows something was sent but it doesn't give
10 us a copy of that notice" -- they can't find it because
11 it's not there. It never left their office. And this is
12 why their position changed as to original return was three
13 months late. And that's my closing.

14 In my opinion in this case my client exercised
15 everything in their power to make sure everything is done
16 properly and paid on time. That's why they really
17 exercised the ordinary care. They really did do their due
18 diligence trying to avoid any additional penalties if they
19 were mistaken on the tax issue. And that was on the
20 reliance of the C.P.A. It wasn't something that he tried
21 to avoid by not showing. It was advised by C.P.A. this
22 shelter might not work in here. And that's what he relied
23 on at the time that he originally did it.

24 And even if it was two or three months late,
25 there were no taxes due at that time anyway. So they

1 wouldn't have known that, oh, four years down the road
2 we're going to end up owing this much penalty. How could
3 they have avoided that if they were able to look past four
4 years later, after the audit, and that's why they did
5 everything. I mean in this case I can't think of anything
6 else -- personally, in my opinion, I can't think of
7 anything else my client could have done to have done a job
8 better than this to make sure everything goes smoothly.
9 Thank you, Your Honor.

10 JUDGE BRAMHALL: Closing statement?

11 MR. KOWALCZYK: We waive our closing statement.

12 JUDGE BRAMHALL: Okay. Then that concludes the
13 appeal hearing at 9:28. You all did a great job of
14 shortening the time of your estimated presentation. So I'm
15 going to close the record at this time. We as a panel
16 will take the arguments and the evidence into
17 consideration. We will reach a decision. We will mail
18 that decision. We intend to mail that decision within 100
19 days of today.

20 MR. KAHEN: Thank you.

21 JUDGE BRAMHALL: Thank you all for your
22 presentations. They were really clear and helped us
23 understand the issues. Thank you.

24 MR. KAHEN: Thank you, Your Honor.

25 MR. KOWALCZYK: Thank you, Your Honor.

(Proceedings concluded at 9:28 a.m.)

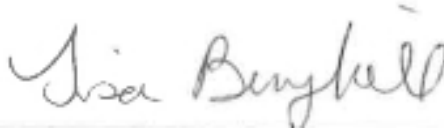
1 STATE OF CALIFORNIA)
2) SS.
3 COUNTY OF LOS ANGELES)
4

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

7 That the foregoing 22-page Hearing was taken down by
8 me in shorthand at the time and place therein named and
9 thereafter reduced to typewriting under my direction, and
10 the same is a true, correct and complete transcript of
11 said proceedings;

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

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

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19 LISA V. BERRYHILL, CSR NO. 7926
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