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HEARING
OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Franchise and
Income Tax Appeals Hearing of:
THOMAS M. PURBAUGH and OTA Case No. 18042889
KAREN M. SPINA,
Appellants.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, MARCH 26, 2019
10:02 A.M.

OFFICE OF TAX APPEALS
400 R STREET
SACRAMENTO, CALIFORNIA

Reported by AMY E. PERRY, CSR No. 11880

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APPEARANCES

Panel Lead:

SARA HOSEY, ADMINISTRATIVE LAW JUDGE
STATE OF CALIFORNIA
OFFICE OF TAX APPEALS
400 R Street
Sacramento, California 95811

Panel Members:

JEFFREY MARGOLIS, ADMINISTRATIVE LAW JUDGE
TOMMY LEUNG, ADMINISTRATIVE LAW JUDGE

For Appellants:

CHRISTOPHER YORK, REPRESENTATIVE

For Franchise Tax Board:

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Also Present:

CRISTINA RUBALCAVA, SUPERVISOR
OFFICE OF TAX APPEALS
FOUNDATION SUPPORT

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EXHIBITS

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Exhibits A-G admitted into evidence	5

(Exhibits premarked, described
and retained by Administrative
Law Judge.)

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TUESDAY, MARCH 26, 2019 - 10:02 A.M.

ALJ HOSEY: We're going to now go on the record. This is the appeal of Thomas M. Purbaugh and Karen M. Spina, Case No. 18042889. Today is March 26, 2019, and it's approximately 10:00. We're in Sacramento, California.

I am lead Administrative Law Judge Sara Hosey, and with me today is Judge Jeffrey Margolis and Judge Tommy Leung,

Parties, can I please have you state your names for the record.

MR. YORK: Christopher York.

MR. COUTINHO: Brad Coutinho for the Franchise Tax Board.

ALJ HOSEY: Thank you. The issue before us today is how Appellants established reasonable cause to abate the late payment penalty imposed under California Revenue and Taxation Code Section 19132.

Can I get the parties' agreement as to the issue today?

MR. YORK: I agree.

MR. COUTINHO: Franchise Tax Board agrees.

ALJ HOSEY: Great. Moving on to the exhibits. We premarked Exhibits 1 through 6 for

1 Appellant, and A through G, as in goat, for Respondent
2 FTB at the pre-hearing conference held on March 7,
3 2019.

4 Mr. York, do you have any objections to
5 admitting Exhibits A through G?

6 MR. YORK: I do not.

7 ALJ HOSEY: Mr. Coutinho, any objections to
8 admitting Exhibits 1 through 6?

9 MR. COUTINHO: No objection.

10 ALJ HOSEY: Great. And we have no new
11 exhibits --

12 MR. YORK: Correct.

13 ALJ HOSEY: -- today?

14 MR. COUTINHO: That's correct.

15 ALJ HOSEY: Okay. Exhibits 1 through 6 and A
16 through G are admitted into evidence in the record.
17 Okay.

18 (Appellants' Exhibits 1-6

19 admitted into evidence.)

20 (Respondent's Exhibits A-G

21 admitted into evidence.)

22 ALJ HOSEY: Okay. Mr. York, are you ready to
23 begin your presentation?

24 MR. YORK: I am.

25 ALJ HOSEY: Okay. Please begin.

1 MR. YORK: Great. I'd just take to start
2 with kind of rehashing the facts that took place in
3 the situation. The taxpayer has engaged the CPA to
4 prepare the 2015 tax returns. I've been doing the
5 returns and working with this client for over ten
6 years. The tax -- to file a complete tax return was
7 not available so extensions were prepared on
8 April 18th.

9 The taxpayers had a very large balance with
10 their extensions due to the sale of the business
11 during that tax year. The CPA offered to have
12 payments made via direct debit from their checking
13 account, part of the electronic filing of the
14 extensions.

15 The taxpayers were on vacation away from
16 home, so they opted to have the payments made for them
17 rather than having to deal with getting checks written
18 and not in the mail. The taxpayer verified funds were
19 in the account to make sure the large balances would
20 be covered.

21 The CPA submitted extensions via E-File
22 through their tax software Monday, April 18th which
23 was a timely-filed extension. On Thursday,
24 April 21st, only three days later, still on vacation,
25 the taxpayer called the CPA to notify them that the

1 money was not taken out of the bank account. They
2 were diligently watching the bank account balances.

3 The CPA researched and discovered that there
4 was a key punch error inside the tax software, and the
5 California payment was not submitted along with the
6 extension.

7 The fed payment, which was also very large,
8 was submitted as planned. The CPA notified the
9 taxpayer of the issue, immediately made an electronic
10 payment using the FTB web-based system to pay the
11 balance due on April 21st, again, three days later.

12 The payment for the unpaid balance was made
13 and everything cleared the bank very timely.
14 Ultimately, that's the facts of the situation. It's
15 very simple, very straightforward. A mistake was made
16 and it was remedied very, very quickly.

17 In the Franchise Tax Board's Exhibit F, they
18 talk about the requirement for abatement. There's two
19 key factors in that: One is the taxpayer exercised
20 ordinary business care and prudence; and two, the
21 taxpayer acted consistent with an ordinarily
22 intelligent, prudent, business person.

23 We believe that the taxpayer fulfilled both
24 of these requirements. They hired a professional tax
25 preparer to assist them with the proper filing of

1 their tax reporting. Millions of people every year
2 hire professional tax prepares, so I think it's
3 something that an ordinarily intelligent and prudent
4 person would do.

5 I would bet that many of the people in this
6 room, including FTB Counsel, have engaged CPAs for
7 their tax returns. So I think that's a good thing.
8 Tax code is significantly more difficult so people
9 can't understand on their own. Hiring a tax preparer
10 is often the only way to file a correct tax return.

11 The taxpayer had a long history of the CPA
12 with no issues or reason to believe that an error
13 would occur. The taxpayer diligently monitored bank
14 account activity to ensure that the payments were
15 made, despite being on vacation. And they remedied
16 the error immediately upon discovery of the problem.
17 They didn't wait, they didn't think, they just acted
18 and paid the bill that needed to be paid.

19 For all these reasons, I believe that they've
20 acted in accordance with the rules to have the penalty
21 abated. That's all I have.

22 ALJ HOSEY: Thank you, Mr. York. Judge
23 Margolis, do you have any questions?

24 ALJ MARGOLIS: No.

25 ALJ HOSEY: Judge Leung? Okay. We're going

1 to move on to Mr. Coutinho's presentation. If you're
2 ready. Begin.

3 MR. COUTINHO: Good morning. Appellants have
4 not demonstrated reasonable cause to abate the late
5 payment penalty imposed in the Revenue and Taxation
6 Code Section 19132 for the 2015 tax year. As stated
7 in Appellant's appeal letter due to an oversight by
8 the tax preparer, Appellants failed to make a timely
9 payment for the 2015 tax year.

10 As stated in FTB's opening brief, the
11 taxpayers reliance on an agent such as an accountant
12 or tax attorney to pay their taxes by the due date has
13 not been found to be reasonable cause. Further, as
14 stated by your office in the precedential case in the
15 appeal from *Sidney Friedman*, the failure to timely
16 remit the balance due on a tax liability caused by an
17 oversight does not by itself constitute reasonable
18 cause.

19 Accordingly, there are no grounds to abate
20 the late payment penalty in this case. And FTB
21 respectfully requests that it be sustained. I'd be
22 happy to address questions or concerns the panel may
23 have. Thank you for your time.

24 ALJ HOSEY: Thank you. Judge Leung, do you
25 have any questions? Judge Margolis?

1 ALJ MARGOLIS: Yes. Excuse me. Could you
2 explain the computation of what the penalty -- I'm a
3 little bit confused about what the five percent was
4 applied to, what the late filing penalty was applied
5 to.

6 MR. COUTINHO: Sure. I believe in this case,
7 the late payment penalty was going to be a higher
8 amount because it did not consider Appellant's return
9 payment that was received on April 22, 2016.

10 A penalty in this case was calculated as five
11 percent, the total tax to be paid plus one-half
12 percent for every month of the payment of tax is late,
13 not to exceed 40 months.

14 In this case, the appellant's tax was
15 considered one-month late. And the \$22,863 late
16 payment penalty was imposed. That was calculated on
17 the total tax of 415,000 times 0.05 percent to be
18 20,785 plus the one month that it was late. And it
19 was a half percent on the total tax of 415,000, for a
20 total of late payment being 22,863. This is more
21 specifically laid out in our opening brief on page 3.

22 ALJ MARGOLIS: Thank you. I guess I have a
23 question. I've seen lots of briefs from the FTB where
24 you, the taxpayer, fixed an error and files late or
25 pays late. And you asked the Franchise Tax Board -- I

1 mean, you pointed out the fact that they didn't
2 promptly rectify it.

3 And here, you have a situation where the
4 taxpayer did properly rectify it. They were
5 monitoring it. The payment was only three days late.
6 I'm just -- is there any ability, I mean, does the FTB
7 have any sort of grace period in this type of
8 situation where even though there was an innocent
9 oversight, there was constant monitoring. This was
10 paid very promptly afterwards.

11 MR. COUTINHO: Fortunately, there is no grace
12 period in this specific thing. I refer to the Office
13 of Tax Appeals, *United States vs. Boyle*. In that case
14 they said taxpayer had personal [inaudible] duty to
15 file and pay their taxes on time and rely [inaudible]
16 as a reasonable cause.

17 In that case, it said it may be reasonable
18 for a taxpayer to assume that an attorney or CPA would
19 comply with the statute, but that resolved a matter
20 between them, the taxpayer and the CPA. But it did
21 not absolve the taxpayer of his or her responsibility
22 under the unambiguous statute.

23 In this case, because it was within the
24 taxpayer's control to submit a timely payment, had it
25 not been within their control, it had been a system

1 error, they were not able -- the tax software wouldn't
2 allow him to make a payment, or if there was some type
3 of natural disaster like such as a fire or something
4 that was outside of the taxpayer's control such as
5 serious illness, then could possibly reprise to the
6 level of reasonable cause.

7 However, when it's within the taxpayer's
8 purview and control, that does not rise to the level
9 of reasonable cause.

10 ALJ MARGOLIS: Well, I guess I'm somewhat
11 sympathetic to the taxpayer's case here because here
12 when he made the payment, the FTB's system or the
13 payment system, I think it sends out a notice saying
14 that we can't even confirm whether or not the payment
15 was successful for another two business days.

16 So the taxpayer, you know, pays -- thinks
17 they paid on April 15th, there's no way they can check
18 it that day. They can only check it two or three days
19 later. So here, you have a taxpayer who, I guess they
20 made an oversight in error, but they thought they --
21 they were definitely constantly monitoring. There's
22 no dispute about that from what I can tell.

23 Is there a way your systems can maybe make it
24 so they can immediately tell if the payment is
25 successful?

1 MR. COUTINHO: I'm not aware of what the
2 systems -- how it would necessarily tell them
3 specifically. But I believe, I checked with our lead
4 payment department to see if they could show any
5 render that a payment had been tried and attempted on
6 that date. And our records reflect there wasn't an
7 attempt on that date.

8 However, there was a payment made for the
9 2016 tax year and payment by the taxpayer for the
10 following tax year, but we don't have records that
11 attempt was made for the 2015 tax year.

12 MR. YORK: I disagree. I mean, there's
13 clearly a payment made three days later for \$449,000.

14 ALJ MARGOLIS: I think what he was saying is
15 that he doesn't -- he doesn't see any documentary
16 evidence that the payment was attempted for the 2015
17 tax year, is that what you're saying?

18 MR. COUTINHO: That's correct, a timely
19 payment.

20 (Multiple voices.)

21 MR. YORK: That, I agree with. It was
22 supposed to happen on the 18th but that was
23 accidentally missed. It was paid three days later on
24 the 18th [sic] for the 2015 tax year. I just want to
25 make sure that's clear.

1 ALJ MARGOLIS: Okay. My questions have been
2 answered.

3 ALJ HOSEY: Okay. Mr. York, you have time
4 for a final statement if you'd like to.

5 MR. YORK: Yeah. I got a couple things.
6 First, Exhibit F clearly states that here are ways
7 that we can abate the penalty. The burden of proof is
8 on the taxpayer to establish reasonable cause.

9 How they define reasonable cause, I think we
10 demonstrated they have reasonable cause based on the
11 two facts that they were acting like a prudent
12 ordinary businessmen, and that they were diligent.
13 Let me see if I used the terms properly there. Yeah.

14 They exercised ordinary business, care and
15 prudence. The taxpayer acted consistent with an
16 ordinarily intelligent and prudent business person. I
17 think it clearly demonstrated that which is grounds
18 for abatement according to their Exhibit F.

19 Other thing I'd like to say is that if you
20 cannot delegate the authority to somebody else to pay
21 your tax or file your tax returns, why does the FTB
22 allow third parties to submit tax returns on behalf of
23 taxpayers, or allow payments directly from tax
24 preparation software?

25 If they're allowing this to happen, how could

1 they have obviously allowed the delegation? The whole
2 tax filing system is premised on delegation, so I
3 don't see how this can be allowed.

4 ALJ HOSEY: Mr. Coutinho, would you like to
5 respond to that specific question?

6 MR. COUTINHO: While a taxpayer can delegate
7 the authority to have a CPA or an attorney file their
8 tax return or pay their tax return, the code is very
9 clear that the responsibility lies on the taxpayer.

10 And as I stated earlier in the *United States*
11 *vs. Boyle*, states clearly even though a taxpayer may
12 delegate that and that may be reasonable for them to
13 do it between those two parties that enter into a
14 contract together, it's not -- it does not absolve a
15 taxpayer's responsibility to make sure that their
16 taxes are paid and filed on time.

17 ALJ HOSEY: Okay.

18 ALJ MARGOLIS: Mr. Coutinho, can I ask you a
19 question?

20 If there wasn't a delegation and the
21 taxpayer did exactly what Mr. York did himself, would
22 the FTB still impose a penalty, would they find the
23 taxpayer's actions to be reasonable?

24 MR. COUTINHO: There would still be a penalty
25 imposed even if it had been the taxpayer as opposed to

1 the CPA.

2 ALJ MARGOLIS: Okay.

3 ALJ HOSEY: Mr. York, would you like to add
4 anything else?

5 MR. YORK: Yeah. I guess the Franchise Tax
6 Board's position is that mistakes can't be made,
7 right? In this case, the taxpayer or the CPA made a
8 mistake. In the case of the taxpayer doing the same
9 thing, they made a mistake. But I'm sure the
10 Franchise Tax Board has made mistakes, and they stand
11 behind the fact that mistakes happen.

12 ALJ HOSEY: Thank you. We're ready to submit
13 the case. The record is now closed. This concludes
14 the hearing, and the judges will meet and decide the
15 case based on the documents and the arguments
16 presented today. We will aim to send both parties our
17 written decision within 100 days of today.

18 Thank you both. Hearing is now adjourned.

19 (Whereupon the proceedings were
20 adjourned at 10:16 a.m.)

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REPORTER'S CERTIFICATE

I, Amy E. Perry, a Certified Shorthand Reporter in and for the State of California, duly appointed and commissioned to administer oaths, do hereby certify:

That I am a disinterested person herein; that the foregoing hearing was reported in shorthand by me, Amy E. Perry, a duly qualified Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewritten form by means of computer-aided transcription.

I further certify that I am not of counsel or attorney for any of the parties to said hearing or in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of April, 2019.

AMY E. PERRY
Certified Shorthand Reporter
License No. 11880