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HEARING
OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Franchise and
Income Tax Appeals Hearing of: NO. 18010796
SHARON E. MCDANIEL (Appealing Spouse)
and DAVID D. MCDANIEL (Non-Appealing
Spouse),
Appellant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, JUNE 26, 2019

1:12 P.M.

 COPY

OFFICE OF TAX APPEALS
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SACRAMENTO, CALIFORNIA

Reported by AMY E. PERRY, CSR No. 11880

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APPEARANCES

Panel Lead:

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

Panel Members:

TOMMY LEUNG, ADMINISTRATIVE LAW JUDGE
SARA HOSEY, ADMINISTRATIVE LAW JUDGE

For Appellant:

SHARON E. MCDANIEL, TAXPAYER
KENNETH CURRY, REPRESENTATIVE

Also Appearing:

DAVID D. MCDANIEL, (Non-Appealing) TAXPAYER

For Franchise Tax Board:

BRAD COUTINHO, TAX COUNSEL
MARGUERITE MOSNIER, TAX COUNSEL
MICHAEL CORNEZ, TAX COUNSEL
STATE OF CALIFORNIA
FRANCHISE TAX BOARD
PO Box 1720
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1 WEDNESDAY, JUNE 26, 2019 - 1:12 P.M.

2

3 ALJ JOHNSON: We are now going on the record.
4 This is the appeal of Sharon E. McDaniel, Case No.
5 18010796. It is 1:15 p.m. on June 26, 2019 here in
6 beautiful Sacramento, California.

7 I'm the lead ALJ for this hearing, John
8 Johnson. And let me say good afternoon to my fellow
9 co-panelists today. Good afternoon, Judge Hosey.

10 ALJ HOSEY: Good afternoon.

11 ALJ JOHNSON: Good afternoon, Judge Leung.

12 ALJ LEUNG: Good afternoon, Judge.

13 ALJ JOHNSON: And let me have the parties
14 introduce themselves for the record, beginning with
15 Ms. McDaniel.

16 THE APPELLANT: This is Sharon McDaniel.

17 ALJ JOHNSON: And her representative?

18 MR. CURRY: Kenneth Curry from the Tax
19 Appeals Assistance Program.

20 ALJ JOHNSON: And for the Franchise Tax
21 Board?

22 MR. COUTINHO: Brian Couthino, Marguerite
23 Mosnier, and Michael Cornez for the Franchise Tax
24 Board.

25 ALJ JOHNSON: Thank you. And Mr. McDaniel?

1 MR. MCDANIEL: David McDaniel, the
2 non-appealing spouse.

3 ALJ JOHNSON: Thank you. The issue today is
4 whether Ms. McDaniel has shown that FTB erred in
5 granting innocent spouse relief to Mr. McDaniel for
6 the 1999 tax year. And FTB does refer to the
7 Franchise Tax Board.

8 The exhibits that have been provided on
9 appeal include the appealing spouse's Exhibits 1
10 through 4, Respondent's Exhibits A through P, and the
11 non-appealing spouse's Exhibits NS1 through NS25. We
12 have no objections to those exhibits at this time.
13 And they will be admitted as evidence.

14 (All Exhibits admitted into
15 evidence.)

16 ALJ JOHNSON: To start, we have Mr. Curry
17 going to provide us an opening statement. I suspect
18 it to be approximately two minutes. I think you're
19 aware of what an opening statement is, but just a
20 reminder, we're not arguing a case-in-chief or
21 presenting new evidence, just giving us a roadmap of
22 what you will show us today and ending with the ruling
23 on this appeal to decide. When you are ready, please
24 begin.

25 MR. CURRY: As we all know, taxes are a part

1 of every person's life. People make mistakes in
2 filing tax returns. And those mistakes often affect
3 other people like spouses with whom taxpayers often
4 file joint tax returns. We often file joint tax
5 returns for the tax benefits of such an arrangement,
6 for example, even when a joint tax return -- for
7 example, when a joint tax return recognizes income
8 from only one spouse, the other spouse counts as a
9 dependent and the joint benefits both taxpayers by
10 having an additional standard deduction.

11 Likewise, spouses will often use the joint
12 return to account for losses or expenses of one kind
13 or another, deductions, often business losses or
14 expenses against the income reported on the tax
15 return, all party to the joint return benefit from the
16 deductions taken against all the income reported.

17 It stands to reason then that the party with
18 the most income benefits the most from the deductions.
19 The rest of this, I think we'll cover in questions and
20 I would just say that obviously we're hoping for a
21 reversal of the granting of innocent spouse relief to
22 Mr. McDaniel.

23 ALJ JOHNSON: Thank you. Up next, we do have
24 Ms. McDaniel's testimony. I will put you under oath
25 before we begin, Ms. McDaniel. And I believe you'll

1 start with a prepared statement; is that correct?

2 THE APPELLANT: That's correct.

3 ALJ JOHNSON: Okay. Let me ask you, do you
4 solemnly swear or affirm to tell the truth, the whole
5 truth, and nothing but the truth?

6 THE APPELLANT: Yes, I do.

7 ALJ JOHNSON: Okay. Please begin.

8 (Appellant sworn in.)

9 THE APPELLANT: Okay. Good afternoon. I
10 have never disputed making an accounting error. It
11 was an honest mistake. David and I left for our
12 wedding December 24, 1998. I hurriedly vouched all I
13 could for the end of the year as I would not return
14 until January 1999.

15 Then in 1999, I accidentally vouched the same
16 invoices resulting in the additional taxes. I was
17 commuting each week from Visalia to Hayward three
18 hours each way, staying in Hayward all week and
19 heading home on the weekends. I became pregnant three
20 months after we got married and I continued to commute
21 to Northern California while I was pregnant until
22 October 1999, then closed my Hayward office and tried
23 to work from home, but with a newborn, I soon realized
24 I had to give up my business. There was a lot going
25 on that year, and I made an honest mistake.

1 David benefited from not only the income I
2 earned during our marriage, but also in the loss of
3 business profit, which greatly helped our tax returns
4 as he was making over \$100,000. My business paid off
5 his Dodge truck which was approximately \$7,000 and
6 also paid for the Visalia Country Club membership
7 which was approximately \$16,000.

8 David played golf almost every, if not every
9 day, at the country club for the first three to
10 four years of the membership. The accountant who
11 prepared the taxes did not catch the error either. As
12 I said, it was an honest mistake. I was hastily
13 preparing the year-end books, preparing for a wedding,
14 moving to a new city all within one week, then getting
15 pregnant, commuting, trying to run a business. There
16 was a lot going on.

17 As a couple, we were both responsible for the
18 IRS audit. We were both responsible for the
19 additional IRS taxes and should both be responsible
20 for the California state income tax as well. David
21 benefited not only in the money I made with the
22 business but also benefited when the business showed a
23 loss to offset his six-figure income resulting in
24 refunds. Thank you.

25 ALJ JOHNSON: Thank you. We'll move to

1 questions from Mr. Curry of Ms. McDaniel.

2 SHARON MCDANIEL,

3 called as a witness, being first duly sworn, testified
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. CURRY:

7 Q Okay. So first question, why have you not
8 produced any of the documentation regarding the 1999
9 tax return?

10 A Because David has all that information.

11 Q Okay. And all of that information was in
12 where, in the house that you lived in together?

13 A Correct.

14 Q Okay. So when you left, when you separated,
15 you didn't take any documentation with you, it stayed
16 with the house?

17 A That is correct. I left everything there.

18 Q So in your opening statement, you reiterated
19 that Mr. McDaniel benefited from your income when you
20 paid off his truck and paid off the club membership
21 that he used extensively. From the numbers you
22 estimated, the total comes to about 23,000 about, as
23 an interesting fact, about the cost of an average car
24 or about the average cost of a car around 1999 to
25 2000.

1 Has Mr. McDaniel ever repaid these amounts?

2 A No, he has not.

3 Q And to your recollection, this -- these
4 payments are recorded in your divorce decree and the
5 judge did not object or did not find to the contrary?

6 A I don't know if those payments were payments
7 for the membership and the truck.

8 Q Okay. We'll come back to that if we need to.

9 A Okay.

10 Q Do just -- this is going to sound a little
11 harsh, but do you have other close personal friends
12 that accuse you of fraud and think you have to spend
13 two lifetimes in prison?

14 A No, I do not.

15 Q Okay. And to the best of your recollection,
16 since the documents have been withheld from you, did
17 you incur substantial deductions from your businesses
18 in tax years 1998 and 1999? Those are the years that
19 were the subject of the 2002 IRS audit.

20 A Yes, I did.

21 Q Okay. And in both of those years, again, to
22 the best of your recollection, was Mr. McDaniel's
23 income greater than yours?

24 A Yes, very much so.

25 Q And do you recall if Mr. McDaniel had only

1 wage income or did he have other income or gain from
2 another source during those two years?

3 A He had gain from the sale of the house
4 [inaudible] --

5 (Multiple voices.)

6 Q I'm sorry -- in addition to his wage income?

7 A Correct.

8 Q And the wage income was greater than your
9 income for that year?

10 A Absolutely.

11 Q So the deductions that came from your
12 business activity, they significantly lowered what
13 would have been Mr. McDaniel's tax bill because you
14 contributed the deductions had the two of you not
15 filed jointly? Is that question clear?

16 A That is -- yes, it's clear. That is correct.

17 Q Okay. And so when did you become aware of
18 the state's 1999 tax liability adjustment?

19 A Not until 2016.

20 Q And that's after your divorce?

21 A Correct. Our divorce was final in 2014.

22 Q And prior to when you became aware of the
23 2016 -- this is going to sound a little bit
24 redundant -- but did you receive any notices from FTB
25 about this tax liability adjustment?

1 A No, I did not.

2 Q Because you didn't become aware of it until
3 2016. Okay.

4 A Correct.

5 Q So until you received notice of
6 Mr. McDaniel's application for innocent spouse relief,
7 had you seen the notice of proposed assessment or been
8 made aware of its existence?

9 A No. I had no idea.

10 Q So you became aware of the revised assessment
11 or the assessment after the revised -- after the State
12 of California revised your income tax return, you
13 became aware of this assessment as a result of the
14 innocent spouse relief application?

15 A Correct.

16 Q And has Mr. McDaniel ever discussed it with
17 you prior to your becoming aware of it through the
18 innocent spouse relief application?

19 A No. No.

20 Q Okay. And did the 1999 tax liability to the
21 State of California ever come up in the divorce
22 settlement proceedings?

23 A No, they did not.

24 Q When did you and Mr. McDaniel stop filing
25 joint tax returns?

1 A I believe Mr. McDaniel held them all but I
2 believe the last one we filed jointly was in 2002.

3 Q And why did you stop filing joint returns?

4 A Because he was fired in, I believe it was
5 2003, and started his own business. And whenever we
6 talked about filing taxes, I always asked him for
7 receipts and things so I could help with the taxes,
8 and I never got anything. So nothing was ever filed
9 for years and years and years.

10 Q Okay. And did you and Mr. McDaniel share
11 joint bank accounts in '99 and 2000?

12 A Yes, we did.

13 Q Okay. And did you stop using joint bank
14 accounts at some point?

15 A Yes. I believe it was right before we
16 separated in 2010, maybe 2009. I'm not positive on
17 that though.

18 Q Okay. And other than the obvious answer of
19 the separation, why did you stop using joint checking
20 or bank accounts?

21 A Actually, Mr. McDaniel opened his business on
22 a personal account without me knowing, so I don't know
23 why he did that.

24 Q During the period that you did have joint
25 bank accounts, did you ever prevent Mr. McDaniel from

1 accessing those accounts for any records from them?

2 A No, not at all.

3 Q Did you and Mr. McDaniel use the same tax
4 accountant prior to your marriage?

5 A Yes, we did.

6 Q So Mr. McDaniel was acquainted with and used
7 the services of the same accountant you used prior to
8 your marriage?

9 A That is correct.

10 Q And that's the same accountant that filed, at
11 the very least, the 1998 and 1999 tax returns which
12 were the subject of the IRS audit?

13 A Correct.

14 Q And did you ever attempt to prevent
15 Mr. McDaniel from contacting your accountant?

16 A No, not at all.

17 Q Did you attempt to prevent Mr. McDaniel from
18 inquiring about any information pertaining to your tax
19 returns, your tax returns, Ms. McDaniel's tax returns
20 or your joint returns at any time before, during or
21 after your marriage to Mr. McDaniel?

22 A No, I did not.

23 Q Your accountant actually played an important
24 sort of minor part in your marriage to Mr. McDaniel;
25 is that right?

1 A Yes, that is correct.

2 Q And tell us about that.

3 A We had both been using the same accountant
4 for years. And when my divorce from my first husband
5 was final in April of 1998, I had my taxes done
6 through the accountant, Bill McAvoy. And when I went
7 to see him, I told him that I had gotten divorced and
8 he said that David had asked about me and would it be
9 okay for David, for him to give David my phone number.

10 And I said, well, can I get his address. And
11 I ended up writing David a letter. But it was -- and
12 then we got together, and David came back to pick up
13 his taxes. I believe it was around April 13th. We
14 started dating around the 13th. This was after my
15 divorce was final from my first husband.

16 Q And but that wasn't the first time that the
17 two of you had dated; is that correct?

18 A That is correct. David and I had dated back
19 in either 1984 or 1985, but it ended because he was a
20 little possessive and controlling.

21 MR. CURRY: All right. That's the end of my
22 questions at this point, Judge.

23 ALJ JOHNSON: Thank you. Let me turn to
24 Mr. McDaniel. You will have five to ten minutes for
25 any questions that you may have.

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EXAMINATION

BY MR. MCDANIEL:

Q You realize you are under oath; correct?

A Absolutely. As are you.

Q In the court documentations, it shows that that tax lien was part of the documentation so you knew about it. You had to. It was part of the court order and I will show that later on.

If I was to give you or if I was to ask you to give me \$100,000 and then I give you \$7,000 worth of write-offs, how many times would you do that before you realized that you're not benefiting anything?

If you lose \$93,000 every time we exchange \$100,000, how many times is it going to take before you realize that you're losing money?

MR. CURRY: I'm sorry, but is this relevant?

THE WITNESS: Is that a question?

MR. MCDANIEL: Yes.

ALJ JOHNSON: Let me ask Mr. McDaniel. I think you're asking hypotheticals and questions where your answer might be obvious that you're looking for. Let's try to focus on questions that look for factual answers rather than hypotheticals or questions that don't need an answer.

MR. MCDANIEL: Okay.

1 BY MR. MCDANIEL:

2 Q According to your tax returns for 1998, what
3 was your profit or loss?

4 A You probably have my tax returns. All I have
5 from your exhibits is my Schedule C, and I am trying
6 to find it, but it's right there so I don't have it
7 handy unless I scroll through all these pages.

8 MR. CURRY: May I just ask, is this in the
9 record so we can all look at it?

10 MR. MCDANIEL: Yes.

11 MR. CURRY: Okay.

12 BY MR. MCDANIEL:

13 Q I'll tell you as soon as I find it. I went
14 by letters and then she said they go by letters so go
15 by numbers. And I went by numbers and now
16 everything's by letters even the ones that I did.

17 ALJ JOHNSON: Mr. McDaniel, are you looking
18 for the Schedule C or are you looking for a different
19 document?

20 MR. MCDANIEL: I'm looking for the tax
21 returns that --

22 MR. COUTINHO: Looks like it's NSN, Schedule
23 C that you're referring to.

24 ALJ JOHNSON: There was a 1998 tax return
25 document I recall being exhibits.

1 MR. CURRY: Was it a more recent exhibit --

2 MR. MCDANIEL: Yes.

3 MR. CURRY: I know that I've seen it, too.

4 MS. MOSNIER: What is it we're looking for?

5 MR. CURRY: The 1998.

6 MR. COUTINHO: I think it's this one. Looks
7 like the number seven.

8 (Multiple voices.)

9 MS. MOSNIER: Okay. Profit and loss for
10 business 1998.

11 MR. COUTINHO: I believe it's --

12 MR. CURRY: Seven, I'm almost there.

13 MR. COUTINHO: Number seven, but I don't
14 see --

15 (Multiple voices.)

16 MS. MOSNIER: Is it this one? I don't know.
17 It was --

18 (Clarification by Reporter.)

19 ALJ JOHNSON: We can go off the record for a
20 minute.

21 (Off the record.)

22 BY MR. MCDANIEL:

23 Q According to your tax return for 1998, what
24 was your profit or loss?

25 A A loss is \$93,481.

1 Q Okay. For the year 2000, what was your
2 profit or loss?

3 MR. MCDANIEL: It's two pages later.

4 MR. CURRY: The 2000 return is not part of
5 the appeal, is this relevant?

6 MR. MCDANIEL: Yes, it is.

7 MR. CURRY: I know you think it is.

8 ALJ JOHNSON: Mr. McDaniel, you will have no
9 more than ten minutes, so make sure you ask the
10 questions you want to ask. But I'm going to let you
11 continue on this path.

12 MR. MCDANIEL: Okay.

13 THE WITNESS: Is this the one we filed
14 jointly, the \$85,618, is that what you're looking at?
15 BY MR. MCDANIEL:

16 Q No. It's the negative \$20,000, but --

17 A Business income and loss, I didn't have any
18 business in 2000, I don't believe.

19 MR. CURRY: There should be a Schedule C or
20 something to go with that number to reveal what is
21 involved. So if we don't have the Schedule C, I'm not
22 sure the point of this question is. All we have is --

23 ALJ JOHNSON: We can continue with the
24 questions at this point, but thank you. We
25 understand. When you're ready, Mr. McDaniel.

1 BY MR. MCDANIEL:

2 Q Okay. You brought up the first time we
3 dated, I guess that's irrelevant now.

4 But since you claim that I was possessive and
5 controlling, what was the real reason for the
6 departure or breakup?

7 A The first one?

8 Q Yes.

9 A I just told you, you were possessive and
10 controlling.

11 Q Okay. The reason we left is because you were
12 cheating.

13 A David McDaniel.

14 Q It's a fact.

15 ALJ JOHNSON: Mr. McDaniel, if you want to
16 state your own facts, if you don't believe she's
17 telling the truth, you'll have your time on the
18 testimony to state your own facts. You can just move
19 on with extra stuff that you want to address after she
20 testifies.

21 MR. MCDANIEL: Okay. There's nothing else I
22 can ask because she's not going to tell the truth so
23 there's no point.

24 ALJ JOHNSON: Thank you. Franchise Tax
25 Board, did you have any questions for the witness?

1 MS. MOSNIER: I have a couple questions.

2 EXAMINATION

3 BY MS. MOSNIER:

4 Q Ms. McDaniel, this is Marguerite Mosnier from
5 the Franchise Tax Board. I think you testified that
6 during 1999, you and Mr. McDaniel had joint bank
7 accounts.

8 Did you have those for the entire year?
9 That's the first part of my question.

10 And the second question is were they personal
11 bank accounts or were they business bank accounts?

12 A I had a separate account for my business and
13 then we had joint accounts. I don't know. And
14 honestly, we got married January 1, '99, so it may
15 have overlapped, but we had our own personal account
16 for a short time in our own name, but I know I had my
17 business account through '99, I believe, maybe into
18 2000 a little bit.

19 Q Okay. And that business account was a
20 separate account, and it was your account?

21 A Correct.

22 MS. MOSNIER: Okay. Good. That's all my
23 questions. Thank you.

24 ALJ JOHNSON: Mr. Curry, do you have any
25 follow-up questions you'd like to ask?

1 MR. CURRY: No follow-up questions. Thank
2 you.

3 ALJ JOHNSON: When you're ready, you can
4 begin with your 20 minutes of arguments. Sorry.
5 Before we leave, Ms. McDaniel, there is time for the
6 panel to ask questions.

7 Judge Leung, did you have a question?

8 ALJ LEUNG: Yes, for Ms. McDaniel.

9 THE WITNESS: Yes.

10 EXAMINATION

11 BY ALJ LEUNG:

12 Q Thank you. I'd like to take you back to, I
13 guess, the year 2000 when you would have filed your
14 1999 return.

15 How, if you remember, if you recall, how does
16 that process work? Do you contact your accountant,
17 your accountant contacts you? How does that work?

18 A I believe we contacted the accountant to make
19 an appointment to take all the paperwork to him.

20 Q And that happened towards the deadline of
21 April 15th, later on in October or early on in the
22 year in February? When did you do that back in 2000?

23 A I believe we did it right around the 15th of
24 April.

25 Q Okay. And when the accountant is done, when

1 he's ready for it go out, what happens at that point?
2 He calls you, he asks you to come down to sign it, is
3 that what happens?

4 A Usually. I know we dropped them off one
5 year probably. We probably just went back and forth
6 and picked them up or we could mail them. I mean,
7 honestly, I don't remember.

8 Q Just trying to figure out.

9 Well, do you guys actually talk to the
10 accountant before you sign, or does he just hand them
11 off to you and you just sign them?

12 A Oh, no. We met with him and go over things,
13 yeah.

14 ALJ LEUNG: Okay. Thank you.

15 ALJ JOHNSON: Judge Hosey?

16 ALJ HOSEY: No questions.

17 ALJ JOHNSON: I don't have any questions at
18 this time.

19 Mr. Curry, was there any follow-up question
20 based on Judge Leung's question?

21 MR. CURRY: No, thank you.

22 ALJ JOHNSON: And you may begin with your
23 argument.

24 MR. CURRY: All right. Couple things to get
25 out of the way first about presumptions. Respondent

1 FTB enjoys the presumption of correctness in their
2 determination, but this is a rebuttal presumption and
3 when evidence under the law, when evidence is
4 presented that contradicts that assumption or that
5 presumption, the presumption disappears and the
6 arguments have to be weighed against the evidence.
7 There's no longer an enjoin of that presumption.

8 There is a lot of evidence here that
9 contradicts the presumption. There's also another
10 presumption at work here. It's also in the law that
11 the evidence that is within the possession of a party,
12 within the possession and control of a party to a
13 controversy, and that party does not provide that
14 evidence especially after it's been asked for twice,
15 the evidence is presumed to be unfavorable to that
16 party.

17 Mr. McDaniel is clearly withholding a
18 substantial amount of evidence. He's provided
19 individual pages from a range of tax years, so he has
20 those tax returns and a lot of other irrelevant and
21 defamatory material, but somehow he cannot provide the
22 most important document, the 1999 tax return. He's
23 not even claimed that he doesn't have it.

24 Instead, he asserts, quote, I am not hiding
25 1999, I just have so much paperwork spread from the

1 divorce to create that it's still being worked on. I
2 do not have it handy. And that comes from, I don't
3 know how I reference that document, I guess we can
4 find it if he wants to see it.

5 ALJ JOHNSON: You can tell me the location.
6 Was that a brief, or is that in a document that's
7 provided to Office of Tax Appeals, Franchise Tax
8 Board?

9 MR. CURRY: Yeah. It was in one of the
10 document -- sorry, provisions to the FTB and OTA.

11 ALJ JOHNSON: In the form of an email, is
12 that what you're saying?

13 MR. CURRY: I'm sorry?

14 ALJ JOHNSON: Was it in the form of an email?

15 MR. CURRY: No. It's in one of the
16 documents. It's in one of the letters. Let me find
17 it for you real quick. It's in actually one of the
18 cover letters, I can tell you the date. So this was
19 in a collection of exhibits that was received. It's
20 marked received by OTA on October 16, 2018. I'm not
21 sure how I can cross-reference.

22 ALJ JOHNSON: We have that listed as
23 Mr. McDaniel's additional brief where he just did
24 Exhibits 1Z, 2A, 9Z, et cetera. It was on one of the
25 first pages, is that what you stated?

1 MR. CURRY: Right. On page 2.

2 ALJ JOHNSON: Okay. That's sufficient for
3 me. Thank you.

4 MR. CURRY: Okay. Well, it's there. Okay.
5 All right. But he does have handy documents about
6 personal loans and tax returns that do not pertain to
7 him nor do they belong to him. He has those but not
8 the most critical piece of evidence in this appeal and
9 in the application for the innocent spouse relief. If
10 Mr. McDaniel cannot be troubled to find the 1999 tax
11 return, did he provide it to FTB, or is that an
12 innocent spouse relief revocation?

13 If not, how did FTB arrive at a conclusion
14 without it especially after stating in a letter to
15 Mr. McDaniel that he must provide it, this is
16 Respondent's Exhibit H. And if he did provide the
17 1999 tax return to FTB, why hasn't FTB provided it to
18 Appellant? We've requested it twice, and Ms. McDaniel
19 has a right to that information.

20 If Mr. McDaniel did not submit the return,
21 how can any analysis be conducted by FTB as required
22 at least by subdivision C relief which requires an
23 allocation of benefit as a result of the disallowed
24 deduction? Without the return, how could that
25 analysis be done? If any analysis was conducted at

1 any point regarding any manner resulting from
2 Mr. McDaniel's innocent spouse relief application,
3 what documents or what information informed that
4 analysis? We've asked for all the documents related
5 to that, and we have received nothing except the
6 two-page summary.

7 Appellant has requested on two occasions
8 including her request that OTA issue a subpoena for
9 all the documents provided to FTB for or with the
10 innocent spouse relief application. The only
11 information provided again was the summary of findings
12 from the innocent spouse program, the subject matter
13 experts on this issue.

14 Does this mean that FTB relied on zero
15 documentation to arrive at its conclusion for relief
16 twice, two separate analyses or two separate
17 determinations, or is it withholding documentation to
18 which the appellant has the right to have?

19 It's very difficult to believe the FTB had no
20 documentation. So it is clear that both Respondent
21 and Mr. McDaniel have withheld evidence, evidence they
22 both possess and is entirely within their control to
23 provide.

24 Therefore, the required presumption under the
25 law is that both Respondent and Mr. McDaniel are

1 concealing information that is damaging to their
2 claims and conclusions. Anything that results from
3 this appeal that disfavors Ms. McDaniel results from
4 these conditions, that both Mr. McDaniel and
5 Respondent are concealing evidence, documentation that
6 has been asked for by definition, as a matter of law,
7 some deliberate withholds of evidence as to which
8 Ms. McDaniel -- Mr. McDaniel has or had.

9 There were two determinations by FTB, one is
10 their innocent spouse program, one by Mr. Coutinho who
11 I met today. They came up with different conclusions.
12 The innocent spouse program found that -- held that of
13 the three options for relief, B and C, subdivisions B
14 and C, Mr. McDaniel did not qualify for.

15 They went to subdivision F which is sort of a
16 catch-all for any inequitable reason he should be
17 granted relief. There are some conditions, and I
18 don't believe that he's met them.

19 In another component of FTB, Mr. Coutinho has
20 conducted a second evaluation of the claims or a
21 request for innocent spouse relief. He came up with a
22 different conclusion that Mr. McDaniel qualifies for
23 all three, except that that's not permitted.
24 subdivision F is only available if B and C are not.
25 It cannot be all three.

1 Mr. McDaniel has made a lot of statements,
2 very little of them are backed up with any kind of
3 documentation. Revenue Taxation Code 158 or 1 --
4 excuse me -- 18533, that's a long regulation or
5 section.

6 Under subdivision B requires that the
7 individual filing joint return establishes, this has
8 been Mr. McDaniel as requesting innocent spouse
9 relief, establishes that in signing the return, he or
10 she did not know of and had no reason to know of that
11 understatement. That has not been established.

12 He has asserted it but there's no
13 documentation that shows he establishes he had no
14 reason to know it. In fact, in his application, on
15 page 3 of his application, Part 3 of the innocent
16 spouse application asks for the applicant to tell us
17 if and how you were involved in filing tax returns for
18 those tax years.

19 Question No. 14, when -- excuse me.

20 When the returns were filed, what did you
21 know about any incorrect or missing information? Two
22 boxes are checked, and there's an explanation. The
23 box is checked for, you knew something was incorrect
24 or missing and asked about it. Explain below. The
25 box is also checked for you did not know anything was

1 incorrect or missing.

2 In the explanation box, Mr. McDaniel states,
3 Sharon was handling the tax details. I signed the tax
4 forms under the assumption that it was -- under the
5 assumption that all was correct. When the refund tax
6 due for the years were being held to pay back taxes, I
7 was told -- this is a fax, I'm so sorry -- I was told
8 it would be done in a year.

9 After three years, the returns were still
10 being held to pay back taxes. So something was a miss
11 or at least he believed it was. Going on, I asked
12 about it but Sharon was very offensive -- I think
13 defensive is probably the right word -- and
14 argumentative about the subject. That should have
15 been a clue to an ordinary taxpayer, that should have
16 been a clue.

17 ALJ JOHNSON: Just to clarify, that is
18 Exhibit H from Franchise Tax Board's exhibits that
19 you're reading from?

20 MS. MOSNIER: H.

21 MR. COUTINHO: I believe it's G.

22 ALJ JOHNSON: Sorry. Thank you.

23 MR. CURRY: Right. G. That's correct, page
24 5. Another problem with the subdivision B and C
25 relief is that those are elected -- electable and

1 Applicant is required to elect for those. Is that a
2 better way to say it? They must -- an applicant must
3 elect for those possibilities of relief. And I'm not
4 sure that there's any election indicated that he
5 intended toward those opportunities of relief.

6 Lacking any substantial evidence, there is no
7 establishing that Mr. McDaniel did not know or did not
8 have any reason to know. And, in fact, his own
9 testimony in the application suggests otherwise.
10 Still, let me back up.

11 All three offers of innocent spouse relief
12 require, among many things, several things, that the
13 applicant not be aware of and had no reason to be
14 aware of any problems with the tax returns must be
15 innocent. But the conclusions by two different
16 components of FTB have been very generous in accepting
17 his assertions without any documents to back them up.
18 And no consideration has been given to Ms. McDaniel's
19 statements which are in direct contravention to
20 Mr. McDaniel's. That seems obvious.

21 Part of the analysis for whether innocent
22 spouse relief should be granted is the impact that it
23 would have on the applicant. Would it create a
24 financial hardship? This requires an analysis of
25 Mr. McDaniel's financial situation. I don't believe

1 that's been done. If it has been done, I'd like to
2 see it.

3 But Mr. McDaniel's own evidence, which he has
4 submitted, his bank statements and his work history
5 demonstrate that he does spend money on overdraft fees
6 and airfare, at least to come here, money which he
7 could spend on paying down his tax liability. So it
8 is not fair to say that a financial situation is
9 creating a need for this relief.

10 Two more issues quickly. First, whether or
11 not Mr. McDaniel knew or should have known.
12 Obviously, in the record there's some evidence that he
13 should have known. The arguing or whatever it was
14 between them in the case law is evident that is a
15 signal that should be obeyed -- or excuse me -- should
16 be attended to. The taxpayer has a duty to inquire.

17 He cannot simply just say, I don't know. I
18 didn't know. I didn't see it. I'm innocent. You
19 cannot willfully be ignorant and not ask questions,
20 particularly when there are signals that there could
21 be something wrong. That is not an acceptable excuse
22 in the case law for innocent spouse relief.

23 Finally, in the last round of documents, let
24 me get to it real quick. The very last page is a long
25 list, we can find it, I guess, is a long list of

1 moneys that Mr. McDaniel would like to get back from
2 Ms. McDaniel and whatever, probably FTB, too,
3 something like \$80,000. And on the innocent spouse
4 relief application itself, the box is checked for, Do
5 you want a refund? Yes. The box is checked yes for
6 Do you want a refund? And there are a number of tax
7 years listed on this application.

8 What's happening here is more than just
9 innocent spouse relief for tax year 1999. All those
10 moneys Mr. McDaniel wants back, he's asking for a
11 work-around for an expired statute of limitations on
12 refunds. He's asking for a refund. Whatever the
13 statute of limitations on innocent spouse relief, the
14 refund statute of limitations expired a long time ago.

15 And for all of those reasons, the granting of
16 innocent spouse relief should be reversed.

17 ALJ JOHNSON: Thank you, Mr. Curry.

18 MR. CURRY: I'm done. Thank you.

19 ALJ JOHNSON: To clarify, I think the last
20 exhibit you're talking about is the last page in your
21 exhibits, it's NS25, page 52. Can you verify that
22 it's talking --

23 MR. CURRY: It's just a spreadsheet that has
24 a series of a amounts on it, total [inaudible] --

25 MR. COUTINHO: Yeah.

1 MR. CURRY: The total amount is \$82,740.85?

2 ALJ HOSEY: Yes.

3 ALJ JOHNSON: Thank you. Thank you,
4 Mr. Curry. We're not quite at an hour yet, but let me
5 ask, does anybody need a break or a rest?

6 MR. COUTINHO: Can we take a brief?

7 ALJ JOHNSON: Sure. Let's take a ten-minute
8 break.

9 MR. COUTINHO: Thank you.

10 ALJ JOHNSON: We'll come back at 2:05. We'll
11 go off the record.

12 (Recess taken.)

13 ALJ JOHNSON: All right. We're back on the
14 record. Franchise Tax Board, are you ready to proceed
15 with the hearing?

16 MR. COUTINHO: Yes, we are ready.

17 ALJ JOHNSON: All right. Thank you. What we
18 have next is Mr. McDaniel will provide testimony and
19 argument. Before we begin, we'll swear you in the
20 same oath that you used prior. Can you please stand
21 and raise your right hand.

22 Do you solemnly swear or affirm to tell the
23 truth, the whole truth, and nothing but the truth?

24 MR. MCDANIEL: I do.

25 (Mr. McDaniel sworn in.)

1 ALJ JOHNSON: You have 20 minutes. And you
2 can begin when you're ready.

3 MR. MCDANIEL: Okay. Thank you. In regards
4 to 1999 taxes, I didn't have them for months because
5 in the divorce, we hadn't done our taxes for many
6 years because -- and I'll show you why in a moment.
7 But there was a lot of tax fraud that happened prior
8 to us getting married that I did not know about, and
9 that is part of the innocent spouse thing. And I
10 understand that it's very frustrating and emotional,
11 but the facts are the facts.

12 A lot of these are just single pages like
13 Mr. Curry said, and we have 500, 600 pages here. So
14 it's to the point and concise. If there's anything
15 you need, I can probably get it.

16 The issue was that Internal Revenue Service
17 came back and re-audited Sharon's personal business
18 accounts, her Premier Business Impressions from before
19 we were married but for 1999 is when they caught it.

20 Then what this is all about here is a
21 piggyback onto the IRS audit. So that's what this
22 whole thing is about. Now, the Franchise Tax Board
23 came back in 2006 and sent us a letter saying that we
24 we're going to do this. And in 2006, we were still
25 married, and at that time, Sharon did have multiple

1 accounts and she was still getting mail and bills
2 under a bill person, but that's neither here or there,
3 but that's just a fact of the case.

4 So first thing, it wasn't really actually --
5 I am not asking for a refund from the State of
6 California for any of this. This is all stuff that
7 Sharon -- that I gave Sharon other than the time
8 involved coming back, because on the proceedings on
9 the request for the appeal, her first statement is, I
10 do not dispute the tax for 1999. I do not dispute I
11 owe the tax for 1999. What I do dispute is the
12 penalty and interest that has been assessed. On that
13 2006 letter tells you what the assessments and the
14 penalties are going to be. So that's not a surprise.

15 But in my world, once somebody admits that
16 they are their taxes and solely their taxes, then it's
17 a moot point. Why I was -- I was requested from -- I
18 requested innocent spouse. They asked me questions,
19 had me send in documentation, and I sent in everything
20 that I had that was available. I have hid nothing.

21 And if there's something they need, you need,
22 whatever I have, I will give you. I have absolutely
23 nothing to hide. So when it said we were separated,
24 she left. She just walked away, which is fine.

25 In closing, I'd like to add that I understand

1 that my business that resulted in the additional tax
2 however greatly benefited from profits of my business,
3 and in the paperwork, and that's what I was getting at
4 earlier, is that I showed that during our marriage
5 according to our tax records, she had that loss of
6 \$50,000, more than \$50,000. So I did not benefit
7 anything from her business.

8 And in court records, she did go on to say
9 because I told her I paid her back for everything,
10 including the country club, including the truck,
11 everything was paid back. The money that was -- well,
12 we'll get to that later.

13 Anyway, on NS25 in the hearing exhibits,
14 that's the list of things that I kind of went through
15 and tried to make it pretty concise and simple. So if
16 we kind of go through those really quickly, just my
17 quick point.

18 The No. 1 is she admits that they were hers
19 and only her taxes. And on the third -- I had the
20 third page on that, but where I was granted innocent
21 spouse.

22 Number 2, there's a premarital audit. So in
23 '98, '99 is when the tax examination came. And that
24 documentation there, those numbers should be
25 sufficient for Curry to figure out what the IRS was

1 piggybacking on or what they were asking for.

2 No. 3 is a previous list of Sharon
3 Gilbertson's previous taxes from '96, '97. There's
4 \$22,000 there, actually \$27,000 there. And then it
5 shows in '97, she was still married to Steven
6 Gilbertson at the time. So I don't know how I should
7 be responsible for those. And in the third page shows
8 \$22,000 in taxes owed by Sharon E. Gilbertson, not by
9 Sharon and Steve, by Sharon herself. So that's a
10 separate one.

11 And there's a levy for Bank of the West for
12 22,000 from the California State Board of
13 Equalization. So there's a history of tax fraud with
14 Sharon.

15 Number 4 --

16 MR. CURRY: Can I just interject? I'm sorry.
17 We talked about this at the pre-hearing conference
18 that these allegations of fraud, unless we're going to
19 explore this, I object. There's no evidence of fraud.
20 I doubt Mr. McDaniel even knows how to establish there
21 was fraud. It's only meant to disparage Ms. McDaniel,
22 and I object to all of this talk about the fraud.

23 ALJ JOHNSON: We have great levity as far as
24 how much, what evidence we admit. We appreciate your
25 objection. We are going to overrule it for

1 administrative patency. We'll take it in and examine
2 it for probative value to determine what weight to
3 give it. But as it goes towards equitable relief,
4 there is some tendency that it could be relevant so
5 we'll take it in and review it when we make our
6 determination. Thank you.

7 MR. CURRY: Thank you, Judge.

8 MR. MCDANIEL: Section No. 4 shows my
9 pre-Sharon history of zero fraud, no reason to cheat
10 on my taxes. It lists my 1040 or my whatever tax
11 refunds are, where I made sufficient money. I paid
12 sufficient taxes, and there was never a question,
13 there was never a lien. There was never anything
14 other than somebody working hard earning their money
15 and paying their taxes.

16 Section 5 is a list of my 1099s for the time
17 we were married. So it shows I was making really good
18 money. I was fortunate, I was blessed to work in a
19 place that paid me commission. And I worked my butt
20 off because I wanted to do well, and I averaged
21 probably \$120,000 a year there. And my taxes are
22 shown on all of them.

23 There's never any, any hint of needing to pay
24 anything else. Everything was paid exactly. So I am
25 innocent of any tax fraud in that.

1 Number 6, I know this is really obscure but
2 it's just like here's a set of check scans from
3 Sharon. And it goes from a check from \$9.99 to the
4 end, it's a check to the Internal Revenue Service for
5 \$5,953. Okay. That is not the issue, is the issue is
6 that she's proving to somebody that she paid taxes
7 that she did not.

8 And at that time for 1998, if she didn't have
9 that money to pay those taxes, how did those taxes get
10 paid? I ended up paying them. So it's not the check
11 fraud and the -- well, the wording. Okay.

12 Number 7 shows that there is no possible way
13 that I could have benefited from her business while
14 she lost over \$50,000 in those years, along with
15 previous tax liens, and along with a debt from her
16 ex-husband which I'll show in a moment. There's no
17 possible way I could have gained anything. And I
18 didn't.

19 During the time we were married, I probably
20 made over \$800,000, and I walked away from the
21 marriage with nothing, a foreclosure and debts and
22 obviously continued tax issues.

23 In '98, she lost \$93,000. In '99, that's
24 listed on the social security just so I'm not skewing
25 anything. So \$20,000 was her year 2000, 2001 when she

1 lost \$19,000. And then her social security statement
2 shows that she claimed no income for the next ten
3 years. Interesting.

4 But it does show in '99 that she made really
5 good money, but the combination of those years along
6 with the things that I paid, there is no possible way
7 that I could have benefited from anything.

8 Number 8, we received letters for the audit
9 from the IRS because there was tax anomalies or tax
10 fraud anyway. So that is a letter saying that they're
11 going to come out and inspect us. And they said get
12 all the paperwork ready. And Sharon got all the
13 paperwork ready. And she was found that her business
14 had committed mistakes, errors. And now she says she
15 doesn't, you know, it's an honest mistake. And at the
16 time, it wasn't an honest mistake. It was whatever it
17 was.

18 Number 9, this undeniably shows that Sharon
19 knew about the proposed tax lien. She was getting the
20 mail all the time because there was so much more stuff
21 going on at the time, dates 2006 claimed Sharon not to
22 know anything about this tax lien. It cannot be the
23 truth because it's right here with this.

24 How do I have all this information? I was
25 working 12 to 14 hours a day. Sharon was a

1 stay-at-home mom. The only thing I asked during the
2 entire marriage, and it was a rough marriage from day
3 one, the switch flipped the day we got married, and I
4 wish I would have got it annulled but I did not. But
5 the only thing I asked of her was to take care of the
6 taxes because after the '98 taxes, I knew there was
7 tax inappropriations or however you want to call it
8 but I was not going to be a part of that.

9 So in not doing -- I refused to do the taxes
10 so our taxes weren't done until I was court ordered by
11 the judge to do them. Obviously, they would get done
12 so I had probably 20 garbage bags of receipts that I
13 had given to her that she had requested but she just
14 refused to do them. She was better than that than to
15 do the taxes.

16 Number 10, this is where she had stole money
17 from her ex-husband. And the only reason that comes
18 out is just another part of if she has to steal money
19 from her ex-husband in November of '98 --

20 MR. CURRY: And I again object, how is --

21 MR. MCDANIEL: It's signed documentation that
22 she did that and that she paid him back after I was
23 married.

24 MR. CURRY: How is Mr. McDaniel in a position
25 to know what happened between Mrs. McDaniel and her

1 ex-husband?

2 MR. MCDANIEL: Look in -- excuse me. If he
3 was to look in the documentation, he would see that
4 she agrees to pay Steven the amount of --

5 ALJ JOHNSON: I'm going to -- sorry. Don't
6 want to over-talk each other here. We have a
7 stenographer who is trying to keep track of everything
8 that's being said, but I will allow your testimony,
9 Mr. McDaniel, as to the events as you see them and as
10 you presented. I'll allow that to be in. So thank
11 you, Mr. Curry. Objection overruled. Please
12 continue.

13 MR. MCDANIEL: And that just shows that it
14 was paid after we were married and that she used him
15 as part of the draw. The hardest part of this whole
16 thing is I was going through these tax things and
17 finding things that was breaking my heart every day.
18 Then I found out the statement of identity where I
19 found out she was married in '98, and it just about
20 killed me.

21 She had a nice story earlier that in April,
22 that we met after that. It was long before that. She
23 said she had been divorced for a year and a half. I
24 think I said two, three years in the first paperwork,
25 but it was -- I looked back, it was a year and a half.

1 If I would have known she was still married,
2 I wouldn't have dated her, and I certainly wouldn't
3 have married her the same year. So everything is just
4 really difficult.

5 Number 12, at the bottom of the sheet, you'll
6 see that there is numbers written in Sharon's
7 handwriting where \$17,796 went to 1999 taxes. That
8 was my money from my return from my making incredibly
9 good money, and actually changing my deductions so we
10 could pay her back-taxes. I didn't gain anything. I
11 never betted anything except heartache and a loss of
12 800,000 or over more.

13 Number 12 shows specifically how her tax
14 liens were paid by me. You can see the IRS
15 transcripts that I had to get for the divorce. And
16 there was never a question with the IRS in how I paid
17 their taxes.

18 Probably the fourth page of No. 13, it lists
19 page 2, 3, you can go down and you can see halfway
20 down the page, you start seeing these negative
21 numbers. And those were liens that were taken from my
22 business for her personal taxes.

23 Number 13 also shows the tax liens from the
24 State of California from '96, '97, '98. And then
25 there's, it shows -- No. 13 also shows a tax lien of

1 \$22,000 for an account for Sharon for her business
2 from Premier Business Impressions, not from David
3 McDaniel, not from David and Sharon, but from Sharon
4 McDaniel, Premier Business Impressions, her business
5 prior to us being married.

6 I've never been audited. I've never been
7 charged with fraud before I ever married her. And
8 there's just pages and pages of that. And so I
9 honestly, I don't understand how she's not in jail.
10 If I committed those numbers of fraud, I guarantee I
11 would be punished. And for her, just because she's a
12 woman and then she can sneak out of the next guy and
13 steal from him, that's wrong.

14 In her knowing -- and we were human, we have
15 a 20-year old child, and we're human to each other,
16 sometimes we get frustrated. But I asked her, I said,
17 Sharon, why are you doing this? I said, you admitted
18 to it, you know it's your taxes. She goes, because I
19 can. Because she can. She can create all of us
20 wasting all of this time because she can.

21 I'm sorry. I'm sorry that you guys have to
22 spend your time listening to me ramble through a bunch
23 of past stuff, but this is a 20-year old tax, a
24 20-year old tax. And I paid the IRS. I paid the
25 \$20,000 for the IRS when they audit us. I gained

1 nothing. I benefited nothing.

2 So in doing that, in asking her so that I put
3 a bill together for the time that I spent putting
4 paperwork together in my flight, my stuff, so it's not
5 for the State of California. I mean, whoever allowed
6 the appeal to continue on, that's, you know, the Board
7 of Equalization. And I tried to go through that
8 system there, and it's just like basically not
9 available online or anywhere.

10 But anyway, why did it continue to go on is
11 my biggest question? And then as Mr. Curry said on
12 the last page, these are just specific liens that I
13 paid of Sharon that was just absolutely undeniable.
14 Okay.

15 Just a couple more things. Sharon claimed
16 that she did not know about the taxes.

17 ALJ JOHNSON: Mr. McDaniel, you have two
18 minutes left.

19 MR. MCDANIEL: Perfect. Thank you. In the
20 divorce decree, which is No. 4 on your list, on page
21 5, in 2003, the parties were audited by the IRS for
22 tax return they filed for the '99 tax year. To the
23 best of Sharon's recollection, the audit resulted in
24 an additional tax obligation of \$18,000 of which a
25 substantial portion was related to Sharon's premarital

1 business promotions. That debt was paid during the
2 marriage from the parties' tax refunds and other
3 marital income.

4 I gave the judge absolute direct undeniable
5 facts of tax documentation, and that wasn't good
6 enough. But if Sharon said to her recollection, then
7 that made the paperwork good.

8 MR. CURRY: I'm sorry to interrupt again.
9 Can you tell me what page that is?

10 MR. COUTINHO: Divorce decree, page 5.

11 MR. CURRY: I apologize.

12 MR. MCDANIEL: No worries. And so she says
13 that I owe her \$20,000. And from the court judgment,
14 well, nothing is finished with the court yet because
15 my son was 18. And I honestly thought she would go to
16 jail for her tax fraud. But this is not a tax fraud
17 case. I am not here to say that she's committed
18 fraud. I'm not here to prove it.

19 I can, I can absolutely undeniably prove that
20 she committed tax fraud for many years. But that's
21 not why I'm here. I'm here to prove that I'm an
22 innocent spouse. And in doing so, some of the stuff
23 with the fraud had come up.

24 So the last thing is I'm not sure where it
25 came in the paperwork, but the judge ordered me to

1 pay -- her \$20,000 number came from -- I can't think
2 of the word -- but anyway, from the value of the
3 house. The value of the house was \$235,000.

4 We were \$60,000 in arrears and we stopped
5 paying for it in '99 because she was making more than
6 I was at that time. And she would not put a penny
7 towards the house and she would not pay for anything
8 at all.

9 So at that point, that's when I got a
10 separate account, and then I realized that there was a
11 whole lot of money going missing. And so the \$20,000
12 is ludicrous from the judge. And I gave her this
13 document. This is part of the court documentation.

14 Thank you for allowing me to testify and
15 trying to show that I am completely innocent and just
16 show the character of her throughout our marriage.
17 Thank you.

18 ALJ JOHNSON: Thank you, Mr. McDaniel.
19 Mr. Curry, you have a chance now to ask questions of
20 Mr. McDaniel. Do you need a short break before we
21 begin?

22 MR. CURRY: It looks like Ms. McDaniel would
23 like to ask questions. Should we do it after the
24 break?

25 ALJ JOHNSON: Let's take a break. She can

1 forward the questions to you so you can ask them. So
2 we'll take, is five minutes enough for her to send
3 questions to you or ten?

4 MR. CURRY: Should be fine.

5 ALJ JOHNSON: Okay. Five minutes. We'll go
6 off the record and take a break.

7 MR. CURRY: Thank you.

8 (Recess taken.)

9 ALJ JOHNSON: Let's go back on the record.
10 And before we go to questions, I just want to clarify.

11 Mr. McDaniel, you mentioned an amount around
12 \$20,000, that was in the marriage dissolution
13 document?

14 MR. MCDANIEL: Yes.

15 ALJ JOHNSON: I think I have it here on the
16 bottom of page 8 of that Exhibit 4. It's \$20,083.49,
17 does that sound accurate?

18 MR. MCDANIEL: No. I don't know that there
19 was an absolute number on it. I was just looking on
20 the first page of the divorce proceedings, which I
21 don't know -- it's her reply to the appeal, I guess
22 her original number to the appeal, I think.

23 MR. COUTINHO: I think it's Appellant's
24 appeal letter.

25 MR. MCDANIEL: Yeah.

1 ALJ JOHNSON: Is that the non-requesting
2 taxpayer notice where she filled out answers to the
3 questions?

4 MR. COUTINHO: I think it might be the letter
5 dated April 14, 2016. This is Appellant's appeal
6 letter.

7 ALJ JOHNSON: Okay. Thank you very much.
8 Okay. Thank you. All right. Let's turn now to
9 Mr. Curry. You have up to ten minutes to ask any
10 questions about factual statements made by
11 Mr. McDaniel.

12 EXAMINATION OF DAVID MCDANIEL

13 BY MR. CURRY:

14 Q Okay. So these are statements or questions
15 about, I think that correlate to the numbered
16 assertions Mr. McDaniel was making a moment ago or a
17 few minutes ago. Okay.

18 So first with regard to the issue of benefit
19 versus responsibility. Mr. McDaniel has no problem
20 when there were huge refunds that came --

21 ALJ JOHNSON: This is a question, sorry, for
22 Mr. McDaniel, is that correct, rather than a
23 statement?

24 MR. CURRY: Not exactly. Let me see if I can
25 rephrase this so there is a question. Okay. Let me

1 hold off on that.

2 ALJ JOHNSON: You will have a five-minute
3 closing at the end in case you want to try to tie up
4 any loose ends.

5 BY MR. CURRY:

6 Q Okay. So one question she has is whether or
7 not Mr. McDaniel has proof that he paid the liens
8 issued by Board of Equalization. And the reason for
9 the question is that these, some of the liens
10 apparently that he mentioned, that Mr. McDaniel
11 mentioned were for sales tax or business and paid
12 through a business and did not have to do with, I'm
13 assuming doesn't have to do with the relevant tax
14 return of income tax.

15 ALJ JOHNSON: That might be two questions
16 there. Do you want to ask the first question?

17 BY MR. CURRY:

18 Q Is there evidence that the liens that you
19 paid, Mr. McDaniel, paid the liens that were issued
20 at, I guess, issued by the Board of Equalization?

21 A No. She took all -- she stole all of the
22 check information and all of the relevant paperwork
23 like that. She took all the -- all of the check stubs
24 and all the bank statements and there was multiple
25 bank statements so I don't know where it was from. I

1 do not have -- no, I do not have absolute undeniable
2 proof. I just know that if you lose \$50,000 and pay
3 out \$400,000, you can't afford to do that.

4 ALJ JOHNSON: And that second part of the
5 statement, more of a statement, do you want to
6 rephrase as a question or move on?

7 BY MR. CURRY:

8 Q So let me phrase it as a question.

9 Do you dispute that those liens were -- that
10 resulted from sales tax were the result of, I guess,
11 nonpayment of sales tax for her business through and
12 then they were subsequently paid through her business?

13 Let me see if I can clarify. So the sales
14 tax liens didn't relate to the income tax.

15 And are you asserting and do you have proof
16 that you paid for those which were her business liens
17 and she says were paid through her business accounts?

18 A Can she prove that those were paid through
19 her business account?

20 Q That's the question of her, and right now I'm
21 asking you.

22 A No, I don't have -- no. As I said, she took
23 all of the check books and all the registers and stuff
24 like that.

25 Q And you have all the tax returns, looks like?

1 A I have all the tax crap, yeah.

2 Q But not 1999?

3 A I do have that.

4 Q Okay.

5 ALJ JOHNSON: Did you ask the question, if
6 you had the document that you want?

7 BY MR. CURRY:

8 Q Right. Okay. Let me come back to that.
9 These are her questions as best as I can tell.

10 Okay. Going back to the topic of whether or
11 not there was a benefit. Now there's two types of
12 benefits that could be part of an analysis or not. A
13 benefit in lifestyle, a lavish lifestyle in the case
14 law, we see that a lavish lifestyle is an indication
15 that someone ought to know that there is something
16 going on with an error in a tax return. That is an
17 indication, maybe not exclusive.

18 But another benefit would be in the tax
19 return itself. So business losses, I mean, I know
20 people who -- I might be going a little far field --

21 ALJ JOHNSON: Let's try to focus the
22 questions a little bit.

23 BY MR. CURRY:

24 Q There are circumstances where a business will
25 open another business that will maybe lose some money

1 so that the main business which makes a lot of money
2 say in a fishing season, for instance, would have
3 losses to reduce the tax liability, right? So that's
4 another type of --

5 So all the losses you're talking about -- now
6 I'm getting back to her question -- all the losses
7 you're talking about would be one kind of benefit that
8 relates to the tax return.

9 But her question is related to the sort of,
10 if you want to say lavish lifestyle, but paying for
11 the truck, paying for the golf club.

12 What about the Oakland Raiders season
13 tickets? I've never had them, I don't know if they're
14 expensive, but I guess they probably are. Who paid
15 for those?

16 A Sharon paid for the -- she had the season
17 tickets through her things. And in the divorce
18 decree, I questioned whether she -- paid her back on
19 everything else. And it was. And the judge
20 documented that also. And so the only thing that is
21 in question is the season tickets for the Raiders, and
22 yes, I was a Raider fan, but she had those. And we
23 had a child and we got rid of them. I didn't benefit
24 anything from her business. Nothing.

25 Q But you did go to the games?

1 A I went to --

2 Q You got to enjoy the games?

3 A I went to maybe six games.

4 Q Okay.

5 A Not worth \$800,000.

6 Q Okay. Let me see if I can nail down a couple
7 other questions.

8 A And to answer your question, a lavish
9 lifestyle or anything else, if somebody actually loses
10 money, somebody's got to pay for that money that is
11 lost unless you're just making it up. And if you're
12 making it up to the Franchise Tax Board, I don't know
13 if that's legal or not.

14 So to answer your question, yeah, bologna, I
15 did not benefit anything and I did not live a lavish
16 lifestyle.

17 MR. CURRY: Okay. I don't see anything else
18 that I can quickly and concisely put into a question,
19 so I apologize, Sharon, if I blew it. I think that's
20 all the questions that I have from Ms. McDaniel for
21 Mr. McDaniel.

22 ALJ JOHNSON: Okay. Did you have questions
23 yourself for Mr. McDaniel?

24 MR. CURRY: Oh, yes. Thank you. I do. Just
25 a couple.

1 BY MR. CURRY:

2 Q So Mr. McDaniel, there was a long delay
3 between the issuance from FTB of the NPA, Notice of
4 Proposed Assessment, that was in 2006, I believe, for
5 the 1999 tax year.

6 When and how did you did you discover the
7 innocent spouse relief benefit?

8 A Every time I get -- and I got lots of them --
9 every time I get a letter from the State of
10 California, the state of Montana that I live in now,
11 or the IRS, I call them immediately. And if it's my
12 responsibility, I figure out payments. I prove that
13 it's not my responsibility or I take care of it.

14 In 2015 or '16, whenever this started to come
15 to a head, I got a letter. I called the Franchise Tax
16 Board, Board of Equalization and I said, I don't know
17 this. This is from my ex's thing and I have nothing
18 to do with it. And the judge put a line to where I
19 got screwed on everything and she got, you know, bells
20 and whistles for everything.

21 So I drew a line myself, so that was not my
22 responsibility. And Sharon in her opening statement
23 and in her things said she doesn't dispute those are
24 her taxes. So that came -- to answer your question,
25 in 2015 or whenever it came to a head, whenever I got

1 a tax lien or bill, that is when I called. And when I
2 did that, then I said that's not mine. And then they
3 told me what I had to do.

4 And I went through the system, the program,
5 and I filed for innocent spouse. And I filled all the
6 paperwork that was required of me that I had. And I
7 may or may not have had the '99 taxes at the time, the
8 whole form at the time.

9 I have what the IRS gave me, probably 40,
10 50 pages of what they were looking at. I don't know
11 what it is. I never paid attention.

12 Q Okay. So you began the innocent spouse
13 program with in relation to the assessment issue in
14 2006 for the '99 tax but --

15 A I didn't do that until 2016. When all this,
16 April 14th of '16, when she received that, I think my
17 documentation which I don't have with me, it's in my
18 file, I don't know where it is. But as soon as I got
19 a tax lien from the State of California, I called and
20 took care of it.

21 Q Okay. And you were talking about a lot of
22 other tax liens.

23 And did you call at that time and ask about
24 other tax liens?

25 A What years were those?

1 Q When did those start?

2 A Those, the tax liens, most of those were
3 prior to our marriage, but they were dated after we
4 were married. So they were '96 and '97, but if you
5 look at the date, it was after we were married.

6 Q Okay. But you were getting notices, and the
7 liens were issued or you were getting collection
8 notices regarding those liens in the period of what,
9 2002, '3, '4, '5, '6?

10 A I don't think we really started getting them
11 until maybe 2005 or something because we were living
12 here and everything was pretty good. And then when we
13 sold our property in Exeter to move to Montana because
14 my son was sick all the time, that's when we had a big
15 capital gains. And I knew that it was a capital gains
16 so I actually wouldn't have to pay the taxes, but I
17 was getting tax bills for 500-something thousand
18 dollars for years.

19 And I still stuck to my guns. Sharon, this
20 is your deal. You take care of our taxes. That's the
21 only thing I'm asking of you. And she refused to do
22 that.

23 Q We're getting a little off topic.

24 What I'm curious about is when you received
25 those notices, and you were at least around the time

1 period of at least 2005, and did you call in and find
2 out why didn't you discover the innocent spouse relief
3 program at that point, no one told you about it?

4 A I didn't care. I was married. It's just
5 like, hey.

6 Q But did you know about it, that it was an
7 option?

8 A No. No. As a matter of fact, I would have
9 never, ever put her name on my taxes, ever. If I
10 would have known when I got married, it was you're
11 married or you're not. It wasn't -- you didn't have a
12 choice --

13 Q But the way that you discovered it was
14 because FTB told you, or how did you learn about that
15 there was such a thing as innocent spouse relief?

16 A I don't know if I looked it up online or if
17 the State of California told me. I don't recall.

18 ALJ JOHNSON: We've gone over the ten minutes
19 but I have allotted a couple more minutes if you have
20 questions to catch up on.

21 BY MR. CURRY:

22 Q Okay. So you said earlier in your testimony
23 you never had a lien, there was no issues in paying
24 taxes, you worked your rear-end off and all of that.

25 But what about the tax liens and collection

1 activities that were issued to you by the state or the
2 Franchise Tax Board? These are in -- these are the
3 representative samples of collection activities. And
4 in FTB's Exhibit F, and they're all addressed to you,
5 are you saying that none of these taxes are yours?

6 A Not necessarily. Just because they're
7 addressed to me, they could be Sharon's completely
8 100 percent, or they could possibly be mine. We were
9 married until 2010, so all of our taxes would be
10 together at that point in time. But that little
11 snake, she had the judge go back and change it to
12 where we were separate, so she drew a line. So if you
13 asked me --

14 Q Now you're into the divorce decrees and I
15 don't want to get in there, at least not yet. But I'm
16 just staying focussed on the collection activities.

17 A What year are you asking for? That's all.
18 Then I can give you the better answer.

19 MS. MOSNIER: Excuse me, can I interrupt for
20 a second? To clarify with respect to the documents
21 that are in Exhibit F to FTB's opening brief,
22 Mr. McDaniel's name is the only one that shows on
23 them, but they have been redacted. And it may be
24 that -- it may be that Ms. McDaniel's name is also on
25 them and has been redacted. I don't know but that's a

1 possibility. And I just wanted to advise the panel
2 and the parties of that.

3 ALJ JOHNSON: Thank you.

4 MR. CURRY: It may be that it's not. In
5 fact, it's probably more likely that it's an address.
6 I believe OTA regulations allow or require personal
7 information like addresses to be redacted in
8 information that goes out to the public.

9 Why would Ms. McDaniel's name be redacted if
10 it's her tax liability? What this suggests is that
11 it's not.

12 ALJ JOHNSON: Thank you. You can continue.

13 BY MR. CURRY:

14 Q Okay. But getting back to the issue of the
15 tax liens and this representative sample of collection
16 activities, these -- okay.

17 You have said that the 2015 notice you
18 received instigated your discovering somehow, either
19 through FTB telling you that, although FTB states that
20 they didn't send out notices with their collection of
21 letters and, therefore, the statute of limitations of
22 two years did not go into effect. Okay. So those are
23 two different statements, right?

24 So they're saying they didn't inform you, at
25 least not through letters that came with the notices.

1 A What is your question?

2 Q And what you're saying is, I think I forgot
3 my question now. Let's be honest with you. Okay.

4 So you said that you first learned of the
5 innocent spouse relief program in 2015 after getting a
6 notice by the tax lien that you didn't think was
7 yours, but you got other notices in many -- for or in
8 other years much earlier than that.

9 And you could have, if you had inquired, gone
10 through the same process and discovered the innocent
11 spouse relief program at the time. You said you
12 didn't want to or you didn't consider doing innocent
13 spouse relief because at that time you had been
14 married.

15 But innocent spouse relief is available to
16 married persons just as it is, maybe a different
17 subdivision, just as it is available to unmarried
18 persons.

19 So could you have discovered if you had
20 inquired earlier than 2015, why didn't these other
21 notices cause you to inquire about that program?

22 A We hadn't done our taxes for say at least
23 eight or nine years.

24 (Multiple voices.)

25 (Clarification by Reporter.)

1 ALJ JOHNSON: Make sure we don't talk over
2 each other.

3 BY MR. CURRY:

4 Q Okay. Why didn't those notices trigger a
5 response to learn about the program?

6 A Because I went through and I had what I had
7 as far as tax information. Like I said, I had a bunch
8 of garbage bags that I had to go through and figure
9 out what was what. In 2005, I submitted my tax
10 returns in the best possible way because I was getting
11 pressure from the judge, and you can read that in the
12 documentation. And it was not complete.

13 I did not send in all the write-offs and all
14 the information that I had. It was all the
15 information I had at the time, but I was on a time
16 frame and so I had to do that because I was going to
17 get, you know, whatever by the court. So I came back
18 for 2005 in 2008 and 2009.

19 I believe my individual taxes which are no
20 longer part of Sharon's magically, I have additions
21 and changes that I need to make. And I did it within
22 the period of time of my tax return but not within the
23 year.

24 So there's still a lot of tax fighting, a lot
25 of tax hassles I guess I'll have to live the rest of

1 my life with because of Sharon.

2 Q Okay. So, again, with your statement, you
3 never had a lien, that doesn't appear to be true.
4 There was no issue of paying your taxes. But Exhibit
5 F, page 11 shows there's an order to withhold personal
6 income tax. That sort of comes after several other
7 steps in the collection process.

8 And another FTB exhibit, I think N, I think
9 it was submitted later, is the brochure about how to
10 enter into a payment agreement, if my memory serves.

11 So why could you not have gone into a payment
12 agreement rather than waiting until it gets into a
13 withholding situation?

14 A Because they were Sharon's taxes and I don't
15 want to pay Sharon's taxes anymore. I was financially
16 rigged by Sharon, and the IRS does not care about
17 anything. They want their money. And so I got liens.
18 The Franchise Tax Board is a little bit more humane
19 and they sent letters and they're more lenient but
20 it's just they start putting numbers on your house,
21 the IRS. And those are the things that I went by most
22 importance.

23 Q Okay.

24 A You would never believe what went on. Never.

25 ALJ JOHNSON: Mr. Curry, we're at 20 minutes

1 to ask questions.

2 BY MR. CURRY:

3 Q Okay. One last question. And this is what
4 you mentioned earlier.

5 You do have the tax return, the '99 tax
6 return?

7 A The majority of it, yeah.

8 Q Okay.

9 A And I just, I just --

10 Q Do you have it?

11 A What's that?

12 Q Can we have it?

13 A Sure.

14 Q Okay. Well, it's a little late now. How
15 long have you had it?

16 A I just, I found the majority of it last week,
17 but I don't -- I have what came from the IRS and
18 that's a 30-page or 40-page thing. And that's all
19 that you guys really needed to know because that's all
20 the information that was -- this whole thing is based
21 on.

22 ALJ JOHNSON: Thank you, Mr. McDaniel.

23 Franchise Tax Board, do you have any
24 questions for Mr. McDaniel?

25 MR. COUTINHO: No further questions.

1 ALJ JOHNSON: Let me turn to my panel.

2 Judge Leung, do you have any questions?

3 ALJ LEUNG: Yeah, I have questions.

4 EXAMINATION

5 BY ALJ LEUNG:

6 Q Mr. McDaniel, I'm going to take you back also
7 to 19 -- no, to 2000 when the 1999 return was filed.

8 So as Ms. McDaniel had testified, you guys,
9 when you were ready, called, made an appointment with
10 the accountant and went to meet with him, and when the
11 accountant was ready, he contacted you; is that
12 correct?

13 A Not necessarily, sir.

14 Q Okay. So tell me what, in your view of what
15 happened in 2000 regarding the 1999 return.

16 A I don't know. I've never been super prompt
17 on my taxes. I don't cheat, and so I don't -- I don't
18 have to play a game if I have to make an extension. I
19 get an extension. For that year, I don't recall what
20 happened, but I was never in a hurry. So it wouldn't
21 be something that was rushed or because of a pregnancy
22 or because of something else, that would not have
23 happened.

24 Q Okay. But do you remember when the 1999
25 return was ready to be filed, did you meet and have a

1 discussion with the accountant?

2 A I don't recall.

3 Q You don't recall?

4 A I just remember the IRS coming to our house.

5 Q And when did IRS come to your house?

6 A I believe it was in 2001. I think the judge
7 said 2003, but I think it was actually 2001. And
8 that's in my documentation also, in the last set of
9 the FTB where the pages are, the NS25, I believe it's
10 in there.

11 Q Okay. You talked about being contacted by
12 the IRS because they were examining prior years'
13 returns.

14 When IRS sent notices, were they sent to you,
15 to Ms. McDaniel, to both? How were those notices sent
16 to you?

17 A They were sent to me, but I knew they weren't
18 mine because they were to the small business, and
19 there's another name for it but it's on the sheet.
20 But it's because of a small business or
21 self-employment. And I was employed getting W-2s at
22 the time so I knew they weren't mine.

23 But as I said, the IRS is pretty brutal. And
24 if you claim together, you're liable together. And so
25 I was thrown under the bus on all of that.

1 Q So who handled that exam, you, the
2 accountant?

3 A We were -- no. We were both there and the
4 IRS came to the house and they asked for certain
5 documentation, and they had a long list. And they
6 gave us four months to prepare for it. And they came
7 to the house and then they found discrepancies where
8 she paid her sister for '98, which isn't, I don't
9 think a question here. I think we're only talking
10 about the '99. And the '99 had some discrepancies
11 where she had written off things multiple times.

12 But I don't think that if there was any
13 issues before, that they would have came up. But I
14 think there was a consistent pattern, and so I was a
15 good target and I was making good money and so it was
16 easy to collect.

17 ALJ LEUNG: Okay. Thank you.

18 ALJ JOHNSON: Judge Hosey, do you have any
19 questions?

20 ALJ HOSEY: Yes.

21 EXAMINATION

22 BY ALJ HOSEY:

23 Q Hello. So when were you aware that she had
24 past tax liabilities before 1999, was it during 1999?

25 A No. Prior to us getting married, we were

1 supposed to get married on the 1st in the State of
2 California. We were getting married out of state so
3 the Justice of the Peace. Thanksgiving before we got
4 married, I get a letter saying she hasn't been real
5 honest with me, and that her business isn't what she
6 claimed it was, and she has back-taxes. And I asked
7 her, and she said 20 or 30 thousand dollars.

8 Q This letter was from Ms. McDaniel?

9 A From Mrs. McDaniel, yeah.

10 Q Okay.

11 A And we talked and we cried and figured it out
12 and just said, you know, we'll go forward. Well, it
13 wasn't 20 or 30 thousand dollars. It was hundreds of
14 thousands.

15 Q Okay.

16 A And that's what -- and I didn't know about
17 the taxes until I started doing the taxes for -- to
18 answer your question, I knew there was something
19 before because of the letter I got on Thanksgiving
20 before we get married in 1998. But the numbers that I
21 see now just flabbergast me. Now I know where my
22 money went.

23 ALJ HOSEY: Okay. Thank you.

24 ALJ JOHNSON: Thank you. Now we move on to
25 Franchise Tax Board. You'll have 20 minutes to

1 provide your arguments.

2 MR. COUTINHO: Thank you. Good afternoon, in
3 this case, Mrs. McDaniel has failed to show that FTB
4 erred in granting her former spouse Mr. McDaniel
5 innocent spouse relief for the 1999 tax year. There
6 are three forms of innocent spouse relief under
7 California Revenue and Taxation Code, Section 18533
8 that I will be addressing today.

9 The first is traditional relief under Section
10 18533(b). The second is separate allocation relief,
11 Section 18533(c). And the third is equitable innocent
12 spouse relief under Section 18533(f).

13 Taxpayer only needs to meet one of the forms
14 of relief to be granted innocent spouse relief and
15 does not need to meet all three forms. In its initial
16 review, FTB erred by not considering Mr. McDaniel for
17 relief under its Section 18533(b) or (c).

18 Upon further review of those subdivisions,
19 Mr. McDaniel qualifies independently under (b) and (c)
20 as well as Section 18533(f). There have been a lot of
21 submissions and testimony about each of the spouse's
22 failure to comply with various obligations. However,
23 many of the documents and assertions are not pertinent
24 to the determination of whether Mr. McDaniel is
25 entitled innocent spouse relief for the 1999 tax year.

1 Therefore, I will go through why Mr. McDaniel
2 qualifies independently for innocent spouse relief
3 under Section 18533(b), (c) and (f).

4 Mr. McDaniel is entitled to relief under
5 Section 18533(b), traditional innocent spouse relief
6 because he satisfies all five requirements. First,
7 Mr. and Mrs. McDaniel filed a joint tax return on
8 April 15, 2000.

9 Second, in our appeal letter, her
10 non-requesting spouse notice and her testimony today,
11 Mrs. McDaniel admits that the understatement of tax is
12 due to a business that she independently owned and
13 operated during the 1999 tax year.

14 Contrary to Mrs. McDaniel's assertion,
15 Mr. McDaniel also meets the knowledge requirement.
16 The knowledge requirement analyses whether the
17 requesting spouse knew or had reason to know of the
18 item giving rise to the understatement of tax at the
19 date that the return was filed.

20 In this case, Mr. and Mrs. McDaniel filed
21 their joint tax return on April 15, 2000. Exhibit M
22 to Respondent's opening brief shows that the IRS
23 opened its examination on January 31, 2002. The IRS
24 examination focused largely on the cost of sales
25 deduction claimed on Mr. and Mrs. McDaniel's joint tax

1 return. As stated in Appellant's -- as stated in
2 Ms. McDaniel's appeal letter, Exhibit J, the
3 non-requesting spouse notice and in her testimony
4 today, she made a mistake in relation to the
5 bookkeeping of her separately-owned business.

6 Exhibit G to Respondent's opening brief is
7 Mr. McDaniel's request for innocent spouse relief. In
8 Exhibit G, Mr. McDaniel testified that he had an
9 arrangement -- each party had an arrangement to report
10 their own income to the CPA. Mr. McDaniel allegedly
11 reported his W-2 income to the CPA and Ms. McDaniel
12 reported her separate business income to their CPA.

13 Contrary to the assertion made by Appellant's
14 representative today, page 5 of Exhibit G states that
15 after three years, Mr. McDaniel asked Sharon -- asked
16 Ms. McDaniel about the tax returns. And she became
17 very offensive, defensive and argumentative.

18 The crucial portion when looking at the
19 knowledge requirement is what happened when the return
20 was filed which was April 15, 2000. Therefore, it is
21 irrelevant what Mr. McDaniel said three years later
22 and whether or not that indicates that he should have
23 known regarding the deficiency.

24 FTB has attached all documents that were
25 submitted during the innocent spouse review and has

1 not concealed or withheld any documentation from the
2 record. Based on the evidence before this panel,
3 Mr. McDaniel did not have knowledge of the deficiency
4 at issue at the time the joint return was filed on
5 April 15, 2000.

6 Mr. McDaniel also meets the fourth
7 requirement because it would be inequitable to hold
8 him liable for deficiency that is solely attributable
9 to Mrs. McDaniel.

10 Finally, as stated in FTB's additional brief,
11 Mr. McDaniel's application for innocent spouse relief
12 was timely under Section 18533(b) and (c).
13 Accordingly, Mr. McDaniel meets all the requirements
14 and independently qualifies for relief under Section
15 18533(b).

16 Turning to Section 18533(c), separate
17 allocation relief, this provision would only be
18 relevant if the Office of Tax Appeals determines that
19 Mr. McDaniel is not entitled to relief under Section
20 18533(b). Mr. McDaniel meets the first requirement of
21 separate allocation relief because he and Ms. McDaniel
22 were divorced prior to him filing for innocent spouse
23 relief in June 2015.

24 Secondly, IRS Treasury Regulation pertaining
25 to separate allocation relief, unlike traditional and

1 equitable innocent spousal relief places the burden on
2 the taxing agency to show that a requesting spouse had
3 actual knowledge of the deficiency at the time the
4 joint tax return was filed.

5 In this case, as stated previously, there is
6 no evidence that Mr. McDaniel had actual knowledge of
7 the deficiency.

8 MS. MOSNIER: Specifically with respect to
9 the knowledge requirement under (c), this is unlike
10 what it is under (b) or (f). Under (b), the burden is
11 on requesting spouse to show he did not have a reason
12 to know of the item that gave rise to the
13 understatement.

14 Under (c), as soon as the requesting spouse
15 establishes that he was single or separated, the
16 amount of time before requesting relief, that a valid
17 joint return has been filed, and also establishes how
18 much of the deficiency assessment is attributable to
19 the non-requesting spouse. At that point, the burden
20 of proof shifts to the government to show that the
21 requesting spouse had actual knowledge of the item
22 that gave rise to the understatement. And in this
23 case, we know that that item is the disallowed cost of
24 goods deduction that was reported on the Schedule C
25 business operated by Ms. McDaniel.

1 And 18533(c) conforms to Internal Revenue
2 Code Section 6015(c) and the IRS promulgated treasury
3 regulations to interpret that section, specifically
4 Treasury Regulation 1.6015-3 discusses the relief by
5 separate allocation and directs that with respect to
6 the knowledge factor.

7 When the item that gives rise to an
8 understatement is an erroneous deduction as it was
9 here, that knowledge of the item means, quote,
10 knowledge of the facts that made the item not
11 allowable as a deduction, end quote.

12 And in this case, the facts that made the
13 item not deductible, the cost of goods, a certain
14 portion of them not deductible was, according to
15 Ms. McDaniel's testimony today, a duplication of
16 submission of certain invoices for both the 1998 and
17 1999 tax years.

18 She stated it was an oversight on her part.
19 She wasn't aware of it. The tax professional to whom
20 she gave the information did not identify it as an
21 issue. It was her business, and she was not aware of
22 the duplication of the submission of certain invoices.

23 It is simply the case that the government, in
24 this case, FTB cannot show that Mr. McDaniel had
25 actual knowledge of the reason that the deduction sent

1 out on Schedule C was incorrect. He wouldn't have
2 known, if Ms. McDaniel whose business it was didn't
3 know, certainly Mr. McDaniel would not have known that
4 certain invoices had been submitted for both and used
5 for both tax years.

6 MR. COUTINHO: Based on what the testimony is
7 said, the actual knowledge requirement under Section
8 18533(c) has been satisfied. Third --

9 MS. MOSNIER: No. I'll correct that. FTB
10 cannot show there is actual knowledge because to get
11 (c) relief, as long as the requesting spouse
12 establishes the valid joint return and the portion of
13 the deficiency that's attributable to the
14 non-requesting spouse, then the requesting spouse is
15 entitled to relief under (c) unless the government can
16 establish factual knowledge.

17 And in this case, FTB cannot establish that
18 as actual knowledge. And Mr. McDaniel for that reason
19 qualifies for relief under (c). And he is deemed by
20 the way to have elected relief under (b), (c) and (f)
21 simply by the nature of the form FTB uses for its
22 innocent spouse request, Form 705, it's one of the
23 exhibits, I think F or G, to our opening brief because
24 FTB advises the requesting spouse on that notice that
25 he or she will be considered for relief under (b), (c)

1 and (f) as appropriate.

2 MR. COUTINHO: The third requirement also has
3 been met under separate allocation relief under
4 Section 18533(c) as admitted in her appeal letter and
5 the non-requesting spouse notice. The deficiency
6 arises from Ms. McDaniel's separate business that she
7 owned and operated during the 1999 tax year.

8 Accordingly, even if the Office of Tax
9 Appeals finds that the requirements of traditional
10 innocent spouse relief under Section 18533(b) have not
11 been met, Mr. McDaniel should still be granted
12 separate allocation relief under Section 18533(c).

13 Mr. McDaniel also qualifies for relief under
14 Section 18533(f), equitable innocent spouse relief.
15 Section 18533(f) would only apply in this case if the
16 OTA determines that Mr. McDaniel is not entitled
17 relief under Sections 18533(b) and (c).

18 Relief under Section 18533(f) should be
19 granted if after taking into account all the facts and
20 circumstances, it is inequitable to hold Mr. McDaniel
21 liable for all or part of the deficiency arising from
22 the joint return.

23 Section 18533 is patterned after the Federal
24 Innocent Spouse Statute. Thus, it is appropriate to
25 look for federal guidance when determining when to

1 grant innocent spouse relief under Section 18533(f).

2 IRS Revenue Procedure 2013-34 was
3 non-exclusive factors for granting equitable relief,
4 but the revenue and procedure states that no one
5 factor controls that determination.

6 Ms. McDaniel's representative today asserts
7 that Mr. McDaniel significantly benefited from their
8 relationship during the 1999 tax year. However,
9 significant benefit is only one of the non-exclusive
10 factors to be considered when evaluating when a
11 taxpayer's entitled to equitable innocent spouse
12 relief.

13 Mr. McDaniel -- the revenue and procedure
14 also only looks -- doesn't look at the significant
15 benefit as a whole, whether benefits one of the
16 requesting spouse during that relationship, rather, it
17 looks more narrowly and looks significantly whether
18 the taxpayer, the requesting spouse significantly
19 benefited from the understatement of tax.

20 The understatement of tax in this case
21 resulted in an additional tax assessment of roughly
22 \$3,800. There is a U.S. Tax Court decision that is on
23 point in regards to this, the amount that's
24 potentially at issue, and that is Howerter vs.
25 Commissioner. And that case --

1 ALJ JOHNSON: Can you please spell the first
2 name.

3 MR. COUTINHO: Yes. Sure. And I'll give the
4 citation. Howerter is H-O-W-E-R-T-E-R, vs.
5 Commissioner. It's a United States Tax Court
6 decision. And I believe the citation is -- the docket
7 number is 27079-12S. And in that case, the U.S. Tax
8 Court found that there was -- that in evaluating the
9 significant benefit factor, that a deficiency amount
10 of approximately \$2,900 was too small to weigh either
11 way, whether or not the requesting spouse receive a
12 significant benefit and weigh that factor as neutral.

13 The court in that case divided the assessment
14 between both of the spouses and found 1,450 to be the
15 amount of the unpaid tax to be too small to allow
16 either spouse to enjoy a significant benefit, and that
17 is why the court in that case determined that the
18 significant benefit factor should be waived as --
19 should be weighed as neutral.

20 In this case, similarly, the deficiency, the
21 additional tax that is owed is roughly 3,800, and once
22 divided between the two parties, I believe is \$1,700.
23 And similar to the Howerter case, that significant
24 benefit factor should be weighed as neutral.

25 In this case, equitable innocent spouse

1 relief under Section 18533(f) should be granted. The
2 deficiency at issue is solely attributable to
3 Ms. McDaniel, and further, Mr. McDaniel did not know
4 or had no reason to know at the time the joint return
5 was signed about the deficiency from Ms. McDaniel's
6 separate business.

7 Accordingly, for the tax year at issue, it
8 would be inequitable to hold him liable for a
9 deficiency he did not cause nor know about at the time
10 the joint tax return was filed.

11 MS. MOSNIER: With respect to the other
12 balancing factors, Revenue Procedure 2013-34 sets out
13 seven balancing factors. And we have derived them in
14 greater detail in our opening brief. But just in
15 general, the marital status factor weighs in favor of
16 relief. The knowledge factor weighs in favor of
17 relief. The tax compliance factor weighs in favor of
18 relief. And the four remaining enumerated factors,
19 economic hardship, legal obligation, significant
20 benefit, and health are neutral.

21 In other words, there's not a single
22 balancing factor that weighs against relief. And we
23 have not identified any other additional specific
24 facts or circumstances which, when you think of
25 April 15th, the time in April 15, 2000 when he filed

1 the return or any circumstances since then that should
2 weigh either in favor or against relief for
3 Mr. McDaniel in this case.

4 But the listed factors alone are sufficient
5 to establish, as Mr. Coutinho explained, that
6 Mr. McDaniel is independently entitled to a refund or
7 (f), if the office determines that he is not otherwise
8 entitled under either (b) or (c).

9 MR. COUTINHO: Just in conclusion, FTB's
10 position is that it correctly granted relief under
11 Section 18533(b), Section 18533(c) and Section
12 18533(f). Thank you.

13 ALJ JOHNSON: Thank you. So we have the
14 testimony, and we have asked questions of the
15 witnesses. We now have all the legal arguments as
16 well. At this time, I will give time to the judges if
17 they have questions regarding the parties' position.
18 Judge Hosey.

19 ALJ HOSEY: No questions. Thank you.

20 ALJ JOHNSON: Judge Leung.

21 ALJ LEUNG: A couple quick ones for Franchise
22 Tax Board.

23 Ms. McDaniel had indicated that she never got
24 notice of the granting of innocent spouse relief to
25 Ms. McDaniel.

1 So how, so did the Franchise Tax Board send a
2 notice of this process to her or how does that process
3 work?

4 MR. COUTINHO: I believe Ms. McDaniel did
5 receive a notice of action of granting innocent spouse
6 relief. And I believe it is attached to her appeal
7 letter as I believe it is Exhibit 1 of Ms. McDaniel's
8 appeal letter.

9 ALJ LEUNG: So the first time she would get
10 notice of it is when you've done your intake on
11 Mr. McDaniel's application, have you made your
12 decision and that's the first notice she gets?

13 MR. COUTINHO: No. She received a
14 non-requesting spouse notice. I believe the notice is
15 dated and it's Exhibit 2 of Appellant's appeal letter.
16 It was dated November 19, 2015. And that would, I
17 believe that would be the first time Ms. McDaniel
18 received notice of Mr. McDaniel's innocent spouse
19 request.

20 ALJ LEUNG: And at that point, can she get to
21 see to provide information to you to not grant the
22 relief requested?

23 MR. COUTINHO: Yes. And Ms. McDaniel did
24 respond to the non-requesting spouse notice with what
25 statements regarding to her claim.

1 ALJ LEUNG: Great. Thank you.

2 ALJ JOHNSON: Thank you. So to clarify that,
3 FTB will send notice to the non-requesting spouse at
4 the same time it sends notice of granting to the
5 requesting spouse; is that correct?

6 MR. COUTINHO: In regards to the notice of
7 action, yes, that's correct.

8 ALJ JOHNSON: And they're notified at that
9 time, the non-requesting spouse, that they can protest
10 that determination?

11 MR. COUTINHO: Yes, they can appeal that. It
12 gets them appeal rights to appeal before the Office of
13 Tax Appeals.

14 MS. MOSNIER: Excuse me, Judge Johnson. Did
15 you ask if the non-requesting spouse has an
16 opportunity to respond before FTB issues its notice of
17 action?

18 ALJ JOHNSON: Before the notice of action --
19 well, I was looking at the --

20 MS. MOSNIER: The Revenue Taxation Code
21 15833, and I would have to check the subdivision,
22 prohibits FTB from making a determination on an
23 innocent spouse request less than 30 days after giving
24 notice and opportunity to participate to the
25 non-requesting spouse.

1 And in this case, FTB did that. And
2 Ms. McDaniel did participate. She wrote back to FTB
3 and provided her statement.

4 ALJ JOHNSON: And that was prior to the
5 notice of action being issued?

6 MS. MOSNIER: Yes.

7 ALJ JOHNSON: Okay. Thank you. And for
8 Franchise Tax Board, you mentioned at first when you
9 went over subpart (b) of 18533, including that it was
10 timely, can you explain sort of what makes that timely
11 based on liabilities and all that?

12 MR. COUTINHO: Yes. As stated in its
13 additional brief, dated September 29, 2017, FTB, the
14 reason why that provision, the statute of limitations
15 under Section 18533(b) and Sections 18533(c), it's not
16 applicable is because Respondent's collection notice
17 do not advise taxpayers of their right to request
18 innocent spouse relief, so Respondent's collection
19 activities do not trigger the two-year statute of
20 limitations to request innocent spouse relief under
21 Sections 18533(b) and Section 18533(c).

22 ALJ JOHNSON: Okay. Thank you. Let me ask
23 Mr. Curry a question. I believe you were asking
24 questions about statute of limitations and
25 jurisdiction as well.

1 Did you have anything to add about whether
2 the claim for (b) or (c) would be timely under these
3 facts?

4 MR. CURRY: I have nothing to add on that
5 topic. Thank you though.

6 ALJ JOHNSON: Thank you.

7 MR. CURRY: Let me withdraw that. No --
8 [inaudible] never mind. Thank you.

9 ALJ JOHNSON: Thank you. I did have one
10 final question.

11 Mr. Curry, if we were able to provide an
12 additional 30 days for the next tax year return to be
13 provided to you and provide additional briefing, do
14 you think that would benefit your position?

15 MR. CURRY: Yes, I do.

16 ALJ JOHNSON: Okay. And Mr. McDaniel, you
17 said you do have the return for 1999, you would be
18 able to provide it to all the parties?

19 MR. MCDANIEL: Yes. I have the majority of
20 it. I may not have every page of it, like W-2, I
21 think my W-2's here. I don't know what got separated
22 or not, but I definitely have the IRS sheet that is
23 huge, that shows all the documentation of any question
24 of the financial liability.

25 ALJ JOHNSON: Okay. Thank you.

1 MR. MCDANIEL: I don't know what you would be
2 looking for there. I mean, as far as specifics, if
3 there's specifics, I may be able to help.

4 ALJ JOHNSON: Thank you. Any more questions
5 from the panel? All right.

6 MR. CURRY: I have a couple questions for FTB
7 if that's permitted.

8 ALJ JOHNSON: We don't ask questions of just
9 argument, only questions reserved for witnesses or
10 sworn as to testifying as to facts.

11 MR. CURRY: Right. I know this is unusual.
12 In a sense, Mr. Coutinho has prepared a -- he's not --
13 how can I say this. He's prepared the report the same
14 way that the innocent spouse program has prepared a
15 report. So in that sense, I'm not questioning his
16 legal judgments. I want to question how the report
17 came about with missing information, and does FTB have
18 the information? Does that make sense?

19 ALJ JOHNSON: This question is related to
20 what information they had when they made the
21 determination?

22 MR. CURRY: In part, yes.

23 ALJ JOHNSON: Why don't you go ahead and ask
24 the question. We can deflect it back to FTB if we
25 need to.

1 MR. CURRY: So -- oops, wrong questions.
2 Okay. This might be -- with regard to -- well, where
3 in the documents -- okay.

4 So did Mr. McDaniel provide any documents to
5 FTB to make the decision initially, the innocent
6 spouse program, did they receive any of these
7 benefits? And if not, how could a determination be
8 made without them?

9 ALJ JOHNSON: Okay. Let me go ahead and you
10 can answer that question as well, but as far as
11 generally, what documents did you have or FTB have
12 when they made the determination?

13 MR. COUTINHO: As stated previously,
14 Respondent attached to its opening brief all documents
15 they received during the innocent spouse.
16 Mr. McDaniel's request for innocent spouse,
17 Mrs. McDaniel's non-requesting spouse notice, and the
18 information that they provided, it's all in our
19 opening brief.

20 MS. MOSNIER: We also may have relied on
21 information we had concerning their return, for
22 example, Exhibit A to our opening brief is the return
23 information display that we have because at the time
24 the request was filed, we no longer had the 1999
25 return, and it had been purged per FTB's retention

1 policy.

2 So we would have relied on information set
3 out in Exhibit A, Exhibit B, Exhibit C, Exhibit D,
4 Exhibit E, and then which were all in-house documents
5 concerning this tax year account, in addition to the
6 information that both Ms. McDaniel and Mr. McDaniel
7 submitted to the innocent spouse unit. We have
8 included all they submitted as Exhibits G and H to
9 FTB's opening brief.

10 MR. COUTINHO: Just one more note. The one
11 document that the innocent spouse did not have was the
12 appeal letter that Respondent also used in making its
13 determination that in which he admitted deficiency.

14 MR. CURRY: My apologies. What was that last
15 part?

16 MR. COUTINHO: Appellant's appeal letter.

17 MS. MOSNIER: We wouldn't have had that when
18 we made the decision because the appeal letter was
19 filed in response to the notice of action having been
20 issued.

21 ALJ JOHNSON: Okay. Thank you. Let's
22 proceed on to closing statements. Franchise Tax
23 Board, let me give the instructions to everyone here.
24 The closing statement is going to be short, projecting
25 two to five minutes to those statements, similar to

1 Mr. Curry's opening statements. You will not be
2 introducing any facts or arguments. Just reiterate
3 your strongest points and give us the key evidence
4 that supports your position. You do not need to run
5 through the whole list of evidence, so just a few key
6 points and a few key arguments after two to
7 five minutes, with the result you'd like this panel to
8 find.

9 We'll begin with Franchise Tax Board if you
10 have a closing statement to provide.

11 MR. COUTINHO: We rest on our arguments and
12 we have nothing else to add.

13 ALJ JOHNSON: Okay. Thank you.
14 Mr. McDaniel, you'll have two to five minutes to
15 provide a closing statement if you would like to, or
16 rely on what you provided so far as FTB did.

17 MR. MCDANIEL: I have just a quick closing
18 statement that Sharon does not dispute that they're
19 her taxes on her letter to the first initial letter
20 and on her opening statement. I never disputed making
21 an accounting error. So she's taking responsibility
22 for those taxes being hers.

23 And I think I showed without a reasonable
24 doubt that I did not benefit from her business or her
25 taxes or anything from her. So I don't see how that I

1 could not -- well, it's up to you, but I feel that I'm
2 a very, very incredibly innocent spouse in this case.
3 Thank you.

4 ALJ JOHNSON: Thank you. And Mr. Curry, do
5 you have a closing statement you'd like to provide?

6 MR. CURRY: I do. Thank you, Judge.

7 First, I'd just be honest with you, I think
8 Mr. Coutinho's briefing is excellent. It is very --
9 it goes right down each one of the relief options and
10 it's very articulate, very excellent. I just think
11 that the FTB is very generous in its interpretation
12 and its acceptance of Mr. McDaniel's statements.

13 There's no evidence he established his lack
14 of knowledge. He admits that he knew that there were
15 at least potential for problems. The heated
16 discussions or however we want to characterize it,
17 that is a signal. That is in the case law.

18 This issue of knowledge, I'll come back to
19 that. But it's not the question of knowledge, what he
20 knew when he signed it. Okay. It's not what he said
21 three years later about what he knew. He said in the
22 application for the 1999 tax year relief that there
23 was some -- that he both did know and did not know.
24 Okay. That statement was in the 1999 relief
25 application. Whenever he said it, it applies to the

1 '99 tax year.

2 Part of the evaluation of subdivision (f),
3 relief analysis, tax compliance and hardship, I don't
4 know that Mr. McDaniel made any claims as to hardship.
5 I think he's been given an opportunity, I don't know
6 that anything has been made of that. But with regard
7 to -- but it's clear that he's paying expenses that
8 could go to tax liabilities.

9 But with regard to the tax compliance, FTB's
10 analysis of this is very, very generous. Mr. McDaniel
11 has tax liens for many years after 1999, 2000. And
12 those tax years after that, notices of liens, some of
13 those are after he was filing no longer as a joint
14 taxpayer. I don't know if that makes sense.

15 And the judge in the divorce decree seemed to
16 me was a little bit frustrated with him not having
17 filed his tax returns in the same position that
18 Appellant is now in. You can't make decisions about
19 settlements without having the documents. That does
20 not comport with this idea about complying with tax
21 regulations or tax obligations, tax filing
22 obligations. That's a very generous interpretation by
23 FTB in Mr. McDaniel's regard.

24 Again, on the topic of knowledge, the notices
25 from FTB, they say do not contain information with

1 regard to opportunities for relief under the innocent
2 spouse program. But eventually, Mr. McDaniel did
3 discover that program, and he is now trying to take
4 advantage of it. There's nothing wrong with that.

5 But the reason he discovered it was because
6 of a notice that he received. He received many other
7 notices many years earlier and could have had the same
8 reaction. He could have discovered this the same way
9 he did in 2015, in 2005 or any of the years he
10 received other notices.

11 And with regard to specific knowledge, this
12 is from Price v. Commissioner. This is a 9th Circuit
13 case. A spouse has, quote, reason to know, end quote,
14 of the substantial understatement if a reasonable,
15 reasonably prudent taxpayer in her position at the
16 time she signed the return could have been expected to
17 know that the return contained the substantial
18 understatement.

19 Now, there's evidence to suggest it wasn't
20 discovered until after the audit. Factors to consider
21 in analyzing whether the alleged innocent spouse had
22 reason to know of the substantial understatement
23 include those spouses' level of education, spouses'
24 involvement in the family's business and affairs, the
25 presence of expenditures that appear lavish or unusual

1 when compared to past levels of income, standard of
2 living and spending patterns. And the culpable
3 spouses [inaudible] concerning the couple's finances.

4 I don't know what Mr. McDaniel's level of
5 education is, but as a taxpayer, he clearly is no
6 novice. He's very aware of the advantages of, for
7 instance, offsetting the gain on the sale of his house
8 with Mrs. McDaniel's deductions. He had his own
9 business. He was not just a wage earner. The
10 presence of expenditures that appear lavish or
11 unusual. Okay.

12 Lavish expenditures does not -- doesn't cover
13 just the amount of the California adjustment which is
14 \$3,800. The entire adjustment was \$18,000. That's a
15 huge mistake at this income level. And the amount of
16 money that she spent through her businesses on things
17 like tickets, football tickets, paying off his truck,
18 the golf club membership, that's well in excess of
19 \$20,000. That's well in excess of 20 percent of
20 Mr. McDaniel's income. That's not a small amount.

21 ALJ JOHNSON: Just a couple more key points
22 to wrap up in the next minute or two.

23 MR. CURRY: Okay. Again, touching on the
24 knowledge, it sounds very cut and dry when you read
25 the regulation or the statute. Does he have knowledge

1 or not. Well, similarly, we have to rely on what the
2 party is telling you. And both parties have different
3 stories. FTB's being very generous to Mr. McDaniel's
4 statements and have flat-out rejected Ms. McDaniel's
5 statements.

6 With regard to knowledge, a requesting spouse
7 has a reason to know of an understatement if he has a
8 duty to inquire and fails to satisfy that duty. The
9 requesting spouse has a duty to inquire when he knows
10 of enough facts to put on him notice that such an
11 understatement exists. I'm sorry, I should have given
12 you this. This is from Work v. Commissioner. I'll
13 give you the citation in a minute.

14 In such a scenario, a duty to inquire arises
15 which if not satisfied by the requesting spouse will
16 not -- or excuse me -- will result in constructive
17 knowledge of the understatement.

18 I think FTB is making the knowledge issue too
19 black and white. If every spouse who didn't want to
20 have to pay his or her fair share of the taxes or
21 wanted relief, they could just say, I didn't know.
22 Who's going to prove them wrong? How do you know
23 what's in somebody's head?

24 The question is was there an opportunity to
25 know that a taxpayer had a duty to inquire based on

1 some red flag, if we can call it that, something in
2 their life surrounding the taxes should have or could
3 have indicated a problem. And once that is indicated,
4 they have a duty to discover it. They can't just turn
5 their blind eye and expect to be relieved. I'll give
6 you the citations after I'm done if that's all right.

7 Mr. McDaniel's position and FTB's position
8 would grant relief to the taxpayer who benefited the
9 most from the deductions. Think about that. Is that
10 equitable? Mr. McDaniel had the most income for those
11 two years and any deductions benefited him the most.
12 We talked about the code of federal regulation 1.615-
13 3.

14 Example 3 illustrates how to allocate the
15 benefit. And there's no evidence that FTB tried to
16 allocate. This is a perverse outcome of FTB -- or
17 excuse me -- of innocent spouse relief.

18 The person who benefits the most from
19 deductions keeps those benefits. The person who
20 benefits least because she had lesser income has to
21 pay the entire penalty. That is a perversion of
22 innocent spouse relief. And a lot of this
23 information -- okay. Let me be more specific.

24 The information with regard to the revision
25 for the same assessment, I was looking back at

1 Mr. McDaniel's reference to page 5 of the divorce
2 decree, right, where the judge says that the --

3 ALJ JOHNSON: We're getting little too deep
4 into argument. They're supposed to be closing
5 statements, not new case law. If you can just wrap it
6 up in one more sentence, that would be great.

7 MR. CURRY: Okay. So in one sentence, two
8 parts. FTB has been very generous to Mr. McDaniel's
9 assertions which are not backed up by evidence. The
10 evidence that is in the record suggests, at least
11 suggests that he, if he did not know he had an
12 opportunity and therefore a duty to inquire and failed
13 to do so on many occasions, okay, and both to FTB and
14 to the divorce, in the divorce settlement. The
15 reference is not to the California assessment. It's
16 to the federal assessment. So it was not addressed.

17 And the reason for that probably, since we
18 don't have any documents, and if FTB had the
19 documents, they say they turned everything over, I
20 believe them, but how can they make that assessment,
21 that determination with no documents, the most
22 relevant document, the divorce decree which they asked
23 him for and the 1999 tax year. That is truly
24 remarkable.

25 ALJ JOHNSON: Thank you, Mr. Curry. We have

1 evidence and arguments and briefs as well as your
2 testimony and arguments today. Appreciate that.
3 Thank you very much. Certainly appreciate everyone
4 has come here today or appeared telephonically. I
5 know several people came from a long distance away so
6 we appreciate that.

7 The outstanding issue about the 1999 tax
8 return and whether we should request that or not,
9 whether it benefits the appeal, I want to confer with
10 my panel on that. So we will hold the record open
11 while we confer after the hearing, not going to make
12 everyone wait around while we try to set that issue.

13 But we will issue a post-hearing order which
14 will either close the record or dictate when the
15 record will close based on the request for additional
16 evidence or briefing.

17 This concludes our hearing on this appeal and
18 the judges will meet and decide the case. We will aim
19 to send both parties our written decision no later
20 than 100 days from the date that the record is closed.
21 And with that, we are now off the record. And this
22 concludes our hearings for today. We are adjourned.
23 Thank you.

24 (Whereupon the proceedings were
25 adjourned at 3:46 p.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 18th day of July, 2019.

AMY E. PERRY
Certified Shorthand Reporter
License No. 11880