

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
ERIC GRAB AND CHRISTINE GRAB, ) OTA NO. 18011443  
 )  
APPELLANT. )  
 )  
 )

## TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, August 20, 2019

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
355 South Grand Avenue, South Tower, 23rd Floor,  
Los Angeles, California, 91401,  
commencing at 10:04 a.m. and concluding  
at 10:34 a.m. on Tuesday, August 20, 2019,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

APPEARANCES:

Panel Lead:

Hon. KENNY GAST

Panel Members:

Hon. LINDA CHENG

Hon. JOSHUA LAMBERT

For the Appellant:

CHRISTINE GRAB

For the Respondent:

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

By: ERIC YADAO

CYNTHIA KENT

TAX COUNSEL

Legal Division

P.O. Box 1720

Rancho Cordova, CA 95741

916-845-2498

I N D E X

OPENING STATEMENT

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E X H I B I T S

(Appellant's Exhibits were received at page 6.)

(Franchise Tax Board's Exhibits were received at 6.)

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Los Angeles, California; Tuesday, August 20, 2019

10:04 a.m.

ADMINISTRATIVE LAW JUDGE GAST: We're on the record.

This is the appeal of Eric W. Grab and Christine Grab, OTA Case No. 18011443. It is Tuesday August 20th, 2019, approximately 10:04 a.m. We're in Los Angeles, California.

I'm the lead Administrative Law Judge, Kenny Gast. And joining me today is Judge Joshua Lambert and Judge Linda Chang. We're the panel hearing deciding this case today.

May I ask the parties to please state your names and titles for the record, starting with the taxpayer.

MS. GRAB: My name is Christine Grab, and I'm an individual taxpayer.

ADMINISTRATIVE LAW JUDGE GAST: Thank you.

FTB?

MR. YADAO: Eric Yadao, tax counsel, Franchise Tax Board.

MS. KENT: Cynthia Kent, tax counsel, Franchise Tax Board.

ADMINISTRATIVE LAW JUDGE GAST: Thank you very much.

We have two issues for this case. The first issue is whether Appellants are liable for the demand penalties imposed for the 2011, '13, and '14 tax years. And the second issue is whether Appellants are liable for the collection cost recovery fee imposed for the 2011 tax year.

Regarding -- I'm getting some feedback here. I'm not sure if it's me.

(There is a pause in the proceedings.)

ADMINISTRATIVE LAW JUDGE GAST: Okay. Regarding the exhibits, taxpayer has submitted Exhibits 1 through 40. FTB has no objections to those exhibits, so they'll be admitted into the record as evidence.

(Appellant's Exhibits 1-40 were marked for identification by the Administrative Law Judge.)

ADMINISTRATIVE LAW JUDGE GAST: And FTB has admitted Exhibits A through HHH. Taxpayer has no objections to those exhibits. Therefore, all of FTB's exhibits will admitted into the record as evidence.

(Department's Exhibits A-HHH were received in evidence by the Administrative Law Judge.)

ADMINISTRATIVE LAW JUDGE GAST: All right. Moving on to the parties' presentations. Ms. Grab, you'll

have 18 minutes. But before you present, I need to know if you're going to be testifying?

MS. GRAB: Yes.

ADMINISTRATIVE LAW JUDGE GAST: Okay. So if you could please stand and raise your right hand.

CHRISTINE GRAB,

produced as a witness, and having been first duly sworn by the Administrative Law Judge, was examined and testified as follows:

ADMINISTRATIVE LAW JUDGE GAST: Okay. Great. Thank you. And whenever you're ready, you'll have 18 minutes.

OPENING STATEMENT

MS. GRAB: Okay.

Introduction: My husband Eric Grab and I, Christine Grab, are requesting a refund of the \$15,133.57 that the Franchise Tax Board improperly charged us for interest, penalties, and fees for the tax years 2011, 2013 and 2014. It is our understanding that interest will be paid on this improperly collected money as well.

As I documented in my second response brief using the Respondent's own records, which are Exhibits 16 and

21, the Franchise Tax Board's accounting practices and lack of disclosure if their withholding policies created the situation that forced us to file our returns late, via the following tactics:

Respondents neglected their duties by continually and improperly applying monies that they received from us between the years of 2008 and 2016. 12 of 17 payments, which is 70 percent of payments made, were not lawfully credited. Respondents sabotaged our effort of resolving the accounting improprieties by using tactics, such as putting incorrect phone numbers on notices, long hold times, frequently disconnecting calls, disregarding almost all written correspondence, giving inconsistent information that caused us further delays, and not disclosing their withholding practices.

Respondents continually denied responsibility for their errors and would not correct them despite the fact that we repeatedly sent in evidence of payments made. Respondents coerced us into overpaying by using harassment techniques, such as threatening with wage garnishment and bank levies. Then they misapplied the overpayments. The threats didn't end until we involved our state senator, assemblyman, and Governor Brown to intervene on our behalf.

Point 1, the demand penalties were not improperly



imposed. As I show on Exhibit 10, the main reason that my husband and I filed our tax years, 2011 through 2015, returns late was because Respondents unlawfully did not credit 12 of 17 payments made between 2008 and 2016. The Franchise Tax Board redacted most of these accounting improprieties from the documents that they submitted to the judges.

The Franchise Tax Board applied these penalties under Revenue and Tax Code 19133. This code only requires the taxpayers furnish information, not necessarily file a return. They argued in both of their briefs that this code is applicable in our case because our failure to file was due to willful neglect in providing this information.

The Franchise Tax Board argued willful neglect despite the fact that they, themselves, documented that my husband and I had responded 25 times with 7 phone calls and 18 letters in Exhibits F, G, L, O, R, T, U, V, Y, Z, AA, CC, FF, HH, JJ, KK, NN, OO, RR, TT, and WW. My second response brief details an additional 26 phone calls and 20 more letters found in Exhibits 11, 14, 16, 19, 20, 21 and 25. Many of these additional phone calls and letters were redacted from the documents the Franchise Tax Board submitted to the judges.

I think any prudent businessperson would agree that 33 phone calls and 38 letters does not qualify as

willfully negligent. I spent even more time going round and round with the Franchise Tax Board beyond what was documented. There were several successful calls to various departments that were not logged into FTB's notes.

I cite one example on page 10 of my second response brief. There were also several more calls to numbers listed on the FTB notices that turned out to be incorrect departments, and several more trips out to fax machines and/or the post office to resend documents proving that we didn't owe, any money.

Furthermore, as I complained about in my initial abatement request, which is Exhibit 39, I estimate that 30 percent of calls that I made to the FTB were disconnected after long hold times. I spent somewhere between 5 and 40 hours on tax issues every month. I believe that I averaged about 10 hours per month. This tax ordeal lasted for four-and-a-half years, which totals about 550 hours of effort that I put into resolving these payment issues.

I would have normally spent that time working on filing the returns, but instead I was stuck on the phone and writing the letter. My husband was frequently required to call in as well. As I've also documented on pages 4 through 10 of my second response brief, utilizing the information from Exhibits 10, 19, 20 and 21, it was not possible for me to disregard the issues of the

unlawfully not credited payments.

Respondents were aggressively harassing us for money that was never owed, going so far as to file a wage garnishment and reinstated multiple times. Locating the uncredited money was imperative to ending the harassment. In 2016, more than four years after the harassment started, we found out that several of these payments were deliberately withheld from our account per the Franchise Tax Board's policy of withholding estimated tax payments made via Credit Elects.

We believe that this policy violated Revenue and Tax Code 19363 which, up until a few months ago, stated that credit elects are to be applied effective April '15 year regardless of filing date. Since the law has just been changed, we believe that the Judges should consider the law as it was written during our tax ordeal.

For proof, see Exhibit 9, pages 1 and 2, which is a letter from the Franchise Tax Board where this law quoted to me in its earlier form. While you are looking at Exhibit 9, please note that the other law that FTB quoted to justify this holding practice was R&TC 19304. This isn't a relevant tax code intended for scholarships that was taken out of context.

Respondents' counsel has not disputed our interpretation of 19363. It is noteworthy that in both of

their briefs, the Franchise Tax Board used deceptive wording to make it sound like our credit elects had been immediately applied to our account, and only disclosed in the footnotes that our funds had actually been held in suspense.

Whether or not the policy is legal, it is still the Respondent's policy and all FTB staff should be aware of it. However, Respondents did not disclose this withholding policy to me. They simply allowed me to believe that the money was lost. On page 7 of my second response brief utilizing Exhibits 16, 19, and 21, I documented two instances where I was explicitly told by Respondents that credit elects were immediately applied to the designated tax year. This was the same information that all of the other FTB representatives gave me as well.

Yet, no matter how many times I sent in tax returns showing the credit elects, the money could never be located. As you can in see Exhibit 38, Respondents are still giving me conflicting information about this withholding policy. In a letter dated August 8th, 2019, the FTB's disclosure department denied that this withholding policy exists.

The rest of the payments were misapplied. Some of the payments were located with relative ease. But even the easy ones were time consuming to resolve, usually

involving at least two phone calls with long hold times, digging up canceled checks, and having to make a trip out to a fax machine and/or the post office.

I cite examples on pages 9 and 10 of my second response brief, which utilized information from Exhibits 16 and 19. Other loss of payments took years to resolve with countless time-consuming phone calls and letters over those years. On pages 6 and 7 of my second response brief using evidence from Exhibits 16 and 17, I detailed that it took Respondents over three years to locate the lost \$9,000 payment.

Once the payment was located, it took Respondents yet another 6 months to apply that money to our account. Exhibit 12 shows that the \$3,500 payment wasn't fully located until State Controller Betty Yee's office personally intervened on our behalf 7 years after the payment was made.

The Franchise Tax Board has offered no explanation as to why so many of our payments were misapplied or why they had such difficulty in locating and reapplying these payments. I believe that any prudent-business person would agree that it is better to error on the side of the caution by waiting to file the returns until the accounting improprieties were corrected.

It is unconscionable that the Franchise Tax Board

would take so many years to locate misapplied payments, and unconscionable that they would allow us to believe that our credit elects were lost instead of disclosing that they were held in suspense. Had the Franchise Tax Board not been negligent in their duties, I would have spent that 550 hours of time working on the returns. I am certain that all of the returns for tax years 2011 and on would have been filed timely.

Furthermore, I believe that they failed in their duty to properly issue demand notices for tax years 2011, '13 and '14. In footnote 9 of their opening response brief, the Franchise Tax Board states that they were not assessed any penalties or -- sorry -- that we were not assessed any penalties or interest for filing late in tax year 2010 because we had paid our liability in full by the due date. However, we had paid the full tax liabilities prior to the due dates for all of the years in dispute as well.

I believe that the demand notices for all three years in dispute never would have been sent out had Respondents not wrongfully misapplied and improperly withheld so many of our estimated tax payments. If it is indeed the case that the demand notices were sent as a result of their own accounting improprieties, then we should not be held liable for the demand fees.

Exhibits CCC, DDD, 22, 38, and 40, show that I have repeatedly asked for Respondents' legal counsel and the Franchise Tax Board's disclosure department whether demand notices are issues in the same time frames for someone whom the FTB believes still owes money, versus someone that the FTB believes is due a refund. Respondents have consistently provided me with vague responses that do not adequately address the issue of what determines time frames. I find the unwillingness to disclose this information to be unconscionable.

In their exhibits, Respondents did not include a notice of proposed assessment for my husband for the tax year 2011, nor did we receive one. Revenue and Tax Code 19133(b)(2) states that a demand notice is not properly imposed if a notice of proposed assessment was not issued.

Point 2, reasonable grounds for abatement of penalties. I believe that any prudent business person would agree that 550 hours was a reasonable amount of time to spend on resolving tax issues that were created by the Franchise Tax Board's breach of duties. But due to personal hardships, I did not have an unlimited amount of time to spend on resolving the issues.

Pages 2, 3, and 5 and 6 of our first response brief and pages 11 through 14 of our second response brief detail these hardships. Exhibits N, KK, NN and 2, show

that the tax issues came to a head in May of 2012, less than two months after I gave birth to a new baby via C-section. He was born with a serious health issue that required him to be transported via ambulance to Children's Hospital. The issue was surgically corrected when he was three-weeks old.

Over the course of this tax ordeal, he grew from a colic infant that cried all the time into a healthy and active toddler and preschooler, despite the fact that he was a terrible sleeper. My son is now 7 years old. In addition to my child, Exhibits KK, 3, and 33, show that I was the primary caregiver for 3 sick, elderly people, one of whom was on hospice and died in April 2014. The Franchise Tax Board gave me no bereavement time.

In fact, this is when the harassment was the most aggressive with the wage garnishment that kept getting reinstated due to them unlawfully not applying the \$9,000 payment. I have documented in Exhibits 5 and 34 that my husband traveled extensively for work and was rarely home. Exhibits WW, 4, 31, and 32 document that I was also seriously ill with a rare autoimmune disease, which affects kidney function.

The first symptoms of this disease began in late summer of 2012, about two or three months after this tax ordeal started. I am certain that the stress created by



Respondent was a contributing factor in a rapid decline of my health. By the time that I was finally diagnosed in April of 2014, I was literally on the verge of kidney failure. I had a 93 percent chance of losing my kidneys within a few months.

I also had cholesterol levels so high that my nephrologist warned me that I could die of a heart attack or a stroke at any moment. There's currently no effective medical treatment for my disorder. So I was on my own to heal myself. I undertook a strict protocol of diet and rest, which slowly but steadily healed me. Today I am still sick, but it is now a mild chronic illness that must still be carefully managed.

Any of one of these personal hardships alone would qualify as a legitimate reasonable cause for filing the returns late. Given the extent of our personal hardships, I believe it is commendable that I've devoted as much of time as I did on resolving the tax issues.

Point 3, collection recovery fee. Exhibit DD shows that on November 6, 2013, Respondents wrongfully filed a wage garnishment for \$6,478, which included late fees, penalties and interest, and this collection recovery fee. As is documented in Exhibits CC and 10, at that point in time, we had paid in \$16,893 in estimated tax payments designated for 2011, that had unlawfully not been

credited to our account.

As Respondents' counsel explained in Exhibits DDD, \$12,500 of this money was misapplied to miscellaneous bills, that never existed in the first place, from tax years 2002 and 2009. As I've already mentioned, this money would not be fully located until 2018. Refusing to locate these funds timely was an unconscionable breach of duty.

In their opening brief, the Franchise Tax Board acknowledged on pages 4 and 5, as well as a footnote in 21, that there was still \$4,393 designated for tax year 2011 that was sitting in suspense as per Respondents' policy of withholding credit elects. This is also documented in Exhibit 16. I would like to remind the Judges that Respondents' counsel has not disputed our claims that the credit elect withholding practice violates Tax Code 19363.

As was already mentioned, Respondents failed to issue an NPA for my husband for 2011. So we're unclear on how much money Respondents initially claimed was under-collected by my husband's employer. However, Exhibit W indicates that the underpayment amount was only \$1,829. That collection fee would unlikely have been imposed if the \$4,393 credit elect had been applied in accordance with Tax Code 19363, or had Respondents located

and reapplied the \$12,500 in a timely manner.

We believe that Respondents imposing a collection fee for nonpayment, when they received more than payment in full, is both unlawful and unconscionable. As such, we believe that we should be refunded the full collection fee.

Closing: In closing, I would like to remind the Judges that the Franchise Tax Board has not disputed any of the facts that I have presented in evidence. It is telling that Respondents redacted a majority of these pertinent facts from the documents that they submitted to the Judges.

I also want to reiterate that at no point in time from 2010 on, did we ever owe any tax liabilities. The many problems that we experienced were solely a direct result of the Franchise Tax Board unlawfully not crediting our account with the payments that they received.

I cannot begin to describe the emotional and physical toll that this ordeal took on me and my family. We believed that trying to get the accounting improprieties rectified was the right thing to do. We feel like we have been deliberately punished for bringing these improprieties to light.

In the mist of all this personal hard -- in the mist of all of that personal hardship, time was my most

precious resource. That 550 hours of time should have been spent caring for myself, my child, and our ill parents. I will never get that time back.

Thank you.

ADMINISTRATIVE LAW JUDGE GAST: Thank you. Very much.

Mr. Yadao, do you have any questions for the witness?

MR. YADAO: None.

ADMINISTRATIVE LAW JUDGE GAST: Okay. Panelist?

ADMINISTRATIVE LAW JUDGE CHENG: No questions.

ADMINISTRATIVE LAW JUDGE LAMBERT: No questions.

ADMINISTRATIVE LAW JUDGE GAST: Okay. Mr. Yadao, you will have 10 minutes.

MR. YADAO: Thank you.

#### OPENING STATEMENT

MR. YADAO: I would just like to open by pointing to FTB's Exhibits I, L, MM, VV, just as an example, which are demand for tax returns. And notably these say -- advise the taxpayer that it appears that they have a filing requirement. And it says, "You must file even if you're due a refund.

"How do I respond to this notice? If you filed already, provide a copy of your return. If you don't have

a filing requirement, please," you know, "describe why you don't have a filing requirement. Or if you have not filed yet, file a return."

There are three ways to reply. The taxpayers did not reply in either of those three ways by the end of the demand deadlines, even the demand deadlines that were extended for a period of time.

Second, I'd like to point to the Appellant's description of various payment discrepancies; which, if I recall correctly, she said were not resolved until 2018. They were actually resolved in January of 2014, and we have the exhibits in the record that show that the Appellant called in. We described how those payments were applied and refunded. Of that \$12,500, specifically, \$9,000 was refunded two months later. But rather than question that refund, the taxpayers kept the refund, continued to report that on their late 2010 return.

The \$3,500 is a separate issue, but it was also in part refunded, which was not questioned by the taxpayers until we issued them a notice regarding their 2010 return filed late, stating they overstated their timely payments. And that's where the discrepancy arose in payments. But unlike what you've heard already, that discrepancy was resolved in 2014.

Now, under my presentation, I would say that over

the course of the appeal, Appellants have offered numerous explanations attempting to establish that their failure to file returns as they were required to, by filing returns by the demand letter deadlines, it was not due to reasonable cause. As we set forth in our pleadings, the law requiring that the alleged circumstances of any illness must be such that the severity and timing of the illness made it virtually impossible for both taxpayers to comply. And when taxpayers demonstrate a selective inability to perform tax obligations, while instead pursuing personal litigation or attending to work pressures, taxpayers must bear the consequences of those choices.

The evidence in the record reflects Appellants, over the course of the demand notices, the deadlines, they were not continuously prevented from filing the returns. Rather, they pursued recreation activities and travel, attended a civil litigation and work affairs over the same course of time. Statements that were made by the Appellants in a number of their letters, however, may offer another answer as to why they did not file their returns by the demand deadlines.

For example, their early letter dated December 6, 2013, it's labeled as Exhibit V, as in Victor, in FTB's opening brief, where Appellants expressed

aggravation with FTB's notices, stating they were due a refund and, therefore, they did not owe the penalty. And in their recent March 29, 2019 supplemental pleading, page 2, paragraph 6, where they state it was reasonable for them to conclude because the IRS does not have a demand penalty, the penalties would be lifted once their timely payments were applied.

Taking their own statements into consideration, it was not personal difficulties, depressive business affairs, the pursuant of litigation and not any accounting questions or any other reason that continuously prevented Appellants from filing their returns and reply to the demand letter. Instead as they have expressed in their letters, it was their consistent belief that timely payments would eliminate any penalties, which Appellants then believed there was no consequence and no urgency to comply with the demand letters by filing their returns.

In the appeal of Malakoff, the Office of Tax Appeals' predecessor authority, Board of Equalization, addressed the same presumption in its precedential decision stating, "The demand penalty is properly computed on the amount of tax liability determined without applying timely payments, despite the fact that the taxpayer's payments or withholding exceeded the amount of tax due."

The Malakoffs, like the Appellants here, also

held the belief that no penalty would apply because the Malakoffs had sufficient timely payments. However, they still failed to file their returns by the demand deadlines, and the demand penalties applied on the reported tax liability.

Finally, there's the issue of collection fee. The filing enforcement action commenced on tax year 2011-year income earned by Appellant's husband in the absence of a return filed, in spite of an extension time granted to comply with the demand, an NPA issued and became due and payable.

Billing notices followed, which resulted in collection action, and a collection fee was imposed based on continued nonpayment of the proposed assessment's balance. Once properly imposed, there's no abatement of the collection fee. And based on what I present to you this morning, we're asking, respectfully, that you sustain the demand penalties and the collection fees at issue.

Thank you.

ADMINISTRATIVE LAW JUDGE GAST: Thank you.

Ms. Grab, you will have five minutes on rebuttal.

#### CLOSING STATEMENT

MS. GRAB: Okay. I'd like to point out that Mr. Yadao has not denied my claims that the demand notice



was sent out improperly, that it would have been not sent out had the payments issues not arisen. He claimed that an NPA was sent out for 2011 for my husband, but there was no copy of that in the documents that Mr. Yadao supplied to the Judges, nor do I have one. So I'm pretty sure we never got -- they never issued one.

And, finally, Mr. Yadao said that they provided proof that the payments in dispute were rectified in what -- I think he said 2014. But I -- he didn't reference which exhibit. So I would like to know which exhibit he was referring to because I don't believe those issues were rectified. And my Exhibit 6 -- I'm sorry. My Exhibit 12 shows my complaint letter to Betty Yee about my frustrations about the Franchise Tax Board, still all those years later, not adequately resolving my payment issues. In that letter 12, I go into detail about the very, very strange accounting practices that led to the confusion.

ADMINISTRATIVE LAW JUDGE GAST: Okay. Thank you very much.

FTB.

MR. YADAO: The 2011 NPA is Exhibit J of our opening brief. Let me verify that. Yes, it's a notice of proposed assessment for tax year 2011 to Eric Grab, Exhibit J. And the exhibits in the record regarding the

payment discrepancies being resolved is also in the record. It is Appellant's supplemental pleading, what they have labeled as Exhibit I, but I think OTA has converted that to Exhibit 16, page 19 of 23. A comment dated January 23rd, 2014, "System Demo, Christine and Eric Grab. User, taxpayer. Taxpayer 2011. Taxpayer called. Re: FE payments."

And within that comment, we advised her how those payments were applied, and how they refunded. She has two of those payments, the refund checks, in her own exhibits. And then if your panel is interested, I actually have a copy of the endorsed and deposited check for \$9,000 plus interest, which was signed and deposited by Eric Grab.

ADMINISTRATIVE LAW JUDGE GAST: I think we're okay.

MR. YADAO: All right.

ADMINISTRATIVE LAW JUDGE GAST: All right. I think concludes this hearing today. The Judges will meet and decide the case, and we will issue a decision approximately within 100 days of today. And that is it. The case is now submitted, and the record is closed. Thank you very much.

(Proceedings adjourned at 10:34 a.m.)

HEARING REPORTER'S CERTIFICATE

I, Ernalyn M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 12th day of September, 2019.

---

ERNALYN M. ALONZO  
HEARING REPORTER