

HEARING  
OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA

In the Matter of the Franchise and/  
Income Tax Appeals Hearing of:

ADAM M. BERMAN AND

OTA Case No. 18043054

ALEJANDRO SCOTTA,

Appellants.

\_\_\_\_\_ /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, SEPTEMBER 25, 2019

11:12 A.M.

OFFICE OF TAX APPEALS  
1400 R STREET  
SACRAMENTO, CALIFORNIA

Reported by: Gigi Lastra

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## APPEARANCES

## Panel Lead:

JOSHUA LAMBERT, ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA  
OFFICE OF TAX APPEALS  
1400 R STREET  
SACRAMENTO, CALIFORNIA

## Panel Members:

JEFF ANGEJA, ADMINISTRATIVE LAW JUDGE

JEFFREY MARGOLIS, ADMINISTRATIVE LAW JUDGE

## For Appellant:

NICK WAGNER, ESQ.

## For Franchise Tax Board:

JOEL SMITH, TAX COUNSEL  
NATASHA PAGE, ASSISTANT CHIEF COUNSEL

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1 WEDNESDAY, SEPTEMBER 25, 2019 - 11:12 A.M.

2 ALJ LAMBERT: Okay. Let's go on record.

3 We're now on record in the Office of Tax Appeals  
4 formal hearing for the appeal of Adam M. Berman and Alejandro  
5 Scotta, Case Number 18043054. We're in Sacramento,  
6 California. The date is Wednesday, September 25<sup>th</sup>, 2019, and  
7 the time is approximately 11:15 a.m.

8 My name is Joshua Lambert and I'm the lead  
9 administrative law judge for this hearing. And my fellow  
10 copanelists today are Jeff Angeja and Jeff Margolis.

11 ALJ MARGOLIS: Good morning.

12 ALJ LAMBERT: Appellants, could you please identify  
13 yourselves.

14 APPELLANT BERMAN: My name is Adam Berman.

15 MR. WAGNER: I'm Nick Wagner representing Adam Berman  
16 and Alejandro Scotta.

17 ALJ LAMBERT: And FTB, could you please introduce  
18 yourselves.

19 MR. SMITH: Yes, my name is Joel Smith.

20 MS. PAGE: I'm Natasha Page, also representing FTB.

21 ALJ LAMBERT: Thanks. This appeal involves one issue  
22 which is whether the notice and demand penalty should be  
23 abated.

24 During our prehearing conferences we already  
25 created -- to admit into evidence Appellants' Exhibits 1

1 through 6 and FTB's Exhibits A through G.

2 And do either party have any objection; is that still  
3 correct?

4 MR. WAGNER: Yes.

5 MR. SMITH: Yes.

6 ALJ LAMBERT: Thank you. So I hereby admit those  
7 exhibits into evidence.

8 [EXHIBITS ADMITTED]

9 ALJ LAMBERT: As we agreed, Appellants will have ten  
10 minutes to present their arguments, then we will ask  
11 questions and FTB will ask questions. And FTB will make its  
12 presentation not to exceed 20 minutes and panelists and  
13 judges will ask questions. And after that, Appellants, you  
14 can give a rebuttal for ten minutes.

15 Okay. And as I understand, Mr. Berman, you'll be  
16 testifying as a witness today?

17 APPELLANT BERMAN: I will.

18 ALJ LAMBERT: Can you please stand and raise your  
19 right hand?

20 APPELLANT BERMAN: Sure.

21 ALJ LAMBERT: (Indiscernible.)

22 Do you solemnly swear -- or just say yes after -- do  
23 you solemnly swear or affirm to tell the truth, the whole  
24 truth, and nothing but the truth?

25 APPELLANT BERMAN: I do.

1 ALJ LAMBERT: Thank you. Okay, Appellants, you can  
2 have your opportunity now to explain your position.

3 MR. WAGNER: Good morning, Your Honors, Nick Wagner  
4 representing Appellants Adam Berman and Alejandro Scotta.

5 The issue before you today is whether the penalty for  
6 failure to respond to a notice and demand letter was properly  
7 imposed by the FTB upon the Appellants, as well as whether  
8 Appellants have shown reasonable cause.

9 The Appellants respectfully ask that this body abate  
10 the penalty opposed upon them for their perceived failure to  
11 respond to a letter sent to them on -- to their address on  
12 the 13<sup>th</sup> of June 2017. They do so based on the ground that  
13 the penalty is being improperly imposed upon them by the  
14 Respondent and the facts of their case easily establish  
15 reasonable cause for failure to respond.

16 The Appellants are being penalized under California  
17 Tax and Revenue Code 19133 which imposes a 25 percent penalty  
18 against the taxpayers' liability for failure to respond to a  
19 notice and demand letter within the requested period, usually  
20 30 days. The driving theory behind this penalty is simply to  
21 get a response.

22 While the Appellants will speak to the details of  
23 their experience, the legally relevant facts of this case are  
24 simple. The Appellants were on a four-month sabbatical  
25 abroad to recover from events which Mr. Berman will explain.

1 That trip spanned from April to September of 2017. During  
2 that time, they charged their neighbor to scan for their  
3 mail. Due to an oversight on behalf of their neighbor  
4 Mr. Jake Stucki, the FTB's notice and demand was dismissed  
5 and not forwarded to the Appellants while they were abroad.

6 The Appellants arrived back in the U.S. on the 21<sup>st</sup>  
7 of September. And after viewing the notice, called the FTB  
8 the next day on the 22<sup>nd</sup>. In that call, the Appellants  
9 explained their situation to the FTB and advised them that  
10 they would file their return in early October. And in fact,  
11 by October 8<sup>th</sup>, well within 30 days of actually receiving the  
12 notice, the Appellants filed their returns.

13 The Appellants contend that these facts demonstrate  
14 sufficient due diligence to merit a finding of reasonable  
15 cause for their failure to respond. The Appellants here took  
16 every reasonable step a person could take to ensure that  
17 their mail were sent to them. Were it not for the human  
18 error on the part of Mr. Stucki, the Appellants would have  
19 received --

20 ALJ LAMBERT: Mr. Wagner, could you please talk a  
21 little slower so the court reporter can follow along.  
22 Thanks.

23 MR. WAGNER: I'm sorry. We're it not for the human  
24 error on the part of Mr. Stucki, the Appellants would have  
25 received the notice. These facts stand in bright contrast

1 the facts of the appeal of Winston R. Schwihart (phonetic)  
2 referenced in our reply brief. In that case, the Appellant  
3 moved from his home permanently and asked a friend to collect  
4 his mail and forward it to him. Like the Appellants in the  
5 present case, the friend made a human error by losing the  
6 address and decided simply to put all the Appellant's mail in  
7 a drawer. The Court there found that the Appellant was not  
8 acting as a prudent taxpayer and decided that such facts did  
9 not constitute reasonable case.

10           However, in the present case, the Appellants were not  
11 moving permanently but rather traveling abroad for a set  
12 length of time. And the system they set up with Mr. Stucki  
13 ensured that even if there was a piece of mail not forwarded  
14 to them on their trip, they would still receive it upon their  
15 return.

16           It appears to the Appellants that the FTB seeks to  
17 penalize them for failing to respond to a notice that they  
18 never saw. This strikes the Appellants as unfair as it is  
19 completely unreasonable to expect someone to take action and  
20 respond to something that they have absolutely zero knowledge  
21 of. Despite this, the Respondent chose to impose the penalty  
22 for their failure to respond under Code 19133.

23           In this case, the demand letter was sent from the FTB  
24 only sought specifically a tax return for 2015. The purpose  
25 of the Statute 19133 is only to motivate the taxpayer to



1 respond, it is not a late filing penalty. That is Tax and  
2 Revenue Code 19131. And the Respondent might have chosen to  
3 penalize the Appellant under that statute.

4           It occurs to us that the Respondent is attempting to  
5 solidify precedent through this case so the FTB may approach  
6 whichever penalty it prefers, late filing or notice in demand  
7 when dealing with taxpayers who find themselves in situations  
8 such as the Appellant.

9           Your Honors, the Appellants here are hard-working  
10 taxpayers who have never found themselves in a situation like  
11 this in 30 years. Despite failing to file for their return,  
12 the Appellants paid and overpaid all their taxes on time  
13 throughout this ordeal. The Respondent here is applying the  
14 laws of our tax system in a systematically rigid way in order  
15 to achieve the penalty they seek. This statute does not  
16 function as a protective measure for the state's revenue but  
17 rather as a cudgel by which the Respondent punishes taxpayers  
18 into compliance solely at the Respondent's whim. To penalize  
19 them to this extent for not seeing a piece of paper despite  
20 taking steps to avoid this from occurring is not in keeping  
21 with the spirit of our tax code.

22           For these reasons, we respectfully ask the Court look  
23 favorably upon the Appellants and find that the penalty  
24 against them should be abated.

25           Your Honors, thank you for your time and I look

1 forward to any questions you might have.

2 ALJ LAMBERT: Thanks. Is that -- is that a petition?

3 MR. WAGNER: Yeah.

4 ALJ LAMBERT: Mr. Berman, you may proceed.

5 APPELLANT BERMAN: Thank you. And good morning,  
6 everyone.

7 I just wanted to just provide a little more context  
8 very briefly and really elaborate a bit on what had happened  
9 to us.

10 So look, prior to 2013, we filed all of our tax  
11 returns on time. And that happened over more than 30 years.  
12 In 2013, we were subject to really quite an extraordinary set  
13 of circumstances surrounding the birth of our son Emilio.  
14 And that caused us to be unable to file our returns on time  
15 for the subsequent three years.

16 Alex who -- or Alejandro, I call him Alex, my  
17 husband, is not able to be here today and expresses his  
18 regret that he can't be here but he is taking care of our son  
19 and our son had to be taken to school this morning.

20 But we always want -- when we met back in 2008, we  
21 always wanted to figure out a way to have children. And  
22 after careful consideration and significant due diligence, we  
23 decided to work with the Surrogacy Center of India, a Delhi-  
24 based agency and also the largest surrogacy center in India.  
25 We did a lot of due diligence on them.

1           Our surrogate eventually became pregnant in February  
2 of 2013 and our son was born in October of 2013. My mother  
3 and I traveled to India for what was supposed to be 17 days  
4 in October. That's about the time that's required to get  
5 what's called the consular, essentially equivalent of a U.S.  
6 passport. It's a very straightforward simple process.

7           About ten days after he was born and we were already  
8 taking care of him at this point, we learned that I am not  
9 his biological father, even though that was what was supposed  
10 to have occurred. The U.S. Embassy rejected our passport  
11 application for Emilio and they told me at that time that it  
12 might take ten years to get Emilio into the United States.  
13 They actually said they couldn't even make that promise.  
14 They told me at the time that the only other couple where  
15 this occurred left India and their child went into an  
16 orphanage.

17           We were determined not to let that happen. We -- you  
18 know, it didn't matter -- once we had our son, it didn't  
19 matter that he was not biologically related to us, he was  
20 part of our family, he was our only son, he was my mom's only  
21 grandson in the family. We were determined to bring him home  
22 no matter what, even though the odds and the -- there was no  
23 precedent, there was no path. And we were committed to do --  
24 doing whatever it took.

25           We engaged the world for support, from lawyers in the

1 United States, India, and Argentina, geneticists in the  
2 United States and Israel, Senator Dianne Feinstein, Leader  
3 Nancy Pelosi, Homeland Security, the U.S. Citizen and  
4 Immigration -- Citizenship Immigration Services, and a host  
5 of folks who I'd never met in India who also came forward to  
6 help. Eventually we were able to bring our son home and in  
7 2016, Emilio became a U.S. citizen.

8           The only bad actor in our story is the agency and  
9 their partners who committed a series of egregious crimes in  
10 connection with the birth of our son. The full range of  
11 crimes is described in detail in the criminal complaint that  
12 we filed with the police in India back in June of 2014, a  
13 copy of which you have been provided.

14           I also wanted to point out that Senator Dianne  
15 Feinstein's letter in January of 2014 to U.S. Citizenship and  
16 Immigration Services requesting their assistance is a really  
17 nice one-and-a-half-page summary of what occurred. So that's  
18 just a bit of context.

19           The other -- only other thing I wanted to mention  
20 was -- and actually, Mr. Wagner touched on this -- we went on  
21 this sabbatical from April until September to recover from  
22 the trauma of what had happened in India and to rebuild our  
23 relationship. As -- as Nick mentioned, our neighbor Jake was  
24 offered to help and scan and forward essential mail. As  
25 background, we probably get 10 to 20 pieces of mail every

1 day.

2 He did not forward this notice from the FTB while we  
3 were on vacation. So we didn't receive the notice until  
4 September of 2017. If we had received the notice when I was  
5 on the trip, I would have called the FTB and I would have  
6 simply said we are not able to file the return for various  
7 reasons and we would have explained to them on the phone in a  
8 what would have been a two-minute phone call. We didn't have  
9 that opportunity. We all -- so -- anyway, it is just  
10 unfortunate.

11 I'm kindly asking you to rule in our favor. I've  
12 been an on-time taxpayer my entire life. And Alex and I have  
13 been on-time taxpayers, again, since 2016. In every case,  
14 I've always paid what was owed, even when we were not filing  
15 the returns on time for that three-year period. And in fact,  
16 probably most of the last 15 years, including the year in  
17 question, I overpaid what was owed. So I would request that  
18 you abate the penalty.

19 I'm happy to respond to any questions.

20 ALJ LAMBERT: Thank you, Mr. Berman.

21 FTB, do you have any questions?

22 MR. SMITH: I do not.

23 ALJ LAMBERT: Judge Angeja, do you have any  
24 questions?

25 ALJ ANGEJA: No.

1 ALJ LAMBERT: Judge Margolis.

2 ALJ MARGOLIS: I'm not sure how relevant it is, I  
3 just don't understand why you didn't -- you said that your  
4 2013, '14, and '15 returns weren't able to be filed on time.  
5 You didn't really explain why that was the case. I'm curious  
6 why that was the case.

7 APPELLANT BERMAN: So we were in consultation with  
8 our accountants and also our tax lawyer to really figure out  
9 how to treat the theft, the theft loss that is related to  
10 what happened to us in India.

11 ALJ MARGOLIS: Okay.

12 ALJ LAMBERT: So the purpose of the trip was a  
13 sabbatical. Okay. Then you discovered -- you're saying you  
14 eventually discovered the amount of the theft loss, and is  
15 that why -- one reason why it took longer to file your  
16 return?

17 APPELLANT BERMAN: Yeah. So the theft loss was just  
18 very complicated to figure out how to treat the theft loss.  
19 And so our accountant and our lawyer, our tax lawyer that we  
20 had to retain to figure all of this out, it just took a lot  
21 of time to really figure out what -- what to do and how to  
22 treat it. So we eventually by -- so we were also waiting for  
23 the criminal proceeding in India to play out because we were  
24 waiting to see if there was going to be any recovery.

25 By late 2017 -- not late, but by basically September

1 2017, we realized that there wasn't going to be and we were  
2 able to catch up, but we actually filed the 2013 and '14  
3 returns in early 2017.

4 ALJ LAMBERT: Okay.

5 APPELLANT BERMAN: And then the '15 return was filed  
6 in October of '17. And then all of the rest of the returns  
7 have been filed on time since.

8 ALJ LAMBERT: Okay. Just to confirm, you paid your  
9 tax timely for 2015?

10 APPELLANT BERMAN: Yes. In full. In fact, in our  
11 original letter to the Office of Tax Appeals dated March 20,  
12 2018, I'm just going to quote from this. "All 2015 taxes  
13 were paid by April 15<sup>th</sup>, 2016, and no taxes were owed on the  
14 return that was filed. In fact, I overpaid my taxes by  
15 \$53,277, applied \$39,000 to 2016 estimated tax, applied \$2072  
16 for a late tax penalty, and was due a refund in the amount of  
17 \$12,205."

18 ALJ LAMBERT: Thank you.

19 FTB, you can present your argument now.

20 MR. SMITH: All right. Thank you.

21 Good morning. Based on a September 11<sup>th</sup>, 2019  
22 request from your office, it appears that there might be two  
23 issues in this appeal. The first issue is whether the  
24 Respondent properly imposed the demand penalty for the 2015  
25 tax year. As I will explain under California Code of

1 Regulations, Title 18, Section 19133, imposition of the  
2 penalty is proper.

3           Second issue is whether Appellants have established  
4 reasonable cause to abate the demand penalty. The record  
5 shows that Appellants have not established reasonable cause  
6 to abate the penalty.

7           The facts are not in dispute. When Respondent did  
8 not receive a timely 2015 tax return for Mr. Berman,  
9 Respondent issued a demand for tax return in June of 2017.  
10 When Respondent failed to receive a response, Respondent  
11 issued a notice of proposed assessment in August of 2017,  
12 imposing a demand penalty in accordance with Regulations  
13 Section 19133. Thereafter, Appellants filed their 2015 tax  
14 return. Respondent accepted the return and adjusted the  
15 demand penalty accordingly. The demand penalty's calculated  
16 based on the amount of tax shown on the return. It does not  
17 take into account timely payments.

18           With regard to the first issue, Respondent imposed  
19 demand penalty under authority granted by Revenue and  
20 Taxation Code Section 19133. This section gives Respondent  
21 discretionary authority to impose the demand penalty. As a  
22 result of this discretion, Respondent promulgated Regulation  
23 Section 19133 in 2004. Under Regulation Section 19133,  
24 subdivision D, the demand penalty for Appellants' 2015 tax  
25 year is proper because Respondent issued a prior NPA to



1 Mr. Berman for the 2014 tax year.

2           The rules of statutory construction govern the  
3 interpretation of regulations. California courts have held  
4 that the fundamental objective when interpreting a regulation  
5 is to determine the intent of the agency issuing the  
6 regulation. To start, courts looked at the plain meaning of  
7 the language to determine the agency's intent. Under *Busbee*  
8 *Board of Trustees* which cites to Code of Civil Procedure  
9 Section 1858, when interpreting a regulation, courts must  
10 first give meaning to every word and phrase in the  
11 regulation, courts must read the regulation as a whole, and  
12 courts cannot omit what has been inserted into the  
13 regulation.

14           After considering the entire regulation, if the plain  
15 meaning is ambiguous or inconsistent, California courts give  
16 great deference to the interpretation of the regulation by  
17 the promulgating agency. California courts defer to the  
18 agency's interpretation when the subject regulation addresses  
19 an area of the agency's expertise, touches on policy issues  
20 within the agency's purview, and when the agency has shown  
21 consistent enforcement of the regulation. While California  
22 courts, the United States Supreme Court has repeatedly given  
23 deference to the promulgating agency, unless the  
24 interpretation is plainly erroneous or inconsistent with the  
25 regulation or the interpretation does not reflect the

1 agency's fair and considerate judgment on the matter.

2           With regard to Regulation Section 19133, the plain  
3 language in subdivisions B and D creates ambiguity in the  
4 regulation. Therefore, deference should be given to  
5 Respondent's longstanding interpretation of the regulation.  
6 As earlier stated, Revenue Taxation Code Section 19133 grants  
7 Respondent discretionary authority to impose the demand  
8 penalty. In order to provide uniform exercise of that  
9 discretion, Respondent promulgated Regulation Section 19133  
10 nearly 15 years ago to provide clear direction to California  
11 taxpayers. The intent of the regulation was to codify  
12 Respondent's demand penalty policy to penalize recent repeat  
13 nonfilers. Regulation Section 19133 was promulgated after  
14 substantial analysis on the imposition of the demand penalty  
15 and with input from the three-member Franchise Tax Board.

16           Respondent's interpretation of the regulation  
17 provides certainty to taxpayers. Respondent will impose  
18 demand penalty if it issued a notice of proposed assessment  
19 to the taxpayer for one of the four preceding tax years. An  
20 alternative interpretation that ignores Respondent's intent  
21 and ignores subdivision D of the regulation creates confusion  
22 and puts taxpayers at a disadvantage if their distant filing  
23 history can expose them to the demand penalty.

24           Respondent's interpretation of Regulation Section  
25 19133 reflects the agency's fair and considerate judgment, it

1 is not erroneous, and it is not inconsistent with the  
2 regulation. Therefore, deference should be given to  
3 Respondent's interpretation. Therefore, Respondent properly  
4 imposed the demand penalty under Regulation Section 19133,  
5 subdivision D.

6 Now as for the abatement of the demand penalty, under  
7 Revenue Taxation Code Section 19133, Respondent's imposition  
8 of the demand penalty is presumed proper unless Appellants  
9 are able to show that their failure to timely reply was due  
10 to reasonable cause, not due to willful neglect. Appellants  
11 must show that the failure to respond to the demand occurred  
12 despite the exercise of ordinary business care and prudence.

13 In addition, Appellants have a personal, nondelegable  
14 obligation to timely respond to the demand. Now in this  
15 particular matter, the time period at issue is from when the  
16 demand was sent to when the demand required response and  
17 that's from June 13<sup>th</sup>, 2017 to July 19<sup>th</sup>, 2017. Appellants  
18 suggest that they were not responsible to timely respond to  
19 the demand while they were Europe because their neighbor did  
20 not forward them the demand. This does not establish  
21 reasonable cause. As mentioned, Appellants had a  
22 nondelegable obligation to timely respond to the demand.

23 This same rule even applies to taxpayers who rely on  
24 a tax professional such as a CPA or an attorney to respond to  
25 a demand. Appellants were responsible to timely respond to

1 the demand and could not transfer that responsibility to  
2 anyone. As such, based on case law and evidence in the  
3 record, Respondent requests you sustain its position.

4 I can answer any questions that you might have.

5 ALJ LAMBERT: Thanks. Appellants, do you have any  
6 questions for FTB?

7 Judge Angeja, Judge Margolis, do you have any  
8 questions?

9 ALJ MARGOLIS: Yes, I have a few questions.

10 In your -- Mr. Smith, in your opening statement, you  
11 said FTB has discretionary authority to impose this penalty.  
12 What I don't understand is why didn't you exercise that  
13 discretion here when the taxpayer credibly says that they  
14 didn't get the letter and when they did get it, they promptly  
15 took this into account and in exercising this discretion. I  
16 guess -- I read your package about the intent behind this  
17 regulation. And I think one of the problems that was noted  
18 there is that this penalty is so harsh and that it doesn't  
19 take into account any prepayments. And here, the taxpayer  
20 had overpaid.

21 Why isn't that a factor that you take into account in  
22 deciding to exercise your discretion when the taxpayers  
23 overpaid and clearly did not get the -- did not receive the  
24 actual notice of they reply within 30 days?

25 MR. SMITH: Okay. So I'm going to try to answer all

1 those, if I miss one, please --

2 ALJ MARGOLIS: Okay.

3 MR. SMITH: -- alert me to one I missed.

4 As for the discretion. The discretion is -- is -- is  
5 in the Revenue Taxation Code Section itself that the  
6 legislature wrote. It says that the Franchise Tax Board may  
7 add a penalty of 25 percent.

8 So given that discretion, Respondent promulgated the  
9 Regulation 19133 to make sure that that discretion is  
10 uniformly applied to all California taxpayers. In addition,  
11 the --

12 ALJ MARGOLIS: So are you saying that if I issue that  
13 regulation, that's the only manner in which you can exercise  
14 your discretion?

15 MR. SMITH: So I'm speaking to the discretion in  
16 the reg --

17 ALJ MARGOLIS: The statute.

18 MR. SMITH: -- as to the statute.

19 ALJ MARGOLIS: Right.

20 MR. SMITH: And so that -- that's -- that is what has  
21 been the regulation creates a uniform application of the  
22 discretion.

23 Now the -- as it relates to abatement of the penalty,  
24 the regulation -- or excuse me, the statute says that the  
25 taxpayer needs to show reasonable cause. And so that's --

1 that's the second piece to this. And the reasonable cause  
2 analysis is whether someone acted as a prudent  
3 businessperson.

4 In this matter during that month that the demand was  
5 sent to the taxpayers address, taxpayers admitted that it was  
6 sent there, taxpayers admitted that it was received. The  
7 time period that matters is that month where the demand  
8 requires a response. And in this instance, being out of the  
9 country, it is not reasonable cause. So the discretion isn't  
10 related to the reasonable cause, it's not whether, you know,  
11 you impose a penalty here, impose it there. So the  
12 regulation ensures that the penalty is equitably applied to  
13 all taxpayers.

14 ALJ MARGOLIS: I guess from reading the package, it  
15 said that one of the problems that you were -- taxpayers and  
16 the tax committee had in the statute is it was such a harsh  
17 penalty that applied when taxpayers had full paid and then  
18 overpaid.

19 I mean, this taxpayer was potentially subject to a  
20 late filing penalty, you know, I know that he was full paid  
21 so the penalty would be just a flat fee if that, you know, if  
22 that was the case. But, you know, to have a penalty for them  
23 filing late, this penalty is for not responding to a notice.  
24 So it seems to me that they should actually get the notice  
25 before you can impose the penalty, especially since it's so

1 harsh.

2 I don't know if the last known address will be, you  
3 know, you seem to implying here that all you have to do is  
4 mail out the notice and you're going to presume that the  
5 taxpayers received it and then impose this, you know,  
6 admittedly harsh penalty here.

7 MR. SMITH: Okay. I'm not entirely sure what packet  
8 you're referring to. In this particular matter, the  
9 regulation has not been briefed, so I'm not -- I can't speak  
10 to the packet that you're referring to.

11 As for -- so I'm not entirely sure what -- what  
12 packet you're referring to.

13 ALJ MARGOLIS: This is the package -- it's pretty  
14 standard package that you file in several 19133 cases where  
15 the issue of the prior years' notices come into effect. I  
16 mean, you did refer to the legislative history, right? I  
17 assume that you reviewed those materials. I mean, the  
18 legislative history relate to regulations so I assume you're  
19 familiar with that.

20 MR. SMITH: Right. I just wanted it to be on the  
21 record that that -- this has not been briefed in this -- in  
22 this deal.

23 ALJ MARGOLIS: Okay. Is the FTB doing some sort of  
24 clarification regulation on this matter? Is it working on  
25 that?

1 MR. SMITH: Recently FTB was given permission to  
2 proceed with the informal regulatory process. Any  
3 adjustments or amendments that might be made have no bearing  
4 on this appeal.

5 ALJ MARGOLIS: Okay. I don't think I have any other  
6 questions.

7 Oh, I do -- actually, I do have one more.

8 I mean, you do -- if the taxpayer had made a phone  
9 call, if you did get this thing when the notice was issued in  
10 June and he called the FTB, it is the FTB's policy to grant a  
11 reasonable extension, isn't it?

12 MR. SMITH: Correct. As shown on Exhibit A, page 1,  
13 the demand outlines options available to the taxpayer.

14 ALJ MARGOLIS: Okay.

15 MR. SMITH: Real quick. I didn't, sorry, you had  
16 mentioned the last known address rule. The legal standard  
17 for Respondent's notices is that they send -- is that notices  
18 are sent to the taxpayer's last known address. There's been  
19 no allegation that this was sent to the wrong address,  
20 there's been no evidence to suggest that Respondent was on  
21 notice to provide documentation to any other address. So the  
22 Franchise Tax Board did meet its legal standard by issuing  
23 this demand to the taxpayer's address.

24 ALJ MARGOLIS: And do you have any authority that  
25 that last known address rule applies when the penalty -- the



1 penalty's imposed based upon failure to respond to that  
2 notice? I understand, you know, you have -- that the law  
3 requires that a notice of additional tax be sent to the last  
4 known address, so whether you get the notice or not doesn't  
5 matter. But here you're sending him a notice saying respond  
6 by a certain day, and just seems to me that there should  
7 be --

8 MR. SMITH: That there's a --

9 ALJ MARGOLIS: -- an actual receipt of that. I mean,  
10 I'm not saying a taxpayer would be off the hook if they, you  
11 know, purposefully ignore their mail, I just don't think that  
12 was the situation here.

13 MR. SMITH: There's no legal authority that stands  
14 for the last known address being applied differently in a  
15 situation where response is required. The last known address  
16 is applied uniformly for all notices sent by Respondent.

17 ALJ MARGOLIS: Okay. Thank you very much.

18 ALJ LAMBERT: Okay. Appellants, you can make your  
19 rebuttal now.

20 MR. WAGNER: Thank you very much.

21 The Respondent holds that it met its burden by simply  
22 sending their -- the letter to the last known address. It  
23 holds this as an irrebuttable presumption. However, we  
24 believe the facts of this case clearly show an example where  
25 the last known address rule cannot be considered an

1 irrebuttable presumption.

2           There are larger ramifications for applying this rule  
3 so narrowly. The Appellants here actually took genuine steps  
4 to ensure that their mail was received. They were acting as  
5 a prudent businessperson. They can't control the errors made  
6 by someone that they charged to take care of their mail.

7           I contend that not every taxpayer makes such diligent  
8 steps as the Appellants in this present case when they take  
9 extended trips. More often than not, taxpayers in the state  
10 take long vacations without making any arrangements for their  
11 mail. The FTB would have this panel believe the last known  
12 address is irrebuttable, I offer that the only irrebuttable  
13 fact here is the Appellants did not receive this mail.

14           Next, I also question whether or not this is really  
15 consistent enforcement as Judge Margolis, you mentioned, they  
16 could have gone with a late filing penalty but they didn't do  
17 so in 2013 or 2014. How would the Appellant honestly be  
18 expected to understand the gravity of these notices if they  
19 aren't consistently enforcing them?

20           Thank you very much.

21           ALJ LAMBERT: Thanks. Any more questions?

22           All right. Okay. Well, I'm going to close the  
23 record and conclude the hearing.

24           So thanks to both parties for coming. And following  
25 this hearing, we will discuss the evidence and argument and

1 issue a written opinion within a matter of days.

2 Thanks. This hearing is now closed.

3 MR. SMITH: Thank you.

4 MR. WAGNER: Thank you.

5 (Whereupon the proceedings were

6 adjourned at 11:45 a.m.)

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**REPORTER'S CERTIFICATE**

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of October, 2019.



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Eduwiges Lastra  
CER-915

**TRANSCRIBER'S CERTIFICATE**

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of October, 2019.



Jill Jacoby  
Certified Transcriber  
AAERT No. CERT\*\*D-633