

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
PARADIGM PUBLISHING, INC.,) OTA NO. 18042682
)
APPELLANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, September 19, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE OF,)
PARADIGM PUBLISHING, INC.,) OTA NO. 18042682
APPELLANT.)

IN THE MATTER OF THE OF,)
CSBT ENTERPRISE, INC.,) OTA NO. 18053206
APPELLANT.)

IN THE MATTER OF THE OF,)
CSBT CORP.,) OTA NO. 18042961
APPELLANT.)

Transcript of Proceedings, taken at
355 S. Grand Ave. 23rd Floor, Los Angeles,
California, 91401, commencing at 12:50 p.m. and
concluding at 2:02 p.m. on Thursday,
September 19, 2019, reported by Ernalyn M. Alonzo,
Hearing Reporter, in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ RICHARD TAY

Panel Members: ALJ KENNY GAST
ALJ DOUGLAS BRAMHALL

For the Appellant: IVAN MISNER
CAROLYN DENNY
SEAN R. KENNEY

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
By: MIRA PATEL
MARIA BROSTERHOUS

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I N D E X

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	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Ivan Misner	15			
Carolyn Denny	32			

E X H I B I T S

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

CLOSING STATEMENT

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1 Los Angeles, California; Thursday, September 19, 2019

2 12:50 p.m.

3

4 ADMINISTRATIVE LAW JUDGE TAY: Good afternoon.
5 We are opening the record in the consolidated appeal of
6 Paradigm Publishing, Inc., CSBT Corp., and CSBT
7 Enterprises, Inc., before the Office of Tax Appeals. The
8 Case Numbers are 18042682, 18042961, and 18053206. This
9 hearing is being convened in Los Angeles on
10 September 19th, 2019 at 12:50 p.m.

11 Today's case is being heard and decided equally
12 by a panel of three judges. My name is Richard Tay, and I
13 will be acting as lead judge for the purposes of
14 conducting this hearing. Also on the panel with me today
15 are Judges Doug Bramhall and Kenny Gast.

16 For the record, will the parties please introduce
17 themselves. Beginning with the appellant, please spell
18 your name just for the sake of the stenographer. And
19 state any title you wish to have just as part of the
20 record.

21 MR. KENNEY: Sean Kenny, S-e-a-n K-e-n-n-e-y,
22 appearing for Appellant.

23 MR. SHAEFFER: John Shaeffer, J-o-h-n
24 S-h-a-e-f-f-e-r, also counsel for Appellant.

25 ADMINISTRATIVE LAW JUDGE TAY: Franchise Tax

1 Board?

2 MS. PATEL: Mira Patel. It's P-a-t-e-l, tax
3 counsel for Franchise Tax Board.

4 MS. BROSTERHOUS: Maria Brosterhous,
5 B-r-o-s-t-e-r-h-o-u-s.

6 ADMINISTRATIVE LAW JUDGE TAY: Thank you. The
7 issue that we'll be hearing today is: Whether reasonable
8 cause exist to justify abatement of the late payment
9 penalty for Appellants' 2014 tax year.

10 Prior to the hearing, we circulated exhibits
11 submitted by both parties in a file we called "The Hearing
12 Binder." It contains Appellant's Exhibits A through M,
13 and FTB's Exhibits 1 through 15. There are no objections
14 to admitting the exhibits into evidence. Is that right,
15 Appellants?

16 MR. KENNEY: No objections.

17 ADMINISTRATIVE LAW JUDGE TAY: Franchise Tax
18 Board?

19 MS. PATEL: No objections.

20 ADMINISTRATIVE LAW JUDGE TAY: Thank you. The
21 exhibits will now be admitted into evidence.

22 (Appellant's Exhibits A-M were received
23 in evidence by the administrative Law Judge.)

24 (Department's Exhibits 1-15 were received in
25 evidence by the Administrative Law Judge.)

1 ADMINISTRATIVE LAW JUDGE TAY: I would like to
2 start with the presentation. We're going to start with an
3 opening statement by Appellants followed by an opening
4 statement by Franchise Tax Board. You will each have five
5 minutes. I'll ask the Appellants to go first.

6 Please begin when you're ready.

7 MR. SHAEFFER: Very good.

8

9 OPENING STATEMENT

10 MR. SHAEFFER: The purpose of this hearing is to
11 determine whether or not reasonable cause has been shown
12 by Paradigm Publishing, Inc., CSBT Corp., and CSBT Inc.,
13 to abate approximately \$50,000 in penalties from an asset
14 sale that occurred in 2014.

15 I start with the simple proposition. If
16 Dr. Misner and/or his company owed a vendor money on four
17 invoices and he hadn't paid on one of them, but
18 substantially overpaid all of them combined, I could not
19 imagine a court in this country that would agree that the
20 vendor was justified in charging Dr. Misner and/or his
21 company penalties when vendor was dramatically overpaid.

22 This brings us to the case at hand, where in
23 fact, Dr. Misner and/or his companies overpaid their
24 personal tax bill by nearly one-million dollars based on
25 the advice of their CPA, Carolyn Denny, and only to be

1 charged penalties for such overpayment.

2 On the other hand, the Franchise Tax Board states
3 that such overpayment and allocation of the wrong account
4 cannot qualify for reasonable cause penalty abatement. In
5 fact, the FTB consistently and correctly argues that the
6 very specific allocation in question is only a mere
7 calculation and computational.

8 This cannot be further from the truth. I note
9 that there's also some irony here, based on the literally
10 thousands of -- or hundreds of pages that have been given
11 in evidence and legal arguments regarding allocation of
12 payment and whether or not it may or not be mere
13 computational error.

14 As this court is aware, Dr. Misner and his wife,
15 Beth Misner, were the sole owners of Paradigm, CSBT Corp.,
16 and CSBT, Inc., at the time of the 2014 sale. These
17 companies are known as BNI, which is the world's leading
18 referral organization. At the time of the 2014 sale,
19 Dr. Misner was running an organization that had
20 approximately 200,000 members.

21 Dr. Misner has written over 24 books, has been
22 featured in the New York and Los Angeles Times. In other
23 words, he's a successful businessman. He relies on upon
24 the advice of others in regard to many different facets of
25 this company, including his longtime CPA, Carolyn Denny.

1 The sale in question, it was covered by a
2 purchase agreement that had numerous clauses to which the
3 Misners and their company had to adhere. In particular,
4 an allocation clause existed that gave full discretion to
5 the purchaser on how they wanted to allocate the purchase
6 price among the Misner companies, making it impossible for
7 the Misners and Ms. Denny to conclude with any accuracy
8 where to allocate funds for tax payments among the
9 companies.

10 Furthermore, if Ms. Denny and Dr. Misner
11 proceeded with an allocation without the third-party
12 purchaser's authorization, they would have likely had a
13 breach in -- likely, would have had a breach in contract.
14 A premature allocation can also create a mismatch of tax
15 reporting between the purchaser and the Misner companies,
16 which in turn would create more complications. In other
17 words, it was entirely reasonable for the Misners to
18 believe that paying it into their personal account was a
19 reasonable solution for a complicated problem.

20 Reasonable cause abatement is specifically
21 provided for in California Revenue and Tax Code 19132. To
22 that end, US v Boyle is a similar case for reasonable
23 cause. Under Boyle, reliance on a tax advisor constitutes
24 reasonable cause. The taxpayer relied on substantive tax
25 advice.

1 And the tax advisor can establish: One, that the
2 adviser was a company professional with sufficient
3 expertise; two, the taxpayer provided necessary and
4 accurate information to the advisor; and three, the
5 taxpayer relied in good faith on the advisor's judgement.

6 The evidence we intend to present today coupled
7 with the evidence previously received by the Court, will
8 show that the taxpayer's reliance on Ms. Denny, who was
9 formally the CFO for the City of Beverly Hills and has
10 worked for as a CPC in California for over 35 years, meets
11 the reasonable cause standard as articulated in the Boyle
12 case.

13 This Court recently decided a case on reasonable
14 cause in favor of the taxpayer. In that case, namely in
15 re Moren, OTA Case Number 18011276, the taxpayer was
16 unable to ascertain his tax liability based on a lack of
17 information received from the third-party CPA trustee.
18 This Court cites Frias v. Commissioners, stating that the
19 most important factor in determining reasonable cause in
20 good faith, is the extent of the taxpayer's efforts to
21 assess his or her proper tax liability. Pardon me.

22 Not only did Dr. Misner attempt to determine his
23 tax liability, but he believed he actually had timely paid
24 the liability on Ms. Denny's substantive tax advice.
25 Thus, the Misner's good faith attempt, not only to

1 ascertain the tax liability but paying it, is a textbook
2 example of reliance on a CPA that constitutes reasonable
3 cause.

4 The linchpin of the FTB's argument against
5 penalty abatement is the Berolzheimer Case. Here the
6 facts of this case where the court found reasonable cause
7 did not exist are as follows:

8 Appellants made an underpayment of tax. The
9 underpayment of tax was based on a software by the tax
10 preparer. The tax preparer made some sort of error
11 calculating capital gains. There is no substantive tax
12 advice on any matters of law. And the court also alluded
13 to the fact that the taxpayer was licensed in New York.
14 There's no basis in the record for concluding that a New
15 York law firm was retained -- that was retained by the
16 taxpayer had expertise in California law. In other words,
17 the tax preparer here did not appear to be qualified.

18 The facts of our case bear a little similarity to
19 Berolzheimer. Although, there is indeed some math
20 involved, as one would expect since we're dealing with
21 taxes, the advice stemmed from Ms. Denny's review of the
22 purchase agreement, the allocation clause, confusion and
23 lack of certainty in the somewhat novel situation, and
24 lack of direction from a third-party buyer.

25 Very similar to Moren, but here our taxpayer

1 tried to pay the taxes. And clearly Ms. Denny's advice
2 was not a mere calculation. A ruling against the Misners'
3 companies creates bad policy and further jurisprudence
4 providing reasonable cause penalty abatement on its head.
5 It's one thing when a taxpayer doesn't pay when taxes are
6 due, however, it's a whole other thing when a taxpayer
7 believes that he/she/it has satisfied its liability based
8 on its expert's advice, and in fact, overpaid what it
9 believed to be the tax.

10 The FTB's principle case Berolzheimer --
11 Berolzheimer is instructed. It quotes a similar case,
12 Boyle, as follows, "When an accountant or an attorney
13 advises a taxpayer in a matter of law, such as whether a
14 liability exist, it is reasonable for the taxpayer to rely
15 on that advice. Most are not competent to discern error
16 in the substantive of an accountant or attorney."

17 To require the taxpayer to challenge the attorney
18 or seek a second opinion or to try to monitor counsel on
19 the provision of the code himself, would nullify the very
20 purpose of seeking the advice of the presumed expert in
21 the first place. The case goes on to quote, as follows,
22 "For example, if a layperson relies upon a tax expert's
23 advice, that the taxpayer need not file a return at all
24 due to the taxpayer's lack of tax liability. The taxpayer
25 is not required to question the expert's advice and may

1 reasonably rely on that opinion."

2 Dr. Misner's reliance on Ms. Denny's advice that
3 its estimated payments use a personal account could later
4 be allocated to his business account -- accounts, is not
5 unreasonable. It seems awfully similar to what
6 Berolzheimer stated would qualify as reasonable cause for
7 penalty abatement.

8 In summary, if overpaying an account by nearly a
9 million dollars, making numerous inquiries to a reputable
10 tax professional as to where proper payment should be
11 made, having a complicated purchase agreement with an
12 allocation clause that requires expert interpretation does
13 not equate to reasonable cause or penalty abatement, I'm
14 not really sure what does.

15 ADMINISTRATIVE LAW JUDGE TAY: Thank you.

16 Franchise Tax Board, your opening statement.

17

18 OPENING STATEMENT

19 MS. PATEL: Good afternoon. Revenue and Taxation
20 Code, Section 19132, imposes a late payment penalty when
21 taxpayers fail to pay the amount of tax by the due date.
22 Appellants filed their returns within the automatic
23 extension period. However, an extension to file is not
24 extension to pay. Consequently, when Appellants paid
25 their 2014 tax liabilities over 13 months late, Respondent

1 properly imposed a late penalty.

2 Appellants argue that lack of necessary
3 documents, oral advice from Respondent, and reliance on
4 their CPA excuse their late payment by establishing
5 reasonable cause. However, as the evidence in case law
6 will show, arguments asserted by Appellants do not
7 establish grounds to abate these liabilities.

8 Thank you.

9 ADMINISTRATIVE LAW JUDGE TAY: Thank you, FTB.

10 Appellants, I'd like to give you an opportunity
11 to present the rest of your case and to examine your
12 witnesses. If I could have both witnesses stand to be
13 sworn it. I could do that all at the same time. If you
14 could please state your name for the record.

15 MR. MISNER: Ivan Misner, M-i-s-n-e-r.

16 ADMINISTRATIVE LAW JUDGE TAY: Thank you.

17 MR. DENNY: Carolyn Denny, D-E-N-N-Y.

18 ADMINISTRATIVE LAW JUDGE TAY: Thank you. If you
19 could raise your right hand, please.

20

21 IVAN MISNER,

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

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CAROLYN DENNY,

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

ADMINISTRATIVE LAW JUDGE TAY: Thank you.

Appellants will have 90 minutes to make their presentation and examine their witnesses. After each witness, I'd like to give FTB an opportunity for cross-examination. Please begin when you're ready.

MR. KENNEY: We would like to call Dr. Misner first.

DIRECT EXAMINATION

BY MR. KENNEY:

Q Dr. Misner, could you tell us where you currently reside?

A I currently reside in Austin Texas.

Q And can you briefly provide us your education history with college forward?

A I went to Citrus Community College and transferred to Cal-Poly University Pomona where I received my bachelor's degree. And then I did my master's and my doctorate, PhD, at the University of Southern California with an emphasis on organizational behavior and

1 leadership.

2 Q And do you currently have any ownership in an
3 entity called CSBT Enterprises, Inc.?

4 A My trust -- my irrevocable trust does, yes.

5 Q And do they own all of it?

6 A Yes.

7 Q Okay. And do you know what type of entity this
8 is?

9 A It is an S corp.

10 Q And what is the difference between an S corp and
11 C corp?

12 A An S corp doesn't have double taxation. The key
13 is that all of the tax liability flows up to the
14 individual.

15 Q Did that entity previously have a different name?

16 A It did. It had the name of BNI.

17 Q And what about the other entities, the other two
18 corporate entities that are parties to this lawsuit, do
19 you have any ownership? Do you or your trust have any
20 ownership interest in that?

21 A Yes, 100 percent.

22 Q And are they both S corps as well?

23 A Yes.

24 Q Now, during December of 2014, were you involved
25 in a transaction where BNI Enterprises, BNI Corp, and

1 Paradigm Publishing sold certain of their assets?

2 A Yes.

3 Q And can you describe that transaction? What were
4 you attempting to accomplish with that transaction?

5 A It was an asset purchase where the private equity
6 company purchased the assets of BNI Enterprises, BNI Corp,
7 and Paradigm.

8 Q And what line of businesses were those entities
9 in?

10 A BNI is a referral marketing platform for small
11 businesses and for sales people in large companies to help
12 them increase their business through referrals. We have
13 9,190 groups today in 70 countries around the world.

14 Q And what role or responsibility did you have with
15 those entities from their inception to the time they were
16 sold -- caused the assets to be sold?

17 A I was and still am the founder of the
18 organization. I was CEO for most of that time. At the
19 time of the transaction, I had an acting CEO because I was
20 in the mist of dealing with a cancer diagnosis.

21 Q And can you take a look at Exhibit C in the
22 binder that is before you, which I believe is page 172 of
23 the record. Can you identify this for us?

24 A Yes. This is the asset purchase agreement
25 with -- between us and the private equity company.

1 Q And if you turn to page 179, do you recall what
2 the purchase price was for the entity?

3 A I do recall. I don't have to turn to the page,
4 but I will. It was 36 million.

5 Q And was that all going to be paid in cash in
6 connection with the transaction?

7 A No. It included assumed liabilities. It
8 included a promissory note, and it also included a
9 reinvest back into the new company where I ended up owning
10 20 percent of the new corporation.

11 Q Now, if you were the founder and owner of these
12 entities, why weren't you the seller?

13 A The entities were what was sold. I owned the
14 entities, but the entities is what were sold.

15 Q Assets were sold as opposed to the equity in the
16 entity?

17 A Correct. Assets were sold.

18 Q Now, how was the purchase price that you
19 mentioned, how was that going to be allocated amongst the
20 assets that were being sold?

21 A That was completely determined by the sales
22 agreement which said that the buyer would allocate the
23 assets to the three different entities.

24 Q Now, before that allocation occurred, if you look
25 at Section 1.5 of this agreement, there was something

1 referred to as closing date adjustments. Do you have any
2 understanding as to what adjustments would need to occur
3 before any allocation would happen?

4 A I believe it would be all of the assumed
5 liabilities, the promissory note, my reinvestment back
6 into the company.

7 Q So they had some time to go in and look at what
8 the liabilities were and all of those things and make
9 adjustments?

10 A Yes, exactly.

11 Q And they were given about 90 days to do that?

12 A Yes.

13 Q And you had the right to object to any
14 adjustments they made?

15 A Yes, I did.

16 Q And did you make any objections?

17 A I did not.

18 Q Okay. And if you turn to 1.8 of the purchase and
19 sale agreement, there's a reference to something called
20 allocation. What was the -- what did that refer to?

21 A That referred to the allocation of the asset
22 value for each of the three companies. And they had 60
23 days to do that after the closing statement was
24 calculated.

25 Q Now, did you have any say or power to determine

1 that allocation?

2 A No. None.

3 Q And consistent with the terms of the agreement,
4 you would -- the seller had no obligation to provide that
5 allocation to you until something, like, 150 days after
6 closing; isn't that correct?

7 A That's correct.

8 Q So you wouldn't have known anything about that
9 allocation. The transaction is dated December of 2014.
10 You wouldn't have known anything about that allocation
11 until May of 2015; correct?

12 A No. It was complex in what they were doing.

13 Q Do you recall whether they gave you that
14 allocation timely?

15 A No. I think they gave it late.

16 Q Now, at the time of closing, was there any
17 mathematical formula you could apply to the purchase price
18 and this contract that would tell you how the buyer would
19 ultimately allocate?

20 A No, because it was very complex.

21 Q And it was in their mind too. It was something
22 that they could decide?

23 A Yes.

24 Q Now, you understood, didn't you? You're a
25 sophisticated businessman that when you entered this

1 transaction, both you and your entities would have some
2 tax liability, did you not?

3 A Yes.

4 Q And did you have anyone advising you with respect
5 to this tax liability?

6 A Yes.

7 Q And who was that?

8 A Carolyn Denny.

9 Q And how long -- and how long have you known
10 Ms. Denny?

11 A I have known Ms. Denny for more than 35 years.

12 Q And how long has she been the -- is she the CPA
13 for you and your company?

14 A She is the CPA still for me and another company I
15 own, not for the current BNI. No.

16 Q And did Ms. Denny have any experience, role, or
17 responsibility in your prior networking company?

18 A Yes, quite a bit. She was the auditor of BNI
19 Franchise Corp., which required an annual audit because it
20 was a franchising arm. So she was actively engaged in the
21 company.

22 Q And was she also one of your first members?

23 A She was the very first member of the very first
24 chapter of BNI, 9,190 chapters ago.

25 Q Now, you knew at the end of 2014 that you would

1 have to make -- you would owe estimated taxes both
2 personally and for these entities?

3 A Yes.

4 Q Now, take a look at Exhibit K, which is a copy of
5 Ms. Denny's declaration she filed in this case. I'd like
6 you to look at the very last page, which is an exhibit --
7 which is an e-mail from Ms. Denny to you dated
8 December 12, 2014. Just looking at the e-mail at the
9 bottom, what is she telling you to do here?

10 A She's telling me to pay the amounts due. I
11 believe that was quarterly, the first line. The second
12 line is that there will be additional amounts due by the
13 end of the year, by the 31st. And then she also asked for
14 the closing documents to determine how to allocate the
15 transaction.

16 Q Okay. So she's telling you, reminding you in
17 December that you're going to have to make your estimated
18 payments?

19 A Yes.

20 Q And then right above that you respond to her.
21 What do you tell her?

22 A Are we looking at the bottom of that?

23 Q Yeah. The one right above her -- the e-mails are
24 strange. They always go backwards. So the e-mail at the
25 bottom of the page right there, that's actually her first

1 e-mail to you. And then you respond to her. What are you
2 saying in response when she asks you -- tells you you're
3 going to need to make your estimated payments?

4 A Are you talking about the one that says, "Okay.
5 I'd rather go over than under the estimated payment. And
6 if I need to prepay any of the additional money, I will
7 pay it early."

8 Q What did you mean you'd rather go over than
9 under?

10 A I didn't want to have any issues with any taxing
11 authorities. I wanted to -- and I made it clear to her,
12 not only in writing but many times verbally, overpay just
13 to make sure that we don't underpay anything.

14 Q Well, if you turn two pages further, which is a
15 December 11th, 2014, e-mail that you write to Lori O'Brien
16 and Jose Burnell. Who are those individuals?

17 A They work for Carolyn Denny, and I cc'd Carolyn
18 on the e-mail.

19 Q And what are you telling her -- telling them in
20 this e-mail about what you want to do with respect to your
21 estimated payments?

22 A I was okay with what they suggested, but I wanted
23 to make sure -- upper case, yelling -- I wanted to make
24 sure, absolutely sure we pay more tax than what's needed.
25 And if you have to round up, round up. Don't hit the

1 minimum.

2 Q Now, in the e-mail -- going back to the last
3 page, the e-mail where Ms. Denny responds to your
4 December 12th, 2014, e-mail, she has a reference there in
5 all caps, "I need a copy of the closing documents."

6 Why did you think she needed a copy of the
7 closing documents? Or why did she tell you she needed a
8 copy of the closing documents?

9 A She says it here, to allocate -- or to start the
10 process of allocating the transaction.

11 Q Now, couldn't she just -- she could just look at
12 those documents and figure out the appropriate allocation?

13 A No.

14 Q Why not?

15 A Because the buyer, the private equity company,
16 was the one to determine what the allocations would be.
17 And I was told that it would be a problem for us to do it
18 because they might not match.

19 Q And did you provide her a copy of the asset sale
20 agreement?

21 A I did.

22 Q But she was able, looking at the documents and
23 looking at the transaction to figure out the gross
24 liability of all the entities, did she -- was she not?

25 A Yes. She was able to take all the entities in

1 her personal and come up with one number that we would
2 absolutely owe.

3 Q So you had a number. You had three entities.
4 What does she tell you to do with the estimated that she
5 came up with?

6 A She told me she had conversations with the taxing
7 authority, and that they said, "You didn't owe the
8 allocation. Put it all in the personal bucket because it
9 all flows up to the personal bucket." And so we put -- we
10 overpaid in the personal bucket, based on Carolyn's advice
11 from her conversation.

12 Q But wait a second. You know the difference
13 between you personally and your company's, don't you?

14 A Yes.

15 Q Well, why would it make sense to put the money in
16 your personal?

17 A I was relying on the advice of a CPA who had
18 talked with the State, who she said told her, "Put it all
19 there if you don't have the allocation. We can allocate
20 it later."

21 Q Now, turning to Exhibit D in the binders, and I'm
22 going to particularly be looking at the last page of
23 Exhibit D, which is page 239 of the record. Do you know
24 how much you ultimately deposited into your personal
25 accounts related to the -- related to these companies?

1 A Yes. On December 30th, we deposited \$950,000.

2 Q Now, did you have an understanding as to whether
3 or not that was the -- just about what the liability would
4 be?

5 A No. I specifically asked her to put in more just
6 in case there was any mistake.

7 Q Now, if Ms. Denny had told you to put that money
8 in a different bucket, would you have done that?

9 A Absolutely. It didn't matter to me what bucket
10 the taxes went into, just make sure we pay in full.

11 Q So she had told you that the taxing authority
12 said, "No, no, no. Don't put it into that bucket. Put it
13 into one of the three companies or split up the three
14 companies." You would have done that?

15 A Absolutely.

16 Q Now, did you benefit in any way by taking
17 \$950,000 and giving it to the State of California?

18 A No. No. I would have liked to have had that
19 money to invest, to put into savings, or make some kind of
20 investment.

21 Q Now, why didn't you just divide the amount in
22 three and put it in all three?

23 A That would have created problems for the buyer,
24 and they would not have been -- well, I mean, it would
25 have created legal issues to do that because I had a

1 contract that said it had to be allocated by them.

2 Q Now, do you recall that in October of 2015 you
3 received a notice of a tax deficiency?

4 A Yes.

5 Q And take a look at Exhibit G, which is the
6 last -- Exhibit G, which is page 250 of the record.
7 There's a letter here from Ms. Denny to the Franchise Tax
8 Board. Do you recall what you discussed with Ms. Denny?

9 A 260, you said?

10 Q Yes, 260.

11 A Okay. I'm sorry. Yeah.

12 Q Do you recall the conversation with Ms. Denny
13 about how this tax deficiency was going to be addressed?

14 A Yes. She told me that this happened in other
15 situations with tax authorities, and she was in
16 conversation with them. And she said that if -- that she
17 believed, based on our conversations, that if we paid the
18 personal, the \$900,000, it could be allocated later. And
19 that sounded really reasonable to me.

20 Q And in response to Ms. Denny's letter, do you
21 know whether or not California just took the money -- the
22 overpayment in your personal account, and allocated it as
23 it was determined into the various companies?

24 A No. I don't believe they did.

25 Q In fact, in April of 2016, didn't you get a

1 refund?

2 A I did.

3 Q And would that refund amount have been sufficient
4 to pay those taxes?

5 A Yeah. It was \$900,000, I think.

6 Q Do you have a sense as to the amount of taxes the
7 three entities owed?

8 A I believe it was \$325,000.

9 Q Something, like, \$325,000. So you -- the State
10 of California had more than \$600,000 of your money that
11 they -- you didn't owe them?

12 A That's correct, and I didn't mind. I just wanted
13 it taken care of in full.

14 Q And when you received the refund, what did you do
15 with it?

16 A Well, when I received the refund, it was a shock
17 because I thought this would all be worked out with the
18 allocation. And so I immediately then paid this amount
19 that they were saying that I still owed, even though I
20 paid them \$900,000 more.

21 Q So you took -- you had Ms. Denny take 325 and pay
22 the allocation that's appropriate?

23 A Yes. Yes. Immediately.

24 Q Okay. But you also paid the interest and
25 penalties you had?

1 A I did because I didn't want it to accrue while we
2 would be working out what I thought would be worked out
3 through conversations.

4 Q And in the history of your working with Ms. Denny
5 and various tax entities, had there been other issues --
6 times or issues that have come up and you've been able to
7 work them out?

8 A Yeah. A number of them. Carolyn is great at
9 talking to tax entities and showing, you know, where there
10 might have been miscommunication. And there have been a
11 number of cases. So that's why I felt very comfortable
12 that this would get addressed until I got a check for
13 \$900,000.

14 Q Now, do you believe you should be liable for
15 these interests and penalties?

16 A Absolutely, positively not.

17 Q Why not?

18 A Because I overpaid. I would have been put the
19 money anywhere somebody told me to put it. I overpaid.
20 It just seems unfair to be charged for something that I
21 overpaid and --

22 Q And was that --

23 A May I just say one thing? It's all the same
24 transaction. So we're talking about different companies,
25 but it was all the same transaction. And on the same

1 transaction I overpaid.

2 MR. KENNEY: I have nothing further.

3 ADMINISTRATIVE LAW JUDGE TAY: Thank you.

4 Franchise Tax Board.

5 MS. PATEL: No cross-examination.

6 ADMINISTRATIVE LAW JUDGE TAY: Okay.

7 MR. KENNEY: You're done, and you can --

8 ADMINISTRATIVE LAW JUDGE GAST: I have some
9 questions. Sorry.

10 MR. KENNEY: I apologize.

11 ADMINISTRATIVE LAW JUDGE GAST: It's okay. I
12 wasn't quite clear. When did the purchasers provide a tax
13 allocation to the S corporation or to Ms. Denny?

14 MR. MISNER: I couldn't give you the exact date,
15 but I believe it was in 2015.

16 ADMINISTRATIVE LAW JUDGE GAST: So there was an
17 actual document provided that had the allocation?

18 MR. MISNER: If I so, I don't think I saw it, but
19 she did.

20 ADMINISTRATIVE LAW JUDGE GAST: Oh, okay.

21 MR. MISNER: I relied on her to give me her CPA,
22 her accounting advice.

23 ADMINISTRATIVE LAW JUDGE GAST: Okay. And you
24 said you know the difference between C corpse and S corps?

25 MR. MISNER: Yes.

1 ADMINISTRATIVE LAW JUDGE GAST: California has
2 this quirky, you know, 1.5 percent any level tax on
3 S corps. So when Ms. Denny told you to pay the tax at
4 your level, the shareholder level, you didn't question,
5 well, what about the 1.5 percent any level tax? Which is
6 not an issue, I guess, at the federal level, but in
7 California we have that.

8 MR. MISNER: I relied on my tax professional, who
9 has done a fantastic job for me for 35 years. So I
10 didn't -- I did not ask her that question.

11 ADMINISTRATIVE LAW JUDGE GAST: Okay. No further
12 question.

13 ADMINISTRATIVE LAW JUDGE TAY: I just have one
14 clarifying question. When your representative was asking
15 about the allocation and whether or not you had any
16 participation in the allocation; just to clarify, did you
17 or any other representative of the Appellants' have any
18 participation in that allocation process?

19 MR. MISNER: No.

20 ADMINISTRATIVE LAW JUDGE TAY: Thank you. Thank
21 you very much.

22 MR. KENNEY: We will call Ms. Denny now.

23 MS. DENNY: Will I be looking at the same?

24 MR. KENNEY: It will be the same. I'll be
25 referring to the same one, yes. That's just a binder of

1 the exhibits.

2 MS. DENNY: Okay. I'm ready.

3

4

DIRECT EXAMINATION

5 BY MR. KENNEY:

6 Q Good afternoon, Ms. Denny. Can you tell us how
7 you are currently employed?

8 A I'm the managing partner of Denny and Company
9 LLP, a certified public accounting firm in Valencia,
10 California.

11 Q And can you briefly tell us about your
12 educational background from college forward?

13 A From college forward?

14 Q Yes. Did you go to college?

15 A I did.

16 Q And where did you go, and what degree did you
17 get?

18 A I have a degree of -- a Bachelor's of Science
19 degree with an emphasis in accounting from the University
20 of Southern California, Southern California.

21 Q And are you a licensed CPA?

22 A I am a licensed CPA. I have been licensed since
23 1984.

24 Q And can you -- once you graduated from USC, can
25 you briefly review for us your employment history? What

1 did you do with your life?

2 A Go backwards or forwards?

3 Q Let's go from college forward up to today.

4 A Okay.

5 Q And just the highlights. We don't need all of
6 it.

7 A Yeah, I like to tell the whole story. But no, I
8 had to get my experience in order to qualify to get my
9 license. So I worked for small CPA firms for a while, and
10 then I did some -- in order to get some specific training,
11 I worked for one of the big 8s for a while. After that,
12 then I had the opportunity to become an auditor for the
13 City of Glendale, which was right close to home. And I
14 had young children at that time, so I took that job.

15 Then those auditors recommended me to the City of
16 Beverly Hills where I became the chief financial officer.
17 And I was there for about five years and did some really
18 good things while I was there. After that, that's when I
19 started my own practice in 1984, and I have been doing
20 that ever since.

21 Q And you worked -- did you work -- you said you
22 lived in Glendale. Did you work for the City of Glendale
23 as well?

24 A I did, yes.

25 Q And then if you turn to -- hopefully, you'll be

1 able to find this. If you look at the records, there's
2 numbers at the top. There's -- and if you go to page 8
3 numbered at the top, which would be at the beginning, I'm
4 going to ask you if that's a copy of your CV?

5 A Oh, page 8?

6 Q It's not eight pages in. It's just when they
7 started numbering. Is that a copy of your CV?

8 A Yes, it is.

9 Q Okay. And if you go to the next page there,
10 there's a history document or background document about
11 BNI, which we understand is Dr. Misner's company. How
12 long have you known Dr. Misner?

13 A Since 1984.

14 Q And if you look at this history document from
15 BNI, there's a reference to 1984. And right above that I
16 see your name. What's that about?

17 A He and his friends, Carolyn Denny and several
18 others hatched a plan.

19 Q So you were there when the idea was born?

20 A Well, let me tell you. The four of us, the four
21 people that you see listed here were in another networking
22 group because we were all just starting our businesses,
23 and we needed business. And we were very unhappy with the
24 situation. So we sat in the backroom one day at the
25 restaurant and hatched our plan to start our own

1 networking organization.

2 Q Now, we heard how Dr. Misner built this company
3 to an international company. Did you -- were you involved
4 in that building?

5 A Not the international piece, no. But I was
6 president of a number of chapters over the years and
7 brought members into the organization, and all that time
8 being the CPA for the organization.

9 Q And in addition to being the CPA for the
10 organizations, have you also done -- provided some
11 personal CPA work for Dr. Denny -- Dr. Misner on any of
12 these trusts?

13 A Yes, I have. I have prepared his personal return
14 since 1985. That would be his 1984 return.

15 Q And did you learn in the fall of 2004 that
16 Dr. Misner was contemplating selling the various BNI
17 entities?

18 A 2014?

19 Q 2014. Sorry.

20 A That's okay. Oh, I learned it way before that
21 because there was a lot of activity going on searching for
22 a buyer. And so I was involved with him and with
23 attorneys and working on financial aspects or tax aspects
24 of the proposed sale.

25 Q If you turn to Exhibit J in the binder before

1 you, if you go to the second page, is that your notarized
2 signature on this document?

3 A Yes, it is.

4 Q And is this a document that you prepared on or
5 around July 3rd of 2018?

6 A That's correct.

7 Q Do you believe the contents of this declaration
8 are true and correct?

9 A They are. I think we issued another one on the
10 26th that has a couple of corrections in it.

11 Q Would that be Exhibit K?

12 A I hope so. July 26, yes, this is the final
13 affidavit.

14 Q And this is the affidavit that is attached to
15 various e-mails I discussed with Dr. Misner?

16 A That's correct.

17 Q And do you recall -- if you look at the last page
18 of the bottom, I went over this with Dr. Misner so I can
19 go a little bit more quickly. You provided him with a
20 reminder in mid-December that his estimates were coming
21 due?

22 A Yes. That reminder was because he had regular
23 estimates that were due based on the prior year income.
24 You were required to pay in the 110 percent of the prior
25 year's tax. So he still had those estimates that needed

1 to be paid. Those were paid, and then we worked out an
2 estimate of what additional amounts that would need to be
3 paid to cover the taxes related to the sale of the three
4 entities.

5 Q And that's the e-mail at the top of this page.
6 You're discussing various tax payments for two of the
7 entities, and then you reference that you need to see the
8 sales document for the allocation?

9 A That's correct.

10 Q And looking at Exhibit C, the very first page of
11 Exhibit C, is this a copy of the sales document that
12 Dr. Misner provided you?

13 A It appears to be correct, yes.

14 Q And if you go to Section 1.8, which is page 183
15 of the record -- you see that at the top? Did you learn
16 in your review of the agreement about how the value of the
17 assets would be allocated amongst the three companies?
18 I'll let you get there.

19 A I learned that the buyer was going to make the
20 allocation that -- 183. Where do you want me to look?

21 Q 1.8.

22 A Okay.

23 Q And it's at the paragraph on allocation?

24 A That's correct.

25 Q And that would have been the paragraph you would

1 have looked at to determine how to allocate the proceeds
2 amongst the three companies?

3 A That's correct.

4 Q And did it provide you with a mathematical
5 formula to figure that out?

6 A Afraid not.

7 Q So you were able, at least from knowing the value
8 of the transaction and the entities involved, you were
9 able to determine what the total tax would be, could you
10 not?

11 A Yes, I could.

12 Q So what was the problem?

13 A Well, the problem with this paragraph -- and I
14 believe it's in this one where it indicates the seller is
15 required or was not required but is responsible for making
16 the allocation.

17 Q The seller was? That would be Dr. Misner?

18 A I'm sorry. I'm sorry. He's the purchaser. The
19 purchaser was required to make the allocation. Okay. And
20 being very familiar with the laws of buy and sells, I'm
21 very much aware that the law says that the buyer and the
22 seller must agree, and they must both report on their
23 respective tax returns the same allocation. Okay.

24 And further with the purchaser being required to
25 make the allocation, we couldn't do anything with the tax

1 return because we could not provide the form. We could
2 not make an allocation. We could not do anything until we
3 had that allocation in hand.

4 Q So looking at your declaration again, Exhibit K,
5 paragraph 4, when you were able to figure out the total
6 amount that was due but you had this problem with the
7 allocation, what did you -- what work did you do to
8 attempt to get an answer to what you should do; how this
9 should be allocated or how you should pay this estimate?

10 A Well, it was at that time that I looked at
11 different options and different alternatives, talked to
12 several people within my field, and also talked to the FTB
13 and told them I had a problem. I didn't -- at that time
14 this was an informal call to the FTB that I was just
15 inquiring. Here's my problem. What can I do?

16 I have this situation where I can't make
17 allocations. We know there's a lot of money owed, and how
18 are we going to deal with this? And somehow in that
19 conversation with that person I -- between the two of us,
20 we sort of said well, let's have -- since it's a past due
21 entity any way, let's have the owners of the businesses
22 pay the entire amount.

23 Q Now, you're aware, are you not, that the FTB has
24 no record of that call?

25 A I am. I am. I have several other calls that I

1 made that there isn't any record of either. So --

2 Q Would you have any record of that call?

3 A That particular one, I'm not sure. I know I have
4 several other calls that I did make that I do have time
5 and billing records that show I made the calls, and I have
6 notes in my file. But I believe that the particular call
7 I made I did not identify the client. I did not identify
8 myself as, you know, presenting my CAF Number to them or
9 anything like that. So I can understand that might not
10 have been on the record.

11 Q But you knew, did you not, that corporations are
12 different than individuals, didn't you?

13 A Corporations?

14 Q Yes.

15 A Of course.

16 Q Then why would you believe the advice you're
17 receiving is reasonable; corporation, different entity
18 owes tax. I'm going to go put it in the individual's
19 bucket.

20 A Well, I tell you what. I've had many occasions
21 with other taxing authorities, including EDD, where that
22 kind of thing had happened where the -- with the EDD it
23 was a payroll issue, and they had mistakenly deposited the
24 payroll taxes into a personal account when it should have
25 been deposited into their business account.

1 I made a phone call, and they said no problem.
2 We'll fix it. And that kind of thing happened various
3 other times with conversations with FTB agents. And I
4 felt very comfortable that this was not going to be a
5 problem.

6 Q Now, after you reached professional opinion that
7 this was the right thing to do, what did you do?

8 A That's when I asked Dr. Misner that we needed to
9 make these estimated payments. I had estimated the total
10 value of the tax, and let's get these payments paid.

11 Q And you discussed the matter with him?

12 A I did.

13 Q And he followed your advice?

14 A Yes, he did.

15 Q And if you look at Exhibit D, which I'll view
16 with Dr. Misner, but we can look at it real quickly again.

17 A Okay.

18 Q Do you recall -- it's the last page, which would
19 be page 239 of the record. Do you recall how much money
20 you and Dr. Misner agreed to pay as estimates for these
21 three entities?

22 A Well, we paid \$950,000 on December 30th.

23 Q And did you believe that Dr. Misner's estimates
24 and these three entities' estimates would have been that
25 amount? That these three entities would be that amount?

1 A We knew that I believed that it was more than
2 enough to cover the three, yeah, entities.

3 Q Now, you learned sometime in October of 2015 of a
4 deficiency notice that these entities received, did you
5 not?

6 A I had no copies of the notices yet.

7 Q Okay. Oh, but if you look in December -- October
8 of 2015, let's take a look at Exhibit G and your letter.

9 A Oh, okay.

10 Q It's the next page. You were there. It's the
11 next page after G.

12 A There it is. There it is.

13 Q What is this? What is Exhibit G?

14 A This is the letter that I wrote to the Franchise
15 Tax Board requesting that they apply the 2000 -- apply --
16 that the money being applied to 2015 of the referenced tax
17 return be reallocated to reflect the payments of the taxes
18 due for the entities owned by Dr. Misner.

19 Q And did you send this letter in response to
20 something you had received from the Tax Board?

21 A I can't say for sure. I must have.

22 Q And did --

23 A I just don't write them, you know, just for the
24 heck of it.

25 Q Did the Franchise Tax Board respond to your

1 letter?

2 A They said they did. I never got a response.

3 Q Do you recall calling them in January of 2016?

4 A I did call. Yeah. You usually wait any way
5 because of -- they typically will say it's going to take 2
6 months to 90 days to get a response. So I wasn't worried
7 until it got to be January, and I hadn't had a response.

8 I figured by then there should have been one, so
9 I did make a call. And I think they told me at that time
10 it would probably take another 12 weeks or something.

11 Q Well, if you take a look at Exhibit K, again,
12 paragraph 8, is that the paragraph of your declaration
13 where you would count that phone call?

14 A Yes, the January 7th phone call. Yes,
15 absolutely. That was a very lengthy phone call. It was a
16 very -- very well-received by an agent who seemed to be
17 really interested, and who kind of said, "I don't
18 understand. Why aren't you getting your money back," kind
19 of thing.

20 Q So did the agent have complete clarity of what
21 you should have done in this instance previously with
22 respect to the allocation, or was he also confused?

23 A No. He -- I had -- he was on my side. He
24 believed that it should have occurred, but he was not
25 aware of any law. He went to his manager. They discussed

1 it. He went to the head auditor, and they discussed it.
2 And he came back to me later in the afternoon, and he
3 said, "We've exhausted every exception we can come up
4 with, and it looks like they're going to deny your request
5 to have the refunds."

6 And at that time, he made the suggestion that,
7 "The best thing you can do now is file the next year's tax
8 return as soon as possible. Get the money back, and then
9 you can pay the tax."

10 Q So when he said they exhausted their -- the
11 exceptions that they could that related to the ability to
12 take money out of one bucket and put it into a different
13 bucket --

14 A Yeah.

15 Q -- they said they can't do that?

16 A Yeah.

17 Q Okay.

18 A He said he couldn't find anything in their
19 regulation that would allow them to do that. And, you
20 know, they have to follow the rules.

21 Q And so then did you cause Dr. Misner's individual
22 returns to be filed?

23 A We did. We filed them as quickly as possible.

24 Q And then did you get a refund? Did Dr. Misner
25 get a refund?

1 A He did. I think it came in at the end of April.

2 Q That was for about \$900,000?

3 A It was.

4 Q And then what did you do? What did you advise
5 Dr. Misner to do with that \$900,000 -- or some portion of
6 that \$900,000?

7 A We would pay the liabilities that were due for
8 the three entity returns from 2014.

9 Q And do you know if he did that?

10 A Absolutely.

11 Q And do you recall what the amount was? Was it
12 about \$300,000?

13 A Between 3 and 400. I don't recall the exact
14 amount. I know that he ended up being overpaid by --
15 between 5 and \$600,000 altogether.

16 Q And you paid, not only the amount that was due,
17 but you paid the interest and penalties?

18 A We did.

19 MR. KENNEY: Okay. I have nothing further.

20 ADMINISTRATIVE LAW JUDGE TAY: Thank you.

21 Franchise Tax Board?

22 MS. PATEL: No cross-examination.

23 ADMINISTRATIVE LAW JUDGE TAY: Thank you.

24 Panelists. Judge Bramhall?

25 ADMINISTRATIVE LAW JUDGE BRAMHALL: No.

1 ADMINISTRATIVE LAW JUDGE TAY: Okay. Judge Gast?

2 ADMINISTRATIVE LAW JUDGE GAST: I have a few
3 questions for Ms. Denny. How come you didn't -- if you
4 knew the tax was going to be due -- there's no question
5 tax is going to be owed by the S corporation for the 1.5
6 percent any level tax. How come you didn't divvy it up
7 maybe one-third, let's say? Did it ever cross your mind,
8 hey, maybe I should pay in a little bit here to avoid an
9 underpayment situation and not listen to an FTB, you know,
10 agent on the phone?

11 MS. DENNY: No. I definitely considered that. I
12 considered equally or based on their individual sizes.
13 But here's what would have happened if I had gone ahead
14 and issued those tax -- filed the tax returns. I would
15 have had to report the income, and I would have had to
16 report the taxes. And I would have been in violation of
17 the purchaser's contract because I would have to submit
18 the 8954 Form, which says it has to agree with what the
19 purchaser and the seller have agreed upon.

20 I didn't have that. I didn't have -- I didn't
21 have anything close to really knowing how I might divvy it
22 up. And then lastly, if I had done that, I would have
23 been in violation of the contract. I would now have to
24 file three amended tax returns to put the correct
25 information on. And sometimes that can be very

1 unrelenting. And there would have been a lot of
2 additional fees that my client would have had to pay to
3 have that done.

4 ADMINISTRATIVE LAW JUDGE GAST: Well, I mean,
5 instead of filing returns, just estimating it for
6 extension purposes.

7 MS. DENNY: Oh, sending in the money?

8 ADMINISTRATIVE LAW JUDGE GAST: Yeah. One third
9 or something like that. Just curious on that.

10 MS. DENNY: I don't know. It just didn't make
11 sense to me, and I felt so confident because of my past
12 experiences that this would be resolved the way that we
13 were expecting it to be, that the returns would be filed.
14 We would know what the final amount was, and I would then
15 contact the FTB, which I did in October, and say, "Here,
16 you've had the money all this time. Let's reallocate it
17 back to the three entities."

18 I just -- it felt more efficient. It made more
19 sense to me.

20 ADMINISTRATIVE LAW JUDGE GAST: Okay. And you
21 said you knew the total correct tax for all the three
22 entities. When did you know that?

23 MS. DENNY: Well, I wouldn't have known the
24 entire amount at the time we made the estimates. I did
25 not know that until when we actually filed the returns in

1 September of 2015.

2 ADMINISTRATIVE LAW JUDGE GAST: Okay. So --

3 MS. DENNY: I'd like to clarify one point about
4 that. Is that we -- we, meaning the CPAs, we did not get
5 the proper forms from the purchaser's CPA until about two
6 weeks before the filing deadline. So I couldn't even do
7 anything until the 1st of September to get a final number.
8 So I worked specifically off of estimates.

9 ADMINISTRATIVE LAW JUDGE GAST: Okay. So when
10 you say in your declaration, "Although I was able to
11 calculate the aggregate amount to be paid by these
12 entities collectively," you didn't know that amount until
13 after the extension time period?

14 MS. DENNY: The total actual amount, yes. At the
15 time of the estimate payment I was -- I guess I wasn't
16 even that concerned because I knew he was going to pay so
17 much more than he would ever owe, that I didn't try to
18 make a fine -- fine-tuning of it.

19 ADMINISTRATIVE LAW JUDGE GAST: Okay. And then
20 one more question. Between December 2014 and the due date
21 of the payment, which I think is 3/15 --

22 MS. DENNY: Correct.

23 ADMINISTRATIVE LAW JUDGE GAST: -- of 2015, did
24 you take any steps to follow-up with the purchasers, and
25 if so, is that in the record? To follow-up with the

1 purchasers as to, "Hey, are you done with your allocation
2 yet?"

3 MS. DENNY: I don't have any specific
4 recollection, but the other CPA firm that was handling it
5 for the purchaser we -- we were having conversations off
6 and on throughout that time because they were still
7 working on the allocation.

8 ADMINISTRATIVE LAW JUDGE GAST: Okay. Okay.
9 That's it for my questions. Thank you.

10 ADMINISTRATIVE LAW JUDGE TAY: Thank you,
11 Ms. Denny. I have no questions.

12 Appellants do you have anything further on your
13 presentation? You will have an opportunity for a
14 10-minute rebuttal in closing after FTB makes their
15 presentation. But do you have anything further right now?

16 MR. KENNEY: Not right now.

17 ADMINISTRATIVE LAW JUDGE TAY: Okay. FTB, you
18 have 20 minutes for your presentation.

19

20 CLOSING STATEMENT

21 MS. PATEL: Respondent properly imposed a late
22 payment penalty for the 2014 tax years, and Appellants
23 have not established grounds to abate it. Appellants had
24 balances due with their 2014 returns, which were not paid
25 until May 2nd of 2016, over one year after they were due.

1 In an attempt to establish reasonable cause,
2 Appellants assert three main arguments. First, that they
3 lack the necessary documents to determine their tax
4 liability for March 15th. Second, that they relied on
5 oral advice given to their CPA by Respondent. And third,
6 that that they reasonably relied on the CPA for advice.
7 None of which amounts to reasonable cause.

8 First addressing the lack of necessary documents
9 needed to pay their tax liability. It's established law
10 that a taxpayer's liability to obtain the information
11 needed to make a reasonable estimate of tax is not
12 reasonable cause. The fact that tax information is lost,
13 lacking, inaccurate, or difficult to obtain is
14 insufficient to meet the taxpayer's burden of establishing
15 reasonable cause.

16 Consequently, Appellant's inability to obtain
17 that allocation percentage from the asset purchase
18 agreement does not constitute reasonable cause for making
19 their payments late. Appellants point to the reason OTA
20 pending precedential case of Appeal of Harry Moren in
21 support of abating their late payment penalty.

22 This case was limited to its unique facts, and
23 the panel considered multiple factors in determining
24 whether there was reasonable cause. The OTA found that
25 the inquiry of whether there was reasonable cause starts

1 from the due date of the payment and ends at the actual
2 payment date.

3 In the case before us, the inquiry of whether
4 there was reasonable cause begins on March 15th, 2015, and
5 ends May 2nd of 2016. Appellants were each involved in
6 the asset purchase agreement with BNI holdings and the
7 sole shareholders of Appellant were Dr. and Mrs. Misner.

8 The terms of the asset purchase agreement
9 indicated that allocation information would be provided 60
10 days after the closing date. Appellants argue, however,
11 that this information was not -- was provided at a
12 significantly later date. But Appellants never indicates
13 when they actually received this information.

14 Moreover, unlike Moren, Appellants have not
15 provided what, if any, steps they took to obtain this
16 information timely. The Moren opinion held that taxpayers
17 must show the efforts made to acquire the information from
18 the source and the difficulties in obtaining that
19 information, which led to the delay of payment. When
20 allocation was not provided by, lets say mid-February, an
21 ordinarily intelligent prudent business person would have
22 reached out to BNI to obtain that necessary information.
23 However, Appellants have not provided any evidence as to
24 their attempts to obtain this information.

25 Furthermore, assuming Appellants received the

1 information just days before they filed their returns on
2 September 14th, 2015, a prudent business person would not
3 have waited an additional seven months to make payments to
4 their liabilities as Appellants did in this case.

5 In Moren, the OTA also considered the fact that a
6 taxpayer believed his distribution was not taxable.
7 Appellants here were aware of the fact that their income
8 was taxable, and as evidenced by Ms. Denny calculating the
9 aggregate tax liability. Also, unlike Moren, Appellants
10 were the direct parties involved in the asset purchase
11 agreement.

12 Therefore, they had control and were involved in
13 the taxable transaction. Having that level of involvement
14 would put them in a better position to obtain the
15 information needed. Moren also considers as a factor,
16 whether or not the taxpayer has access to sufficient
17 information upon which to base an estimate of tax.

18 While the asset purchase agreement indicated
19 allocation would be provided 60 days after closing, it
20 also had a section on how to deal with tax treatment.
21 Mainly, that for federal and state tax purposes,
22 Schedule 1.2(a) would be the closing date payment
23 allocation. Therefore, Appellants had the ability to use
24 the contractual allocations in order to estimate their
25 taxes even to mitigate or completely avoid a late payment

1 penalty.

2 Next addressing the alleged advice given by
3 Respondent. Appellants argue that Ms. Denny conducted her
4 own research and contacted FTB for guidance on how to make
5 estimate payments for Appellants. Appellants allege that
6 FTB and Ms. Denny's own research suggested that
7 Mr. and Mrs. Misner, the sole owner of Appellants, make a
8 combine estimate payment to cover both their personal and
9 the Appellants' corporate tax liabilities.

10 Ms. Denny has not indicated what independent
11 research has led her to this conclusion. And when asked
12 about the details of the conversation with FTB, none were
13 provided. Furthermore, Respondent's records don't
14 indicate that there was phone call made during this time.

15 Respondent's comments -- comments list, marked as
16 Exhibit 15, shows there's no record of a phone call that
17 was made during the time period for the Misners, Paradigm,
18 CSBTE, or CSBT Corp. However, even if Appellant did -- or
19 excuse me. Even if FTB did advise Appellants over the
20 phone to make a combined estimate payment for the Misners
21 and Appellants' corporate tax liabilities, the Board of
22 Equalization has held on multiple occasions that oral
23 opinions offered by an FTB employee is not sufficient to
24 rely on, and that tax liabilities must be based on law.

25 The law is clear here. Corporations are separate

1 and distinct from their shareholders. As such, payments
2 made to the stockholder's account cannot be reallocated to
3 a corporation's account. Furthermore, Appellants and the
4 Misners have always in the past made separate payments for
5 their separate liabilities.

6 Finally, Appellants argue that Ms. Denny
7 incorrectly advised them to overpay the Misners'
8 individual income tax for Appellants' corporate tax
9 liabilities. Appellants argue that the advice made -- to
10 make this joint payment was substantive advice that meets
11 the Boyle standard of reasonable cause.

12 However, the Board of Equalization's decision of
13 Berolzheimer held that a computational problem is not a
14 legal interpretation. And taxpayers cannot hide behind
15 and expert for their failure to properly determine the tax
16 that was due. Similarly in this case, there's no question
17 of whether or not Appellants had a tax liability. The
18 only question that remained was how to divide that
19 aggregate liability amongst Appellants.

20 Calculating each entity's share is a computation
21 of tax and consequently not a legal interpretation on a
22 matter of law. As such, Ms. Denny's advice does not
23 constitute substantive advice and does not fall under
24 Boyle. Furthermore, Appellants argue -- or excuse me.
25 Dr. Misner argues that he relied on his tax preparer,

1 Ms. Denny, to make that payment. However, Appellants
2 can't delegate their responsibility of paying their tax by
3 the due date. It's simply not a delegable task.

4 It's also important to note that Ms. Denny
5 alleges she intended Appellants make a combined estimate
6 payment to the Misners' individual account, and then later
7 transfer the payment to the corporation's account.
8 However, this intention is negated by the fact that the
9 Misners irrevocably transferred any overpayment on their
10 2014 return to their 2015 individual account, suggesting
11 they had different intentions for this 2014 overpayment.

12 On the facts and the evidence in the record,
13 Respondent respectfully request you sustain this position.
14 I would be happy to answer any questions.

15 Thank you.

16 ADMINISTRATIVE LAW JUDGE TAY: Thank you,
17 Franchise Tax Board.

18 Judge Bramhall, any questions?

19 ADMINISTRATIVE LAW JUDGE BRAMHALL: Can you tell
20 me the authority that FTB relies on to refuse to make a
21 reallocation when requested by taxpayers?

22 MS. PATEL: I think the authority here is just
23 that they're individual -- they're different taxpayers.
24 And the issue that was run into was we couldn't re -- even
25 if they had called in, and we would have issued that

1 refund for their 2014 tax year, they had moved that
2 payment to their individual 2015 account.

3 So even if they had called in, requested, or
4 turned in that claim for refund for 2014 and we issued a
5 refund right away, we simply couldn't do that because that
6 refund was reallocated to their individual 2015 account.
7 So things could have gone faster had they not on their
8 2014 return allocated -- irrevocably allocated that income
9 or that overpayment to 2015.

10 ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay. And
11 all the authority that you cite and so on, as I think
12 about it, involve cases where a taxpayer actually hadn't
13 made payments of tax. Are you aware of any cases like
14 this where a taxpayer made a payment and then the FTB was
15 whole -- the State was whole? So that as you're
16 evaluating this authority, are you aware of any cases
17 where the tax authority had the money, it just didn't end
18 up in the right bucket?

19 MS. PATEL: I would have to look into the same
20 fact situation for a similar case here. I don't have one
21 in front of me. But if you need me to do further briefing
22 on it, I can do that. But I don't have the same exact
23 factual situation as here.

24 ADMINISTRATIVE LAW JUDGE BRAMHALL: So you, in
25 evaluating this fact pattern, you didn't look at any cases

1 that matched this fact pattern?

2 MS. PATEL: In terms of the actual estimate
3 payment fact, no. But, I think, in terms of the
4 reasonable cause and acting as a prudent business person,
5 there are plenty of cases that are very similar, if not
6 very different when finding for reasonable cause.

7 ADMINISTRATIVE LAW JUDGE BRAMHALL: Okay.
8 Nothing else right now.

9 ADMINISTRATIVE LAW JUDGE TAY: Judge Gast?

10 ADMINISTRATIVE LAW JUDGE GAST: Yes. Thanks.
11 Yeah. I just have one question. Understanding, you know,
12 what substantive advice means is not the clearest thing in
13 these cases. But in this situation, you know, when the
14 tax preparer, Ms. Denny, didn't know the allocation, isn't
15 that substantive advice? How do you divvy something like
16 that up? That doesn't seem to me like a simple math
17 computation, or am I wrong on that?

18 MS. PATEL: I definitely don't think it's a
19 simple math computation, but I think the advice to make
20 that group payment or that combined payment wasn't
21 necessarily substantive advice. That was just a
22 procedural aspect of this how you should make a payment.

23 And when making a payment or filing a return by
24 due date, multiple cases have held that that's not
25 substantive tax advice. And if -- if that was, there's a

1 lot that can be covered for a CPA's mistakes. There's an
2 oral case that's a 9th Circuit case that illustrates every
3 mistake can't fall under Boyle. And if that was the case,
4 it would just be a slippery slope of CPAs wanting to cover
5 up their -- their mistakes by alleging.

6 ADMINISTRATIVE LAW JUDGE BRAMHALL: That was my
7 point earlier, though, that those cases involved somebody
8 that didn't pay their tax. This is advice to pay, just
9 did it in the wrong bucket. So that's the distinction I'm
10 trying to get you to help understand why.

11 MS. PATEL: But I think what's unique here, is
12 that the Misners are not actually parties to this appeal.
13 They're a completely separate taxpayer. It's really just
14 the corporations. So when involving a taxpayer with a
15 corporate taxpayer, it's almost more distinct and more
16 clear that they're separate.

17 ADMINISTRATIVE LAW JUDGE BRAMHALL: Got it.

18 ADMINISTRATIVE LAW JUDGE GAST: No further
19 questions.

20 ADMINISTRATIVE LAW JUDGE TAY: I have no further
21 questions.

22 Appellant you have 10 minutes for your rebuttal
23 and closing.

24 MR. KENNEY: Do you mind if we break for three
25 minutes? Or is that -- I haven't been in an OTA hearing.

1 Do we just jump right into that or can we have three
2 minutes to break?

3 ADMINISTRATIVE LAW JUDGE BRAMHALL: Do take a
4 couple of minutes. Go ahead.

5 MR. KENNEY: Thank you. We'll be very quick.

6 ADMINISTRATIVE LAW JUDGE TAY: Two minutes.

7 (There was a pause in the proceedings.)

8 ADMINISTRATIVE LAW JUDGE TAY: We're ready.
9 Appellant, please feel free whenever you're
10 ready.

11

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CLOSING STATEMENT

13 MR. SHAEFFER: So a few things that I just wanted
14 to go over. The OTA correctly focuses on this idea, there
15 being no case. I couldn't find any case similar to this
16 where reasonable cause had not been -- where there is a
17 situation where the taxpayer actually made a good faith
18 with credible evidence showing that, you know, he/she/it
19 paid the taxes.

20

21 Here we have a case where Dr. Misner was
22 communicating with Ms. Denny. It's very clear. There's
23 no cross-examination to refute that Mr. -- or Dr. Misner
24 did not talk with Ms. Denny. You know, reasonable cause
25 and substantive advice, they are fluid concepts. We all
understand that. But one of the most important things

1 that this Court states in *Moren*, he basically says -- I
2 think the Appellant quotes the FTB Taxpayer's Bill of
3 Rights.

4 It says hey, look. I just -- I'm not just
5 supposed to throw money at the FTB. I'm not just supposed
6 to throw money willingly. I'm supposed to make a
7 good-faith attempt to pay my taxes. And that, in your
8 opinion of *Moren*, that's pending precedential. It's one
9 of the things that you can see that are most important.

10 Here Dr. Misner made the payment, and the
11 companies tried to make the payment ostensibly for the
12 companies. And it's very different than any of these
13 other cases. I mean, these other cases, *Berolzheimer* in
14 particular, that's a case that FTB keeps on citing and
15 keeps on using.

16 It's entirely different to the facts of this
17 case. There is no tax payment made in that case at all.
18 It had to do literally with math. And that, to me, seems
19 like a clear-cut distinction. Unlike this case, where
20 there's impossibility of Dr. Misner being able, or the
21 companies rather, being able to figure out how to allocate
22 tax liabilities and where tax liabilities would be. This
23 idea of hey, let me just put a bunch of different money in
24 the different buckets, when, you know, Dr. Misner through
25 the advice of CPA thought this is sufficient. It doesn't

1 make any sense. And it seems like this Court agrees with
2 the same -- it says the same thing in their open in Moren.

3 You just don't throw money at the FTB if you're
4 making a good-faith attempt to pay the taxes. So I think
5 that's what happened here. And, you know, at this point
6 I'm just surprised that we're still actually sitting here.
7 It's pretty clear that Dr. Misner recently tried to make
8 the payments on behalf of the companies, and the companies
9 tried to make the payments.

10 That's all I have.

11 ADMINISTRATIVE LAW JUDGE BRAMHALL: Thank you.

12 ADMINISTRATIVE LAW JUDGE TAY: Thank you,
13 Appellants.

14 Questions? Any further questions?

15 ADMINISTRATIVE LAW JUDGE GAST: No.

16 MR. SHAEFFER: You know one -- can I say one more
17 thing too, quickly?

18 ADMINISTRATIVE LAW JUDGE TAY: Sure.

19 MR. SHAEFFER: You know, the one other thing I
20 just wanted to say too was, Ms. Denny to some degree --
21 the FTB had stated that, you know, she hadn't spoken to
22 the FTB. It was alleged that she spoke. They didn't
23 cross her at all. So by saying that, it's a little bit
24 disingenuous. She's right here. She could have been
25 crossed, but she wasn't.

1 In their argument they're saying, "Ms. Denny
2 never spoke with the FTB," alluding to that sort of thing,
3 you know. This just feels slightly disingenuous.

4 But any way, that's all I have.

5 ADMINISTRATIVE LAW JUDGE TAY: Okay. Thank you.

6 Thank you, both parties, for your presentations.

7 The record in this appeal is now closed, and the appeal
8 will be submitted for decision. We will endeavor to send
9 our written decision no later than 100 days from today.

10 This hearing is now adjourned. Thank you, again,
11 to both parties.

12 (Proceedings adjourned at 2:02 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne 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 17th day of October, 2019.

ERNALYN M. ALONZO
HEARING REPORTER