

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
TAMMY MARIE MCKEE, ) OTA NO. 18063305  
)  
Appellant. )  
)  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Thursday, December 19, 2019

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
12900 Park Plaza Dr., Cerritos, California, 91401,  
commencing at 10:35 a.m. and concluding  
at 10:51 a.m. on Thursday, December 19, 2019,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ AMANDA VASSIGH

Panel Members: ALJ KENNY GAST  
ALJ SARA HOSEY

For the Appellant: TAMMY MARIE MCKEE  
CHRISTOPHER ENGELMANN

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
By: BRIAN WERKING

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I N D E X

E X H I B I T S

(Appellant's Exhibits were received at page 7.)  
(Department's Exhibits were received at page 7.)

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1 Cerritos, California; Thursday, December 19, 2019

2 10:35 a.m.

3

4 JUDGE VASSIGH: We are now going on the record.

5 We're opening the record in the appeal of Tammy

6 Marie McKee before the Office of Tax Appeals in Case

7 Number 18063305. Today is Thursday, December 19th. The

8 time is 10:35 a.m. This hearing is being convened in

9 Cerritos, California.

10 Today's case is being heard by a panel of three

11 judges. My name is Amanda Vassigh, and I will be acting

12 as the lead judge for the purpose of conducting this

13 hearing. Judge Gast and Judge Hosey will also be

14 participating in the hearing.

15 We've read the briefs and examined the exhibits

16 produced. We will all be tasked with making a decision in

17 this matter as equal participants. Any judge on the panel

18 may ask you questions and otherwise participate to ensure

19 we have all the information needed to make a fair

20 decision.

21 So let's have the parties state their appearances

22 for the record.

23 MR. ENGELMANN: Chris Engelmann representing the

24 tax payer.

25 JUDGE VASSIGH: Okay.

1           MR. WERKING: Brian Werking representing the  
2 Franchise Tax Board.

3           JUDGE VASSIGH: And we have Ms. Tammy McKee on  
4 the phone telephonically.

5           So as discussed at our prehearing conference, the  
6 issues in dispute are as follows:

7           Issue number one is whether Appellant has shown  
8 error in Respondent Franchise Tax Board's proposed  
9 assessment, which is based on a federal determination.

10          The second issue is whether Appellant has  
11 demonstrated that the accuracy-related penalty should be  
12 abated.

13          Okay I'm going to mark and read exhibits into the  
14 record. Other than Ms. McKee's testimony, we have no new  
15 evidence; correct?

16          MR. ENGELMANN: Correct.

17          JUDGE VASSIGH: Okay. And that is correct for  
18 Franchise Tax Board as well?

19          MR. WERKING: Correct.

20          JUDGE VASSIGH: Okay. So Ms. McKee's Exhibits 1  
21 and 2 are listed in the exhibit index before you.  
22 Mr. Engelmann, is this what you expect to see in the  
23 record?

24          MR. ENGELMANN: Yes.

25          JUDGE VASSIGH: Okay. And Mr. Werking, can you

1 confirm for the record that there are no objections to  
2 these exhibits?

3 MR. WERKING: No objections from Respondent.

4 JUDGE VASSIGH: Okay. Exhibits 1 and 2 are now  
5 admitted into the record.

6 (Appellant's Exhibits 1 & 2 were received  
7 in evidence by the Administrative Law Judge.)

8 JUDGE VASSIGH: Franchise Tax Board's Exhibits A  
9 through K are listed in the exhibit index before you.  
10 Does this reflect what FTB expects to see in the record,  
11 Mr. Werking?

12 MR. WERKING: It did.

13 JUDGE VASSIGH: Okay. And Mr. Engelmann, can you  
14 confirm that you have no objections to these exhibits?

15 MR. ENGELMANN: I have no objections.

16 JUDGE VASSIGH: Okay. So exhibits A through K  
17 are now admitted into the record.

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

20 JUDGE VASSIGH: Mr. Engelmann, are you ready to  
21 begin your opening?

22 MR. ENGELMANN: Yes.

23

24 OPENING STATEMENT

25 MR. ENGELMANN: So as you kind of said, the issue

1 is whether Appellant showed error in Respondent Franchise  
2 Tax Board's proposed assessment, which is based on federal  
3 determination and whether the Appellant has demonstrated  
4 the accuracy-related penalty should be abated.

5 So back in 2012 the business of Eggs Etc. was a  
6 restaurant that served breakfast and lunch to all its  
7 customers. It was run, not by Ms. McKee, but here mother  
8 and sister for a number of years. And her name wasn't on,  
9 you know, as part -- as part owner at the time in the  
10 beginning. She didn't have any -- she also didn't have  
11 any interest in working at the restaurant. This includes  
12 any business aspect of it as well as, like, working within  
13 the restaurant such as cooking, cleaning, et cetera.

14 Then in 2012 Ms. McKee's mother told her that the  
15 business was failing. So in order to help her family,  
16 Ms. McKee's asked her to transfer ownership by name alone  
17 to Ms. McKee for no monetary value in order to keep it  
18 running. This did not mean, however, that Ms. McKee  
19 worked at the restaurant at all. It only meant by name.  
20 She was 90 percent owner, and that's solely it.

21 However, this doesn't stop it from  
22 underperforming. And so -- but it did allow Ms. McKee's  
23 mother and sister to sell the business at a profit of  
24 \$230,000 in 2014. And now this is where the issue occurs.  
25 Due to Ms. McKee's generosity and being 90 percent owner



1 by name alone, the IRS decided to audit her and no one  
2 else.

3 The other member of the LLC, her sister, was  
4 absolved from any tax liability. Despite her working part  
5 time as a nurse while achieving her masters and not even  
6 being involved in the business at all, Ms. McKee had  
7 solely participated in the IRS audit. The FTB then  
8 proposed an assessment based on the IRS's assessment that  
9 Ms. McKee owed \$23,847 in tax liabilities based off that  
10 gross income of the \$230,000 made at the sale of the  
11 business.

12 However, Ms. McKee -- and this can be seen by the  
13 exhibits we provided on her bank statement for that  
14 year -- received only \$28,000 and not the entire amount of  
15 \$230,000. The main amount was used to pay the other  
16 business that they now have. They got that amount and  
17 then made a -- put it into a new business called Pam's  
18 Place, which runs today.

19 Therefore, Ms. McKee shouldn't be responsible for  
20 the entire amount, up to \$230,000, because she didn't even  
21 receive the amount. Thank you.

22 JUDGE VASSIGH: Okay. Ms. McKee, are you ready  
23 to testify? Ms. McKee? We might have lost the connection  
24 to --

25 MS. MCKEE: I can only hear you.

1 JUDGE VASSIGH: You can only hear me.

2 MS. MCKEE: Yeah. I can hear only a couple of  
3 words. I can only hear you.

4 JUDGE VASSIGH: Okay. Are you ready to testify?

5 MS. MCKEE: Yes.

6 JUDGE VASSIGH: Okay. And maybe we'll ask  
7 Mr. Engelmann to speak up more or, you know, bring you in  
8 further.

9 MR. ENGELMANN: Yeah. I'll try to be louder.

10 JUDGE VASSIGH: Okay. So Ms. McKee, I'm going to  
11 swear you in for your testimony. So where you are, could  
12 you please stand up and raise your right hand.

13

14 TAMMY MARIE MCKEE,

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

18

19 JUDGE VASSIGH: Thank you. So you may go ahead  
20 and take this opportunity to tell us what you would like  
21 us to know.

22

23 WITNESS STATEMENT

24 MS. MCKEE: I can't even remember the dates now  
25 because it's been quite some time. But my mom was in

1 trouble with the restaurant, and I had been going through  
2 a divorce. So she kind of gifted the restaurant over to  
3 me, and then I help build the business up. But my sister  
4 and her were running it on their own, but everything was  
5 still in my name.

6 They had an audit with the Board of Equalization,  
7 and then they were determined to have underreported their  
8 sales tax and then had sold the restaurant. The escrow  
9 closed without the audit being completed. And then since  
10 I was 90 percent of the LLC, the Board of Equalization  
11 reported the audit to IRS, and then everything went from  
12 LLC to my personal security account.

13 And the restaurant was sold in October of 2014,  
14 and the -- it was still in the state of audit. It was  
15 never -- the escrow was not supposed to have been closed  
16 until the audit was completed. And then it somehow got  
17 closed, and the money was never paid. And then I was  
18 responsible for that.

19 And then it all rolled over to the IRS. I guess  
20 because my sister was only 10 percent, and I was  
21 90 percent, and she wasn't being compliant with them, that  
22 it just kind of -- that it just all rolled over onto me.

23 JUDGE VASSIGH: Okay. Mr. Werking, do you have  
24 any questions for the witness?

25 MR. WERKING: I do not have any questions.

1 JUDGE VASSIGH: Okay. Do my co- panelists have  
2 any questions for the witness?

3 JUDGE HOSEY: No questions.

4 JUDGE GAST: No questions.

5 JUDGE VASSIGH: Okay. I do have a question,  
6 Ms. McKee. I'm trying to understand the level of your  
7 involvement or non-involvement in the business. So what  
8 was the purpose of transferring 90 percent to you? I  
9 understand the business wasn't doing well.

10 MS. MCKEE: Initially, when my mom had signed it  
11 over, it was a DBA. And when we went to an accountant, he  
12 said it would be better to have an LLC. So we opened it  
13 as an LLC, and I was the only person. And then they told  
14 me that I needed to have someone else that was part owner.  
15 So my sister came in with 10 percent because she was  
16 struggling to get back on her feet. That's just how it  
17 went.

18 And then when they were running it alone, I tried  
19 to sign it over to them, but you have to dissolve the  
20 whole LLC, close all your accounts with the State and  
21 reopen everything. And it never got to that point. They  
22 ended up selling it before we got to do all that.

23 JUDGE VASSIGH: Okay. I have another question,  
24 which I will direct at your representative, but you can  
25 feel free to answer if you choose.

1           Mr. Engelmann, the 2014 individual California tax  
2           return claimed a nonpassive loss from Eggs Etc. Does that  
3           indicate that Appellant was materially participating in  
4           the business?

5           MR. ENGELMANN: To my understanding, no.  
6           But Appellant would have more information in regards to  
7           that.

8           JUDGE VASSIGH: I need you to speak up. I don't  
9           think she can hear you.

10          MR. ENGELMANN: To my knowledge, no, it does not.  
11          But Appellant will have more information on that.

12          MS. MCKEE: Hello?

13          JUDGE VASSIGH: Yes. Could you hear  
14          Mr. Engelmann? He said --

15          MS. MCKEE: No.

16          JUDGE VASSIGH: Okay. So he said that to his  
17          understanding, you did not materially participate in the  
18          business in 2014.

19          MS. MCKEE: No, I haven't even stepped into the  
20          business since 2011, but it was still in my name.

21          JUDGE VASSIGH: Okay. Mr. Engelmann, are you  
22          ready for your closing argument?

23          MR. ENGELMANN: Yes, Your Honor.

24          JUDGE VASSIGH: Okay. I'm going to ask you to  
25          really try to project your voice.

1 MR. ENGELMANN: Okay.

2

3 CLOSING STATEMENT

4 MR. ENGELMANN: So just to, kind of, repeat what  
5 I was saying earlier. Just -- she had no involvement in  
6 the business whatsoever, and she concedes that she only  
7 received \$28,000 as opposed to the entire gross profit of  
8 the sale of the business. And so to kind of -- to have a  
9 tax based off the entire amount, when she didn't even  
10 receive, which her bank statements and her only bank  
11 account that she owns reflects that, that shouldn't be the  
12 case where you're getting your entire gross income and  
13 your tax based off that when she didn't even receive that  
14 amount. She only received the \$28,000.

15 And so, therefore, she shouldn't even be taxed  
16 based off that amount. In addition to that, she also  
17 didn't participate in the restaurant at all whatsoever.  
18 She hasn't even had any contact with her mother and sister  
19 for a number of years. She lives in Hawaii. They -- and  
20 they're using the money that they -- that was left over  
21 for their current business now.

22 And so that's -- as far as the issue of where did  
23 that money go, to my understanding, that's where it went  
24 as opposed to going to the taxpayer. Thanks.

25 JUDGE VASSIGH: Thank you.

1           So Mr. Werking, when you're ready.

2           MR. WERKING: Thank you.

3

4

CLOSING STATEMENT

5           MR. WERKING: The issues in this case are whether  
6 Appellant has shown error in Respondent Franchise Tax  
7 Board's proposed assessment, which is based on federal  
8 adjustment, and whether Appellant has demonstrated that  
9 the proposed accuracy-related penalty should be abated.

10           Appellant has not established error in the  
11 proposed assessment or any basis for the abatement of the  
12 proposed accuracy-related penalty. The facts in this case  
13 are not in dispute. The Internal Revenue Service audited  
14 an LLC in which Appellant was a member with a 90 percent  
15 ownership interest. The IRS made adjustments increasing  
16 the LLC's gain, which the IRS then flowed through  
17 Appellant's portion of the gain and assessed additional  
18 tax and imposed an accuracy-related penalty.

19           California law conforms to federal law regarding  
20 taxation of flow-through income from a pass-through entity  
21 to its members. Based on the federal adjustment,  
22 Respondent proposed additional tax and proposed an  
23 accuracy-related penalty. It is well settled that  
24 proposed efficiency assessment by Respondent is based on a  
25 federal adjustment is presumptively correct, and the

1 Appellant bears the burden of proving it erroneous.

2 Appellant has provided no evidence to establish  
3 error of the IRS in making its adjustment and has provided  
4 no evidence to establish error on the part of Respondent  
5 in making its proposed assessment based on the federal  
6 adjustment. It's well settled that Respondent is in  
7 position of an accuracy-related penalty is presumptively  
8 correct when it's based on a federal adjustment, and the  
9 burden is on the taxpayer to prove it erroneous.

10 Appellant has asserted no basis for the abatement  
11 of the accuracy-related penalty, thus, has not satisfied  
12 her burden of proving error in Respondent's proposed  
13 imposition of the penalty. Accordingly, Respondent  
14 respectfully asks the OTA to affirm its actions. Thank  
15 you.

16 JUDGE VASSIGH: Thank you.

17 Judge Gast and Judge Hosey do you have any  
18 questions for the FTB?

19 JUDGE HOSEY: No questions.

20 JUDGE GAST: No questions.

21 JUDGE VASSIGH: Okay. Mr. Engelmann, would you  
22 like to provide a rebuttal?

23 MR. ENGELMANN: Yes.

24 JUDGE VASSIGH: Okay.

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REBUTTAL STATEMENT

MR. ENGELMANN: As far as rebutting presumption and proving that there was an error, we have done that. We're providing the bank statements that show that she only received \$28,000 opposed to \$230,000. We also have given a declaration showing that that's her bank -- you know, those are her bank accounts, as well as she had no involvement in the business whatsoever.

So as far as rebutting the presumption, we have provided evidence to do that. So and entirely -- because the FTB relies entirely on the IRS determination, and so that determination was erroneous which we have provided. So we have rebutted the presumption.

JUDGE VASSIGH: Okay. Ms. McKee, do you have any final words you would like us to consider or anything else you would like us to know?

MS. MCKEE: No, I do not.

JUDGE VASSIGH: Okay. Thank you.

Then the record is closed now to further evidence and argument. This concludes this hearing. The judges will meet and decide the case based on the evidence and testimony presented. Thank you everyone for your participation today. I'd also like to thank our stenographer.

We will aim to send the parties our written

1 decision no later than 100 days from today. Have a  
2 wonderful holiday. Thank you.

3 (Proceedings adjourned at 10:51 a.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 21st day of January, 2020.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER