

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
MORIS BENBENIST,) OTA NO. 18073456
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, December 17, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE OF,)
MORIS BENBENIST,) OTA NO. 18073456
APPELLANT.)
_____)

Transcript of Proceedings, taken at
12900 Park Plaza Dr., Cerritos, California, 91401,
commencing at 10:29 a.m. and concluding
at 11:30 a.m. on Tuesday, December 17, 2019,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

1 APPEARANCES:
2
3 Panel Lead: ALJ RICHARD TAY
4
5 Panel Members: ALJ JOHN JOHNSON
6 ALJ JEFFREY MARGOLIS
7
8 For the Appellant: MORIS BENBENIST
9 C. THOMAS MALLOS
10
11 For the Respondent: STATE OF CALIFORNIA
12 FRANCHISE TAX BOARD
13 By: JOEL SMITH
14 NANCY PARKER
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

E X H I B I T S

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

(Department's Exhibits were received at 6.)

OPENING STATEMENT

PAGE

By Mr. Benbenist 8

By Mr. Smith 32

WITNESS STATEMENT

PAGE

By Mr. Mallos 19

By Mr. Colaruotolo 25

By Mr. Paletz 30

REBUTTAL STATEMENT

PAGE

By Mr. Benbenist 40

1 Cerritos, California; Tuesday, December 17, 2019

2 10:29 a.m.

3

4 JUDGE TAY: Good morning. We are opening the
5 record in the appeal of Moris Benbenist before the Office
6 of Tax Appeals, Case Number 18073456. This hearing is
7 being convened in Los Angeles on December 17th, 2019. The
8 time now is 10:29 a.m.

9 Today's case is being heard and decided equally
10 by a panel of three judges. My name is Richard Tay, and
11 I'll be acting as the lead Judge for the purposes of
12 conducting this hearing. Also on the panel with me today
13 are Judges John Johnson and Jeff Margolis.

14 Will the parties please introduce themselves for
15 the record, beginning with the Appellant. Please just
16 state your name and spell your name for the record.

17 MR. BENBENIST: Moris Benbenist, M-o-r-i-s,
18 B-e-n-b-e-n-i-s-t.

19 MR. MALLOS: Thomas Mallos, M-a-l-l-o-s.

20 JUDGE TAY: Okay. Thank you, Appellants.
21 And Franchise Tax Board?

22 MR. SMITH: Joel Smith, S-m-i-t-h.

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

25 JUDGE TAY: Okay. The issues before us today

1 are: Whether reasonable cause exist to justify abatement
2 of the late payment penalty for Appellant's 2015 tax year;
3 and whether Appellant is entitled to abatement of the
4 estimated tax penalty; and whether Appellant is entitled
5 to abatement of interest.

6 Prior to the hearing, we circulated exhibits
7 submitted by both parties, and we receive a few more. It
8 contains -- we now have Appellant's 10 exhibits and FTB's
9 Exhibits A through J. There are no objections to
10 admitting the exhibits into evidence.

11 Is that right, Appellant?

12 MR. BENBENIST: Yes, sir.

13 JUDGE TAY: And Franchise Tax Board?

14 MR. SMITH: Correct.

15 JUDGE TAY: Okay. Thank you. The exhibits will
16 now be admitted into the record.

17 (Appellant's Exhibits 1-10 were received
18 in evidence by the Administrative Law Judge.)

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

21 JUDGE TAY: We'll start with Appellant's
22 presentation, which includes the examination of witnesses.
23 After each witness testifies, I'll give Franchise Tax
24 Board the opportunity to cross-examine each witness.

25 So before you begin, I'd like to ask you to call

1 up your witnesses forward, and I'll swear them in.

2 MR. BENBENIST: Mr. Damiano Colaruotolo, head
3 salesperson, and Mr. Clive Paletz one of my export
4 customers.

5 JUDGE TAY: Sure. Maybe I can call them to
6 introduce themselves before they give testimony just for
7 the record.

8 MR. COLARUOTOLO: Damiano Colaruotolo,
9 C-o-l-a-r-u-o-t-o-l-o, last name. First name is
10 D-a-m-i-a-n-o. Head sales manager for Bentex.

11 JUDGE TAY: And sir, if you don't mind
12 introducing yourself, please.

13 MR. PALETZ: Clive Paletz, C-l-i-v-e, last name
14 P-a-l-e-t-z. Owner of Malibu Industries, DBA Malibu
15 Threads.

16 JUDGE TAY: Okay. Thank you. If you both can
17 stay standing and Mr. Mallos, if you could stand and
18 please raise your right hand. I'll swear you in at this
19 time.

20

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

25 ///

1 CLIVE PALETZ,
2 produced as a witness, and having been first duly sworn by
3 the Administrative Law Judge, was examined and testified
4 as follows:

5
6 THOMAS MALLOS,
7 produced as a witness, and having been first duly sworn by
8 the Administrative Law Judge, was examined and testified
9 as follows:

10

11 JUDGE TAY: Thank you.

12 Appellant, you will have 30 minutes. Please
13 begin when you are ready.

14

15 OPENING STATEMENT

16 MR. BENBENIST: Good morning, Your Honors, and
17 all the legal team for the Franchise Tax Board. I want to
18 take --

19 JUDGE TAY: I'm so sorry. Would you mind moving
20 the microphone a little bit closer so we can hear you a
21 little bit better.

22 MR. BENBENIST: This way?

23 JUDGE TAY: Yes, please. Thank you.

24 MR. BENBENIST: Good morning, Your Honors and all
25 the legal team for the Franchise Tax Board. I want to

1 thank you all for allocating this time for me to explain
2 in person my own cause -- my case. I decided to represent
3 my case by myself instead of getting a lawyer or a doctor.

4 I would like to start with a short history of my
5 medical history. In 2011 I was diagnosed with a rare
6 cancerous large tumor in my lower abdomen. After seeing
7 many doctors in Southern California and traveling across
8 the country, Texas and New York, I concluded to get the
9 large tumor removed surgically against advice, instead of
10 getting long-term chemotherapy.

11 During the pre-op examines, my surgeon noticed a
12 serious difficulty in my breathing and referred me to a
13 Dr. Wachtel at Cedars to help me with the wheezing and
14 breathing stabilizer. I was treated for a few weeks, and
15 I was made ready for surgery. After 3 of serious
16 abdominal surgeries, each taking about 6 or 7 hours back
17 to back, 7 days between the first and the second and
18 40 days between the second and the third.

19 And after dropping about 34 pounds in 30 days, I
20 came back to normality towards the end of 2012,
21 unfortunately, continuing with the breathing issues.
22 While Dr. Wachtel was my primary pulmonologist, I tried to
23 seek help from other doctors, like Dr. Adair at Saint
24 Joseph in Santa Monica, Dr. Eric Kleerup at UCLA,
25 Dr. Ansari, Dr. Schroeder, and Dr. Akhavan, all

1 pulmonologist specialist.

2 Later on in 2014, I met a new doctor,
3 Dr. Bellack, an ENT doctor, who suggested getting a sinus
4 surgery may help me; may help to solve the problem of my
5 breathing. As a result, I went -- I underwent a surgery
6 at Cedars in January 2015. For a few months I felt super,
7 reacquainting with life again, tasting, smelling,
8 breathing, and sleeping, much, much better.

9 Unfortunately, a few months later, maybe around
10 May, June, the problem started to reoccur slowly; losing
11 smell, taste. Breathing became a huge problem and
12 continued cough. I went to see a multitude of doctors
13 again. With Dr. Wachtel and Bellack's suggestion, I was
14 referred to Dr. Eitches, a top allergy specialist in
15 Cedars, treating me with weekly injections.

16 Unfortunately, every month I noticed my condition
17 was getting worse and worse. I continue to take every
18 kind of inhalers, nasal sprays, albuterol, breathing
19 treatments, and above all continued Cortisone treatments,
20 which for short term was helping me a lot, but long-term
21 big side effect. My observation was doctors did not
22 really care too much. They just saw me for 5 to
23 10 minutes, a short exam, and wrote me a big prescription.

24 Each time I stated my complaints, I felt I had --
25 I was under the impression that it was a broken record,

1 time and time again as far as I was concerned. Nobody
2 really cared about. Each visit was about 30 to 40 minutes
3 driving to doctors, sitting in doctors' offices, 1 hour
4 and 40 minutes for me to see the doctor and having 5 to 10
5 minutes visitations with doctors. So it really created a
6 huge, huge frustration for me.

7 Eventually in 20116, around February, I had a
8 massive asthma attack that I could not attend to myself.
9 I went straight away to Dr. Eitches. The assistant
10 referred me immediately to ER at Cedars, and I stayed in
11 the hospital for four days with heavy treatment. All
12 these doctors made their usual visits with a big smile and
13 with a big billing.

14 I started to believe that there was no solution
15 to my problem. Instead of seeing the regular
16 pulmonologist and ENT doctors, I start to medicate myself.
17 I found alternative medicines made by the same U.S.
18 companies in France for a fraction of the price, like,
19 Advair, like, Ventolin, like, other inhalers.
20 Unfortunately, I continued to take Cortisone. This
21 Cortisone was prescribed to me, not by any pulmonologist,
22 but otologist surgeon who is a very good friend of mine, a
23 biking buddy, and who saw my deterioration. And
24 Dr. Brioji and his name is on the CVS medications.

25 I would have called him as a witness to explain

1 what I went through, but I decided not to. I could also
2 have called my wife who lived this misery with me day and
3 day, day after day, but I decided not to. What I have
4 forgotten to mention to the -- while I was interviewed by
5 the tax examiner in 2017, was the misfortune of having had
6 a very big robbery in my warehouse in Vernon.

7 The damage was about \$520,000. And,
8 unfortunately, this was submitted to you only last Sunday.
9 It was on my original submission, but the size of the file
10 was too big. I think it did not go through. That's why
11 it was a late submission, and my apology for that.

12 It took the police, the Vernon Police and LAPD
13 and the insurance companies months to deal with this. I
14 was unfortunately underinsured. So on top of my health
15 issues, I had to go through this agony, and I tried to
16 keep my business afloat. At the time I had 17 or 18
17 people working for me. The condition -- my condition and
18 the breathing problems, feeling like choking -- not every
19 day, but made it was once or twice a week. It made me
20 very uncomfortable.

21 The lack of sleep made me totally unfocused on my
22 day-to-day life. It made me even afraid to go to sleep
23 with the feeling that I would choke. I would dose for 30
24 to 15 to 20 minutes at times, and then stay woken for
25 hours. This was night after night. I tried to explain

1 this to doctors, but nobody would hear me. For them I was
2 just an ignorant patient. I lost a lot of concentration,
3 focus, you name it, even at times, the desire to live.

4 I was very upset all the time. Sleepless night
5 after night turned me in a way to a little zombie not
6 following conversations, not registering what was told me,
7 what was going on around me in my office, not paying
8 attention to anything, to work, most importantly, to
9 family and friends. Maybe I was even seriously depressed.

10 While this was happening, in 2016, as always, I
11 must have received a bunch of K-1s. About 14 years ago --
12 12 to 14 years ago, I invested in a big office project in
13 Dallas, Texas. After many years of zero distribution, the
14 managers decided to dispose of this asset, while the net
15 goes to me -- sorry -- while the net goes to me and all
16 the investors. This is not the -- the reason we're -- we
17 have a very large profit according to Franchise Tax Board.

18 Higher -- neither myself nor investors have
19 realized that this special K-1, this single K-1, had
20 illustrated the capture of a very high-profit, paper
21 profit that the amortizations over the years created.
22 This was a paper profit, but not actual cash profit, but
23 it was on my K-1. I had no idea about the enormity of
24 this tax bill. First of all, I've not even seen that K-1
25 come into my office.

1 There was a pile of folders sitting in my office
2 or envelopes sitting in my office, and everybody can
3 witness to that. I could have brought more witnesses from
4 my office, but I didn't. And I was not even aware that
5 there was one K-1 that illustrated such a big -- big
6 profit. I had received many times phone calls from my
7 CPA's office asking where the K-1s were. I had totally
8 ignored him. The ignoring was not on purpose, it's just a
9 lack of concentration. I had no idea what was my -- my
10 annual vacation was.

11 You're going to laugh at it, but I had my water
12 shut off once and my phone cut twice for not being paid.
13 It's a 4, 5, \$600.00 bills. But even that was, you know,
14 I don't know. I did not pay. I was not really present.
15 During meetings, office meetings, I would leave the
16 meetings just to take a rest, go to my car and take a nap.
17 I was in a, kind of, floating mode, depressed and
18 demoralized. Was I comatose? No. Did I seek psychiatric
19 help? No. Was I withdrawn from life? Yes. Did I
20 mistrust everybody, all doctors? Yes. Was I taking
21 Cortisone regularly? Yes.

22 I'm sure everyone has experienced sleepless
23 nights in their regular lives. And I'm sure everybody
24 knows what it does to them the next day. From being a
25 very strong person, I became like a little lamb. I could

1 not challenge anybody. I could not argue with anyone. I
2 was just -- just there.

3 When I was phoned by Mr. Don West from Sacramento
4 about -- about why I had not filed on time and all these
5 questions, I was in such a -- such an absent mode. I'd
6 even forgotten to mention to him that I had a very, very
7 big robbery in 2016. We're talking an inside job. And
8 unfortunately, you know, in my conversation I only said I
9 was not feeling well while this robbery had -- was -- had
10 a big, big influence on my life and on my finances.

11 Upon ill advice from my CPA's office, I simply
12 produced a doctor's letter saying that I was under the
13 care of Dr. Wachtel. It was a letter, I think a four or
14 five liner, and this was my only evidence and all the
15 excuse, as far as the Tax Board is concerned about the
16 delay. I apologize for that. It was negligence on my
17 side. Even before coming to this trial or to this
18 hearing, I did contact a couple of doctors who treated me
19 to submit a letter. They did not even bother to do that.
20 All of them, it was only Dr. Bellack.

21 Going back to the brief, naturally, the Franchise
22 Tax Board requires facts. What I have cannot be
23 factualized. What I went through time and time and time
24 again when you're sick, you're alone. Nobody is with you.
25 Not your wife. Not your family. They come and see you.

1 They come and give you a kiss, but you're alone. I stayed
2 in Cedars-Sinai for 34 days in 2011. It's very, very hard
3 to be alone and to deal with it on your own.

4 The examiner claims that on the briefs that I had
5 \$2,173,000 of income in my 2015 tax year. This is true on
6 paper. Unfortunately, this is not true in cash terms. It
7 was a recapture of amortization that the K-1s had done in
8 the previous years. So I ask everyone, someone who makes
9 over \$2 million in cash would be silly not to pay
10 somebody -- I'm a businessman for the last 40 years. It
11 would be totally silly not to pay a \$240,000 tax.

12 I came to know about all that under the pressure
13 of Mr. Mallos when he really came to my office and
14 demanded me to give the K-1s and seeing the consequence of
15 the tax consequence since October 2016, I think. If you
16 look at my previous records, I was not late in paying my
17 IRS and California tax obligations ever. And the numbers
18 were normal numbers. This year we see a huge, huge peak.

19 And I'm asked to produce facts. Facts are doctor
20 reports, which it doesn't really reflect my situation.
21 The Tax Board is saying I failed to pay my taxes. I was
22 doing the regular quarterly installments based on my
23 previous tax years. My income had not gone up much
24 besides this huge peak.

25 On page 2 on the -- on the brief, Appellant

1 argues from 2012 to 2016, he had a chronic medical
2 condition. This is not true. This is all the way to
3 present. I packed a bag of inhalers and other medications
4 to bring to the court today. Unfortunately, I forgot it
5 at home. But I keep getting the same medication produced
6 by Glaxo from France. And if the court is interested, I
7 can show you. There is the picture. But my condition is
8 continuing, and I'm feeling much, much better now.

9 And if there's an interest, I'll even explain
10 what happened. But I'm going to continue on my prepared
11 text. I cannot produce facts. If this court is only
12 going to judge me on -- based on facts, there's no facts.
13 There's only my personal experience; the person who has
14 been ill, from being an avid biker biking four times a
15 week, becoming a person who could hardly climb the steps
16 in his own house.

17 The best way to put my case is if any of you has
18 got a kin who has been ill, ask him what he went through.
19 Ask him what he went through himself. Do not ask his
20 doctor. Do not ask his wife. Just ask him. Had I been
21 more focused, healthy, and concentrated, I'm sure I would
22 have been able to deal with this matter in a much, much
23 better way.

24 The robbery was a huge blow to -- to -- to my
25 existing condition. It made me very upset, and I lost

1 faith even to the law enforcers. I got a few more things
2 to respond to on the briefs. And, actually, if anybody is
3 interested to see how the story ended, I was in Turkey in
4 2017 for my brother's 80th birthday, and I caught an
5 infection. A friend of mine referred me to an ENT doctor.
6 While visiting him and getting cleaned up, I said, "Do you
7 mind to check me?"

8 He went in through cameras and everything. He
9 saw my breathing. He said this is caused with heavy sinus
10 issues. I said, can you take care of it? He said yes. I
11 said, well, I'm leaving now. Can I come back next year
12 and get operated? He said yes. I was in and operated on
13 in Turkey by a doctor educated in Turkey then trained in
14 U.S.

15 I had a four-hour surgery. While I could not
16 breath from my nose at all, now I'm able to breath, and
17 much, much better and back to, somehow, connected to life.
18 I don't know what this has any relevance with all of this,
19 but I felt to explain this myself rather than my lawyer.
20 That's all I've got to say.

21 I've got two witnesses who somehow lived what I
22 lived through, you know, in my office hours. And
23 Mr. Mallos, of course, was my dear CPA who had warned me
24 several times about what's, you know, what was going on.

25 Thank you.

1 JUDGE TAY: Thank you Mr. Benbenist.

2 Mr. Mallos, will you be examining the witnesses?

3 MR. MALLOS: Yeah. I will present some testimony
4 from the witness.

5 JUDGE TAY: Okay. I just ask you to be weary of
6 the clock while you do so. 30 minutes is close, but I'm
7 willing to give you a little bit more time to state your
8 argument.

9 MR. MALLOS: Okay. Then I'll be brief.

10 JUDGE TAY: Okay.

11

12 WITNESS TESTIMONY

13 MR. MALLOS: I just say that Mr. Benbenist
14 usually mailed me the K-1s sometime in March or April of
15 '16 for '15. It didn't happen at that time. I called him
16 repeatedly. He didn't present anything in June. And then
17 I had to go to his office in about August or September of
18 that year, and I -- we went through his office, and I got
19 the K-1s.

20 We prepared the tax return, and we came with the
21 liability. He was in a fog. He didn't understand what
22 was going on. And I presented with him -- to him the
23 liability that he had, which was enormous, and he was
24 unable to pay it at that time. And we went on extension
25 to the Franchise Tax Board and the IRS. And the IRS

1 waived the penalty. But the Franchise Tax Board, they're
2 rules are different. But he had a medical condition that
3 arose to the occasion that he was incapacitated.

4 So I want to state that. That was important.
5 And luckily, he's better now. But at the time, he was
6 unable to pay the tax for medical reasons. That's all I
7 have to say.

8 Well, he just said that it was a liability. The
9 recapture was -- that caused the income to rise to
10 2.2 million and the liability was so high for the IRS and
11 the Franchise Tax Board beyond what he had estimated, and
12 what we had paid in normally. And so the penalty was
13 exorbitant under the circumstances, and it should be
14 waived. Okay.

15 JUDGE TAY: Thank you.

16 Franchise Tax Board, any questions for
17 Mr. Mallos?

18 MR. SMITH: No.

19 JUDGE TAY: I'm going to turn to my panelist.

20 Judge Margolis, any questions for Mr. Mallos?

21 JUDGE MARGOLIS: Mr. Mallos, you said that you
22 had warned Mr. Benbenist several times that he had to deal
23 with his taxes. Can you elaborate on that a little bit of
24 when that happened, and what did you say?

25 MR. MALLOS: Well, yeah. Most of his income came

1 from K-1s, unearned income. And so we -- I called him to
2 get the K-1s, and he was unresponsive. And I had to go
3 out to the office eventually, and we went through his
4 office and found some K-1s. Others he didn't have, and we
5 had to call the accountants for them, and they sent them
6 to us. That was it.

7 JUDGE MARGOLIS: And did the -- so the IRS waived
8 the penalty?

9 MR. MALLOS: Yes.

10 JUDGE MARGOLIS: What was the basis for the IRS
11 waiver? Was that because of the first time to abate the
12 penalty or --

13 MR. MALLOS: Well, it was referred -- well, the
14 laws are different. They waived it because it was his
15 first time. They took into consideration of his past
16 history, and they waived the penalty. And the Franchise
17 Tax Board has different regulations.

18 JUDGE MARGOLIS: And I'm not sure if this
19 question is best addressed to Mr. Benbenist or to you, but
20 you talked about -- you talked about the -- his inability
21 to pay, and you also mentioned your -- the theft from your
22 office. Did those two relate to each other, or other than
23 the fact that it made you more distracted or was your
24 financial relationship --

25 MR. BENBENIST: It was a -- it was a big

1 financial loss. And the effect was basically a very
2 moral, you know, it morally made me go down a lot. It was
3 you wake up one morning and you get a phone call saying
4 that, you know, you've been robbed and this -- this
5 happened. The robbery happened before my big asthma
6 attack before I was admitted to the hospital. I was -- I
7 went to the hospital in mid-February 2016. This happened
8 towards the end of January 2016. But both things
9 combined, of course, takes a big toll not only on me but
10 on anybody.

11 JUDGE MARGOLIS: And over how long a period did
12 it take to pay off these liabilities?

13 MR. MALLOS: Within a year it was paid off.
14 Within a year. Maybe less.

15 MR. BENBENIST: Less than a year.

16 MR. MALLOS: I'm not sure of the exact time, but
17 it was the medical condition that caused the problem. And
18 when we got the penalty, we were just shocked by it that
19 they didn't accept our medical excuse. Let's put it that
20 way. His condition was much more serious.

21 JUDGE MARGOLIS: Okay. I don't have any further
22 questions.

23 JUDGE TAY: Thank you.

24 Judge Johnson.

25 JUDGE JOHNSON: Yes, just a question.

1 Mr. Benbenist, you mentioned that you had 17 or 18
2 employees around early 2016, presumably during the tax
3 year at issue as well. And were you typically on-site
4 every day for your business?

5 MR. BENBENIST: I beg your pardon?

6 JUDGE JOHNSON: Were you on site every day for
7 your business?

8 MR. BENBENIST: No. I would -- I missed -- I
9 would miss many days of work basically and my mind really
10 isn't in Vernon. So I said well, it's already 11:30 in
11 the morning. I start work when I'm driving. I would be
12 on the phone. I would get phone calls about inquiries,
13 customs inquiries. When I arrive to the office,
14 unfortunately, it looks funny, but I would drive into the
15 parking lot and they'll see my car, but they would not see
16 me in the office. So everybody would look for me. Was
17 I -- was I in the warehouse or in the bathroom? They
18 would find me dosing in the car many, many times.
19 Unfortunately, it looks funny.

20 At the beginning they thought something happened
21 to me, then they understood what was -- I was in touch on
22 the phone. I was not comatose. I was not insane. You
23 know, I don't know how to exaggerate, you know, the
24 situation, but I was, basically, not focused at all for
25 lack of sleep, you know. At the end of the day, the lack

1 of sleep caused that. But the asthma caused the lack of
2 sleep. Unfortunately, they were all related to each
3 other.

4 JUDGE JOHNSON: Thank you. And was there any
5 period during the early 2016 that you missed sort of a
6 large period or was it sort of a day-to-day, depending on
7 how you felt.

8 MR. BENBENIST: Starting from second half or
9 third quarter of 2015, I start to see a big deterioration
10 in my day-to-day activities, you know. I lack -- I was a
11 hiker. I would walk and stop, walk and stop. I could not
12 finish the hikes. I was a biker. I would stop biking
13 after 10 minutes. I was just -- I couldn't. I couldn't.
14 I called my wife to pick me up.

15 And then the situation deteriorated, you know. I
16 would have attacks, but I would deal with attacks myself.
17 I mean, I carry with me Ventolin always. That one time it
18 was so bad I said, you know, I think I'm in a very bad
19 situation, and I went to see Dr. Eitches in February 2016.
20 They immediately referred me to ER, and put on me a big
21 mask, and oxygen mask, you know, for the first hour and a
22 half until they stabilize you. And then, you know, all
23 the treatments. I was four or five days in the hospital.

24 JUDGE JOHNSON: And sorry. What month or days
25 was that?

1 MR. BENBENIST: This was mid-February of 2016.

2 JUDGE JOHNSON: Okay. Thank you.

3 MR. BENBENIST: And the robbery took place,
4 unfortunately, the third week in January of '16.

5 JUDGE JOHNSON: Okay. And just a final question.
6 I understand the explanations for the difficulties or
7 delay in getting the K-1s to the tax preparer. Was the
8 K-1s still received in normal time in early 2016? Is
9 there any indication that it was received?

10 MR. BENBENIST: I believe so. I mean, the K-1s
11 were from the management companies in which I make
12 investments. So, basically, they prepare the K-1s most of
13 them are sensitive. I mean, it was coming to my office,
14 and it was piling up. I - I did not realize it.

15 JUDGE JOHNSON: Okay. Thank you.

16 JUDGE TAY: Mr. Benbenist or Mr. Mallos, are you
17 now also going to examine the two witnesses you've brought
18 today? Do they have any prepared statements or are you
19 going to ask them any questions?

20 I'm asking from you, Mr. Benbenist?

21

22 WITNESS TESTIMONY

23 MR. COLARUOTOLO: Yeah. I was -- I was hired as
24 the sales manager in 2012.

25 JUDGE TAY: Hold on. I'm sorry to interrupt.

1 THE STENOGRAPHER: Can you bring your microphone
2 closer to you?

3 MR. COLARUOTOLO: Oh, I'm sorry. Yes. First
4 time.

5 THE STENOGRAPHER: Thank you. And could you
6 please repeat your name?

7 MR. COLARUOTOLO: Yeah. My name is Damiano
8 Colaruotolo, D-a-m-i-a-n-o. The last name is
9 C-o-l-a-r-u-o-t-o-l-o. I was hired in 2012, February, as
10 a sales manager for Bentex. And when I first started with
11 Moris and I, he was like a tiger in -- in -- in the
12 business. I mean, it was -- we're a pretty good crew.
13 We're working very hard. We had huge inventories. We
14 were moving those inventories down.

15 And then as I noticed by 2014 going into 2015, it
16 was -- he was -- he was changing. We would go into
17 meetings with customers, and he would have these cough
18 attacks, and he would have to excuse himself. And I would
19 have to run the meetings by myself. He would call me at
20 6:00 o'clock in the morning coughing. Because, you know,
21 he would call me at home, or he would text me and I would
22 call him right away.

23 And, again, as he said, I would find him in the
24 parking structure just zoned out sleeping. And I didn't
25 want to disturb him because I knew having a child who had

1 asthma growing up, the medications that you do take --
2 again, I'm not a doctor, but I've been around it
3 personally. I know what albuterol does. I know what
4 steroids do.

5 I, again, with my own son going through it, I
6 know what it does. It -- it affects you. It affects your
7 mind. It affects your thinking. There are days where my
8 son couldn't go to school for two or three days because
9 the cough was so bad that he had to miss two or three days
10 of school.

11 So I do know what Moris is going through. And
12 we, you know, again, we would lose orders where I would
13 tell him, "Moris, hey, so and so has an order. What do
14 you want to do? There's a price."

15 He's like, "Okay. I'll talk to -- we'll talk
16 about it later. We'll talk about it later." You know,
17 because he was completely zoned out. We would lose those
18 orders. We had clients who were just really upset with us
19 because of that situation. And it was going on in 2015,
20 2016. Then it got even worse. Then we had the robbery.
21 Again, it was an inside job with one of our employees.

22 And it just -- it was like a mountain. It just
23 kept rolling and getting bigger and bigger. The other
24 thing too that it was affecting was even our invoicing.
25 There would be -- there would be stacks of invoices

1 sitting on his desk waiting to be invoiced, and we -- I
2 would have customers approved.

3 They were approved through the factories, you
4 know, that they were shipped and ready to go. And I'd
5 have customers call me two or three weeks later and say,
6 "Hey, Damiano, I haven't received those invoices," because
7 they're telling me it's those invoices because there's a
8 certain amount of time to pay those invoices, and they
9 would just be sitting there for -- for weeks at a time not
10 ready to be going out.

11 And I would talk to our own controllers, and, you
12 know. So they leaned on me to make sure that I would have
13 the -- Moris, we have to send these out. They have to go
14 out. So, again, this was -- again, and him biking was
15 true because, again, besides calling me about business, I
16 would get phone calls or text messages at 6:30 in the
17 morning. I'd call him back. "Oh, Damiano, I'm in the
18 Santa Monica mountains. It's gorgeous. It's beautiful.
19 He was telling me where he was when I first started.

20 Again, he was a tiger in this business. And --
21 and it was good because I was aggressive that way too, so
22 we had a great thing going. And, again, 2013, 2014, going
23 into 2016, that's when I started noticing what was going
24 on. And it wasn't right. And I knew the medication,
25 again, he was taking. I know it has effects on -- on your

1 minds and thinking.

2 So I mean, if there's any questions, I'm --
3 feel -- free to answer.

4 JUDGE TAY: Thank you.

5 Franchise Tax Board, any questions?

6 MR. SMITH: Just briefly. Between January and
7 April of 2016, do you have any recollection of
8 Mr. Benbenist's attendance at work or availability via
9 phone?

10 MR. COLARUOTOLO: Again, yeah. I mean, again,
11 sometimes he would show up for work. And there were times
12 absolutely yes, he would -- I would text him. I would
13 call him, and he wouldn't answer my phone.

14 MR. SMITH: Thank you.

15 JUDGE TAY: Panelist? Judge Margolis?

16 JUDGE MARGOLIS: No.

17 JUDGE TAY: Judge Johnson?

18 JUDGE JOHNSON: No.

19 JUDGE TAY: Does your last witness have any
20 statement or any -- do you have any questions for him?

21 MR. PALETZ: I can make a statement.

22 JUDGE TAY: I'm sorry. Before you make your
23 statement, will you please state name one more time for
24 the record.

25 MR. PALETZ: Clive Pellets. Is it on?

1 JUDGE TAY: Yes.

2

3 WITNESS STATEMENT

4 MR. PALETZ: As a customer of Bentex, I would --
5 I think we started doing business in 2011, 2010, 2011,
6 somewhere around there. We would send in orders and I
7 would get responses pretty quickly. We had a business
8 with Bentex through the years, and by the time we got to
9 the middle or end of 2015, I wouldn't get responses. I
10 would put in request for information regarding orders, and
11 there would be no response at all.

12 And it would lead to a situation where I was
13 losing business because I wasn't getting a response, and I
14 wasn't responding to my customers. The customers that I
15 would supply, I would supply major distributors like
16 Forever 21, Urban Outfitters, et cetera. And I ended up
17 losing a lot of business due to the inconsistency of not
18 getting any response from Mr. Benbenist and Bentex itself.

19 In 2016 or late 2015, early 2016, I actually
20 started having to go to other suppliers, which caused
21 major problems for myself due to the fact that the quality
22 of the goods was not the same, and I had to readdress how
23 to deal with it. It got to a point where I actually had
24 to start making the goods myself. He would bring in gray
25 goods that he would use and convert them into finished

1 good.

2 And it got to the point that I couldn't trust
3 other people's goods, so I was having to buy yarn and
4 actually manufacture the fabric myself, and then produce
5 for the clients that I had. So due to the fact that I
6 lost a lot of business, I had to reduce what I did with
7 him because of nonresponse over the extended period.

8 I can vouch for the fact that if I ever did get
9 ahold of Mr. Benbenist he was coughing and hacking like
10 nothing I've ever heard before. There were times when I
11 would think he actually may need to be in a hospital. He
12 should not have been home. It got to the point where
13 sometimes I'm like, you need to just go to a hospital
14 because he couldn't even respond. The coughing was so
15 bad. And it caused a rift in our business situation. And
16 when I found out what was really going on, I realized he
17 was very ill.

18 And if there's any questions, I'm more than
19 willing to answer them.

20 JUDGE TAY: Thank you.

21 Franchise Tax Board, any questions?

22 MR. SMITH: No.

23 JUDGE TAY: I'll turn to my panel. Judge
24 Margolis?

25 JUDGE MARGOLIS: No.

1 JUDGE TAY: Okay. Judge Johnson?

2 JUDGE JOHNSON: No.

3 JUDE TAY: Okay. Appellant, I think that
4 concludes your presentation; is that correct?

5 MR. BENBENIST: Yes, sir.

6 JUDGE TAY: Okay. You'll have five minutes of
7 rebuttal after Franchise Tax Board.

8 Franchise Tax Board, I'll give you an opportunity
9 to make your presentation. You have 10 minutes whenever
10 you're ready.

11 MR. SMITH: Okay. Thanks. I think I can keep it
12 under 10 minutes, though I will say a large portion of
13 that argument is entirely new information. So I will be
14 addressing stuff that I did not account for when I told
15 you that I would keep my argument to 10 minutes.

16 JUDGE TAY: That'll be fine.

17

18 OPENING STATEMENT

19 MR. SMITH: As has been stated, there are three
20 issues for your office to decide. First, is whether
21 reasonable cause exist or abate the late payment penalty.
22 Second, is whether Appellant is entitled to abatement of
23 the estimated tax penalty. I'll refer to that as the
24 estimate penalty. And third, is whether Appellant is
25 entitled to abatement of interest. All three of these

1 issues have their own standards for abatement, which is
2 why we need to address them separately.

3 In this matter Appellant has not met his burden
4 to establish that these matters should be abated in his
5 favor. I will address each issue separately, starting
6 with the late payment penalty. To be clear, this late
7 payment penalty was calculated based on Appellant's
8 self-reported income. There was no audit conducted for
9 this tax year. So I'm not sure what the illusions to
10 communication with FTB personnel were regarding this
11 balance. This was a self-reported tax.

12 To abate this penalty, Appellant must show that
13 the failure to timely pay was due to reasonable cause, not
14 willful neglect. Appellant must show that his failure to
15 timely pay occurred despite the exercise of ordinary
16 business care and prudence. A review of Appellant's
17 federal 2015 tax year does indicate that the late penalty
18 was abated under their first-time abatement program. As
19 stated, the FTB does not have authority to abate this
20 penalty under those circumstances.

21 And the time period at issue to consider for the
22 late payment penalty is January 2016 to April 2016, which
23 is when the tax for the 2015 tax year was due. It's an
24 important timeline or time frame to keep in mind as we
25 consider abatement of this penalty. Here Appellant argues

1 his medical condition prevented him from timely paying his
2 tax.

3 Respondent does not dispute the nature of
4 Appellant's medical condition or suggest that he did not
5 have any issues medically. This is not what this is
6 about. However, a taxpayer's medical condition may
7 establish reasonable cause if the taxpayer demonstrates
8 said condition rendered him incapable of exercising
9 ordinary business care and prudence.

10 In Taylor v. Commissioner, which is a 2009 U.S.
11 Tax Court Case 97 TCM 1109 is the citation. That case
12 is -- appears similar to this one here. There, the
13 taxpayer was a professional singer who suffered a heart
14 attack in December of 2001. 2001 was one of the tax years
15 at issue. The taxpayer was hospitalized for nine days and
16 did not return to work as a singer until February 2002.
17 Despite the hospitalization and recovery, the United
18 States Tax Court held the taxpayer did not establish
19 reasonable cause to abate the late payment penalty for the
20 2001 tax year because she did not establish that she was
21 incapable of exercising ordinary business care and
22 prudence.

23 JUDGE MARGOLIS: Is that case in your briefs? If
24 not, can you restate the -- can you give me the cite
25 again?

1 MR. SMITH: Right. I don't have every piece of
2 the brief memorized. It's Taylor v. Commissioner 2009 97
3 TCM 1109.

4 Here, Appellant has provided a letter from a
5 treating physician indicating Appellant experienced
6 medical difficulties during the relevant time period. He
7 also provided medication lists and discharge instructions
8 from his February 2016 hospitalization. In addition,
9 today he has gone into further detail regarding treatment
10 that was taken before and after the relevant time period.
11 As stated, Respondent does not dispute that Appellant had
12 health issues.

13 However, Appellant's documentation does not show
14 that he was incapable of exercising ordinary business care
15 and prudence. Appellant's argument establishes that he
16 was -- he was present at the office on occasion. He was
17 available via phone during this time period. He -- and he
18 did work in 2016 as evidenced by the 2016 tax return that
19 he filed, which indicated he earned the same amount of
20 income from the corporation that he did in 2015.

21 In addition, Appellant made an estimated payment
22 for the 2015 tax year on February 15, 2016. Admittedly,
23 that's a couple days before the February hospitalization,
24 but that estimate payment was made. As it relates to
25 these arguments that he was addressing other issues in his

1 life, there are a number of cases, Triple Crown Baseball
2 LLC, an OTA case, being one of them. That stands for
3 sacrificing tax obligation to attend to other matters is
4 not reasonable cause.

5 In this case, the exhibit provided today, Exhibit
6 10, shows that February 1st, 2016, the Appellant was the
7 one who reported the -- the burglary and vandalism. And
8 then as you look further into this document, there is an
9 e-mail from the insurance company dated March 22, 2016,
10 where the insurance company addresses an e-mail to the
11 taxpayer starting off with, "Thank you for taking the time
12 to discuss your claim with me." So he was addressing this
13 matter in March of 2016.

14 There's also another e-mail attached,
15 April 22nd, 2016, that is from a CPA in New Jersey that
16 also notes that they were in contact with the taxpayer
17 regarding the warehouse robbery. So in addition to the
18 medical condition not rising to the level of reasonable
19 cause, given evidence of the Appellant's work at the
20 corporation, the -- these other evidence, pieces of
21 information, show that he was able to attend to other
22 matters while he was not attending to tax matters.

23 Now, the third element which, again, was brought
24 up today is a reference to an inability to pay argument,
25 it seems. Again, this the first we've heard of this. The

1 Exhibit H, page 2, is -- this was not part of our brief.
2 This is an exhibit, but it gives a rundown of what an
3 inability to pay -- what a taxpayer has to show for that
4 to be considered reasonable cause.

5 It's that the taxpayer needs to show that he was
6 unable to pay the tax or would suffer an undue hardship if
7 paid on the due date. An undue hardship is defined as
8 more than an inconvenience to the taxpayer. It must
9 appear that substantial financial loss, such as loss to
10 the a -- or really to a sale of property will result to
11 the taxpayer. So there's nothing in the record to suggest
12 that the financial inability to pay exists.

13 So with all that being said, the evidence shows
14 Appellant was capable of exercising ordinary business care
15 and prudence between January and April of 2016. Meaning
16 Appellant has not established reasonable cause to abate
17 the late payment penalty.

18 The second issue is the abatement of the estimate
19 penalty. California Revenue and Taxation Code Section
20 19136, a certain modification is not relevant to today's
21 appeal, conforms to Internal Revenue Code Section 6654,
22 which imposes an addition to tax if the taxpayer fails to
23 make timely estimated tax payments. The standard to abate
24 the estimated penalty is not a reasonable cause standard.

25 IRC Section 6654 provides for abatement of the

1 estimated penalty if it's determined that by reason of
2 casualty, disaster, or other unusual circumstances, the
3 imposition of a penalty would be against equity in good
4 conscious. Appellant has not made any argument to support
5 abatement of the estimate penalty.

6 The third and final issue concerns abatement of
7 interest. Respondent's imposition of interest is
8 mandatory, and Respondent is not allowed to abate interest
9 except where authorized by law. Revenue and Taxation Code
10 Section 19104 provides for abatement if there's been an
11 unreasonable error or delay in the performance of a
12 ministerial or managerial act by one of Respondent's
13 employees.

14 Appellant has made no argument and there's
15 nothing in the record to suggest abatement of interest
16 under Section 19104 is appropriate in this matter. As
17 shown in the facts and evidence in the record, Respondent
18 requests you sustain this position.

19 I can answer any questions you may have.

20 JUDGE TAY: Thank you.

21 Panelist, any questions? Judge Margolis?

22 JUDGE MARGOLIS: I just, you know, I guess here
23 the evidence shows that he was, you know, I don't know if
24 he was capable of taking care of his business affairs in
25 an ordinary businesslike fashion. But, certainly, it

1 seems to show that he was not taking care of those affairs
2 in an ordinary business fashion. Maybe you would like to
3 speak to what the standard applies, you know, here where
4 you have some evidence that he was not -- that, you know,
5 he was not taking care of his business. Does that show
6 that he wasn't able to take care of his affairs in a
7 businesslike fashion? I mean, we have this evidence here
8 today about how, you know, his health problem was
9 affecting his business. Invoices were not being paid,
10 things like that. You know, is that sufficient for
11 purposes of the reasonable cause standard?

12 MR. SMITH: Well, if considered in a vacuum,
13 perhaps. However, Exhibit 10 indicates that Appellant was
14 very involved in the -- the crime that was committed at
15 the warehouse during this relevant time period, which
16 speaks to the -- the standard that if you're attending to
17 other matters, that's not reasonable cause for not
18 attending to tax matters, which is what we're concerned
19 with as it relates to his ability to not attend to
20 business matters that's not necessarily relevant to the
21 consideration of attending to the tax matters.

22 JUDGE MARGOLIS: That's my only questions.
23 Thanks.

24 JUDGE TAY: Judge Johnson, any questions?

25 JUDGE JOHNSON: No.

1 JUDGE TAY: Okay. That concludes Franchise Tax
2 Board's presentation.

3 Appellant, you have five minutes to rebut.

4 MR. BENBENIST: Thank you.

5

6 REBUTTAL STATEMENT

7 MR. BENBENIST: After hearing what happened to
8 the gentleman with the heart attack the senior, and he
9 lost the case, I realize that the Franchise Tax Board has
10 no heart. In order for a case like mine to be -- to go
11 through, I need to produce a death certificate. I should
12 be in my -- in my grave to be accepted that I was not
13 capable.

14 I said earlier on that I was not comatose. I
15 was -- I was alive. And the robbery was a present case,
16 and I was getting phone calls by detectives. And it was a
17 big case for City of L.A. and Vernon. It affected
18 Vernon's business community very badly. And I never said
19 I did not -- I was totally disconnected from life. I was
20 totally afloat but, you know, I could not-- I was not
21 comatose.

22 And in my opinion -- in my view, the whole
23 situation with the abatements of the penalties and the tax
24 and everything goes in the same package. So I did not
25 make an attempt to say, "Okay. I accept the penalty, but

1 I'm not accepting the interest." You know, they're all in
2 the same package.

3 So I was not well. I was not capable to attend
4 to my day-to-day business, and I was not even aware that I
5 received the K-1s. The K-1s keep coming and coming and
6 coming. And for someone like me not to pay a phone bill
7 or not to pay a water bill is not acceptable. It's not
8 considerable, but this happened to me. And,
9 unfortunately, I do not -- I don't have those facts, but
10 I'm just saying what I went through in the whole year of
11 2016.

12 Not answering an e-mail -- yes, I did answer the
13 e-mails, you know. I mean, half a million dollars of
14 violent robbery by gangs, it's -- it's, you know, you have
15 to ask it. When the detective calls you to the Vernon
16 Police Station, you have to go. That's all I can say.
17 But this was not my day-to-day life. My day-to-day life
18 was to attend my business, to answer inquiries, and run my
19 business. This I cannot do.

20 JUDGE TAY: Okay. Thank you. That concludes
21 Appellant's rebuttal; is that correct?

22 MR. PALETZ: Can I state something?

23 JUDGE TAY: Sure.

24 MR. PALETZ: With regards to the robbery, we were
25 made aware of this in the whole community of Vernon, City

1 of Industry. And I can vouch for Mr. Benbenist that he
2 wasn't exactly where he needed to be with the way he
3 related to business because I had some product in one of
4 the warehouses where it was stolen. And it only became
5 aware to him this past year that my goods were actually
6 also stolen as well.

7 So he was not really completely aware of
8 everything that was going on. And, you know, for them to
9 say that he attended to everything, is not the way it
10 really looks. He didn't attend to everything the way
11 exactly he should have. Because if he was aware, he would
12 have known what was going on. He would have been aware
13 exactly at the time when the goods were stolen of mine as
14 well, because he was not completely in his self-mind.

15 JUDGE TAY: Okay. Thank you.

16 That concludes Appellant's rebuttal. I'm going
17 to ask the panelist if they have any final questions.
18 Judge Margolis?

19 JUDGE MARGOLIS: No.

20 JUDGE TAY: Judge Johnson?

21 JUDGE JOHNSON: No.

22 JUDGE TAY: Okay. Thank you everyone for your
23 presentations. The record in this appeal is now closed
24 and the appeal will be submitted for decision. We will
25 endeavor send you our written decision no later than 100

1 days from today.

2 This hearing is now adjourned. Thank you again.

3 (Proceedings adjourned at 11:30 a.m.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 8th day
of January, 2020.

ERNALYN M. ALONZO
HEARING REPORTER