

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
ANDREW J. LASPINO,) OTA NO. 18093820
)
APPELLANT.)
)
_____)

IN THE MATTER OF THE APPEAL OF,)
)
PATRICIA M. LASPINO,) OTA NO. 18093737
)
APPELLANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Wednesday, January 29, 2020

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
400 R Street, Sacramento, California, 95811,
commencing at 12:49 p.m. and concluding
at 2:15 p.m. on Wednesday, January 29, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ SUZANNE BROWN

Panel Members: ALJ ANDREW KWEE
ALJ MICHAEL GEARY

For the Appellant: KAI MICKEY

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE DEPARTMENT
By: SUNNY PALEY
MONICA SILVA
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits were received at page 13.)
(Department's Exhibits were received at page 13.)

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1 Sacramento, California; Wednesday, January 29, 2020

2 12:49 p.m.

3

4 JUDGE BROWN: Good afternoon. We are on the
5 record in the case of the appeal of Andrew Laspino and
6 Patricia Laspino, OTA Case Numbers 18093820 and 18093737,
7 and this is the Office of Tax Appeals hearing. It is
8 12:49 p.m. on January 29th, 2020.

9 My name is Susanne Brown, and I am the lead
10 Administrative Law Judge for this hearing. My
11 co-panelists are Andrew Kwee and Michael Geary. And we
12 will be hearing the matter this afternoon. I am the lead
13 ALJ, meaning I will be conducting the proceedings, but my
14 co-panelist and I are equal participants and we will all
15 be participating in reviewing the evidence and asking
16 questions and reaching a determination in this case.
17 Okay.

18 First, I will ask the parties to identify
19 themselves for the record. I'll start with Appellant's
20 representative. Mr. Mickey, can you please state your
21 first and last names and your role here today.

22 MR. MICKEY: First name Kai, last name Mickey.
23 I'm a representative here representing the Appellants,
24 Patricia and Andrew Laspino.

25 JUDGE BROWN: Thank you.

1 And for CDTFA?

2 MS. PALEY: Sunny Paley and I'm with Monica Silva
3 and Jason Parker.

4 JUDGE BROWN: And are we hearing everyone okay?
5 I think -- I wonder if the Appellant's microphone --

6 (There was a pause in the proceedings.)

7 JUDGE BROWN: So moving on to the substance of
8 this case, everyone should have received a copy of the
9 prehearing conference minutes and orders that I issued in
10 this matter following our prehearing conference. The
11 first thing I'm going to do is revisit the issues that we
12 confirmed in the prehearing con -- during the prehearing
13 conference, and I confirmed in any prehearing conference
14 order.

15 And we identified three issues in this appeal:
16 Whether the February 2nd, 2007, Notices of Determination
17 were timely issued to Appellants; whether Appellants are
18 personally liable under Revenue and Taxation Code Section
19 6829 for the unpaid liabilities of Sea Elm, Inc., for the
20 periods May 1st, 1998, through December 31st, 1998, and
21 January 26, 1999, through December 31st, 1999; and
22 finally, whether there is reason to relieve the late
23 payment penalties imposed on Sea Elm that were included in
24 each Appellants' liability under Revenue and Taxation Code
25 Section 6829.

1 Mr. Mickey, when we discussed these issues during
2 the prehearing conference, you had indicated you weren't
3 sure whether you were going to proceed on all three
4 issues. Obviously, the second issue about liability under
5 Section 6829 is the crux of the hearing. But then I
6 wasn't sure about the first issue about timeliness or
7 relief of penalties. So can you confirm? Are all three
8 issues still in dispute?

9 MR. MICKEY: Issue A is still in dispute. I will
10 be talking directly to issue A and to Issue B. Issue C is
11 not something I'm going to be speaking to directly, but to
12 the extent that the presentation for B can apply to C, it
13 will. I realize that's a -- would require, I think, a
14 6592 statement, which we can provide later if -- if what I
15 present for Items B would be supportive of Item C. I'm
16 not going to speak directly to Item C.

17 JUDGE BROWN: Well --

18 MR. MICKEY: I think because it goes hand in hand
19 with B.

20 JUDGE BROWN: The question that I need -- that we
21 need to determine here and now is this part of -- is this
22 an issue at the hearing? Are you seeking relief of the
23 penalties?

24 MR. MICKEY: I guess for now I will say yes.

25 JUDGE BROWN: Okay. Then I was going to if

1 assuming that it -- now, that I know that is the case, I
2 was going to raise the question about a 6592 statement
3 under penalty of perjury. I understand from the record in
4 the D&R it indicates that your clients did submit such a
5 statement. And I see that the agency people are nodding.
6 Everyone agrees.

7 And so from a formal perspective, it is my
8 understanding that the requirement has been met -- and
9 everyone is nodding -- that there was a statement
10 submitted, a penalty of perjury, requesting relief of the
11 penalties. I don't have that statement in evidence, and
12 it was -- I went through the evidence yesterday, and I
13 realize we -- it was not part of the record here.

14 On the other hand, I do have Appellant's
15 statement under penalty of perjury. That is Exhibit 4.
16 And it does not directly address the penalties, but I have
17 a feeling that Appellants are going to argue that the
18 arrangements regarding -- the arguments stated in
19 Exhibit 4 apply the same to the penalties?

20 MR. MICKEY: Yes. That is correct.

21 JUDGE BROWN: Okay. Okay.

22 MR. MICKEY: I was not aware there was a 6592
23 statement already filed. I was going to use their
24 affidavit signed under penalty of perjury as that
25 statement and to the effect that that applies primarily to

1 B. I believe the factors raised in that affidavit would
2 also qualify for relief of C.

3 JUDGE BROWN: Okay. CDTFA, do you have any -- do
4 want to weigh in and respond here to his question first,
5 do you agree that there was a statement submitted in 2008?
6 And second, do you have any objection to me considering
7 Exhibit 4 as Appellants' statement under penalty of
8 perjury regarding relief of penalties?

9 MS. PALEY: We do not have any objection, but I
10 would like to make a clarification.

11 JUDGE BROWN: Yes.

12 MS. PALEY: And I address it in my presentation,
13 but just so that we're clear of the issues under B.

14 JUDGE BROWN: Actually, can you speak into the
15 microphone?

16 MS. PALEY: Yes. Sorry. I'll slide over.

17 I address it in my presentation, however
18 regarding the liability periods under B, it is for the
19 periods of May 1st, 1998, through October 1998. And then
20 the only period at issue in 1999 is December 1999.

21 MS. SILVA: These were monthly returns.

22 MS. PALEY: Right. So those are the only periods
23 at issue.

24 JUDGE BROWN: I understand that, but let's finish
25 the question about the penalty relief and then we'll move

1 onto clarifying that because I don't want to forget where
2 we were. Regarding the penalty relief, do you agree that
3 one, there was a statement submitted?

4 MS. PALEY: Yes.

5 JUDGE BROWN: It's documented in the D&R?

6 MS. PALEY: Yes.

7 JUDGE BROWN: And second, that we can consider
8 Appellants' Exhibit 4 also as a statement under penalty of
9 perjury as it applies to penalty relief?

10 MS. PALEY: Yes.

11 JUDGE BROWN: Okay. Then I think you don't have
12 to submit a separate statement.

13 MR. MICKEY: Okay.

14 JUDGE BROWN: Assuming that your arguments tie in
15 to -- for Exhibit 4, tie into penalty relief as well.

16 MR. MICKEY: They will all be -- it all goes
17 together.

18 JUDGE BROWN: Okay. Now, let us address -- and I
19 know I have these as A, B, and C, but in the opinion,
20 they're going to be Issues 1, 2, and 3. It's just the way
21 that the numbering versus lettering worked in the
22 prehearing conference minutes and orders.

23 As to the time period at issue, I understand what
24 you're saying. I just wrote it this way because I was
25 being formal. And the time period formally not at issue

1 under the supplemental decision and recommendation omitted
2 only that short period from January 1st, to
3 January 25th, 1999. And everyone is nodding, so I take it
4 you're all in agreement?

5 MR. MICKEY: Yes.

6 MS. PALEY: Yes.

7 JUDGE BROWN: Okay. But Ms. Paley, you can --
8 why don't you repeat what you were just saying so that --
9 to make sure that we are all on the same page.

10 MS. PALEY: The periods -- the unpaid liability
11 periods would be May, July, August, September and
12 October 1998, and then December 1999.

13 JUDGE BROWN: That's my understanding as well.
14 And Mr. Mickey has --

15 MR. MICKEY: I agree.

16 JUDGE BROWN: Okay. All right. Then if we're
17 clear on clarifying -- we've clarified what the issues
18 are. I did also want to -- before I move on to admitting
19 the exhibits into evidences, I also wanted to clarify
20 again what elements of Section 6829 are in dispute. When
21 we talked about this during the prehearing conference as
22 well, that the first two elements, the did termination of
23 the business, and the collection of sales tax
24 reimbursement are not in dispute.

25 Correct, Mr. Mickey?

1 MR. MICKEY: Yes. That is correct.

2 JUDGE BROWN: Okay. And the second two elements
3 you indicated are in dispute?

4 MR. MICKEY: Yes.

5 JUDGE BROWN: Okay. And I just want to confirm
6 that when we're talking about the third element, it's
7 called responsible person but, you know, it is the -- it
8 has the long language of whether Appellants had control or
9 supervision of or were charged with the responsibility for
10 or had the filing of returns or payment of tax or
11 otherwise had a duty to act for the corporation. That
12 is -- that is in dispute?

13 MR. MICKEY: Yes.

14 JUDGE BROWN: Okay. And then regarding
15 willfulness, I wanted to confirm that all three prongs of
16 willfulness are in dispute; knowledge, authority, and
17 ability to pay funds available.

18 MR. MICKEY: Knowledge is not in dispute.
19 Authority and ability to pay are what's in dispute.

20 JUDGE BROWN: Okay. And I think everyone
21 understands that the reason I'm spending this time now is
22 so that we can all focus on what is in dispute, and we
23 don't have to waste time admitting evidence or arguing
24 about what is not in dispute. So it is a question of
25 efficiency and allowing the panel as well as the

1 participants to focus.

2 All right. Then I think I can move on to talking
3 about the documentary exhibits. Everyone should have
4 received the courtesy copy of the hearing binder that my
5 office compiled, and it contains Appellants' Exhibits 1
6 through 4 and CDTFA's Exhibits A through G. The parties
7 indicated during the prehearing conference; I believe they
8 are -- we did not anticipate there would be any objections
9 to any of these documents being admitted.

10 MS. PALEY: Correct.

11 JUDGE BROWN: Okay. So I will confirm there's no
12 objection. Neither party has any objection to admitting
13 these documents into evidence.

14 MS. PALEY: Correct.

15 JUDGE BROWN: Right?

16 MR. MICKEY: Yes.

17 JUDGE BROWN: So there being no objection, I will
18 say that Appellants' Exhibits 1 through 4 are admitted,
19 and Respondent's Exhibits A through G are admitted.

20 (Appellants' Exhibits 1-4 were received
21 in evidence by the Administrative Law Judge.)

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

24 JUDGE BROWN: We also discussed during the
25 prehearing conference that neither party was intending to

1 call any witnesses during the hearing, and that is still
2 the case?

3 MR. MICKEY: Yes.

4 MS. PALEY: Right.

5 JUDGE BROWN: So I won't be swearing anyone in as
6 a witness. I will just be hearing -- we will just be
7 hearing argument. Okay. And I'll just briefly go over
8 the order of proceedings that was also in my prehearing
9 conference minutes and orders. Everybody understands that
10 we'll hear Appellants' presentation first.

11 And Mr. Mickey, you'll have up to 30 minutes to
12 make your presentation. And when you are done, there may
13 be questions from the panel, then CDTFA will have its
14 opportunity to make its presentation. And I believe that
15 also will be up to 30 minutes, and there may be questions
16 from the panel. And then Appellants will be able to make
17 a rebuttal to respond, and that will not exceed
18 15 minutes. And the panel may have questions for either
19 party at that time.

20 Does anyone have any questions about the order of
21 the proceedings or any questions about how this process
22 works?

23 MR. MICKEY: Nope.

24 MS. PALEY: No. Thank you.

25 JUDGE BROWN: Okay. Then if everyone is ready,

1 we can go ahead and begin Appellants' presentation.

2 Mr. Mickey, whenever you're ready. You have 30
3 minutes.

4 MR. MICKEY: Thank you.

5

6 PRESENTATION

7 MR. MICKEY: We're going to begin by talking to
8 the issue of the timeliness of the Notice of Determination
9 that was issued in 2007. I want to begin by saying that
10 we're fully aware of the changes in Regulation 1702.5 in
11 Section 6829 that took place effective January 1st, of
12 2009. So we realize as of 2009 forward, those provisions
13 call for the three-year statute of limitations based on
14 date of knowledge.

15 We're also fully aware that prior to that, that
16 language was not in that statute nor was it in the
17 regulation. And prior to that 2009 date, we also note the
18 State, or the Department routinely looked at the ability
19 of having eight years to issue a Notice of Determination
20 for responsible person liability. That's not what the
21 issue is here. We understand they're doing what they had
22 always done.

23 What I'm looking for today is to present to you
24 the concept that that practice that was in place by the
25 Department prior to 2009 was misplaced based on the law.

1 I have looked at the law myself, and I believe I know
2 where they trace back through the statutes to get their
3 eight-year statute of limitations during that period, but
4 I believe that, again, is misplaced.

5 Based on the concept of equity -- and I'm not an
6 attorney so I don't pretend to know all the legalese
7 behind these types of theories from a legal standpoint.
8 But I know that there is a concept of equity that is
9 behind many laws. And in the old periods, during which
10 time this Notice of Determination would have been issued
11 timely under their -- the Department's understanding of
12 their timeliness.

13 It was issued within the eight years of the date
14 of closeout. But using the eight years is what we're
15 taking issue with. Looking back at the statutes and
16 regulation, and looking at the equity behind those
17 regulations both to the State and to the taxpayer, it does
18 not appear to us that an eight-year statute on a person
19 being held liable for an entity, another person's
20 liability, is justifiable when you're going to hold the
21 individual liable longer than you held the originating
22 person liable in the first place.

23 To make that simplified, Sea Elm had a three-year
24 statute of limitation on all these periods that are in
25 question. Why is it rationally and legally justifiable to

1 look at the statutes in a way that provides that the
2 individual who is being held responsible under 6829 should
3 have an eight-year statute to be held liable for that same
4 liability.

5 From an equity standpoint, that does not seem to
6 make sense nor from even a legal standpoint do I think
7 that it makes sense. So when the State -- when the
8 Department was utilizing this concept of issuing these
9 NODs within eight years of the date of close out, they
10 were operating under what they believe to be correct.
11 They did issue this NOD within that understanding, but we
12 believe that understanding was wrong.

13 So I'm asking you as a separate now, entity
14 looking at what CDTFA BOE Department had been doing prior
15 to 1/1 of 2009 and see that their policy of how they were
16 interpreting that is wrong. I have seen the write ups. I
17 believe a similar case has been before you guys, but it
18 wasn't talking about the eight years. It was just talking
19 about whether or not returns of a corporation could be
20 accepted as returns filed by the individual. We are
21 not -- I'm not saying that. I'm not arguing that same
22 point.

23 I don't -- it's not saying that the fact that
24 their corporation filed returns should be moved over to
25 the individual as returns filed by the individual. We are

1 simply saying that an individual who is being held liable
2 under 6829 because of the abandonment or dissolution or
3 discontinuance of the corporation should not face an
4 eight-year statute when the corporation itself only faced
5 three.

6 And if you could find that the -- this
7 Department, during that entire period of time that was
8 occurring, was misapplying perhaps that statute under
9 their misunderstanding, then you can find that this Notice
10 of Determination was not issued timely because it was not
11 issued within three years of the date of the close out.

12 And to be clear, although, I think there was an
13 equity argument here, I'm not making it. Then the fact
14 that the 2009 amendments seem to make it pretty clear that
15 there was not an intent. There was never an intent for
16 taxpayers. Individuals, people, persons, to be held
17 liable for eight years when the corporation to which the
18 liability originated was only three years.

19 I think that was the purpose of the change in the
20 statute. I realize the change in the statute is not
21 retroactive. I'm not asking it to be applied retroactive.
22 It clearly says, "On or after January 1st." I'm simply
23 saying that the interpretation that was being used prior
24 to that was incorrect and that this NOD was not issued
25 within three years. It should have been issued within

1 three years. The interpretation that was being used to
2 justify eight years was not correct, should be adjusted,
3 and this NOD should be canceled because of that.

4 So that's what I had. That's my argument for the
5 first one. Do you want to -- do we address that now or do
6 we -- do I move on?

7 JUDGE BROWN: You can move on.

8 MR. MICKEY: Okay. So barring your finding that
9 the entire Notice of Determination should be deleted,
10 canceled, based on the first position, we're now going to
11 address the issue of whether or not both Appellants --
12 either or both Appellants were factually and really
13 responsible persons who had the authority and ability to
14 pay the taxes.

15 I will concede that the Department is -- and
16 they're probably going to list a -- they could list a --
17 list of things they have in the D&R and the supplemental
18 D&R that they put together to support their findings. We
19 don't dispute that those things took place. There's no
20 point in me sitting here and saying that the documentation
21 that they have doesn't exist. Returns that were filed
22 weren't signed -- weren't filed by the person signing it.

23 We're not making that. We're not -- that's not
24 what this is about. So we concede that those factors are
25 there. What we do not concede and what we will not accept

1 is that those items are sufficient to dictate a finding
2 that these two individuals, the Appellants, should be held
3 responsible as responsible persons.

4 Whether you look at what I'm going to present
5 here as a basis for supporting that they're not
6 responsible persons, or whether you look at it in terms of
7 they didn't have the authority or the ability to pay. It
8 doesn't matter to us. Okay. Because either of one of
9 them, if they're not supported, will element the
10 liability, because we all know that all of the elements
11 have to be satisfied.

12 So what I'm suggesting here -- and the exhibits,
13 first of all, Exhibit 4 -- our Exhibit 4, which is the
14 signed affidavit under penalty of perjury by the
15 Appellants. They have done a fantastic job recollecting
16 over 10 and 20 years, okay, what took place during that
17 period of time. They attempt to address some of what the
18 Department had put together during that period of time.
19 And they bring in other information that is very, very
20 relevant to this finding, that to date has not really been
21 addressed in our opinion.

22 The case died within the BOE before we got to the
23 oral hearing after this stuff was all presented. It just
24 disappeared. We talked about that at the prehearing
25 conference. I'm not -- I'm making the argument now

1 against -- you know, this thing needs to go away because
2 of that. But it is absurd that the case got pulled from
3 the oral hearing calendar by the Department, and it
4 disappeared for four years and then it popped up over to
5 OTA. Resurrected. Okay.

6 They, again, tried to recollect what had gone on,
7 and we prepared the Exhibit 4. Originally, they prepared
8 what's in the brief. They prepared the brief, which is
9 synonymous almost with the Exhibit 4, except the dates
10 were changed because it was four years later. In that
11 statement and also in the brief, you see that they
12 outlined what they were operating under. How they were
13 operating this business. There's no question that they
14 are the corporate officers of record. It's not in
15 dispute.

16 What has been overlooked all the way up to now --
17 and perhaps it won't be overlooked now -- is the fact that
18 they did not have the authority or the ability to pay
19 these liabilities that are in question. The D&R and SD&R,
20 they address that to some extent, but overlooking the
21 foundation of the fact that the real person here that
22 should have been sought after was the attorney who was
23 representing this to Appellants through the process early
24 on.

25 This gentleman who I believe you call him an

1 officer of the court is a bankruptcy attorney. The
2 Appellants hired him because they did not have the
3 knowledge of how all of this worked. That individual
4 explicitly told these taxpayers, these Appellants, whether
5 he was right or wrong, that they could not pay the
6 liability in question. They followed the directives of
7 that attorney.

8 Subsequent to the first attorney, Dan Lucid,
9 there were two other attorneys that came on board and
10 followed through to the ultimate conclusions of the
11 bankruptcies that took place sometime in 2000. What --
12 what has been missed here is this concept that the
13 taxpayers did not have the authority. They did not have
14 the perceived authority.

15 You can say that they were wrong. You can say
16 that the attorney was wrong. But the fact is, these two
17 individuals did not act willfully in not paying these
18 taxes. They did not. They did not believe that they
19 could pay them. And they have tried to address that all
20 the way through.

21 And 6829 should have been created to avoid the
22 situation where individuals are true -- truly, willfully
23 not paying taxes that they owed. They know they owe it.
24 They absolutely have the ability to pay it, the authority
25 to pay, and they just choose not to pay it. And yes,

1 other -- other creditors were paid because that's what the
2 attorneys and the trustees working together were telling
3 the Appellants they had to do.

4 They were not making these decisions on their own
5 because they were told they could not. Now I found
6 another case, and I realize that you're not probably
7 governed by federal cases. But there's a case here, and
8 I'll give you the name of it. It's -- and this is going
9 to -- I didn't put this in as an exhibit because I
10 actually found this in my last-minute preparation.

11 I figured you probably wouldn't take it anyway.

12 JUDGE BROWN: It doesn't have to be an exhibit.
13 You can just give us the citation -- the name and the
14 citation.

15 MR. MICKEY: That's Gray Line Company.

16 JUDGE BROWN: Spell it.

17 MR. MICKEY: Gray Line, G-r-a-y L-i-n-e, Company,
18 a Corporation, Appellant versus R.C. Grenquist District
19 Director of Internal Revenue. And the number is relevant.
20 237 F.2d 390. It's a 1956 case. And I don't know what
21 the whole case is about. I, you know, didn't look at
22 that. I was looking for information that has historically
23 played to the concept of willfulness.

24 When they do their presentation -- when the
25 Department does their presentation, they're going to

1 recite what it says. And they could say, oh, all we're
2 going to say is it doesn't have to be a bad motive. We --
3 we know all that. Okay.

4 We're not acknowledging that that's not what the
5 law says. But that idea has not been further defined.
6 And it's not -- it can't be a catchall for just saying,
7 oh, it wasn't a bad motive. It doesn't matter, so
8 everything works. So I was looking for information that
9 helped us, helped you, and the Department in the future,
10 further define this idea of willful element. And the one
11 section of this court case that I'm going to read, it
12 just -- it talks to this.

13 It says -- there was a letter that had been given
14 to the taxpayer, I think. And they had been directed by
15 attorneys to do something. And the court came back and
16 said, "Appellee would spell willfulness out of Appellant's
17 failure to comply with the demand in the letter of
18 June 30, 1948. Appellant, however, in relying upon the
19 advice given to it rather than upon the interpretation
20 contained in the letter, does not show willfulness.
21 Appellant's position was not arbitrary or unreasonable."

22 It's exactly what happened here. The taxpayer
23 tried everything to do -- to try to do everything that was
24 right. They didn't try to wing it on their own because
25 they didn't know what they were doing. They didn't

1 understand the process. They were in a bind, no doubt.
2 And they hired professionals, officers of the court, to
3 help direct them through that process all the way to the
4 very end.

5 And that officer of the court slash attorney did
6 exactly what happened here. He gave them the advice, told
7 them what they had to do, and didn't really give them an
8 election to do anything else. And that's what they did.
9 And they were not unreasonable. They were not -- it
10 certainly was not a bad motive, but we know that's not
11 enough. It was not unjustifiable. It was not negligence.
12 They did what they were being told to do.

13 So I have seen other cases where the issue came
14 down to whether or not someone had to ask permission to do
15 the things that they were being told they had to do. Did
16 they have the final authority? Okay. That, in this case,
17 is the key point. They did not understand that they had
18 the final authority. They were going by the officer of
19 the court who told them they did not, that they could not
20 do this. And they followed exactly what they thought the
21 courts were telling them, and the Department is now saying
22 that's not enough. And that's what we dispute.

23 So I would hold that the fact that these other
24 individuals had taken on this role of guiding the
25 taxpayer, not just as friends, but as professionals,

1 officers of the court. I keep throwing that out because
2 this is what this is. This is a designated licensed
3 individual that is supposed to understand these rules and
4 interpretations of laws, and this is what these taxpayers
5 hired to tell them what to do, and they did exactly what
6 they were told to do by that.

7 And now we have a somewhat of a court and a
8 juris -- you know, jurisdiction coming back and saying
9 that doesn't work. And there's a conflict there. And
10 6829 and the subsequent 1702.5, in our opinion, is not
11 designed to -- to catch that kind of a situation. That's
12 exactly the kind of situation that it is designed not to
13 catch, to have these justifiable reasons for what they
14 did.

15 So all the other information that the Department
16 has, returned signed, you know, they are on the permit,
17 all that stuff, that all sort of gets trumped by the fact
18 that maybe that's enough to show that they started out as
19 a responsible person. But at the end of the road here --
20 or during the middle of this road, they became individuals
21 who did not have the authority to make happen what the
22 State wanted to happen. And now they are paying the price
23 for it. And they've been paying the price for 20 years
24 now for this.

25 And it's -- I -- I know that there's other things

1 that the State is going to bring up, you know, about how
2 the bankruptcy works. And I have told my clients I'm not
3 a bankruptcy attorney. I don't know how bankruptcy works.
4 I don't know what protections there are and what stays are
5 and all that.

6 But I do know that when you hire an attorney and
7 the attorney and the trustee take on this role, that your
8 authority has been diminished or lost. There's a
9 statement in the D&R or the supplemental D&R that talks
10 about how there are other bills paid, but they -- they
11 don't have evidence that the taxpayers told the trustee
12 what to pay or what not to pay. They never did any of
13 that. That's what the attorneys were doing with the
14 trustees.

15 And all that was happening was they were being
16 told what to do by these individuals, and that's what they
17 did. So the real authority goes back to Dan Lucid and to
18 the trustees. And Exhibits 1 and 2 -- is it -- yeah.
19 Exhibits 1 and 2 in our package, those are the letters
20 that were written by Dan Lucid, the attorney. Written to
21 show that what was going on was exactly what the taxpayers
22 were saying. Dan Lucid was telling them, "you could not
23 do this. You can't do it."

24 He took on the role as authoritative person who
25 should have maybe made the taxes get paid to the State but

1 didn't. But the Appellants did not make that decision.
2 They did not have the authority. So based on that we
3 would hold that regardless of whether you find they're
4 responsible persons, regardless of the fact they knew
5 there was liability. They were filing the returns. We
6 can't argue that they didn't know the returns are not
7 being filed or the returns being filed, not paid.

8 But they did not have the requisite authority or
9 the ability to pay. And even if you want to say they had
10 the ability to pay, because ultimately they were writing
11 the checks, they weren't able to write these checks
12 without getting the authority from the trustee through the
13 attorney, and they were nothing but pawns to the trustee
14 and the attorney's plan of how to resolve the dire
15 situation that the corporation found them in.

16 And to come back now or come back seven years
17 later to these individuals for those taxes is not what the
18 statute nor the regulation should have ever intended to
19 capture. It was not. And we believe we have shown how
20 all the information that the Department has is not
21 sufficient to satisfy the authority and the ability to pay
22 the element which must be met.

23 And for that reason, we believe that all of these
24 periods should be deleted, removed, canceled, however you
25 want to refer to them as. There should be a re-audit

1 where they don't owe anything at all.

2 Thank you.

3 JUDGE BROWN: Thank you, Mr. Mickey.

4 I'm going to go ahead with a couple of questions,
5 and my co-panelist may have some. I don't know. And then
6 we'll -- after that we'll move on to hearing CDTFA's
7 presentation.

8 I wanted to ask about the period before the
9 bankruptcy filing in 1998.

10 MR. MICKEY: Can I step back a second?

11 JUDGE BROWN: Sure.

12 MR. MICKEY: Because I forgot to mention a couple
13 of things.

14 JUDGE BROWN: Okay.

15 MR. MICKEY: It's in the letter, but I should
16 clarify something. There was -- and I apologize. There
17 was a question about the timing of the bankruptcy, and the
18 timing of the returns that were filed in here. You will
19 see in their letter. You would have seen what I'm going
20 to say now because it's in their affidavit.

21 JUDGE BROWN: You mean Exhibit 4. I understand.

22 MR. MICKEY: In Exhibit 4.

23 JUDGE BROWN: Right. I'm just saying that
24 though, because there's two in the record.

25 MR. MICKEY: I'm sorry. You're right.

1 JUDGE BROWN: Okay.

2 MR. MICKEY: Exhibit 4. So you' will see that
3 there initially was a question about when the bankruptcy
4 filings were made, and there were two filings made. And
5 there was a question about whether one was dismissed or
6 transferred, and there is a distinction between the two
7 and debtor in possession comes up. All that has been
8 addressed. We acknowledge that's been addressed.

9 But the key is that we'll see in their
10 Statement 4 is when Dan Lucid came on board in around
11 August of 1998. Okay. August. He did not come in at the
12 end of August of 1988 when the initial filing of the
13 bankruptcy was done. He came on board in August of '98,
14 and that's when he began counseling and advising the
15 taxpayers as to what to do.

16 So if we look at the May -- if you look at the
17 May return that's in question, it's only \$41 and late
18 penalty is left, and July is a small amount of penalty as
19 well. The real -- the tax doesn't start until August of
20 1998. So that return became due in September of 1998.
21 Well, Dan Lucid came on board in August.

22 Now, even though the bankruptcy wasn't filed
23 until October, the first bankruptcy filed in October. He
24 was already counseling them in August. So when the August
25 return came due in September, he was already advising them

1 that they could not pay these pre-petitioned liabilities
2 because he was preparing to file the bankruptcy in
3 October.

4 So once again, maybe that's right, maybe that's
5 wrong, but that's what he was telling them to do as that
6 officer of the court irrespective to the bankruptcy
7 proceedings that he was working on, and that he ultimately
8 filed.

9 I don't know if that will answer your question,
10 but that's -- that's why August and September, and, I
11 guess, even October you would say, if you looked at the
12 December date why they weren't handled. They weren't
13 handled because Dan Lucid was already representing them
14 and told them they couldn't do it. And they followed what
15 he said.

16 JUDGE BROWN: I think that is -- that is
17 essentially what I was talking about.

18 MR. MICKEY: It's a thing I should have
19 mentioned, yes.

20 JUDGE BROWN: Okay. Let me ask about the
21 December 1999 Sales and Use Tax Return that was due on
22 January 31st, 2000. So it's -- if I understand your
23 argument correctly, you're saying that the whole period
24 when Appellants were debtors in possession under
25 Chapter 11 prior to the Chapter 7 conversion in the 1999

1 period, that all of the taxes being paid were under the
2 attorney's instructions per the attorney's -- I don't know
3 what the technical term -- the attorney's communications
4 with the trustee?

5 MR. MICKEY: I can't directly answer that because
6 I don't know what all conversations were had during the
7 later periods. I know that they had attorneys that entire
8 period. There were three attorneys, I think, that ended
9 up being involved towards the end. The bankruptcy wasn't
10 finalized, I think, until April of 2000, right before the
11 business was closed out.

12 I don't know what went on during that later
13 period, so I don't want to attest to that. But I know
14 they were under the direction of the attorneys the entire
15 time.

16 JUDGE BROWN: You get what I'm asking about
17 because there were other -- there were tax periods in 1999
18 that were paid.

19 MR. MICKEY: Yes.

20 JUDGE BROWN: And then December 1999 was not.

21 MR. MICKEY: I don't --

22 JUDGE BROWN: And that -- but that was long
23 before the conversion to Chapter 7. So I don't think that
24 was the reason what -- about what changed for
25 December '99.

1 MR. MICKEY: I don't specifically know that other
2 than I don't know what the conversation would have been
3 and why that happened. I don't -- I don't know. I'd
4 rather say I don't know than try to give you an answer
5 that I don't know. Because the entire time they were
6 under the guidance of the attorneys.

7 There was a point in time they were allowed to
8 run the day-to-day business operation, and perhaps that
9 was why the period in '99 was being filed because they
10 were not pre-petitioned. I think that's actually
11 addressed in their letter now that I think about it. So
12 that -- so, you know, so why the 2000 -- the 1999 one
13 wasn't filed, perhaps that has a different bearing or
14 answer than the earlier ones, which is the majority of it.
15 I -- I don't know.

16 JUDGE KWEE: I did have one clarification. I'm
17 not understanding that one bankruptcy was filed because it
18 looks like there's a number of petitions that were filed.
19 One is from, looks like, December. And then another one
20 from November, and then there was another petition that
21 was dated in October, it looks like.

22 And the decision that CDTFA had said the
23 bankruptcy was filed the following year in January 25th of
24 '99, I believe. So I'm just -- I'm not -- I'm really
25 confused why there's so many bankruptcy petitions, and I'm

1 just wondering what the -- if the parties agree when there
2 actually was a bankruptcy filing that was in place.

3 MR. MICKEY: In the Exhibit 4, they outline the
4 time frame for that. What happened was -- and I don't
5 know the specific case. But there was a bankruptcy that
6 was filed in October, and it was filed -- I think it was
7 October -- and it was filed in the wrong court. It was
8 filed in Northern California, I think. So they had --
9 they got dismissed, and they refiled it in December, I
10 think in Southern California or flip-flop. I don't
11 remember. It might have been flip-flop.

12 But however, there was a filing. It was
13 dismissed, and then it was refiled. And that one that was
14 refiled is the one I believe that followed all the way
15 through.

16 JUDGE KWEE: Oh, okay. So if I'm understanding,
17 you're saying that with respect to even the October one,
18 the October filing, they would have been precluded from
19 paying the liabilities for that month or for, I guess,
20 September, which would have been due in October because
21 the bankruptcy attorney was telling them they can't pay
22 pre-petition debts. And the time they had an active
23 bankruptcy they would have been precluded from making that
24 payment. Is that what you're -- what you're getting at?

25 MR. MICKEY: I think so. What we're saying and

1 what we're explaining took place was during that entire
2 time from August of '98 all the way through, at least
3 until for the '98 periods and then -- and then the first
4 part of '99 periods. The attorneys had taken on the role
5 of telling the taxpayers what they could and could not
6 pay.

7 Whether or not that was right or wrong, I don't
8 know. I can't attest to that because I'm not a bankruptcy
9 attorney. That's why we had Dan Lucid write the letters.
10 He's explaining why he did what he did. I don't know if
11 it's right or wrong. But the taxpayers followed their
12 guidance. That's what we're saying right there.

13 And the timing of -- the timing of the actual
14 filings of the petition for bankruptcy, that didn't
15 really -- wasn't in the mindset of the taxpayer as far as
16 what they were doing. What was the mindset of the
17 taxpayer as far as what was going on, was that regardless
18 of those multiple filings, they were being told they
19 couldn't pay these?

20 JUDGE KWEE: Okay. And so I'm looking at your
21 Exhibit Number 1, which is the letter from Daniel Lucid
22 dated May 18th, 2011, for example, one of the letters.
23 And under Bullet Point 2 he was saying, "Sea Elm was
24 prohibited by bankruptcy law from making tax payments on
25 pre-petitioned tax debts to any government agency except

1 by order of the bankruptcy." Is that what you're
2 referring to in reference to your argument that they were
3 directed that they could not make payments?

4 MR. MICKEY: Yes, that' part of it. His letter
5 is the whole thing.

6 JUDGE KWEE: Okay. So it seems that this is
7 referring to payments that occurred after the filing of
8 the bankruptcy petition because they're talking about
9 except by order of the bankruptcy court. I'm wondering if
10 there's anything in the file there where the attorney was
11 directing the clients that they can't make payments before
12 the filing of the bankruptcy, or this is what you're
13 relying on?

14 MR. MICKEY: Well, all we have -- this is a long
15 time after the fact. Dan Lucid is not available. He
16 wouldn't do anything more than this. We couldn't get any
17 more clarification of what happened than this. Dan Lucid
18 is not available now for us to get a hold of. And in the
19 affidavit of the Appellants, they talked to that.

20 So whether -- this is the key. Whether something
21 was pre-petitioned or not pre-petitioned in the eyes of
22 the bankruptcy court, that -- that's really not what is at
23 issue. When these items were not being paid that are in
24 dispute, the taxpayer was being told by Dan Lucid that
25 these were pre-petitioned liabilities that could not be

1 paid.

2 What impact the dismissal of the first court case
3 and the filing of the second bankruptcy court case had on
4 that definition, that was determined after the fact. And
5 that didn't change the fact that they already got -- paid
6 them, because that's what Dan Lucid told them.

7 JUDGE KWEE: Okay. Thank you.

8 Do you mind if I ask CDTFA to address something
9 in their opening presentation?

10 JUDGE BROWN: If you want, go ahead.

11 JUDGE KWEE: Just a clarifying question for
12 CDTFA. I'm just wondering if CDTFA in their opening
13 presentation could address whether or not the filing of
14 the bankruptcy in October would have affected his
15 authority or ability to pay the liabilities for, for
16 example, the October or September liabilities which would
17 have been due after the filing of that petition or if that
18 is relevant in your position -- CDTFA's position to his
19 responsible person liability.

20 MS. PALEY: I do address it in my --

21 JUDGE KWEE: Okay. Thank you.

22 JUDGE BROWN: Okay. We can go ahead with CDTFA's
23 presentation, and I'll just do it. You have 30 minutes.

24 MS. PALEY: Thank you.

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PRESENTATION

MS. PALEY: Appellants were corporate officers of Sea Elm Incorporated and ran a floral business called Floresque in Caramel, California from 1996 to the year 2000. The corporation seller's permanent was closed out effective April 10th, 2000, Exhibit G, Dual A, page 8.

During certain periods between May 1998 and December 1999, the corporation failed to remit sales and use tax it had collected. The Department holds the Appellants personally liable for the unpaid corporate liabilities that originated from nonpayment of Sales and Use Tax Returns filed for the months of May, July, August, September, and October of 1998 and December of 1999.

As you are aware, personal liability under Section 6829 requires four elements: The corporation must be terminated; the corporation must have collected sales tax reimbursement; the person must have been responsible for the payment of sales and use taxes; and the person's failure to pay must have been willful.

The first two elements are not in dispute. As to the third element the evidence establishes that Appellants were the persons responsible for the corporation's payment of sales and use tax. A responsible person means any person having control or supervision charged with the responsibility of filing returns or payments or had a duty

1 to act for the corporation in compliance with the law when
2 the taxes became due.

3 Both Appellants were the only corporate officers
4 of the closely-held company, as demonstrated by Sea Elm
5 seller's permit application and the Secretary of State
6 filings, Exhibit G, the Dual B and C, pages 9 and 10. The
7 Appellants conceded during the appeals conference that
8 they were the officers of the corporation with
9 responsibility for sales and use tax compliance.

10 Ms. Laspino signed each non-remitted return at
11 issue, Exhibit G, Dual J, pages 26 through 44. Since
12 Appellants were the only two people running Sea Elm, each
13 had the control and duty to ensure compliance with the tax
14 laws. No one else had responsibility for Sea Elm's
15 business operations, even while in bankruptcy proceedings.
16 And I'll discuss the bankruptcy in greater detail in a
17 moment.

18 As to the fourth element, failure to pay is
19 willful if the person had knowledge that the taxes were
20 not being paid, and the authority and ability to pay but
21 failed to do so. No bad purpose or evil motive is
22 required. Willfulness is defined and controlled by
23 statute in California. The California law is what
24 controls.

25 And I haven't had the opportunity to review the

1 Gray Line Case that was cited, but I would that it is --
2 it is a federal case and in federal court. So that is a
3 distinction to be made just off the bat there. I would
4 also respond to Appellants' contention that the
5 questionable or bad legal advice that they may have
6 received does not negate or relieve liability. That would
7 be a separate civil action for them to take against that
8 counsel.

9 With respect to knowledge, it is no longer in
10 dispute. With respect to authority, we acknowledge the
11 bankruptcy proceedings. However, does not afford the
12 relief sought by the Appellants. With respect to
13 Appellants' contention that after the corporation's
14 bankruptcy, they are no longer personally liable for the
15 debts of the corporation. We shall discuss the effects of
16 filing a bankruptcy under Chapter 11 of the bankruptcy
17 code.

18 A case filed under Chapter 11 of the bankruptcy
19 code is frequently referred to as a reorganization
20 bankruptcy. A Chapter 11 case begins with the filing of a
21 petition with the bankruptcy court, which is filed by the
22 debtor. The filing of a petition under Chapter 11
23 triggers an automatic stay of creditor actions against the
24 debtor for most pre-bankruptcy petition debts.

25 The filing date essentially sets up two claims

1 of -- two classifications, pre-bankruptcy claims and
2 post-bankruptcy claims. Appellants initially filed
3 bankruptcy in the Central District on October 30th, 1998,
4 which is shown in Appellant's Exhibit 2, page 3. That's
5 when they initially filed erroneously. Not even two
6 months later on December 15th, 1998, the courts dismissed
7 and vacated that petition in its entirety to improper
8 venue. And that's in Exhibit C, the Supplemental D&R,
9 Exhibit 2, Page 20, and Appellant's Exhibit 1, page 2.

10 The corporation then filed for Chapter 11
11 reorganization bankruptcy in the Northern District of
12 California on January 25th, 1999, Exhibit G, Dual E, page
13 16. The Department maintains that the January 25th, 1999
14 bankruptcy filing in the Northern District is the bright
15 line that separates Sea Elm's pre-bankruptcy petition
16 debts from its post-bankruptcy petition debts.

17 Given that the Central District Case was
18 dismissed as improper, it's, therefore, in consequential
19 to this appeal. What's at issue are six non-remittance
20 monthly returns, five pre-bankruptcy returns, May, July,
21 August, September, and October 1998, and one
22 post-bankruptcy return, December 1999.

23 What's important to recognize is that the 5/1998
24 non-remittance returns were due and payable prior to the
25 bankruptcy filing. And in fact, May 1998 would have been

1 due in June 1998 which even precedes Mr. Lucid's purported
2 advice. I would also note that Mr. Lucid apparently was
3 the attorney responsible for filing the erroneous Central
4 District filing but was not counsel, subsequently, in the
5 Northern District as noted in the same exhibit of the
6 filing dates.

7 Upon filing a Chapter 11 petition, a debtor also
8 automatically becomes a debtor in possession. And the
9 filing triggers an automatic stay of creditor actions
10 against most pre-bankruptcy petition debt. And those
11 debts are addressed by the plan of reorganization. And
12 generally, the debtor in possession is prohibited from
13 paying those debts.

14 A debtor in possession is, however, expected to
15 act as a fiduciary and continue to operate the business
16 with the same rights and powers. To be clear, in this
17 case, the bankruptcy filing did not prevent Appellants
18 from paying or relieve the liability of pre-bankruptcy
19 liabilities that were due and payable prior to the
20 bankruptcy filing.

21 In this case, the May, July, August, September,
22 and October 1998 monthly returns were due prior to the
23 bankruptcy filing. The Appellants, therefore, had the
24 authority to pay the liabilities when they were due. And
25 they should have been paid prior to the bankruptcy filing.

1 For example, the August '98 reporting period became due
2 and payable on September 30th months before the bankruptcy
3 filing.

4 And even the October 1998 return due and payable
5 on November 30th was prior to the January 25th bankruptcy
6 filing. Regarding post-bankruptcy filing debts, pending
7 the confirmation of the reorganization plan, the debtor in
8 possession is allowed and expected to continue to operate
9 the business and pay post-bankruptcy petition debts,
10 including taxes.

11 The post-bankruptcy non-remittance return for
12 December 1999 falls into this category as established by
13 the evidence and in accordance with bankruptcy law.
14 Appellants did not cease to perform the duties and
15 obligations of running Sea Elm during the 14 months
16 between bankruptcy filing and the later conversion to
17 Chapter 7, liquidation.

18 This is evidenced by the Sales and Use Tax
19 Returns filed and paid for by the Appellants during 1999,
20 contrary to their claim of non-control post-bankruptcy
21 filing. And that's Exhibit G, Dual J and I, pages 26 and
22 25. Appellant's, therefore, had authority to pay the
23 December 1999 return. At all relevant times, Appellants
24 had the authority to pay the liabilities at issue at the
25 times they were due.

1 With respect to the ability to pay at the time
2 the taxes that were due, Sea Elm had funds available to
3 pay the taxes, instead used the collected funds to pay
4 other creditors. EDD records in Exhibit G, Dual K, pages
5 45 to 51, show the corporation had funds available when
6 the taxes were due and thereafter because the corporation
7 paid wages of its employees exceeding \$90,000 during the
8 liability periods.

9 The sales tax is about \$6,800. Suppliers were
10 also being paid, Exhibit G, Dual L, page 52. And let us
11 not forget that the sales tax reimbursement was collect.
12 Regarding the late payment penalties, the Notice of
13 Determination, Exhibits E and F issued to Appellants
14 include 10 percent late payment penalties of approximately
15 \$690, which were incurred by the corporation for failing
16 to timely pay the tax due for the non-remittance returns
17 filed.

18 Section 6592(a) allows for relief of late-fee
19 liability if reasonable cause is found. The required
20 statement under penalty be perjury -- excuse me -- allows
21 for relief of late penalty liability if reasonable cause
22 is found. The required statement under penalty of perjury
23 is provided and there is a determination that the failure
24 to pay was due to circumstances beyond the corporation's
25 control and occurred despite the exercise of ordinary care

1 and the absence of willful neglect.

2 A required statement under penalty of perjury was
3 provided. In the statement Appellants make the same
4 arguments in support of relief from the late payment
5 penalty as made for the relief of personal liability lies
6 as was done here today, in short, that the bankruptcy
7 caused nonpayment. As discussed previously, Sea Elm's
8 bankruptcy did not impact Appellant's authority or ability
9 to pay its taxes.

10 And further, nothing in the record indicates that
11 the corporation's failure to timely pay was due to
12 reasonable cause. Regarding the statute of limitations
13 issue raised, Section 6829 was amended by the Assembly
14 Bill 1895 in 2008 adding Subdivision F, providing a
15 specific statute of limitation for the section, the
16 three-year statute of limitation from the Department's
17 actual knowledge of termination or eight years from the
18 corporation's termination, whichever period expires
19 earlier with an operative date of January 1, 2009.

20 The law is not retroactive. The legislature had
21 the opportunity to act, and that is how the law stands.
22 Since the NOD in this case was issued on February 2, 2007,
23 prior to January 1, 2009, operative date, the shorter
24 three years -- three-year statute of limitations added by
25 Assembly Bill 1895 cannot apply.

1 Prior to January 1, 2009, the statute of
2 limitation for issuing a determination commenced on the
3 last day of the month following the quarterly period in
4 which the business terminated and ran for three or eight
5 years, depending on whether or not the responsible person
6 filed a return in his or her name. In this case,
7 termination was on April 2000.

8 And because there's no evidence that Appellants
9 filed a sales and use return as individuals, an eight-year
10 statute of limitations applied for the issuance of this
11 determination and the authority being in Section 6487(a)
12 and the memorandum opinion in Hosmer Chandler McKoon. So
13 the Department had until July 31st, 2008 to timely issue a
14 Notice of Determination to any persons liable for Sea
15 Elm's unpaid liabilities pursuant to 6829. The NODs,
16 Exhibits E and F, were, therefore, timely issued on
17 February 2nd, 2007.

18 Regarding relief of interest, the Department has
19 acknowledged an unreasonable delay from 2014 to 2018 and
20 relieved interest for that period as allowed for under the
21 law. However, that does not change the fact that the
22 Appellants are personally liable for the remaining amounts
23 at issue. There is no legal basis to relieve the tax
24 liability for an unreasonable delay.

25 We are sympathetic to the Appellants' stated

1 medical and financial straits. Yet, based on all of the
2 evidence and the law, the Department has met the elements
3 and burden for imposing personal liabilities to the
4 Appellants. So for these reasons we request the appeal be
5 denied.

6 JUDGE BROWN: Thank you.

7 MS. PALEY: Thank you.

8 JUDGE BROWN: Do you want to go first? Go ahead.

9 JUDGE KWEE: Yeah, I would like to follow up on
10 the question I had asked right before your presentation.
11 So from my understanding and the decision, you had the
12 pre-petition period of January 1st to January 25th, 1999.
13 They filed bankruptcy in the 25th of 1999, and CDTFA
14 waited -- deleted that first month of '99 on the basis
15 that they didn't have authority to pay when that January
16 payment became due in February of 1999; is that correct?

17 MS. PALEY: Yes.

18 JUDGE KWEE: So I'm just trying to analogize that
19 or I'm trying to understand why when they filed bankruptcy
20 the first time in -- I believe you said October 30th, of
21 1999?

22 MS. PALEY: It was --

23 JUDGE KWEE: I meant '98. I'm sorry. Why that
24 wouldn't have prevented them from paying the pre-petition
25 at that and personal liability for the month of September,

1 which would have been due on October 31st, the day after
2 following the bankruptcy petition. That would have been
3 the pre-petition debt. What are their authority to pay
4 that liability would have been up then because the
5 automatic stay would have still kicked in at the time of
6 the bankruptcy filing, and that wasn't thrown out until
7 December 15th? So I'm trying to -- I'm having a hard time
8 analogizing, I guess, comparing why January '99 was
9 thrown, but why October '98 was not thrown out.

10 MS. PALEY: And we believe that the evidence is
11 clear that case was erroneously filed and dismissed and no
12 protections given. And we believe that to allow that to
13 stand and to allow a relief to stand, then that would open
14 the floodgates to reliability without any merit.

15 So people could just file an erroneous bankruptcy
16 to try to stay off that -- that liability, which would
17 be -- which would be inappropriate. The case that went
18 forward is the -- in the appropriate venue was the
19 January 25th, 1999.

20 JUDGE KWEE: Well, I guess what I'm not
21 understanding is even though it was thrown out later, and
22 then maybe on the 16th that he could have had -- he could
23 have paid. But I -- I'm just thinking there is still an
24 automatic stay that kicks in when he files bankruptcy, and
25 that would have applied unless I'm misunderstanding

1 something until the case was thrown out. Or am I not
2 understanding what the stay -- how the stay operates?

3 MS. SILVA: I would also add -- I mean, our
4 position is that there was, you know, nothing happened in
5 that, you know, short amount of time. And once it was
6 dismissed, there was time also and authority and ability
7 to pay. And they actually filed returns and paid the
8 November 1998 returns. So they knew after that it was
9 dismissed that they now had the ability to, you know, to
10 make payments and the authority to make payments.

11 And while they filed non-remittance returns, they
12 filed returns and they did pay one month. They filed the
13 return and did pay the month before they filed the
14 bankruptcy on January 25th. So even if we want to say
15 there was some type of pre-petition liability that can be
16 paid, although, that's not our position, there's enough
17 time in between where they then gained the authority and
18 ability to pay. And they did, some of it.

19 JUDGE KWEE: Okay. Thank you. I had only been
20 asking about September, but I understand what you're
21 saying now. And I did have one other follow-up
22 clarification in the -- I understand there was amnesty
23 interest penalties here. And in the decision and
24 supplemental decision it indicated that CDTFA was
25 conceding it, provided it was paid within 60 days of the

1 decision being finalized. Is that still the position of
2 CDTFA?

3 MS. PALEY: Yes, that's still our position.

4 JUDGE KWEE: And what document would trigger
5 that -- what document -- is it a document OTA is sending
6 out or is it a document that CDTFA is sending out that's
7 going to trigger the time -- the running of the 60-day
8 period to pay the liability?

9 MS. SILVA: We believe that our document goes out
10 once your decision is filed --

11 JUDGE KWEE: Okay. Thank you. I just --

12 MS. SILVA: -- with respect to the liabilities.

13 JUDGE KWEE: Okay. Thank you. I just wanted to
14 clarify for the record so that the taxpayers would know in
15 the event it went that way. Thank you.

16 JUDGE BROWN: I guess I want to ask CDTFA to --
17 if you can address a little more on this concept of
18 perceived lack of authority. Are you saying that,
19 essentially, whether in a strict legal sense if the
20 taxpayers have authority, it doesn't matter whether they
21 have any reason to believe that they don't have authority,
22 like say, from the advice of an attorney?

23 MS. PALEY: And I tried to address that as far
24 as --

25 JUDGE BROWN: I heard -- I heard earlier you said

1 if they were relying on legal advice that's not any sort
2 of defense, and that that might be grounds for a civil
3 claim against the attorney.

4 MS. PALEY: Yes.

5 JUDGE BROWN: But there's no circumstances where
6 relying on, let's say, hypothetically incorrect legal
7 advice could ever establish lack of authority. I mean, it
8 is no circumstance relevant to this kind of case.

9 MS. PALEY: No. But all the more so in this
10 particular case where we've seen that they have the
11 authority and did so as evidenced by their filings, their
12 Sales and Use Tax Return filings post-filing January '99,
13 as well as what Ms. Silva was just speaking of that they
14 in fact filed those returns, albeit late, but filed them
15 themselves and made a payment for the November date.

16 JUDGE BROWN: And I think you were talking about
17 this earlier with Judge Kwee's questions, but I wanted to
18 make sure I followed about the October. He was asking
19 about the September '98 Sales and Use Tax Return, and I
20 wanted to make sure and I think you were responding and
21 addressing the October '98 return. So --

22 MS. PALEY: Well, the October -- the Central
23 District October 1998 filing, again, was dismissed and
24 vacated in its entirety. So we believe that does not
25 afford them any protection.

1 JUDGE BROWN: So -- but the October 1998 return
2 was due in November of '98.

3 MS. PALEY: Yeah. Yes.

4 JUDGE BROWN: So and -- but the automatic stay
5 for the October '98 filing in the Central District --
6 Central District for the bankruptcy court, that did --
7 that does apply; correct?

8 MS. PALEY: We believe that it does not. We
9 believe the controlling date is January 25, 1999.

10 JUDGE BROWN: For that --

11 MS. PALEY: That is the case that went forward.

12 MS. SILVA: But as I explained earlier, even if
13 that is the case or you find that is the case, the
14 taxpayers here then gained their authority and ability
15 subsequent to the dismissal and actually used that. They
16 recognize they had the authority and the ability because
17 they filed returns after, before the January 25th filing,
18 and even paid one of those returns. So they understood
19 that they had authority.

20 JUDGE BROWN: Your concept that if you file in
21 the wrong venue that the automatic stay does not apply.
22 Is there any authority for that that you're aware of?

23 MS. SILVA: I think -- I think for us it's -- I
24 mean, it wasn't even transferred. It's like it didn't
25 exist. So I mean, maybe there was a stay. I don't know.

1 Apparently, maybe the attorney knew that or felt there was
2 and didn't do anything. But, you know, they filed other
3 returns afterwards.

4 So, I mean, it kind of -- I don't know that it
5 really matters here at the end of the day because they had
6 authority at the time before they filed the next. Even if
7 you want to say they -- there was a stay and they couldn't
8 file. Then subsequent to the dismissal, there was time
9 before the next filing because once it was dismissed there
10 was nothing. So they had then gained the authority and
11 ability, and they actually used that authority and ability
12 by paying.

13 So, I mean, even if you want to say there was a
14 stay, it doesn't matter here because they lost it when it
15 was dismissed. And there was a time before the next
16 filing. And they actually recognized that they had
17 authority and ability and they filed returns and paid a
18 return.

19 JUDGE BROWN: Just one second. Then I'll say we
20 can proceed to Appellants' rebuttal, if CDTFA has nothing
21 further.

22 Mr. Mickey, you have 15 minutes.

23

24

REBUTTAL STATEMENT

25

MR. MICKEY: Thank you. First thing, when the

1 Department is using the pronoun "they," you know, they
2 knew they had authority. They did this. It would not
3 have been they. It would have been still at that time Dan
4 Lucid, the attorney directing the taxpayers on what to do.
5 Now, much of what the Department said in their write up,
6 we don't disagree with.

7 I told you that at the very beginning. I knew
8 what they were going to say and all the things they found,
9 that case that they built. We don't disagree with a lot
10 of that, but I do disagree with a couple of things.
11 First, I disagree fundamentally with the idea that there
12 cannot be control taken away and authority taken away from
13 somebody and -- and passed on to somebody else during
14 times like this.

15 In this case, again, I need to stress this
16 because this is really what the heart of this is. We do
17 believe that there were stays put in place because of
18 these filings. Even if there wasn't, we still hold that
19 the taxpayer was told there was by this officer of the
20 court. But I believe there was. And I believe that
21 during the period of time where the Department says, "They
22 knew that there was -- they had authority, so they filed
23 returns." Perhaps that was in between the two filings,
24 and so they filed it.

25 It didn't change the idea to them through their

1 attorney that the periods that are at issue right here are
2 still pre-petitioned because they were going to file
3 another bankruptcy. Maybe that is not how the bankruptcy
4 works exactly, but that's what Dan Lucid was hired to tell
5 them until it got up to that -- to that other jurisdiction
6 and they brought in -- I think it was Paul Cast to do it.
7 Okay.

8 So I disagree that the idea that authority could
9 not have been taken on by somebody else. And the idea
10 that it's a civil case, maybe there is. Okay. But we're
11 still talking today here about the civil matter between
12 the State and the taxpayers. And that has its own
13 foundational basis for being sustained or not sustained.

14 And when you find that they didn't have the
15 authority, you can't hold them liable because they could
16 have had a civil case against the attorney. That's
17 totally two different things. They are either liable
18 under the State's rules, or they're not. What happens in
19 civil court is totally different.

20 And I'm showing here that the one element if --
21 or the two, authority and ability to pay, have not been
22 satisfied by these two Appellants. And so some of what
23 they were saying, I think, is misplaced from the
24 perspective of looking at this concept of authority to
25 pay.

1 They in their presentation, they mention that
2 there are five prebankruptcy amounts. Five prebankruptcy
3 amounts compared when looking at the January filing, I
4 suppose, because there's pre-bankruptcy to the October
5 filing, which is July, August, September, and October.
6 Okay.

7 Because remember, the filing at the end of
8 October that was going to cover September and August and
9 July and May, making those pre-petition liabilities. Now
10 I just want to clarify something here. The May liability
11 -- we have focused a lot on the May and on the July. The
12 May liability is \$41.33 in late penalties. Okay. Not a
13 significant dollar amount.

14 The July '98 penalty -- unpaid penalty is \$15.41.
15 So what's -- the gist of what's at issue here is the
16 August, September, October, and the December '99. So we
17 really have three main tax amounts that are at issue. And
18 they are all three pre-petitioned when you look at either
19 the October date or the January date.

20 And when they got out of the first bankruptcy,
21 perhaps Dan Lucid told them to file the November and the
22 December because there was no bankruptcy there, but the
23 other debts still remained in their eyes as
24 pre-bankruptcy. So they weren't taken care of. So I feel
25 there's this window of time that the Department is talking

1 about.

2 The taxpayer did not know what that window of
3 time was because they were told -- they were not advised
4 to use that window. In fact, they were advised not to use
5 that window and to pay these pre-bankruptcy because they
6 couldn't. So there's, again, there's this idea of whether
7 it was right or wrong, and then there's an idea of whether
8 the taxpayers knew it was right or wrong, and whether they
9 are the ones with the authority.

10 They did not know it was wrong, and they did not
11 have the authority. Still despite what the Department has
12 raised in their conversation and to judge Kwee's notes
13 when talking about the September and October versus the
14 amounts due to the due date or the filing of bankruptcy,
15 both of them would apply.

16 Because bankruptcy for October would have been
17 November. And for September it would have been the end of
18 October. And the bankruptcy filing was filed before
19 October 31st. So both of those would have been
20 pre-petition bankruptcy amounts for the October filing of
21 the bankruptcy. Okay.

22 And then the other thing I want -- the concept
23 that the erroneously filing -- the erroneous filing of a
24 bankruptcy to gain protection that you wouldn't otherwise
25 have. I admit there may be some merit to that and that's

1 what the court should rule out; right? That's not what
2 happened here. There is not an erroneous bankruptcy
3 filing made for that purpose.

4 There was an erroneous bank filing made. And I
5 hate that word because that word is definitely a negative
6 connotative word when people use it. They made a mistake.
7 They filed in the wrong court. I don't suppose that's the
8 only time it's ever happened. And to say that it was
9 erroneously filed and, therefore, all the subsequent
10 protections and rules that apply to bankruptcy wouldn't
11 apply because it was found to be in error, and they filed
12 another one.

13 Doesn't make legal sense to me. And so I would
14 just hold that they filed the bankruptcy. The protections
15 took place, whatever they were. They were out of
16 bankruptcy. They filed returns for the periods they were
17 out, took care of them. They reentered bankruptcy, and
18 they are back into the control of courts. And they are
19 operating as they were told to operate by the attorney and
20 the trustee. And so we're right back to the point where
21 the Appellants did not have the authority and the control.

22 And to address the memorandum opinion, I also
23 have the memorandum opinion. And it's interesting in the
24 memorandum opinion it goes to talking about the statute.
25 So really quick I want to talk about that too. We did not

1 come here and say we wanted the statute that's provided
2 for by the new 6829 to be retroactive. I know it's not
3 retroactive. I said that.

4 What I am suggesting is that the concept that
5 there was eight years based on 6487(a) is misplaced when
6 you're looking at responsible person. And the fact that
7 the prior board members decide to put together a
8 memorandum stating that that's the way they interpret it,
9 didn't create the law and is still subject to question.
10 And perhaps the memorandum opinion is wrong as well
11 because it's clearly what the State's position always has
12 been. They had eight years.

13 We're saying that position was wrong. It should
14 have been the three years, the same three-year statute
15 that the business had. Now, if the business didn't file
16 returns and they had eight years, then you would hold the
17 individuals as having the eight-year statute. But this
18 business had a three-year statute.

19 And so we're holding that they should have had a
20 three-year statute against the individuals under
21 responsible person, not because of the change in the law.
22 Not because of the memorandum opinion. Even the
23 memorandum opinion makes an interesting comment where
24 people should just file personal returns after they close
25 a corporation.

1 And if they file a personal return, it starts a
2 three-year statute. Well it's kind of dumb. They even
3 mention that they don't have a form for that. So there's
4 no return out there for individuals to file for a
5 responsible person liability. There's no information out
6 there at all. It's silent to that. You have to dig it
7 out from the 6487 and try to apply it.

8 So even the board members recognize that there
9 should have been maybe a provision to tell taxpayers,
10 "Hey, you better file three-year because that's really
11 what it should be." But we're just holding that the use
12 of the eight-year was wrong. It was a wrong
13 interpretation. It's been wrong the whole time.

14 So everybody got billed under an eight-year
15 statute, it was wrong too. This one happens to still be
16 in the process because it's taken 20 years to get here,
17 and it should be correct. That's what we're saying there.

18 JUDGE BROWN: Thank you.

19 Yeah. Go ahead.

20 JUDGE KWEE: Just one question occurred to me.
21 Did either of your clients, Andrew or Patricia Laspino,
22 did they have any other businesses where they filed Sales
23 and Use Tax Returns with CDTEFA during this time period,
24 like, a sole proprietorship?

25 MR. MICKEY: That's a good question I don't know

1 the answer to, but I can certainly find that out. I don't
2 know that answer.

3 JUDGE KWEE: I was only asking in the context of
4 whether or not you could have argued that they triggered
5 the three-year statute because they filed a return in
6 their own name, and that's the reason why I asked. But
7 okay.

8 MR. MICKEY: Can I put that record to the extent
9 that if they did, that the three-year would kick in then?

10 JUDGE KWEE: I was asking in the context of I was
11 wondering that if you don't have evidence on that in the
12 record, I'm not sure what we would do.

13 I'll turn it back over to the lead.

14 MR. MICKEY: How can I address that if I -- I
15 don't know. I don't think that is the case. But if it
16 was, how can I have an opportunity to address that? Or
17 can you put on record here that to the extent that they
18 did have, which is recorded with the Department, that that
19 would trigger the three years?

20 JUDGE BROWN: I don't think --

21 JUDGE KWEE: We're not prepared to make a ruling
22 on your case today. I was just asking if --

23 MR. MICKEY: No. But can I -- can I add that to
24 our position -- to my argument in defense of the
25 timeliness to say to the extent that the taxpayer did have

1 their own personal return permits and filed returns during
2 that period, that that should be factored in to you
3 establishing the three-year statute of limitations versus
4 the eight years?

5 JUDGE KWEE: You can make that argument, but I
6 was -- I mean, if we -- we're required to rely on the
7 facts in the evidentiary record. And if we don't have any
8 evidence of that, we can't make a finding to that effect.
9 So you can make that argument, but we're required to rely
10 on what's in the evidentiary record of making a factual
11 finding as to what did or didn't occur.

12 MR. MICKEY: Is there a mechanism for that
13 information getting to you? I mean, the Department would
14 know this too I think if -- I mean, and I would not speak
15 for them. But I would hope that if they had their own
16 permit and filed the three years, that they would agree --
17 I mean, the memorandum opinion says that -- that they
18 would agree that it should be relieved.

19 JUDGE KWEE: The lead has the authority to hold
20 the record open if the parties -- we're -- we're open to
21 that, to receiving additional information. I would defer
22 back to the lead at this point.

23 MR. MICKEY: Well, I would like to ask you if we
24 could leave it open. I mean, I will find that out and
25 present that ASAP to the extent that it would get us a

1 right answer. I would hope that the Department wouldn't
2 object to that. I just want a right answer here.

3 JUDGE BROWN: I'll let the -- I'll let CDTFA
4 respond.

5 MS. PALEY: We have no evidence of the existence
6 of such.

7 JUDGE BROWN: And you've been representing the
8 Appellants for over 10 years now.

9 MR. MICKEY: Yeah, they were long -- they had
10 long since stopped doing anything by the time I got
11 involved.

12 JUDGE BROWN: So wouldn't you have -- oh, go
13 ahead.

14 JUDGE GEARY: Mr. Mickey, what would you propose
15 to do from your end since we can't require the Department
16 to offer any evidence? What would you propose to do if
17 you were allowed additional time to marshal evidence on
18 the issue?

19 MR. MICKEY: Well, I would simply contact my
20 clients first of all and ask them if they had a permit
21 during that time. I don't believe they did, but it's
22 not --

23 JUDGE BROWN: This is what I was getting at is
24 if --

25 MR. MICKEY: But I -- but I don't want to say

1 that for sure, and I would welcome an opportunity to find
2 that answer out. If they tell me no, then I would just
3 respond to you no and enter that into evidence, and that
4 point is moot then. If they did, I would find out what
5 the permit was, and we could enter that into evidence.

6 JUDGE BROWN: All right. If there's no objection
7 from CDTFA, and it's my understanding there isn't, I would
8 be willing to leave the record open for 15 days to resolve
9 this. I just -- if you've been representing your clients
10 for over 10 years, I would think they would have raised it
11 to you by now?

12 MR. MICKEY: I believe so, and I'm not so sure I
13 haven't addressed it. But I -- I just --

14 JUDGE BROWN: And I haven't seen any evidence of
15 it. But I suppose I don't have a problem with -- I'll
16 leave the record open for 15 days. And within that time
17 period -- within that time period you should, you know,
18 communicate with my office with a copy to CDTFA to
19 indicate whether you have any evidence on that point.

20 MR. MICKEY: I will probably know an answer
21 within the next two days that I can send you. If they
22 don't have it, then that's -- we're done.

23 JUDGE BROWN: Okay.

24 MR. MICKEY: If they do, I'll have to contact
25 CDTFA and seek out the returns and for that period of

1 time.

2 JUDGE BROWN: Yes. Go ahead. You have a
3 question.

4 JUDGE GEARY: Ms. Paley discussed interest relief
5 in her argument, but it's not listed as an issue before
6 us. Is that issue -- is the interest relief question
7 resolved already?

8 MR. MICKEY: Yes. As long as we're going to live
9 by their memorandum. The only other item I bring up is
10 there was a -- we talked about this at the prehearing. I
11 try to pick my arguments here to try to focus on things.
12 There was several months before the OTA got to us -- got
13 to me about the case subsequent to the date addressed in
14 the letter that they relieve the interest.

15 So I would hope that there could be consideration
16 of that extra few months between the last date that they
17 cite in the letter, which I don't have with me right now,
18 and the time when the OTA actually sent me the
19 notification that it had gone over to you. I think it was
20 three to four months difference.

21 JUDGE BROWN: Then I guess I was going to ask
22 CDTFA. Is there any evidence in the record of when CDTFA
23 sent the appeal to the Office of Tax Appeals?

24 MS. PALEY: We put the last date that we had
25 reflected within our letter relieving that liability.

1 JUDGE BROWN: I saw that in the letter, but I
2 don't know whether --

3 MS. PALEY: We have no other information.

4 JUDGE BROWN: Okay. Because I didn't know what
5 that was based on, and I couldn't find anything in our
6 records. All right.

7 MR. MICKEY: I did not bring up the interest
8 issue because I presumed -- perhaps it was wrong. Maybe I
9 should have brought it up -- that the letter that they've
10 already acknowledged that they're going to relieve it
11 meant that I didn't have to address that here. I think
12 that would be extra time.

13 JUDGE BROWN: Right. No. I think that was my
14 understanding as well. It does cover it. The one
15 question I wasn't sure about admittedly is the date that
16 CDTFA sent it to OTA. The whole question of whether OTA
17 could relieve interest during that period is I don't think
18 we have that ability, but I'm not going to say.

19 It's not a ruling. It's just I'm not sure if we
20 do, and I don't -- and I did understand that the interest
21 relief was resolved by CDTFA's memorandum. I think it was
22 a memorandum or letter that --

23 MS. PALEY: Correct.

24 JUDGE BROWN: Yeah. All right. Did you have
25 something further?

1 JUDGE KWEE: Oh, no further questions.

2 JUDGE BROWN: Okay. Do you have anything
3 further?

4 JUDGE GEARY: No.

5 JUDGE BROWN: Okay. I think I've asked all my
6 questions then. As we indicated, I will leave the record
7 open for up to 15 days solely for Appellants to clarify
8 whether they are arguing that they did file Sales and Use
9 Tax Returns as individuals, such that it would shorten the
10 statute of limitations on the 6829 NODs to three years,
11 pursuant to the McKoon Memorandum Opinion.

12 MR. MICKEY: Thank you.

13 JUDGE BROWN: Okay. Yes.

14 MS. SILVA: Will it just close automatically if
15 we don't hear anything or --

16 MR. MICKEY: I will respond. I will respond
17 affirmatively either way.

18 JUDGE BROWN: I trust you.

19 MS. SILVA: Thank you.

20 JUDGE BROWN: But yes, if for some reason
21 whatever -- for whatever reason we did not hear from
22 Mr. Mickey, the 15 -- I would close the record at 15 days.
23 It doesn't extend beyond that, but I trust we will hear
24 from Mr. Mickey.

25 MR. MICKEY: You will.

1 JUDGE BROWN: Okay. Then as I indicated, the
2 record will stay open for 15 days. And you know that once
3 the record closes, then we, the panel, will issue a
4 written opinion within 100 days of when the record closes.

5 If for some reason we get new information from
6 Mr. Mickey that requires a response from CDTFA, we'll
7 address it at that time. I think I've then covered
8 everything we need to cover? Yes? Okay.

9 So I will say thank you all very much for
10 participating today, and we have concluded the hearing and
11 the record is now closed.

12 MR. MICKEY: Thank you.

13 MS. PALEY: Thank you.

14 JUDGE BROWN: Sorry. The record for today's
15 hearing is closed, except for being held open for the
16 later submission.

17 (Proceedings adjourned at 2:15 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 2nd day of March, 2020.

ERNALYN M. ALONZO
HEARING REPORTER