

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
MICHAEL JAMES SAVAGE, ) OTA NO. 18012052  
)  
APPELLANT. )  
)  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, August 19, 2020

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER



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APPEARANCES:

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ KENNY GAST  
ALJ SUZANNE BROWN

For the Appellant: LISA NELSON  
LAVAR TAYLOR

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
CHAD BACCHUS  
STEPHEN SMITH  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-7 were received at page 8.)  
(Department's Exhibits A-D were received at page 8.)

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1 Cerritos, California; Wednesday, August 19, 2020

2 1:00 P.m.

3

4 JUDGE KWEE: Okay. We're going on the record  
5 now.

6 So we're opening the record in the appeal of  
7 Michael James Savage. This matter is being held before  
8 the Office of Tax Appeals. The case number is 18012052,  
9 and today's date is Wednesday, August 19th, 2020. The  
10 time is approximately 1:00 o'clock p.m. This hearing was  
11 noticed for Cerritos, California. However, it's being  
12 conducted electronically with the agreement of all  
13 parties.

14 Today's hearing is being heard by a panel of  
15 three administrative law judge, myself, Andrew Kwee. I  
16 will be the lead judge. And JudgeS Suzanne Brown and  
17 Kenny Gast are the other members of this tax panel. All  
18 three judges will meet after the hearing today and produce  
19 a written decision as equal participants. Although, the  
20 lead judge, myself, will be conducting the hearing, any  
21 judge on this panel may ask questions or otherwise  
22 participate in today's proceedings to ensure we have all  
23 the information necessary to decide this appeal.

24 For the record, would the parties please state  
25 their names and who they represent, starting with the

1 representatives for the taxpayer.

2 MR. TAYLOR: Good afternoon. This is Lavar  
3 Taylor, and I'm appearing on behalf of Mr. Savage.

4 JUDGE KWEE: Okay. Do we have another  
5 representative for the taxpayer? Taxpayer.

6 MS. NELSON: Hi, Judge Kwee. This is Lisa  
7 Nelson, also with the law offices of Lavar Taylor. I am  
8 here in support of the taxpayer, although, Mr. Taylor just  
9 for efficiency purposes will be the sole speaker on behalf  
10 of the taxpayer.

11 JUDGE KWEE: Okay. Thank you.

12 And for CDTFA, may I ask who is representing  
13 CDTFA today?

14 MR. BACCHUS: Chad Bacchus for the Department.

15 MR. PARKER: Jason Parker for the Department.

16 MR. SMITH: Steven Smith for the Department.

17 JUDGE KWEE: Okay. Great thank you.

18 Again, this is Judge Kwee. And so I note that  
19 we've had three prehearing conferences on this. So I will  
20 try and make the preliminary matters as brief as possible.  
21 I would like to summarize what -- to make sure we're all  
22 on the same page, I'd like to summarize everyone's  
23 understanding of the hearing today.

24 So I understand that there are no witnesses. The  
25 presentations are going to be consisting entirely of oral

1 arguments. As far as exhibits, we have CDTFA Exhibits A  
2 through D. These were all attached to the minutes and  
3 orders, and the Appellant has no objections to CDTFA's  
4 exhibits. For the taxpayer, I have exhibits numbered 1  
5 through 7. Those were also attached to the minutes and  
6 orders.

7 And my minutes and orders -- the most recent  
8 minutes and orders that we just added after the conference  
9 three weeks ago; and CDTFA has no objection to these  
10 exhibits.

11 I'll start with CDTFA. Is the summary I just  
12 provided correct, CDTFA?

13 MR. BACCHUS: Yes, it is.

14 JUDGE KWEE: Okay. And you have no further  
15 exhibits to add; is that correct?

16 MR. BACCHUS: That's correct.

17 JUDGE KWEE: Okay. And for Appellant, is the  
18 summary that I just provided accurate?

19 MR. TAYLOR: Yes, it is.

20 JUDGE KWEE: Okay. And you also -- Appellant  
21 also has no further exhibits to add?

22 MR. TAYLOR: Correct.

23 JUDGE KWEE: Okay. Great. Thank you.

24 So those exhibits, Exhibits A through D for CDTFA  
25 and, 1 through 7 for the taxpayer are admitted into the

1 evidentiary record without objection from either party.

2 (Department's Exhibits A-D were received  
3 in evidence by the Administrative Law Judge.)

4 (Appellant's Exhibits 1-7 were received in  
5 evidence by the Administrative Law Judge.)

6 And I know having said that we had three  
7 prehearing conferences, I did have one quick  
8 clarification. I understand that the penalties but not  
9 the taxes are at issue; is that correct?

10 MR. TAYLOR: That's correct.

11 JUDGE KWEE: Okay.

12 MR. TAYLOR: -- added to the portion of the  
13 penalty, which I will elaborate on.

14 JUDGE KWEE: Okay. Yes. That was just one brief  
15 clarification. I would like to ask the parties, because I  
16 was unsure of the exact amount that's at issue for the  
17 penalties. I can see two figures. One is \$8,328.28, and  
18 the second figure is \$8,364.28. So that's a difference of  
19 about \$36. And I was just wondering if either of the  
20 parties can clarify the exact amount at issue, or is that  
21 something that they know.

22 MR. TAYLOR: I believe the precise amount at  
23 issue -- although, I don't have the number right now. I  
24 can pull it. We contend what's at issue was in our  
25 opening brief, our very first brief filed. My memory



1 tells me it's about \$11,000 but that -- I would not rely  
2 on my memory because, you know, this is more.

3 You know, the precise amount at issue here is not  
4 as important as the legal issue. So I didn't memorize the  
5 amount, but I can tell you the periods for which the  
6 penalties are at issue.

7 JUDGE KWEE: Great. And I don't want to get too  
8 hung up on this. But I guess since you had an opportunity  
9 to speak, I'll just quickly ask CDTFA if they know the  
10 amount at issue for the penalties.

11 MR. BACCHUS: Chad Bacchus with CDTFA. Our  
12 understanding is that the penalty amount in dispute is  
13 \$8,328.28. The \$11,000 figure that Mr. Taylor stated was  
14 the original amount that was contested. But in the  
15 Appeals Bureau's supplemental decision dated,  
16 April 28, 2017, a portion of the period -- original  
17 period -- liability period was removed. So the fourth  
18 quarter of 2008 was removed. So that reduced -- so the  
19 penalty amount that was associated with the fourth quarter  
20 of 2008 was also removed.

21 JUDGE KWEE: Okay. So CDTFA has \$8,328.28.  
22 Thank you.

23 And if either party would like to address that,  
24 you have an opportunity to at the hearing. It doesn't  
25 sound like that's the crux of the issue, though. And with

1 that said, I'll just briefly summarize the two issues in  
2 this appeal.

3 The first -- and this was raised by OTA. The  
4 first issue is whether OTA has jurisdiction to decide this  
5 appeal because the issue involves the matter of whether  
6 the liability of the taxes were discharged in bankruptcy.  
7 The second issue is whether Appellant's personal liability  
8 for the late payment and the late filing penalties  
9 incurred by the corporation were discharged in bankruptcy.

10 And that's assuming that CDTFA determines it has  
11 jurisdiction to decide this appeal, then that will be the  
12 second issue. If we determine we do not have jurisdiction  
13 to decide the appeal, then the inquiry would end the first  
14 issue. In either event, there will only one decision  
15 issued for this appeal, though.

16 With that said, we briefly summarized how this  
17 case would proceed. Basically, the parties did agree that  
18 the taxpayer would have 60 minutes to do their opening  
19 presentation to discuss both issues. CDTFA would have  
20 30 minutes to do their opening presentation. And after  
21 that each party would be afforded 5 minutes for closing or  
22 final remarks.

23 So are there any questions about that? Did I  
24 state anything incorrectly or any clarifications that need  
25 to be made?

1           MR. BACCHUS: Mr. Bacchus with the Department.  
2       Sorry, Judge Kwee. Just one clarifying question. With  
3       the presentations are we going to present both issues  
4       together or are we going to present first the jurisdiction  
5       and exhaust all the questions about the jurisdiction and  
6       then move into the second? Just a question of how exactly  
7       the format is going to be.

8           JUDGE KWEE: Oh, yes. Thank you, Chad. This is  
9       Judge Kwee. My understanding was that the taxpayer would  
10      have 60 minutes. And during that 60 minutes, they would  
11      discuss both the first issue and the second issue. After  
12      that we would return to CDTFA, and they would address both  
13      the first and second. But if the parties would like to  
14      split it up half-and-half or, you know, issue first --  
15      issue one first followed by issue two, I'm open to doing  
16      that.

17                 I'll turn it over to representative for  
18      Appellant. Do you have a preference on how we do that?

19           MR. TAYLOR: We have no preference. In fact, I  
20      think I'm going to be able to deal with this in less than  
21      60 minutes. My plan was just address both issues, answer  
22      all questions the panel members have regarding either  
23      issue, you know, either of the two issues. And then let  
24      CDTFA go ahead and have their say. So.

25           JUDGE KWEE: Okay. CDTFA, Mr. Bacchus, does that

1 sound good with you?

2 MR. BACCHUS: Yes, that's fine. Thank you.

3 JUDGE KWEE: Okay. Great. With that said, I  
4 believe we're ready to start opening presentations. So  
5 I'll turn it over to the representative for Appellant to  
6 start their opening presentation.

7 You have 60 minutes. Thank you.

8

9

PRESENTATION

10 MR. TAYLOR: Thank you very much. This is Lavar  
11 Taylor appearing on behalf of the Appellant.

12 I want to briefly discuss what is at issue --  
13 aside from jurisdictional issue -- what precisely is at  
14 issue because it ties into the legal issue this panel has  
15 to decide. Originally, the Department or its predecessor  
16 had determined that Mr. Savage was personally liable,  
17 issued a dual determination under 6829 for a longer period  
18 of time than we have at issue now. That was with the  
19 third quarter of 2007 to the fourth quarter of 2008.

20 Subsequently, there was an agreement between the  
21 parties that is -- that period was short. And so the  
22 fourth quarter of '08 is -- that there -- some of the  
23 periods are no longer at issue. In addition, for each of  
24 the periods which remain -- for which the liability was  
25 asserted as reduced by agreement of the parties, there are

1 penalties asserted or assessed against the underlying  
2 entity, Bella, which are included in the dual  
3 determination asserted by the Department.

4 Not all of those penalties are at issue. And the  
5 reason for that is that per the rules in the bankruptcy  
6 code assessing which establish the dischargeability of  
7 penalty. So the only quarters for which there is a  
8 dispute as to whether or not the be penalties were  
9 discharged in bankruptcy are the third quarter of 2007,  
10 the fourth quarter of to 2007, and the first quarter of  
11 2008.

12 The substantive discharge rules in the bankruptcy  
13 code are found in Section 523(a)(7). That rule is a  
14 specific rule designed to deal with tax penalties and tax  
15 penalties only. So the rules that govern whether or not  
16 taxes are discharged are located in a separate section of  
17 the Bankruptcy Code 523(a)(1). 523(a)(7) has a multipart  
18 task, and it's written, unfortunately, in language that  
19 was designed to confuse even the most intelligent person.

20 But the case law that's out there has been out  
21 there for a long time. What that case law says is that  
22 you can discharge the penalties, if the underlying tax was  
23 discharged, the underlying liability, which is not the  
24 case here. We're not disputing the tax portion of the  
25 dual determination was discharged. However, there is a

1 separate disjunctive test that if met, allows the  
2 penalties to be discharged.

3 I'm just going to read the exact language because  
4 the exact language is important. That language says that,  
5 "If the penalty is imposed with respect to a transaction  
6 or event that occurred before three years before the date  
7 of the filing of the petition." And so the penalties in  
8 this case that relate to the entity Bella Famiglia are  
9 failure to file on time and failure to pay on time.

10 So for those three quarters that are at issue,  
11 the third quarter and fourth quarter of '07 and the first  
12 quarter of '08, the statutory deadline to file and pay,  
13 which if not met trigger the running of the penalties, all  
14 occurred more than three years before the date of  
15 Mr. Savage's Chapter 7 bankruptcy.

16 So the latest period we're -- the latest date  
17 we're dealing with is for the first quarter of '08. And  
18 the deadline -- the three-year period referred to in  
19 523(a)(7) would have run before July of 2011 when the  
20 bankruptcy was filed. So that's why we're only dealing  
21 with those three quarters, and why we've conceded that  
22 penalties for later quarters are not dischargeable because  
23 the failure to file and the failure to pay by the entity,  
24 Bella Famiglia, fell within that three-year period prior  
25 to the date of Mr. Savage's Chapter 7 bankruptcy petition.

1           So the language in 523(a)(7) is very simple. Or  
2 I should say the language is not simple. The concept is  
3 simple. The concept says if the event or transaction  
4 giving rise to the penalty occurred more than three years  
5 before the date of the bankruptcy, then the penalty is  
6 discharged.

7           So why do we have -- why are we here arguing for  
8 the imposition against Mr. Savage personal liability for  
9 failure to file and failure to pay penalties is because  
10 the underlying entity failed to file and fail to pay on  
11 time. And those events, the failure to file and the  
12 failure to pay all for these quarters all happened more  
13 than three years before the date of the bankruptcy. Now,  
14 the Department comes in and says, well, wait a second.  
15 The three-year period, it hasn't been three years since we  
16 asserted a dual determination.

17           We don't -- you know, the dual determination was  
18 not asserted and more than three years before the date of  
19 the bankruptcy, a point which we don't dispute. But from  
20 our standpoint, that's legally irrelevant. The penalty is  
21 not imposed -- it's imposed because of the corporation's  
22 failure to file on time and failure to pay on time, not  
23 because of something Mr. Savage did.

24           Now, to give an example of a different kind of  
25 penalty where the analysis would be different, is that

1 one, if there's a dual determination under 6829, and that  
2 dual determination is sustained or agreed to by the  
3 taxpayer, and amount that's paid -- the amount for which  
4 that person is liable or they're assessed is not paid  
5 within a period of time, there's a separate finality  
6 penalty that's assessed against that person.

7 That particular penalty is assessed because of  
8 the failure of the person who was assessed to pay that  
9 penalty. So that's a separate analysis. It is different  
10 from the analysis of whether the penalties that form the  
11 basis of the -- of the asserted 6829 assessment occurred  
12 more than the -- the penalties are based on transactions  
13 or events occurring more than three years before the date  
14 of the bankruptcy. So the -- and -- and I -- so that's  
15 the legal analysis.

16 I'd like to step back for a moment and explain  
17 why we brought this case over to what is now an \$8,000  
18 penalty. Many years ago I raised the same issue in a case  
19 that's reported in the Ninth Circuit called Dan -- in re  
20 Ilko, Daniel Ilko. In that case we argued a number of  
21 things. One of the -- that case was brought before this  
22 tribunal's predecessor, the Board of Equalization  
23 Administrative. And after, Mr. Ilko did not prevail  
24 there, he went and filed an action in the bankruptcy court  
25 to determine whether or not the asserted 6829 liability



1 was discharged.

2 At the trial level of that case, the Department's  
3 predecessor agreed on facts that indistinguishable from  
4 the facts of the present case for purposes of that issue,  
5 that the personal liability for the penalties against --  
6 resulting from the underlying entity's failure to file and  
7 failure to pay on time were dischargeable even though the  
8 bankruptcy was filed before there was an assertion of dual  
9 liability.

10 In other words, you looked and say, why are these  
11 penalties here? Well, they're here because the underlying  
12 entity didn't file on time. It didn't pay on time. And  
13 the Department -- the Board of Equalization at the trial  
14 level and the bankruptcy court agreed with that analysis  
15 and conceded. Then -- and then the other issues in the  
16 case were decided. They were decided in Mr. Ilko's favor  
17 in the bankruptcy court. And the Board appealed to the  
18 Ninth Circuit, and they prevailed on those other issues.

19 So the Ilko case, it doesn't deal with the issue  
20 that we have here directly, at least not the reported  
21 decision. But there was action taken -- or I should say  
22 by the California Attorney General's Office to agree with  
23 our position. And one of the reasons we're here, probably  
24 the key reason, is that we're requesting this tribunal to  
25 issue a ruling on this because what we don't have to have

1 happen is when taxpayers go -- or faced with this issue,  
2 taxpayers who really don't have a lot of money and are  
3 faced with this issue, they don't have to go to bankruptcy  
4 court and then have the Attorney General's Office likely  
5 concede, as they did in Ilko.

6 We want a ruling out there that tells people,  
7 hey, look, Department, you can't do this because the  
8 bankruptcy code says you can't. So that's why in the  
9 bigger picture why we're here today. I'd like to talk --  
10 and so if the members have questions about the legal  
11 argument before I go onto jurisdiction, that is -- you  
12 know, I've actually done what I could to shorten this for  
13 the benefit of everybody.

14 And that's the short version of my argument on  
15 the legal issue that does -- of whether or not the tax or  
16 I should -- whether or not the penalties were discharged  
17 in Mr. Savage's Chapter 7.

18 I'm happy to answer any questions on that legal  
19 issue that members of the panel have, or if you prefer,  
20 I'll just go ahead and dig right into the jurisdictional  
21 issue.

22 JUDGE KWEE: Mr. Taylor, this Judge Kwee. I just  
23 have one quick clarification. Which prong under  
24 507(a)(8)(a) were you saying that -- you were providing  
25 analysis for with respect to the penalties in the three

1 years?

2 MR. TAYLOR: This is Mr. Taylor, again. It's not  
3 507. It's 523(a)(7). 507, so if you look at the analysis  
4 of the Bankruptcy Code 523(a)(1) deals with the  
5 dischargeability of taxes. That section references  
6 507(a)(8). And just say generally speaking, the first  
7 rule under 523 says if a tax is entitled to priority, it's  
8 not dischargeable. Okay.

9 There's other text there. So but 523(a)(1)  
10 references 507(a)(8) for the tax and just the tax.  
11 523(a)(7) deals with penalties; a completely different  
12 analysis. And so the specific subsection is 507 --  
13 sorry -- 523(a)(7)(b) as in boy. It says imposed with  
14 respect to a transaction or event that occurred before  
15 three years before the date of the filing of the petition.

16 JUDGE KWEE: Okay. Thank you.

17 MR. TAYLOR: Okay. Any further questions before  
18 I address jurisdiction?

19 JUDGE KWEE: If there's no further questions from  
20 the panel, you may please proceed.

21 MR. TAYLOR: Thank you. This is Mr. Taylor  
22 again.

23 The jurisdictional issue is one that I was  
24 stumped, frankly, because when the panel asked it which,  
25 you know, every tribunal needs to find out and decide if

1 they have jurisdiction. It's an important issue. We were  
2 not able to find any precedential opinion that deals with  
3 whether or not the Board -- this tribunal's predecessor  
4 has the jurisdiction to determine the dischargeability of  
5 sales and use tax issues or a liabilities or dual  
6 liabilities under 6829.

7           There is a rule out there cited in our brief that  
8 says that this tribunal lacks jurisdiction to determine  
9 the dischargeability of income taxes that are asserted.  
10 And so that makes sense when you consider how those income  
11 tax cases got to the Board of Equalization, or how they  
12 now get to the Office of Tax Appeals. So what happens  
13 when the Franchise Tax Board audits. They audit an income  
14 tax return, and if there's no agreement, then they issue a  
15 Notice of Proposed Assessment.

16           That Notice of Proposed Assessment says we think  
17 you owe some additional taxes and maybe some penalties to  
18 go with it. And that appeal goes forward. And within the  
19 Franchise Tax Board itself, they do not consider whether  
20 or not the taxes or even the penalties are dischargeable.  
21 I mean, I've handled income tax cases where we believed  
22 the penalties were dischargeable and the taxes were not  
23 because of a prior bankruptcy. And, well, Franchise Tax  
24 Board in their internal administrative Appellant procedure  
25 at the protest hearing, they didn't consider that.

1           And when they issue their Notice of Action, which  
2           is what triggers the jurisdiction of either the old Board  
3           of Equalization Board or the Office of Tax Appeals. When  
4           they issue that Notice of Action, that Notice of Action  
5           does not address the question of dischargeability of  
6           either the asserted tax, the disputed tax, or the disputed  
7           penalties.

8           So when that case comes to this tribunal or its  
9           predecessor, that issue has never been discussed by the  
10          agency itself. And so understand -- can understand why  
11          there would have been a rule and still is a rule out there  
12          that says well, we're not going to consider the  
13          dischargeability of asserted income tax deficiencies or  
14          penalties on asserted income tax deficiencies.

15          Now, you back up now and lets look at what  
16          happened, and it happened under the -- you know, with the  
17          Board of Equalization and the Board -- and I'm talking now  
18          about the agency conducting an audit or deciding whether  
19          to assert a dual determination under 6829. I have not  
20          just -- you know, I did this in Ilko case. Although,  
21          again unfortunately I -- because the case is so old and,  
22          my files are destroyed, I don't recall whether the Board  
23          of Equalization considered the issue in its ruling.

24          But we raised the issue of the dischargeability  
25          of the asserted liability -- a dual liability in

1 Mr. Ilko's case. And we raised the dischargeability of  
2 the asserted penalties in Mr. Savage's administrative  
3 appeal. And there is an exhibit in this case, the  
4 decision and recommendation, issued under the -- you know,  
5 before the transition to the Office of Tax Appeals, which  
6 addresses in quite a bit of detail the question of whether  
7 or not the penalties were discharged.

8 So what happened is that in -- the Board of  
9 Equalization, the agency actually considers the issues,  
10 and they write-up -- in this case, they wrote up a  
11 decision and recommendation which addressed the issue.  
12 And so then when the issue then comes to this tribunal, it  
13 comes in a manner in which the agency itself has  
14 considered it and has ruled on it.

15 Where there's a -- not only a live dispute --  
16 but, actually, the agency itself has taken the time to  
17 take -- you know, say okay, here, Mr. Savage, we looked at  
18 your argument. We don't like it. Okay. And if you don't  
19 like our answer, you know, previously it was going to the  
20 Board of Equalization. Now, the answer is, let's go to  
21 the Office of Tax Appeals. So there are no rules out  
22 there that say that that cannot happen. I've looked for  
23 them. I can't find them.

24 I've looked for cases that say can that happen or  
25 can it not happen. I have not -- both administrative

1 rulings and court cases, I've not found any cases that  
2 address this specific point. However, just as a matter of  
3 logic, and in the absence of a, you know, some statute or  
4 rule that says this tribunal cannot consider it. If the  
5 agency itself deems inappropriate to consider that issue,  
6 which they did in this case, it's entirely appropriate for  
7 this tribunal to consider that issue in this appeal rather  
8 than dismiss it for lack of jurisdiction.

9 So that's the short version of my argument on the  
10 jurisdiction. I'm certainly willing to answer any  
11 questions that the members of the panel have.

12 JUDGE KWEE: This is Judge Kwee again. Thank  
13 you. And I would just briefly like to go back to the  
14 substantive argument, if you don't mind. I just want to  
15 get a quick clarification on that just to make sure I'm  
16 understanding the taxpayer's position. So I understand  
17 that you're not disputing that the taxes are not  
18 discharged and just, I guess, I'm trying to distinguish  
19 why the taxes are being treated differently from interest  
20 or penalties, because your only disputing the penalties  
21 from my understanding.

22 And so just to clarify, are you -- do you agree  
23 that the taxes are accepted from discharge under  
24 507(a)(8), but then there's a separate analysis for the  
25 penalties in those taxes. Is that the crux of your

1 argument?

2 MR. TAYLOR: This is Mr. Taylor again. And the  
3 answer -- the short answer is yes, and I would like to  
4 elaborate and explain. Again, the discharge of the way  
5 tax is dealt with by 507(a)(1). And the analysis -- the  
6 issue of whether or not the taxes discharged is the  
7 precise issue litigated in Ilko. And so, you know, I'm  
8 not going to sit here and argue that the Ninth Circuit was  
9 wrong. Okay.

10 I think they were wrong. I don't agree with  
11 them, but the specific test which was dressed in the Ilko  
12 case was whether or not the taxes were assessable --  
13 unassessed or assessable. Okay. And that's separate  
14 test. In 523(a)(1), which is -- which incorporates  
15 507(a)(8). Okay. So again, these are really two separate  
16 statutory regimes. And so in 523(a)(7), which deals with  
17 penalties, doesn't deal with whether or not the taxes are  
18 assessed or whether the penalties are assessed or  
19 unassessed.

20 I have had multiple agencies not -- you know,  
21 IRS, Franchise Tax Board, Employment, and other agencies  
22 agree that even though the taxes were not assessed against  
23 my client because the transaction giving rise to the  
24 penalties occurred more than three years before the date  
25 of the bankruptcy, that the penalty was discharged. So I



1 mean, I have even had to litigate this issue against the  
2 Franchise Tax Board because they just agree.

3           They look at it and say, okay. We see. And the  
4 Ninth Circuit case is perhaps useful to discuss the facts  
5 in the Ninth Circuit case that we rely on that everybody  
6 agrees governs this. And in that case, the taxpayer pled  
7 guilty to tax evasion under 7201. They said we filed a  
8 fraudulent return. And because they filed a fraudulent  
9 return, the tax could not be discharged. That's  
10 clear-cut.

11           But the Ninth Circuit said, well, you know the  
12 penalties are discussed under a different rule, the fraud  
13 penalties. And the fraud -- why were the fraud penalties  
14 imposed? Well, because the debtor, taxpayer filed a  
15 fraudulent return. And so even though the taxes were not  
16 assessed because there was a criminal prosecution and the  
17 civil audit is delayed until after the criminal  
18 prosecution, and so it was many, many years later that the  
19 IRS finally assessed the tax. Okay.

20           Notwithstanding that fact, the Ninth Circuit  
21 said, well, look. The fraudulent return was filed more  
22 than three years before the date of the bankruptcy. So  
23 it's a complete -- and under that analysis, the penalties  
24 are discharged. So it is -- there are two very distinct  
25 tests. They're independent of one another. Although,

1 they are linked in this way in that if the tax is  
2 dischargeable, the penalty is dischargeable.

3 But again, there's a separate disjunctive test.  
4 It says if the transaction or event, you know, upon  
5 which pen -- you know, generated the penalty occurred more  
6 than three years before the date of the bankruptcy, then  
7 the penalty itself is discharged even though the tax is  
8 not.

9 JUDGE KWEE: Thank you. This is Judge Kwee. And  
10 I did have one additional question on that, and that's  
11 getting to the, I guess, the assessable but not yet  
12 assessed the language with respect to the taxes and --  
13 because 6829 cases, you know, they are dual  
14 determinations. I understand the corporation.

15 I guess the penalty say in year one but then if  
16 they -- the corporation is still operating, there's no  
17 basis for the taxpayer, the responsible person, to be  
18 heard liable for that penalty. So I'm just wondering. So  
19 assuming we're to say that these are two separate tests --  
20 if we agree -- this jurisdiction agree there's two  
21 separate tests for taxes and penalties. I'm just  
22 wondering if 6829 dual determinations are a unique  
23 scenario in that -- that determination doesn't get issued  
24 until after there's a termination of the corporation.

25 So I, mean, why isn't the termination of the

1 corporation basically, you know, a determining factor or  
2 relevant factor because how could you say it was assessed?  
3 How could you say the actions occurred when the taxpayer  
4 didn't have a liability for the penalties at the time that  
5 they weren't the corporation because it's the dual  
6 determination that imposes the liability and then the  
7 corporation not in. And even in this case it's not even  
8 yet final because it's a petition from my understanding.

9 MR. TAYLOR: Because of the language of the  
10 statute, which I will read again. And it says, "Imposed  
11 with respect to transaction or event." That is the  
12 penalty is imposed, okay, not the tax. The penalty is  
13 imposed with respect to a transaction that occurred more  
14 than three years before the date of the bankruptcy.

15 And so the question is -- if I may take the  
16 liberty of rephrasing it -- is why was the penalty  
17 imposed? The penalty was imposed because the corporate --  
18 the underlying business entity didn't file on time and  
19 didn't pay on time. And again, I distinguished the  
20 penalty that's imposed on the responsible person under  
21 6829. If there is a final assessment and they don't pay  
22 on time, they get hit with a finality penalty.

23 And that penalty is based on a separate event,  
24 the failure to pay on time. And you would have to start a  
25 new three-year period that runs from that failure to pay

1 the separate assessment. Section 506 and 523(a)(7)  
2 doesn't reference assessment. It just says why -- "If the  
3 transaction or event give rise to the penalty, happened  
4 more than three years before the petition -- before the  
5 bankruptcy petition, well, then the penalty is discharge."

6 So the reason, to answer your question,  
7 Judge Kwee, is it's the language of the statute.

8 JUDGE KWEE: Okay. Thank you.

9 I'll turn it over to the panel to see if they  
10 have any additional questions to ask. I'll start with  
11 Judge Brown.

12 JUDGE BROWN: This is Judge Brown. I think I  
13 just have one question for the Appellant. In reading the  
14 briefing you've submitted, it seems that you're saying --  
15 you seem to be relying a lot on the facts of Ilko,  
16 meaning, the fact that CDTFA conceded the penalties in  
17 that case. I don't -- I want to make sure I understand  
18 your argument. You're not saying that because CDTFA made  
19 a concession in this different case, that that's legally  
20 you know, a precedent for us to consider, or are you?

21 MR. TAYLOR: This is Mr. Taylor again, and the  
22 answer is no. We're not arguing it's not binding.  
23 There's no estoppel, but they got it right back then.  
24 That's what we're saying. And we're pointing out the,  
25 kind of, the horizontal inequity of, you know, taking

1 different positions. And, you know, look. They can take  
2 it. They can do it. There's no law that says they can't.  
3 I want to make that clear. But they did get it right back  
4 then in Ilko when they conceded.

5 JUDGE BROWN: This is Judge Brown. Thank you. I  
6 guess I just want to clarify. I looked through all the  
7 submissions. I don't see anything in the evidence  
8 establishing the basis for why CDTFA conceded back in the  
9 Ilko case; is that correct? There's -- I just want to  
10 make sure I'm not missing anything.

11 MR. TAYLOR: No. The only thing that's in the  
12 record is the pleadings from the -- at the bankruptcy  
13 court level. I mean, you know, nobody shared with me in a  
14 form that I can present to this court or this tribunal any  
15 information regarding why they conceded. They just  
16 agreed. I mean, you know, I was told by the deputy  
17 assistant attorney general who handled the case, who is  
18 now deceased, that they agreed with my analysis, and they  
19 were giving up. That was great. But, again, I'm not  
20 arguing that's binding on them here.

21 JUDGE BROWN: This is Judge Brown. Okay. Thank  
22 you. That's all my questions for now.

23 JUDGE KWEE: This Judge Kwee, one additional  
24 question came up. And I'm just wondering supposing OTA  
25 were to conclude that we lack jurisdiction, is it possible

1 for Appellants to file an adversary complaint to seek a  
2 determination from the bankruptcy court whether or not  
3 this liability was discharged? I'm wondering if there are  
4 other remedies in the event that we were to conclude we  
5 lack jurisdiction.

6 MR. TAYLOR: It is possible for Mr. Savage to go  
7 back in and reopen this. Yes, it is. I mean, that fact,  
8 however, doesn't preclude that, you know, the mere fact  
9 that other courts like the bankruptcy court has  
10 jurisdiction, doesn't preclude this tribunal from  
11 exercising jurisdiction.

12 There's a provision in the California Government  
13 Code that I have. It's cited in the briefs. I can't  
14 remember the code section, but it's a very, very short  
15 provision. And it says that the Office of Tax Appeals  
16 will not be treated and -- will not be treated as a tax  
17 court. And I don't know what that means. I do know,  
18 however, that the mere fact a court or a tribunal has the  
19 ability to consider the dischargeability of the penalties  
20 in this case. It doesn't mean that that tribunal is a tax  
21 court.

22 Otherwise, the bankruptcy court would be a tax  
23 court. And otherwise, the Superior Court would be a tax  
24 court. And of course, in Superior Court you have to pay  
25 first to file a refund claim. And that's not going to

1 happen in this case with Mr. Savage. He doesn't have any  
2 money. So just because -- you know, again, I don't know  
3 what that means. It's very, you know -- but we know that  
4 the bankruptcy court is not a tax court just because it  
5 can consider dischargeability issues.

6 JUDGE KWEE: Okay. This Judge Kwee. Thank you  
7 very much.

8 And I'll turn it over to Judge Gast. Judge Gast,  
9 do you have any questions?

10 JUDGE GAST: This is Judge Gast. I don't have  
11 any questions at this time. Thank you.

12 JUDGE KWEE: Okay. Back to Judge Kwee. At this  
13 time I'll turn it over to CDTFA to do their opening  
14 presentation.

15 CDTFA, you have 30 minutes. Thank you.

16 MR. BACCHUS: Thank you.

17

18 PRESENTATION

19 MR. BACCHUS: This is Chad Bacchus for the  
20 Department. This appeal involves Appellant's personal  
21 liability for the unpaid tax liabilities of Bella  
22 Famiglia, Incorporated, for the period July 1st, 2007,  
23 through December 14th, 2009.

24 In its decision and recommendation dated,  
25 December 30th, 2015, the Appeals Bureau found that

1 Appellant was not personally liable for Bella's tax  
2 liabilities for the period January 1st, 2009, through  
3 December 14th, 2009.

4 Appellant is no longer contesting whether he is  
5 personally liable for Bella's tax liabilities for the  
6 period July 1st, 2007, through January 31st, 2008.  
7 Instead Appellant is asserting that he is not liable for  
8 the penalties imposed on Bella totaling \$8,328.28.

9 Pursuant to Title 28 of the United States Code  
10 Section 1334, bankruptcy courts have either exclusive or  
11 concurrent jurisdiction over all cases under the  
12 bankruptcy code. In the case of In Re Aldrich, the  
13 bankruptcy court found that bankruptcy courts have  
14 exclusive jurisdiction to determine whether a debt is  
15 discharged under Section 523(a)(2), (4), and (6) of the  
16 Bankruptcy Code.

17 The court also found that for all other  
18 subsections of Section 523(a), bankruptcy courts and state  
19 courts have concurrent jurisdiction to adjudicate whether  
20 a debt is discharged. Pursuant to California Government  
21 Code Section 15672, the Office of Tax Appeals shall not be  
22 construed to be a tax court.

23 Here Appellant contends that the penalties at  
24 issue were discharged in its bankruptcy proceedings  
25 pursuant to Section 523(a)(7) of the bankruptcy code, of



1       which bankruptcy courts and state courts have concurrent  
2       jurisdiction. Because the Office of Tax Appeals is  
3       neither a bankruptcy court nor a state court, it does not  
4       have jurisdiction to determine whether the penalties were  
5       discharged.

6               We acknowledge that Appellant's bankruptcy case  
7       is now closed. However, the bankruptcy court in  
8       Koehler versus Grant held that a matter over which a  
9       bankruptcy court has jurisdiction can be considered by  
10      that court even if the case is closed. Additionally, in  
11      Staffer versus Predovich, the Ninth Circuit held that a  
12      separate motion to reopen a bankruptcy case is not  
13      necessary when commencing an action for  
14      nondischargeability of a debt under Section 523(a)(3)(B),  
15      and that the debtor need only file -- need only to file a  
16      complaint to determine this nondischargeability with the  
17      bankruptcy court. Therefore, Appellant's appropriate  
18      course of action is to either file a complaint to  
19      determine nondischargeability with the bankruptcy court or  
20      to open a case in state court.

21              I wanted to address the issue of the predecessor  
22      of the Board of Equalization, the predecessor to the CDTFA  
23      and to also to the Office of Tax Appeals and why -- and  
24      why they -- and why they heard matters and decided matters  
25      of dischargeability of -- and why the Appeals Bureau makes

1 determinations nondischargeability of debts.

2           When CDTFA was the Board of Equalization, the  
3 appeals process for a taxpayer to appeal an adverse  
4 determination went through the Appeals Bureau. The  
5 Appeals Bureau would write a decision and recommendation,  
6 which, essentially, was a recommendation to the members of  
7 the Board who are going to hear the case of how the  
8 Appeals Bureau -- how the legal Department believed that  
9 the case should be decided.

10           And, ultimately, the members of the Board decided  
11 if they were going to follow that recommendation, or if  
12 they were not going to follow it. And they made the final  
13 determination. And at that point, the determination of  
14 the agency, Board of Equalization, was complete. And so  
15 the taxpayer in that case, if the Board of Equalization  
16 decided that tax debt was not discharged, then the  
17 taxpayer could then take that and either file a motion in  
18 state court or go back to the bankruptcy court and say we  
19 think they were wrong, and we need a decision made on  
20 whether the Board of Equalization was correct or incorrect  
21 in determining that the debt was not discharged.

22           Now, with the creation of the Office of Tax  
23 Appeals, that process at the CDTFA now ends once the  
24 Appeals Bureau writes their decision. It's no longer a  
25 decision and recommendation. It is a decision, and that's

1 the final decision of the agency. So now that the agency  
2 has decided, based on the Appeals Bureau decision that the  
3 penalties were not discharged, that determination is  
4 ended. There's no second step.

5 The Office of Tax Appeals now decides whether in  
6 most cases that where the Office of Tax Appeals has  
7 jurisdiction, the Office of Tax Appeals act as the Board  
8 used to act with the Franchise Tax Board. So that the  
9 Franchise Tax Board, they make their final determination  
10 and it went to the Board of Equalization for their review.  
11 And now the Office of Tax Appeals acts in that capacity  
12 for both the Franchise Tax Board and the California  
13 Department of Tax and Fee Administration.

14 So that's the distinction that we see with why  
15 things have changed. There's no -- there's no rule that  
16 says that the California Department of Tax and Fee  
17 Administration cannot look at dischargeability. Because  
18 if a taxpayer is asking or claiming that a debt has been  
19 discharged in bankruptcy, then the Department will  
20 consider -- will consider it. That's what the Department  
21 does. That's what the Appeals Bureau does.

22 As far as -- yeah. So, again, for the Department  
23 our determination has been made and taxpayer then now can  
24 take that and if they disagree, their course of action is  
25 to take that back to the bankruptcy court and file a

1 motion or file a complaint -- sorry -- or to open a case  
2 in state court.

3 Based on the foregoing, the Office of Tax Appeals  
4 does not have jurisdiction to determine whether penalties  
5 at issue have been discharged in Appellant's bankruptcy  
6 proceedings. Because Appellant has conceded all of the  
7 aspects of his appeal, including those properly within the  
8 jurisdiction of the Office of Tax Appeals, this appeal  
9 must be dismissed.

10 One final note about -- sorry. Things keep  
11 slipping my mind. But one final note about that is the --  
12 never mind. I can't think of what I was going to say. So  
13 I'll move on.

14 Moving on to whether the penalties were discharge  
15 in the bankruptcy, the remaining dispute, it's based on  
16 fact, and there's not really any dispute. Both parties  
17 agree that the applicable law is Bankruptcy Code Section  
18 523(a)(7)(B), which states that any tax penalty imposed  
19 with respect to a transaction or event that occurred three  
20 years before a bankruptcy petition is filed, may be  
21 accepted from a Chapter 7 discharge.

22 Moreover, the parties agree that McKay versus  
23 United States correctly interprets Section 523(a)(7)(B).  
24 In McKay the Ninth Circuit Court of Appeals states, and I  
25 quote, "Section 523(a)(7)(B) is quite straightforward. It

1 makes dischargeable any tax penalty imposed with respect  
2 to a transaction or event that occurred before three years  
3 before the date of the filing of the petition. A penalty  
4 imposed on unpaid taxes occurring more than three years  
5 before the filing of the bankruptcy petition is  
6 dischargeable," close quote.

7 Therefore, the only remaining dispute concerns  
8 the date of the transaction or event giving rise to the  
9 penalty. Bella originally incurred the penalties at issue  
10 when it failed to file its sales and use tax returns for  
11 the third and fourth quarter of 2007 and the first and  
12 third quarter of 2008. Appellant filed his Chapter 7  
13 bankruptcy petition on August 31st, 2011. On  
14 February 26th, 2010 the Department became aware that Bella  
15 ceased business operations.

16 Therefore, as of February 26th, 2010, Appellant  
17 became personally liable for Bella's unpaid tax, interest,  
18 and penalties if the Department could prove all elements  
19 of Revenue and Taxation Code Section 6829. It is  
20 important to note that the Appellant -- that Appellant  
21 does not dispute that he's personally liable for Bella's  
22 unpaid tax liability.

23 Accordingly, pursuant to Section 6829(a), that is  
24 from the Revenue and Taxation Code, Appellant is also  
25 personally liable for penalties incurred by Bella.

1 Section 6829 is a derivative statute; meaning that the tax  
2 liabilities and penalties incurred by Bella are being  
3 passed through to Appellant as an individual. This  
4 distinction is critical in determining the event or  
5 transaction date.

6 Because while Bella incurred the penalties when  
7 it failed to file its sale and tax use returns, Appellant  
8 did not incur personally liability for the penalties until  
9 he became personally liable for Bella's unpaid liabilities  
10 when the Department became aware that Bella ceased  
11 business operations, which occurred on February 26th,  
12 2010.

13 Because Appellant filed his Chapter 7 bankruptcy  
14 on August 31st, 2011, the February 26th, 2010, transaction  
15 or event date did not occur more than three years prior to  
16 the filing of the Appellant's bankruptcy. Thus, the  
17 penalties were not discharged in the Appellant's  
18 bankruptcy matter.

19 I am available for questions if you have any.  
20 Thank you.

21 JUDGE KWEE: Yes. Thank you. This is  
22 Judge Kwee. And I guess I would like to follow up on that  
23 last part on the 523(a) (7) (b) that you were just referring  
24 to where it's talking about what's not accepted or what  
25 would be accepted from discharge and what would not be

1 accepted from discharge. And then there's language of  
2 with respect to language or event that occurred before --  
3 three years before the date of the addition.

4 So my understanding is CDTFA was saying that if  
5 it was -- if that transaction occurred -- in this case,  
6 CDTFA is saying the transaction was discovered in that  
7 termination. But if that transaction occurred more than  
8 three years, then it would be dischargeable. But if it  
9 occurred within three years of the petition, then it would  
10 not be dischargeable. Is that what CDTFA is saying?

11 MR. BACCHUS: Correct. If the transaction or  
12 event date occurred -- sorry. This is Chad Bacchus with  
13 the Department. If the transaction or event date occurred  
14 more than three years prior to the filing of the  
15 bankruptcy petition, then those penalties would be  
16 discharged.

17 JUDGE KWEE: Okay. This is Judge Kwee again.  
18 Thank you. I just have another clarification on that  
19 because, you know, 523(a) starts off by saying that  
20 discharge does not apply to. And then when you get down  
21 to (7) it has (a) or (b), and you're talking about (b).  
22 But then another thing which would be not discharged is  
23 (a) (7) (a), and that is relating to a tax of a kind not  
24 specified in paragraph 1 of this subsection.

25 And I'm wondering, does CDTFA have a position on

1 whether that could be applicable here or whether that's  
2 applicable here.

3 MR. BACCHUS: I don't have that subsection open  
4 in front of me, and I, at this point, do not have a  
5 position. But we can look into it after the hearing, if  
6 you would like.

7 JUDGE KWEE: Okay. I'll turn it over to the  
8 representative for Appellant just to see if they would  
9 like to offer an opinion on that, Mr. Taylor.

10 MR. TAYLOR: I'm sorry.

11 JUDGE KWEE: This is Judge Kwee. I was turning  
12 it over to Appellant to see if they would like to offer an  
13 opinion on whether or not 523(a)(7)(A) would be applicable  
14 or if --

15 MR. TAYLOR: Okay. This Mr. Taylor again. And  
16 so that subsection relates that basically says that if the  
17 tax is discharged, okay. If it's not accepted for  
18 discharge under 523(a)(1), the penalty is discharged.  
19 That's what it says. So here we're not arguing that the  
20 tax is discharged. So we're not arguing that the penalty  
21 is dischargeable under (a)(7)(A).

22 So that -- so when you look at it it's a triple  
23 negative which can be confusing. But it basically says if  
24 a tax is discharged, the penalty is discharged under that  
25 section. But because 507(a) -- or 523(a)(7)(A) and



1 523(a)(7)(B) are disjunctive, you can satisfy either test,  
2 either rule and discharge the penalty.

3 JUDGE KWEE: Okay. I -- I think I see what  
4 you're saying.

5 I'll turn it over the panelist at this time.  
6 Judge Brown, do you have questions for either party?

7 JUDGE BROWN: This is Judge Brown. I do not have  
8 any questions.

9 JUDGE KWEE: Okay. Thank you.

10 Judge Gast, do you have questions for either  
11 party at this time?

12 JUDGE GAST: This is Judge Gast. I had a quick  
13 question for Mr. Bacchus. The BOE, from my understanding,  
14 wasn't a tax court either. So can you clarify or explain  
15 one more time why the BOE was allowed to consider --

16 JUDGE KWEE: I'm sorry. This is Judge Kwee.  
17 Judge Gast, I'm -- we're not able to hear you. Yeah, I  
18 think you need to get a little closer to your mic. Would  
19 you please --

20 JUDGE GAST: Can you hear me now?

21 JUDGE KWEE: Yes. Thank you.

22 JUDGE GAST: Okay. Sorry about that. I had a  
23 question for Mr. Bacchus. You had said that the BOE did  
24 discharge or consider dischargeability prior to the OTA  
25 being established. My understanding is that BOE wasn't a

1 tax court either. So can you address that one more time  
2 for me.

3 MR. BACCHUS: Sure. This is Chad Bacchus with  
4 the Department. What I was trying to convey is that the  
5 Board of Equalization or the members of the Board of  
6 Equalization that would conduct similar types of hearings,  
7 they acted on behalf of the agency. So yes, it's true  
8 they were not a tax court either. But they were acting --  
9 they were making a final determination on behalf of the  
10 agency in the same way that the Franchise Tax Board would  
11 make a determination based on -- for the agency or for the  
12 EDD or any other agency that might have -- that a taxpayer  
13 might have a debt with, that the taxpayer might believe  
14 that that debt is discharged.

15 When a taxpayer gets a discharge order in a  
16 bankruptcy case, then they go to the agency where they  
17 have debts, and they seek to have their debt discharged by  
18 the agency. The agency has to determine if that -- if  
19 they're going to discharge the debt or if they're not  
20 going to discharge the debt. And if they don't, there has  
21 to be a final determination for then the taxpayer to go  
22 back to the bankruptcy court or to the court and say we  
23 think they're wrong.

24 And so that's essentially what I'm saying is the  
25 Board of Equalization, the Board members were able to --

1 part of their function was to -- was to make a final  
2 determination on behalf of the agency. That's what they  
3 did. And it wasn't until they made that determination  
4 that then the agency would go and try to collect whatever  
5 liabilities were owed.

6 JUDGE GAST: This is Judge Gast. Thank you for  
7 explanation. I don't have any further questions.

8 JUDGE KWEE: Okay. This is Judge Kwee. At this  
9 time I'm going to turn it over to the parties to have  
10 their five minutes on closing remarks. I'll start with  
11 the taxpayer.

12 Mr. Taylor, you have five minutes for any final  
13 closing remarks.

14 MR. TAYLOR: Thank you.

15

16 CLOSING STATEMENT

17 MR. TAYLOR: This is Mr. Taylor again. I want to  
18 point out with respect to the jurisdictional issue, this  
19 case is a transitional case. So the appeal was filed and  
20 pending with the Board of Equalization when the OTA was  
21 created. I'm probably the person with the least amount of  
22 knowledge on this call as to the scope of the OTA's  
23 authority with respect to cases inherited from the Board  
24 of Equalization.

25 I'm sure members of the panel have dealt with

1 that and staff members have dealt with that far more than  
2 I have. However, I'm not aware of anything in the  
3 statutory scheme that created the Office of Tax Appeals  
4 that says that respect to an item that was pending at the  
5 time before the Board of Equalization, we're going to  
6 strip the OTA of authority to hear the case.

7           So maybe -- and I don't know this panel doesn't  
8 have to address that necessarily, maybe there's a  
9 distinction here between cases that were pending on the  
10 discharge versus cases that were not. Because I don't  
11 think the California legislature intended to strip the OTA  
12 of powers that were held by the Board of Equalization at  
13 the time that law was enacted. And, clearly, everybody  
14 agrees that the Board of Equalization now -- at least when  
15 I hear Mr. Bacchus say, yeah, they did determine it. They  
16 had the authority to determine it.

17           So I -- again, I'm not the person most  
18 knowledgeable on that issue, but I'm certainly not aware  
19 of any statutory authority that says that this tribunal is  
20 being stripped of the authority to decide something that  
21 the Board of Equalization had the authority to decide at  
22 the time the Office of Tax Appeals is created with respect  
23 to the merits.

24           This -- I ask the members of this tribunal, take  
25 a look at the language. The language says impose with

1 respect to a transaction or event. The penalty is  
2 imposed. Okay. All right. The penalty is imposed with  
3 respect to a transaction or event not personal liability  
4 for a penalty but is the penalty imposed. The language  
5 focuses on the penalty, not the personal liability for the  
6 penalty.

7 And there's no doubt whatsoever that the penalty  
8 was imposed with respect to a failure to pay and a failure  
9 to file that occurred more than three years before the  
10 date of Mr. Savage's bankruptcy petition.

11 Thank you very much.

12 JUDGE KWEE: Yes. Thank you. This is  
13 Judge Kwee.

14 At this time I'll turn it over to CDTFA,  
15 Mr. Bacchus for your final comments.

16 MR. BACCHUS: Thank you.

17

18 CLOSING STATEMENT

19 MR. BACCHUS: Chad Bacchus for the Department.

20 Just to respond and to kind of continue to try to  
21 clarify the change that happened when the legislature  
22 created the Office of Tax Appeals. At that point in time  
23 whatever appeals were pending before the Board of  
24 Equalization, at this time when it got switched over, the  
25 Department's or the agency's final determination became

1 the decision that was written by the Appeals Bureau.

2 And I want to point out that when the Office of  
3 Tax Appeals was created, they had emergency regulations in  
4 place. And the emergency regulations stated that the  
5 Office of Tax Appeals did not have jurisdiction to hear  
6 discharge in bankruptcy cases. And that regulation  
7 changed, but now there are proposed amendments to the  
8 regulations that -- that add that limit to the Office of  
9 Tax Appeals' jurisdiction back. And so once those  
10 proposed amendments are accepted, the Office of Tax  
11 Appeals will again not have jurisdiction to hear cases  
12 involving discharge and bankruptcy.

13 Moving on to the transaction or event date,  
14 again, there's a distinction in 6829 cases. 6829 is a  
15 derivative statute. There's a distinction between the  
16 penalties owed by the underlying business entity, in this  
17 case Bella. They owed tax or they owed tax and the  
18 penalty, and penalties were imposed upon them for their  
19 failure to file the returns.

20 However, the penalties passed through and imposed  
21 upon Mr. Savage or -- or it's a separate -- it's the same  
22 penalty because it's passed through, but his liability for  
23 that penalty did not occur until the business entity  
24 ceased business operations. It wasn't until that time he  
25 could even be -- he could even be held liability for the

1 tax and penalties.

2 So a distinction has to be made, and it was that  
3 distinction in that that is at the crux of this -- of this  
4 appeal. It's -- and that's when -- and that's when  
5 Mr. Savage became liable for the penalties at issue.

6 Thank you.

7 JUDGE KWEE: This is Judge Kwee. I think we lost  
8 our representative for Appellant. Was it Lisa Nelson? I  
9 think she dropped off at the beginning of CDTFA's closing  
10 remarks. I'm just noting that for the record and I'm  
11 confirming with Appellant's remaining representative.

12 Mr. Taylor, do you have any objections to  
13 continuing to proceed in absence of your other  
14 representative?

15 MR. TAYLOR: This is Mr. Taylor again. No  
16 objection whatsoever to this manner of proceeding. Thank  
17 you.

18 JUDGE KWEE: Okay. Thank you. This is  
19 Judge Kwee.

20 Mr. Bacchus, were you finished with your  
21 presentation?

22 MR. BACCHUS: Yes, I am. Thank you.

23 JUDGE KWEE: Okay. Thank you. This is  
24 Judge Kwee.

25 Then I'll turn it over to the panel so see if the

1 panel would like to ask any final questions at this point.

2 I'll start with Judge Brown. Judge Brown, do you  
3 have anything further to ask?

4 JUDGE BROWN: I don't have any. This is  
5 Judge Brown. No, I don't have anything further. Thank  
6 you.

7 JUDGE KWEE: Judge Gast, do you have any further  
8 questions before we conclude today?

9 JUDGE GAST: This is Judge Gast. I don't have  
10 any further questions. Thank you.

11 JUDGE KWEE: Okay. Then this is Judge Kwee.  
12 We're ready to conclude today's hearing. This case is  
13 going to be submitted today, August 19th, 2020, at  
14 approximately 2:06 p.m. Thank you everyone for coming in  
15 today. The record in this appeal is now closed. The  
16 judges are going to meet and decide your case later on,  
17 and we'll send a written opinion of our decision within  
18 100 days from today.

19 The hearings for today are now adjourned, and  
20 thank you everyone.

21 (Proceedings adjourned at 2:06 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 21st day of September, 2020.

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