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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
N. PRINCE,) OTA NO. 19024304
APPELLANT.)
_____)

Transcript of Proceedings, taken at
400 R Street, Sacramento, California, 95811,
commencing at 1:16 p.m. and concluding
at 2:00 p.m. on Tuesday, September 29, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOHN JOHNSON

Panel Members: ALJ SHERIENE RIDENOUR
ALJ CHERYL AKIN

For the Appellant: ERIC ANDERSON
MICHAEL VIGIL

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

MIRA V. PATEL
MARIA BROSTERHOUS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received at page 7.)
(Department's Exhibits A-H were received at page 7.)

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1 Sacramento, California; Tuesday, September 29, 2020

2 1:16 p.m.

3

4 JUDGE JOHNSON: With that we're on the record.

5 This is the Appeal of Prince. It is OTA Case

6 Number 19024304. It is 1:16 on September 29th, 2020.

7 This appeal is being conducted electronically led by

8 myself, Judge Johnson, here in Sacramento, California.

9 While I'm the lead ALJ for purposes of conducting

10 this hearing, it will be the panel of three administrative

11 law judges that will decide the appeal. At this point,

12 let me say good afternoon to my fellow co-panelists today.

13 Good afternoon, Judge Ridenour.

14 JUDGE RIDENOUR: This is Judge Ridenour. Good

15 afternoon, everybody.

16 JUDGE JOHNSON: Thank you, Judge Ridenour.

17 And good afternoon, Judge Akin.

18 JUDGE AKIN: Good afternoon. Judge Akin

19 speaking.

20 JUDGE JOHNSON: Thank you. This is Judge Johnson

21 again.

22 Just a reminder that OTA is an independent agency

23 with no ex parte communication. So our decision will be

24 based on the arguments and evidence provided by the

25 parties on appeal in conjunction with an appropriate

1 application of the law. We have read the briefs and
2 examined the submitted evidence. We are looking forward
3 to your arguments today. I understand it has taken many
4 steps to get to this point, so I want to say that I
5 appreciate the parties' efforts up to now. We fully
6 respect the importance of the decision to be made.

7 Let me have the parties introduce themselves on
8 the record. We'll begin with Appellant.

9 MR. ANDERSON: Eric Anderson with the firm
10 Anderson, representing the Appellant, Mr. Nathan Prince.

11 MR. VIGIL: And Michael Vigil with Anderson Tax,
12 representing Nathan Prince.

13 JUDGE JOHNSON: Thank you. Mr. Vigil, could you
14 just introduce the two other members you have on the call
15 as well.

16 MR. VIGIL: Yes, of course. Thank you,
17 Judge Johnson. We also have two of my partners, Jason
18 Graham and Nicholas Ramundo, also of Anderson.

19 JUDGE JOHNSON: Thank you.

20 And Respondent, could you introduce yourself for
21 the record.

22 MS. PATEL: This is Mira Patel with Respondent.

23 MS. BROSTERHOUS: And Maria Brosterhous with
24 Respondent.

25 JUDGE JOHNSON: Thank you. This is

1 Judge Johnson.

2 The issue we have today is whether Appellant has
3 shown error in Respondent's determination concerning the
4 allocation of income from Appellant's restricted stock
5 units, or RSUs, that vested in the 2012 tax year.
6 Appellant's have provided Exhibits 1 and 2. And Franchise
7 Tax Board has provided Exhibits A through H. The parties
8 have stated they have no objection to those exhibits, and
9 those are now admitted into the record.

10 (Appellant's Exhibits 1 & 2 were received
11 in evidence by the administrative Law Judge.)

12 (Department's Exhibits A-H were received in
13 evidence by the Administrative Law Judge.)

14 At this stage we are ready to go into the
15 parties' presentations. Let me ask before we start.

16 Respondent, did you have any questions or
17 comments before we go into oral arguments?

18 MS. PATEL: This is Mira Patel. No questions.
19 Thank you.

20 JUDGE JOHNSON: Thank you.

21 And Appellant, if you have any questions or if
22 you're not, if you're ready to go, you may proceed.

23 MR. ANDERSON: Okay. Thank you, Judge Johnson.

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OPENING STATEMENT

MR. ANDERSON: Again, this is Eric Anderson with Anderson representing the Appellant, Mr. Nathan Prince. We want to thank the OTA today, and we hope it pleases you to hear our presentation today. We want to thank you, especially during this unprecedented time up where we're coming from people's bedrooms and loft landings and wherever else they happen to be. So we appreciate you being here and the Franchise Tax Board as well for convenience or for each agency, the OTA and the FTB.

This OTA panel must determine today what a reasonable allocation of income is derived from equity compensation, the form of restricted stock notes. This OTA has the opportunity to look at the particular facts of this particular case and determine a reasonable allocation for Mr. Prince. Now, this case involves a very distinct set of facts.

Mr. Prince worked for a time period in California and a time period outside of California. And what this panel needs to decide is how to reasonably allocate the income derived from these restricted stock units that takes into account the time period of inside work and outside of work in California to determine the amount of income appropriately sourced for the State.

Now, we want to be clear. This is a case of

1 first impression in front of you. There has not been a
2 single court, a board, or this panel, or this OTA that has
3 determined an issue of equity compensation on facts
4 particular like this, where we are looking at a reasonable
5 allocation for time periods for inside and outside of the
6 state, and reasonable allocation methodology. I also want
7 to acknowledge that the OTA recently issued the opinion
8 and appeal of Stabile.

9 Now in Stabile there was a question of an
10 allocation of compensation. But in that case, Mr. Stabile
11 did not offer a reasonable allocation but instead argued
12 that California cannot tax any compensation related to a
13 non-resident. That's not the matter before you today, and
14 the facts here will bear that out.

15 So let's go into what those facts are that are
16 particular to this case. Mr. Prince worked as a Facebook
17 customer support representative starting in Palo Alto,
18 California with Facebook in March of 2007. On
19 June 7th, 2010, the Appellant took a position in Singapore
20 and moved overseas. From that point forward until 2012,
21 he worked for Facebook up until a move to Australia where
22 he lives and works for Facebook up to this day.

23 The question here is when the taxpayer earned
24 income from restricted stock units that vested in 2012,
25 how so we allocate between the time period that he worked

1 exclusively in California or nearly exclusively up to
2 June 7th, 2010, and outside of California thereafter. The
3 restricted stock units at issue fall into a few different
4 tranches. Primarily, the taxpayer earned most of his
5 restricted stock units or received them in 2007. And then
6 there were five other tranches granted in 2009 and 2010.
7 All of these restricted stock units then vested at the
8 later part of 2012.

9 At the time, all of that income was record as
10 compensation for services performed and included in a W-2
11 reported as California source income. The question is,
12 should it have been reported as California source income.
13 And the answer to that is clearly no. The taxpayer was a
14 none-resident of California at that time, which means
15 there should have been a reasonable allocation of that
16 income.

17 So taxpayer filed a refund claim claiming that
18 reasonable allocation should bifurcate the period that he
19 worked inside of California and outside of California.
20 And in so doing, took account of the value of the Facebook
21 stock that appreciated from the time he was granted the
22 restricted stock units to June 7th, 2010, when he left
23 California and, thereafter, the period of time outside it
24 took the value of the stock as of June 7th, 2010, to the
25 time that the stock vested. And that period was outside

1 of California. The former being taxable, the latter not.

2 When the Franchise Tax Board reviewed this claim,
3 they agreed that the Appellant was entitled to a
4 reasonable allocation methodology and agreed that their
5 working days, nothing would apply. However, what the
6 Franchise Tax Board did was took no account of the value
7 of the stock at the time Mr. Prince was working. And in
8 so doing, looked at all of the time period from grant to
9 vest as all one continuous timeline.

10 The Franchise Tax Board, therefore, only allowed
11 about half of the plan, leaving the \$62,937 in front of
12 you today. Now, the issue here is whether the FTB
13 unreasonably applied their working days method to the
14 taxpayer's particular facts. Or stated differently,
15 whether the FTB disregarded those facts. The FTB does not
16 dispute that the Appellant was a non-resident of
17 California, nor does the FTB dispute that a working days
18 method may apply.

19 The FTB also does not dispute that all relevant
20 facts and circumstances of a particular taxpayer must be
21 taken into consideration. The question here is, did the
22 FTB fail to take these relevant facts into consideration
23 by applying a working days method without regard to the
24 value of the work that was performed at the time the work
25 was performed. We submit that the FTB ignored its own

1 standard and ignored Mr. Prince's particular facts and
2 improperly denied the refund based upon an unreasonable
3 allocation.

4 Now, we want to be clear here. What the taxpayer
5 is offering to the Franchise Tax Board and to this OTA
6 panel is a working days method that takes into account
7 that bifurcation. For simplicity and for -- and to make
8 this clearer, we're going to refer to the method the
9 taxpayer is putting forward as a stock appreciation method
10 that ties the working days to the appreciation of the
11 stock. But to be clear, it is a variation on the working
12 days method and not a departure from it.

13 To frame-up the technical basis for this position
14 under California law, I'll hand this over to my colleague
15 Mr. Vigil.

16 MR. VIGIL: Thank you very much, Eric. And good
17 afternoon everyone.

18

19 OPENING STATEMENT

20 MR. VIGIL: Under California Code of Regulation
21 Section 17951-5, when employees are paid on some other
22 basis, for example, options, or in this Appellant's case,
23 RSUs, the total compensation for personal services must be
24 apportioned between California and other jurisdictions in
25 such as a manner as to allocate to California that portion

1 of total compensation, which is reasonably attributable to
2 personal services performed in this state.

3 This is the language in California's regulation.
4 Importantly, the regulation does not mandate application
5 of Respondent's working days method. It's not there.
6 Neither does the regulation even state that it is the most
7 reasonable. 17951-5 does not even limit a taxpayer's or
8 Respondent's choice of methodology. If the FTB's position
9 is sustained, California will be taxing the increase in
10 stock prices, various tranches of RSU grants without
11 giving regard to time and geographic location and
12 appreciation of stock.

13 And this bears no rational relationship to the
14 personal services rendered within the State of California
15 for this Appellant. This attempt to capture multiple
16 years for this taxpayer with a single one size fits all
17 apportionment methodology quite simply should be the
18 poster child for one size fits all working days method
19 that produces an unreasonable result, disproportionate tax
20 burden on a non-resident. Appellant's stock appreciation
21 method remains faithful to a reasonable allocation for
22 personal services.

23 By contrast, Respondent's method ignores
24 Appellant's specific facts and is arbitrary and
25 unreasonable. Respondent ignores that the determination

1 of such compensation is inseparably linked to the
2 appreciation of the equity. And importantly, effect and
3 impact ought to be given for the time period during which
4 and the geographic location where the actual personal
5 services were render.

6 Instead Respondent ignores the time period and
7 geographic location during which the stock appreciated.
8 And that is what is linked to the performance of services
9 where we to believe the employee contributed to the
10 success of the company. Respondent made no showing that
11 Appellant's appreciation method was unreasonable or less
12 valid, or that auditor's working days method was more
13 reasonable or more valid.

14 This panel should not subscribe to shifting
15 burdens. However, even if you do determine that Appellant
16 has the burden, Appellant believes he has met this burden.
17 Appellant's appreciation method gives respect to time,
18 geographic location at the time personal services were
19 rendered, and to appreciation in the value of the stock.
20 The vast difference between the outcomes using either
21 method is itself evidence supporting the Respondent's
22 method is unreasonable.

23 Importantly, during the final two-and-a-half
24 years of vesting time, after moving and working for the
25 company, not only outside the state, but outside the

1 country. Appellant spent only 9 days in California.
2 That's 9 out of approximately 900 days. And as you may
3 note from the briefs and the exhibits, these last
4 two-and-a-half years is when much of the appreciation in
5 the stock occurs.

6 The best authority for looking at an alternative
7 for when a taxpayer works partly in California and partly
8 out is Appeal of McKee. McKee highlights that income
9 reasonably attributable to personal services perform in
10 California must consider the value of the work performed
11 at the time the work was performed and the geographic
12 location at which it was performed. Both RSUs, the
13 instant case, and bonus income, McKee, are inherently
14 compensation, which is directly tied to the performance of
15 services by the Appellant and the value and profitability
16 of the company. Attribution should focus on the value of
17 the RSUs during the time the Appellant performed his
18 services. And Appellant's stock appreciation method is
19 faithful to the principle.

20 Let me illustrate with the two exhibits Appellant
21 submitted to the panel. On Exhibit 1 you will see, or you
22 should see, a depiction of Appellant's facts. You will
23 note the stark contrast of the days spent in California in
24 the later years as compared to the earlier years. And now
25 overlaid on top of the Appellant's less than 1 percent of

1 time spent in California during the latter two-and-a-half
2 years, you will note the amazing appreciation in stock
3 price during that same period.

4 Put simply, it seems patently unfair to tax
5 appreciation and value that has no bearing whatsoever on
6 the State of California other than for tax dollars. On
7 Exhibit 2, the McKee facts you will note the similarities
8 in how the Board ruled in favor of the taxpayer there,
9 that his bonus compensation was properly sourced outside
10 the state coincident with the period of time during which
11 he was in Oregon during businesses.

12 Notably, that taxpayer continued to pay
13 Respondent the taxes owed on salary earned while he was in
14 California. It was simply the bonus that was sourced
15 outside for that period. These exhibits help illustrate
16 the importance of the work performed at the time the work
17 was performed and the location -- the geographic location
18 at which it was performed, and how those relate to a
19 reasonably attributable allocation to the State.

20 Appeal of Stabile, FTB's most recent working days
21 method case, which submitted for determination by the OTA
22 on the basis of briefs just last month. Similarities
23 include performance-based equity compensation and shares
24 vesting after the taxpayers left California. However,
25 that's where the similarities end. Appellant believes

1 what matters most here are the distinct differences.

2 Stabile did not include any of the equity
3 compensation in his California tax return, and he asserted
4 that the shares were not taxable because of non-residency,
5 not because he raised an alternative allocation or a
6 portion of methodology. To be sure, to our knowledge,
7 there's no other precedential court case prior BOE
8 decision or OTA opinion, that presents a taxpayer who
9 provided her own alternative apportionment methodology as
10 is the case here.

11 Most of the prior similar cases or administrative
12 appeals related to attacks on the state's ability to tax
13 any of the equity compensation -- it's not here -- or a
14 tax on the working days method itself; variation including
15 excluding specified days or including others and why. If
16 the working days method is the only method, then
17 California and the Respondent should clarify.

18 It has demonstrated the ability to be clear in
19 promulgating regulations across the body of its
20 administrative roles. But as the applicable regulation
21 stands now, any reasonable method should suffice. And it
22 is for these reasons we hereby respectfully request the
23 panel for the Appellant, to rule for the Appellant in
24 granting his refund.

25 We thank the panel for your consideration, and

1 thank you to the FTB.

2 Thank you.

3 JUDGE JOHNSON: This is Judge Johnson. Thank
4 you.

5 Let's now turn to Respondent Franchise Tax Board.
6 You will also have 10 to 15 minutes for your arguments.

7

8 OPENING STATEMENT

9 MS. PATEL: Thank you. This is Mira Patel for
10 Respondent.

11 Respondent properly allocated Appellant's
12 restricted stock unit compensation or RSUs based on a
13 ratio of California working days to total working days
14 between the grant date and the vest date. Pursuant to the
15 precedential case of *Stabile*, this method has been
16 established as a reasonable method to a portion restricted
17 stock. Additionally, Appellant has not met his burden of
18 proof on appeal to establish that Respondent's method
19 produces an unreasonable result.

20 Appellant began his employment with Facebook as a
21 customer support representative in Palo Alto, California
22 in 2007. Throughout his time at Facebook, Appellant was
23 offered six tranches of RSUs starting in 2007 through
24 2010. All six tranches of RSUs vested during the 2012
25 taxable year. In 2010 Facebook offered Appellant a

1 position at its Singapore office. Subsequently, Appellant
2 became a California resident in July of 2010. Appellant
3 filed a 2012 non-resident return reporting all of the RSU
4 income as California source.

5 He subsequently filed an amended return sourcing
6 only \$7.27 per share as California source income.

7 Respondent reviewed Appellant's claim for refund and
8 allowed a partial refund based on a duty days or working
9 days method of calculating Appellant's source income.
10 Revenue & Taxation Code Section 17951 taxes California
11 residence on income from California sources.

12 The taxation of restricted stock is governed by
13 Internal Revenue Code or IRC Section 83 subsection (a),
14 which California conforms to under Revenue & Taxation Code
15 Section 17081. IRC Section 83(a) provides that the
16 taxpayer does not recognize any gain when the restricted
17 stock is granted. Instead, a taxpayer recognizes taxable
18 compensation when the restricted stock is vested. Or in
19 the words of statute, the first time the rights of the
20 person having the beneficial interest in such property are
21 transferable or not subject to substantial risk of
22 forfeiture; whichever occurs earlier.

23 It's well established through case law that the
24 gain from the vesting of the RSU is characterized as
25 compensation for personal services. An RSU plan is a form

1 of stock-based compensation under which and employee is
2 awarded the right to receive a fixed payment equal to the
3 value of a specified number of shares of the employer's
4 stock. The RSUs are subject to restrictions, including
5 vesting, limits on transferability, or performance goals,
6 and generally require the employee to remain employed with
7 the employer until the RSUs vest.

8 The IRS treats RSUs like other forms of
9 non-qualified stock options subject to substantial risk of
10 forfeiture. Similar to stock options, the RSUs have a
11 clear grant date and period of vesting. Also similar, the
12 RSU value is not recognizable until the vesting date. In
13 this case, Appellant received six tranches of RSUs, all of
14 which vested throughout the 2012 taxable year.

15 Even though the six tranches were granted
16 starting from 2007 through 2010, they had no value until
17 the day they each vested. The characteristic of an RSU
18 requires Appellant to continue employment with his
19 employer until the vesting date. Otherwise, the six
20 tranches of RSUs have no value.

21 It's undisputed that Appellant performed services
22 in California between the time the RSUs were granted and
23 vested and also as a California non-resident.
24 Consequently, pursuant to the California Code of
25 Regulations Section 17951-5, Appellant's California source

1 of income would be allocated to California based on the
2 extent Appellant performed services in California. The
3 reasonable allocation method must be based on the facts
4 and circumstances of each case.

5 In accordance to the regulation and case law,
6 Respondent multiplied the compensation from each tranche
7 by the corresponding ratio of California working days to
8 total working days from the grant date to the vest date.
9 The duty day or working day analysis is an established
10 method of allocation for multiple types of compensation,
11 including restricted stock.

12 As established by the recent precedential case of
13 *Stabile*, Respondent's allocation method is consistent with
14 the mandate of Regulation Section 17951-5, which requires
15 an individual's compensation for personal services to be
16 apportioned in such a manner as to allocate to California
17 that portion of the total compensation, which is
18 reasonably attributable to personal services in this
19 state. Therefore, Appellant's arbitrary apportionment
20 value of \$7.27 ignores the explicit requirement of the
21 Regulation and of *Stabile*.

22 In the *Stabile* case, the taxpayer was awarded
23 mirror shares by his employer. The shares were awarded to
24 the taxpayer when he was a California resident and later
25 vested when the taxpayer was a California non-resident.

1 The taxpayer argued that the increase in the share price
2 after he became a non-resident is not taxable by
3 California.

4 The Office of Tax Appeals noted that the taxpayer
5 appears to misunderstand IRC Section 83(a), which provides
6 that a taxpayer is taxed precisely on the fair market
7 value on the vesting date, less any consideration paid for
8 the stock. The Office of Tax Appeals held that the
9 working days formula used to allocate the taxpayer's
10 California source income for the share is a reasonable
11 formula.

12 Similarly, Appellant in this case was awarded
13 RSUs when he was a California resident. These RSUs vested
14 once Appellant was a California non-resident. Appellant's
15 case is analogous to that of Stabile. Consequently, the
16 working days formula in this case reasonably allocates
17 Appellant's California source income. Appellant argues
18 that the proper method to source RSUs is to consider the
19 approximate value of the stock on the last day that he
20 worked in California.

21 This method does not reasonably attribute
22 Appellant's personal services performed in California.
23 The RSUs are deferred compensation that only have value
24 upon vesting. Appellant's method completely disregards
25 both the California Code of Regulations and the Federal

1 Treasury Regulation and arbitrarily places the value on
2 the stock when there is no taxable or recognizable event.

3 California Code of Regulation Section 17951-5
4 requires the allocation of California source income be
5 based on the total compensation. Consequently, using
6 \$7.27 is arbitrary and contrary to the requirements of the
7 California Regulations. Additionally, Treasury Regulation
8 Section 1.83-7 states the fair market value of an option
9 is not nearly the difference that may exist at a
10 particular time between the option's exercise price and
11 the value of the property subject to the options, but also
12 includes the value of the option privilege for the
13 remainder of the exercise period. In the context of RSUs,
14 RSUs cannot be valued at any given time between grant and
15 vest. It's only after the vesting has occurred do the
16 RSUs provide any value to Appellant.

17 Furthermore, Appellant's method of allocation is
18 analogous to what the taxpayer argues in *Stabile*. And the
19 OTA made clear, this method is a misunderstanding of IRC
20 Section 83(a). Therefore, Appellant's premature and
21 arbitrary approximation during 2010 does not properly
22 allocate the RSUs. Additionally, Appellant's method
23 disregards California working days after the 2010 taxable
24 year.

25 Appellant argues that pursuant to the *McCamey*

1 principle, each year stands on its own, which requires FTB
2 to treat separate taxable years independently. However,
3 Appellant is mistaken. As explained earlier, RSUs are a
4 form of deferred compensation. And pursuant to Revenue &
5 Taxation Code Section 17041 and 17051, the amount of
6 taxable income computed for the taxable year includes all
7 prior years for deferred income. Consequently, for
8 purposes of RSUs, Respondent's duty day calculation for
9 the period of 2007 through 2012, is statutorily required
10 and appropriate.

11 Finally, Appellant cites to other sources and
12 cases in hopes of supporting his position, including the
13 McKee case. McKee involved the sourcing of bonus income,
14 which is a different form of compensation than RSUs. It's
15 undisputed that the income in this case is deferred
16 income. Deferred income is governed by a separate federal
17 code section and regulation. Therefore, to compare
18 Appellant's deferred income to bonus income incorrectly
19 completes two very differently treated incomes.

20 Additionally, the facts and profitability of the
21 company in McKee were substantially different than in the
22 case at hand. Consequently, the McKee case cannot be
23 compared to for purposes of RSU income. A review of the
24 Stabile case demonstrates the duty days analysis employed
25 by Respondent is a reasonable method of allocation for

1 purposes of RSUs.

2 Furthermore, Appellant has failed to argue why
3 its case should be distinguished from Stabile case.
4 Consequently due to its precedential nature, the method
5 employed in Stabile must also be used to determine
6 Appellant's California source income. In a claim for
7 refund, OTA has held that the taxpayer bears the burden of
8 proof.

9 Appellant has failed to meet his burden of
10 establishing that Respondent's duty day method of sourcing
11 his RSU income is unreasonable. Therefore, on the facts
12 and evidence in the record, Respondent respectfully
13 request you sustain this position.

14 Thank you.

15 JUDGE JOHNSON: This is Judge Johnson. Thank
16 you.

17 Appellant, you now have five minutes to provide a
18 rebuttal.

19 MR. ANDERSON: Okay. Thank you, Judge Johnson.

20

21 CLOSING STATEMENT

22 MR. ANDERSON: We're thrilled that the FTB wants
23 to dig into the Stabile case, and we're happy to do that
24 here as well. But at its forefront, let's talk about what
25 the issue is here.

1 The issue here is if you apply a working days
2 formula in the way that the FTB is offering to you today,
3 it is a tacit approval of Publication 1004 as effectively
4 a regulation. Because there would be no other way that
5 RSU income would be sourced in a reasonable allocation
6 formula to taxpayer's particular facts.

7 So if you were to apply this in the way that the
8 Franchise Tax Board is offering this to you, you were
9 saying that Publication 1004 using the grant date to the
10 vest state is the methodology to use disregarding any
11 particular facts of any particular taxpayer. And that's
12 what we're asking you not to do here. And Stabile
13 actually bears that out. In fact, I think there's a gross
14 misrepresentation of what was in the Stabile case.

15 In that case, the taxpayer never offered an
16 allocation methodology that was different than what
17 they -- FTB had offered. In fact, the Appellant didn't
18 dispute the FTB's California working days allocation
19 ratio. They merely disputed whether or not the
20 allocation -- the income could be taxed at all by
21 California and not by the ratio. In fact, the OTA went
22 through great lengths to talk about the allocation ratio
23 and what Stabile had actually failed to do.

24 They pointed out the Newman decision, which was
25 rendered by our Court of Appeal. In the Newman decision,

1 there was a question about whether or not the working
2 day's method should include actors' duty days plus the
3 days that they were on call or only the duty days. The
4 FTB was saying it was only the duty days and the actors
5 were saying, well, we're on call. So those are days that
6 actually should count in the duty days formula.

7 Well, in the Newman case, even the taxpayer had
8 the burden of showing that the FTB's result was
9 unreasonable, they were able to easily meet that burden
10 because the duty days were part of the on-call that they
11 were supposed to be rendering. And that allowed the
12 actors to have some value to what they were providing by
13 being available for their duty.

14 So even this OTA looked at that decision and
15 said, look, we have a way to use different methodologies
16 by applying working days formula in a different way. And
17 all we need to determine is whether or not it's reasonable
18 or unreasonable to determine it in a taxpayer's particular
19 facts. Mr. Stabile failed to do that; never even argued
20 that there was a different methodology that should apply.

21 So this OTA should look at that decision very,
22 very carefully, and look at the facts of this case very,
23 very carefully with the overlay of Newman that says, where
24 really, the burden of the taxpayer is only to show that
25 the FTB's result is unreasonable, relegating it to a

1 question for this panel of whether what the taxpayer has
2 put forward is reasonable.

3 And what we're submitting to you is, if you side
4 with the Franchise Tax Board in this case, you are siding
5 with an opinion that is effectually rubber stamping a
6 regulation and have a one-size fits all approach to all
7 RSU compensation. Now, also not in dispute in this case
8 is the way compensation is rendered. We recognize that
9 RSU compensation is stock compensation, and that
10 compensation actually does get recognized in the 2012 year
11 for Mr. Prince.

12 The question is, there is a period of time within
13 which that compensation is actually earned. And what the
14 Franchise Tax Board is saying is, you don't take into
15 account the time period within which it is earned. And,
16 oh, by the way, McKee doesn't matter because it's a bonus
17 case. Well, let's talk about how those actually relate to
18 each other.

19 The McKee case deals with a bonus that is
20 effectively like a deferred compensation in a way, because
21 you're working during a period of time. And after the end
22 of that period of time, there's an amount that's paid
23 related to past performance of services. That is no
24 different than what an RSU fundamentally is. Now, of
25 course, the instruments are different, but the principle

1 is the same; that you need to take into account the time
2 period within which the taxpayer was working.

3 In the McKee decision, the taxpayer was working
4 for a company that paid a bonus based on the profitability
5 of the business. He was working for the business in
6 Oregon when it was profitable and was in California when
7 it wasn't profitable. He paid his tax in California based
8 upon the work that was being done in California on his
9 salary. But in that case, it was determined that the
10 bonus only related to the period of time of profitability,
11 and that was when he was working in Oregon.

12 We have exactly the same situation here. The
13 profitability or value of the restricted stock was at one
14 level when the taxpayer was working in California, and at
15 a different level when he was outside of California. And
16 to not take that into consideration produces an
17 unreasonable result.

18 I'll hand it over to Mr. Vigil for any of his
19 comments.

20 MR. VIGIL: And Judge Johnson, I don't think this
21 will take very long at all; so if you would allow me the
22 leeway?

23 JUDGE JOHNSON: Yes, please go ahead.

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CLOSING STATEMENT

MR. VIGIL: Thank you very much.

Just a couple of points real quick. The federal rules inasmuch as they relate to allocation and apportionment, really have no bearing here. I don't think anybody was discussing, you know, vesting or et cetera of the RSUs, and FTB knows that. What really matters is the application of FTB's own Rule of 17951-5, and that rule calls for allocation of the state under a reasonable attribution. The 2010 \$7.00 amount of the stock is not arbitrary, but based on valuations that were provided during audit. All of that was substantiated.

RSUs cannot be valued was stated by Respondent's counsel, and that's just absolutely not true. It's the 21st Century. Many, many companies value RSUs or other instruments that may or may not be vested for a number of reasons, not the least of which is it represents a form of compensation. Okay.

Statutorily required, I think that statement is a little misleading. And as much as the statute is an enabling device that defers to FTB's own regulation, and with that -- and with respect, Appellant is of the belief that if you allow Respondent's method to apply in this instance under the Appellant's particular facts, you will have effectively permitted the Respondent to fashion a

1 regulation without the benefit of a full review as has
2 been the longstanding practice in California.

3 As you may surmise, that would be in fact -- I'm
4 sorry. That would, in fact, be a regulation that
5 presently does not exist. Either you allow the FTB to
6 regulate, or you champion the application of a reasonable
7 method as it is called for in the existing regulation.
8 Appellant's belief is the present regulatory language
9 provides for allocation for total compensation which is
10 reasonably attributable personal services in the state.
11 And this is the plain language of the regulation. Because
12 a one-size fits all methodology will not necessarily
13 reasonably apply to all facts.

14 Appellant would like you to consider his
15 alternative method as, again, it gives effect and impact
16 to time, geographic location, and appreciation of the
17 underlying security. This would be particularly
18 reasonable under this Appellant's specific facts. Again,
19 the Appellant thanks the panel for your consideration as
20 well as the FTB. Thank you.

21 JUDGE JOHNSON: This Judge Johnson. Thank you.

22 With that, we can move onto questions from the
23 panel. I will start with Judge Akin. Do you have any
24 questions for the parties?

25 JUDGE AKIN: Judge Akin speaking. No questions.

1 JUDGE JOHNSON: Thank you.

2 And Judge Ridenour, do you have any questions for
3 the parties?

4 JUDGE RIDENOUR: Hello. This is Judge Ridenour.
5 I do not have any questions for either party. Thank you
6 very much.

7 JUDGE JOHNSON: Okay. Thank you. Judge Johnson
8 again. I have a couple of questions. I think they're
9 fairly simple though. For Respondent, you mentioned
10 during your arguments that -- I believe you stated that
11 taxpayer became non-resident as of July 2010; is that
12 correct?

13 MS. PATEL: This is Mira Patel for Respondent.
14 That's correct.

15 JUDGE JOHNSON: Okay. And for Appellant, are
16 there any arguments regarding the actual calculations of
17 workdays that Respondent is using in their formula?

18 MR. ANDERSON: In terms of the actual number of
19 days working in California, no. There's no dispute.

20 JUDGE JOHNSON: Okay. Thank you. And to just
21 kind of follow up on Appellant's rebuttal, Franchise Tax
22 Board's statements regarding the value of the restricted
23 stock units, on the value of them before they become
24 vested, I think part of Respondent's argument is, well, as
25 part of that value they take into is a potential future

1 value.

2 And so, Appellant, would you care to comment
3 about whether potential future value comes into play or
4 whether you look at just the exact \$7.64 at that time or
5 perhaps that incorporates future value.

6 MR. VIGIL: This is Michael Vigil for Appellant.
7 So in this situation, as is reflected in a number of other
8 companies as you might very well see, there are periodic
9 valuations for any number of reasons; whether it be regard
10 to M&A transactions or compensation for a new employee,
11 and is that particular instance to which I'm focused.

12 Again, the documentation supporting the \$7 and
13 change valuation at the time of Appellant's departure from
14 the State of California, again, not just to another state
15 but to another country was done at the time as a snapshot
16 valuation of what that RSU was valued at that time. Could
17 he cash it in? No. However, I will point you to the fact
18 that if he made an IRC 83(b) election to treat it as his
19 stock, he could have.

20 He could have treated that for tax purpose. Now,
21 the fact that he did not should have not moments here.
22 But the point is, what would the tax impact be? It would
23 be related back to that valuation at that time. And that
24 is all we ask you to look at.

25 MR. ANDERSON: And Judge Johnson, if I may very

1 quickly. The -- the -- also, if you look at that what is
2 a central tenet of the Franchise Tax Board's argument,
3 which is that there's a continued inducement to -- to
4 continue to be employed.

5 Well, Mr. Prince was induced to continue to be
6 employed by taking another position in Singapore and
7 subsequently Australia. And he could have at that time
8 decided that the RSUs were really not worth much, to part
9 with the company, and decided to go work someplace else,
10 because at the time they actually weren't worth a
11 significant amount until he subsequently left California
12 and went and worked in Singapore.

13 So if you think about one of those simple tenents
14 of this inducement to work and the value at the time, it
15 is in the taxpayer's mind whether or not they want to
16 continue to work for the future appreciation, at which
17 time that work was done outside of California. Or if he
18 wants to give away the value of the restricted stock units
19 at the time for all of the work that had already been
20 performed in California.

21 Another piece to this is under that regulation
22 17951-5 where the reasonable methodology arises, it says
23 nothing about equity compensation. There is a working
24 days method that is in there. And the working days method
25 applies to people who go in and out of California

1 routinely, like airline pilots and stewardesses and sports
2 players and other -- other people that are kind of going
3 in and out.

4 That's not what this case is. This case is
5 somebody who is in California for a period of time, left
6 and was outside of California for a period of time for the
7 vast majority of time in those two tranches and periods.
8 So to be able to bifurcate the value of that period of
9 time makes a lot more sense than a working days method
10 that provides a peanut butter approach as if your
11 compensation was the same during that entire period of
12 time.

13 I mean, reasonably when Mr. Prince was working as
14 a customer service representative in 2007, he was probably
15 making a little bit different money than when he was
16 working in Singapore in 2000 and -- I'm sorry -- 2007 than
17 when he was working in Singapore in 2011 managing a large
18 group of people. So, you know, the compensation is
19 different during the periods of time anyway. And we
20 should take that into account in the stock value.

21 So pegging the value at a period of time and
22 thinking about the future appreciation actually is aligned
23 with the methodology that we're putting in front of you
24 here today.

25 JUDGE JOHNSON: Okay. I think that's all the

1 questions I have today.

2 Let me turn one more time to my co-panelists.
3 Judge Akin, any questions before we go?

4 JUDGE AKIN: Judge Akin speaking. No additional
5 questions. Thank you.

6 JUDGE JOHNSON: Thank you.

7 And Judge Ridenour, any questions?

8 JUDGE RIDENOUR: Actually, I do have one
9 question. This is Judge Ridenour. Mr. Anderson, so I
10 have a couple of questions about the last minute thing you
11 mentioned about how he started in 2007 as a customer rep
12 and then he became a manager and, therefore, his
13 compensation increased, which must have, therefore,
14 increased his -- correlate with the increase of the stock.
15 Is that what I'm understanding what you're saying?

16 MR. ANDERSON: So Judge Ridenour, no. I'm sorry.
17 I didn't mean to align those two directly. What I meant
18 to say is -- is when you have an employee that is working
19 and a stock is a -- or restricted stock units are a
20 component of that compensation, the time period that the
21 person is working may coincide with some value related to
22 the services that they're performing.

23 It's not unreasonable to think that while he was
24 working in California and the company was doing moderately
25 well when he was at the beginning of his career and making

1 less money, that the value of that compensation in the
2 restricted stock units would also be commensurably less
3 than what it was when he left and he had a higher position
4 in the company, and the stock was worth more.

5 Now, that may be coincidence in this particular
6 case. But it is reasonable to think that his compensation
7 for his restricted stock units should not be ratable the
8 same way that his salary over that period of time was not
9 ratable.

10 JUDGE RIDENOUR: Okay. I just wanted to clarify.
11 Thank you. No further questions. This is Judge Ridenour.

12 JUDGE JOHNSON: This is Judge Johnson. Thank
13 you.

14 So the evidence has been admitted into record.
15 We have the arguments and the briefs, as well as the oral
16 arguments here today. We have a complete record from
17 which to base our decision.

18 Let me ask one last time. Any final questions
19 from Appellant before we end today.

20 MR. VIGIL: None. This is Mike Vigil for
21 Appellant. No additional questions.

22 JUDGE JOHNSON: Thank you.

23 Any final questions from Respondent?

24 MS. PATEL: Mira Patel for Respondent. No
25 additional questions. Thank you.

1 JUDGE JOHNSON: Well, thank you to both parties
2 for efforts on appeal. The record is now closed. This
3 concludes our oral hearing on this appeal. The parties
4 should expect our written decision no later than 100 days
5 from today. With that we're now off the record. This
6 concludes this hearing appeal of Prince.

7 (Proceedings adjourned at 2:00 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 23rd day of October, 2020.

ERNALYN M. ALONZO
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