

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
O. CREMEL and) OTA NO. 18042625
E. KOEPPEL,) OTA NO. 20076340
)
APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, January 26, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Virtual Proceedings, taken at
400 R Street, Sacramento, California, 91401,
commencing at 1:05 p.m. and concluding
at 1:43 p.m. on Tuesday, January 26, 2021,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

1 APPEARANCES:
2
3 Panel Lead: ALJ CHERYL AKIN
4
5 Panel Members: ALJ MIKE LE
ALJ JOSHUA LAMBERT
6 For the Appellant: GREGORY R. WILSON
7
8 For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
9 BRADLEY COUTINHO
ELLEN SWAIN
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I N D E X

E X H I B I T S

(Appellants Exhibits 1-11 were received at page 7.)
(Appellants Exhibits 1-2 were received at page 7.)
(Department's Exhibits A-F were received at page 7.)
(Department's Exhibits A-E were received at page 7.)

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1 Sacramento, California; Tuesday, January 26, 2021

2 1:05 p.m.

3

4 JUDGE AKIN: Good afternoon. I am Judge Akin.

5 We are opening the record in the consolidated appeals of

6 Oliver A. Cremel and Evelyne Koepfel, Office of Tax

7 Appeals, Case Number 18042625 and 20076340. It is

8 presently 1:05 p.m. on January 26th, 2021.

9 Consistent with the Governor's Executive Order

10 Number 25-20 to reduce and minimize the spread and risk of

11 Corona virus infection, and with the agreement of the

12 parties, this hearing is being conducted via Webex video

13 conferencing.

14 The case is being heard and decided equally by a

15 panel of three judges. My name is Judge Akin, and I am

16 the lead judge for the purposes of conducting this

17 hearing. Also on the panel with me are Judge Le and

18 Judge Lambert.

19 Can I have the parties state their names and who

20 they represent for the record. We will start with

21 Appellant, please.

22 MR. WILSON: Gregory R. Wilson, counsel for

23 Appellants Olivier Cremel and Evelyne Koepfel.

24 JUDGE AKIN: Okay. And Franchise Tax Board.

25 MR. COUTINHO: Brad Coutinho for the Respondent

1 Franchise Tax Board.

2 MS. SWAIN: Ellen Swain for the Respondent
3 Franchise Tax Board.

4 JUDGE AKIN: Okay. Judge Akin speaking. Thank
5 you.

6 My understanding that there are three issues to
7 be decided by us today. One, is whether Appellants have
8 established error in Franchise Tax Board determine --
9 excuse me -- Franchise Tax Board's determination that
10 Appellant Koeppel's community property interest in the
11 income earned during the 2011 and 2012 tax years from
12 nonqualifying stock options and restricted stock units
13 granted to Appellant Cremel was California source income.

14 The second issue is whether Franchise Tax Board's
15 proposed assessment issued to Appellant Koeppel for the
16 2012 tax year is barred by the statute of limitations.

17 And the third is whether the late-filing penalty
18 was properly imposed with respect to Appellant Koeppel's
19 2012 tax return.

20 With respect to first issue, I would note that
21 the parties have agreed that only the income earned while
22 Appellant Koeppel was a nonresident of California is at
23 issue. Any income attributable to and earned while
24 Appellant Koeppel was still a California resident is
25 California source income.

1 Mr. Wilson, does my statement of the issues to be
2 decided today sound correct to you?

3 MR. WILSON: It does, yes.

4 JUDGE AKIN: Okay. Thank you. And Franchise Tax
5 Board, Mr. Coutinho?

6 MR. COUTINHO: Yes, those are correct.

7 JUDGE AKIN: Okay. Thank you.

8 Judge Akin speaking again. Pursuant to the
9 January 6th, 2012, minutes and orders, we have admitted
10 Appellant's Exhibits 1 through 11 relating to the 2011 tax
11 year and Appellant Koepfel's Exhibits 1 through 2 relating
12 to 2012 tax year.

13 (Appellant's Exhibits 1-11 were received
14 in evidence by the Administrative Law Judge.)

15 (Appellant's Exhibits 1-2 were received
16 in evidence by the Administrative Law Judge.)

17 Also pursuant to the January 6th, 2021 minutes
18 and orders, we admitted Franchise Tax Board's Exhibits A
19 through F relating to Appellant's 2011 tax year and
20 Exhibits A through E relating to Appellant Koepfel's 2012
21 tax year.

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

24 (Department's Exhibits A-E were received in
25 evidence by the Administrative Law Judge.)

1 These exhibits were admitted without objection by
2 either party. The parties have indicated the intent to
3 submit one additional exhibit, which will be the full 2012
4 tax return for Appellant Koeppel, including some notation
5 of the actual date it was filed by Franchise Tax Board. I
6 would like to verify with Mr. Wilson that this is
7 consistent and correct with the Appellant's understanding.

8 MR. WILSON: Yeah. The return I'm referring to,
9 there was actually two 2012 541 Forms; 541 filed in 2013.
10 Which was a resident return. And one filed in late or
11 several years later, which was a nonresident return. The
12 return I'm referring to is the 2013 return. And I want --
13 we only have a partial in the record right now, and I want
14 to submit the full return.

15 JUDGE AKIN: And I think -- Judge Akin speaking.
16 I think you mean 2012 rather than 2013?

17 MR. WILSON: I mean 2012 return, yes. But it was
18 filed in 2013.

19 JUDGE AKIN: Okay. I understand. And are you
20 planning on submitting that, or are you asking Franchise
21 Tax Board to submit that?

22 MR. WILSON: I'm planning to submit it.

23 JUDGE AKIN: Okay. And Franchise Tax Board, just
24 to verify, you do not have any objection to the submission
25 of the tax -- the complete 2012 tax return, which was

1 filed in 2013 by Appellant Koepfel?

2 MR. COUTINHO: This is Brad Coutinho speaking. I
3 just want to clarify with Appellants. Are they speaking
4 about Mr. Olivier Cremel's return that was filed for the
5 2012 tax year with his -- believe his new wife, Ms. Lee,
6 or was it a return that was filed by Ms. Koepfel for the
7 2012 tax year?

8 MR. WILSON: Yeah, I'm referring to the former,
9 right. And so right now I believe it's exhibit --

10 MR. COUTINHO: I believe it's -- sorry. This is
11 Brad Coutinho speaking. I believe it's Exhibit 2 for the
12 2012 tax year, and I believe it's a partial, page 1
13 through 7, for Mr. Olivier Cremel. And that is the return
14 you're referring to; is that correct?

15 MR. WILSON: It is. Exhibit 2-A, exactly.

16 MR. COUTINHO: Right. Okay. Yes -- sorry,
17 Judge Akin. I think your question was whether or not
18 that's Respondent's understanding, and that is correct.

19 JUDGE AKIN: Okay. And just to verify, there's
20 no objection to keeping the record open to allow the
21 submission of that document following this appeal? That's
22 directed to Mr. Coutinho up there.

23 MR. COUTINHO: Yes. There's no objection to
24 that.

25 JUDGE AKIN: Okay. Thank you.

1 And there are no additional exhibits beyond that;
2 correct, Mr. Wilson?

3 MR. WILSON: Correct.

4 JUDGE AKIN: And Mr. Coutinho?

5 MR. COUTINHO: That is correct.

6 JUDGE AKIN: Okay. Thank you. And I would also
7 note that on January 11th, 2021, the parties filed a
8 document -- one moment -- entitled "Appellants and
9 Respondent's Stipulation of Facts". The parties have
10 agreed that the stipulation of facts was jointly prepared
11 by Appellants and Franchise Tax Board and may be relied
12 upon by the Panel in this hearing and the written opinion
13 to be issued following today's hearing.

14 Mr. Wilson, can you confirm this for the record,
15 please?

16 MR. WILSON: Yeah, I confirm that.

17 JUDGE AKIN: Okay. And Mr. Coutinho?

18 MR. COUTINHO: This is Brad Coutinho speaking.
19 Yes, Respondent confirms that the stipulation is a joint
20 statement between Appellants and Respondent.

21 JUDGE AKIN: Okay. Thank you.

22 With that and just to confirm, neither party has
23 any witnesses today; correct, Mr. Wilson?

24 MR. WILSON: Correct.

25 JUDGE AKIN: And Mr. Coutinho?

1 MR. COUTINHO: Correct.

2 JUDGE AKIN: All right. With that, I believe,
3 Mr. Wilson, we are ready for your presentation. As a
4 reminder we have allotted 20 minutes, and you may begin
5 when you're ready. Please remember to restate your name
6 before speaking.

7 MR. WILSON: Thank you, Your Honor.

8

9 PRESENTATION

10 MR. WILSON: This is Gregory Wilson for the
11 Appellants.

12 So during the relevant years, Olivier Cremel was
13 living and working in California while married to Evelyne
14 Koepfel, who resided in France with her children. Olivier
15 was granted property, stock options, and RSUs from his
16 employer VM Ware. IRC Section 83 governs the taxation of
17 property granted for services. California has adopted
18 Section 83.

19 The primary issue in this case is the source of
20 Evelyne's community property share of that -- of the
21 income from the options and the RSUs as outlined by
22 Judge Akin. IRS Ruling 2002-22 addresses the taxation of
23 stock options under Section 83 where income is divided
24 between a husband and wife. In this ruling, like Evelyne,
25 the nonemployee spouse was entitled to her share of

1 community property income resulting from husband's stock
2 options.

3 The IRS in now ruling, they cited Supreme Court
4 Case Poe versus Seaborn. They wrote that the nonemployee
5 spouse, and only nonemployee spouse, is taxable on her
6 share of the community income earned via her husband's
7 stock options. The IRS further stated in that ruling that
8 the nonemployee spouse is taxed on her share of the income
9 as if she was the person who actually performed the
10 services.

11 The best interpretation and application of this
12 statement from this Revenue ruling is that Evelyne is
13 deemed to have performed the services for VM Ware for her
14 share of the income. Evelyne performed these services
15 while living in France. Thus, her share of the income is
16 not California source. This appears to me to be the end
17 of the analysis. Section 83 governs the taxation, in this
18 case, this property. California has adopted Section 83.

19 Revenue Ruling 2002-22 is the only authority to
20 speak to this issue that I can locate, other than Li which
21 we'll address -- I'll address later. It says that Evelyne
22 is treated as if she was the person who actually performed
23 the services. She worked for VM Ware in France for her
24 income.

25 Another way to look at this with the same result,

1 is if you look at the couple's collective contributions
2 and collective fruit of such contributions. Evelyn was
3 in France while she performed her services for the
4 community. Her share of the community income is for her
5 services she provided for the family unit. Those services
6 were provided while she was in France.

7 In the prehearing conference minutes and orders,
8 you ask that we address certain opinions issued by this
9 appeals body. The first is Li. Li dealt with a couple's
10 filing status. They thought to change their filing status
11 to separate, but the Revenue & Taxation Code requires one
12 spouse to be a nonresident with no California source
13 income. This appeals body concluded the requirement was
14 not met finding the nonresident spouse had California
15 source income.

16 The Li opinion stated that California residence
17 income retains its California source when paid to the
18 nonresident spouse. This is contrary to our position, to
19 Appellant's position in this case and inconsistent with
20 Revenue Ruling 2002-22. The opinion in Li cites Schechter
21 Rozan and Malcolm and Browne for the statement that the
22 nonresident share of community income is California
23 sourced. None of those cases, however, actually address
24 the sourcing issue. Those cases are cited as concluding
25 something which they did not discuss.

1 I'm in the unfortunate position today to come
2 before this appeals body and argue that its opinion in Li
3 is flawed. But, nonetheless, that is my position. Li
4 states the conclusion and cites cases for that conclusion,
5 but the cited case doesn't address the relevant sourcing
6 issue. Instead, those cases conclude the same things as
7 many other authorities conclude in this area of law. They
8 say that you look to state law when determining whether
9 income is separate or community. And they conclude that
10 the nonemployee spouse, and only the nonemployee spouse is
11 taxable on his or her share of the community income.

12 Those are not -- those issues are not disagreed
13 here. That's well settled. But none of those cases
14 address the sourcing issue. In Mitchell, cited in the Li
15 opinion, the Supreme Court stated that state law
16 determines if income is community is separate. But
17 federal law addresses how the income is taxed. In Revenue
18 Ruling 2002-22, states we treat in this case as Evelyne
19 having worked in France for her share of the income.

20 The Supreme Court in Mitchell also recognize that
21 all property acquired during marriage under community
22 property laws is due to the joint efforts of the spouses
23 and not -- and the nonemployee spouse is just as much an
24 agency in acquiring this property as the employee spouse.
25 Her share, in the case of Mitchell, was not from the

1 gratitude of her husband. She earned her share as much as
2 she did.

3 This is just and right. And California was right
4 to be an earlier supporter of this concept. Revenue
5 Ruling 2002-22 then explains how the nonemployee spouse is
6 taxed on his or her share of the community income. And
7 recognizing the community efforts outlined in Mitchell
8 states she is deemed to be the person who actually
9 performed the services for her share of the income.

10 The Browne opinion cited in Li is a bit difficult
11 to follow. It's an older case, and otherwise it doesn't
12 support the sourcing statement made in the Li opinion. In
13 Brown, husband was a nonresident, and wife lived and
14 worked in California. The FTB in Browne allocated one
15 half of wife's income as community to husband. But
16 strangely it doesn't appear that the husband filed a
17 nonresident return in California reporting his share of
18 the community income earned by his wife in California.
19 And the FTB never seem to have asserted this was required.

20 Lin and Gao are not applicable to this case.
21 There, this appeals body determined they're -- neither
22 spouse was a California resident, and there was no
23 community income earned. Stabile also referenced in the
24 orders is also not relevant. I don't see any relevance in
25 Stabile. So really the only -- the only relevant opinion

1 referenced is the Li opinion. And it's -- the cited case
2 for its conclusion -- the cited cases for its conclusion
3 don't address the sourcing issue.

4 The second issue in this case is the statute of
5 limitations issue for the 2012 year only. Evelyne's share
6 of the couple's 2012 community income was reported on a
7 Form 540 filed by Olivier in April of 2013. On that
8 return, her share of the income was shown as
9 non-California source income. Seven years later the FTB
10 issued an MPA asserting Evelyne owes tax on this income.
11 It's true that Evelyne did not file her own separate
12 income tax return reporting the 2012 income prior to the
13 MPA being issued. But the couple believed the proper way
14 to report the income was on the 2012 Form 545 by Olivier.

15 All of the income was reported. It was shown as
16 exclusive California source income. They identified the
17 income as Evelyne's, but it was not -- Evelyne was not on
18 that return directly. It was Olivier's return filed
19 jointly with his new spouse. But all the income was
20 reported. And the FTB did not propose to change the
21 taxation of that income until seven years later.

22 Finally, the third issue is the penalty, also
23 only applying to the 2012 case of that year. Here, again,
24 Revenue Ruling 2002-22 says Evelyne is deemed to have
25 worked in France for her income. Li is contrary to our

1 position, but Li wasn't issued until many years until
2 after taxpayers reported their 2012 income. Furthermore,
3 this income was reported and excluded by Olivier on his
4 right with a clear explanation as to why it was excluded.

5 The FTB then said the income should have been
6 instead reported on a return file by Evelyne. So they did
7 that and, again, explained how it was not California
8 source income. We've been fully transparent with the FTB
9 and the law supports our position. Yet, the FTB asserted
10 a penalty. This is bad policy, frankly, by the FTB, who
11 should be encouraging taxpayers to disclose their
12 positions.

13 But if the FTB is going to hit taxpayers with
14 penalties, even when their position is supported by law
15 and fully disclosed, it eliminates the incentive for
16 taxpayers to disclose their position. What's the point of
17 it if they're going to -- if the FTB is going to penalize
18 the taxpayer anyway? The penalty shouldn't apply in this
19 case.

20 Thank you, Your Honors.

21 JUDGE AKIN: Judge Akin speaking. Thank you,
22 Mr. Wilson.

23 At this point I'd like to check with my Panel to
24 see if they have any questions.

25 Judge Le, any questions.

1 JUDGE LE: This is Judge Le. I don't have any
2 questions.

3 JUDGE AKIN: Okay. Thank you.

4 Judge Lambert, any questions for Appellants?

5 JUDGE LAMBERT: This is Judge Lambert. I don't
6 have any questions at this time. Thanks.

7 JUDGE AKIN: Judge Akin speaking. Thank you.

8 I do have one question for Appellants.

9 Mr. Wilson, I guess I'm curious to know if you see any
10 distinction here, because the income in question was
11 earned from nonqualified stock options and restricted
12 stock units as opposed to, you know, perhaps more
13 traditional salary or wage income?

14 I don't know if that is part of your position, or
15 if you would also assert that wage income earned, you
16 know, traditional wage income that was Ms. Koepfel's
17 community property interest, whether that would be
18 non-California source income under your theory as well.

19 MR. WILSON: Well, we haven't asserted that
20 position. The RSUs and the stock options are governed by
21 83 Property for Services. We know that in the revenue
22 ruling that applies is dealing specifically with Section
23 83 Property for Services. So I focused on that area
24 because that's what we're dealing with. Would it matter
25 if -- does it -- is it different if we're dealing with

1 just income? I'm not sure. But I haven't -- I haven't
2 considered that because we haven't claimed that position.

3 JUDGE AKIN: Okay. Thank you. That addresses my
4 question. I don't have any further questions for
5 Appellants at this time.

6 As such, Mr. Coutinho, I think we're ready for
7 Franchise Tax Board's presentation. You have 15 minutes,
8 and you may begin when you're ready. Again, please
9 restate your name before speaking.

10

11 PRESENTATION

12 MR. COUTINHO: Good afternoon. This is Brad
13 Coutinho speaking for Respondent Franchise Tax Board.

14 I also should have covered this earlier. I've
15 had issues in the past with my audio. And if, for
16 whatever reason, my audio starts to cut out, the Panel or
17 Appellants please feel free to cut me off, and I can call
18 in to the phone number provided.

19 I'd like to start with saying, based on the OTA's
20 precedential opinion in the Appeal of Stabile and under
21 California Code of Regulation 17951-5, Ms. Koeppel's
22 one-half interest in Mr. Cremel's compensation for
23 personal services must be treated as California source
24 income. Prior to this hearing, as stated by Judge Akin,
25 the parties did stipulate that the income at issue,

1 nonqualified stock options and restricted stock units,
2 were issued to Appellant-husband Olivier Cremel as part of
3 his compensation for services that he performed while he
4 was in California.

5 As articulated today, Appellants assert that
6 because Ms. Koepfel lived in France during the time the
7 stock options were exercised and because she has a
8 one-half interest in the income realized, that it must
9 follow that her share of the income must be sourced to
10 France, not California. However, Appellant's position is
11 inconsistent with California law. As stated earlier, the
12 parties have stipulated that the income at issue is
13 compensation for services that were performed by
14 Mr. Cremel while he was in California.

15 As such, Regulation 17951-5(b) is controlling in
16 this appeal because it dictates the California sourcing
17 rule for income that is earned by an employee for
18 performance of personal services. In the Appeal of
19 Stabile, a precedential opinion, the Office of Tax
20 Appeals' in interpreting California Code of Regulations
21 17951-5 held that the critical factor for determining the
22 source of income from personal services is not the
23 residence of the taxpayer but, rather, it is the place
24 where the services are actually performed.

25 In addition, numerous cases have held that under

1 California community property laws, one-half of resident
2 spouse's income is considered California source income of
3 the nonresident spouse. For example, in the Appeal Li,
4 the Office of Tax Appeals held that Appellant's spouse is
5 one-half interest in Appellant's wage income earned in
6 California was California source income, despite the fact
7 that Appellant-spouse lived in Texas.

8 The Li opinion establishes that when sourcing
9 compensation for services performed, we look not to the
10 nonresident's domicile or residence but, rather, you look
11 to where the services were performed, which is consistent
12 with Stabile Regulation 17951-5 in Respondent's position
13 in this appeal. Appellants have relied upon IRS Revenue
14 Ruling 2002-22 to support their position. However, the
15 facts of that revenue ruling are inapplicable to this
16 appeal.

17 Revenue Ruling 2002-22 involve a divorce decree
18 and stock options that were transferred to the non-earning
19 spouse prior to the exercise date. In this case, the
20 parties have stipulated that the income at issue is not
21 transferred as part of a divorce decree. Rather, it was
22 exercised solely by the earning spouse, Mr. Cremel, during
23 the period when Appellants were married.

24 In regard to the statute of limitations argument
25 that Appellants had made today regarding the 2012 tax

1 year, Mr. Cremel, the earning spouse's tax return is not
2 absolved or start the statute of limitations under
3 Revenue & Taxation Code Section 19087. Rather,
4 Ms. Koepfel filed her tax return in the tax year during
5 the 2009 calendar year and, thus, Respondent has until
6 2023 to issue a Notice of Proposed Assessment. And thus,
7 Respondent's proposed assessment in this case was timely
8 under Revenue & Taxation Code 19087.

9 In regard to Appellants arguments today regarding
10 the delinquent filing penalty, ignorance of the law and
11 California sourcing law has not been found to be a
12 reasonable cause to abate the delinquent filing penalty.
13 And thus, the delinquent filing penalty imposed was
14 correct and should be sustained by the Office of Tax
15 Appeals.

16 I'd be happy to address any questions or concerns
17 the Panel may have regarding any of the three issues in
18 this appeal. Thank you.

19 JUDGE AKIN: Thank you. Judge Akin speaking.

20 Does the Panel have any questions for Franchise
21 Tax Board? Judge Le?

22 JUDGE LE: This is Judge Le. I have no
23 questions.

24 JUDGE AKIN: Judge Lambert?

25 JUDGE LAMBERT: This is Judge Lambert. No

1 questions at this time. Thanks.

2 JUDGE AKIN: Okay. I do have one question for
3 Franchise Tax Board. It's essentially the same question
4 that I asked Appellants, and that is whether or not you
5 see any distinction due to the fact that the income in
6 question here was earned from nonqualified stock options
7 and restricted stock units as opposed to just, you know,
8 standard wage income?

9 MR. COUTINHO: No. This Brad Coutinho for
10 Respondent. No, I do not see any distinction. It appears
11 in the Li opinion that I mentioned earlier. It dealt with
12 wage income. And in that case, they found it to be --
13 even though the non-earning spouse was in Texas, they
14 determined that the wage income earned by the Appellant
15 was still California source income. And then consistent
16 with the Stabile decision, in that case, they found stock
17 options that were -- part of the Appellant's compensation
18 was California source income.

19 So Respondent does not find any distinguishing
20 feature between wage income -- regular wage income and
21 stock options in this particular case.

22 JUDGE AKIN: Okay. Thank you. I don't have any
23 further questions at this time.

24 With that, Mr. Wilson, I believe we're ready for
25 your rebuttal or closing statement. You have five minutes

1 and may begin when you're ready.

2 MR. WILSON: Thank you, Your Honor.

3

4 CLOSING STATEMENT

5 MR. WILSON: This is Greg Wilson. The language
6 in Revenue Ruling 2002-22 isn't a red herring. It's a
7 logical extension to the application of community property
8 loss and the taxation of community income. Each spouse
9 contributes equally for their share of the income. The
10 nonemployee spouse is treated as if she was the person
11 actually performing services for the income, because she
12 was performing the services for the income. This is
13 consistent with Mitchell and all their cases on this
14 topic.

15 To conclude otherwise requires a distortion of
16 community property laws that Olivier earned all of the
17 money here in California and then paid Evelyne separately
18 for her services. That feels wrong because it is wrong.
19 He earned all the money, but that is not taxed federally
20 on the share he paid to Evelyne. That is not consistent.
21 2002-22 resolves this logic. Evelyne earned her own share
22 for the community income -- for her share of the community
23 income. She earned that while performing services for the
24 community in France.

25 Thank you, Your Honors.

1 JUDGE AKIN: Thank you, Mr. Wilson. Judge Akin
2 speaking.

3 Does the Panel have any further questions for
4 either party at this time? Judge Le?

5 JUDGE LE: This is Judge Le. No questions.

6 JUDGE AKIN: Okay. Judge Lambert?

7 JUDGE LAMBERT: Yeah, I think I have a question
8 for FTB. Just if you can answer it, but maybe you can't.
9 But in a community property share situation like this, why
10 would you look at -- or why do you look at nonresident
11 sourcing rules and not the fact that the earner is a
12 resident?

13 MR. COUTINHO: My understanding with community
14 property rules is that just as the Appellants have stated,
15 Ms. Koepfel in this instance has a one-half interest in
16 those funds. And so we looked to her to treat it as
17 though she does have ownership of that. And then we
18 looked as though she is a nonresident. We applied the
19 rules under 17951, and then we go through the sourcing
20 rules to determine whether or not it is California source
21 income.

22 And then because of this specific type of income
23 in this case, compensation for personal services, we find
24 that we're under 17951-5. And so that's the analysis that
25 we did. I hope -- does that answer your question at all,

1 Judge Lambert?

2 JUDGE LAMBERT: Yes. Thanks.

3 JUDGE AKIN: Okay. Any further questions,
4 Judge Lambert, or was that it?

5 JUDGE LAMBERT: I guess one more question is, is
6 there -- I noticed that in Stabile it doesn't mention any
7 community property. So do we have any specific
8 authorities that these rules apply to the community
9 property?

10 MR. COUTINHO: Yes. I would turn to the Li
11 opinion, the precedential opinion in that case where they
12 looked at compensation for personal services that the
13 earning spouse had earned -- the Appellant had earned.
14 And -- or I believe it was a married couple in that case.
15 And they found that the compensation for personal services
16 earned by the earning spouse, the one-half interest of the
17 wife was California source income, even though she was
18 living in Texas at the time.

19 JUDGE LAMBERT: Okay. Thanks a lot.

20 MR. COUTINHO: Thank you.

21 MS. SWAIN: This is Ellen Swain from the
22 Franchise Tax Board. I just wanted to add one additional
23 thing to possibly address your question, Judge Lambert.
24 Which is, when you have a situation of stock options,
25 we're looking at you could have actually been a resident,

1 just hypothetically, at the time that you were earning
2 wages. But it has to do with when you're exercising the
3 option. One is a resident and then we look -- we do a
4 look back and we say, "Well, where was that person doing
5 the service days at the time?"

6 So there can be a slightly different calculus
7 when you have -- between those two different years that
8 can occur.

9 JUDGE LAMBERT: Thanks.

10 JUDGE AKIN: Okay. Any further questions,
11 Judge Lambert?

12 JUDGE LAMBERT: I have no further questions.
13 Thank you.

14 JUDGE AKIN: Okay. And I'm just going to circle
15 back to Judge Le one more time before I wrap things up
16 here. Any further questions?

17 JUDGE LE: This is Judge Le. No.

18 JUDGE AKIN: Okay. And I don't have any further
19 questions for either party.

20 Mr. Wilson, we've received your arguments and
21 your statements. I just wanted to give you a brief
22 opportunity to address anything else before we wrap up the
23 case.

24 MR. WILSON: No, I don't have any -- the only
25 thing is that as pointed out, the facts in the Stabile

1 case are quite different. And I've read that case, and it
2 just doesn't apply to this. The Li facts are similar, and
3 I've addressed why the opinion in Li I disagree with it.

4 JUDGE AKIN: Okay. Thank you.

5 Before I close this case, I wanted to note that
6 in my prehearing conference minutes and orders I noted
7 that I'd give the opportunity -- or excuse me -- give the
8 parties the opportunity to request post-hearing briefing
9 to the extent they felt it was needed to address our
10 precedential opinions in Appeal of Li, Appeal of Stabile,
11 and/or appeal of Lin and Gao. So I wanted to just take
12 one opportunity to circle back to the parties to see if
13 either feels the need to file a post-hearing brief on
14 that.

15 I'll start with Appellant Mr. Wilson.

16 MR. WILSON: Yeah, this is Greg Wilson. I would
17 like to file a post-hearing brief addressing those cases.

18 JUDGE AKIN: Okay. Mr. Coutinho, since
19 Mr. Wilson has requested to file a post-hearing brief,
20 would Franchise Tax Board also like to file a post-hearing
21 brief on that matter -- on those issues?

22 MR. COUTINHO: Yes. Respondent would like to
23 reply to Appellant's -- to Appellant's brief --
24 post-hearing brief regarding those cases.

25 JUDGE AKIN: Okay. There are two -- two ways we

1 can do this. We can either have Appellant file a post
2 hearing brief and FTB reply, or we can have both parties
3 file a simultaneous brief both addressing the issue. I
4 would like to recommend the latter so that we don't have
5 the record open too long and can resolve the case.

6 Any objection, Mr. Wilson, to both parties
7 submitting simultaneous briefs on the applicability of the
8 Appeal of Li, Appeal of Stabile, and appeal of Lin and
9 Gao?

10 MR. WILSON: No objection by Appellants.

11 JUDGE AKIN: Franchise Tax Board, would that be
12 acceptable to you as well, or do you have an objection?

13 MR. COUTINHO: No, Respondent doesn't have any
14 objection to that. However, Respondent just wants to
15 preserve its rights. We don't -- I'd like to confer with
16 my team to see if whether an additional brief would be
17 needed in this case, if that would be fine with the Office
18 of Tax Appeals?

19 JUDGE AKIN: Certainly. What I can do is give
20 the parties an opportunity to file one. And if you decide
21 not to, you can submit a statement simply indicating that
22 you don't wish to file a brief.

23 MR. COUTINHO: Thank you, Judge Akin.

24 JUDGE AKIN: Okay. I think what I'll do --
25 Mr. Wilson, would 30 days work for you to file that

1 post-hearing brief --

2 MR. WILSON: Yes. Yes, Your Honor.

3 JUDGE AKIN: -- as well as the additional
4 exhibits, the tax return for the 2012 tax year?

5 MR. WILSON: Yes.

6 JUDGE AKIN: Okay. So 30 days that would be --
7 it looks like February 26th. So what I'll do is I'll keep
8 the record open until February 26th to allow the parties
9 to file an additional brief addressing our precedential
10 opinion. It's Issue One and the precedential opinions of
11 the Appeal of Li, Appeal of Stabile, and Appeal of Lin and
12 Gao.

13 FTB, you can always decline to file one. Just
14 simply let us know.

15 MR. COUTINHO: Thank you very much.

16 JUDGE AKIN: Okay. With that, I think we're
17 ready to conclude the hearing. The record will be held
18 open until February 26, 2021, to allow the additional
19 briefing on Issue One, the sourcing issue. I would -- and
20 also allow Appellant to provide the 2012 tax return.

21 I would like to thank both parties, both
22 Mr. Wilson and Mr. Coutinho, for your participation and
23 presentations today, and for being flexible with the
24 hearing format. I know it can be a little tricky with
25 Webex, but you both have done a great job presenting your

1 case -- your cases, and we appreciate your time today.

2 The judges will meet and decide the case based on
3 the briefs, including the post-hearing briefs filed by the
4 parties, the evidence in the record, including the joint
5 statement of stipulated facts, and the arguments presented
6 today. We will issue a written opinion within 100 days
7 after we close the record. So that will be about -- well,
8 that will be 100 days from March 26, 2021.

9 This concludes this hearing.

10 (Proceedings adjourned at 1:43 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
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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 16th day
of February, 2021.

ERNALYN M. ALONZO
HEARING REPORTER

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