## BEFORE THE OFFICE OF TAX APPEALS STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF	)
T. DOYLE AND K. DOYLE,	) ) OTA No. 1905479
,	)
APPELLANT.	)
	) )

VIDEOCONFERENCE

TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Wednesday, February 3, 2021

Reported by: Dorothy M. Simpson CSR No. 14323

1	BEFORE THE OFFICE OF TAX APPEALS
2	STATE OF CALIFORNIA
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4	
5	IN THE MATTER OF THE APPEAL OF )
6	T. DOYLE AND K. DOYLE, ) OTA No. 19054797
7	APPELLANT. )
8	)
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12	TRANSCRIPT OF PROCEEDINGS, via videoconference,
13	Sacramento, California 95811, commencing at 10:12 a.m. and
14	concluding at 11:08 a.m. on Wednesday, February 3, 2021,
15	reported by Dorothy M. Simpson, CSR No. 14323, in and
16	for the State of California.
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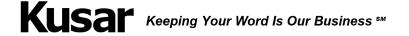
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1	APPEARANCES:	
2	Panel Lead:	Hon. Elliott Scott Ewing
3	Panel Members:	Hon. Alberto Rosas Hon. Andrea Long
4		<u>-</u>
5	For the Appellant:	Jae Lee
Э	For the Respondent:	Franchise Tax Board
7		By: David Muradyan
8		Nancy Parker
9		
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11	(All parties	appeared via videoconference.)
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                 (Appellants' Exhibits 1 through 10 were
     ADMITTED at page 7.)
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                 (Respondent's Exhibits A through J were
 8
     admitted at page 7.)
 9
                 (Respondents Exhibits K through M were
     admitted at page 8.)
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1 Sacramento, California; Wednesday, February 3, 2021 2. 10:00 a.m. 3 4 5 JUDGE EWING: Okay. All right. Very well. We are 6 now going to go on the record in this matter. We are now on the record in the appeal of 7 T. Doyle and and K. Doyle, OTA Case Number 19054797. 8 9 Today is Wednesday, February 3rd, 2021, at 10 approximately 10:12 actual local time. 11 This appeal was intended to be heard in 12 person in Sacramento, California, but instead, and with the consent of the parties, it is being held by WebEx 13 14 video conference today. 15 I am Elliott Scott Ewing, the lead 16 administrative law judge on this matter, and with me today are Judge Alberto Rosas and Judge Andrea Long. 17 18 The three of us will be hearing this matter this 19 morning. I am the lead ALJ, meaning I will be 20 conducting the proceedings but my copanelists and I are 21 equal participants, and we will reviewing the evidence, 2.2 asking questions, and reaching a determination on this 23 case today. 24 Parties, please, state your name and who you



represent for the record, starting with Appellants.

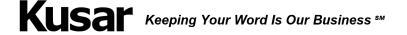
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This is Jae Lee. I am the Appellants' 1 MR. LEE: 2 representative. 3 JUDGE EWING: Okay. And also for Appellants, I 4 understand we have Ms. Menguin. Ms. Menguin, please, state your name and your role for the record. 5 6 MS. MENGUIN: Yes. Good morning, your Honor. 7 Menguin He from TAAP. JUDGE EWING: Okay. And also for Appellants, 8 9 Appellant Mr. Doyle, will you, please, state your name 10 for the record. 11 MR. DOYLE: Thomas G. Doyle. Thank you. 12 JUDGE EWING: Thank you, Mr. Doyle. Now for Respondent, please, state your name 13 14 and who you represent for the record. 15 MR. MURADYAN: Hello. This is David Muradyan, and 16 I represent the Respondent Francise Tax Board. JUDGE EWING: Okay. And finally for Respondent, 17 18 Franchise Tax Board, we also have Ms. Nancy Parker. 19 Ms. Parker, please, state your name for the 20 record. 21 MS. PARKER: My name is Nancy Parker, and I also 2.2 represent the Franchise Tax Board. Thank you, Ms. Parker. 23 JUDGE EWING: 24 I understand we have no one else for the 25 parties, so we will move on to the issues in this case.

1	At the Prehearing Conference held in this
2	matter on January 6, 2021, the parties represented as
3	agreed that the following are the issues in this appeal:
4	Number 1. Whether Appellants have
5	established reasonable cause for abatement of the late
6	payment penalty.
7	Number 2. Whether Appellants are entitled to
8	a refund of the underpayment of estimated tax penalty.
9	And 3. Whether Appellants are entitled to
10	interest abatement.
11	Any questions at this point? No? We're
12	doing fairly well. Okay.
13	As far as the exhibits. Appellants have
14	submitted Exhibits 1 through 10, which are admitted into
15	evidence without objection.
16	(Appellants' Exhibits 1 through 10 were
17	admitted into evidence.
18	JUDGE EWING: Respondent FTB Has submitted Exhibits
19	A through J which also are admitted into evidence
20	without objection.
21	(Respondent's Exhibits A through J were
22	admitted into evidence.)
23	JUDGE EWING: For Appellants, Mr. Lee, I would like
24	to reconfirm you have no additional exhibits at this
25	time.



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This is Jae Lee.
 1
          MR. LEE:
 2.
                That is correct.
 3
                But I do have a question about -- I'm sorry.
     Can I continue?
 4
          JUDGE EWING: Certainly. Go ahead.
 5
 6
                    I do have a question about the
 7
     Respondent's exhibit list.
                According to my Exhibit Log, the Respondent's
 8
 9
     Exhibits go to M. Is that not the case?
10
          JUDGE EWING: That is correct. Thank you for
11
     pointing that out. Let me go back to that item.
12
                Yes. Let me correct the record on that
13
     point.
14
                Regarding the exhibits, FTB has submitted
15
     Exhibits A through M as in Mike, which are also admitted
16
     into evidence without objection.
                (Respondent's Exhibits K through M were
17
18
     admitted into evidence.)
19
                And thank you for bringing that up, Mr. Lee.
20
     I appreciate that.
21
                Okay. Any other questions about the
2.2
     exhibits?
23
                Okay.
                       Hearing none.
24
                Okay.
                       Do my fellow ALJs have any questions
25
     at this point? No?
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1 Very well. Okay. We'll go ahead and get 2 started with Appellant's opening presentation. We will 3 begin with the opening presentation of Appellant. Mr. Lee, you indicated in the Prehearing 4 5 Conference -- excuse me -- in this matter, your 6 presentation would be expected to take 20 to 25 minutes. 7 You have requested an additional five minutes, which I 8 granted. 9 Please, go ahead and begin. 10 Thank you. I'd like to start by asking MR. LEE: 11 Mr. Doyle questions to establish some relevant facts 12 regarding this appeal against the FTB's Assessment of penalties and interest against the Appellants. 13 14 BY MR. LEE: 15 Ο. Mr. Doyle, how would you describe the Merrill 16 Lynch account that you used for the tax payment at 17 issue? 18 Α. This is Tom Doyle. 19 The Merrill Lynch account is my standard and 20 primary checking account. Thank you. And by "primary account," what do 21 Ο. 2.2 you mean? It's the account I use for everyday 23 Α. 24 transactions -- for writing checks, debit transactions,

withdrawals, payments, digital payments, just like an

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everyday transaction account.

So I have used this without any incidents over the years, and I think I have been a client of Merrill Lynch for about 20 years now.

This particular account is also tied to another trust investment account, and this is account is where the -- at the time I got about 1.2 million dollars of liquidty in the when the payment was made, and that was consistent with the funds that I left in that account for several months following the payments and throughout the following year. So as to that account, like I said, it's a traditional checking account, write out credit and debit cards tied to it and handle all my deposits and withdrawals.

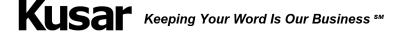
- Ο. Thank you. And have there been any incidents or features of the account that kept you from using the account in the manner you just described?
- Α. No, there's no other feature that's ever impeded me from using the account in the manner that I described, or as most of us would use our typical checking accounts or withdrawal accounts. I found it to work very efficiently for my everyday use.

This is Judge Long. I'm sorry -- I'm JUDGE LONG: sorry to interrupt.

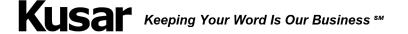
Judge Ewing, I think we may have overlooked



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     swearing in Mr. Doyle.
 2.
          JUDGE EWING: Yes, you're right. Thank you, Judge
 3
     Long. I appreciate that.
                We may have to -- to go back and re-ask these
 4
 5
     questions. And my apologizes to the panel and those on
 6
     the -- WebEx today.
 7
                Yes. I need to swear in the witness,
     Mr. Doyle.
 8
 9
                       Mr. Doyle, will you, please, raise
10
     your right hand.
11
12
                        THOMAS DOYLE,
13
                    Produced as a witness, and having
14
          been first duly sworn by the Administrative
15
          Law Judge, was examined and testified as
16
          follows:
17
18
          JUDGE EWING: Do you solemnly swear and affirm that
19
     you will tell the truth, the whole truth, and nothing
20
     but the truth?
21
          THE WITNESS: I do.
2.2
          JUDGE EWING:
                        Okay. Very well. Thank you.
                                                        Thank
     you for pointing that out, Judge Long.
23
24
                Okay.
                       I apologize for this, but, Mr. Lee,
25
     would you, please, repeat your questions now that the
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1 witness is under oath? 2. MR. LEE: Yes. I'll start from the beginning. 3 BY MR. LEE: Now, Mr. Doyle, how would you describe the 4 Ο. 5 Merrill Lynch account that you used for the tax payment 6 at issue? That account is used as my primary account Α. for checking, withdrawals, and digital transactions. 8 And by "primary account," what do you mean? 9 Ο. It's (audio distortion) --10 Α. 11 THE REPORTER: Excuse me. Excuse me. There's --12 there's something, there's clicking and I can't hear 13 Somebody is moving papers or something. him. 14 Can you start your answer over? 15 THE WITNESS: Yes. This is Tom again. 16 And by my primary account, it's the account that I use for my everyday transactions as a checking 17 18 account as well as for some investments. I've used this 19 account without incident for well over 10 -- 20 years 20 now with Merrill Lynch. 21 And in that account I have maintained a 2.2 balance during that year 2017 to 2018 that was 23 approximately 1.2 million dollars and those were the 24 balances in the account at which time I did make the



25

payment.

1	This checking account acts as any other
2	checking account similar to what most people have. I
3	have a credit card tied to it. I use it for my debit
4	transactions as well as just digital transactions,
5	withdrawals, and payments.
6	So there are limitations placed on it, and,
7	like I said, I use it for traditional withdrawals and
8	deposits.
9	BY MR. LEE:
10	Q. And are there any features or incidents of
11	the account that keep you from using the account in the
12	manner you just described?
13	A. No, there are no restrictions on the account.
14	I can use it for any transactions that I so choose, and,
15	you know, it's very accommodating, it's very easy to
16	use.
17	So, like I said, I do use it for my everyday
18	transactions just like any other checking account.
19	Q. Thank you. Now, turning to the routing
20	number issue.
21	Have you made an error in accurately
22	transcribing what you believe to be the correct routing
23	number?
24	A No I did not I included and had input the



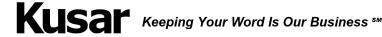
correct number for the routing from that bank.

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- Q. So you did not make an error in typing the routing number?
- A. No, I did not make an error in typing the routing number. It's the same routing number that I had used previously on other wire transactions, and I believed it to be the valid routing number at the time that I made the payment.

I have never had any other issues using that exact routing number in the past. In fact, that was the first time that routing number was used, and I experienced any kind of issues associated with that account.

- Q. Thank you. And did either -- either of the merging banks provide you with notice of a change in your banking information?
- A. No, I was not notified by either bank about any changes in the routing numbers or any other details that would have affected my use of the account. I did not receive any personal notices, nor had I ever seen any types of public notices or statements to that effect regarding changes to any potential routing numbers.
- Q. Thank you. And did you have any independent indications that could have suggested to you that the routing number you provided was outdated?
  - A. No. No, there was nothing that -- no reason



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to believe or prior to that transfer that the routing number was outdated in any fashion.

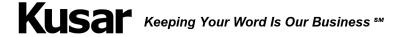
At the time I believed, and to the best of my knowledge, I knew that that was the correct routing number and it should have been valid at that time.

Looking back even, I can't think of anything else that I would have done differently because I was using the same number that I had used previously, and there was nothing else that would have tipped me off to the lack of validity of that routing number.

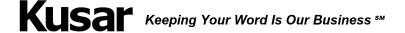
I was using it in the same manner which I generally would have attempted to make any other necessary payments that would have led to payments of funds that were due.

- Q. Thank you. Now, are there any facts you wish to provide the Panel as relevant to this appeal?
- A. I think that the significant fact was the confirmation page that I received from the payment at the time that I made it suggested, and common sense would have suggested it as well, in the ordinary course of business that confirmation page indicated that payment was made.

And I think in the ordinary course of business, a confirmation page like that would suggest and would have been a sufficient evidence of payment,



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1
     not just a preliminary scheduling of the payment.
 2.
                And nothing on that page would have suggested
 3
     that I should have reviewed or had future reason to
     confirm that payment was actually made.
 4
                    Thank you.
 5
          MR. LEE:
                That is all I have for Mr. Doyle.
 6
 7
          JUDGE EWING: Thank you, Mr. Lee.
                Judge Rosas, do you have any questions at
 8
 9
     this time?
10
          JUDGE ROSAS: This is Judge Rosas.
11
                I do not have any questions at this time.
12
     Thank you.
13
                       Okay. Very well. Judge Long, do you
          JUDGE EWING:
14
     have any questions at this time?
15
          JUDGE LONG: This is Judge Long.
16
                I have no questions at this time.
17
          JUDGE EWING: Okay. This is judge Ewing.
18
                Mr. Doyle, I do have a couple of questions.
19
                One question is is we have the Web page
20
     confirmation page which is Appellant's Exhibit Number 1.
21
                On the Web page confirmation it says that the
     date the request was made 9/11/2017, and it shows that
2.2
     the payment date would occur on 9/14 -- September 14,
23
24
     2017.
25
                Did you -- did you happen to notice that
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1 those dates were different? 2. MR. DOYLE: No, I do not recall that. 3 Okay. Thank you. JUDGE EWING: Second question is, near the bottom of that 4 5 page, it says your bank account allowed up to two 6 business days from the payment date for your bank 7 account to reflect your payment. 8 Did you -- did you happen to notice that 9 language? 10 MR. DOYLE: I don't recall at this time reading 11 that specifically. JUDGE EWING: Okay. 12 Thank you. And, finally, the bank account that you were 13 14 using, the Merrill Lynch account, had you ever used any 15 other account to -- to make your tax payments? 16 MR. DOYLE: Not that I am aware of, no. 17 JUDGE EWING: Okay. Okay. Very well. 18 Thank you. Those are all the questions I 19 have. 20 MR. DOYLE: Thank you. 21 JUDGE EWING: Franchise Tax Board, Mr. Muradyan, do 2.2 you have any questions for the witness? 23 I do not. MR. MURADYAN: 24 JUDGE EWING: Okay. Thank you. 25 I do not have any questions. MR. MURADYAN:

1 JUDGE EWING: Okay. Thank you. 2. Okay. Now we can turn to Respondent FTB's 3 presentation. Mr. Muradyan, you indicated at the Prehearing 4 Conference in this matter that you needed 10 to 15 5 6 minutes for your presentation. Feel free to begin. 7 MR. MURADYAN: Thank you. And I along with Nancy Parker represent 8 9 Respondent, Franchise Tax Board --10 THE REPORTER: Who's talking? I -- can't I can't 11 see who's talking. 12 Okay. You're talking. Start again then. MR. LEE: Jae Lee. Sorry. 13 14 Judge Elliott, that was just the -- the 15 testimony part of the initial statement. I -- I haven't 16 yet made the rest of my argument. Is that the course 17 or --18 JUDGE EWING: Oh, yes. Yes. My apoligies. 19 Mr. Muradyan, if you can wait one moment for 20 your presentation. 21 And, Mr. Lee, go ahead. 2.2 MR. LEE: Thank you. This is Jae Lee. Now, the Appellant's first contention is that 23 24 the Appellant's have established reasonable cause for 25 the abatementment of penalties imposed Pursuant to

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Revenue and Taxation Code Section 19132.

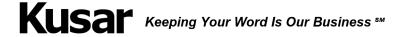
Now, 19132(a) allows the abatement of penalties imposed pursuant to that section where the tax show the late payment was due to reasonable cause, and not willful neglect.

In the Appeal of Curry, the BOE expounds on the reasonable cause standard by adopting the ordinary prudence and care standard specifying that inquiry will take into account the circumstances of the taxpayer.

And as repeatedly found in other precedential opinions, ordinary business care is a fact-sensitive inquiry into what an ordinarily prudent and careful businessperson would do under the circumstances that the taxpayer faced.

In the Appeal of Harry Moren, the FTB held that that acting — that acting with ordinary business prudence and care does not require that the taxpayer act in the most cautious manner. In that appeal, OTA rejects FTB's contention that the taxpayer could simply have doubled his tax liability while faced with uncertainty. In rejecting the FTB's position, the OTA explicitly finds that the most cautious approach is not the only reasonable one.

A misunderstanding of the ordinary prudent standard is in line with a reasonableness concern



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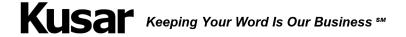
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evident in the very wording of reasonable cause. It would be unreasonable for a taxpayer to take a vastly more cautious approach that his knowledge would suggest is advisable. To require that the taxpayer make exhaustive inquiries into every possible impediment to payment, violates the standard as articulated in Morse, and imposes a burden on the taxpayer that is out of proportion to the possibility of issues arising.

Now, it is possible that reasonableness may include a reasonable inquiry into the fact so to determine adequately -- the adequately prudent course of action. But even conceding this, the ordinary prudence and care standard does not require that the taxpayer act in accordance with those facts that would not be uncovered by reasonable inquiry.

So the question to be asking, applying the reasonable care standard is not whether the taxpayers acted as a perfectly diligent and inquiring taxpayer, but rather whether the taxpayers acted reasonably given the set of facts knowing to him or should have been known to him.

The Appellants in this case had acted with ordinary business care and prudence given the set of facts available to them. The Appellants have completed the payments steps and no further action was required on



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their part for the payment to be scheduled. They reached the final page of the Web page -- page which confirmed that the payment had been scheduled. They also clearly believed that no further action was required of them at this point as evidenced by their saving of the confirmation page, and highlighting the confirmation page to the FTB.

And it's important to note here that

Appellants had input the correct routing number as far
as they were aware or should have known. If Appellants
had not input an incorrect routing number in the sense
that they made a typo or used a number wrong transcribed
by them. They used the routing number most recently
provided to them by their bank.

The only reason the payment was not effectuated was because after the Bank of America and Merrill Lynch merger, the required routing number had changed unbeknownst to the Appellant. The bank gave them no notice whatsoever that the merger had left a change in their banking information. Nor were they aware of any other issues with the scheduled payment and had no reason to believe further inquiry was necessary.

They had no issues with the routing number before this incident. They had sufficient funds in the account in question at the time, and they had used the

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same bank account to effectuate a tax payment to FTB with no issues.

Given the foregoing, the Appellant has acted in a manner consistent with an ordinarily -- with what an ordinarily prudent and careful businessman, given substantially similar facts. All the facts support that Appellants had every intention of making the payment, undertook all the necessary steps to effectuate the payment, and were only prevented from doing so because of a piece of information that they were not aware of.

Moreover, an ordinarily prudent and careful businessman would not have felt that further inquiry as to the validity of the routing number would have been necessary or even reasonable.

An ordinarily prudent businessperson would expect the bank to inform them of such significant changes to his bank information. When first provided with a routing number by the bank, we cannot know what it is without the bank informing us, and once provided a number the average account holder has no independent need to verify the validity of the routing number, and must accept the bank statement at face value. At least, that is, until they are given information that may contradict the accuracy of the routing number. For example, when a payment does not go through. But until

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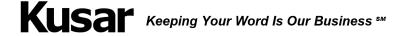
such indication is given, the account holder has no basis to question the validity of that number. It would actually be unreasonable for the account holder to question the validity of the number for electronic transfers without proceeding without issue while using numbers as that indicates for the Appellant.

By the same reasoning, a reasonable person would have expected the bank to clearly notify them of any change to that banking information. When a change in the number happens, the account holder, again, has no means of discerning that the original number is no longer valid, at least until given independent indication to the contrary or the bank notification to that effect. And again, the account holder relied on the bank to provide him accurate information in a timely manner.

What this means is that a reasonable person would not inquire into whether the routing number provided is problematic, at least until being notified by the bank of a change or being given some other indication that the routing number is no longer valid.

The Appellants' lack of action until notice from the FTB, likewise, can be understood as reasonable.

As has been argued in Reindale Electronic Transfer of Funds Act, the EFTA, provides relevant guidelines on



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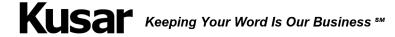
part of reasonable behavior on the part of the trasnferrer and transferee in an electronic transfer.

Pursuant to EFTA 1693(d)(f) adopting is given to the consumer by a financial institution which indicates that a transfer was made offered as prima facie evidence that such transfer was, in fact, made.

Now, lets make clear that the Appellants are not claiming that the EFTA is controlling in this appeal. Instead the claim is that the relationships and assumptions created by EFTA, serve as indications of congressional finding on rational behavior for either party in an electronic transfer. Here Congress has elected to treat a document which indicates the payment is made, like a confirmation page, as evidence of transfer which creates an evidentiary hurdle, which must be overcome by the other party to assert that no such payment was made. This move is indicative, at least, a congressional finding the document indicating a payment is made is taken as a confirmation that a reasonable transfer or need.

That is to say a reasonable person would not think it necessary to further confirm actual transfer, at least, absent some other indication of issues.

Appellants have received a document which can reasonably be construed that a payment was made,



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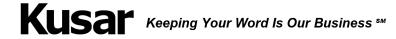
believed the document was evidence of such, and had no independent reason to doubt that the transfer had been made.

Based on the foregoing, the Appellants have acted reasonably in not confirming whether the routing number was active.

The Appellants were given no notice by either of the merging institutions that there was an attendant change in the routing number, nor were they -- nor had they had any other issues with the payments being made from the same account.

Given these facts, a reasonable business person exercising ordinary prudence and care in the conduct of his business would not have felt that an inquiry into whether the -- into whether the routing number is valid is necessary. Indeed, the foregoing would suggest that it would be unreasonable to make such inquiries, and to require such a burden in the situation -- of the taxpayer in the situation, would not only deviate substantially from reasonable prudence, but also contradict the holding in Morse in which it explicitly rejects the idea the most cautious approach is the only reasonable one.

Now, the case is relied on by the FTB to argue sufficient, they don't undermine the Appellants'



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claim that they have acted reasonably, prudently and carefully --

THE REPORTER: Can you slow down? Hey, hey, hey. Slow down. You're -- you're going way too fast. Slow down.

MR. LEE: I'm sorry. I'll slow down.

The appeal of Michael and Devin Scanlon is distinguished from the present appeal such the guidance they provide is of limited relevance. Scanlon ought to be narrowly construed in light of Curry and other numerous precedential opinions which made clear that the reasonable cost standard is fact sensitive.

The OTA specifically points to the

Appellants' actual knowledge of prior errors and

suggests that this actual knowledge ought to have

prompted to be especially diligent.

It is significant that the OTA linked actual knowledge with diligence, a level of care in conducting himself, that the OTA thought that actual knowledge had a bearing on what the Appellants ought to have done, suggests the OTA found that knowledge to be a relevant factor in determining the necessary level of care, and therefore actual knowledge is a material fact which attaches to and explains the OTA's decision in that appeal.

1 So the interpretation offered by the FTB fails to explain this causal link between the 2 3 Appellants' knowledge and the standard of care, and so fails to account for the fact specific nature of the 4 5 inquiry. 6 JUDGE EWING: Mr. Lee. MR. LEE: Presently --JUDGE EWING: Mr. Lee, can I -- can I interrupt you 8 9 there a moment? My apologies for interrupting, but can 10 you slow down a little more, please. You are still --11 you are still going quite fast, so we would appreciate 12 that. 13 MR. LEE: I'm sorry. Yeah. There's a lot to get 14 through. 15 JUDGE EWING: I understand. Thank you. 16 The alternative interpretation offered by MR. LEE: the FTB fails to explain this causal link between the 17 18 Appellants' knowledge and the standard of care, and so 19 fails to account for the fact specific nature of the 20 inquiry. 21 Now, the present appeal is distinguished from Scanlon such that the requirement articulated in that 2.2 23 appeal provides only limited guidance here. 24 As stated earlier, Appellants had no actual

knowledge of any problems with this particularly payment



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or any issues with past payments which informed the OTA of the proper standard of care in that appeal.

Also, it is important to reassert at this point as Appellants had not input the wrong routing number. They had accurately entered the routing number which they reasonably believed was accurate and which they had no reason to question.

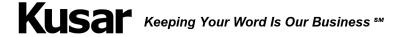
Given these factual distinctions between Scanlon and the instant appeal, it would be an undue extension of Scanlon to accept the standard of care as articulated in that appeal.

The Appeal of Sidney and Ellen Friedman is likewise distinguished from the present appeal.

Again, that case, the OTA had found significant that Appellants had failed to complete the payment process, such that an ordinarily prudent businessman would have understood that the payment was not complete.

JUDGE EWING: Mr. -- Mr. Lee. Mr. Lee, I -- I -- I have to interrupt you.

Judge Rosas has lost his audio and cannot hear you. He is going to try to get back in. So while he does that, we are going to go off the record, and break for five minutes, and we'll come back on the record in five minutes.



1 Thank you. (Off the record from 10:39 a.m. until 10:40 2. 3 a.m.) 4 JUDGE EWING: Okay, Mr. Lee. We will go back on record in this. 5 6 And Mr. Lee, continue with your presentation. 7 Apologies for the interruption. MR. LEE: Not a problem at all. 8 9 This is Jae Lee. 10 All right. As the Appeal of Sidney and Ellen 11 Friedman is likewise distinguished from the present 12 appeal. Again, in that appeal, the OTA found it significant that the Appellant had failed to complete 13 14 the payment process, such that an ordinarily prudent 15 businessman would have understood that the payment was 16 not complete. The OTA found that the Appellants failed to 17 18 act reasonably given their constructive knowledge that 19 they had not, in fact, completed the process. 20 And like in Scanlon, OTA again linked this 21 particular fact to the requirement of monitoring their 2.2 bank account to insure payment was made, suggesting, therefore, that a reasonable person would have realized 23 24 he had failed to undertake all steps to schedule a 25 payment and would first finish scheduling the payment



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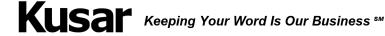
and second monitor their bank account to insure there were no other errors.

And, again, to extend the holding of Friedman to those appeals where the Appellants do not have a reason to believe their payment would not be honored, fails to account for the significant attack to that fact by the OTA and the fact of the nature of this inquiry as a whole.

The two cases, in fact, add strength to the Appellants' position that they had acted reasonably given actual and constructive knowledge of the facts.

In both Scanlon and Friedman, OTA required the monitoring of accounts to ensure sums were withdrawn, where there were facts that suggested that the taxpayer should have been particularly diligent. This heightened requirement of monitoring accounts in light of these concerns suggests that a lower level of inquiry would be reasonable when such factors are lacking. This is consistent with the idea that the abatement policy is fact sensitive and the idea as hinted in Morris that a reasonably cautious businessperson reacting porportionate to the level of inquiry and diligence that facts known to him would suggest are appropriate.

In the present appeal, the Appellants were



1 not aware of any fact, nor should have been -- nor should inquired into the number such that there are no 2. 3 factors which would have led to a reasonable 4 businessperson to inquire further. There is more. It stands to reason that a 5 6 reasonable person confronted with this set of facts 7 would not believe it reasonable to monitor his bank 8 accounts. 9 Now, this concludes the portion of the statement directed directly at Section 19132 10 penalties --11 12 THE REPORTER: Say that one again. Section what? What section? 13 14 MR. LEE: 19132 penalties. 15 THE REPORTER: Okay. 16 JUDGE EWING: Mr. Lee, you have approximately seven 17 more minutes to go on your presentation. 18 MR. LEE: Thank you. 19 Now, this next argument is directed in equal 20 parts to both penalties assigned pursuant to 19132 and 21 19136 as well as all interest accrued. 2.2 The Appellants urged the OTA equitably to stop the FTB from collecting any and all penalties 23 24 imposed and interest accrued thereon.

The four requirements for the application of



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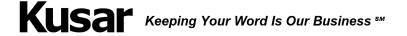
equitable estoppel are satified.

appraised of the relevant facts. The FTB was fully appraised of the fact that the scheduled payment did not go through because of the routing number error. As evidenced by Exhibit F -- K of the Exhibit log. Not only did the FTB know that the scheduled payment had not been made, but also the reason why the payment did not go through, and they had been aware of this issue for a full year before they decided to take any action.

For the Appeal of Western Colorprint, BOE
held that the Appellants failed to prove that the FTB
was fully appraised of the fact because the evidence
presented was just a phone call with no transcript
detailing the content of the conversation.

There is no such issue in this present appeal. The FTB, by its own admission was fully appraised of the relevant facts regarding the issues with payment, and the Appellants have the FTB's own exhibit as evidence of such.

Second, the FTB intended for the Appellants to act in reliance of its action. The FTB concedes this point again when they are relying on the confirmation and the fact in question page that suggests that the Appellant had not acted in a reasonable manner. The FTB



would be made public.

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would not point to the failure to follow the instructions on those pages if it did not intend for the Appellants to act with reliance to the guidance provided by those pages. The pages are also formal expressions of the FTB's position on tax payments which FTB tends to be much more authoritative than an impromptu phone

conversation. The FTB has full control of how to write

the pages, what information to include, and more 10 importantly, was in control of when this information

Given the significance attached to these pages by the FTB, it is fair to suggest that these pages are formal expressions of the FTB's considered position after due deliberation.

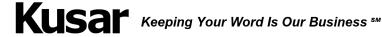
Therefore, the fact in question and confirmation pages are best characterized as formal expressions of the FTB's position intended to provide authoritative guidance on proper taxpayer behavior.

Third, the Appellants were not aware of the true lay of the facts.

THE REPORTER: I'm sorry. They are not aware of what?

24 MR LEE: The true lay of the fact.

> Okay. You are going very fast, THE REPORTER:



so...

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MR. LEE: I'm sorry. I'll slow down.

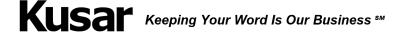
Right. The Appellant husband has made a sworn statement that the Appellants were not aware of the fact that their payment had not been processed, never mind the reason why it wasn't.

Numerous facts support this contention. The Appellants were not aware of any circumstances which might have led them to pay closer attention. They had sufficient sums in the bank account at all times, and the Appellants acted promptly upon notice by the FTB, making the payment within a reasonable period of time.

Now, these facts suggest that the Appellants' inaction was not the result of willful neglect but rather innocent ignorance.

Fourth, the Appellants acted in reliance with FTB's actions to their detriment. In the Appeal of Western Colorprint, the OTA determined that to the detriment to reliance requires that the taxpayers' reliance on the FTB's action led to an increase in their tax liability.

In this appeal, Appellants suffered harm in the form of penalties and interests accrued that would not have been imposed absent the FTB's misleading statement in its confirmation page. Confirmation pages



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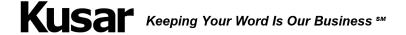
worded such that the Appellant could have and did rely upon it to believe that no further actions were required on its part.

with the Appeal of Lopert, the BOE agrees
with Appellants that pertinent information missing from
FTB's document leading to misleading statements made the
FTB. This case is analogous to the Appeal of Lopert.
The confirmation page reads, and I quote, "We recommend
printing and saving this screen." This can reasonably
be interpreted as having legal significance, suggesting
that this is legally operative as evidence of payment.
This suggestion is strengthened by ordinary business
practice of using the -- on the confirmation page as
proof of payment, rather than merely the proof of
scheduling for payment, as evidenced by argument made
previously regarding the applicability and the
significance of of the EFTA.

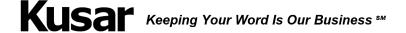
That -- Appellants have testified that they acted and relied on the confirmation page when the ill-chosen wording of the confirmation page suggests that their reliance was reasonable.

Finally, failure to stop the FTB in the current appeal will result in manifest injustice.

Allowing the FTB to impose penalties and fines caused by its own inadequate wording is manifestly unjust and

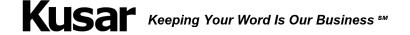


1 shifts the costs of bad governance to the taxpayer. 2. As noted above, the confirmation page fails 3 to adequately inform the taxpayer of the actual significance of confirmation. This con -- this 4 contingence is compounded by the fact that confirmation 5 6 is often used in business to mean confirmation of 7 payment, rather than simply confirmation of scheduling. 8 The FTB should have been particularly 9 diligent in crafting a message which could be 10 potentially confusing, goes against normal business 11 usage of the word, and was considered significant enough 12 by the FTB to suggest that the taxpayer should save this 13 document. 14 FTB, however, failed to do this. Instead, we 15 have a document that failed to make use of opportunities 16 to clarify significance while actively confusing the It would be manifestly unjust to force the 17 taxpayer. 18 harm caused by this oversight to the taxpayer. 19 That concludes my statement. Thank you. 20 Thank you, Mr. Lee. JUDGE EWING: 21 Now, let me try this again. 2.2 Judge Rosas, do you have any questions at this time? 23 24 JUDGE ROSAS: This is Judge Rosas. 25 I do not. Thank you.

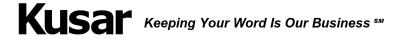


Thank you, Judge Rosas. 1 JUDGE EWING: 2. Judge Long, do you have any questions at this 3 time? 4 JUDGE LONG: This is Judge Long. 5 No questions. 6 JUDGE EWING: Okay. And I should ask Appellant 7 Thomas Doyle the questions I asked previously since he was not under oath, and I'll go very quickly with this. 8 Mr. Doyle, on the Appellants' Exhibit Number 9 1, it indicates that the date the payment request was 10 11 made is 9/11/2017 and the payment date lower on the page 12 shows as 9/14/2017, three days later. 13 Did you notice those dates on the -- on the 14 Web page confirmation form? 15 THE WITNESS: No, I don't recall. 16 JUDGE EWINGOkay. Thank you. 17 And my second question is lower on the form it says to allow -- I'm sorry? Okay. Lower on the form 18 19 it says to allow up to two business days from the date 20 the payment is made to reflect the payment. Did you --21 did you notice that language as well? 2.2 THE WITNESS: I don't recall. 23 JUDGE EWING: Okay. Mr. Doyle. Thank you. 24 And -- and finally you mentioned that you 25 used your Merrill Lynch checking account to make the

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     payments in questions here.
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                Had you used any other bank account --
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     checking or savings -- to make prior tax payments in the
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     past?
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          THE WITNESS: No, I don't believe so.
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          JUDGE EWING: Okay. So, well -- thank you.
                       Mr. Muradyan, you indicated at the
                Okay.
     Prehearing Conference in this matter that you needed 10
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     to 15 minutes for your presentation. Feel free to
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     begin.
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                         Thank you.
          MR. MURADYAN:
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                Good morning. My name is David Muradyan, and
     I, along with Nancy Parker (Audio distortion) --
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          THE REPORTER:
                         I think -- it's -- you're garbled.
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          MR. MURADYAN:
                         Sorry about that. I will repeat.
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                Good morning. My name is David Muradyan, and
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     I, along with Nancy Parker, represent Respondent,
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     Franchise Tax Board, in the appeal of Appellants Thomas
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     and Kerry Doyle in this action.
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                In this case, there are three issues.
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                First, have Appellants established reasonable
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     cause for the abatement of late payment penalty?
                Second, have Appellants shown that they are
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     entitled to a refund of the underpayment of estimated
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     tax penalties?
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1 And third, have Appellants established that 2 they are entitled to abatement of the interest? 3 For reasons set for the FTB's opening and reply briefs, as well as, the reasons I will now state, 4 FTB's actions must be sustained on all accounts. 5 6 Before covering the issues, I want to briefly 7 address all of the facts. On September 11th, 2017, Appellants used 8 9 FTB's Web pages and requested an electronic payment in 10 the amount \$100,000 to be remitted on September 14th, 11 2017, as an estimated tax payment for the 2017 tax year. 12 However, payment was not honored by the Appellants' 13 financial institution, and Appellant did not pay the 14 outstanding balance until January 9th, 2019, which was 15 nearly one year and four months after the initial 16 attempted payment. 17 In addition, there was testimony from 18 Appellant about the type of account used, and I'd like 19 to address that as well. Specifically, the Merrill 20 Lynch account has both a corresponding checking account which ends in 98 as well as a investment type account 21 2.2 which ends in 29, as stated in Exhibit F to Appellants' 23 own reply. 24 Unfortunately, in this case, Appellants did



not use the corresponding checking account for payment

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at issue, that, rather, they used investment account ending in 29.

With the facts out of the way, I'll now address all of the issues.

First, Appellants have failed to establish reasonable cause to the abatement of the late payment penalty. In this case, FTB imposed a late payment penalty because Appellants did not make their payment which was due on April 15th, 2018, until January 9th, 2019.

Appellants' primary argument is that they received a confirmation page on September 11th, 2017, establishes reasonable cause for the late payment that they relied on that confirmation page as evidence of payment. However, this argument is not (audio distortion), as Appellant's Web page request for payment was not honored by their financial institution because Appellants entered the wrong type of banking account. Specifically, when using FTB's Web page system, Appellants information for a Merrill Lynch cash management account, which is not a regular checking or In fact, savings account as required by FTB's Web page. as set forth in FTB's page instructions, taxpayers must use only a regular checking or savings account and not a money market or brokerage account.

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Moreover, as also set in FTB's Web page instructions, the confirmation page is not confirmation of payment, but rather confirmation that a request has been made.

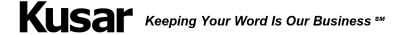
Unfortunately, after Appellants' unsuccessful attempt on September of 2017 -- 2017, they did not undertake any effort to determine whether the funds had been withdrawn from the account successfully, and they stated in their briefs they discovered that the payment had not been processed only after receiving FTB's notice of tax return change nearly one year and two months later.

In fact, even after receiving notice that their payment had not gone through, it took Appellants another two more months to finally make a payment.

Thus, they finally made their payment nearly one year four months after their initial attempt.

Appellants have not stated what they did to ensure that the \$100,000 payment had been processed, and instead placed blame on FTB arguing that they did not receive any notification from FTB regarding an issue with their scheduled payment.

The argument is a deflection from Appellants' failure in their obligation to provide accurate information about the bank from which the electronic



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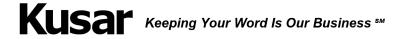
payment was to be made.

Moreover, not withstanding the inordinant time, Appellants did not seek to confirm that the payment in the amount of \$100,000 had been processed and cleared from their financial institution. This is not conduct of a reasonably prudent person and does no constitute reasonable cause to abate the penalty.

As stated in your precedential opinion,
Scalon, the exercise of due care and diligence requires
taxpayers to monitor their bank account for benefit and
quickly ascertain whether a scheduled electronic payment
from their account to the FTB was, in fact, paid.

Likewise, as also stated in Scalon, lack of notice from the FTB about failed payment, does not negate Appellants' due prudence and due care to verify that their scheduled payment was successful, because exercising ordinary business care and prudence would entail ensuring that the electronic payment of \$100,000 was actually debited.

Contrary what Phillips argued, Scanlon did not require actual knowledge. Rather it stated that in the light of Appellants' prior error -- prior error, they should have been especially diligent. In other words, it didn't -- it didn't require knowledge, but rather they should have been especially diligent in



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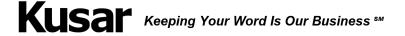
light of their actual knowledge.

In Scanlon, your office stated that they expect reasonably prudent taxpayers, exercising due care and taxpayers monitoring their bank account and quickly ascertain whether a scheduled payment was, in fact, paid.

Your office also stated in Scanlon that lack of notice from FTB of a failed payment does not negate the (audio distortion) and due care to verify that a scheduled payment was successful.

In sum, contrary to Appellants' assertion, both Scanlon and Friedman required monitoring of one's bank account to insure that an attempted payment did, in fact, get debited.

Appellants also made arguments regarding the EFTA. However, as stated in FTB's reply to them, the EFTA does not apply as EFTA is not a service provider under 15 U.S.1693(b)(d). However, even if it did for limited purposes of being a service provider under that section, Section 1693(3)(b) provides that an electronic funds transfer services are made available to the consumer account by a person other than a financial institution holding a consumer's account, the Consumer Protection Bureau, by regulation, shall assure that the disclosing sections of responsibilities and remedies



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created by the (audio distortion) are made applicable to such person and service. However, FTB was not providing (audio distortion) benefits to Appellants and it is not clear how such provision would apply in this instance in that Appellants were paying FTB, not FTB (audio distortion) based payments (audio distortion).

In sum, the EFTA does not apply to FTB.

In conclusion, the late payment penalty was imposed because Appellants failed to use the correct type of an account when making the e-payment. It was further compounded by Appellants' failure to ensure that the payment successfully cleared the bank account.

Accordingly, the late payment penalty was properly imposed and the Appellants have not established reasonable cause for abatement of the penalty.

Second, Appellants have failed to show that they are entitled to a refund of the underpayment of estimated tax penalty. The law requires taxpayers who are seeking and not subject to withholding make payments of the estimated amount of their tax. FTB has proved that underpayment estimated tax penalty because Appellants failed to make all of their estimated tax payments of their 2017 taxes. Thus, the penalty was properly imposed.

In this case, Appellants have not contested



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the compentency of this penalty, rather they offered the same reasonable cause and argument for abatement of this penalty that they asserted with respect to the late payment penalty. However, the law does not provide an abatement of the estimated tax penalty for reasonable cause.

Moreover, Appellants have not argued, nor do the facts available to FTB suggest, that they meet any one of the limited exceptions.

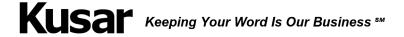
Without evidence that Appellants meet the spirit of the section, the estimated tax should be sustained.

Third and final, Appellants have failed to show that they are entitled to abatement of interest.

The assessment of interest of tax (audio distortion) and interest is not a penalty, but simple compensation for the taxpayers' use of money after the date of the tax.

There is no reasonable cause exception to this. The interest that accrued in this appeal for the taxpayers is resolvable if the taxpayers paid their tax liability (audio distortion) returned to them. There was no delay or error on the part of FTB that caused interest to accrue.

Since the assessment of interest is mandatory and Appellants do not meet the limited circumstances



1 that would allow for abatement of it, the interest for 2. the 2017 tax year cannot be abated. 3 In conclusion, based on the facts and arguments of FTB's opening and reply briefs, and for 4 reasons I just provided, FTB's actions with the 2017 tax 5 6 year must be sustained. 7 Thank you. And with that, I look forward to any questions you may have. 8 9 JUDGE EWING: Thank you, Mr. Muradyan. 10 Judge Rosas, do you have any questions at 11 this point? 12 JUDGE ROSAS: This is Judge Rosas. 13 I do not have any questions. Thank you. 14 JUDGE EWING: Okay. Thank you, Judge Rosas. Judge Long, do you have any questions at this 15 16 point? 17 JUDGE LONG: This is Judge Long. 18 I don't have any questions at this point. 19 JUDGE EWING: Okay. Thank you, Judge long. 20 And I do not have any I questions at this 21 point. 2.2 So now we have five minutes for Appellants' 23 closing presentation, if any. 24 Mr. Lee, do you wish to make a closing 25 statement?

1 MR. LEE: Yes, I'd like to make a closing 2 statement. 3 JUDGE EWING: Okay. Thank you. Mr. Lee, may I remind you to, please, speak 4 5 slowly for the stenographer. Thank you. This is Jae Lee. 6 MR. LEE: It shouldn't be much of a problem this Yeah. time, don't have so much to go through. 8 9 First of all, I'd like to make clear for the 10 panel here, that the Appellants are not making a 11 reasonable cause type argument for all penalties and 12 interest accrued. 13 The reasonable cause argument is only being 14 made in response to the penalties imposed pursuant to 15 Section 19132, but that the equitable estoppel argument 16 is being made in response to all the -- to both 17 penalties and interest accrued. 18 So I just wanted to make that clear for the 19 panel. 20 And the FTB focuses on the fact that the 21 Appellants have used an outdated routing number and have made no effort to check to maintain -- to check their 2.2 account after the fact, as reasons for their lack of 23 24 reasonable prudence. But that is only an issue if it is

reasonable for a person to have felt that there was such



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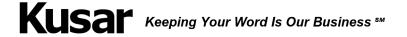
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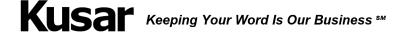
a need. Now, Appellants have shown that a reasonable person would not have felt that monitoring their bank account would be necessary, given the fact that the Appellant was aware of or should have been aware of. Actually, the Appellants have shown that to have monitored the bank account under these circumstances would have been unreasonable.

Now, I want to draw a parallel to the grace provided to FTB by the last known address rule. For that rule, notice is sent by the FTB to a taxpayer's last known address, is sufficent for notice even if not received by the taxpayer so long as the address the notice is sent to is the address that appeared on the taxpayer's last return filed with the FTB. The law does not require that the FTB actually locate the address of the taxpayer it hopes to reach. It allows the FTB to assume that the information it had is correct and avoid the cost of the reaffirming a fact that it had no reason to doubt.

The FTB's position creates an onerous requirement for the taxpayer that the FTB itself is excused from. Why should the taxpayer be held to a more rigorous standard than the FTB when it comes to verification of facts that he has no reason to doubt? That is the thorny question that must be asked and



1 answered if this Panel to accept the FTB's position. 2. The FTB asks this Panel to focus merely on 3 the fact that the taxes were not paid on time and that there was an issue with the routing number provided by 4 5 the Appellants. In essence, the FTB asks this panel to 6 the facts of the issue of this appeal, as if they are a 7 black and white picture with inadequate sensitivity failiing to capture the true colors of the scene. The 8 9 Appellants have provided facts to this Panel which 10 populate those parts of the picture left bare by the 11 FTB's position. This is no less than what the law 12 requires, that a taxpayer's circumstances be examined with care beyond the immediate problem to determine 13 14 whether the taxpayer had nonetheless acted reasonably. 15 And that full picture shows that the plaintiff has acted 16 reasonably and in detrimental reliance of the FTB. 17 Thank you. That concludes my final 18 statement. 19 Thank you, Mr. Lee. JUDGE EWING: 20 So Judge Rosas, do you have any questions at 21 this point? 2.2 JUDGE ROSAS: This is Judge Rosas. 23 I do not. Thank you. 24 JUDGE EWING: Okay. And Judge Long, do you have 25 any questions?



This is Judge Long. 1 JUDGE LONG: 2. I have no questions. 3 JUDGE EWING: Okay. And Mr. Muradyan, is there anything else you'd like to add? 4 The only thing I would just close 5 MR. MURADYAN: 6 with, is at the end of the day, you know, we're very 7 sympathetic to taxpayers' position with respect to the confirmation page. But ultimately, this becomes an 8 9 issue of whether, when someone makes an attempted 10 payment, whether they have a responsibility to ensure 11 that that payment is eventually debited from their bank 12 account. 13 In this case, that was not done, you know, a 14 week after the payment was submitted. It wasn't done on 15 April 15th of 2018 or when the tax bill would have been 16 due. It was not done on November -- or I'm sorry -- it 17 was not done on April -- on October 15th when they 18 finally filed the return. 19 And ultimately, it comes down to whether they 20 had a requirement to ensure that the payment was 21 debited. 2.2 And the Scanlon and Friedman opinions, both of which are precedential, make it clear that the 23 24 taxpayers have an obligation to monitor their bank

accounts and to ensure that the payment is eventually



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     done.
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                With that, I would like to say thank you
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     again for everyone, and I have nothing further at this
     time.
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          JUDGE EWING: Very well.
                                    Thank you, Mr. Muradyan.
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                And, Mr. Lee, you get the last word. Do you
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     have anything else you would like to add?
          MR. LEE: No, not at this time. Actually, no.
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     This is the last time.
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          JUDGE EWING: Okay. Well, thank you, Mr. Lee.
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                Okay. We are ready to conclude this hearing.
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                The judges will meet and decide the case
     based on the documents and testimony presented and
13
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     admitted as evidence today.
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                We will send both parties our written
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     decision no later than 100 days from today.
17
                Thank you everyone for your time and
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     participation today.
19
                And thank you to Ms. Simpson, our
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     stenographer.
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                Thank you, Mr. Doyle, for your testimony and
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     time today. We very much appreciate it.
                And finally, Judge Rosas and Judge Long,
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     thank you, my fellow panelists.
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                This case is now submitted and the record is
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     closed.
                 This hearing is now adjourned. Thank you
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     very much for your valuable time today and goodbye.
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                 (Hearing adjourned at 11:08 a.m.)
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1	REPORTER'S CERTIFICATE
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3	
4	
5	I, Dorothy M. Simpson, CSR No. 14323, the
6	undersigned Certified Shorthand Reporter licensed in the
7	State of California does hereby certify:
8	That the foregoing proceeding was taken before
9	me at the time and place therein set forth, and
10	thereafter, to the best of my ability to hear and
11	understand, transcribed under my direction and
12	supervision.
13	I further certify that I am neither counsel
14	for nor related to any party to said action, nor in any
15	way interested in the outcome thereof.
16	The dismantling, unsealing, or unbinding of
17	the original transcript will render the Reporter's
18	certificate null and void.
19	In witness whereof, I have subscribed my name
20	this date: February 10, 2021.
21	
22	Derotty M Simpson
23	7
24	Dorothy M. Simpson, CSR Certificate Number 14323
25	

