

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
PATIENT COMFORT SERVICES, LLC,) OTA NO. 19044621
)
APPELLANT.)
)
)

TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Tuesday, May 25, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Virtual Proceedings,
taken in the State of California, commencing
at 10:07 a.m. and concluding at 10:36 a.m.,
on Tuesday, May 25, 2021, reported by
Ernalyne M. Alonzo, Hearing Reporter, in and
for the State of California.

1 APPEARANCES:
2
3 Panel Lead: ALJ JOSHUA LAMBERT
4
5 Panel Members: ALJ TOMMY LEUNG
6 ALJ ELLIOTT SCOTT EWING
7
8 For the Appellant: ROBERT C. MACK, JR.
9
10 For the Respondent: STATE OF CALIFORNIA
11 FRANCHISE TAX BOARD
12 GRACE POWER
13 NANCY PARKER
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I N D E X

E X H I B I T S

(Department's Exhibits A-K were received at page 6.)

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1 California; Tuesday, May 25, 2021

2 10:07 a.m.

3

4 JUDGE LAMBERT: We are now on the record in the
5 Office of Tax Appeals' oral hearing for the appeal of
6 Patient Comfort Services, LLC, Case Number 19044621. The
7 date is May 25th, 2021, and the time is 10:07 a.m.

8 My name is Joshua Lambert, and I'm the lead
9 Administrative Law Judge for purposes of conducting this
10 hearing. And my co-panelists today are Judges Leung and
11 Judge Ewing.

12 FTB, can you please introduce yourselves for the
13 record.

14 MS. POWER: Hi. This is Grace Power for the
15 Franchise Tax Board.

16 MS. PARKER: This is Nancy Parker for the
17 Franchise Tax Board.

18 JUDGE LAMBERT: Thank you.

19 And Appellant can you please introduce yourself,
20 Mr. Mack.

21 MR. MACK: Oh, this is Robert Mack for Patient
22 Comfort Services, LLC.

23 JUDGE LAMBERT: Thanks.

24 The issues in this appeal are whether Appellant
25 has a filing requirement in an obligation to pay tax for

1 the 2016 tax year; whether Appellant has established
2 reasonable cause for the untimely response to Respondent's
3 Demand for Tax Return, such that the notice and demand
4 penalty may be abated; and whether interest may be abated.

5 Mr. Mack, do you agree that these are the issues?

6 MR. MACK: Yes.

7 JUDGE LAMBERT: And, FTB, do you agree that these
8 are the issues?

9 MS. POWER: Yes.

10 JUDGE LAMBERT: Okay. Thanks.

11 FTB provides Exhibits A through K. Mr. Mack
12 representing Appellant is not providing exhibits but will
13 refer to FTB's exhibits.

14 FTB, are there any objections -- well, I guess
15 because Appellant is not admitting anything then there's
16 nothing to object to.

17 But, Mr. Mack, are there any objections to that?

18 MR. MACK: No.

19 JUDGE LAMBERT: Okay. Then -- and FTB, you
20 agree; right?

21 MS. POWER: Yes.

22 JUDGE LAMBERT: Okay. Then we'll admit that
23 evidence into the record.

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

1 Okay. Mr. Mack, we're going to start your time.
2 You'll have 15 minutes, but before you get started, can
3 you raise your right hand and answer?
4

5 R. C. MACK,
6 produced as a witness, and having been first duly sworn by
7 the Administrative Law Judge, was examined and testified
8 as follows:
9

10 JUDGE LAMBERT: Okay. Mr. Mack, you may proceed
11 with your presentation for 15 minutes. Thanks.

12 MR. MACK: Thank you.
13

14 PRESENTATION

15 MR. MACK: All right. In reference to the 2016
16 Tax Year 568, that was originally not planned on being
17 filed by Patient Comfort Services because they had filed a
18 568 2015, in which they indicated that it was the final
19 return for that particular LLC on H-2. Subsequent to
20 that, I believe that there was to have been a filing of an
21 LLC-4/7 with the Secretary of State, which was not done,
22 allegedly, on a timely basis. To tie both of those in at
23 the LLC-4/7 having filed on a timely basis, the State
24 would not be asking for a 2016 568.

25 If you'll notice on the form -- that's exhibit --

1 Exhibit B from the State, page 4 of 6 -- is a requirement
2 for a signature from the, in this case, Appellant. But
3 there's no date requirement. So the copy I have just has
4 my signature and no inference as to when that particular
5 document was filed. Now, there is also a document that
6 was stamped by the State at a later date and forwarded
7 back to me.

8 But my contention would be whether that's an
9 accurate date. No inference of the State and their
10 capabilities, but it does raise a question as to why
11 there's no date requirement on that particular form. So
12 my intent, when I closed the company on 12/24/15 and filed
13 the 568 2015 and reflected the fact that was my last
14 return, was because the company ceased doing business.

15 Because of the alleged timing of filing of the
16 LLC-4/7, the State required that I file a 2016 568, which
17 I did. And that's indicated as may be not being filed on
18 a timely, but I contend that I did not need to and did not
19 require a filing of a 2016, 568. So whether it was timely
20 or not, my contention is it need not be filed. So it
21 couldn't be late if it was not required.

22 So in my perspective and as a small business
23 owner, and I'm sure with many other small business owners
24 in California, I wanted to reflect on the fact that if you
25 have on a form 568, on page 1-H2, requiring a checkmark

1 for a business that will cease business, there should also
2 be reflection in the instructions of 568 going to page, I
3 believe, it's 10, section G, I believe it is. Page --
4 excuse me -- page 10, section 8 of 568 instructions for
5 2015, regarding cancellation of an LLC.

6 I checked the instructions. There is no
7 reflection from that line on the first page of 568 to the
8 cancellation requirements, which would reflect a filing of
9 LLC-4/7. So not being an expert on how to close out a
10 company in California, I just believed that between the
11 568 2015 last return -- a final return checkmark and
12 subsequent documents that were filed with the State
13 indicating that my company had ceased to do business on
14 12/24/2015 that was sufficient, until otherwise notified.
15 And that pretty much brings us to where we are today.

16 I found some documents that were in the exhibits
17 from the State, and I'd just like to mention them briefly.
18 State Exhibit B, page 3 of 6, under comments I put,
19 "Business closed effective 12/24/15." An LLC-12 was
20 mailed. This is Exhibit B. Excuse me. Exhibit B, an
21 LLC-12 was mailed on 8/10/2016, page 5 of 6, in which it
22 again reflected "Business Closed."

23 I hope I'm not redundant here, but I have
24 Exhibit E, page 1 of 27, 2016 Form, which I was required
25 by request of the State to file. I reflected again "Final

1 Return" under H-2, and I referred to 568 2015, line H-2.
2 And I have an Exhibit D here, page 7 of 7. Well, forget
3 that. I apologize. That's a note I should have crossed
4 out.

5 Exhibit I, under 568 Instructions, page 10 of 11,
6 I believe I just mentioned this. There's a Section H,
7 which indicates how an LLC could be canceled, but it
8 doesn't tieback in to the 568, page 1 of page 2, and I
9 think that would be very helpful. It's something to
10 consider any way for future reference for small
11 businesspeople like myself.

12 At this time I believe that ends my references to
13 exhibits. I may refer to a few items that I have found in
14 additional research for preparation of this conversation,
15 but I believe I'll leave it there at this point.

16 Thank you.

17 JUDGE LAMBERT: Okay. Thank you, Mr. Mack.

18 And first I'll ask FTB if they have any
19 questions.

20 MS. POWER: Not at this time, no.

21 JUDGE LAMBERT: I think we have some feedback.
22 Mr. Mack?

23 MR. MACK: Yes.

24 JUDGE LAMBERT: Is it possible to have your phone
25 muted?

1 MR. MACK: Yes, I believe.

2 JUDGE LAMBERT: Okay. Thanks. Okay. I'm going
3 to turn to my panel and ask if they have any questions for
4 you.

5 Judge Leung, do you have any questions for
6 Mr. Mack?

7 JUDGE LEUNG: No questions at this time. Thank
8 you.

9 JUDGE LAMBERT: And, Judge Ewing, do you have any
10 questions?

11 JUDGE EWING: Hi, Judge Lamber. I do not have
12 any questions at this time.

13 JUDGE LAMBERT: Thanks.

14 I don't have any questions at this time either,
15 but I may have them later on. So now we can turn to FTB.

16 Ms. Power, you may proceed with your presentation
17 for about 15 minutes.

18 MS. POWER: Thank you.

19

20 PRESENTATION

21 MS. POWER: Good morning, Judges.

22 Respondent properly assessed the annual tax and
23 the demand penalty for the 2016 taxable year, and
24 Appellant has not established reasonable cause to abate
25 these penalties.

1 Appellant was a limited liability company that
2 was registered to do business with the California
3 Secretary of State during the 2016 taxable year and did
4 not file a statement of cancellation with the Secretary of
5 State until February 28th, 2018. Revenue & Taxation Code
6 Section 17947 contains three requirements a taxpayer must
7 meet in order to not be subject to the annual tax.

8 To avoid liability of the annual tax, and LLC
9 must: One, file a timely final tax return; two, file a
10 Certificate of Cancellation with the Secretary of State
11 within 12 months after filing its final return; and three,
12 conduct no business after the end of the taxable year for
13 which the final return was filed. These steps are found
14 in instructions of California Form 568 and have been
15 included in this appeal as Respondent's Exhibit I, and it
16 could be found on page 10 of that exhibit.

17 In this case, Appellant did not complete the
18 necessary steps. First, Appellant did not file a timely
19 final return. Appellant's return for the 2015 taxable
20 year was designated as its final return. The extended due
21 date for that return was October 15th, 2016. However,
22 that return was not filed with the Franchise Tax Board
23 until January 15th, 2019, more than two years after the
24 extended due date.

25 Plus, although Appellant designated its 2015

1 return as its final return, that return was not timely.
2 Second, Appellant did not file a Certificate of
3 Cancellation with the California Secretary of State until
4 February 28, 2018. Therefore, Appellant was registered as
5 a limited liability company with the California Secretary
6 of State during the taxable year at issue.

7 In a recent non-precedential opinion, the Office
8 of Tax Appeals held in the Appeal of DRH Construction
9 Group, that a corporation, which was registered to do
10 business in California, was subject to the minimum
11 Franchise Tax until a Certificate of Dissolution was filed
12 with the Secretary of State. Although, that case involved
13 a corporation and not an LLC, it provides relevant
14 guidance because Section 23331, as applied to
15 corporations, and Section 17944, as applied to LLCs, both
16 provide that dissolution and cancellation are not
17 effective until the date the appropriate certificates are
18 filed with the Secretary of State. Because Appellant was
19 registered with the Secretary of State and did not
20 properly cancel as a limit liability company, Appellant is
21 liable for the annual tax computed under
22 Section 23153(d)(1), which is \$800.

23 Respondent properly imposed the demand penalty
24 pursuant to Section 19133 because Appellant failed to file
25 a return by the prescribed due date in the demand. A

1 demand was issued on June 13th, 2018. Appellant responded
2 to that demand on June 15th stating that it did not have a
3 filing requirement. Appellant was given a hearing and a
4 protest officer determined that Appellant did have a
5 filing requirement. A Determination of Filing Requirement
6 letter was sent to Appellant on August 3rd, 2018, which
7 gave Appellant until August 31st, to file its 2016
8 California tax return.

9 Appellant did not file its tax return until
10 January 15th, 2019. Appellant's failure to respond to the
11 demand provides the sufficient basis for the proper
12 imposition of the demand penalty. This penalty is also
13 mandatory, and Appellant has not made any arguments or
14 offered any evidence to establish reasonable cause for
15 failing to respond to the Demand Notice.

16 On the facts and evidence in the record,
17 Respondent respectfully request that you sustain its
18 action.

19 Thank you.

20 JUDGE LAMBERT: Thank you, Ms. Power.

21 I'm going to ask my panel if they have any
22 questions.

23 Judge Leung, do you have any questions?

24 JUDGE LEUNG: Judge Lambert, no questions at this
25 time. Thank you.

1 JUDGE LAMBERT: Judge Ewing, do you have any
2 questions?

3 JUDGE EWING: I do not have any questions at this
4 time. Thank you.

5 JUDGE LAMBERT: Okay. Well, this is
6 Judge Lambert. Maybe I have a question. I just want to
7 confirm a couple of things with FTB. There's a
8 requirement that you have to file a Certificate of
9 Cancellation with the Secretary of State, and I believe
10 that's in the statute. And I'm wondering about the
11 requirement that taxpayers must file a return that's
12 marked as a final return, and it was noted in the briefing
13 that's from the instructions for the tax return. And I'm
14 wondering if there's any other authorities for that
15 requirement that you have to file a final return?

16 MS. POWER: I believe if it's in the requirements
17 it would be in -- let's see -- Section 17947.

18 JUDGE LAMBERT: Okay. Thanks. And another
19 question was that there was a statement of information in
20 the record that looks like Mr. Mack filed in 2016. And
21 I'm sure the briefing addressed it or maybe it was
22 addressed to protest, but it looks like he filed a
23 Statement of Information with the Secretary of State
24 stating the business closed in 2015, and this is dated in
25 2016. And it's not a Certificate of Cancellation, but I

1 don't know if it was addressed in the briefing, but maybe
2 if you -- if you had any comments on that particular form?

3 MS. POWER: The Statement of Information is
4 typically a form that LLCs or corporations file on an
5 annual basis. In terms of properly canceling an LLC, we
6 require that a Certificate of Cancellation is filed. What
7 is written on the Statement of Information does not
8 qualify, per the statute, to cancel a limited liability
9 company.

10 JUDGE LAMBERT: Okay. Thank you very much. I
11 will now turn to Mr. Mack.

12 You have five minutes to make any remarks in
13 closing or to respond to anything that FTB stated. You
14 may proceed. Thanks.

15

16 CLOSING STATEMENT

17 MR. MACK: Okay. I was on mute. I apologize.
18 Robert Mack here. I wear a hearing aid. So sometimes I
19 get a tingeing or not quite comprehensive input. I
20 believe it was Ms. Powers who had indicated that I filed
21 2015 568 on an untimely basis, or was it 2016?

22 Hello.

23 JUDGE LAMBERT: I believe we're -- Ms. Power, you
24 can respond to that.

25 MS. POWER: Thank you.

1 Yes, Mr. Mack, I stated that you had filed the
2 2015 and 2016 returns in January 15th of 2015. Both were
3 untimely.

4 MR. MACK: Well, that's of some consequence to me
5 because I wasn't prepared to address the 2015 filing, and
6 there's nothing in brief that the State submitted to me
7 that mentioned anything about 2015, just the 2016 return.
8 I don't have that -- the 568 2015 in front of me to
9 validate when I signed it, and when I mailed it. So I can
10 only state that I'm sure that I filed it on a timely
11 basis. I have no reason not to.

12 But, regardless, the 2016, again, I refer back to
13 the fact that the LLC-4/7 was filed. I don't know when.
14 The State has a date. I have no filing date on my copy
15 because there's no requirement for the date. But I also
16 want to mention the fact that in regards to whether I was
17 insufficient or sufficient or whatever in trying to
18 follow, in quotes, "The Statutes," again, I mention
19 page 10, which refer back to the 568 instruction on page 1
20 of 568 Form.

21 There were other things that hopefully the Court
22 will take into consideration. Because I think that if
23 there's "errors," in quotes, there are by both parties.
24 I'll just mention a couple of things that I have
25 experienced over the last few years dealing with the State

1 trying to resolve this issue.

2 I requested a copy of a 568 2015 from the State,
3 FTB Form 3516, which I never received a copy. And that
4 was on March 30th, 2019. I sent a letter to Grace Powers
5 regarding -- or excuse me -- a letter from Grace Powers
6 that I received recently. It was dated April 23rd, 2021.
7 It had to do with any additional information I wanted to
8 file with the Court prior to the hearing, and it was dated
9 the 23rd, 2021, postmarked the 26th of April, 2021,
10 received by me on April 28th, 2021, and my response time
11 was to 4/30/2021. So this letter did not come in on a
12 timely basis, and I use that term untimely basis politely.

13 I also had a conversation with Grace Powers on
14 4/3/20 in which I was requested to refile 568s for 2002
15 and 2003. And I'll repeat that, 568s for 2002 and 2003.
16 I never really got an answer as to why. I just indicated
17 that I would contact her, if I could just get some bank
18 information because I certainly wouldn't have records that
19 go back that far, since the conversation was on
20 April 3, 2020. I left her a voicemail or after that the
21 bank only went back to 2013.

22 So my position, obviously, is that I had no
23 intent not to file a form that was pretty simple,
24 straightforward, and so forth. But I wasn't aware of the
25 fact that I need to file it at the time that I should have

1 known. And, again, I hope that maybe we can tie all those
2 instructions together for future small businesspeople like
3 myself. I would like to think that there was plenty of
4 intent to show that the company had closed by the various
5 forms it did file reflecting the date 12/24/15 as the last
6 day of business.

7 So without further adieu, I believe that I have
8 about as much information to share with you as I have. So
9 thank you.

10 JUDGE LAMBERT: Thank you, Mr. Mack.

11 I'm going to ask my panel if they have questions.

12 Judge Leung, do you have any questions?

13 JUDGE LEUNG: Yes, I do for Mr. Mack. Mr. Mack,
14 could you tell us a little bit more about your LLC,
15 Patient Comfort. How many members were in that LLC?

16 MR. MACK: Effectively, it was just me. I could
17 have gone under a sole proprietorship, but with the offer
18 the State has under LLC for the \$800 a year, you get cover
19 obviously to a limited -- well, from a liability
20 personally. And I already decided to go in that
21 direction. A sole proprietorship, I'm not even sure if
22 that's registered with the Secretary of State the same way
23 an LLC is. But possibly I would not be conversing with
24 you right now if I had gone that way.

25 But the LLC was setup as a distributorship for

1 rehab equipment for people with special needs. And
2 because of that and it's considered medical product and so
3 forth, the LLC seemed to be the best way for me to do
4 business in the State of California.

5 JUDGE LEUNG: So this is Judge Leung again. You
6 were the only member of the LLC, or were there other
7 members or owners of that LLC?

8 MR. MACK: I was the only member.

9 JUDGE LEUNG: Can it be said that the Patient
10 Comfort was a single-member LLC?

11 MR. MACK: Correct.

12 JUDGE LEUNG: Judge Leung, again. Okay. The
13 information statement you sent in for 2016 through the
14 Secretary of State, was that in response to a request from
15 the Secretary of State in 2016 to submit an annual
16 statement?

17 MR. MACK: I'm sorry. I didn't quite get all of
18 that. Could you repeat it, please?

19 JUDGE LEUNG: Absolutely. The Information
20 Statement you filed with the Secretary of State in 2016,
21 was that in response to a request from the Secretary of
22 State to file a 2016 statement?

23 MR. MACK: I have to say yes. Again, my original
24 intent was to discontinue business in the State of
25 California as an LLC on 12/24/2015. Any subsequent

1 filings for the year 2016 were per the request of the
2 State. And on those forms, through the various exhibits,
3 are reflected the fact that we had stopped doing business
4 in 12/24/2015. But I'm trying to meet the demands of the
5 State which, I guess, the LLC-4/7 had been received by the
6 state at an earlier time and reflected by the Secretary of
7 State, none of the 2016 request would have even come into
8 play.

9 JUDGE LEUNG: This is Judge Leung. Thank you,
10 Mr. Mack.

11 My next question is towards the FTB. Mr. Mack
12 indicates that Patient Comfort is a single-member LLC. Do
13 you agree with that?

14 MS. POWER: Yes, I do.

15 JUDGE LEUNG: Thank you. So Judge Leung again.
16 If a single member LLC, which demand penalty rule applies?
17 The one that applies to corporations, or the one that
18 applies to individuals?

19 MS. POWER: Nancy, I might --

20 Nancy is very good on this penalty.

21 Thank you, Nancy.

22 MS. PARKER: Judge Leung, this is Nancy Parker.
23 The demand penalty that applies is the demand penalty.
24 The demand regulation does not apply because this is an
25 LLC not as an individual, as it provides under the

1 regulation. So at any time FTB can make a demand for a
2 return. And if an entity, like and LLC, doesn't respond,
3 we can impose the demand penalty under the statute.

4 JUDGE LEUNG: This is Judge Leung, again. Thank
5 you, Ms. Parker. Just a little point on clarification.
6 When a single-member LLC will disregard a member being an
7 individual, does the Franchise Tax Board have any guidance
8 as to which regulation applies through this LLC or not?

9 MS. PARKER: Yes. The guidance is, it is -- the
10 regulation does not apply, and the statute does apply to
11 any entity that fails to file a return after demand by
12 FTB. There's not a different treatment for a disregarded
13 entity, because they are filed as an entity. And if we
14 were to, you know, not have the demand penalty apply, it
15 would be, in essence, in saying, "They didn't have a
16 return filing requirement."

17 In 23 -- I believe it was 23026 that specifically
18 provides that LLC required, even though they are
19 disregarded entity, they were required to file a return.
20 And as such, FTB can demand a return to be file under
21 demand penalty statute.

22 JUDGE LEUNG: This is Judge Leung. That's all my
23 questions.

24 Judge Lambert, thank you.

25 JUDGE LAMBERT: Thanks.

1 Judge Ewing, do you have any questions?

2 JUDGE EWING: I do not have any additional
3 questions, Judge Lambert. Thank you.

4 JUDGE LAMBERT: Okay. Thank you.

5 I have no further questions either. So if
6 there's nothing further, I'm going to close the record and
7 conclude the hearing.

8 I want to thank each party for appearing today.
9 We will issue a written opinion within 100 days. Thank
10 you. This hearing is now close.

11 (Proceedings adjourned at 10:36 a.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for
the State of California, do hereby certify:

That the foregoing transcript of proceedings was
taken before me at the time and place set forth, that the
testimony and proceedings were reported stenographically
by me and later transcribed by computer-aided
transcription under my direction and supervision, that the
foregoing is a true record of the testimony and
proceedings taken at that time.

I further certify that I am in no way interested
in the outcome of said action.

I have hereunto subscribed my name this 11th day
of June, 2021.

ERNALYN M. ALONZO
HEARING REPORTER