

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
J. ACHABAL and A. BEHRENSMEYER, ) OTA NO. 20116970  
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APPELLANT. )  
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TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Wednesday, August 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 10:41 a.m. and concluding at 11:08 a.m. on  
Wednesday, August 25, 2021, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Panel Lead: ALJ NATASHA RALSTON

Panel Members: ALJ SHERIENE RIDENOUR  
ALJ TOMMY LEUNG

For the Appellant: H. ROBERT TRACY

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
GI JUNG NAM  
ELLEN SWAIN

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California; Wednesday, August 25, 2021

10:41 a.m.

JUDGE RALSTON: We're opening the record in the appeal of Achabal and Behrensmeyer. This matter is being heard before the Office of Tax Appeals. The OTA Case Number is 20116970. Today's date is Wednesday, August 25th, 2021, and the time is approximately 10:41 a.m. This hearing is noticed for Sacramento, California, and is being conducted electronically with the agreement of the parties.

Today's hearing is being heard by a panel of three Administrative Law Judges. I am Judge Ralston, and I will be the lead judge. Judge Ridenour and Judge Leung are the other members of this tax appeals panel. All three judges will meet after the hearing and produce a written decision as equal participants. Although I will be conducting the hearing, any judge on this panel may ask questions or otherwise participate to ensure that we have all the information that we need to decide this appeal.

I'm going to ask the parties to please introduce themselves again. No need to spell your names, but just please introduce yourselves for the record, starting with Mr. Tracy, the representative for the Appellants.

MR. TRACY: My name is Robert Tracy.

1           JUDGE RALSTON: Thank you. And for Respondent  
2 FTB, if you could please introduce yourselves for the  
3 record again. Thank you.

4           MR. NAM: I am Gi Nam for Franchise Tax Board.

5           MS. SWAIN: Good morning. I'm Ellen Swain for  
6 the Franchise Tax Board.

7           JUDGE RALSTON: Good morning. Thank you.

8           So as discussed at the prehearing conference, the  
9 issue to be decided in this appeal is whether Appellants'  
10 failure to timely pay their 2019 taxes was due to  
11 reasonable cause.

12           And Mr. Tracy, is that the issue as you  
13 understand it?

14           MR. TRACY: That is correct.

15           JUDGE RALSTON: Thank you.

16           And Mr. Nam, do you agree that that's the issue?

17           MR. NAM: Gi Nam. Yes, I agree.

18           JUDGE RALSTON: Thank you.

19           As discussed at the prehearing conference,  
20 neither party intends to call any witnesses.

21           As for exhibits, Respondent FTB has submitted  
22 Exhibits A through F, and Appellant has not raised any  
23 objections to FTB's exhibits.

24           Mr. Nam, you still intend to submit exhibits A  
25 through F?

1 MR. NAM: Gi Nam. Yes, those are the correct  
2 exhibits.

3 JUDGE RALSTON: Thank you.

4 And Mr. Tracy, do you still have no objection to  
5 Respondent's exhibits?

6 MR. TRACY: No objections. Thank you.

7 JUDGE RALSTON: Thank you.

8 This hearing is expected to last approximately  
9 30 minutes. Mr. Tracy, for the Appellants, will have  
10 approximately 5 minutes for his opening presentation. The  
11 judges may ask questions at that time. Respondent will  
12 have approximately 10 minutes for their presentation, and  
13 then Appellant will have approximately -- the panel may  
14 also ask questions. The Appellant will approximately 5  
15 minutes for a rebuttal.

16 Does anyone have any questions before we move  
17 onto the opening presentations? It's not indicating that  
18 anyone has any questions. So we are ready to proceed with  
19 Appellant's opening presentation.

20 Mr. Tracy, you have approximately five minutes,  
21 and please begin when you are ready.

22 MR. TRACY: Yes. Thank you very much.

23

24 PRESENTATION

25 MR. TRACY: I wanted to restate what the issue

1 is. The issue is whether Jonathan A. Achabal and Annette  
2 Behrensmeyer, these are the Appellants, established that  
3 their failure to timely pay their taxes for the 2019 tax  
4 year was due to reasonable cause.

5 And I want to stress that we're using the word  
6 reasonable, and reasonable means -- this is according to  
7 the Webster Dictionary -- moderate, fair, being in  
8 accordance with reason. Now, when I received this notice  
9 or that at least the taxpayers received this notice, I  
10 responded by requesting the Franchise Tax Board to  
11 consider an abatement of the penalty. And my letter,  
12 dated November the 20th, said the taxpayers are appealing  
13 the decision by the Franchise Tax Board to penalize the  
14 taxpayers for a \$556.01 late payment penalty.

15 The taxpayers acted in good faith and exercised  
16 ordinary care and prudence in relying on their tax  
17 preparer instructions. The taxpayers were not aware that  
18 the amount due was not drawn from their bank account and  
19 past due or the actual e-file date until they received the  
20 Franchise Tax Board Notice of Tax due. The effects of the  
21 pandemic on expectation or actual deadlines created  
22 additional confusing in delaying the taxpayers' response.

23 Accordingly, the taxpayers are seeking  
24 post-payment relief claim for refund. And the Franchise  
25 Tax Board Respondent, "We denied your claim for refund for



1 tax year 2019 for the amount of \$556.01 plus any  
2 applicable interest. California is authorized to abate  
3 most penalties due to reasonable cause. However, the  
4 information you provided in your letter does not  
5 constitute reasonable cause or abatement for the  
6 underpayment and monthly penalties. There is no  
7 reasonable cause or exception to the abatement of  
8 interest."

9 So the request had to do with abatement of  
10 penalty, and I think that the information that's provided  
11 is very clear that this is reasonable cause. The  
12 taxpayers did not intentionally create a situation where  
13 they were avoiding to pay the tax. This was not something  
14 that they had done intentionally.

15 It was, basically, a situation where they did not  
16 realize that the amount that was -- the tax that was due  
17 was not drawn from their account until way after the fact  
18 when they finally received the correspondence. And in the  
19 meantime, the penalty accrued from that day forward.

20 That's my statement.

21 JUDGE RALSTON: Okay. Thank you, Mr. Tracy.

22 This is Judge Ralston speaking. I'm going to  
23 turn to my panel to see if they have any questions.

24 Judge Ridenour, do you have any questions at this  
25 time?

1           JUDGE RIDENOUR: I do, actually. Mr. Tracy, does  
2 your clients not check their bank statements on a regular  
3 basis to not see that this tax payment did not withdrawal  
4 properly?

5           MR. TRACY: I do not know whether they take --  
6 they check their bank statements regularly. I think  
7 there's a presumption that the payment was made from their  
8 bank account. They have traditionally had their accounts  
9 drawn. But again, during this period of time, I have had  
10 other clients where the amounts were drawn later than  
11 usual, and I just told -- I told them, consistently, that  
12 because of the Covid certain things may not happen  
13 perfectly. Just make sure there's enough funds in the  
14 account so that the payment can be made. But I cannot  
15 answer specifically to that question whether or not they  
16 check their bank accounts regularly.

17           JUDGE RIDENOUR: This is Judge Ridenour. Thank  
18 you very much. No further questions.

19           JUDGE RALSTON: Thank you, Judge Ridenour.

20           This is Judge Ralston. Judge Leung, did you have  
21 any questions at this time?

22           JUDGE LEUNG: Yes, I do. Mr. Tracy, what was the  
23 arrangement by the Appellants regarding who is going to  
24 pay the tax on the return?

25           MR. TRACY: Well, actually, my letter to the

1 client was that -- that they were going to pay the tax  
2 manually as a check. That was -- that was the original  
3 conversation, and I had set aside a voucher for them to do  
4 that. And -- however, prior to that, my conversation with  
5 the client was that the taxpayer -- was that we would have  
6 it drawn from their bank account. And so I think they  
7 were relying on me to have the payment drawn from the bank  
8 account.

9 So from the standpoint of the taxpayer, there's  
10 sort of an expectation that the amount was going to be  
11 drawn from their bank account. However, I had put the  
12 voucher with their tax documents for them to pay it  
13 directly. So there was a -- there was a confusion there  
14 as far as the messaging as to how the payment was going to  
15 be made. I think that from that standpoint, again, the  
16 taxpayers were acting reasonably under the circumstance.

17 JUDGE LEUNG: This is Judge Leung again. What  
18 was the usual practice between you and the taxpayer  
19 regarding payments? I'm assuming this is not the first  
20 time you prepared the returns for them.

21 MR. TRACY: Oh, no. These -- these clients have  
22 been with me for 15 years. And then as -- if we go back  
23 to the previous year, we had -- I believe that depending  
24 whether or not they're due a refund or not, if they had a  
25 tax due, it would be drawn electronically from their bank

1 account.

2 JUDGE LEUNG: And when you say "drawn from their  
3 bank account," you mean that was a signal for you to  
4 electronically pay, not for them to cut a check?

5 JUDGE RALSTON: This is Judge Ralston.  
6 Mr. Tracy, we can't hear you.

7 MR. TRACY: Oh, I'm sorry about that. I've been  
8 trying to mute and not mute. So just to restate what I  
9 said, when we e-file, when the client authorizes us to  
10 transmit the return, which what typically happens with  
11 this particular client, if they have a balance due, we  
12 have all of their bank account information. And when we  
13 transmit the return, if they have a balance due, it's  
14 automatically drawn from their bank account.

15 JUDGE LEUNG: Thank you, Mr. Tracy. That's all  
16 the questions I have.

17 JUDGE RALSTON: This is Judge Ralston. Thank  
18 you.

19 We are now ready to begin FTB's presentation.

20 Mr. Nam, you have approximately 10 minutes, and  
21 please start when you are ready.

22 MR. NAM: Thank you, Judge Ralston.

23

24 PRESENTATION

25 MR. NAM: We are here today to determine if the

1 late payment penalty may be abated. In order to abate the  
2 late payment penalty, the Appellant must establish that  
3 their failure to pay their taxes for the 2019 tax year was  
4 due to reasonable cause. Reasonable cause in this context  
5 means Appellants must show that they failed to timely pay  
6 despite the exercise of ordinary business care and  
7 prudence. The law also requires that Appellants must  
8 support their claim of reasonable cause with credible and  
9 competent evidence.

10 Here, Appellants contend that they relied on  
11 their tax preparer to pay their taxes with their return.  
12 However, this type of reliance does not establish  
13 reasonable cause to abate the penalty. Based on the  
14 Supreme Court decision in *United States v. Boyle*, each  
15 taxpayer has a personal and nondelegable obligation to  
16 timely pay their taxes, and reliance on a tax preparer to  
17 make a timely payment does not establish reasonable cause.

18 Furthermore, the Office of Tax Appeals decided in  
19 the Appeal of Scanlon, that taxpayers are expected to  
20 monitor their bank account and quickly ascertain whether a  
21 scheduled electronic payment was paid. This body has also  
22 decided in the Appeal of Friedman that failure to timely  
23 pay caused by an oversight by itself does not constitute  
24 reasonable cause. Between the date of filing, which was  
25 June 16, 2020, to the date of the collection bill sent by

1 the Franchise Tax Board, September 22, 2020, Appellants  
2 did not closely monitor their bank account to confirm  
3 whether the payment was withdrawn.

4 And regardless of how the payment was withdrawn  
5 in the past, their oversight or confusion with the tax  
6 preparer's instructions do not establish reasonable cause  
7 because the focus here is the taxpayer's action for the  
8 2019 tax years, not any prior tax years. Therefore, the  
9 law prohibits the abatement of the late payment penalty in  
10 this case.

11 Respondent's action should be sustained.

12 Thank you. I'd be happy to answer any questions.

13 JUDGE RALSTON: This is Judge Ralston. Thank  
14 you.

15 I'm going to turn to my panel members to see if  
16 they have any questions.

17 Judge Ridenour, do you have any questions?

18 JUDGE RIDENOUR: This is Judge Ridenour. I do  
19 not have any questions. Thank you.

20 JUDGE RALSTON: Thank you.

21 Judge Leung, do you have any questions?

22 JUDGE LEUNG: This is Judge Leung. No questions.  
23 Thank you.

24 JUDGE RALSTON: Thank you.

25 So next, the Appellant has approximately five

1 minutes to respond if you would like. Mr. Tracy, did you  
2 want to state a rebuttal?

3 MR. TRACY: Of course. So I just want to check  
4 my mute button is off.

5

6 CLOSING STATEMENT

7 MR. TRACY: So yes, this is my response to that.  
8 First of all, the statement that was made was that the  
9 taxpayer was not reasonable. Okay. And again, I'm going  
10 to go back to the issue. The issue is due to reasonable  
11 cause. Now, under the circumstances, first of all,  
12 monitoring the bank account, we did not establish whether  
13 the taxpayer did or did not monitor the bank account. So  
14 let's be reasonable about that.

15 When we get -- when checks get cleared, they  
16 don't -- then they get posted. The process between the  
17 time that a check is posted and when it shows up on your  
18 bank account, that whole process is something that most  
19 people -- again, being reasonable, most people are going  
20 to see their -- I don't know how many people as a  
21 percentage actually monitor their bank account that  
22 closely. I have no idea. But again, we haven't  
23 established that the taxpayers haven't done that.

24 The second thing is, again, under the  
25 circumstances the taxpayers have in good faith relied on

1 the information on the tax return, communicating with tax  
2 preparer whether or not they need to pay the balance that  
3 was due. Under the circumstances, can one say that the  
4 taxpayer was using good reasoning to expect that the  
5 amount would be drawn from their bank account? And how  
6 long does that process take?

7 Again, under the Covid pattern of things with the  
8 government and paying taxes, we've had so many delays with  
9 moving deadlines during this whole process. So I think  
10 under the circumstances, again, based upon the definition,  
11 the taxpayers did exercise good reasonable cause. And I'm  
12 just going to leave it at that, that I think that they be  
13 responsible for the interest is reasonable because they  
14 didn't pay the tax until quite a bit later.

15 But to be penalized under the situation,  
16 basically saying they were not being reasonable is not in  
17 the spirit of the term, being a reasonable action taken by  
18 the taxpayer.

19 JUDGE RALSTON: Okay. Thank you, Mr. Tracy.

20 Judge Ridenour, did you have any questions at  
21 this time?

22 JUDGE RIDENOUR: This is Judge Ridenour.  
23 Actually I do. I have some questions for Mr. Tracy.

24 Mr. Tracy, you previously said prior returns you  
25 would have electronic withdrawals. What changed it for



1 this particular tax year that you sent an e-voucher to the  
2 taxpayers?

3 MR. TRACY: I cannot explain why a voucher was  
4 sent to the taxpayer this time. Again, we normally have a  
5 pattern where we do an automatic payment and -- but I  
6 cannot -- I would not be able to, at this time, tell you  
7 why did it come out as a voucher, and why did it not get  
8 automatically paid as a direct charge.

9 The taxpayer was given, again, conflicting  
10 information expecting, based upon prior experience, that  
11 it would be an automatic charge to their account. And  
12 only after the Franchise Tax Board notified them that they  
13 didn't have the payment, that's when they realized that,  
14 oh, they were supposed to pay by voucher.

15 JUDGE RIDENOUR: Okay. So in the prior ones when  
16 you did an electronic withdrawal, was the  
17 voucher information given with the tax returns?

18 MR. TRACY: No, no.

19 JUDGE RIDENOUR: Okay. So then my follow-up  
20 question to is, would you consider it reasonable the  
21 taxpayers to ignore the voucher information submitted to  
22 them with the tax return?

23 MR. TRACY: I think it would be reasonable  
24 because when you get the return and then you -- like so  
25 many tax clients, a lot of times what they do is, if

1 again, if they're expecting the automatic charge to their  
2 account -- and particularly when I go over this with the  
3 taxpayer, I do tell them that this is going to be an  
4 automatic charge to their account.

5 We don't just do that unilaterally. We -- we  
6 have to get their authorization, and then there's that  
7 expectation. So, you know, there wasn't that step taken  
8 where they see the voucher and then they ask the question,  
9 you know, why wasn't this paid by direct debt?

10 JUDGE RIDENOUR: This is Judge Ridenour. No  
11 further questions. Thank you very much.

12 JUDGE RALSTON: Thank you. Judge Leung, did you  
13 have any questions at this time?

14 JUDGE LEUNG: Yes, I do for the Franchise Tax  
15 Board.

16 Mr. Nam, when did the taxpayers file their return  
17 for 2019? June 15th or July 15th?

18 MR. NAM: This is Gi Nam. June 16, 2020.

19 JUDGE LEUNG: And at that point, we're in the  
20 middle of Covid-19, what was the staffing status of  
21 Franchise Tax Board? Were you -- was Franchise Tax Board  
22 most of the employees working remotely or half-staff? Or  
23 what was the status then?

24 MR. NAM: We don't have that information. I  
25 don't have an accurate information. We may be remote at

1 that time, but it depends on which department of the  
2 Franchise -- which division of the Franchise Tax Board as  
3 well. There's a lot of variability. I could produce that  
4 to you, if it's relevant, in a post-hearing brief.

5 JUDGE LEUNG: Well, I'm trying to figure out if  
6 the taxpayer had sent in a check, and if they were  
7 diligent enough to keep checking their bank to see if the  
8 check cleared, how long would it have taken the Franchise  
9 Tax Board to get the return, process the return, and send  
10 a check off to the bank to be cashed?

11 And the reason I ask that is because in the past  
12 when there were furloughs and the State was in some sort  
13 of emergency, the returns would come into the Franchise  
14 Tax Board, and they sit there for months, and the checks  
15 would not be cashed. And I'm just sort of wondering, even  
16 if this taxpayer had been diligent enough to check their  
17 checking account after submitting a check, would that have  
18 really helped him any?

19 MR. NAM: This is Gi Nam. Judge Leung, you ask  
20 some questions that I don't really have answers to. We  
21 don't really -- at this time, I don't have information  
22 exactly how long it would take for Franchise Tax Board to  
23 process a tax return and then deposit it or to be  
24 withdrawn from the taxpayer's account.

25 However, I'd like to point your attention and

1 focus to the issue at hand. Here, we're looking at the  
2 taxpayer's actions, and we're not so much focused on the  
3 Franchise Tax Board's processing dates. These are  
4 hypotheticals that might be relevant in a different case  
5 but not this particular case. And to point your attention  
6 to the filing due date was -- the file date of the return  
7 was June 16, 2020. The collection bill was sent  
8 September 22, 2020. That was approximately three months.

9 I think that's a considerable amount of time for  
10 the taxpayer to notice whether the tax payment was  
11 withdrawn during that time and for the taxpayer to produce  
12 any type of evidence, credible and competent evidence  
13 showing what type of actions that they conduct during this  
14 time period. Did they call the Franchise Tax Board? Did  
15 they email the preparer to confirm that it was withdrawn?  
16 So we don't have any sort of evidence. And without that  
17 evidence, we think the Franchise Tax Board's action should  
18 be sustained.

19 JUDGE LEUNG: Well, isn't part of your argument  
20 that the taxpayers did not show reasonable cause, that  
21 they did not check their bank account. And then if that  
22 is your argument, then what would be the point to check  
23 their bank account if Franchise Tax Board didn't clear the  
24 check in time?

25 MR. NAM: So that was the OTA, Office of Tax

1 Appeals' decision to require that ordinary act and prudent  
2 act in this situation is to consistently check or actively  
3 check the bank account for the withdrawal. And that was  
4 the Office of Tax Appeals' decision, which we have to  
5 follow as it is precedential. But we -- that's one of the  
6 three arguments that Franchise Tax Board has made.

7 In addition to that, we also made that taxpayers  
8 have a personal and nondelegable obligation to timely pay  
9 their taxes. So what that means is regardless of, you  
10 know, what had happened, their reliance on the taxpayer to  
11 timely pay does not establish reasonable cause in itself.  
12 And that is just -- what you pointed to is just one of the  
13 three arguments that Franchise Tax Board has made.

14 MS. SWAIN: In addition, in response to your  
15 question -- I'm sorry. This is Ellen Swain for the  
16 Franchise Tax Board. In response to your question, the  
17 FTB's staffing was consistent with the Governor's order,  
18 and the essential workers were still working. The payment  
19 processing was not impacted by Covid-19. Those employees  
20 were continuing to report to work during the pandemic.

21 JUDGE LEUNG: Thank you very much, Ms. Swain.  
22 That's what I was looking for. Thank you.

23 I am done now, Judge Ralston.

24 JUDGE RIDENOUR: Judge Ralston, I have one quick  
25 question.

1           Just for clarification purposes, Mr. Tracy, did  
2 your clients believe that you sent a check, or did your  
3 clients believe that there was an electronic withdrawal  
4 from their account?

5           MR. TRACY: The taxpayer believed that there was  
6 going to be an automatic withdrawal from their bank  
7 account.

8           JUDGE RIDENOUR: Thank you. For the  
9 clarification.

10          MR. TRACY: You're welcome.

11          JUDGE RIDENOUR: No further questions for me.  
12 This is Judge Ridenour.

13          JUDGE RALSTON: Thank you.

14          At this time we are ready to conclude this  
15 hearing. This case is submitted on August 25th, 2021, at  
16 approximately 11:08 a.m. The record is now closed.

17          Thank you to everyone for attending today. The  
18 Judges will meet and decide your case later on, and we'll  
19 send you a written opinion of our decision within  
20 100 days, the date after the record is closed.

21          Today's hearing is adjourned, and the next  
22 hearing will resume at 1:00 p.m.

23          Thank you.

24          (Proceedings adjourned at 11:08 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 9th day of September, 2021.

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