BEFORE THE OFFICE OF TAX APPEALS STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
BRYAN WU AND THY TRAN,) OTA NO. 19125538
)
APPELLANTS.)
)

CERTIFIED COPY

VIRTUAL TRANSCRIPT OF PROCEEDINGS

State of California

Thursday, December 16, 2021

Reported by:

SHELBY K. MAASKE Hearing Reporter

Job No.: 34631 OTA(B)

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18	9:42 a.m. and concluding a	=	19		
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1	APPEARANCES:	Page 3	1	Virtual Proceedings; Thursday, I	Page December 16, 2021
2			2	9:42 a.m.	.,
3	Panel Lead:	JUDGE RALSTON	3		
4	Panel Members:	JUDGE HOSEY	4		
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	For the Appellant:	MICHAEL LIM	6	appeal of Wu and Tran. This matter is	is being heard before
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Page 6 Page 8 appellants, Mr. Wu and Ms. Tran. matters could be pursued. Here, the events were extremely 1 1 2 JUDGE RALSTON: Okay. And for Respondent, severe, as anyone knows who has experienced an illness or 2 3 Franchise Tax Board, please, state your name for the 3 loss of a loved one. record and who you are. 4 On October 2nd, 2018, Mr. Wu's mother was 4 5 MS. SWAIN: Good morning. My name is 5 abruptly hospitalized due to an emergency. Her throat was Ellen Swain. I represent the respondent. blocked, and she had trouble breathing. This required 6 6 7 JUDGE RALSTON: Thank you. 7 Mr. Wu's mother to have a tracheostomy and a feeding tube The issue to be decided in this appeal is whether inserted so she was able to breathe and, also, to eat. 8 8 9 appellants have established a reasonable cause for For those of you who do not know what a tracheostomy is, abatement of the late payment penalty. Appellant has it is a severe procedure --10 10 11 submitted Exhibits 1 through 15. Respondent has not 11 JUDGE RALSTON: Mr. Lim? I apologize for raised any objections to Appellant's exhibits, therefore, interrupting. You seem to be cutting in and out a little 12 12 13 Appellant's Exhibit 1 through 15 are admitted without 13 bit. I want to make sure that we are able to get an objection. accurate transcript, so I'm going to ask you to get a 14 14 15 (Appellants' Exhibits 1 through 15 were received.) little closer to your microphone. I'll let you know if 15 16 JUDGE RALSTON: Respondent has submitted that solves the issue. I'm so sorry to interrupt, but, 16 Exhibits A through N, and Appellants did not raise any 17 17 please, continue. Thank you. objections to those exhibits. Respondent's Exhibits A MR. LIM: I apologize. Can you hear me now? 18 18 19 through N admitted without objection. 19 JUDGE RALSTON: Yes. Thank you. 20 20 (Respondent's Exhibits A through N were received.) MR. LIM: Do you mind if I start at the beginning 21 JUDGE RALSTON: Does anyone have any questions 21 of the paragraph? 22 before we move on to opening presentations? 22 JUDGE RALSTON: Please, start wherever you are 23 Okay. We are ready to proceed with Appellant's 23 comfortable. 24 opening presentation. 24 MR. LIM: Thank you. 25 Mr. Lim, you have 20 minutes. Please begin when 25 On October 2, 2018, Mr. Wu's mother was abruptly

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you are ready.

MR. LIM: Mr. Lim. Thank you, Judge Ralston.

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PRESENTATION

MR. LIM: This is Michael Lim representing Appellants. The issue here today is whether Appellants have established sufficient reasonable cause for the abatement of the late filing penalty imposed on Appellants for tax year 2017. California Revenue and Taxation Code Section 19131 provides that a filing penalty must be imposed if the taxpayer fails to file a tax return by the due date unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

To show reasonable cause by reason of illness, you must present credible and competent proof that the circumstances of the illness prevented either the preparation or the signing of a timely return. The type of illness or debilitation that might create reasonable cause, because of severity or timing, makes it virtually impossible for the taxpayer to comply. Things like emergency hospitalization or other incapacity occurring around tax time.

Illness or debilitation do not constitute 24 reasonable cause when the difficulty caused the taxpayer to sacrifice the timeliness of one matter so that other

Page 9 hospitalized due to an emergency. Her throat was blocked, and she had trouble breathing. This required his mother 3 to have a tracheostomy and a feeding tube inserted for her to be able to breathe and, also, to eat.

For those of you who do not know what a 6 tracheostomy is, it is a severe procedure that is performed by creating an opening at the front of the neck so a tube can be inserted into the windpipe to help you breath and, also, to be able to eat as liquid food is fed through the tube. If necessary, the tube can be connected 11 to an oxygen supply and a breathing machine called a ventilator.

As any good and loving son would do in a situation such as this, Mr. Wu jumped to the assistance of his mother. He would continually visit and assist his mother in the hospital until she was released nine days later on October 11, 2018. But Mr. Wu's mother's release from the hospital did not mean she was whole again. Her situation and condition were uncertain.

It was a time of severe worry and stress. Mr. Wu 20 had to step away from his work and craft as a freelancer 22 and use his time to attend to his mother's emotional and physical needs. To add to the severity of Mr. Wu's 23 mother's case once again hospitalized, and was diagnosed 24 with throat cancer on October 31, 2018.

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Because of Mr. Wu's mother's severe cancer and health issue, Mr. Wu's mother's situation became the 2 center of Mr. Wu's life. What else could he do but care for his mother? -- the woman who raised him and loved him 5 throughout his whole life.

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Mr. Wu continued to tend to the care of his mother by proving emotional support, administering morphine, driving her to appointments since she did not own a car, running errands, and helping around the house since his mother was debilitated. The timing of Mr. Wu's mother's decline in health could not have come at a worse time for Mr. Wu.

His mother's emergency hospitalization and the declined occurred in October, less than two weeks before Mr. Wu's taxes were due. Her hospitalization had a snowball effect of doctor appointments, help needed with transportation, running errands, and helping around the house and more. All the attention and help that Mr. Wu's mother needed required an immense amount of time from Mr. Wu.

This situation was not simply sacrificing the 22 timeliness of one matter so that other matters could be pursued, it was a huge human element to Mr. Wu's situation. His mother was seriously ill. His mother. 25 Not a pet, not a stranger, not even a friend, but his

not one of willful neglect by him. It was a situation of 1 desperation, survival, duty and obligation, and love. He 3 needed to attend to the immediate aid of his mother. His mother became his laser focus. This is something that 5 should be commended, not something that should be frowned 6

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7 In conclusion, I'm asking you to be humane, 8 thoughtful, and compassionate. The law was created for and on behalf of the welfare of humanity, not to hurt it. 9 Mr. Wu is diligent and responsible. Please don't punish 10 Mr. Wu for fulfilling his duty as a good son and doing all 11 12 he could for his mother. May his mother rest in peace, and may her passing be a reminder to all of us that life 13 is finite and we are all in this journey together. I hope 14 the laws of the state today can be exercised with 15 16 fairness, gentleness, compassion, and love. Thank you. JUDGE RALSTON: Thank you, Mr. Lim. 17 18 Judge Hosey, do you have any questions? 19 JUDGE HOSEY: No questions. Thank you. 20

JUDGE RALSTON: And Judge Vassigh, do you have 21 any questions? 22 JUDGE VASSIGH: I don't have any question at this

23 time. Thank you. 24 JUDGE RALSTON: Ms. Swain, you have 15 minutes

for your presentation. Please begin when you are ready.

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1 mother. In the terrible timing of this event, Mr. Wu had no choice but to help her with the time he had. When your mother is dying of cancer and you have other obligations to attend to, is there really a choice but to attend to your mother?

Mr. Wu had to see the situation through all the way until his mother passed and all her memorial services were complete. Only after everything was completed, could he finally attend to his personal health and obligations. He filed his taxes as soon as had taken care of his mother, and received grief counseling many times afterward.

In his exhibits, we have credible and competent proof of the severity of Mr. Wu's situation and the timing that prevented Mr. Wu to filing his taxes on time. To highlight, we can see from the exhibits, the heart-wrenching photos of his mother. It is hard to imagine anything more severe and debilitating to a person's soul than seeing his own mother die of cancer right in front of him.

After filing his taxes, despite his 22 heart-wrenching pain, we can also see the long list of counseling sessions Mr. Wu had to do to try to attempt to get back to some mental and emotional stability and 25 health. Mr. Wu's situation of paying his taxes late was

MS. SWAIN: Thank you, Judge Ralston.

PRESENTATION

MS. SWAIN: Ellen Swain for the Franchise Tax Board. The only issue in this case is whether Appellants had reasonable cause until May 6, 2019, to excuse the late filing of their 2017 income tax return. The taxpayers carry the burden to establish that they were exercising ordinary business care prudence. To put it another way, Mr. Wu and Ms. Tran acting as ordinarily intelligent and prudent business people would have acted under similar circumstances during this period.

Now, we start from the position that the delinquent filing penalty was properly imposed, and it's Appellants' burden to establish that they possess the reasonable cause up until May 6, 2019, to excuse this late filing. Because this is a joint return, each spouse has an independent obligation to establish reasonable cause.

19 Now, as the panel wrote in Triple Crown Baseball, 20 reasonable cause, quote, Will excuse such failure only so 21 long as the reasons remain valid, unquote. Here, the 22 reason did remain valid until May 6, 2019, for both 23 spouses who were signatories to the joint return. And the reason it's important to evaluate the actions of each 24 spouse, not just Mr. Wu, leading up to May 6 to determine

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if reasonable cause existed, is really out of parity to all taxpayers to the State of California because we are using the uniform standard.

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During this time, Ms. Tran worked for the Jewish Community Center in San Francisco. She earned fourth-quarter wages of \$1,650.00 in 2018, and first-quarter wages of \$3,350.00 in 2019. The appellant's wife, she was employed outside of the home at the same time the appellants were saying they didn't have the bandwidth to file their California tax return.

This is an example of prioritizing one activity over another, which, let me emphasize, is certainly a taxpayer's choice. It's one that is going to result in the imposition of the penalty and the inability to raise a reasonable-cause argument to excuse its late filing. And Appellants have failed, here, to show reasonable cause existed for appellant wife by virtue of the fact that she was working.

In addition, the appellants were able to file their federal tax return before May 6. Their federal return, according to the federal tax transcript that's provide at Exhibit N, was filed on March 18, 2019, and they received a refund in the amount of \$4,411.00. In light of the fact that the appellants were able to file their federal on March 18, they have not established a

1 Now, this is a risky practice of eyeballing a tax liability, particularly in light of the fact that Mr. Wu 2 3 has his own business. The income is not going to be as predictable as if he were a W-2 salaried employee with a regular paycheck. This is not an exercise of reasonable and prudent business practice. 6

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The risk is that in this eyeballing, you might be incorrect, then when you do calculate the filing return on May 6, 2019, you will have tax overdue and you will be assessed a late filing penalty based on the overdue tax, which is exactly what happened in the case. Instead, it's a mistake. And a mistake is not reasonable cause.

Furthermore, the fact that Ms. Tran worked outside the home and that the couple were able to file their federal joint return on March 18, 2019, shows that they were over-prioritizing other activities over filing their California return. Appellants have failed to carry their burden to establish reasonable cause existed for the entire period until May 6, 2019, and Respondent's actions should be upheld.

21 JUDGE RALSTON: Thank you, Ms. Swain. 22 Judge Hosey, did you have any questions? 23 JUDGE HOSEY: No questions. Thank you. JUDGE RALSTON: And Judge Vassigh, did you have 24 25 any questions?

Page 15

1 reasonable cause existed for the later, May 6, 2019, California filing.

And, finally, Appellants themselves give us another window in the motivation behind their late filing in the supplemental brief at page 7. It had been their practice in 2013 and 2014 to, essentially, eyeball their tax liability and file the returns after the extended due date, because they had overpaid their tax liability and would be expecting a refund, and, therefore, because there was a refund, there would not have been a consequence for the late filing. There would be no penalty.

This is quote from the brief. "Mr. Wu was under 13 the impression that he had overpaid for the 2017 tax year like he usually does and was expecting a refund and, therefore, was not worried about the delay in his tax filing. This was an honest accounting mistake, not a malicious nor wilfully neglectful." That is in the quote. But it's also not reasonable and ordinary business prudence. We have case law that says a mistake does not excuse a late filing.

Let me read that pertinent quote again. "Mr. Wu 22 was under the impression that he had overpaid for the 2017 tax year like he usually does and was expecting a refund and, therefore, was not worried about the delay in his tax filing."

JUDGE VASSIGH: I do not. Thank you.

2 JUDGE RALSTON: Mr. Lim, you have 10 minutes for 3 your rebuttal if you would like?

MR. LIM: Thank you, Judge Ralston.

CLOSING STATEMENT

7 MR. LIM: In response to Ms. Swain's assertions, 8 I would first ask her -- she claims that what we had presented was not valid or reasonable. And in response, I would like to ask if this is unreasonable -- if this isn't 10 valid --11

12 JUDGE RALSTON: Mr. Lim, this is Judge Ralston 13 again. We have lost you. Can you try speaking again so I can see if you're there? 14

MR. LIM: I apologize.

JUDGE RALSTON: Please, go ahead. You can start over with your rebuttal if you'd like.

MR. LIM: Thank you, Judge Ralston.

In response to Ms. Swain's assertions, I'd first ask her, When your mother is dying of cancer, what is reasonable to you, and what would be valid if this is not?

We are not robots. The case here is about

23 reasonable cause, not about perfection. There was a huge human element in this. It wouldn't be anything but 24

reasonable to spend all the time that the appellants could

Page 18 Page 20 in aid of Mr. Wu's sick mother. 1 To clarify -- to make sure I understand 1 2 To address what Ms. Swain said in regards to correctly. Are you referring to his extension within his 3 Mr. Wu's wife working. We can't live without money. We 3 filing? Could you, please, clarify the question for me? need money to live. Mr. Wu had the obligation and the 4 JUDGE VASSIGH: Sure. My understanding was that 4 5 duty to attend to his mother's health, and to do so, he 5 Appellants were able to file their federal tax return. had to step away from working and had to give up income. 6 Did I misunderstand that? 6 7 Mr. Wu's wife, and Mr. Wu as well, is a MR. LIM: My understanding is that Mr. Wu freelancer. She had certain obligations, certain 8 typically overpays his taxes and, typically, files for an 8 extension; and, so, to my understanding, he did not file commitments, to fulfill in terms of the exhibits that 9 9 Ms. Swain presented, but she also had to step away and his federal tax return in April as well. 10 10 11 assist Mr. Wu emotionally and in other ways as well, while 11 JUDGE VASSIGH: Thank you for clarifying that. also meeting the commitments that she had to at work. 12 12 MS. SWAIN: May I be heard, Judge Ralston? 13 In addition to that, we can see that the work 13 JUDGE RALSTON: Ms. Swain, please, go ahead. that she did do here presented in the exhibits didn't MS. SWAIN: I just wanted to clarify the facts. 14 14 produce much income at all. But it was necessary income 15 So the date of the federal return transcript -- I just 15 in order for them to be able to support themselves. So it 16 wanted to draw your attention to that -- that was on 16 was just a matter of necessity. People need money to Exhibit N. That one shows the date that the federal 17 17 return was actually filed on March 18, 2019. Thank you. 18 live. People need financial support, as well as emotional 18 19 support. That, Ms. Tran was able to do for Mr. Wu during 19 JUDGE RALSTON: Thank you, Ms. Swain. It looks 20 this troublesome time. 20 like we are ready to conclude this hearing. This case is 21 submitted on December 16, 2021, at 10:07 a.m. Today's To wrap it up, I would just like to, in 22 conclusion, if we could all step into Mr. Wu's shoes and 22 hearing in the appeal of Wu and Tran is now adjourned and imagine the unimaginable. Something I pray none of us the record is closed. 23 23 24 have to go through. But when your own mother is suffering 24 (Proceedings concluded at 10:07 a.m.)

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1 situation, what would you consider to be reasonable, and what would you do? Thank you. 3 JUDGE RALSTON: Thank you, Mr. Lim. 4 I do have a question. Is there any reason why 5 Ms. Tran could not have filed the return on time? MR. LIM: To answer your question, Judge Ralston, 6 7 I would respond to that. I would say there's only so many hours in a day. Typically, Mr. Wu filed the taxes, and as 8 9 he was tending to his mother's health and needs, you know, Ms. Tran was doing all she could to support the family and 10 11 also meet her obligations as well. And again, the 12 standard that we are basing this case off of today is 13 reasonableness and not perfection. JUDGE RALSTON: Thank you, Mr. Lim. 14 15 Judge Hosey, did you have any questions? JUDGE HOSEY: I have no questions. Thank you. 16 JUDGE RALSTON: And Judge Vassigh, did you have 17 any questions? 18 19 JUDGE VASSIGH: I do have a question for Mr. Lim. 20 Mr. Lim, I was wondering if you have any 21 information you can share with us about the federal tax 22 returns that were filed and why that same information was 23 not used to file the state returns at that time? MR. LIM: Thank you, Judge Vassigh, for your 24 25 question.

and passing in front of you, that desperate and helpless

Page 21 HEARING REPORTER'S CERTIFICATE 1 I, Shelby K. Maaske, Hearing Reporter in and for the State of California, do hereby certify: 5 That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the 7 testimony and proceedings were reported stenographically 8 by me and later transcribed by computer-aided 9 transcription under my direction and supervision, that the 10 foregoing is a true record of the testimony and 11 proceedings taken at that time. 12 I further certify that I am in no way interested in the outcome of said action. 13 14 I have hereunto subscribed my name this 26th day of December, 2021. 15 16 17 18 19 20 SHELBY K. MAASKE 21 22

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