

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
 C. BASKIN and J. FERNSTROM, ) OTA NO. 21017142  
 )  
 APPELLANT. )  
 )  
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Wednesday, March 23, 2022

Reported by:  
 ERNALYN M. ALONZO  
 HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 12:55 p.m. and concluding at 1:39 p.m. on  
Wednesday, March 23, 2022, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Panel Lead: ALJ CHERYL AKIN

Panel Members: ALJ TERESA STANLEY  
ALJ ANDREA LONG

For the Appellant: C. BASKIN

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
  
ALISA PINARBASI  
MARIA BROSTERHOUS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-10 were received at page 7.)  
(Department's Exhibits A-I were received at page 7.)

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California; Wednesday, March 23, 2022

12:55 p.m.

JUDGE AKIN: We are opening the record in the Appeal of Baskin and Fernstrom, OTA Case Number 21017142. This matter is being held before the Office of Tax Appeals. Today's date is Tuesday, March 23rd, 2022, and the time is approximately 12:55 p.m.

This hearing is being conducted electronically with the agreement of the parties. My name is Cheryl Akin, and I am the lead Administrative Law Judge for this appeal. With me today are Administrative Law Judges Teresa Stanley and Andrea Long.

As a reminder the Office of Tax Appeals is not a court. It is an independent appeal body. The office is staffed by tax experts and is independent of the State's taxing agencies.

With that, let me have the parties introduce themselves for the record, and I'd like to start with Appellant.

MR. BASKIN: Thank you all. My name is Cory Baskin. I'm an attorney here in California. I don't know if that's going to help at all, but that's my introduction. Thank you.

JUDGE AKIN: Thank you, Mr. Baskin.

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And Franchise Tax Board?

MS. PINARBASI: Alisa Pinarbasi for Franchise Tax Board.

MS. BROSTERHOUS: And Maria Brosterhous, also for Franchise Tax Board.

JUDGE AKIN: Okay. Thank you.

Judge Akin speaking again. Okay. As confirmed at the prehearing conference and in my minutes and orders following that conference, there are two issues to be decided in the appeal today. The first is whether Appellants have established reasonable cause to abate the late-payment penalty for the 2019 tax year, and the second is whether Appellants have demonstrated that they are entitled to an abatement of the underpayment of estimated tax penalty for the 2019 tax year also.

With that, I'd like to move onto the evidence in this appeal. Appellants have submitted Exhibits 1 through 10. Exhibits 1 through 7 were submitted prior to prehearing conference, and Exhibits 8, 9, and 10 were submitted follow that prehearing conference.

Ms. Pinarbasi, did Franchise Tax Board have any objections to Appellants' additional exhibits? That's Exhibits 8, 9, and 10.

MS. PINARBASI: No objections.

JUDGE AKIN: Okay. Thank you.

1 Appellants Exhibits 1 through 10 will now be  
2 entered into the record.

3 (Appellant's Exhibits 1-10 were received  
4 in evidence by the Administrative Law Judge.)

5 Franchise Tax Board submitted Exhibits A through  
6 I. Exhibits A through H were submitted prior to the  
7 prehearing conference, and Exhibit I was timely submitted  
8 following the prehearing conference.

9 Mr. Baskin, now that you've had a chance to  
10 review these exhibits, did you have any objections to  
11 FTB's Exhibits A through I?

12 MR. BASKIN: No, I do not.

13 JUDGE AKIN: Okay. Judge Akin speaking. Thank  
14 you.

15 FTB's Exhibits A through I are now entered into  
16 the record.

17 (Department's Exhibits A-I were received in  
18 evidence by the Administrative Law Judge.)

19 As a reminder I just want to quickly go over the  
20 plan for today. As indicated in the minutes and orders,  
21 Appellant will have 10 minutes for his presentation,  
22 including witness testimony. After that, both Franchise  
23 Tax Board and the panel will be permitted to ask any  
24 questions they may have of the witness. And once that's  
25 concluded, FTB will then have 10 minutes for their

1 presentation. After FTB's presentation, I will turn it  
2 over to my panel members again for any questions. And  
3 then finally, Appellant will have an additional 10 minutes  
4 for a closing or a rebuttal. Any questions before I allow  
5 Mr. Baskin to begin his presentation.

6 And, Mr. Baskin, you do intend to testify still?

7 MR. BASKIN: Yes. If you guys -- sorry, if you  
8 guys -- if everyone here can consider my argument in a  
9 sense coterminous with my testimony, I would appreciate  
10 that. I am also, of course, available to be interrogated,  
11 examined during the FTB's portion as well. But I don't  
12 think we need to go through with me, you know, asking  
13 myself questions and responding as a witness.

14 JUDGE AKIN: Yes, that's absolutely acceptable.  
15 What I will do then is just swear you in, and then you can  
16 begin your presentation.

17 MR. BASKIN: Sure.

18 JUDGE AKIN: Would you please raise your right  
19 hand.

20  
21 C. BASKIN,  
22 produced as a witness, and having been first duly sworn by  
23 the Administrative Law Judge, was examined and testified  
24 as follows:

25 ///



1 JUDGE AKIN: Okay. Thank you. You have 10  
2 minutes and may begin when you're ready.

3

4 PRESENTATION

5 MR. BASKIN: Well, let me begin by thanking  
6 everyone for suffering through this process. I know that  
7 the amount in question is not necessarily a massive  
8 amount. It's certainly not an insignificant amount. And  
9 when I initially, I guess, objected or protested or filed  
10 an appeal, I did not foresee us ending up here. But I've  
11 been pleased and impressed by the seriousness in which the  
12 OTB -- sorry, the OTB -- the FTB has taken this process  
13 and the formalities followed. And, you know, I'm  
14 confident I'll be getting a fair hearing today and that  
15 the process has impressed me, just so to speak.

16 That being said, we're here today because of,  
17 really, what was a scrivener's error, and I was the  
18 scrivener. I don't like making mistakes. I think one of  
19 my best qualities is when I make a mistake, I admit my  
20 mistakes. I believe that -- I wasn't going to mention  
21 this -- that on Law and Order Jerry Orbach's character  
22 used to say, "When I'm wrong, I say I'm wrong."

23 And here, it's pretty obvious that there was an  
24 error. It's uncontested that the error resulted in, you  
25 know, kind of failure to pay taxes timely. But what I

1 also think is fairly clear from the record and certainly  
2 established by the additional Exhibits A [sic] through 10  
3 that I submitted, that I apologize for not submitting  
4 earlier. It's clear that the intent -- and intent is a  
5 critical determination when we go into the court cases and  
6 law on this.

7 I understand that reasonable cause is the primary  
8 determination under kind of OTA law. But I think that's  
9 wrapped up with intent. And the intent here was clearly  
10 to pay timely. And if we look at new Exhibit 8 -- or  
11 Exhibit 8, what you'll see is kind of what I saw, the  
12 exact screen that I saw, when I kind of clicked --  
13 confirmed, when I finished the tax pay -- or the tax  
14 paying process and the submission process through  
15 TaxSlayer.

16 And, you know, what may have been a slight  
17 misstatement in my brief for one of my appeals, which  
18 turned into the brief, it states that, you know, upon  
19 submission I was immediately taken by TaxSlayer to the  
20 Cal -- FTB website where I was prompted to enter my bank  
21 account information. What I found from actually just  
22 paying my taxes last week for the 2021, is that's not  
23 really what happens. And, in fact, I caught the error  
24 again checking it. I thought it has been corrected.

25 The error existed again this time because you're

1 not prompted to reenter your bank account information.  
2 All that I'm provided -- and, again, this is not the FTB's  
3 fault. I want to make that clear. It really was just  
4 kind of an unfamiliarity at the time with the TaxSlayer  
5 program. And what happens is you're prompted to, I guess  
6 the first time around, enter your bank account information  
7 into the data base. And the asks you -- it shows you the  
8 last four digits of your account, and it says, you know,  
9 use this account.

10 And, you know, that's -- that's what I did.  
11 Unfortunately, the last four digits of -- well, you could  
12 say it's where the error occurred because there's three 2s  
13 where there should be two 2s. And if you look at, I  
14 believe it's Exhibit 9, you can actually see the -- it's  
15 the federal form but it's the same that's used for tax.  
16 You can see my 1040 on page 2, and I've highlighted in  
17 yellow where the account number is listed. And this was  
18 on this particular tax filing, which was also the tax  
19 filing that's used for the state.

20 The way it works with TaxSlayer is you prepare  
21 your federal return. You complete it, submit it, and they  
22 say, hey, would you like us to do your state return as  
23 well? It transfers over all the information. It  
24 completes the form. You review it, and then it says, you  
25 know, how do you want to pay? And you click and use the

1 same account, basically, or use account ending in [REDACTED].

2 My account does end in [REDACTED]. I had entered it  
3 into TaxSlayer previously, I think the year before, or  
4 maybe even that year. I'm not sure exactly because this  
5 issue didn't arise, or maybe I used a different account.  
6 I think, in fact, I used a different account that year.  
7 But I entered in the account number, and it should be --  
8 or the last -- there's an extra 2 in there. It should  
9 be --

10 JUDGE AKIN: I just want to stop you. I didn't  
11 want you to say the whole --

12 MR. BASKIN: Yeah.

13 JUDGE AKIN: Yeah. That's okay. We can probably  
14 take that out of the transcript when it says it. But  
15 yeah, just be careful not to say the entire account  
16 number.

17 MR. BASKIN: Okay. I mean, it's critical here.  
18 But so the issue here is there's an extra 2 in that  
19 transfer of three 2s, which it should be two 2s. And it  
20 didn't affect the last four digits, which is what is the  
21 prompt. And so I didn't notice it at the time. I just  
22 clicked that account. And then if we go back to  
23 Exhibit 8, you'll see that it actually states my  
24 withdrawal dates and the refund dates.

25 And so I -- when I went back into TaxSlayer, it

1 actually confirms to me that the money was withdrawn.  
2 Obviously, I understand that does not mean the money is  
3 withdrawn. What I did see, which I've submitted  
4 previously as an exhibit. When the payment was prompted,  
5 it said, you know, payment -- there's a difference between  
6 when you issue the payment and then a confirmation. You  
7 don't receive a confirmation, and you don't receive a  
8 rejection. It just happens to be confirmed or rejected.

9 Interestingly -- and as I noted in my brief --  
10 the same account number was used for the IRS. The IRS, as  
11 evidenced by my bank statement, using that exact same  
12 number -- and as you can see on the bank statement, which  
13 I apparently put into evidence because it's necessary but  
14 shouldn't have because it's public record -- it has the  
15 actual correct account number. That bank statement is  
16 Item 10 -- Exhibit 10. And it has the correct account  
17 number with one of those 2s.

18 So there's only two 2s on 92 instead of [REDACTED].  
19 And you'll see that notwithstanding that -- and I did, at  
20 least this time, redact all my other banking  
21 information -- there is that entry from April 8th of 2020  
22 showing that the IRS credited my account notwithstanding  
23 the error. Again, I didn't check one way or the other.  
24 This account is what I use, basically. It's not like any  
25 other account. I use my checking account day-to-day.

1 This account is where I basically maintain savings. So  
2 it's not my day-to-day account.

3 And if we look at, I guess, page 4 of the FTB's  
4 brief talking about -- and it says that it is expected and  
5 the quoting from the Sidney Friedman and Ellen Friedman  
6 case from July 20th, 2018, it is expected that a  
7 reasonably prudent taxpayer would exercise due care and  
8 diligence by monitoring their bank accounts to quickly  
9 ascertain whether a payment to the FTB was, in fact, paid.

10 In this instance, the payment was not rejected  
11 immediately. So I understood at the time that the payment  
12 was made. And then this savings account is just a store  
13 house. It's not like my day-to-day transaction log where  
14 I notice where my balance -- what my balance is. It's  
15 where I move money to when I want to get interest and take  
16 money out of my checking account. And so -- and just for  
17 the record, my wife and I, our checking account is joint,  
18 but this is the saving account where I kind of move, kind  
19 of, my earnings and saving into, and my wife does the  
20 exact same thing with hers.

21 And it just so happens since there was more money  
22 in this account, this is the account I use to substantial  
23 payments, such as what I thought was the substantial  
24 payment of -- I think it was \$14,000 or so in my  
25 California tax liability that year. And -- and I know I'm

1 all over the place here a little bit. But to justify the  
2 reason for that high tax liability, as you can see, I  
3 received a refund from the federal -- from the IRS. I  
4 make quarterly estimated tax payments. I don't have to  
5 make estimated tax payments to California because I'm just  
6 not familiar with the process.

7 But so I understand each year that I'm going to  
8 have -- probably even if I'm entitled to a refund  
9 federally, that I'll have California tax liability. And I  
10 understand that's going to be a significant amount. Hence  
11 my intention to use the substantial -- the more  
12 substantial savings account to make the payment. And so  
13 just turning back to, I guess, the standards here, which  
14 is reasonable care for both Issues 1 and 2, I think as I  
15 said before reasonable care is standard is wrapped up with  
16 intent.

17 I've shown here how the interface basically  
18 confirmed to me that the withdrawal was made, at least,  
19 and that absent going back weeks or so later, I wouldn't  
20 have had the ability to or any sort of way of knowing that  
21 the account was rejected. I think if -- if the number was  
22 way off base, if it was, you know, something absurd that I  
23 had put in instead, I can understand why that maybe would  
24 not be a reason -- that would be -- would not fall  
25 under -- or not qualify as reasonable care.

1 I think we all, when we see numbers  
2 consecutively, especially like the number 2 and there's  
3 multiple 2s, your -- your eyes play tricks on you as to,  
4 you know, how many there are. It is common for all of us  
5 to kind of make that mistake. It's unfortunate that our  
6 account number sometimes have multiple numbers  
7 consecutively, which make it hard to spot the errors here.  
8 And, again, since -- when you're prompted to look into  
9 account numbers, even for this purpose here we're talking  
10 about, we don't want to refer to the whole account number.  
11 We refer to the last four digits. Those last four digits  
12 were correct.

13 So I don't really see this as a reasonable care  
14 issue and, certainly, it was not an intent issue as  
15 evidenced by the fact that, again -- and now I'm circling  
16 back around to this as testimony -- what I discovered this  
17 year is -- I had presumed I would be prompted to kind of  
18 reenter the account information. In fact, once I were to  
19 click "use account ending in [REDACTED]," it just automatically  
20 pays it. When I did this time, which I didn't  
21 recognize -- it may not even have been an action.

22 Perhaps TaxSlayer added that option. I can't  
23 testify to that. I know I complained to TaxSlayer about  
24 this, so that you check before -- before you go again. I  
25 had to check my -- basically, my wallet, let's say. And



1 before clicking, this time I checked my wallet. I noticed  
2 again the wrong number with the extra 2 in there. And --  
3 and that is the explanation why -- and I think I may have  
4 argued it on one of these briefs, or at least mentioned to  
5 the FTB at a phone call when I received, like, a one-month  
6 penalty in 2020 -- the same error happened again.

7           Clearly there was no intent. I just wasn't aware  
8 of how to correct the error. This time I caught it  
9 because I was aware of within a month, not after a year of  
10 receiving any sort of notice that I underpaid from the  
11 FTB. And so, factually, I know this presentation has been  
12 all over the place. It's not typically how I would  
13 prepare something. I think, actually, I'm not used to  
14 testifying and arguing in the same breath. There really  
15 was no intent there, and reasonable care was under taken.

16           It was a process where the IRS had no problem  
17 doing it. I had received confirmation that the withdrawal  
18 was made by TaxSlayer. And this is not an account that I  
19 regularly check or I regularly make transactions from.  
20 And so the last thing I'd like to mention -- and I know  
21 it's really persuasive law, persuasive authority as  
22 opposed to, I guess, binding authority, which would  
23 probably be the OTA's own opinion history.

24           But there's ample case law, both Supreme Court,  
25 kind of other federal circuit courts and also California

1 State Court discussing scrivener's errors. And that's  
2 really what it is here. And I think some of the most  
3 notable cases -- I'll just cite for the record so it's on  
4 the record. One is U.S. -- this is a United States  
5 Supreme Court case -- U.S. National Bank of Oregon versus  
6 Independent Insurance Agents of America. It's 508 U.S.  
7 439, and pin site here is page 440.

8 And this was discussing a kind of legislation.  
9 And this is a quote from Supreme Court in this opinion  
10 pretty much exonerating a legislative scrivener's error.  
11 It says, "It would appear that the misplacement of  
12 quotation marks in the 1916 act was a simple scrivener's  
13 error by someone unfamiliar with the laws, object, and  
14 design. Court should disregard punctuation or  
15 re-punctuate if necessary to render the true meaning of  
16 the statute."

17 Here the extra 2 was very similar to basically a  
18 punctuation error. And the true meaning, not of the  
19 statute but of the tax payment here, was to make payment  
20 from that account. Even more pertinent is the -- and do  
21 please tell me if I'm running up against -- I only have  
22 about a minute more of argument here. And I apologize if  
23 I'm going over. I don't think there's a clock. I'm not  
24 seeing one, at least a running clock here.

25 JUDGE AKIN: May I interrupt you for one moment?

1 MR. BASKIN: Sure.

2 JUDGE AKIN: Your final time -- you know if you  
3 go a couple of minutes over that, that's not going to be a  
4 problem.

5 MR. BASKIN: Sure.

6 JUDGE AKIN: I would ask you to slow down just a  
7 little for our stenographer.

8 MR. BASKIN: Sure. I just started speeding up  
9 thinking that I would be running out of time.

10 So -- and aside from the United States Supreme  
11 Court, there is -- there's also very interesting rulings,  
12 you know, from IRS Tax Court. Specifically, there was an  
13 IRS private letter ruling from 2015. That's PLR 201544005  
14 in which the IRS allowed a state court -- a state court  
15 which had reformed a trust to fix certain drafting errors,  
16 which would have resulted in adverse estate tax  
17 consequences, in fact, tax consequences that would  
18 otherwise have been owed.

19 The IRS understood that -- that was a scrivener's  
20 error. And in order to avert unfair tax consequences  
21 that, you know, were -- was not the result of any sort of  
22 malintent by the taxpayer, the IRS agreed to, in a sense,  
23 correct that scrivener's error. In addition to that case,  
24 there is a -- there was recently -- and it's actually a --  
25 I'm saying um, too much here. I'm trying to find it in my

1 notes.

2           There was a case in which a massive tax liability  
3 was avoided by Verizon. In fact, this is a Seventh  
4 Circuit -- U.S. Court of Appeals for the Seventh Circuit  
5 case. I don't have the Westlaw site. I do have the case  
6 number from the Seventh Circuit. It's 09-3872, and then  
7 there's a second case, 099-3965. This is from 2010. And  
8 in this case the Seventh Circuit allowed Verizon to  
9 retroactively reform its, basically, tax-plan document to  
10 correct a drafting error that -- which had it been  
11 enforced, would have resulted in at least \$1.67 billion  
12 windfall for the participants in that plan.

13           Now, obviously, my temporary windfall -- well, I  
14 wouldn't call it that because although all the money  
15 remained in my account, it just sat there and wasn't used,  
16 no way compares to that. But the Seventh Circuit that  
17 explained in this ruling that the plan did not reflect the  
18 clear intent of the parties. In its decision, the Court  
19 said, "People make mistakes, even administrators of ERISA  
20 plans."

21           I'm a person. I make mistakes. I've learned my  
22 lesson. I know to look for these payments in the future.  
23 In fact, I caught it the following year and caught it and  
24 corrected it this time, as I actually knew how to correct  
25 it finally, the error this year. But to penalize, you

1 know, to the tune of \$1,000 with both the late payment  
2 penalty and an underpayment penalty for really what was a  
3 scrivener's error, I don't think is inconsistent with the  
4 intent of the FTB, nor really consistent with the case law  
5 cited by the OTA in its brief -- or the FTB in its brief,  
6 which brief which talks about reasonable cause.

7 And it also talks about, you know, how --  
8 whereas, a history of compliance by itself does not  
9 establish reasonable cause. It does show the credibility  
10 and intent of the taxpayer here. And I think the record  
11 of tax payments establishes that there was no malintent  
12 here. And that coupled with the reasonable cause, that I  
13 believe I've shown based upon the confirmation page, the  
14 IRS -- the IRS' own withdrawal, the fact this error was a  
15 very easy to -- any one of us, I believe, would  
16 acknowledge that adding an extra number is a common  
17 mistake.

18 And I don't see how this does not satisfy the  
19 standard here that would entitle a taxpayer who did not  
20 intend to make an underpayment or avoid tax liability from  
21 being skewed from a relatively harsh penalty for an  
22 innocent error. And I think with that, I'll conclude.  
23 And I don't know if I have any time to reserve, but I  
24 would like to at least have the ability -- I believe I  
25 have the ability for a minute or two to have some sort of

1 rebuttal after the FTB's case.

2 JUDGE AKIN: Yes. Judge Akin speaking here.

3 Yes, Mr. Baskin. You'll have time after  
4 Franchise Tax Board's presentation for a rebuttal, and I  
5 think we allotted up to 10 minutes for that.

6 Before I turn to my panel for questions,  
7 Ms. Pinarbasi, did you have any questions for Mr. Baskin?

8 MS. PINARBASI: No questions.

9 JUDGE AKIN: Okay. And let me start with  
10 Judge Stanley. Did you have any questions for Mr. Baskin?

11 JUDGE STANLEY: This is Judge Stanley. I do not.

12 JUDGE AKIN: Okay. Thank you.

13 And Judge Long.

14 JUDGE LONG: This is Judge Long. I have no  
15 questions.

16 JUDGE AKIN: Okay. I also do not have any  
17 questions. So I think with that, we're ready for  
18 Franchise Tax Board's presentation.

19 Ms. Pinarbasi, you have 10 minutes and may begin  
20 when you're ready.

21

22 PRESENTATION

23 MS. PINARBASI: Good afternoon. My name is Alisa  
24 Pinarbasi, and I, along with Maria Brosterhous, represent  
25 the Franchise Tax Board.

1           The following case presents two issues, both of  
2           which arose from the 2019 tax year. The first is whether  
3           Appellants have met their burden to prove reasonable cause  
4           to abate the late-payment penalty. And the second is  
5           whether Appellants have shown grounds to waive the  
6           underpayment of estimated tax penalty.

7           In this case, Appellants timely filed their 2019  
8           return through their tax software and deducted or -- and  
9           attempted to withdraw their payment from their Capital One  
10          savings account. However, Mr. Baskin states that when he  
11          entered in his account information, he inadvertently  
12          included an extra number. Due to this mistake FTB could  
13          not withdraw the amount due from the Appellants' account.  
14          Appellants state that they have a significant amount of  
15          money in this Capital One account. And because they  
16          rarely check it, it was not until FTB sent a Notice of Tax  
17          Return Change that Appellants realized they had never paid  
18          their amount due. Appellants then promptly paid the  
19          amount reflected on the notice.

20          Appellants argue that they had made a good-faith  
21          attempt to timely pay their tax liability and did not  
22          receive notice from the tax software, FTB, or Capital One  
23          that their payment had not been successful. Further,  
24          Appellants state that their payment to the IRS had gone  
25          through. Lastly, Appellants argue that they have an

1 unblemished tax record and are, therefore, entitled to  
2 relief.

3 Appellants have not indicated any error in FTB's  
4 calculation of the late-payment penalty or the estimate  
5 penalty. I will first address why Appellants have not  
6 demonstrated reasonable cause to abate the late-payment  
7 penalty. When FTB imposes a penalty, the law presumes the  
8 penalty had been imposed correctly. The penalty may not  
9 be abated if the tax -- the penalty may be abated if the  
10 taxpayer demonstrates the failure to pay was due to  
11 reasonable cause and not willful neglect.

12 Taxpayers have the burden to establish reasonable  
13 cause and must demonstrate that the failure to timely pay  
14 the tax amount due on the return occurred despite the  
15 exercise of ordinary care and prudence. In the Office of  
16 Tax Appeals' precedential opinions in Appeal of Friedman  
17 and Appeal of Scanlon, the OTA specifically held that it  
18 would expect reasonably prudent taxpayers exercising due  
19 care and diligence to monitor their bank account and  
20 quickly ascertain whether a scheduled electronic payment  
21 from their account to FTB was in fact paid, and that a  
22 lack of notice from the FTB of a failed payment does not  
23 negate Appellants' duty of prudence and due care to verify  
24 that they're scheduled payments were successful.

25 Further, the Appeal of Scanlon involves facts



1 almost identical to Appellants' facts. In Scanlon the  
2 taxpayers made an error when inputting their account  
3 information and argued that paying the amount due as soon  
4 as they were made aware of their mistake demonstrated due  
5 diligence and constituted reasonable cause. The OTA  
6 disagreed.

7 In this case, as in, Scanlon, Appellants made a  
8 mistake inputting their account information. And the  
9 mistake could have been remedied if they had checked their  
10 bank account to confirm the payment was successful. Given  
11 the OTA's holdings in both Friedman and Scanlon,  
12 Appellants' argument that they did not regularly check  
13 their accounts, that they did not receive a timely notice  
14 from FTB, and that they paid the amount due as soon as  
15 they were made aware of this mistake does not constitute  
16 reasonable cause.

17 Additionally, FTB does not have procedures to  
18 abate penalties based on taxpayer's history of compliance.  
19 However, FTB appreciates Appellants' prompt payment of  
20 their liability as soon as they were made aware of their  
21 mistake and will be abating one of the accrued monthly  
22 penalties with interest in the amount of \$86.01.

23 Next, I will discuss the estimate penalty.  
24 Taxpayers are expected to make payments of their estimated  
25 tax. In this case, Appellants underpaid all of their

1 estimated tax payments, which were due in April 2019,  
2 June 2019, and January 2020. Notably, Appellants had  
3 underpaid the estimated tax before they had inputted any  
4 account information. The estimate penalty does not have a  
5 reasonable cause exception. However, it can be abated by  
6 reason of casualty, disaster, or other unusual  
7 circumstances, if the imposition of the penalty would be  
8 against equity or good conscience.

9 Appellants have not made any argument why their  
10 estimated payments were late, so there are no grounds to  
11 abate the estimate penalty. Therefore, on the facts and  
12 evidence in the record, FTB would respectfully request  
13 that you sustain its position.

14 I'm happy to address any questions the panel may  
15 have. Thank you.

16 JUDGE AKIN: Judge Akin speaking. Thank you,  
17 Ms. Pinarbasi.

18 Let me turn again to my panel. Judge Stanley,  
19 did you have any questions for Franchise Tax Board?

20 JUDGE STANLEY: This is Judge Stanley. I just  
21 wanted to clarify the amount that FTB is conceding with  
22 respect to the underpayment penalty -- the monthly  
23 payment.

24 MS. PINARBASI: It's \$86.01. So that's the  
25 monthly payment penalty, which was in the amount of \$71.33

1 plus the applicable interest.

2 JUDGE STANLEY: Thank you.

3 JUDGE AKIN: And I just have one follow-up  
4 question also. So that \$86.01, is that including the  
5 interest, or is that just the amount of the penalty that  
6 you're abating?

7 MS. PINARBASI: That includes the interest.

8 JUDGE AKIN: Thank you.

9 And, Judge Long, did you have any questions for  
10 Franchise Tax Board?

11 JUDGE LONG: This is Judge Long. I don't have  
12 any questions. Thank you.

13 JUDGE AKIN: Okay. I do not have any additional  
14 questions. So with that, I think we're ready to turn it  
15 over back to Mr. Baskin for a final closing rebuttal  
16 argument. You do have 10 minutes and may begin when  
17 you're ready.

18 Oh, it looks like you're muted. We can't hear  
19 you.

20

21 CLOSING STATEMENT

22 MR. BASKIN: Apologies. Thank you for the  
23 rebuttal time.

24 And thank you, Ms. Pinarbasi, for that  
25 presentation.

1           In fact, the presentation at the beginning I  
2 thoroughly enjoyed. It was -- it's the presentation I  
3 should have made myself. It was a better presentation of  
4 my case than I believe I made. So I appreciate the very  
5 accurate restatement of facts there. And I appreciate  
6 also the FTB's willingness to abate the \$86.01 kind of  
7 final penalty.

8           One point of clarification which I actually did  
9 not recognize during the -- at least until just now,  
10 basically -- I apologize -- is that a portion of this  
11 penalty -- and I know I believe it was Issue 2 of the  
12 issues to be appealed -- is the reasonable cause for the  
13 underpayment of estimated tax. So that's Issue 2. As I  
14 acknowledged, admitted in my presentation the first time  
15 around, I do not pay estimated tax to the FTB. I  
16 understand that is going to result in an underpayment  
17 penalty.

18           And to be very clear here and maybe to clarify,  
19 I'm not challenging -- you know, I hadn't broken down my  
20 challenge here, and I'm not challenging -- I think it's  
21 \$240. I believe the estimated underpayment penalty for  
22 not paying the estimated tax is \$240. So the balance that  
23 I'm challenging here, if it can be followed from the break  
24 down in the FTB's brief, I believe it's \$927.29, or  
25 whatever the penalty is excluding that underpayment of tax

1 penalty.

2 And I want to make clear that I don't want the  
3 issues to be conflated because I don't have a defense or  
4 an argument with respect to the -- to the estimated tax  
5 penalty. I don't know whether -- and perhaps this is  
6 something that the determination will clarify -- whether  
7 my tax liability at the time that the balance due of  
8 \$15,489.31 included the estimated tax or the estimated tax  
9 penalty. My understanding is that it did not and,  
10 therefore, that would still be owed. So if that's the  
11 case I'm not challenging it. However, if that amount was  
12 somehow wrapped up into a payment that I ultimately made,  
13 I withdraw my lack of challenge and reimpose my challenge.

14 The crux of this issue, though, is the intent to  
15 have paid the amount due, not the estimated tax, upon my  
16 tax filing. And I think by virtue of Ms. Pinarbasi's own  
17 presentation, there was no intent there, and the FTB  
18 relies upon Scanlon and Friedman. And interestingly in  
19 the Friedman case as I pointed out, I'm not sure if the  
20 same issue applied in the Scanlon case. The quote from  
21 FTB's brief here is that, you know, reasonable care  
22 includes monitoring your account to quickly ascertain.

23 It says to quickly ascertain. It doesn't provide  
24 you with an obligation to kind of audit, do a self audit,  
25 or kind of, you know, review your statements with a

1 fine-tooth comb. It's to quickly ascertain. And as I  
2 said, I was taken to my account upon the payment or at  
3 least I received a payment confirmation with -- with the  
4 final four digits of my number indicating that the account  
5 had been -- or at least the money had been requested to be  
6 withdrawn from my account thereafter, and it looks like,  
7 you know, three days later.

8 Even on the TaxSlayer situation, it appears the  
9 FTB does not immediately withdraw the money. So there is  
10 no way of knowing in a sense when. And I don't believe it  
11 says this amount will be withdrawn or rejected within  
12 three days. You just make the request. And -- and so  
13 what happened here is the withdrawal date or at least the  
14 attempted withdrawal date was not the same date as the  
15 payment date. So even if you monitor your account to  
16 determine whether it was processed correctly, you -- and I  
17 mean me or the taxpayer or the account holder -- does not  
18 know when that amount will be withdrawn. It could -- so  
19 it's impossible to know whether or not it's been rejected.

20 In this situation, there was no rejection notice  
21 that was received. It's not like a bad check, which I  
22 have never written. But if I were, I believe the  
23 understanding is that you receive kind of an insufficient  
24 funds notice or things of that nature. This was not a  
25 situation where there was insufficient funds. As

1 indicated or as shown -- and I probably should have  
2 redacted this, but I guess I'll use it to help me here.  
3 On Exhibit 10, the amount in the account at the time was  
4 over \$191,000, which Your Honors here and Ms. Pinarbasi  
5 can see, you know, that is a substantial amount.

6 I'm impressed that that amount was in there. And  
7 the reason why that amount was in there is because, as I  
8 indicated earlier, that is really a -- it's a savings  
9 account. It's where I kind of move money in to maintain  
10 it and gain a modicum of interest that I would not receive  
11 in a checking account. It is not an account used for  
12 regular transactions. So the -- what you would also see  
13 here if I were to un-redact it, but there was nothing to  
14 un-redact, I guess just to show my other entries. There's  
15 no line item in the account for rejected -- rejected  
16 amounts processed.

17 So it's not as if by reviewing the account I  
18 would have known that I had made a request for funds, and  
19 it was rejected. My bank statement does not reflect that.  
20 In fact, it doesn't even show that account -- I believe  
21 that amount was requested because the wrong account number  
22 was entered. Therefore, there really would be no way of  
23 me knowing aside from kind of making a reminder, you know,  
24 a month later, basically, because I don't know when the  
25 money is going to be withdrawn by the FTB because it's not

1        withdrawn immediately.

2                    Make a reminder of the amount that I owe in tax  
3        liability and to cross-reference that with the amount in  
4        the account. So, you know, I honestly don't know whether  
5        this issue was addressed in Scanlon or Friedman, but there  
6        is no rejection notice in the account. There is no  
7        insufficient funds notice. And so through reasonable care  
8        there would have been no way to know that the amount was  
9        not in there. In fact, I would have benefited had, in a  
10       sense, there had been insufficient funds in the account  
11       because I would have known at that time that I didn't have  
12       the funds to pay this significant liability.

13                    So I do think that the evidence that I have  
14        presented, or the testimony mostly, that I presented  
15        indicates reasonable care and diligence. The standard is  
16        not perfection. The standard recognizes that humans make  
17        mistakes. I think the balance and the weighing of the  
18        factors, the pros and cons here, the type of error that  
19        was made, the inability to kind of notice it, even by  
20        reviewing your account, the fact that TaxSlayer itself  
21        indicated that the amount was paid, there's really not  
22        much more I could have done.

23                    There's -- oh, aside -- it was reasonable things.  
24        There certainly were extra things that could have been  
25        done. But in order to be basically responsible for the



1 penalty that was imposed, which I believe now is over  
2 \$900, I believe that amount should be abated as well based  
3 upon the showing that's been made here today. And -- and  
4 again, feel free to excise -- and I believe it should be  
5 excised -- the underpayment of the estimated tax  
6 liability.

7 I believe that's the Solomonic result here. I  
8 believe it's the fair and reasonable result here. I  
9 believe that were this situation to arise again, I could  
10 not make the same argument as I'm on notice that this can  
11 and does happen, but that's not the case here today.

12 So I thank you all for your time.

13 JUDGE AKIN: Okay. Judge Akin speaking. Thank  
14 you, Mr. Baskin.

15 I just wanted to take one final moment here to  
16 see if there are any additional questions my panel members  
17 may have.

18 Judge Stanley, any questions for either party?

19 JUDGE STANLEY: I don't have any questions.

20 Thank you for participating.

21 JUDGE AKIN: And Judge Long?

22 JUDGE LONG: I have no questions either. Thank  
23 you.

24 JUDGE AKIN: Okay. I think we are ready to  
25 conclude the hearing then. I just want to thank both

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parties for their presentations today. I do appreciate it.

The panel Administrative Law Judges will meet and decide the case based upon the arguments and the evidence presented. We will issue our written decision within 100 days from today. The case is submitted and the record is now closed.

(Proceedings adjourned at 1:39 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically 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 7th day of April, 2022.

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