

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
J. FISHER and M. FISHER,) OTA NO. 19105379
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 APPELLANT.)
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TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Thursday, May 19, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken
at 12900 Park Plaza Dr., Cerritos, California,
91401, commencing at 9:34 a.m. and concluding
at 10:18 a.m. on Thursday, May 19, 2022,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ AMANDA VASSIGH

Panel Members: ALJ SHERIENE RIDENOUR
ALJ CHERYL AKIN

For the Appellant: JEFFREY BARTH
J. FISHER

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

CHRISTOPHER COOK
ERIC YADAO

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I N D E X

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(Department's Exhibits A-H were received at page 7.)

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Cerritos, California; Thursday, May 19, 2022

9:30 a.m.

JUDGE VASSIGH: Okay. We're opening the record in the Appeal of Fisher, OTA Case Number 19105379. This matter is being held before the Office of Tax Appeals. Today's date is Thursday, May 19th, 2022, and time is 9:34 a.m.

My name is Amanda Vassigh, and I'm the lead Administrative Law Judge for this appeal. With me today are Administrative Law Judges Sheriene Ridenour and Cheryl Akin.

As a reminder the Office of Tax Appeals is not a court. We are an independent appeals body. And because of our neutral position, we only have the exhibits and arguments the parties have provided in this appeal.

With that, let me have the parties please introduce themselves for the record, starting with Appellants.

MR. BARTH: Sure. My name is Jeffrey Barth. I'm a CPA in the State of California, and Appellant is Mr. Jordan Fisher who is present here with us.

JUDGE VASSIGH: Thank you.

And Respondent Franchise Tax Board.

MR. COOK: My name is Chris Cook. I'm a Tax

1 Counsel with Franchise Tax Board.

2 MR. YADAO: Eric Yadao, Tax Counsel, Franchise
3 Tax Board.

4 JUDGE VASSIGH: Thank you.

5 The issue to be decided in this appeal is whether
6 Appellants have demonstrated reasonable cause to abate the
7 late-filing penalty.

8 Let's move on to the evidence in this appeal.
9 Appellants submitted Exhibits 1 through 8. A hearing
10 binder was sent to you earlier this week. Are these the
11 correct exhibits Appellants intend to submit into the
12 record?

13 MR. BARTH: Yes, Your Honor.

14 JUDGE VASSIGH: Thank you.

15 These exhibits were submitted by Appellants prior
16 to the prehearing conference, and FTB indicated that they
17 did not have any objections to these exhibits. As such,
18 Appellants' Exhibits 1 through 8 are now admitted and
19 entered into the record.

20 (Appellant's Exhibits 1-8 were received
21 in evidence by the Administrative Law Judge.)
22 Franchise Tax Board submitted Exhibits A through
23 H.

24 Are these the correct exhibits FTB intend to
25 submit into the record.

1 MR. COOK: Yes, they are.

2 JUDGE VASSIGH: Thank you.

3 These exhibits were submitted by FTB prior to
4 this hearing. We have not received any objection from
5 Appellants. As such, FTB's Exhibits A through H are now
6 admitted and entered into the record.

7 (Department's Exhibits A-H were received in
8 evidence by the Administrative Law Judge.)

9 So I'll go over the order of the proceedings
10 today.

11 Will Mr. Fisher be testifying today, Mr. Barth?

12 MR. BARTH: I believe so, yes.

13 JUDGE VASSIGH: Okay. Thank you.

14 Mr. Fisher I will swear you in before you
15 testify, and you will remain under oath for the duration
16 of these proceedings.

17 At our prehearing conference we agreed that
18 Appellants would be have the first 10 minutes for their
19 preparation and another 20 minutes for witness testimony.
20 Following any questions from the Franchise Tax Board and
21 the panel, Franchise Tax Board will then have 10 minutes
22 for their presentation. And finally Appellants will have
23 an optional 5 minutes for a rebuttal.

24 Are there any questions about the proceedings?

25 JUDGE VASSIGH: Okay. Is see no questions. And

1 with that, I think we're ready to begin.

2 Mr. Barth, you may begin your opening statement
3 when you are ready. And let me know when you are ready to
4 proceed to witness testimony, and I will swear Mr. Fisher
5 in.

6 MR. BARTH: Thank you, Your Honor.

7

8 PRESENTATION

9 MR. BARTH: So the question before this Court
10 today is basically does Mr. Fisher -- can Mr. Fisher
11 establish reasonable cause for the late-filing penalty of
12 his return and basis for abatement of the late-filing
13 penalty. And I would submit to you today that he can, and
14 we will, and he has in the initial appeal, and then to the
15 Franchise Tax Board, as well as to the -- in our opening
16 brief and in our response to Appellant -- the State's
17 brief.

18 Effectively, Mr. Fisher -- the question of
19 whether he can establish reasonable cause, what the State
20 has done is relied on a -- the Boyle case and a bright
21 line test, which is a single action of whether or not the
22 taxpayer mailed a return. Boyle was decided in 1986.
23 Electronic filing is very different than paper filing a
24 return. And I know that in some circumstances we've tried
25 to apply Boyle consistently towards this standard that he

1 cannot -- a taxpayer cannot delegate their authority.

2 I'm going to submit to you today that this case
3 is different because Mr. Fisher can establish facts and
4 circumstances that support a reasonable cause argument for
5 relief of the penalties. And that, in this case, this is
6 an opportunity as well as for the Office of Tax Appeals to
7 let the Franchise Tax Board know that in some cases you
8 can't have just a bright line test. You have to look a
9 little bit further at the facts and circumstances, as this
10 case presents.

11 The facts are -- and there's two parts to
12 reasonable cause as I understand it. One is what are the
13 facts, and the second is what is the law. The facts in
14 this case are that Mr. Fisher attempted to file his return
15 through his taxpayer preparer timely on the extension
16 date. His federal return was filed electronically. His
17 Arizona was filed electronically and acknowledged. His
18 Utah return was filed and acknowledged.

19 The California return, due to what we believe is
20 a software glitch or issue that existed in 2016, was not
21 transmitted properly and/or acknowledged. We accept that.
22 It wasn't filed properly. But unbeknownst to Mr. Fisher,
23 he did not know that. Mr. Fisher, prior to filing his
24 return, did those things which an ordinary and prudent
25 taxpayer would do.

1 He filed an extension. He requested an
2 extension. He verified and made sur the extension was
3 filed. There's communication in an exhibit that
4 demonstrates that there was confirmation of that on
5 April 11th. That's, I think, Exhibit 2.

6 In Exhibit 3, he timely signed an e-file
7 authorization and 8879 form for California to have his
8 return electronically filed, and his wife filed that as
9 well. And that not only requested him to file his
10 California return, but also his federal and his Arizona
11 and the Utah return. That happened.

12 Exhibit 4, Mr. Fisher paid the balance due. He
13 received confirmation from a staff member at the
14 accounting firm that filed his tax return a few days after
15 the return was due that it had been filed, and he received
16 confirmation information on how to pay the return. He
17 paid the return on November 20th through the Web Pay
18 system offered by the State of California. There is no --
19 when he filed it, there was no acknowledgement that his
20 return had not been file. No information. It was just he
21 went -- paid balance due in good faith with the
22 understanding that his return had been filed.

23 Exhibit 5, the first notice that Mr. Fisher
24 received that his 2016 return had not been filed was in
25 September or October of 2018, and it was when his 2015

1 return came under audit. And there's a question that came
2 up, and during the audit process we learned that the 2016
3 return hadn't been filed. To support that fact and
4 contention is Mr. Fisher went forward and he filed his
5 2017 return and his 2018 return.

6 So clearly there was no willful neglect on his
7 part to not file a return, which is one of the elements
8 that you look at for reasonable cause and/or willful
9 neglect. There's no willful neglect. He did everything
10 possible under his control that an ordinary and prudent
11 taxpayer would do.

12 During the communications in Exhibit 6, with the
13 auditors they resolved the issue, and he submitted the
14 return. At this point, except for the discussion with
15 auditors, the Franchise Tax Board had never notified him
16 that his return was late. They had money on deposit, on
17 his account, but never informed him that his return had
18 not been filed or they thought a return was due. I think
19 that's an important element in this whole case as well is
20 to -- look at and consider that.

21 Exhibit 7 is really is it establishes what the
22 late-filing penalty, specifically to 2016. Now the State
23 will argue and say that we shouldn't look at the
24 taxpayer's history of filing and their history of
25 compliance when looking at this. I submit that, actually,

1 in this case you should. And ironically, the State also
2 said -- wants to or wanted to present to you the
3 taxpayer's history of paying penalties.

4 And if you look at those penalties, which they
5 submitted, you'll notice that those are payments for --
6 penalties related for late payment, not late filing. Very
7 distinguished. So if we can rely on that or they would
8 like to, you know, cloud your opinion or view or present
9 that, I think you have to look at both sides. Yes, he
10 paid his taxes late for whatever reasons. He has reasons,
11 valid business reasons that he does that. So I'm not
12 going to judge that, but it has nothing to do with this
13 return being late.

14 This return was late for circumstances outside
15 that were beyond his control, outside of his control, and
16 not specific things that he delegated. All of the steps
17 and actions that Mr. Fisher took were those of somebody
18 who is a prudent person taxpayer trying to fulfill their
19 obligation and duty to file their tax return.

20 And we believe that establishes that he has
21 established through his actions and through his behavior
22 the basis for reasonable cause and that in this
23 circumstance, the State should look at that and not simply
24 dismiss the case on a bright line test of Boyle, which
25 we'll argue does not really apply in this particular case.

1 earlier tax issue with the state for -- you said 2014 or
2 2015. And in that letter it came up that 2016 hadn't been
3 filed. Honestly it's been a few years, do I don't -- if
4 he says it's 2018, I believe him when that happened, but I
5 don't know. I know that I found out through that letter
6 in that messaging, and it was a surprise to me because I'd
7 always filed on time. So I was not aware that there would
8 be a year that had not been filed.

9 Q So prior to 2016, you had filed all of your
10 returns on file or by the extension deadline?

11 A Yeah.

12 Q Is that correct?

13 A Yeah.

14 Q Okay. And then do you recall if you filed your
15 2017 and your 2018 return by the extension deadline?

16 A To my knowledge in my entire life, I've never
17 been late with a filing.

18 Q Okay. And are you -- just for the record, are
19 you trained as a CPA or an accountant or anything like
20 that?

21 A No. But I have taken some accounting in college.

22 Q Okay. Do you have access to any computer
23 software programs to file taxes? Are you familiar with
24 any programs like that?

25 A I mean, I don't do my taxes with QuickBooks, but

1 I've seen it.

2 Q Okay. And just for the record, what's your
3 education or background? What was your -- did you go to
4 college?

5 A I went to West Point for my under grad, and I
6 went to UCLA for graduate school.

7 Q Okay. Thank you. And if you had been aware or
8 received a notice from the State of California prior to
9 2018 when the auditor sent a notice or a letter that said
10 you had not filed a return, what would you have done?
11 What action would you have taken?

12 A If I was notified that I was late? I would have
13 assumed that all my taxes were good because, you know. I
14 mean, I have a pretty complicated tax structure where I
15 file in multiple states. I have a lot of partnerships and
16 business interests. So, you know, I rely on, you know, I
17 review my taxes on time and review that, you know, they
18 have been submitted electronically. And I would have
19 assumed that they were fine.

20 Q You mentioned partnership. Is one of the reasons
21 that you file your return on the extension deadline due to
22 the fact that you have these multiple partnerships?

23 A That's correct.

24 Q And typically, you get those, the K-1, that's
25 needed to file your personal return prior to April 15t,

1 generally, or do you get those later?

2 A No. I usually don't get all of them complete
3 until, you know, before the October deadline. So I don't
4 get them on time for the April deadlines.

5 Q Okay. And going back to your 2016 return, so
6 what steps -- I'm going to walk through a couple of steps
7 that you might have taken to show your intention of filing
8 that 2016 return. Did you request an extension for that,
9 or did you just assume that one would be filed for you?

10 A No. I always -- I mean, we always talk in March.
11 And, yeah, we said we're going to have to extend this year
12 because I'm -- my purpose is always to file in April, but
13 I can't then I can't. So --

14 Q Did you confirm -- to your memory or
15 recollection, did you confirm that you -- that an
16 extension was filed on your behalf?

17 A Yes.

18 Q Is that your pretty much a common business
19 practice to confirm that an extension would have been
20 filed for you?

21 A Usually. I just want to make sure that it was
22 done because, you know, I just like to make sure things
23 are done.

24 Q And what other steps would you have taken to
25 ensure that your 2016 return would be completed timely by

1 the October 15th deadline?

2 A Yes. You normally -- around September when I
3 have all of my, you know, required K-1s and all my, you
4 know, financials collected, then I would contact my CPA
5 and make sure he has all the documents to file my returns.
6 And then once he's done an initial draft, we review them
7 together to make sure that, you know, to what I understand
8 it's completed accurately and submitted on time by the
9 October deadline.

10 Q And then when you file a return in October, your
11 form, typically, do you have a balance due, or do you get
12 a refund? Do you know?

13 A I almost always have a balance due.

14 Q Okay. And then did you -- do you typically pay
15 that balance due, then, when it's -- when you're notified
16 that your return has been filed for you?

17 A That's correct.

18 Q Okay. And in this case in 2016 on Exhibit 3
19 page 6 of 6 is the California 8879 e-sign authorization
20 document, and that has a -- it indicates that there's a
21 balance due of \$87,556. Do you know if you ultimately did
22 pay that and how you would have paid that to the state?

23 A So, again, this is a long time ago, so I'm going
24 to rely on this. But, you know, my normal thing is I go
25 on to the State Web Pay portal and have it -- ACH taken

1 from my checking account once I get the balance due
2 amount.

3 Q So you go to the California Franchise Tax Board
4 and --

5 A Yes.

6 Q -- initiate an ACH payment.

7 A And it's not just California. Like, it's
8 federal, California, and any other state that I owe money.

9 Q Okay. So and you know you pay some sort of a
10 penalty when you do this because you're paying your taxes
11 a little bit late. The deadline, actually, is April 15th
12 for you to pay your taxes. So when you're paying them in
13 October and November, you know you're paying them late?

14 A That's correct.

15 Q And you're paying -- why is that? Why do you pay
16 them late?

17 A So, you know, during this period of time I was
18 starting a new company, and I had sold my old company.
19 When you start a company there's cash flow issues. And if
20 I don't necessarily have the cash in April, then I will
21 wait until I have the cash available. You know I've -- my
22 business has grown. It's more stable so, nowadays I pay
23 more towards the April deadline. But back in 2016, you
24 know, cash was tight, and so I would delay payments.

25 Q So after you filed your tax return, you signed an

1 e-file authorization. You get advise on how to make
2 payment -- remit payment. You remit payment, and that's
3 what you believe happened in 2016. Is there -- did you
4 receive any sort of a confirmation from your tax
5 preparer's office that your 2016 returns, federal, state
6 had been received -- had been submitted and received?

7 A So, again, it's hard to remember exactly what
8 happened in 2016. But normally, you know, I would sign
9 the web file, you know, and then I would talk to you. It
10 would either email or call and make sure it was all setup
11 and submitted, then I'd feel like we're good.

12 Q Okay. Have you ever filed your tax return by
13 paper, by mail that you can recall?

14 A Maybe in the 90s, but I don't -- maybe. I think
15 I did a 1040EZ back when I was in the army.

16 Q Okay. And when you filed it by mail what would
17 you have done in that circumstances? How would you have
18 sent your tax return in, or how would that have happened?

19 A I would usually get a \$50 check back from the
20 army, and I knew we were good.

21 MR. BARTH: Okay. All right. So I'll rest the
22 questions on Mr. Jordan Fisher at this time. Thank you.

23 JUDGE VASSIGH: Thank you, Mr. Fisher. Do you
24 have anything else that you would like us to know?

25 MR. FISHER: Unless you have any questions.

1 JUDGE VASSIGH: All right. So I'd like to turn
2 to FTB and see if the Franchise Tax Board has any
3 questions for the witness regarding his factual testimony.

4 MR. COOK: We have no questions.

5 JUDGE VASSIGH: Thank you, Mr. Cook.

6 Okay. I'd like to see if my panel members have
7 any questions for either Mr. Fisher or Mr. Barth.

8 Judge Akin?

9 JUDGE AKIN: I do have one question and I'm not
10 sure who best can answer it, so I'll let you decide. But
11 regarding the California taxes -- and I know you said
12 there was a software glitch. I'm wondering if the tax
13 preparer received any sort of notification from the
14 software indicating that glitch or indicating that the
15 electric -- attempted electronic filing was not
16 successful.

17 MR. BARTH: The answer to that is no. Mr. Fisher
18 never received anything like that. And, in fact, our
19 office wasn't aware of it either. There is a code. My
20 understanding having researched it, there was an SIC code
21 that was required that was not completed or was not
22 inaccurate. It was a change because we were in a -- there
23 is something to do with an operating loss carry forwards
24 that affected him, and I think that was the issue. But
25 there was no record of it being transmitted, not being

1 transmitted, acknowledged, not being acknowledged.

2 In fact, our belief was that it had -- all the
3 returns had been filed. Because our normal practice is to
4 review those and then send him -- we actually sign the
5 e-file authorization documents after the returns have been
6 submitted, transmitted, and everything is clear. So our
7 belief and understanding is that it was.

8 Furthermore, that since 2016 -- actually, since
9 2018, the State of California to my knowledge has worked
10 with the different software developers. They're
11 constantly working with them to improve their systems and
12 their interfaces. That's my understanding. And in that
13 process, they have actually improved or changed the way
14 that acknowledgements are sent. So today we have an
15 acknowledgment form -- I think it's called a 9325 --
16 similar to what the federal government gives that may not
17 have been or was not fully available in 2016 as it is
18 today.

19 So some of the checks and controls and procedures
20 are, in fact, different as we go. I think that's a little
21 bit -- I mean it's an improvement in the process, which is
22 great, but it increases awareness. Some states -- I file
23 returns in multiple states. Some states have been doing
24 something similar to that. Some are more advanced.
25 California has gotten -- is really one of the leaders in

1 that space, but in 2016 it was a different story.

2 JUDGE VASSIGH: Mr. Barth, would you in 2017
3 usually receive a confirmation or acknowledgment that a
4 return has been filed from the software?

5 MR. BARTH: We do. When we submit it, we receive
6 a confirmation. Or if it wasn't received, we receive a
7 rejection notice. And then if we receive a rejection
8 notice, the rejection notice gets pulled. It gets put
9 into a pink or red folder and gets -- there's a resolution
10 or action plan to resolve that, to get that matter
11 resolved. In this case there was no rejection letter
12 received.

13 JUDGE VASSIGH: There was no notification in this
14 case?

15 MR. BARTH: Right. Yeah.

16 JUDGE VASSIGH: Thank you.

17 Judge Ridenour, do you have any questions for
18 Mr. Barth or Mr. Fisher?

19 JUDGE RIDENOUR: Not at this time. Thank you
20 very much.

21 JUDGE VASSIGH: Thank you.

22 At this time we'll move onto the Franchise Tax
23 Board's presentation.

24 Please begin when you are ready.

25 MR. COOK: Thank you.

1 Appellants also acknowledge here and in their
2 reply brief that the return did not even transmit. And I
3 will quote from their brief that, "It is the preparer's
4 opinion that the reason the 2016 return did not transmit
5 properly is related to this technical issue with the Drake
6 Software program." There's also no evidence of any
7 attempt by the preparer or taxpayer to confirm that the
8 return was filed near the deadline.

9 So the undisputed facts in this case are
10 straightforward. Again, Appellants relied on a preparer
11 to file their return, and the return was not filed on
12 time. This leads us to the U.S. Supreme Court's Boyle
13 bright-line rule. The Boyle bright-line rule is that a
14 taxpayer cannot avoid a filing penalty by relying on its
15 advisor to file the return for them. I paraphrase the
16 Supreme Court when it says in Boyle, Congress has placed
17 the burden of prompt filing on the taxpayer, not on some
18 agent or employee of the taxpayer.

19 The duty is fix and clear. Congress intended to
20 place upon the taxpayer the obligation to ascertain the
21 statutory deadline and to meet that deadline. That the
22 taxpayer's attorney in Boyle as the taxpayer's agent was
23 expected to attend to the matter, does not relieve the
24 principal, that is the taxpayer, of his duty to comply
25 with the statute. It requires no special training or

1 effort to ascertain a deadline and make sure that it is
2 met.

3 So under Boyle, even if it's reasonable for a
4 taxpayer to believe that the professional timely filed a
5 return for them, the duty to timely file remains with the
6 taxpayer alone. So the reliance on a professional to file
7 is per se, not reasonable cause. The Boyle bright-line
8 rule has been cited in California precedential opinions,
9 for instance, by the Board of Equalization in the Appeal
10 of Curry and adopted by the OTA in the Appeal of Quality
11 Tax and Financial Services. It has also been cited in
12 numerous non-precedential OTA opinions. So there's no
13 doubt the Boyle bright-line rule applies in California, so
14 applies to this case.

15 And that leads us to our conclusion. Since this
16 case is governed by the Boyle bright-line rule, Respondent
17 asks the OTA to follow the rule and sustain the
18 Respondent's action because the Appellants reliance on
19 their preparer is not reasonable cause to abate the
20 penalty for their a late-filed return.

21 Thank you.

22 JUDGE VASSIGH: Thank you very much.

23 Judge Akin, do you have any questions for the
24 Franchise Tax Board?

25 JUDGE VASSIGH: Yes. Thank you. I do have one

1 question for the Franchise Tax Board.

2 I'm wondering if Franchise Tax Board can tell us
3 whether there's any duty for the Franchise Tax Board to
4 notify a taxpayer when a tax return for a particular tax
5 year has not filed, especially, where there's, you know, a
6 payment on record for that tax year.

7 MR. COOK: There's no legal duty. What the
8 Franchise Tax Board will do is send out a request or
9 demand for tax return once the records have, you know,
10 prompted it to do so.

11 MR. YADAO: There's also occasion where if we
12 have a credit balance with no return filed, we'll send out
13 a courtesy, not statutory obligated. We'll send a
14 courtesy notice to say there's a payment on file but no
15 return on file. And that gives the taxpayer the
16 opportunity to file a claim for refund.

17 JUDGE VASSIGH: Judge Akin, do you have anymore
18 questions?

19 JUDGE AKIN: That's it. Thank you.

20 JUDGE VASSIGH: Thank you.

21 Judge Ridenour, do you have any questions?

22 JUDGE RIDENOUR: I do not. Thank you very much.

23 JUDGE VASSIGH: Thank you.

24 At this time we turn to Mr. Barth and Mr. Fisher.

25 You have the opportunity to take five minutes to have the

1 last word.

2 MR. BARTH: Is that a response and a closing
3 together?

4 JUDGE VASSIGH: Yes.

5 MR. BARTH: Okay.

6

7

CLOSING STATEMENT

8 MR. BARTH: So first, I want to address one
9 response. It's a good question that Your Honor Judge Akin
10 asked with response to the Franchise Tax Board not having
11 a duty to notify taxpayers. That is in fact correct.
12 They don't notify them. And what I've noticed or observed
13 significantly is, in this case there was no notice. But
14 that's undisputed. We're not -- they've not submitted
15 something where they did give a notice.

16 But there is also, as Eric pointed out, the -- if
17 there's a credit balance, that they would send a notice.
18 My experience in having been a practitioner in this state
19 for 15-plus years or something, is that, typically, if
20 there's a balance due, the state does notify you that
21 they're expecting a return. If they have information that
22 suggest that a taxpayer has balance due, we get those.
23 The taxpayers get those notices all the time.

24 Very rarely do they get them when there's a
25 credit balance on their account, because there's a

1 forfeiture clause that they also have. If a taxpayer
2 doesn't file within five years, they forfeit their right,
3 and that has been especially true. Just for the record,
4 in 1099-S cases where money is withheld on a mortgage
5 closing transaction, we've had numerous problems taxpayers
6 have had because those notices don't go out, and the
7 information is not there readily available to the
8 taxpayers that money is being withheld. So I just point
9 that out as interesting aside.

10 The State's reliance on Boyle, I appreciate and
11 understand, but I think that you have to do a closer
12 reading of Boyle. When you go back and look at Boyle, the
13 court was very clear in Boyle to limit their bright-line
14 test and to also expand that there is no -- there's no
15 bright-line for reasonable cause. And if you go back and
16 look at Boyle you'll see there's two other scenarios that
17 they provide where a taxpayer may be able to establish
18 reasonable cause but in different circumstances. So they
19 left it open, and they constricted Boyle to this very
20 specific case of the function of mailing the tax return in
21 and delegating that responsibility to their preparer. So
22 I'm going to come back to the concept of mailing in a
23 return in a few minutes.

24 But as I said in the beginning, 1986 when the
25 court decided Boyle, mailing returns was pretty common.

1 In 2018, according to IRS filing season statistics for
2 2018, November 23rd, 2018, 135 million out of 144 million
3 returns were electronically filed. So clearly we're doing
4 things very differently. And taxpayers' ability, whether
5 they go and file it themselves with something like
6 TurboTax where they are interfacing with the software,
7 that may be different because they may get a notification
8 of some awareness. But if they are going through an
9 intermediary or an agent different, then there is a
10 different set of reliance placed on that. And I just
11 point that out for you.

12 I think through Mr. Fisher's testimony we've
13 demonstrated that his actions and behavior are those of
14 one who exercises ordinary business care and prudence in
15 causing his return, in this case, the 2016 return to be
16 timely filed. He took all the steps you would think a
17 normal prudent taxpayer would follow. Clearly, there's no
18 willful neglect. It didn't exist. His intention was
19 clear. It's clear through his testimony, through his
20 actions, and through the fact that the federal, state --
21 and other states returns were timely file.

22 So the exception is what about California. Why
23 is this different? And our submission to you is it is
24 different. Something we went awry. Something is wrong.
25 And that burden shouldn't fall on Mr. Fisher in terms of

1 the penalty. It's just not -- it's not a reasonable
2 outcome. In this case, there -- reasonable cause for
3 abatement exist. In fact, he remitted his payment.

4 He sent his payment in November just as he sends
5 his payment ever year. He filed his 2017 and 2018 return
6 on time in California. The 2016 return hadn't been filed.
7 He didn't at this time, with the exception of 2018 return
8 when he filed that. At that time he had noticed that the
9 2016 return hadn't been filed. But, really, until
10 September of 2019, he did not know that the '16 return
11 hadn't been filed. Otherwise, he would have taken -- I
12 would submit -- appropriate action to ensure that it was
13 filed, because that's who he is. He's an honorable
14 consistent taxpayer.

15 So it in some of the earlier arguments -- and I
16 think in the State's reply brief -- one of the things they
17 suggested is that Mr. Fisher might have taken additional
18 steps to ensure that his return had been filed. And I
19 would submit to you that the State of California Franchise
20 Tax Board is not readily equipped to handle phone calls
21 from taxpayers calling up just to confirm that their
22 return has been filed and accepted.

23 And let alone that that would even be ordinary or
24 prudent for -- if all the taxpayers in the state called up
25 the State and said, hey, I want to make sure my thing has

1 been filed. There's no easily readily available process.
2 They're not equipped to handle that. So I think that's
3 just a point there.

4 In *Haynes versus the United States*, which I think
5 I cited in our response brief, the *Haynes* court -- the
6 Fifth Circuit, the taxpayer in *Haynes* is in very similar
7 circumstances. He filed his return. It was rejected by
8 the IRS. The taxpayer was notified 10 months later, and
9 they paper filed the return, and then the paper filed
10 after receiving notice. And then it was remanded to a
11 lower court, and IRS settled the case out because they
12 said something is amiss here, clearly, in that process.

13 And that was one of the first challenges to *Boyle*
14 in the electronic filing era. In the American Tax Counsel
15 Association is -- American College of Tax Counsel has
16 argued consistently and presented on this question of is
17 *Boyle* the right test in this situation in the age of
18 electronic filing. And I would again submit to you that
19 it is not, and the reliance on it may be misplaced when
20 the facts in the case, as they are here, support a broader
21 reading.

22 *Boyle* stands for the proposition that taxpayer
23 cannot establish reasonable cause by simply delegating
24 their filing obligation to an attorney who fails to file
25 on time. That's what happened in *Boyle*. It does not go

1 any further than this. And that's noted in Haynes, in
2 that decision. In Boyle the Supreme Court expressly
3 denied or declined to address the question of whether a
4 taxpayer demonstrates reasonable cause when they're in
5 reliance upon the advice of counsel, as in the Case of
6 Thuran [sic], which they broke out as a separate case.

7 So when they're relying upon the advice of
8 counsel -- which in this case what effectively Mr. Fisher
9 was doing. He's relying upon the representation that,
10 yes, this had been filed. That is what happened in that
11 case there. I think there -- it weakens the Boyle -- the
12 reliance on Boyle, and it forces you to really step back
13 and say, maybe we should look a little bit closer. I
14 think this is the opportunity to tell the -- to let the
15 Franchise Tax Board know that there are some cases where
16 we can't just apply a bright-line test.

17 And I think in our -- in closing I would just say
18 I think we've established Mr. Fisher was not willfully
19 negligent in timely filing his return. He has
20 established, I believe, through testimony and through the
21 record reasonable cause for the abatement of his penalties
22 in this particular case. There is no bright-line test for
23 reasonable cause, but it is relying upon the facts and law
24 in the case.

25 And we would respectfully submit that Mr. Fisher

1 has met his burden of proof to demonstrate the facts and
2 evidence, and overwhelmingly established that he has
3 exercised ordinary and prudent responsibility to ensure
4 that his return was timely filed, and that he did not act
5 willfully in disregard or negligently in ensuring that
6 this happened. We submit that the statute 19131 and the
7 legislative intent there supports that abatement should be
8 provided to taxpayers as in this case, and that the
9 State's reliance on Boyle is misplaced.

10 You know, it's interesting we talk about the mail
11 system, but in reality, if we think for a moment, that
12 Mr. Fisher should not be treated any differently than
13 another resident or citizen of this state who have mailed
14 their return. That's provided for, I would submit to you
15 in the California Constitution 7B the 14th Amendment of
16 the United States Constitution. And like a taxpayer who
17 took his or her return to the post office and mailed their
18 return received a confirmation, received a receipt on
19 October 15th that he mailed that return, and maybe
20 received an acknowledgment from that intermediary, the
21 United States Post Office, yes, that has been mailed.

22 I believe in that case the State would provide
23 for a reasonable cause abatement because the taxpayer
24 showed, whether or not the return made it, was on a truck
25 that went into the San Francisco Bay and disappeared like

1 the IRS returns a few years ago, or was shoved up in the
2 rafters, you know, processing fatality. If the return
3 disappeared, I think that in that case we would look and
4 we would, say yeah, reasonable cause exist.

5 The taxpayer did everything and only transferred
6 it, like in this case, into the intermediary. The
7 intermediary being a software that had a glitch. Every
8 other return filed, the state federal returns filed. And
9 so I think there's no proof that -- or there was proof
10 that the taxpayer, he did everything that was possible in
11 his control.

12 And I thank you for your time today and for
13 taking on this deliberation regarding this question. I
14 understand that the OTA has applied Boyle in several cases
15 and held the bright-line test in that, and I would just
16 submit that this case is a little bit different. The
17 facts are such that they favor a favorable ruling, and
18 this is a really good opportunity to share with the State
19 that there are cases where we have to look a little bit
20 closer at the detail before dismissing them.

21 Thank you, Your Honor.

22 JUDGE VASSIGH: Thank you for your presentation,
23 Mr. Barth.

24 I see Mr. Fisher has something to say.

25 ///

1 submitted. Secondly, they will get a confirmation that
2 the return has been accepted or rejected. There's no
3 evidence any of that happened in this appeal, including
4 from the start of it that they received a confirmation
5 that the return was submitted. There's no evidence of
6 that.

7 Thank you.

8 JUDGE VASSIGH: Thank you, Mr. Yadao.

9 OTA procedures allow the Appellant the last word,
10 so I'm going to come back to Appellant.

11 If you would like the last word, I will give you
12 just a minute or two, if you have anything else you would
13 like to add. Mr. Barth, would you like that time?

14 MR. BARTH: Give me one moment.

15 JUDGE VASSIGH: Sure. Just begin whenever you're
16 ready.

17

18 FURTHER CLOSING STATEMENT

19 MR. BARTH: I would simply submit, Your Honor, as
20 Mr. Fisher expressed, the -- where the penalty drops to
21 the taxpayer. The statute was such or the State wanted to
22 pass -- the legislature wanted to pass a statute that
23 would impose tax penalties on the preparer, then that's a
24 different matter. In this case, it is on the taxpayer,
25 and understand the State's position with respect to

1 principal-agency relationship. But I do submit that in
2 this case, the facts and circumstances are such that
3 that's not the issue.

4 The issue here is more of an intermediary
5 performing a task. He placed reliance on it. The burden
6 of the penalty is on the taxpayer. While the State may
7 want to ascribe that to the preparer, that is not what the
8 legislative intent is. It's not established in the
9 legislature or the statute for that. The burden is on the
10 taxpayer. I submit that in fairness, the taxpayers in
11 this case, that's where the relief should granted. And
12 that's really what we're arguing here for.

13 Thank you.

14 JUDGE VASSIGH: At this point, we've heard all
15 the arguments and the testimony. The panel will meet and
16 decide the case based upon the arguments and evidence in
17 the record. We aim to issue our written decision within
18 100 days of today. This case is now submitted and the
19 record is closed.

20 I want to thank the parties for their
21 presentations today and for coming here to Cerritos. And
22 I'd like thank Mrs. Alonzo for your work with us.

23 This concludes our hearing for today. Thank you
24 everyone.

25 (Proceedings adjourned at 10:18 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 16th day of June, 2022.

ERNALYN M. ALONZO
HEARING REPORTER