

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
W. HARB and A. HARB, ) OTA NO. 21108747  
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 )  
 APPELLANT. )  
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Tuesday, May 31, 2022

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 9:31 a.m. and concluding at 9:46 a.m. on  
Tuesday, May 31, 2022, reported by  
Ernaly M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

ADMINISTRATIVE LAW JUDGE:       ANDREW KWEE

For the Appellant:                RICHARD DONAHUE

For the Respondent:                STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

DAVID HUNTER  
NANCY PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received at page 7.)

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

P R E S E N T A T I O N

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California; Tuesday, May 31, 2022

9:31 a.m.

JUDGE KWEE: We're on the record in the Appeal of William and April Harb. This matter is being conducted electronically pursuant to the provisions of the Small Case Program, and that's before The Office of Tax Appeals. The OTA Office of Tax Appeals Case Number is 21108747, and today's date is Tuesday, May 31st, 2022. The time is approximately 9:31 a.m.

This hearing is being conducted electronically, and it's also being live streamed on OTA's YouTube channel.

Today's hearing is being heard by one Administrative Law Judge. My name is Andrew Kwee, and I will be the judge conducting this appeal today. Just a reminder that I might ask questions of either party at any time during the appeals process, and that's just to ensure that OTA has all the information that we need to decide this appeal.

With that said, for the record, would the parties please state their names and who they represent.

And I'll turn it to the tax agency to go introduce yourselves first. Thank you.

MR. HUNTER: Good morning, Judge Kwee. David

1 Hunter on behalf of Respondent Franchise Tax Board.

2 MS. PARKER: Nancy Parker on the behalf of  
3 Respondent Franchise Tax Board.

4 JUDGE KWEE: Okay. And for Appellant, would you  
5 please identify yourself for the record.

6 MR. DONAHUE: Richard Donahue representing  
7 William and April Harb.

8 JUDGE KWEE: Okay. Thank you. So we don't have  
9 any witnesses scheduled to testify today, so I'll just do  
10 a quick run-through of the exhibits. As you know we had a  
11 prehearing conference on May 9th. And after the  
12 prehearing conference, I distributed the exhibits that  
13 were submitted to OTA. For the Franchise Tax Board, I  
14 have Exhibits A through E, and those were attached to the  
15 minutes and orders and emailed to the parties.

16 Appellant's representative, do you -- or does  
17 Appellant have any objections to the admission of Exhibits  
18 A through E for Franchise Tax Board?

19 MR. DONAHUE: No, I do not.

20 JUDGE KWEE: Okay. And for Appellant, I have --  
21 so we have marked for identification Exhibits Numbers 1  
22 through 2, but -- and listed 1 -- a third document as an  
23 attachment. However, I think for clarity it would be  
24 easier to number Appellant's Exhibits as 1 through 3. So  
25 the first two exhibit are the Franchise Tax Board's

1 letter, and the third exhibit would be the withholding  
2 statement.

3 Exhibit 3 was previously identified as an  
4 attachment, but I think -- I don't think it was attached  
5 to either of those two letters. So I think it would just  
6 be easier just to -- or it would be more clear just to  
7 identify your exhibits, Mr. Donahue, as Exhibits 1  
8 through 3. Is that okay for you?

9 MR. DONAHUE: Yes.

10 JUDGE KWEE: Okay. And for Franchise Tax Board,  
11 do you have any objection to the admission of Appellant's  
12 Exhibits 1 through 3 as just discussed, which are the two  
13 letters that you sent plus the withholding statement?

14 MR. HUNTER: No objection, Judge.

15 JUDGE KWEE: Okay. Great. So then Exhibits A  
16 through E for Appellant [sic] and Exhibits 1 through 3, as  
17 just summarized and as distributed during -- after the  
18 prehearing conference, are now admitted into evidence.

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

21 (Department's Exhibits A-E were received in  
22 evidence by the Administrative Law Judge.)

23 And with that said, I believe we are just about  
24 ready to get started. Oh, and just as a summary, the  
25 issue -- there's only one issue today. That issue to

1       decide is whether OTA may grant the refund claim. And as  
2       relevant, FTB's position, from my understanding, is that  
3       the refund claim is barred by the statute of limitations.  
4       And in addition, the parties agree that the tax was paid  
5       by withholdings, and that the amount paid does exceed the  
6       amount due for the tax year at issue. So the only issue  
7       is basically whether it's barred by the statute of  
8       limitations, or if it could be granted on some other  
9       basis.

10               Is that a correct summary of the issue? I guess  
11       I'll start with FTB.

12               MR. HUNTER: That's correct. Statute of  
13       limitations case.

14               JUDGE KWEE: Okay. And for Appellant, is that  
15       summary that I've provided credit?

16               MR. DONAHUE: Yes, it is.

17               JUDGE KWEE: Okay. Thank you.

18               So then the proceedings today will basically be  
19       five minutes for Appellant's opening presentation, 10  
20       minutes for the Franchise Tax Board's opening  
21       presentation, and then a closing statement of 5 minutes  
22       per party. With that said, does anyone have any questions  
23       before I turn it over to the Appellant's representative  
24       for his opening statement?

25               MR. HUNTER: No, Judge Kwee.



1           JUDGE KWEE: Okay. Then I will turn it over to  
2 Mr. Donahue.

3           Mr. Donahue, you have 5 minutes for your opening  
4 presentation.

5           MR. DONAHUE: Thank you, Judge.

6

7

PRESENTATION

8           MR. DONAHUE: As I outlined in previous  
9 correspondence, this issue arose when the California  
10 Department of Revenue notified the taxpayers that they had  
11 funds on deposit from the partnership for the benefit of  
12 Mr. Harb. This correspondence came to the taxpayers in  
13 February of 2021. Taxpayer contacted me. I told him that  
14 we have never received the California K-1 or any other  
15 documents that would have said that any of the income was  
16 earned or taxable in the State of California.

17           So I asked him to go back to the partnership  
18 management company and to get a copy of the California  
19 K-1, and we would file a tax return. Not an amended one  
20 because there was never one filed in the beginning.  
21 However -- and there was no question that the return did  
22 not get filed until August of 2021, and I realize that the  
23 statute expired in April of 2021 for the year 2016.

24           But I think there were some extenuating  
25 circumstances in this case. And that is that I'm

1 basically a sole practitioner with one administrative  
2 assistant, and my main office is in Easton, E-a-s-t-o-n,  
3 Massachusetts. I reside in Falmouth, Massachusetts, and I  
4 have a small satellite office in Falmouth. Due to Covid,  
5 I was operating primarily out of my Falmouth office, and  
6 my assistant was operating out of the Easton office.

7 Mr. Harb sent the California K-1 to -- via email.  
8 Normally, my assistant would either keep a copy in a  
9 hard-copy file here waiting for me to -- my next visit to  
10 Easton, or she would email it to me; scan it and email it  
11 to me. I did not get it via email, and I only come to the  
12 Easton office, at least at that time, only but once every  
13 two weeks. And when I come to the office, she works from  
14 home; again, the whole Covid situation.

15 And to make a long story short and not get into  
16 the details of it, it wasn't acted upon. And we weren't  
17 made aware of that until quite frankly, my client Mr. Harb  
18 asked for a status report in the beginning of August of  
19 2021. And that's when we had to go back and find the  
20 email with the K-1 on it, and we filed the tax return and  
21 the request for a refund for the \$3,640. So that's the  
22 long and short of it, quite frankly.

23 There's no question the statutory date was  
24 missed, April 15, 2021, but I do request some  
25 understanding for the circumstances that we were dealing

1 with certainly at that time. So that's -- that's the bulk  
2 of my presentation.

3 JUDGE KWEE: Okay. This is Judge Kwee. Thank  
4 you.

5 So if I understand Appellant's position it's that  
6 you had the K-1 after, I guess, FTB sent their  
7 February 12th letter. Unfortunately, there was a mix up  
8 between the office locations in Easton and Falmouth, so  
9 you were unable to -- the representative was unable to  
10 process it until August when there was a status update,  
11 and that was the reason for the delay. Is that a correct  
12 summary?

13 MR. DONAHUE: Yeah, it is. It's just the fact  
14 that we had to be operating out of two separating offices  
15 at the time.

16 JUDGE KWEE: Okay. I think I understand your  
17 position, and I don't have any other questions at this  
18 time. So I will turn it over to the Franchise Tax Board.

19 Mr. Hunter, you have 10 minutes for your opening  
20 presentation. Thank you.

21 MR. HUNTER: Thank you, Judge Kwee.

22

23 PRESENTATION

24 MR. HUNTER: Again, this is a statute of  
25 limitations case, and Appellant's representative just laid

1 out what happened. Appellant is a securities attorney,  
2 and Respondent received information from his law firm that  
3 he earned income during tax year 2016. Respondent also  
4 received a California income tax withholding payment from  
5 his employer for that year, but Appellant failed to  
6 file -- timely file a 2016 California income tax return.

7 And even though Respondent is not obligated to  
8 inform a taxpayer of the deadline by which a claim must be  
9 filed, and Respondent has no duty to notify the taxpayer  
10 of such overpayment, Respondent still reached out to  
11 taxpayer as a courtesy in February of 2021 and notified  
12 Appellant that Respondent had withholding on account, that  
13 Appellant did not file a 2016 tax return, and he needed to  
14 do so in order to claim a refund.

15 Respondent further notified Appellant and made it  
16 clear that his return must be received before the  
17 expiration of the statute of limitations, which typically  
18 would be in April, but in this case was actually  
19 May 17th, 2021, due to the Covid extension. And Appellant  
20 prepared the return and gave us information showing that  
21 he was entitled to about \$3,600 in a refund. However, he  
22 signed his return in August of 2021, and we received it  
23 August 27th, 2021, which is 3 months past the deadline  
24 provided by the statute of limitations.

25 So the law is clear. It does not excuse the

1 taxpayer's failure to file a timely claim for refund, even  
2 if the taxpayer is unaware of the statute of limitations.  
3 And the strict language of the law provides that there's  
4 no waiver of the statutory period based on reasonable  
5 cause. And the evidence we've heard this morning thus  
6 far, is that there was a miscommunication, and there was  
7 an email. And, you know, all of that would give rise to a  
8 pass that Appellant is asking for, but sadly the law does  
9 not give us any flexibility to entertain that.

10 So given that, Respondent's action should be  
11 sustained. Thank you.

12 JUDGE KWEE: Okay. For Franchise Tax Board, I  
13 just have one question. So is the amount of the  
14 overpayment, the \$3,640, you're not disputing that amount?  
15 The only issue is the timeliness?

16 MR. HUNTER: That's correct.

17 JUDGE KWEE: Okay. Then I don't have any other  
18 questions for the Franchise Tax Board at this time. So I  
19 will turn it over for a closing remark.

20 So, Mr. Donahue, you have five minutes for any  
21 closing or final remarks that you wish to make.

22 MR. DONAHUE: Thank you, Judge.

23

24 CLOSING STATEMENT

25 MR. DONAHUE: You know, I just want to thank you

1 all for your time spent on this matter and for the  
2 consideration given to this request for the -- for the  
3 refund. Like I said, I am positive this would not have  
4 happened if -- if we weren't forced, basically, to work  
5 from two different locations due to the Covid situation.  
6 But I do respect the fact that I can't -- I cannot dispute  
7 the fact that the return was filed after the extended due  
8 date.

9 That's the extent of my remarks.

10 JUDGE KWEE: Okay. Thank you.

11 So then I will turn it over to Mr. Hunter for  
12 your closing remarks. You have five minutes. Thank you.

13 MR. HUNTER: I won't even need that, Judge Kwee.

14

15 CLOSING STATEMENT

16 MR. HUNTER: We thank you. The record is very  
17 clear. The facts are undisputed and, again, Respondent's  
18 action must be sustained.

19 Thank you.

20 JUDGE KWEE: Okay. This is Judge Kwee. Thank  
21 you everyone. We're ready to conclude this hearing. I'll  
22 just double check. Are there any questions from either  
23 party before we conclude the matter?

24 MR. HUNTER: No, Judge.

25 MR. DONAHUE: None.

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JUDGE KWEE: Okay. So then this case is submitted on Tuesday, May 31st, 2022, and the record is now closed.

I'd like to thank everyone for coming in today. OTA will send a written opinion of our decision within 100 days from today's date. So the hearing in the Appeal of William and Aril Harb is now adjourned.

And this concludes all oral hearing scheduled for today. Thank you everyone and good day.

(Proceedings adjourned at 9:46 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 13th day of June, 2022.

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