



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
B. LOVAZZANO and T. LOVAZZANO, ) OTA NO. 20035961  
G. LOVAZZANO and J. LOVAZZANO, ) 20036043  
)  
APPELLANT. )  
)  
\_\_\_\_\_ )

Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 9:35 a.m. and concluding at 10:15 a.m. on  
Wednesday, June 22, 2022, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES:

Panel Lead: ALJ JOHN JOHNSON

Panel Members: ALJ TERESA STANLEY  
ALJ AMANDA VASSIGH

For the Appellant: WILLIAM GEKAKIS

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
JOSH RICAFORT  
ELLEN SWAIN

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

E X H I B I T S

(Appellants' Exhibits 1-4 were received at page 6.)  
(Department's Exhibits A-J were received at page 7.)

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

	<u>P A G E</u>
By Mr. Gekakis	7
By Mr. Ricafort	26

C L O S I N G S T A T E M E N T

	<u>P A G E</u>
By Mr. Gekakis	30

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

California; Wednesday, June 22, 2022

9:35 a.m.

JUDGE JOHNSON: We will go on the record.

This is the Consolidated Appeals of Lovazzano, OTA Case Numbers 20035961 and 20036043. It is June 22nd, 2022 at 9:35 a.m.

This hearing is being conducted electronically led by myself, Judge Johnson, here in Sacramento, California. While I'm the lead ALJ for purposes of conducting this hearing, it will be the panel of three ALJs that will decide the appeal.

Before we introduce the parties, I'd like to remind everyone that the Office of Tax Appeals is not a court but is an independent appeals body. The office is staffed by tax experts and is independent of the State's tax agencies. We do not engage in any ex parte communications with either party. Our decision will be based on the arguments and evidence provided by the parties on appeal in conjunction with the appropriate application of law.

Also, we have read the briefs and examined submitted exhibits and looking forward to your arguments today. I know it's taken many steps to get to this point. We appreciate the parties' efforts and totally respect the

1 importance of the decision to be made on appeal.

2 Let me first say hello to my co-panelists.

3 Good morning, Judge Stanley.

4 JUDGE STANLEY: Good morning.

5 JUDGE JOHNSON: And good morning, Judge Vassigh.

6 JUDGE VASSIGH: Good morning.

7 JUDGE JOHNSON: Thank you.

8 And let's have the parties introduce themselves,  
9 beginning with Appellant.

10 MR. GEKAKIS: William Gekakis.

11 JUDGE JOHNSON: Thank you.

12 And Respondent Franchise Tax Board.

13 MR. RICAFORT: Hi. Josh Ricafort along with  
14 Ellen Swain.

15 JUDGE JOHNSON: Thank you. The issue on appeal  
16 in this consolidated matter is whether Appellants have  
17 shown that the late-payments of tax due were due to  
18 reasonable cause and not willful neglect.

19 Appellants have submitted Exhibits 1 through 4,  
20 and FTB's exhibits are A through J. And parties say they  
21 have no objection to exhibits. Parties have stated they  
22 have no objections to the exhibits, and the exhibits are  
23 hereby admitted as evidence into the record.

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(Department's Exhibits A-J were received in evidence by the Administrative Law Judge.)  
With that, we are ready for the parties' presentations.

Mr. Gekakis, are you ready to be sworn in?

MR. GEKAKIS: I am.

JUDGE JOHNSON: Okay. Please raise your right hand.

WILLIAM GEKAKIS,

produced as a witness, and having been first duly sworn by the Administrative Law Judge, was examined and testified as follows:

JUDGE JOHNSON: Okay. And with that, you have 15 minutes. You can begin whenever you're ready.

PRESENTATION

MR. GEKAKIS: Okay. So a brief history of the taxpayers. So I met these taxpayers in 1999. I've been working with them directly for 23 years. I'm very familiar with their activities and their history. These were individuals that went from -- they're basically an operated construction firm -- commercial construction firm. And when I met them, they were at the start of

1 their career, and I was probably in the middle of mine.  
2 And they have grown that company with my help and their  
3 expertise to over a \$20 million company.

4 Now, they do have a high school education, and  
5 that is about it. They are very astute people, and I can  
6 show that by, if you look at the history of their growth  
7 in their business and their personal lives and their tax  
8 compliance. So that being said, briefly, like I said, I  
9 have been working with them. I have an intimate knowledge  
10 of what they do. My position with them as of this point  
11 in our relationship is I handle and direct them in all  
12 their tax affairs.

13 And when I say all their tax affairs, I mean  
14 their business tax affairs and their individual tax  
15 affairs. They provide me with the information, or I  
16 actually go to their office and gather their information.  
17 So there is no question as to do I have the information  
18 available. So this position -- what we're here today is  
19 the taxpayers were imposed a penalty for late-payment of  
20 tax. The late-payment of tax was 17 percent of their  
21 total tax liability for the year. The tax return was  
22 filed somewhere around October 15th, the extended due date  
23 of the return, and it was filed showing no money due, no  
24 tax liable.

25 Subsequent to that, we received a notice from

1 Franchise Tax Board that they were underpaid by an amount,  
2 which amounted to 17 percent of their tax. When I  
3 received that notice, I reviewed it and determined it was  
4 correct. And at that point I instituted payment to the  
5 Franchise Tax Board. So I guess what I'm trying to strive  
6 here are -- is -- or point out here is the late payment  
7 and the notification and the payment itself happened  
8 within weeks of each other.

9 Yes, the tax return was due April 15th. An  
10 appropriate extension was filed. If money was due, it was  
11 paid. There's not a lot of disputes here on the facts as  
12 they exist on the tax return being filed, on the payments,  
13 and the penalty. We understand it. We understand why it  
14 was assessed by the Franchise Tax Board. We -- I  
15 subsequently disputed the penalty, and that's why we've  
16 ended up here today. The Franchise Tax Board is simple.  
17 The Franchise Tax Board's position is simple. They say  
18 they didn't pay the tax by April 15th, therefore, you get  
19 a penalty.

20 They also stated in their affidavit it's up to  
21 the taxpayer to prove otherwise. The facts here are the  
22 taxpayer did prove otherwise when you review the  
23 circumstances, the taxpayer history, the affidavits, and  
24 even the IRS transcript as provided by the Franchise Tax  
25 Board. The Franchise Tax Board's position is that the

1 reasons for missing the tax payment are avoidance of the  
2 penalty are such that an ordinary intelligent and prudent  
3 person would have acted similarly in a similar  
4 circumstance.

5 And they present in their affidavit two facts  
6 that prove that the taxpayers complied. One fact is  
7 that -- give me one minute, please -- that their  
8 ordinary -- that an ordinary and reasonable person in the  
9 same circumstance would have done -- acted the same way in  
10 similar circumstances. That's debatable one way or  
11 another. I think there's no question here, based on the  
12 history and how these individuals operate their business,  
13 that any other taxpayer would have acted in the exactly  
14 the same way.

15 The other circumstances, number two, that the  
16 Franchise Tax Board's position is that if all the relevant  
17 facts were provided to the preparer, which would be me,  
18 and he advised them appropriately when he had all the  
19 relevant facts. Well, you've got two affidavits.  
20 Actually, you have three affidavits there that indicate  
21 that the taxpayer did provide all the relevant facts. And  
22 can testify to that because I actually go to their office  
23 and gather the relevant facts. So they basically rely on  
24 me 100 percent.

25 Here's another fact that we need to understand

1 here. I actually make or remit the tax payments over to  
2 the Franchise Tax Board on behalf of the taxpayer. I  
3 actually direct their controller to deposit funds on a  
4 quarterly or a tax due basis into a different account than  
5 the corporate account. And then those funds actually are  
6 transmitted by me personally to cover the individual's  
7 estimated tax payments and any amounts due.

8 The facts here are they didn't -- they, the  
9 taxpayers, did not know that they had an additional  
10 liability due. The facts are also that the tax preparer,  
11 who advises the taxpayers, did not know that there was an  
12 additional amount due. That amount due only came to light  
13 when the Franchise Tax Board sent a notice to the  
14 taxpayer. The taxpayer immediately sent that notice to  
15 me. I reconciled the accounts and realized the mistake.

16 The mistake was not on the taxpayers' part. The  
17 mistake was on the CPA's part. That happens to be me.  
18 Yes, I used the wrong schedule at the time that I prepared  
19 their extension, and I believe we remitted payments over  
20 at that point. I don't recall. I don't think that's  
21 really much in dispute here. When I recognized that I had  
22 used the wrong schedule and I advised the taxpayers of  
23 that, I immediately remitted the funds over on behalf of  
24 the taxpayer.

25 The tax -- and the reason I'm bringing this up to

1 you is because, if you read the affidavit -- or not the  
2 affidavit -- the position of the Franchise Tax Board, they  
3 said that the Appellant -- or they said the taxpayer did  
4 not pay the tax until six months after the tax -- it was  
5 due. Therefore, as a result of that, they say we properly  
6 assessed the penalty. Well, that's not necessarily true  
7 because while it's technically true, it's a little  
8 misleading because they didn't know they owed any money.

9 So when they knew they owed money, they paid it.  
10 So it's not like they took six months to make the payment,  
11 or they were playing any kind game. It was a simple  
12 mistake of the fact on behalf of the person that prepared  
13 the tax return on behalf of the person that remits the tax  
14 payments to the Franchise Tax Board, and it's -- and it's  
15 a simple misstatement of facts the tax preparer provided  
16 or the advice the preparer provided to the taxpayer.

17 So that's why we're here today is do the  
18 taxpayers get penalized as a result of a mistake by the  
19 tax preparer? The taxpayers did not make the mistake.  
20 The tax preparer made the mistake. I don't know if  
21 there's a penalty on the tax preparer for making a  
22 mistake. We'll probably find out in the near future.  
23 With that being said, other facts to consider here.

24 The Franchise Tax -- or not the -- the Franchise  
25 Tax Board states that the history of compliance is not a

1 factor here, but it will be taken into consideration in  
2 all the circumstances. Well, if you go back and look at  
3 the history of compliance of this taxpayer or these  
4 taxpayers, you'll notice they have a pretty substantial  
5 history of compliance.

6 So that being said, I requested them -- they got  
7 a similar penalty from the IRS. That penalty was abated  
8 by the IRS. It was my understanding it was abated due to  
9 reasonable cause. The Franchise Tax Board has a policy --  
10 unless I'm misquoting -- that they will concur with the  
11 position of the IRS on these kinds of penalties. So --  
12 then that was brought up to me during the process of our  
13 discussions with the Franchise Tax Board, and that should  
14 have been the end of it.

15 But then they went on to say since, "Well, since  
16 we don't have a first-time compliance penalty, if the IRS  
17 decides to abate it based on first-time compliance, that  
18 doesn't count for us." So it's sort of like we -- we will  
19 follow what they do unless they do it this way, then we  
20 won't follow it. So it's a little misleading what they  
21 say there.

22 With that being said, the Franchise Tax Board  
23 provided a transcript of the taxpayers' payments. Well --  
24 and it does show on there that the penalty was abated.  
25 Now, I understand from the Franchise Tax Board that that

1 penalty was abated due to first time compliance. I don't  
2 know that. But even if it was, it shouldn't matter. It  
3 was abated. There are some codes on there that indicates  
4 something on it. I don't know what those codes mean. I  
5 don't have any kind of documentation to show me what those  
6 codes mean but, again, it was abated.

7 So I guess the -- then the other issues here that  
8 the Franchise Tax Board relies on is their history of  
9 authorities and their various exhibits that they have  
10 provided. Well, when you read those authorities, those  
11 prior cases, every one of those cases there's two factors  
12 they rely on as to whether that reasonable cause abatement  
13 exists. One factor is reasonable and prudent taxpayers  
14 would have done the same thing. The other factor is the  
15 information necessary for the tax professional to provide  
16 the compliance and the information to the taxpayer was  
17 given to the professional in total and in full.

18 This case we have met, without question, both of  
19 those factors. This should be a very simple and  
20 non-disputed case. I don't -- so we complied with what  
21 the authorities as presented by the Franchise Tax Board  
22 said. We've got a history of compliance. The taxpayers  
23 didn't make the mistake. The tax professional made the  
24 mistake, and there should be no penalty assessed here.

25 That is our position.

1 JUDGE JOHNSON: This is Judge Johnson. Thank  
2 you, Mr. Gekakis.

3 Let me turn it over to Franchise Tax Board to see  
4 if they have any questions regarding the facts.

5 MS. SWAIN: No, Judge. No questions.

6 JUDGE JOHNSON: Okay. Thank you.

7 Judge Johnson again. Let me turn it over to my  
8 co-panelists.

9 Judge Stanley, do you have any questions?

10 JUDGE STANLEY: Not at this time. Thank you.

11 JUDGE JOHNSON: Thank you.

12 And, Judge Vassigh, any questions at this time?

13 JUDGE VASSIGH: I do have a question. Can you  
14 please explain or clarify a little bit more the error that  
15 caused you to advise your clients not to pay that final  
16 payment?

17 MR. GEKAKIS: I'd be happy to do that.

18 Well, they -- okay. They -- let's go back. When  
19 the tax return was filed, it showed all amounts paid and  
20 no balance due. When we received the notice from the  
21 Franchise Tax Board within two weeks after the tax return  
22 was filed, the notice was they say we were short on our  
23 payments themselves, not the tax liability. And when I  
24 reconciled it, I recognized that they were correct, and we  
25 immediately remitted the funds over. What happens is

1 they're a construction company, and they have a set of  
2 accounting records based on either completed contract or  
3 percentage of completion of accounting.

4 And in this particular case, it's based on  
5 completed contract accounting. And what that means in --  
6 very briefly -- is that when the job is substantially  
7 closed out, you recognize the income. And the income on a  
8 job could range anywhere from \$300,000 to \$900,000. And  
9 since they're an S corporation, that income flows through  
10 to the individuals, and it gets picked up on their  
11 individual tax return, and they pay the tax.

12 What happens is, I go over there on a regular  
13 basis and consult with them as to the status of jobs, so  
14 that we can determine their income. And I prepare  
15 schedules that show based on this amount of income, we  
16 will -- your tax liability is estimated to be this, and  
17 then I prepare an estimated tax schedule as to when and  
18 what I should pay. What happened is, in this particular  
19 case, various jobs, which we reconcile after the year end  
20 as to whether they were substantially complete or not,  
21 there was a change from my original schedule that I was  
22 doing during the year, which changed the estimated tax  
23 payments that I should have made.

24 So I've got two schedules here that show tax  
25 payments to make. When I prepared the extension for that

1 particular year, I used the wrong schedule of tax payments  
2 that I put on the tax return to show that the tax payment,  
3 what they had paid. Unfortunately, I should have used the  
4 X schedule, and I used the Y schedule, and the Y schedule  
5 of payments were short by -- shorter than the X schedule.  
6 So when I recognized that with the notice, we just paid  
7 the tax. It was that straightforward.

8 So it was basically using on my part the wrong  
9 schedule. So my checks and balances weren't as good on  
10 that particular one. They are -- they're better now but  
11 it, you know, it may happen again sometime in the future.  
12 We try to make sure that kind of stuff doesn't happen.

13 JUDGE VASSIGH: Thank you for explaining.

14 JUDGE JOHNSON: This is Judge Johnson. Thank  
15 you.

16 Mr. Gekakis, if I could just follow up on that.  
17 So you mentioned you had an earlier schedule, and then you  
18 adjusted that originally after year-end close?

19 MR. GEKAKIS: Yes.

20 JUDGE JOHNSON: And ended up using the wrong  
21 schedule. All right. Maybe you can clarify. Are there  
22 multiple schedule updates throughout the year, or was it  
23 one in the beginning and then one after the --

24 MR. GEKAKIS: No. I -- I -- I'm sorry. I  
25 changed my schedules during the year, or I go over --

1 normally, at the first six months of the year, we don't  
2 worry too much about what's going to happen because we  
3 know a job is in progress. So we have to determine, is it  
4 going to be completed in the next six months, or is it  
5 going to go -- going to be completed eight months down the  
6 road. So, not a lot happens in the first half of the  
7 year.

8           During the second half of the year, I may go out  
9 there once or twice. And then at the end of the year,  
10 when I try to reconcile their year-end books, I go out  
11 there again to their offices to determine the amounts to  
12 pay, and I prepare an estimated schedule as to -- to pay  
13 their taxes. And like I said, I actually remit the taxes  
14 over to the Franchise Tax Board based on what I believe is  
15 their tax liability.

16           So -- and they actually don't even -- the only  
17 way they -- the only issues they really get involved in at  
18 that point are, why do I have to pay so much in taxes, but  
19 I deal with that with everyone. With that being said, it  
20 was simply -- so the answer to your question is yes,  
21 there's two schedules. And in some years, there could be  
22 three schedules depending on the job activity. Because  
23 I'm not just dealing with one job or five jobs. I'm  
24 usually dealing with 20 jobs, and those 20 jobs end  
25 anytime in the next three months to the next 18 months

1 depending on what's going on. And, you know, it also  
2 depends on what happens with our world economy.

3 Like when we had Covid, which we've just had,  
4 some of the jobs that were supposed to last 12 months are  
5 now stretching into 24 and 26 months because we can't get  
6 supplies. The job gets extended. People can't go to  
7 work. Life just changes. So I'm hoping that answers your  
8 question.

9 JUDGE JOHNSON: It does. Thank you. I may have  
10 a couple of more questions. It's just fact related so we  
11 could get those out of the way. When you mentioned that  
12 you used the wrong schedule, was that sort of a result of  
13 an analysis and a firm conclusion that's the schedule you  
14 can use, that you realize later it was the wrong one? Or  
15 it's just a matter of you kind of mixed up the two  
16 schedules?

17 MR. GEKAKIS: I think I would interpret what you  
18 just said as the same thing. So I'm not quite sure.

19 JUDGE JOHNSON: Yeah. I guess to more boil it  
20 down, was it -- when you decided not to make that January  
21 payment, was that what you thought was correct at the  
22 time? Or was it more of a clerical mistake, which you  
23 went back up to your schedules, picked up the wrong one,  
24 and that told you not to make the payment?

25 MR. GEKAKIS: The pay -- the -- we're probably

1 dealing with more like the April 15th payment when the  
2 extension went in. And well, if you -- I'm the clerk. So  
3 you could say it's a clerical error, but I also -- I  
4 have -- I picked up the wrong schedule from my system.  
5 But like I said, when we paid the tax and the extension,  
6 it was our understanding -- or it was my understanding and  
7 their understanding that 100 percent of the tax liability  
8 was paid at that point.

9 And we did -- like I said, we did not know until  
10 we got the notice from the Franchise Tax Board that the  
11 total payments were not what they received. When I  
12 recognized that, I reconciled to what they received. At  
13 that point on October 20th or whenever we got the notice,  
14 at that point, I recognized the mistake.

15 JUDGE JOHNSON: Thank you. And on that same  
16 issue when you filed the return, there was an over  
17 reporting of the payments that were made. How did that  
18 over reporting happened when you go back and look at the  
19 payments actually made versus what you put on the return?

20 MR. GEKAKIS: Underreporting. There was an  
21 underreporting on the tax return on the tax payments. We  
22 should have -- well, let me think what I'm saying. I --  
23 you're right. There was an over reporting on the tax  
24 return of what should have been made. The amount that  
25 ended up on the tax return is what should have been paid.

1           So -- and the way you reconcile that is, when you  
2 get a notice from the Franchise Tax Board, they actually  
3 identify the total amount of payments received. So when  
4 you take the number from the notice, you can add up what  
5 you paid. And if it agrees to what's on the notice, it's  
6 pretty black and white.

7           JUDGE JOHNSON: Right. I understand. So I guess  
8 one more question on that. When you go into your final  
9 returns and you're reporting how many payments have  
10 already been made or how much has already been paid, are  
11 you looking at the account through which the payments are  
12 made, or are you going back to your schedule and looking  
13 at what you thought you had made?

14           MR. GEKAKIS: Am I going -- what was the first am  
15 I looking at?

16           JUDGE JOHNSON: Are you looking at actual  
17 payments made from the account of the cash that was paid  
18 to Franchise Tax board?

19           MR. GEKAKIS: Usually I -- usually I will --  
20 well, today I reconcile both ways. But I use my schedule  
21 in all circumstances because normally when you prepare  
22 things in April, you're pretty much done except for  
23 wrapping minor things up. So there was no reason to go  
24 back and verify again. Now my procedures change some, and  
25 I will go, actually, to the separate account that the

1 payments come out of and agree that to the schedules and  
2 make sure everything -- the T's are crossed and the I's  
3 dotted. But that's not to say I'm infallible and there  
4 won't be a mistake made in the future. But --

5 JUDGE JOHNSON: I understand.

6 MR. GEKAKIS: But the penalty -- the penalty,  
7 again, is to -- the purpose of the penalty goes back to  
8 ensuring compliance by the taxpayer. And that's why it's  
9 called a penalty. Interest is always paid, and we pay --  
10 we have people pay the interest regardless of the penalty.  
11 The imposition of this penalty on the taxpayer is not  
12 going to -- not going to create any compliance -- force  
13 any compliance issues by the taxpayers. That won't happen  
14 based on these facts and circumstances.

15 JUDGE JOHNSON: All right. And that kind of  
16 leads me to another question. You mention that the  
17 taxpayer's level of expertise as far as when it comes to  
18 handling accounting and that kind of stuff, and that they  
19 kind of entrust you with all the documents and to make the  
20 payments themselves. When you're creating your schedule,  
21 when you're making estimated payments, when you're making  
22 extension payments, is there any back and forth between  
23 you and the taxpayers? Are you letting them know this is  
24 what's going to be paid? Or is it all your responsibility  
25 to take care of?

1           MR. GEKAKIS: Oh, no. No. I would always -- I  
2 always communicate with them as to what we're doing. I  
3 would think I'd have a professional and ethical issue if I  
4 didn't.

5           JUDGE JOHNSON: Okay. Great. Let me see. Two  
6 more questions, if that's all right. In the reply brief,  
7 I think you mentioned that there are three clients that  
8 are kind of similarly situated --

9           MR. GEKAKIS: Yes.

10          JUDGE JOHNSON: -- and we have two of them here.  
11 For that third one, I wonder -- maybe they just didn't  
12 want to appeal. They didn't want to take care -- I wonder  
13 if they are factually different. Were there more payments  
14 made on that third client? Is there any that would be  
15 kind of helpful to know about why we only have two of the  
16 three here?

17          MR. GEKAKIS: Well, let me go into a little more  
18 history. This group is -- they are all family members. I  
19 have a father who today is -- let's see -- 7 -- 80 -- he's  
20 in his mid-80s. He has two identical twin sons. Those  
21 are the two people that we're dealing with right now.  
22 And, yes, the facts and circumstances as they exist for  
23 the father and his wife are exactly the same as the two  
24 individuals that we're dealing with today. They just  
25 decided they didn't want to deal with this.

1 I -- I'm actually the one who is pushing this  
2 more so than them because of the fact that I just -- it  
3 concerns me the penalty being imposed and why it was being  
4 imposed. And it doesn't take into consideration the facts  
5 and circumstances as they existed at the time. The father  
6 said, "I don't want to deal with it." So I let him make  
7 that decision. I said, "Fine."

8 JUDGE JOHNSON: Okay. I just wanted to clarify  
9 because it could involve the practice reasonable cause in  
10 all kinds of situations, but that answers that question.  
11 And I know you mentioned that anytime you make a payment  
12 you'd always check in with the taxpayers, and the  
13 taxpayers have also reviewed returns before they got  
14 filed; is that right?

15 MR. GEKAKIS: I always send the taxpayer -- I  
16 always send returns to a taxpayer before I file them.  
17 They always sign via the electronic file forms, and they  
18 always sign an engagement letter saying they've reviewed  
19 these things.

20 JUDGE JOHNSON: Okay. Thank you. One last  
21 question. This is more of a clerical question. I noticed  
22 on the affidavits that were submitted, they have the name  
23 correctly at the top of the affidavit for the two  
24 individuals that signed them beyond yourself. But on the  
25 signature line, it's the same name, and I just wanted to

1 clarify that the name on the top of those affidavits --  
2 declaration, is the person who signed. Not the name under  
3 the signature line; is that right? It looks different.

4 MR. GEKAKIS: Well, I have to look at the  
5 affidavits and see what I've got here.

6 JUDGE JOHNSON: Yeah. It's the second affidavit,  
7 and the name starts with "G".

8 MR. GEKAKIS: So we have to look at Bruce F.  
9 Lovazzano, and on the bottom it's signed Bruce F.  
10 Lovazzano. I'm looking at the next one. It says, "Gary  
11 Lovazzano," and on the bottom -- oh. Okay. That was a --  
12 that's -- yes. They each sign. Gary signed, and Bruce  
13 signed. But that is --

14 JUDGE JOHNSON: Different signatures. I just  
15 want to make sure, and I also want to give FTB a chance.

16 Did you have any concerns about the name on the  
17 signature lines being incorrect?

18 MR. GEKAKIS: You're asking the Franchise Tax  
19 Board?

20 JUDGE JOHNSON: The Franchise Tax Board.

21 MR. RICAFORT: No concerns, Judge.

22 JUDGE JOHNSON: Thank you. Okay.

23 With that, that's all the questions I have at  
24 this time.

25 We can turn it over to Franchise Tax Board if



1 Appellants have not indicated any error in FTB's  
2 calculation of the late-payment.

3 I will now address why Appellants have not  
4 demonstrated reasonable cause to abate the late-payment  
5 penalty. When FTB imposes a penalty, the law presumes the  
6 penalty has been imposed correctly. The penalty may be  
7 abated if the taxpayer demonstrates the failure to pay was  
8 due to reasonable cause and not willful neglect. The  
9 taxpayers have the burden to establish reasonable cause  
10 and must demonstrate that the failure to timely pay the  
11 tax due amount on the return occurred despite the exercise  
12 of ordinary care and prudence.

13 In the United States Supreme Court Decision, U.S.  
14 v Boyle, the instances alluded to in U.S. v Boyle, wherein  
15 a taxpayer may be found to reasonably rely on the advice  
16 of the tax experts, are those instances where in a true  
17 question of law arises. The reliance of improper advice  
18 by a tax professional may constitute reasonable cause when  
19 such advice relates to a substantive matter of tax law.  
20 The Court in Boyle made a distinction that meeting fixed  
21 statutory deadlines for taxes is not an issue of  
22 substantive law.

23 The Court stated that, "One does not have to be a  
24 tax expert to know that tax returns have fixed filing  
25 dates, and that taxes must be paid when they are due." In

1 short, tax returns imply deadlines. Reliance by a lay  
2 person on a tax professional is, of course, common. But  
3 that reliance cannot function as a substitute for  
4 compliance with an unambiguous statute.

5 Similar to this appeal, in the precedential  
6 long-standing opinion of the Board of Equalization in the  
7 Appeal of Berolzheimer, the question the Board of  
8 Equalization answered is whether Appellants' agent was  
9 advising Appellants on a matter of tax law when the agent  
10 incorrectly estimated Appellants' tax liability.

11 While Appellants in this present appeal assert  
12 that they acted as a reasonably prudent person would when  
13 they relied on their accountant's improper advice to  
14 determine their appropriate estimate payments resulting in  
15 their underpayment of tax, this circumstance does not give  
16 rise to reasonable cause. The Board of Equalization held  
17 in the Appeal of Berolzheimer that the calculation of the  
18 correct estimated payments is not a legal interpretation  
19 but, rather, a simple computation problem in which  
20 Appellants cannot hide behind an expert for the failure to  
21 properly determine the tax that was due.

22 In effect, there's no reasonable cause when  
23 taxpayers rely on a tax professional's improper advice in  
24 merely calculating the correct amount of estimated tax as  
25 was the case in this appeal. The IRS also imposed a

1 late-filing penalty presumably due to facts comparable to  
2 those described in this appeal, and later abated the  
3 penalty on the Appellant's good compliance history -- and  
4 later abated the Appellant's -- the penalty based on  
5 Appellant's good compliance history and not based on  
6 reasonable cause.

7 This is reflected in Appellants' -- I have a tax  
8 transcript, which is Exhibit G, for Bruce and Tina  
9 Lovazzano, and Exhibit I for Gary and Jennifer Lovazzano.  
10 E on page 4 of the Appellants' master file transcript,  
11 Transaction Code 271, indicates abatement of the late  
12 penalty at 290 -- the abatement reason code from 065 to  
13 020 indicate -- indicate that the first abatement -- that  
14 the penalty was abated for the first -- for first time  
15 penalty abatement. Sorry. I would like to correct  
16 myself. I misspoke and said late-filing. I meant  
17 late-payment penalty.

18 Appellants' updated IRS tax transcript do not  
19 show a change in its finding. FTB, however, lacks the  
20 authority to grant a one-time penalty abatement based on a  
21 good compliance history alone. Appellants have not  
22 established their failure to timely pay the tax by the due  
23 date was due to reasonable cause. FTB's action to deny  
24 their claim for refund of the late-payment penalty should  
25 be sustained.

1           Thank you. And at this time, I will be happy to  
2 answer any questions the panel may have.

3           JUDGE JOHNSON: This is Judge Johnson. Thank  
4 you. I think we can roll through to Appellant's rebuttal  
5 at this time, and we may have questions after that.

6           Mr. Gekakis, if you're ready for your  
7 five-minutes rebuttal.

8           MR. GEKAKIS: Well, okay. Yes. I'd be happy to  
9 do that.

10

11

CLOSING STATEMENT

12

13

14

15

16

17

18

19

MR. GEKAKIS: Let me go backwards and address the  
issue of the IRS real quick. Unless I've been misinformed  
by the Franchise Tax Board, the -- they have the ability.  
And as matter of policy, they follow the IRS actions in a  
case like this. It was only after the fact that they say,  
"We follow their actions unless it's this action, and then  
we don't follow it." That's a little double talk to me as  
far as I'm concerned.

20

21

22

23

24

25

The Franchise Tax Board argues that -- I'm not  
sure. I don't think they argue that the tax was  
calculated incorrectly. They argue that the estimated tax  
payments were calculated incorrectly. Well, the estimated  
tax payments as shown on the tax return show there was no  
liability due. So somehow, they were entered and

1       calculated correctly because it showed -- the tax return  
2       showed no liability due. It was only after the fact that  
3       it was recognized that the tax amounts paid weren't  
4       amounts shown on the tax return.

5               So it's like I'm not quite sure what the argument  
6       here is. Are they arguing that the tax estimates weren't  
7       calculated correctly? Because if that's the case, that's  
8       probably not true as they were entered on the tax return  
9       in the correct amount. And the tax return showed no money  
10      due. So we go back to it was a mistake on behalf of the  
11      tax preparer on how he made these payments. So I don't  
12      think their argument makes a lot of sense to me.

13              And the cases that have been cited -- and if you  
14      look at the FTB's brief, they focus on two thing. They  
15      focus on one, would an ordinary and reasonable taxpayer  
16      act the same? And I don't think there's any question that  
17      is true here. And two, was the information as provided by  
18      the taxpayer to the preparer true and accurate and  
19      complete? And you have affidavits that say that is the  
20      case. So the arguments that they have in their affidavit  
21      are both the criteria, both of them have been met. It's a  
22      non-issue.

23              JUDGE JOHNSON: This is Judge Johnson. I think  
24      you have a few minutes. Is there more you would like to  
25      add?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. GEKAKIS: No. That'll be fine.

JUDGE JOHNSON: All right. Thank you.

Let me see if there are any questions from the panel for either party.

Judge Stanley?

JUDGE STANLEY: I don't have any questions. Thank you.

JUDGE JOHNSON: And Judge Vassigh?

JUDGE VASSIGH: I don't have any questions. Thank you.

JUDGE JOHNSON: Thank you.

Judge Johnson again. I do not have any further questions, so I think we're ready to start concluding the hearing. Let me ask the parties quickly before we do that, are there any other comments or any other thoughts that you would like to express to the panel?

I'll start with the Appellants.

MR. GEKAKIS: No, Judge. I have presented what I believe is correct and accurate.

JUDGE JOHNSON: Thank you.

And for Respondent Franchise Tax Board?

MR. RICAFORT: No, Judge Johnson. I just want to thank the panel for their time.

JUDGE JOHNSON: All right. I want to thank everybody for participating today. The evidence has been

1 admitted into the record. We have arguments and briefs as  
2 well as oral arguments presented today.

3 The record will remain open as indicated on the  
4 minutes and orders following the prehearing conference to  
5 allow FTB until June 7th, 2022, to provide written  
6 questions for the declarant. And then also to allow for  
7 responses to those questions from Appellants' side. Once  
8 that process is complete, OTA will issue confirmation that  
9 the record is closed, and the parties should expect our --  
10 sorry. July 7th. I'm being corrected.

11 Once the process is complete of questions and  
12 responses, OTA will issue a confirmation that the record  
13 is closed. The parties should expect our written opinion  
14 no later than 100 days from the day that the record is  
15 closed.

16 I wish to again thank the parties for their  
17 efforts thus far on appeal. With that, we are now off the  
18 record. This concludes the hearing for the Consolidated  
19 Appeals of Lovazzano and OTA's hearings for the day.

20 Thank you, everybody.

21 (Proceedings adjourned at 10:15 a.m.)

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 30th day of June, 2022.

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