

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
V. WANG,) OTA NO. 21027229
)
)
) APPELLANT.
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Wednesday, July 27, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:37 a.m. and concluding at 9:59 a.m. on
Wednesday, July 27, 2022, reported by Ernalyn M.
Alonzo, Hearing Reporter, in and for the State
of California.

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APPEARANCES:

Panel Lead: ALJ ANDREA LONG

Panel Members: ALJ RICHARD TAY
ALJ KENNY GAST

For the Appellant: V. WANG

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
JASON RILEY
ELLEN SWAIN
JAMES FILLING

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received at page 6.)

(Department's Exhibits A-J were received at page 6.)

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California; Wednesday, July 27, 2022

9:37 a.m.

JUDGE LONG: We're ready to go on the record.

Good morning. I am Andrea Long, the lead ALJ for this appeal. We are here today for the Appeal of Wang, OTA Case Number 20096625 [sic]. Today is Wednesday, July 27th. It's approximately 9 -- it is exactly 9:37 a.m., and we are conducting this hearing via Webex.

With me today are Judges Richard Tay and Kenneth Gast. As the lead ALJ for this appeal, I'll be conducting the proceedings in this matter. My co-panelists and I are equal participants. We will all be reviewing the evidence, asking questions, and reaching a determination in this case.

We will begin with the parties stating their names and who you represent for the record, and we will start with FTB.

MR. RILEY: Good morning, Judge. I'm Jason Riley with Franchise Tax Board. Here with me is James Filling and Ellen Swain, and James Filling will be presenting our argument this morning.

JUDGE LONG: Thank you.

This is Judge Long. And, Mr. Wang, can you please introduce yourself as well.

1 MR. WANG: Yes. This is Victor Wang. I guess I
2 am the Appellant, taxpayer. I'm not sure what other
3 introduction is appropriate here.

4 JUDGE LONG: That is sufficient. Thank you.

5 The issues the parties have agreed to discuss
6 today is whether the -- sorry. My notes got away from me.

7 The issue is whether Appellant has established
8 the basis to waive the estimated tax penalty.

9 With respect to the exhibits, we have admitted
10 Exhibit 1 and Exhibit 2 for Appellant without objection
11 from FTB.

12 (Appellant's Exhibits 1-2 were received
13 in evidence by the Administrative Law Judge.)

14 And FTB has submitted Exhibits A through J to be
15 admitted into the record with no objections by Appellant.

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

18 And now we can proceed with the presentation.

19 Mr. Wang, you'll begin first. And before you
20 begin, I'll swear you in. So please raise your right
21 hand.

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VICTOR WANG,

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

JUDGE LONG: Okay. You may begin.

PRESENTATION

MR. WANG: I thought my case was fairly straightforward. It shouldn't take but a few minutes.

The situation to summarize is that a company Celgene was purchased or merged with Bristol-Meyers Squibb, and this happened -- I think it was November 19th to -- November-something 2019. And the terms were that stockholders, of which I am a stockholder, were given one share of Bristol-Meyers in return for a share of Celgene, and they were giving \$50 per share. And there was finally a conditional situation wherein if certain drugs managed to pass the hoops that they were to go through with -- I forget -- FDA or whoever does that, that some additional amount of money, \$9 a share or something or another, might become available.

That last point, I think, is moot because I think those drugs didn't make the cutoff. They had to do three things, which they didn't do all three. So the basic

1 issue was that I just found myself suddenly one day with
2 Celgene being sold and \$50 per share given to me. So I
3 realized that there's a potential of capital gains -- long
4 term capital gains, which is almost the entire amount,
5 since these shares were originally purchased by my late
6 father many years ago.

7 And what was not clear to me, among other things,
8 was would I pay capital gains on the \$50 per share, or
9 would I pay capital gains on the whole amount, which
10 seemed unlikely to me, but that's a possibility, I guess.
11 So it wasn't clear what to do, and I awaited instruction
12 on that matter. Meanwhile I believe there was a -- what
13 do you call it? -- quarterly estimated tax due on, I
14 think, it was around January 5th or something like that
15 2020. And that is the crux of this case is that I did not
16 pay any estimated tax for that potential gain in January.

17 And I think at the end of January or February I
18 did finally receive a notice from FTB that I would owe the
19 whole amount, not just the \$50 a share. And I went ahead
20 and paid that amount, which because of pandemic had a
21 deadline around July of that year. So because I did not
22 pay it in January but in the next payment period, I owed
23 \$1,500-some dollars.

24 So it seems obvious to me, I guess -- and the
25 reason why I am here at this appeal -- that it was not

1 possible for me to make this payment without knowing how
2 much to pay. And the essential -- essentially, the
3 instructions from FTB arrived after that estimated tax
4 deadline in January.

5 So my position is just I have been doing the best
6 I can and have paid after being notified of the amount
7 due. And I should not be penalized for not paying on
8 January 15th -- I think it was, roughly -- 2020.

9 Does that summarize the matter sufficiently for
10 the Judges?

11 JUDGE LONG: This is Judge Long. Yes, thank you.
12 I will give FTB an opportunity to ask you questions.

13 FTB, do you have any questions for Mr. Wang?

14 MS. SWAIN: No, judge.

15 JUDGE LONG: Thank you.

16 I'll ask the panel whether they have any
17 questions at this time.

18 Judge Tay, do you have any questions?

19 JUDGE TAY: I have no questions. Thank you.

20 JUDGE LONG: And, Judge Gast, do you have any
21 questions?

22 JUDGE GAST: This is Judge Gast. I do not have
23 any questions at this time. Thank you.

24 JUDGE LONG: Thank you. This is Judge Long.

25 So we will move on to FTB's presentation. You

1 may begin whenever you're ready.

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PRESENTATION

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MR. FILLING: Thank you. This is James Filling.

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Good morning, Judges.

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This is a case about one central issue, whether

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Mr. Wang has met his burden of proof. So we have the

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estimated tax penalty of \$1,808 or any portion thereof.

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Existing statutory law and case law both from the Office

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of Tax Appeals and the Federal Tax Court make it clear

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that Mr. Wang has not satisfied his burden of proof to

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establish a basis for the Franchise Tax Board to waive the

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penalty.

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The Franchise Tax Board's imposition of penalties

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is presumed correct, and the taxpayer has the burden of

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providing evidence to show error in that determination.

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Here, the Franchise Tax Board imposed a penalty, as did

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the IRS, and Mr. Wang has not argued that the estimated

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tax penalty was imposed in error.

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Instead, he argues in his opening brief that

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there is reasonable cause to abate the penalty, namely,

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that there is a huge increase in his taxable income, and

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that he did not receive a Form 1099 detailing the

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transaction that results in his increased revenue until

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after the estimated tax due date. However, reasonable

1 cause is not the applicable standard.

2 The law provides that the estimated tax penalty
3 may be waived in two situations. First, is by reason of
4 casualty, disaster, or other unusual circumstances.
5 Imposition of the penalty would be against equity in good
6 conscious. Or second, if the underpayment was due to
7 reasonable cause and not willful neglect, and the taxpayer
8 retired after reaching the age of 62 or became disabled in
9 the taxable year which the estimated payments were
10 required to be made, or in the year prior.

11 There are two particularly on point cases that
12 elucidate the meaning of casualty, disaster, or other
13 unusual circumstances. In *Farhoumand v. Commissioner*,
14 adopted in four precedential OTA opinions, the petitioners
15 made the argument that their failure to make an estimated
16 payment was due in part to the bursting of the dot-com
17 bubble and their ensuing stock market loss of \$3 million,
18 which the petitioners classified as an unusual
19 circumstance.

20 The Court disagreed and concluded that the stock
21 market's volatility is not an unusual circumstance.
22 Moreover, the Court held that the imposition of an
23 estimated payment-penalty was not against equity in good
24 conscious because the petitioners had the ability to pay
25 the estimated payment but, instead, chose to purchase

1 other stocks.

2 In the Appeal of Gerald F. and Barbara G.
3 Johnson, a precedential opinion, the Office of Tax Appeals
4 applied the statutory construction principle of a esjusedem
5 generis to limit the meaning of the term "other unusual
6 circumstances" to unexpected loss or hardship. The panel
7 noted that when a general term follows more specific terms
8 in the list, the general term is limited to the kinds of
9 things similar to the specific terms.

10 Accordingly, the panel narrowed other unusual
11 circumstances to only include unexpected loss or hardship
12 since that is the commonality between casualties and
13 disasters. The panel then held that profits from a real
14 estate sales transaction did not fit within the category
15 of an unexpected loss or hardship on the grounds that real
16 estate sales are not unusual -- excuse me -- are not
17 unusual and that a profit is hardly a loss or hardship.

18 Here, given that Mr. Wang has not demonstrated
19 that he retired after reaching 62 or became disabled in
20 2019 or in the year prior. Only the first waiver
21 situation is applicable. In order to meet his burden,
22 Mr. Wang has to show that imposing a penalty would be
23 against equity in good conscious by reason of casualty,
24 disaster, or other unusual circumstances.

25 In his reply brief, it was argued on Mr. Wang's

1 behalf that the merger between BMS and Celgene and
2 Mr. Wang's resulted payout was an unanticipated event
3 properly classified as another unusual circumstances.
4 This is inaccurate for three reasons. First, Mr. Wang's
5 case is similar to Farhoumand that it involves the
6 volatility of the stock market. It is even a stronger
7 case in favor of the Franchise Tax Board since Mr. Wang
8 received a massive windfall rather than a loss.

9 Although the amount of loss in the stock's value
10 and the merger of two companies are different on the
11 surface, both are instances of the stock market's
12 volatility. One day a stock could be valued highly and
13 soon thereafter be worth a lot less. And, similarly, one
14 might own stock in a company and soon be cashed out
15 because of a merger. Both relates to the stock that one
16 owns and the consequences begot by the unpredictable
17 nature of the market.

18 Second, even though the market forces that cause
19 a merger are unpredictable, the BMS Celgene merger, once
20 agreed upon by the two companies, was not something that
21 was carried out overnight. As far back as January 3rd,
22 2019, BMS and Celgene announced that the merger was going
23 to occur and indicated how Celgene shareholders stock
24 would be treated. On February 22nd, 2019, Celgene sent a
25 notice to all shareholders requesting that they vote on

1 the proposed merger and, again, indicated how Celgene
2 shareholder stock would be treated.

3 Finally, on November 21st, 2019, BMS released a
4 press statement notifying shareholders of both companies
5 that the merger had been finalized and that the Celgene
6 stock had been bought out. This press statement also
7 contained a phone number for Celgene shareholders to call
8 should they have any questions. Accordingly, the
9 assertion that BMS Celgene merger was unanticipated is
10 negated by the constructive, if not, actual notice
11 Mr. Wang received at the merger and its impact on his
12 investment.

13 Third, like in the appeal of Gerald F. and
14 Barbara G. Johnson, Mr. Wang received a profit from an
15 occurrence that was perhaps remarkable but by no means
16 unexpected. Like a profitable real estate transaction,
17 coming away from a merger with a gain upwards of
18 \$1,000,000 cannot be classified as a loss or hardship.
19 And as noted in Farhoumand, matters concerned in the stock
20 market's volatility are not unusual. In this case,
21 particularly given Celgene's notifications to
22 stockholders, Mr. Wang's gain from the merger cannot be
23 classified as unexpected.

24 Mr. Wang also argues that an ambiguity with
25 respect to whether his capital gains would be calculated

1 based on a cash payout or on a total value of the
2 liquidated Celgene stock made it difficult to make a
3 payment. However, like in Farhoumand, this is not the
4 kind of thing that makes it impossible to make a payment.
5 Mr. Wang could have made a payment based on what he
6 thought was the best option. He could have gone off the
7 lesser value, keeping in mind if it was of what was
8 required, the estimate penalty would be lower. Or he
9 could have gone off the higher value, keeping in mind that
10 if it was more than required, he would be entitled to a
11 refund.

12 Mr. Wang also could have called the help line
13 noted in BMS's November 2019 press release. Furthermore,
14 Mr. Wang argue that receiving his Form 1099 sometime after
15 the estimated payment was due on January 15th, 2020, as an
16 unexpected hardship. This is not the case. Companies
17 have until January 31st to issue 1099s, which means that
18 the law itself allows for the possibility that 1099s will
19 not be in a taxpayer's hands when he or she is required to
20 make an estimated tax payment. It is, therefore, not an
21 unusual circumstance for such a thing to occur like it has
22 here.

23 For all these reasons, Mr. Wang has not met the
24 casualty, disaster, or other unusual circumstance standard
25 for abating an estimated tax penalty. Accordingly, the

1 Franchise Tax Board respectfully submits that its denial
2 of Mr. Wang's claim for refund be sustained, and we
3 welcome any questions the panel may have.

4 Thank you.

5 JUDGE LONG: Thank you. This is Judge Long.

6 Judge Cho -- I'm sorry.

7 Judge Tay, do you have any questions?

8 JUDGE TAY: I have no questions for Franchise Tax
9 Board. Thank you.

10 JUDGE LONG: Thank you.

11 And, Judge Gast, do you have any questions?

12 JUDGE GAST: This is Judge Gast. I don't have
13 any questions as well. Thank you.

14 JUDGE LONG: Thank you.

15 This is Judge Long again.

16 Mr. Wang, you have five minutes if you want to
17 address any of the arguments or statements FTB made.
18 Would you like to make a statement?

19 MR. WANG: Yes, I would.

20 JUDGE LONG: You may proceed. Thank you.

21

22 CLOSING STATEMENT

23 MR. WANG: Okay. This is Victor Wang.

24 On the first thing I might mention -- I'm not
25 sure about the relevance of my retirement is, but I've

1 been retired for more than seven years now. I don't know
2 if that's any relevance, but it was brought up by FTB. I
3 didn't quite understand the connection.

4 Regarding the arguments, I don't think that the
5 citing of the dot-com bubble, for instance, case as being
6 relevant to this case as appropriate. I'm not arguing an
7 unusual circumstance. I'm just arguing that I needed some
8 instruction as to how much to pay. FTB argues that I
9 could have called and asked. I assumed that I would be
10 told, since this was, as FTB points out, a merger -- or
11 whatever it was -- that had been coming on for some time.
12 It was actually a bit of surprise to me, since I'm not a
13 person that watches the stock market constantly.

14 But in any case, the circumstance of a large
15 estimated tax payment due and the notice of how much it
16 should be occurred in an order such that I took that to
17 mean that I should make the payment on the next estimated
18 tax, which I did. So my argument really is that that much
19 having to do with some unusual circumstance. It's one of
20 just -- I could not make a payment unless I guessed, and I
21 didn't think guessing on an estimated tax payment,
22 especially a rather large one like this was appropriate.

23 The 1099 was what I was -- I think that was the
24 name of the thing I was waiting for. And I took action as
25 soon as I received that. So that's my argument. It's not

1 unusual circumstance. The fact that it was a positive
2 windfall is, I think, immaterial from my standpoint. It
3 wasn't even positive. I didn't want to take a gain on
4 this. I would have preferred to pass this onto my
5 children, but anyway, I think that's not material. So my
6 case is simply that there was no way for me to know how
7 much to pay. And calling some random number, I think, is
8 a specious argument. If you have ever tried calling one
9 of these numbers, it's really hard to talk to anybody in
10 this modern world.

11 I think that's all I have to say.

12 JUDGE LONG: This is Judge Long. Thank you.

13 I'm going to ask my panel if they have any last
14 questions.

15 Judge Tay, do you have any questions?

16 JUDGE TAY: Yes, I have one question for
17 Franchise Tax Board.

18 It seems that Mr. Wang is testifying to the fact
19 that he was retired by 2019, and it looks like he was
20 above the age of 62. Can you just clarify for me what the
21 law is with regard to that first exception to the
22 estimated tax penalty and respond to these -- I don't know
23 if these are new facts, but respond to that, please.

24 MS. SWAIN: Thank you, Judge. This is Ellen
25 Swain.

1 Yeah, the first part of the test, if you're over
2 62, certainly it sounds like he does meet that. But the
3 second part of the test is that you actually have to be
4 really retired, which means that the retirement would have
5 actually had to have occurred in 2018 or 2019, which I
6 believe he just testified is not the case. In addition,
7 it appears that he was reporting SSI benefits since at
8 least 2015, which would also suggest that the retirement
9 did not occur in those proceeding for that actual tax
10 year.

11 JUDGE TAY: Thank you. I have no further
12 questions.

13 JUDGE LONG: This is Judge Long.

14 Judge Gast, do you have any questions?

15 JUDGE GAST: This is Judge Gast. I do not have
16 any questions. Thank you.

17 JUDGE LONG: Thank you.

18 This is Judge Long again. I just want to clarify
19 for the record, the case number in this appeal is
20 21027229.

21 I think this concludes the hearing today -- or in
22 this hearing. The panel will meet and decide the case
23 based on the briefings, the arguments presented, and all
24 of the evidence admitted -- exhibits admitted as evidence
25 today. We will send both parties our written opinion no

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later than 100 days from today.

Thank you for your participation. The case is
now submitted, and the record is closed.

(Proceedings adjourned at 9:59 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 August, 2022.

ERNALYN M. ALONZO
HEARING REPORTER