

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,           )  
   )  
FXG PARTNERS, INC.,                         ) OTA NO. 22029707  
   )  
                            APPELLANT.         )  
   )  
   )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, November 17, 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 9:56 a.m. on  
Thursday, November 17, 2022, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Administrative Law Judge: RICHARD TAY

For the Appellant: SERGIO MEDINA II

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

CAROLYN KUDUK  
ERIC YADAO  
TOPHER TUTTLE

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I N D E X

E X H I B I T S

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California; Thursday, November 17, 2022  
9:37 a.m.

JUDGE TAY: We are going on the record.

This is Appeal of FXG Partners, Inc., OTA Case  
Number 22029707. It is 9:37 a.m. on November 17th, 2022.  
This appeal is being conducted electronically led by  
myself, Judge Richard Tay. This appeal is being heard and  
decided by a single Administrative Law Judge under the  
Office of Tax Appeals Small Case Program.

The Office of Tax Appeals is not a court but is  
an independent appeals body. Our office is staffed by tax  
experts and is independent of the state's tax agencies.  
Thus, OTA does not engage in ex parte communications with  
either party, and my decision today will be based on the  
arguments and evidence provided by the parties on appeal  
in conjunction within an appropriate application of the  
law.

To start off if I could have the parties'  
representatives introduce themselves. So I will start  
with Appellant.

MR. MEDINA: Oh, my name is Sergio Medina, and  
I'm representing FXG Partners, Inc.

JUDGE TAY: Thank you, Mr. Medina.  
Respondent.

1 MS. KUDUK: My name is Carolyn Kuduk. I'm for  
2 the Franchise Tax Board.

3 MR. YADAO: Good morning. Eric Yadao with the  
4 Franchise Tax Board.

5 MR. TUTTLE: Good morning. I'm Topher Tuttle  
6 with the Franchise Tax Board.

7 JUDGE TAY: Thank you, everyone.

8 The issue on appeal is whether Appellant has  
9 shown error in Respondent's denial of a claim for refund  
10 for the late-filing penalty for the 2019 tax year.

11 With the briefs -- with their briefs -- sorry.  
12 With their brief, Respondent provided Exhibits A through  
13 N, and there has been no objections made to those  
14 exhibits. I just want to confirm that for the record.

15 Appellant, do you have any objections to  
16 Respondent's exhibits?

17 MR. MEDINA: No.

18 JUDGE TAY: Okay. The exhibits are hereby  
19 admitted as evidence into the record.

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

22 I would like to start with our presentations now.  
23 Appellant will have 15 minutes.

24 Before you begin, Mr. Medina, I recognize that  
25 you will be also testifying as a witness. And so I would

1     like to swear you in. Okay. So if you could raise your  
2     right hand and answer this.

3  
4                     SERGIO MEDINA II,

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

8  
9             JUDGE TAY: Thank you. Please begin whenever  
10    you're ready.

11  
12                     PRESENTATION

13             MR. MEDINA: Okay. Okay. So the only reason  
14     I'm -- I'm trying to get penalty relief for the delinquent  
15     penalty because, you know, during Covid I believe there  
16     was a lot of confusion. And if we tried to call the  
17     Franchise Tax Board, no one would answer because of  
18     staffing shortages. So the best thing I can say on  
19     Exhibit G, if you look at that one where it talks about  
20     the State postponing everything, it just talks about 2019  
21     tax returns. It doesn't specify between S corporate or C  
22     corp.

23             So, honestly, we truly believed that we can  
24     submit it by October 15th. Like I said before, previously  
25     the IRS has abated our penalty. It's not something we did

1       purposely. We truly believe that, you know, that was when  
2       it was due, and we did it as soon as we humanly could.  
3       You know, I have a young child. Some of the partners had  
4       young children. It was hard to coordinate. And to pay  
5       the penalty for me would be extremely expensive and very  
6       hard to pay because since I gave the people or the  
7       corporation the advice, I would probably end up paying the  
8       penalties.

9               And that's all I have to say.

10              JUDGE TAY: Thank you, Mr. Medina. I have one  
11       question. You mentioned that the -- it was difficult to  
12       coordinate. Would you please elaborate on that?

13              MR. MEDINA: Yeah. Because at the time I believe  
14       some of our children weren't in school or if they were, it  
15       was very limited. So sometimes it was hard to get ahold  
16       of some of the people. There're two partners. So  
17       sometimes it was hard to get ahold of them. And like I  
18       said, with all the times we've looked it up, I never saw  
19       anything from the Franchise Tax Board or the IRS that  
20       stated that S corps were due on 9/15.

21              And, unfortunately, there was no way we could  
22       call because no one would answer the phone. And, you  
23       know, when I did talk to the IRS -- I'm sure this is  
24       hearsay -- but they told me there was a lot of confusion  
25       over the issue, and that's why they abated the penalty.



1 JUDGE TAY: Okay. This is Judge Tay. Thank you,  
2 Mr. Medina. Does that conclude your presentation for now?

3 MR. MEDINA: Yeah. All I could say is when I  
4 looked online, I saw notice 2022-36 from the IRS, and they  
5 were going to, you know, exclude all penalties for 2019  
6 and 2020 tax returns if they were filed by September 30th.  
7 Also, I saw from California AB-194 that was talking about  
8 considering doing the same thing for California. So I  
9 just wanted to mention that.

10 JUDGE TAY: Okay. Thank you for that. Does that  
11 conclude your presentation?

12 MR. MEDINA: Yes.

13 JUDGE TAY: Okay. Thank you, Mr. Medina. I  
14 don't have any questions right now. I'm going to let  
15 Respondent go ahead with its presentation, and then you  
16 will have five minutes on rebuttal, Mr. Medina. Okay.

17 So, Franchise Tax Board, whenever you're ready  
18 please proceed.

19 MS. KUDUK: Thank you.

20

21 PRESENTATION

22 MS. KUDUK: Good morning. My name is Carolyn  
23 Kuduk and my co-counsel is Eric Yadao. Also with us today  
24 is one of FTB's penalty specialist, Topher Tuttle.

25 Appellant is not eligible of abatement of its

1 late-filing penalty. Appellant has not shown that the  
2 late filing of its 2019 tax return was due to reasonable  
3 cause, and there's no other way to provide abatement for  
4 that penalty in taxable year 2019. The standard for  
5 reasonable cause requires taxpayers to present credible  
6 proof that they were continuously prevented from filing a  
7 timely return. Appellant has provided no evidence of how  
8 it was prevented from filing a timely return. Without  
9 this evidence, Appellant has not established reasonable  
10 cause.

11 Further, Appellant's late-filing penalty cannot  
12 be abated based on prior filing history because a one-time  
13 abatement was not available to Californians in taxable  
14 year 2019. So Appellant's late-filing penalty cannot be  
15 abated, and Appellant is not entitled to a refund.  
16 Appellant was a calendar year tax filer whose taxable year  
17 closed on December 31st, 2019. Therefore, Appellant  
18 needed to file its 2019 tax return by September 15th,  
19 2020. That date was not changed by the pandemic, but  
20 Appellant filed its return on September 30th, 2020.  
21 Therefore, its return was untimely.

22 Appellant request a one-time abatement of this  
23 late-filing penalty. California just passed legislation  
24 providing one-time abatement based on filing history.  
25 That abatement is available for taxable years 2022 and

1 beyond. Unfortunately, it's not available for taxable  
2 year 2019, so Appellant doesn't qualify.

3 Appellant argues it has reasonable cause for its  
4 untimely filing because of the Covid-19 pandemic and the  
5 resulting economic dislocation. Respondent acknowledges  
6 the difficulties the pandemic has caused all Californians.  
7 Yet, Appellant has provided no evidence that the pandemic  
8 prevented Appellant from filing its tax return in a timely  
9 manner.

10 Furthermore, nothing in the record suggests that  
11 Appellant's failure to timely file occurred despite  
12 exercising ordinary business care and prudence. Appellant  
13 does not describe what efforts, if any, were taken to  
14 timely file the return. Unsupported assertions are not  
15 sufficient for Appellant to show reasonable cause.  
16 Appellant assumed its return would be due October 15th,  
17 2020. In reality, the return was due September 15th,  
18 2020. Respondent sympathizes with Appellant's mistake,  
19 but a misunderstanding of the law does not excuse  
20 noncompliance with statutory requirements, such as filing  
21 a timely tax return.

22 To meet the legal standard of reasonable cause,  
23 taxpayers must present credible and competent proof the  
24 circumstances continuously prevented complying with the  
25 law. Appellant has not done that. As a final matter, the

1 question was raised at the prehearing conference whether  
2 Respondent could afford Appellant the relief that the IRS  
3 offered in Notice 2022-36, which Appellant has referenced  
4 today in his presentation.

5 Here to discuss this is a penalty expert, Topher  
6 Tuttle. So go ahead, Topher.

7 MR. TUTTLE: Thank you.

8 This question has been asked by many interested  
9 parties recently. Although Respondent examined whether it  
10 had the authority to provide broad penalty relief in  
11 response to Covid 19 pandemic, ultimately, Respondent  
12 determined that it did not have such authority. Revenue &  
13 Taxation Code Section 19131 only authorizes Respondent to  
14 abate the delinquent filing upon a showing of reasonable  
15 cause.

16 As a result, Respondent continues to review  
17 penalty abatement requests on a case-by-case basis. As  
18 discussed by my co-counsel, in this case Appellant has not  
19 established reasonable cause.

20 JUDGE TAY: This is Judge Tay. Respondent does  
21 that conclude your presentation?

22 MS. KUDUK: Yes, it does.

23 JUDGE TAY: Okay. Thank you. I have maybe one  
24 or two questions. My first question is that you mentioned  
25 that Appellant has provided no evidence. However, they

1 provided testimony now that I would -- as evidence. And  
2 while they did not maybe provide a lot of documentary  
3 evidence, I think we all understand that the pandemic was  
4 real and provided some difficulties. So would you please  
5 respond to the evidence -- or the sorry -- the testimony  
6 that Appellant provided today and how that would weigh in  
7 on a reasonable cause determination.

8 MS. KUDUK: Let me -- I wanted to make sure that  
9 I was unmuted.

10 The Appellant has provided testimony about the  
11 difficulties the pandemic caused to childcare and to  
12 getting notification from FTB. However, they didn't  
13 specifically say how that prevented them from filing a tax  
14 return. I believe that there was a notice put out. There  
15 were many, many notifications on our website.

16 And barring some very specific reason why  
17 Appellant was not able to look at that information or get  
18 the information they needed, there is really nothing that  
19 Appellant -- or that Respondent can do to abate the  
20 penalty because reasonable cause was not specifically  
21 shown in this case. So --

22 JUDGE TAY: Okay.

23 MS. KUDUK: And, specifically, Appellant has not  
24 given us any -- any evidence beyond what he's testifying  
25 right now. And as it's clearly known in self-serving

1 statements cannot -- sorry -- uncorroborated self-serving  
2 statements do not provide evidence.

3 JUDGE TAY: Okay. I will ask Appellant to  
4 respond in its rebuttal, and we will move on with the rest  
5 of the hearing. Okay.

6 So, Mr. Medina, you have five minutes on  
7 rebuttal. Please proceed whenever you're ready.

8

9 CLOSING STATEMENT

10 MR. MEDINA: So yeah. I would just like to say,  
11 you know, I agree with everything that's been said. But  
12 that is at the standpoint of hindsight, you know. We can  
13 say now, two or three years later, you know, that was the  
14 case. But during the time there was a lot of confusion.  
15 When I'd look things up, there was no specifics that I  
16 saw. No specific thing about S corps. You know, I've  
17 been doing taxes for 20 years. This is the first big  
18 penalty we got hit with, and it was just due to the due  
19 date confusion.

20 So, you know, what I can say is I do have a young  
21 child. One of the partners has three young children. So  
22 it was just kind of hard to coordinate. You know, I do  
23 have other clients. Everything, basically, was assumed to  
24 be due on October 15th. From hindsight we can say that  
25 that wasn't the case, but during the time that's what we

1       believed. And there was no way to call for any  
2       information. So it was very hard to find information out.

3               And I guess that's all I have to say.

4               JUDGE TAY: Okay. Thank you, Mr. Medina.

5               MR. MEDINA: You're welcome.

6               JUDGE TAY: I have one question for you. Apart  
7       from the childcare aspect -- sorry -- apart from the  
8       childcare aspect -- or maybe in addition to the childcare  
9       aspect and apart from maybe whatever confusion there might  
10      have been with regard to the filing deadline, were there  
11      any other circumstance that prevented Appellant, FXG  
12      Partners, Inc., from filing a timely tax return?

13              MR. MEDINA: Well, like I said in hindsight, but  
14      at the time we assumed it was due October 15th, and I do  
15      have other clients. And we did go back and forth, and  
16      they had a partnership return that was filed on time. So  
17      if you're asking me could we have done it? We could have.

18              But at the time we assumed that the due date was  
19      October 15th. And like I said, there was no way to call.  
20      And if you look at it, it was done like 15 days later  
21      because we assume we were doing it early. So I just --  
22      like I said before, I believe the penalty is super  
23      extensively expensive. And at the end I'll have to pay it  
24      because it was under my advice.

25              JUDGE TAY: Thank you, Mr. Medina. Just to

1 clarify, did you say you filed the federal partnership  
2 return on time?

3 MR. MEDINA: So this particular client has a  
4 partnership return, and then they have an S corp, and they  
5 have personal returns. Everything was filed around that  
6 date. So everything was on time except this one because  
7 the feds -- the IRS abated the penalty because they told  
8 me there was so much confusion over it.

9 JUDGE TAY: I understand. So the IRS abated the  
10 penalty. Okay. Thank you very much.

11 Okay. I have no further questions, and so I will  
12 just ask the parties if they have any final questions for  
13 me today.

14 Appellant, any questions before we conclude this  
15 hearing?

16 MR. MEDINA: Yeah. The only thing I would ask is  
17 just to know when you would come down with the final  
18 decision.

19 JUDGE TAY: Yes. I'll endeavor to issue my final  
20 decision within 100 days at the end of this hearing.

21 MR. MEDINA: All right. So about three months?

22 JUDGE TAY: Approximately.

23 MR. MEDINA: All right.

24 JUDGE TAY: Okay. If no additional questions  
25 from Appellant, Respondent, any additional questions?



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MS. KUDUK: No, Judge Tay.

JUDGE TAY: Okay. I want to thank both parties for their efforts in this matter. This concludes the hearing for this appeal. The record is now closed.

And like I said before, I will endeavor to issue a written opinion no later than 100 days from today. With that, we are now off the record.

(Proceedings adjourned at 9:56 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 19th day  
of December, 2022.

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