

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
H. DUINO,) OTA NO. 220410272
)
)
) APPELLANT.
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)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, December 29, 2022

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:28 a.m. and concluding at 9:41 a.m. on
Thursday, December 29, 2022, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Administrative Law Judge: JOSHUA LAMBERT

For the Appellant: M. DUINO

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

BRADLEY COUTINHO

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I N D E X

E X H I B I T S

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

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California; Thursday, December 29, 2022

9:28 a.m.

JUDGE LAMBERT: We are now on the record in the Office of Tax Appeals oral hearing for the Appeal of Henry Duino, Case Number 220410272. The date is December 29th, 2022, and the time is 9:28 a.m.

My name is Judge Lambert, and I'm the Administrative Law Judge for this hearing.

For FTB, could you please introduce yourself for the record.

MR. COUTINHO: This is Brad Coutinho representing the Franchise Tax Board.

JUDGE LAMBERT: Thanks.

And for Appellant, could you please introduce yourself for the record.

MS. DUINO: My name is Michela Duino, and I'm representing Henry Duino.

JUDGE LAMBERT: Thank you all for attending.

As discussed at the conference, the issues in this appeal are whether the late-payment penalty should be abated, and whether the underpayment of estimated tax penalty should be abated.

FTB provides Exhibits A through G, and Appellant provides Exhibits 1 through 2. There are no objections to

1 those exhibits, and those are now in the record.

2 (Appellant's Exhibits A-G were received
3 in evidence by the Administrative Law Judge.)

4 (Department's Exhibits 1-2 were received in
5 evidence by the Administrative Law Judge.)

6 So at this point, Ms. Duino, this is your
7 opportunity to explain Appellant's position. And you'll
8 have 10 minutes, and you can proceed when you're ready.

9 MS. DUINO: Thank you.

10

11 PRESENTATION

12 MS. DUINO: This is Michela Duino. Basically, my
13 stance is that the payment was attempted in all good
14 faith.

15 JUDGE LAMBERT: I'm sorry, Ms. Duino. Do you
16 hear that noise, talking in the background? I was
17 receiving feedback.

18 MS. DUINO: I'm sorry. I don't hear it.

19 MR. COUTINHO: I think there was some brief
20 feedback. I think there may have been someone behind you,
21 but since then -- since you've been speaking, I don't hear
22 it on my end.

23 JUDGE LAMBERT: Okay. Sorry. Okay. Please
24 continue.

25 MS. DUINO: The payment was made with the best of

1 intention. It only became apparent to me recently when
2 the FTB submitted their latest exhibits that the account
3 number had actually been missing its last digit. Up until
4 that point I was under the impression that it was an issue
5 with Charles Schwab, the holder of the money, because they
6 had disclosed an issue with the routing number changing
7 for their own banks. But it's only recently that I
8 figured out that still was not the issue.

9 I'm hoping that you guys can understand that this
10 was just a mistake and abate the penalties. Interest was
11 paid along with the underpayment as soon as it was made
12 aware to us. And hopefully that, you know, the interest
13 does make the FTB whole and that the penalty might be
14 abated because this was not an intentional thing.

15 One more point that I would hope -- and I don't
16 know if this is even the setting for it. Because my
17 father doesn't have access to internet or anything like
18 that, it's always been very difficult to do the mandated
19 online digital payments. And I don't know if it's
20 possible to get an exemption to do paper checks, but that
21 would make a world of difference.

22 JUDGE LAMBERT: Okay. Thank you, Ms. Duino.

23 I guess I just wanted to ask a question in terms
24 of did your father -- or would it be reasonable looking at
25 this Appeal of Scanlon case at OTA is a precedential

1 decision. It states that, "It's reasonable for a taxpayer
2 to monitor their bank accounts and check that the payment
3 was made." And I'm wondering if -- in this case it seems
4 like it's more of a significant amount. Just how would
5 you respond to, you know, that case and the fact that, you
6 know, taxpayer made, you know, held to be -- maybe held
7 that the taxpayer be reasonable and check their bank
8 account?

9 MS. DUINO: So, unfortunately, because everything
10 is moving towards the tech, kind of, you know, and him not
11 having access to the internet, and he can't check. So how
12 Schwab works is it's not like a bank statement
13 necessarily. It's you have to go in and look at the
14 history of ins and outs and like go through all of the
15 dividends and all that, but it's all online. So it's
16 totally not reasonable to expect him to be able to have
17 seen any of it.

18 JUDGE LAMBERT: Okay. Thanks. And then also the
19 FTB exhibits were noting that it may have been the account
20 number that was entered incorrectly, whereas the Schwab
21 letter about routing number. Could you just, like,
22 comment on that or -- thanks.

23 MS. DUINO: So like I had mentioned, I had no
24 idea that the payment didn't go through. And then in
25 searching for the reason why it would not have gone

1 through, and I had talked to Schwab, they had said that
2 their routing numbers had changed. So that the routing
3 number that was on his checks was the issue.

4 So I was under that impression up until the FTB
5 was able to show me that the last digit had been missing
6 from the payment. And that is something that is not
7 visible on the confirmation page when you go do your
8 payments. So I just was completely unaware.

9 JUDGE LAMBERT: Thanks. This is Judge Lambert.
10 And then were you the one that entered the payments?
11 Okay. You're saying yes?

12 MS. DUINO: Yes, I was. Yes.

13 JUDGE LAMBERT: I guess one last question. Was
14 an email received saying that the other payment was
15 confirmed to have actually been processed? And was there
16 an email saying that the payment that didn't go through
17 was not -- was dishonored?

18 MS. DUINO: No. The only emails I got were the
19 confirmation number when it was placed, like, a scheduled
20 payment. I never received a "funds have been withdrawn"
21 or a "failure" email.

22 JUDGE LAMBERT: Okay. Thanks, Ms. Duino. I
23 appreciate it.

24 Now, we can move on to FTB's presentation for 10
25 minutes.

Mr. Coutinho, if you're ready, you could proceed now.

MR. COUTINHO: Thank you.

PRESENTATION

MR. COUTINHO: This is Brad Coutinho representing the Franchise Tax Board. Appellant has not demonstrated reasonable cause to abate the late-payment penalty imposed for the 2020 tax year nor any basis to abate the estimated tax penalty. The crux of this case is that Appellant attempted to remit an estimated tax payment of \$18,000 in September 2020, but his payment was rejected because he incorrectly input his bank account number, which is reflected in Exhibit G.

Appellant asserts that his failure to pay his taxes was reasonable because he did not know of the dishonored payment until FTB issued its Notice of Tax Return Change. FTB can appreciate the circumstances that Appellant's representative has mentioned today, including limited internet access that led to the imposition of the late-payment penalty. However, precedential opinions from the Office of Tax Appeals reflects that reasonable cause does not exist.

In the Appeal of Friedman, your office held that taxpayers are expected to monitor their bank accounts to

1 determine whether payment has been successfully remitted.
2 Moreover, your office stated in Friedman that an ordinary,
3 intelligent, and prudent businessperson would have
4 monitored their bank account and verified the payment had
5 left their bank account prior to when their taxes are due.

6 As stated today in the Appeal of Scanlon, your
7 office held that a lack of notice from FTB of a failed
8 payment does not negate a taxpayer's duty of prudence and
9 due care to verify that a scheduled payment was
10 successfully remitted. As stated earlier, FTB has
11 recently provided additional exhibits which reflect that
12 Appellant omitted the last digit of his bank account
13 number. Again, FTB can appreciate the circumstances that
14 Appellant has mentioned today, including limited internet
15 access. However, based on the precedential opinions from
16 OTA, Appellant has not established reasonable cause to
17 abate the late-payment penalty and Respondent's position
18 must be sustained.

19 In regards to the estimated tax penalty,
20 Respondent relies on the arguments set forth in its
21 opening brief that Appellant has not established any basis
22 to abate the estimated tax penalty. Accordingly, there
23 are no grounds to abate the late payment or estimated tax
24 penalties, and FTB respectfully request that it be
25 sustained.

1 I'd be happy to address any questions or concerns
2 the Panel may have. Thank you for your time.

3 JUDGE LAMBERT: This is Judge Lambert. Thank
4 you, Mr. Coutinho. Can I ask you a question. I was
5 wondering, does FTB, if you know, send an email when a
6 payment -- there's a confirmation when the payment is
7 confirmed that it will be processed, but does FTB send an
8 email or submit a notice when a payment actually goes
9 through or to say that a payment did not go through?

10 MR. COUTINHO: I don't believe that there's any
11 confirmation. There may be an FTB portal. I'm not
12 honestly sure, but I don't believe that an email is sent
13 to the taxpayer when a payment is dishonored or accepted.

14 JUDGE LAMBERT: Okay. And with regard to the
15 estimated tax penalty, it seems like there was a couple of
16 payments that were significant amounts made in September.
17 So just to confirm, those payments were probably for
18 estimated tax payments from earlier quarters, I think,
19 too.

20 MR. COUTINHO: I believe so. So yeah, there was
21 a payment that was successfully remitted on September 16th
22 of 2020 as I indicated on Exhibit F. And the payment was
23 of the same amount of \$18,000. Obviously, it's difficult
24 to show with the redaction of the account number, but it
25 appears that there was a missing digit of the number one

1 at the very end that resulted in the dishonored payment.

2 JUDGE LAMBERT: Okay. Thank you, Mr. Coutinho.

3 And we can move on to Ms. Duino. If you would
4 like to make any closing remarks or respond to anything,
5 you can have 5 minutes. You can proceed now. Thanks.

6 MS. DUINO: Thank you.

7

8 CLOSING STATEMENT

9 MS. DUINO: Michela Duino.

10 So the -- I don't believe that it was prior
11 estimates in that payment just to be clear. There was a
12 cash merger that happened, and it generated a tax
13 liability. And that's why I made two large payments was
14 just to try to catch up on that because the accountant
15 wasn't able to give us a number right away. So I thought
16 I'd overpay.

17 JUDGE LAMBERT: Okay. Thanks. Did you have
18 anything else you wanted to add?

19 MS. DUINO: Just that I do understand the stance
20 that a reasonable person would monitor their bank accounts
21 and like the verbiage used as a reasonable businessman.
22 My dad didn't graduate high school. He's not by any means
23 a businessman. And like I said, I mean, if there was
24 access, the bank account monitoring, I do completely
25 understand. I mean, I check mine, you know, weekly. But

1 it's just something that was not a possibility for him.

2 JUDGE LAMBERT: Okay. Thank you, Ms. Duino. I
3 appreciate it.

4 So if there's nothing further, I'll conclude the
5 hearing. And I want to thank, you know, both parties for
6 appearing today, Mr. Coutinho and Ms. Duino. And we will
7 issue a written opinion within 100 days.

8 So thank you everyone, and the record is now
9 closed.

10 (Proceedings adjourned at 9:41 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 9th day
of January, 2023.

ERNALYN M. ALONZO
HEARING REPORTER