

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
J. MCCARTHY and S. MCCARTHY,) OTA NO. 21068024
)
 APPELLANT.)
)
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, February 23, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 1:00 p.m. and concluding at 1:31 p.m. on
Thursday, February 23, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ OVSEP AKOPCHIKYAN

Panel Members: ALJ SUZANNE BROWN
ALJ ANDREW KWEE

For the Appellant: J. MCCARTHY

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 1-5 were received at page 8.)
(Department's Exhibits A-E were received at page 7.)

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California; Thursday, February 23, 2023
1:00 p.m.

JUDGE AKOPCHIKYAN: We're going on the record in the Appeal of J. McCarthy and S. McCarthy before the California Office of Tax Appeals. The OTA Case Number is 21068024. Today is Thursday, February 23, 2023, and the time is approximately 1:00 o'clock. We are holding this appeal electronically via Webex by the consent of all parties.

This appeal is being heard by a panel of three Administrative Law Judges. My name is Ovsep Akopchikyan, and I'm the lead judge for purposes of conducting this hearing. Judges Suzanne Brown and Andrew Kwee are the other members of this panel. All three judges are equal decision makers and may ask questions to make sure we have all the information we need to decide this appeal.

Now for introductions, will the parties please introduce yourselves by stating your name for the record, beginning with Appellants.

MR. MCCARTHY: James McCarthy.

JUDGE AKOPCHIKYAN: Thank you, Mr. McCarthy.
And for Respondent.

MR. COUTINHO: Good afternoon. This is Brad Coutinho for the Franchise Tax Board.

1 JUDGE AKOPCHIKYAN: Thank you, Mr. Coutinho.

2 And as discussed and agreed upon by the parties
3 at the prehearing conference on February 1, 2023, and as
4 noted in my prehearing conference minutes and orders,
5 there are four issued in this appeal.

6 The first issue is whether the Office of Tax
7 Appeals has jurisdiction to decide this appeal. And the
8 second issue is whether Appellants have established a
9 basis to abate the late-payment penalty. The third issue
10 is whether Appellants have established a basis to abate
11 the estimated tax penalty. And the final issue is whether
12 Appellants have established a basis to abate interest.

13 With respect to the evidentiary record, FTB
14 provided Exhibits A through D during the briefing process.
15 Mr. McCarthy did not object to the admissibility of these
16 exhibits at the prehearing conference. After the
17 conference, FTB submitted one more exhibit, Exhibit E,
18 which is FTB's denial of Appellant's claim for refund
19 dated February 9, 202.

20 Mr. McCarthy, do you object to the admissibility
21 of this additional exhibit?

22 MR. MCCARTHY: No.

23 JUDGE AKOPCHIKYAN: Thank you.

24 FTB's Exhibits A through E are entered into the
25 record.

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

3 Appellant provided eight exhibits throughout the
4 briefing process. During the prehearing conference, we
5 determined that some of the exhibits were duplicates, and
6 we labeled them as Exhibits 1 through 5. FTB did not
7 object to the admissibility of those exhibits. However,
8 after the conference, Appellant emailed OTA indicating
9 they want to withdraw Exhibit 3.

10 Exhibit 3 is a receipt from the United States
11 Postal Service, basically, like a proof of mailing
12 indicating Appellants mailed the letter to OTA on
13 February 8, 2021, via first class mail. To make sure we
14 are all on the same page, I'm going to have to relabel the
15 exhibits now on the record. And there was one exhibit
16 which is the same denial letter that the FTB submitted
17 that was not included as part of Appellant's original
18 Exhibits 1 through 5.

19 So I'm going to summarize the exhibits now and
20 then ask if that's an accurate summary at the end of my
21 summary.

22 Exhibit 1 is the letter to OTA dated August 11,
23 2021, asking OTA to reconsider its position that OTA does
24 not have jurisdiction to consider this appeal because the
25 appeal was filed untimely.

1 Exhibit 2 is a declaration from a USPS United
2 States Postal Service mail carrier dated August 10, 2021.

3 Exhibit 3 is an error page from FTB's website
4 indicating there's a problem with bank information, which
5 Appellant submitted for demonstration purpose.

6 Exhibit 4 is an email from FTB dated June 17,
7 2019, confirming FTB received Appellants' payment request.

8 Exhibit 5 is FTB's denial of the refund claim
9 dated February 9, 2021, which is the same as Exhibit E
10 submitted by FTB.

11 Is this an accurate summary of your exhibits,
12 Mr. McCarthy?

13 MR. MCCARTHY: Yes.

14 JUDGE AKOPCHIKYAN: Thank you.

15 Does the FTB have any objection to the
16 admissibility of any of the exhibits?

17 MR. COUTINHO: No objection from Respondent.

18 JUDGE AKOPCHIKYAN: Thank you.

19 Appellants' Exhibits 1 through 5 are entered into
20 the record.

21 (Appellant's Exhibits 1-5 were received
22 in evidence by the Administrative Law Judge.)

23 Lastly, as discussed Appellant will testify as a
24 witness at this hearing. This oral hearing will begin
25 with Appellants' presentation, including Mr. McCarthy's

1 sworn testimony for a total up to 20 minutes. FTB will
2 have 15 minutes for its presentation. Appellants will
3 have 5 minutes for rebuttal.

4 Does anyone have any questions before I swear
5 Mr. McCarthy in for his testimony?

6 MR. MCCARTHY: No.

7 JUDGE AKOPCHIKYAN: Okay. Hearing none from FTB,
8 Mr. McCarthy, will you please raise your right hand.

9
10 J. MCCARTHY,
11 produced as a witness, and having been first duly sworn by
12 the Administrative Law Judge, was examined and testified
13 as follows:

14
15 JUDGE AKOPCHIKYAN: Thank you. Please proceed
16 with your presentation when you are ready.

17
18 PRESENTATION

19 MR. MCCARTHY: Okay. Starting off, I first would
20 like to respond to the process of the issue of
21 jurisdiction and then proceed and discuss the issue as to
22 its merits. And then I'll follow up with a rebuttal after
23 the State puts on their issue. I've prepared a statement
24 to make it much easier, if you'll follow along with me.

25 Upon receipt of the February 9th Notice of

1 Action, I prepared and sent a Notice of Appeal to the
2 address of the Office of Tax Appeals in West Sacramento,
3 California, with the -- where I had postage in February of
4 2021. Some date, uncertain, the envelope was returned by
5 the United States Postal Service indicating address
6 undeliverable.

7 I checked and verified that the address was
8 correct and personally gave the envelope to my regular
9 mail carrier who took the returned mailed envelope and
10 stated that she would resend that envelope. Seeing the
11 declaration of Teela Ma, Exhibit 2. Proving a negative is
12 logically impossible because one cannot find evidence for
13 something that is nonexistent. I can state that the
14 envelope subsequently sent in a timely fashion was not
15 returned to me.

16 I did make the assumption that an envelope
17 addressed to the correct address in West Sacramento would
18 be delivered by the United States Postal Service.
19 Therefore, based on these facts, I submit that there is
20 jurisdiction in this matter using the legal principles of
21 inadvertence and excusable neglect because the intervening
22 circumstance of the United States Postal Service was
23 beyond my control.

24 Now I'll proceed onto the merits. On or about
25 June 2019, taxpayer made an estimated tax payment.

1 Taxpayer paid the amount due by entering the amount of
2 \$22,635 providing the routing number and the checking
3 account number for the Bank of America using California's
4 Franchise Tax Board WebPay portal. See Exhibit 5, WebPay
5 confirmation.

6 Taxpayer in the past complied with timely
7 estimated payments using the same WebPay portal for each
8 of those payments. However, something happened unbeknown
9 to the taxpayer on the way to the State's treasury. As we
10 had replied in the past, there was no indication that a
11 routing number provided for Bank of America was invalid at
12 the time. As listed in the required banking information
13 section.

14 At the time, taxpayer did not receive notice that
15 the routing number was incorrect. Taxpayer later learned
16 that according to Tax Advocate Robert Morgan that the
17 mistake was due to an improperly entered routing number
18 provided by the FTB using the phrase "unable to locate."
19 Taxpayer never received notice of the mistake via the
20 WebPay portal. Known for secure payments through the
21 internet is to notify the pair when a routing number is
22 not valid.

23 Taxpayer in 2025 -- excuse me. Taxpayer in 2021
24 returned to the WebPay portal and purposely inserted a
25 wrong routing number as a test. The WebPay portal

1 indicated that the number was not valid. If that
2 information had been provided in 2019, taxpayer and the
3 Franchise Tax Board would not be in this circumstance
4 presently. See Exhibit 4, bank information.

5 Circumstances that may indicate reasonable cause
6 and good faith include the honest misunderstanding of the
7 facts that it could be reasonable, including the
8 experience, diligence, and knowledge of the taxpayer. The
9 facts after the June 29th payment are: Taxpayer operating
10 a business on a daily basis under the demands of numerous
11 clients, ongoing payments, and transactions, and a recent
12 loss of a bookkeeper, created an environment that
13 prevented an in-depth review of payments made. Taxpayer
14 relied on the Franchise Tax Board that confirming payment
15 was made. See, again, Exhibit 5.

16 Ordinary business care and prudence is defined by
17 the law is the degree of care that a reasonably prudent
18 person would exercise. Obviously, the subject tax
19 payment, which is the subject matter of this appeal, the
20 June 2019 estimated payment did not alert the taxpayer
21 that this payment fell through the cracks and was beyond
22 taxpayer's fault and was not caused by reckless
23 indifference. When taxpayer was informed of that payment
24 mistake, taxpayer resubmitted the amount for payment
25 through the WebPay portal.

1 Thank you.

2 JUDGE AKOPCHIKYAN: Judge Akopchikyan speaking.
3 Thank you, Mr. McCarthy for your presentation and your
4 testimony.

5 Mr. Coutinho, do you have any questions for
6 Mr. McCarthy?

7 MR. COUTINHO: No questions for Mr. McCarthy from
8 the Franchise Tax Board. Thank you.

9 JUDGE AKOPCHIKYAN: Thank you.

10 Now I'd like to turn to my Panel members.

11 Judge Brown, do you have any questions for
12 Appellant?

13 JUDGE BROWN: No. I do not have any questions
14 right now. Thank you.

15 JUDGE AKOPCHIKYAN: Thank you. Judge Kwee, do
16 you have any questions?

17 JUDGE KWEE: Yes, just a quick clarification for
18 the Appellant. So I understand that the June payment fell
19 through, the \$22,000 payment, but it did not end up
20 getting paid until September 14th of 2020, if my data is
21 correct. So that would be like three months later and two
22 months after the due date. I'm just wondering if there's
23 any explanation or if you can help me understand why you
24 didn't notice that the payment was not getting processed
25 from your bank account. Like in the week after you made

1 the payment why it took three months to find out that the
2 payment didn't go through.

3 MR. MCCARTHY: If I'm not mistaken, I think the
4 payment -- are you talking about \$22,635 payment?

5 JUDGE KWEE: Right. Yes.

6 MR. MCCARTHY: Yeah. I think that was actually
7 paid quite a while after that when we got noticed that
8 there was an estimated payment that was not paid, and we
9 were shown that it was -- that there was a penalty of over
10 \$2,000 and interest. And that was the first indication of
11 that through a letter from the FTB.

12 And as soon as we got that letter, we looked and
13 found that a payment hadn't been made. But we thought we
14 had a confirmation and then immediately sent it, and sent
15 the whole amount, the penalty and the interest.

16 JUDGE KWEE: Right. And my question was really,
17 I guess, was there a reason that you didn't notice that it
18 didn't get debited from your Bank of America account, you
19 know, because -- like if you make a payment you might
20 think to check the bank account to see if it was debited.
21 Or what -- like, was there a reason it -- you weren't able
22 to check that to see if like a payment went through?

23 MR. MCCARTHY: Yeah. I see what you're asking.
24 Well, as I tried to explain, she runs a business and she
25 only has one bookkeeper at the time. And that bookkeeper

1 was missing. And as a result of that, she's not that good
2 with taking care of the numbers, and that's why she hired
3 CPAs, bookkeepers, et cetera. And she's very busy in her
4 business.

5 It's a document preparation business. Everybody
6 is calling all the time. She's got to prepare documents.
7 She had one other person working with her. So she never
8 really in the past had checked that before. She never
9 looked at it. Lots of big payments are being made in this
10 particular bank account. So one in particular didn't get
11 her attention. It wasn't enough to raise a red flag, and
12 that's why she missed it, and it fell through the cracks.

13 JUDGE KWEE: Okay. I understand. Thank you. I
14 don't have any further questions, so I'll turn it back.

15 JUDGE AKOPCHIKYAN: Thank you, Judge Kwee.

16 I do have a few questions regarding the
17 chronology of the events. You indicated you gave the
18 undeliverable -- undelivered appeal letter back to the
19 postal worker who resent it. Did you subsequently ever
20 mail another appeal to OTA?

21 MR. MCCARTHY: Another appeal?

22 JUDGE AKOPCHIKYAN: Another appeal, whether you
23 mailed it a second time or a third time.

24 MR. MCCARTHY: No, I guess not. What had
25 happened, the sequence was -- and I'm not sure of the

1 dates. I didn't really make a diary of when I sent this
2 Notice of Appeal to the FTB, but it was some time after I
3 received the letter. That's why I withdrew that proof of
4 sending it through the postal service because those dates
5 didn't make sense when I re-looked at it in terms of the
6 challenge of jurisdiction.

7 So when I did get it back I was really amazed
8 because I checked and the address was the same. But if
9 you recall, back in those days it was during the Trump
10 administration and the postal service was not working
11 well. Now, I don't know if that was the problem or not.
12 But as soon as I got that, the one good thing about the
13 postal service is that we have a real nice postal lady --
14 postal carrier.

15 So I immediately dropped down to see her, and I
16 said, hey, here's the envelope. I just got this back,
17 address undeliverable, could you go resend that? As soon
18 as that came, that was like in a week or 10 days, I sent
19 it again. And I assumed at that point since I never
20 received it back again, that it, in fact, was sent to the
21 Franchise Tax Board.

22 JUDGE AKOPCHIKYAN: It was sent to the Office of
23 Tax Appeals. So the proof of mailing that you withdrew,
24 the address on there was the Office of Tax Appeals'
25 address, not the Franchise Tax Board, the date of

1 February 8, 2021?

2 MR. MCCARTHY: That mailing must have been some
3 other mailing.

4 JUDGE AKOPCHIKYAN: Okay.

5 MR. MCCARTHY: Because as I stated, it to be
6 illogical that I would be sending an appeal on the 8th of
7 February when the Notice of Action was sent on the 9th of
8 February. That couldn't work. Now, I wouldn't -- how
9 could I know that the appeal was on -- that the Notice of
10 Appeal was going to be sent to me on the 9th when I sent
11 it on the 8th. So that didn't make sense to me. I might
12 have been careless, got it wrong. I don't know.

13 JUDGE AKOPCHIKYAN: Okay.

14 MR. MCCARTHY: But I did send the subsequent mail
15 through the carrier, the one that -- and with not postage
16 from my wife's business, but actual postage. So it
17 wasn't -- there wasn't really no proof of -- other than I
18 sent the -- resent them the envelope through the postal
19 carrier.

20 JUDGE AKOPCHIKYAN: I checked the record, and I
21 didn't see OTA receiving any appeal in February or March
22 or April, not the first one or the -- either the first one
23 or the one that you gave to the mail carrier. But the
24 first time we received your copy of your appeal was an
25 email that you sent to OTA on June 15th, 2021 -- so that

1 would be approximately four months later -- with a copy of
2 your appeal.

3 And the date of your appeal is also dated before
4 FTB issued a denial letter. It's dated February 7, 2021,
5 whereas the denial letter is February 29th. So I want to
6 know what triggered you to email OTA on June 5th when OTA
7 never contact about you about --

8 MR. MCCARTHY: I -- I can't explain that. I
9 will -- I will assume that I got the number -- the date
10 wrong. That's the only explanation I would have. But as
11 I indicated to the sequence of events were that as soon as
12 I was told that there was a denial, I then immediately
13 prepared the Notice of Appeal and sent it. But,
14 apparently, you didn't get it until July because I wasn't
15 notified that you'd never received it over those four
16 months.

17 JUDGE AKOPCHIKYAN: And just to clarify, we
18 received it on June 15th through an email that you sent to
19 OTA. It was never -- we never received that original --
20 either the original mail that you claimed you sent or the
21 one that you sent through the mail carrier. The only time
22 we received a copy of your appeal is when you emailed that
23 appeal to OTA, and it was dated, again, before FTB's
24 denial letter.

25 I guess -- I mean, I don't have any more

1 questions. If you have any comment about my concern with
2 the chronology here, please feel free to provide
3 additional commentary, otherwise I have no additional
4 questions.

5 MR. MCCARTHY: Yeah. The only extra aspect of
6 this would be that, in fact, I didn't do -- I didn't put
7 the right date in. Because there's no way that I
8 logically could have sent something on the 7th not having
9 received the denial letter until sometime after the 9th
10 that it was dated. So I don't know why the 7th. I might
11 have put the wrong date on. And I'm sure I'm guilty of
12 that in the past, but I don't know what specifically
13 happened in regards to what happened on this mailing.

14 But I do know that it did come back. And what
15 was strange was that the same address, the box number was
16 identical to the box number that I received on the denial
17 letter. And I just put it back in the mail with the --
18 and just assumed that it would again get to you. That one
19 didn't get to you either. So I don't know what the
20 problem is. I can't give you a -- I can't prove a
21 negative as I indicated. I don't know why all that
22 occurred.

23 JUDGE AKOPCHIKYAN: I do have a question. Did
24 the additional mail that you sent to the mail carrier, did
25 that ever return to you as undeliverable?

1 MR. MCCARTHY: No.

2 JUDGE AKOPCHIKYAN: Okay. I don't have any
3 further questions. Thank you, Mr. McCarthy for your
4 testimony.

5 Mr. Coutinho, it is now your turn to make your
6 presentation. You have 15 minutes. Please proceed when
7 you're ready.

8

9 PRESENTATION

10 MR. COUTINHO: Good afternoon. This is Brad
11 Coutinho appearing for Franchise Tax Board.

12 I have three points to make today:

13 One, if Appellants' appeal letter is being
14 submitted on February 8th, 2021, the OTA does not have
15 jurisdiction to hear this appeal.

16 Two, if it's determined that OTA does have
17 jurisdiction, Appellants have not established reasonable
18 cause to abate the late-payment penalty.

19 And three, there's no basis to abate the
20 estimated tax penalty nor interest for the 2019 tax year.

21 To my first point, in their supplemental briefing
22 Appellants stated that they mailed their appeal letter on
23 February 8th, 2021, one day prior to when FTB issued its
24 Notice of Action. As stated today Appellants' letter is
25 also dated February 7th, 2021. Appellants have testified

1 today that they mailed their appeal letter after the
2 Notice of Action was issued and have provided a
3 declaration from their mail carrier to support their
4 position.

5 If it is determined that Appellants' appeal
6 letter was submitted on February 8th, 2021, then OTA would
7 not have jurisdiction as Appellants' appeal letter would
8 have been filed with -- would not have been filed within
9 the 90 period prescribed by Revenue & Taxation Code
10 Section 19324.

11 For my second point, if it is determined that OTA
12 does have jurisdiction, Appellants have not demonstrated
13 reasonable cause to abate the late-payment penalty.
14 Appellants attempted to remit an estimated tax payment of
15 approximately \$22,000 in June 2019, but their payment was
16 rejected because they incorrectly input their bank account
17 number. Appellants assert that their failure to pay their
18 taxes was reasonable because they did not know of the
19 dishonored payment until FTB issued its Notice of Tax
20 Return Change.

21 Precedential opinions from the Office of Tax
22 Appeals reflects that reasonable cause does exist in this
23 case. In the appeal of Friedman, the OTA panel held the
24 taxpayers are expected to monitor their bank account to
25 determine whether payment has been successfully remitted.

1 Moreover, in Friedman, the panel held that an ordinary
2 intelligent and prudent business person would have
3 monitored their bank account and verified the payment had
4 left their bank account prior to when their taxes are due.

5 In another precedential opinion, the Appeal of
6 Scanlon, the OTA panel held that a lack of notice from FTB
7 of a failed payment does not negate the taxpayer's duty of
8 prudence and due care to verify that a scheduled payment
9 was successfully remitted. FTB can appreciate the
10 circumstances that Appellants have mentioned today,
11 including the loss of their bookkeeper and not learning of
12 the dishonored payment until FTB issued its Notice of Tax
13 Return Change. However, based on the precedential
14 opinions from the OTA, Appellant has not established
15 reasonable cause to abate the late-payment penalty.

16 To my third point, regarding the estimated tax
17 penalty, Appellants have not offered any argument or
18 evidence for why either of the two provisions for waiver
19 of the penalty exist in this appeal. Similarly,
20 Appellants have not made any argument that they qualify
21 for any of the interest waiver provisions provided in the
22 Revenue & Taxation Code. Accordingly, there are no rounds
23 to abate the late-payment or estimate tax penalty or
24 interest in this case, and FTB respectfully request that
25 it be sustained.

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

3 JUDGE AKOPCHIKYAN: Thank you, Mr. Coutinho.

4 This is Judge Akopchikyan speaking. Let me turn
5 it over to my Panel members to see if they have any
6 questions.

7 Judge Brown, do you have any questions?

8 JUDGE BROWN: I don't believe I have any
9 questions right now. Thank you.

10 JUDGE AKOPCHIKYAN: Thank you, Judge Brown.

11 Judge Kwee?

12 JUDGE KWEE: Hi. This is Judge Kwee. I don't
13 have any questions. Thank you.

14 JUDGE AKOPCHIKYAN: Thank you, Judge Kwee.

15 I do have one question for FTB. During the
16 prehearing conference, I asked if you would please check
17 whether FTB had any information regarding when the denial
18 letter was mailed to Appellant notwithstanding the date of
19 the letter. Were you able to get records?

20 MR. COUTINHO: I apologize. It's the Notice of
21 Action when it was issued to the taxpayer is when it was
22 mailed.

23 JUDGE AKOPCHIKYAN: Is that something you
24 confirmed, or is that something you're assuming?

25 MR. COUTINHO: I apologize. That is something

1 that I am -- I apologize for not having that information.
2 It is something that I'm assuming that we did send on
3 February 9th, 2021.

4 JUDGE AKOPCHIKYAN: Is it safe to say you don't
5 have any confirmation regarding when that letter was
6 actually mailed to the Appellants?

7 MR. COUTINHO: Correct.

8 JUDGE AKOPCHIKYAN: Thank you, Mr. Coutinho. I
9 don't have any further questions for FTB.

10 Mr. McCarthy, it's now your turn to rebut FTB's
11 argument and give a final statement. You have 5 minutes.
12 Please proceed when you're ready.

13 MR. MCCARTHY: Okay. Thank you.

14

15 CLOSING STATEMENT

16 MR. MCCARTHY: One thing we have all in common is
17 common sense. The Franchise Tax Board was created to
18 improve tax collection. Part of that creation is built on
19 human imperfection, not human perfection. The human
20 process in collection process of taxes is a work in
21 progress. The facts discussed in this action demonstrate
22 that mistakes were made, both through the FTB pay portal
23 and the taxpayer.

24 I submit that the taxpayer made a good faith
25 effort to pay taxes when due and resubmitted payments when

1 discovered an error had occurred. Respectfully, the
2 penalty of over \$2,000 for this mistake was an insult to
3 injury. We're not asking for any returned interest. So
4 the issue that I had previously asked for in terms of
5 interest, I don't want the interest. I'd like to get the
6 abatement of the penalty.

7 What we are asking for is understanding that
8 mistakes occur beyond one's control and request a refund
9 to the tax penalty under the circumstances. And aside and
10 what is also noteworthy, the IRS, whose rules you take
11 into consideration when you're creating taxes, applies the
12 first-time abatement under these circumstances. However,
13 taxpayer is aware that California does not apply the same
14 standard. Their standard is human perfection.

15 Thank you.

16 JUDGE AKOPCHIKYAN: Thank you, Mr. McCarthy for
17 your presentation.

18 Let me turn to my Panel member for final
19 questions.

20 Judge Brown, do you have any questions for either
21 party?

22 JUDGE BROWN: No, I do not. Thank you.

23 JUDGE AKOPCHIKYAN: Thank you, Judge Brown.

24 Judge Kwee, any questions for either party?

25 JUDGE KWEE: I think I do have a question for the

1 Franchise Tax Board. So supposing that the letter was
2 prematurely sent on February 8th, the day before the
3 Notice of Action, but it was returned, and then it was
4 resubmitted by the carrier, that would have -- that had to
5 have been after February 8th because of the time, you
6 know, to return and send it back would FTB -- if we were
7 to find that it was returned and then resent, would FTB
8 still contend that it was premature, or would there be a
9 basis for accepting it on the basis that when it was
10 resent it was after the February 9th Notice of Action?

11 MR. COUTINHO: If -- sorry. I apologize,
12 Judge Kwee. If OTA's position that Appellants' appeal
13 letter was submitted after the February 9th, 2021,
14 deadline or the date of the Notice of Action, then it
15 would be within the 90 days prescribed under Revenue &
16 Taxation Code 19324. I apologize if that didn't answer
17 your question. I can clarify.

18 JUDGE KWEE: Oh, yes. I was -- I was just saying
19 so if they had originally sent it February 8th and it was
20 returned to them, say, on the 10th, and then the mail
21 carrier resent it in -- resent it at that time, FTB would
22 consider that as timely within the 90-day period?

23 MR. COUTINHO: FTB doesn't have any information
24 of -- I don't know Government Code Section 11 -- 11103
25 states it's the date that is attached -- that's shown on

1 the canceled receipt of a letter sent by the taxpayer.
2 And so there's nothing in the record regarding that it was
3 sent by the mail carrier or taxpayer after that date.
4 However, if the OTA does take the position that it was
5 sent after the February 9th, 2021 date and presumably
6 within the 90 days prior to May 10th, 2021, then it would
7 meet the statutory provisions under Revenue & Taxation
8 Code 19324.

9 JUDGE KWEE: Thank you. I think that answers my
10 question. I have no further questions.

11 JUDGE AKOPCHIKYAN: I do have one final question
12 for FTB. Do you think it's possible that the date
13 February 9th on the Notice of Action was a typo and, in
14 fact, it was sent to Appellant on a prior date?

15 MR. COUTINHO: I have no information that was a
16 typo on the Notice of Action that it could possibly be
17 sent prior to the date listed of February 9th, 2021.

18 JUDGE AKOPCHIKYAN: Okay. Thank you,
19 Mr. Coutinho.

20 I don't have any further questions for either
21 party. Does either party have any questions before we
22 conclude the hearing?

23 MR. MCCARTHY: No.

24 MR. COUTINHO: No.

25 JUDGE AKOPCHIKYAN: Hearing none, we're ready to

1 conclude the hearing.

2 This case is submitted on February 23, 2023, and
3 the record is now closed.

4 I want to thank the parties for their
5 presentation today and Mr. McCarthy for his testimony.
6 The Judges will meet and decide this case based on the
7 arguments and evidence presented to the Office of Tax
8 Appeals. We will issue our written decision no later than
9 100 days from today.

10 This concludes the last hearing for today. Thank
11 you all for your participation. Take care.

12 (Proceedings adjourned at 1:31 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyn 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 6th day
of March, 2023.

ERNALYN M. ALONZO
HEARING REPORTER