

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
M. FUMAGALLI and R. FUMAGALLI,) OTA NO. 22039828
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Friday, February 24, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:36 a.m. and concluding at 9:58 a.m. on
Friday, February 24, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Administrative Law Judge: ALJ CHERYL AKIN

For the Appellant: M. FUMAGALLI
A. REES

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

NOEL GARCIA
NANCY PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-4 were received at page 8.)
(Department's Exhibits A-R were received at page 10.)

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1 California; Friday, February 24, 2023

2 9:30 a.m.

3
4 JUDGE AKIN: We are opening the record in the
5 Appeal of Fumagalli, OTA Case Number 22039828. This
6 matter is being held electronically before the Office of
7 Tax Appeals. Today's date is -- excuse me -- Friday,
8 February 24th, 2023, and the time is approximately
9 9:36 a.m.

10 My name is Cheryl Akin. I am the Administrative
11 Law Judge who will be conducting the hearing today and
12 deciding this appeal. This case is being heard by a
13 single Administrative Law Judge under the Office of Tax
14 Appeals Small Case Program.

15 As a reminder, the Office of Tax Appeals is not a
16 court. It's an independent appeals body. The office is
17 staffed by tax experts and is independent of the State tax
18 agencies, including the Franchise Tax Board. Because
19 Office of Tax Appeals is separate and independent from
20 Franchise Tax Board, the only information I have and will
21 consider is the argument and evidence that have been
22 submitted to Office of Tax Appeals by the parties.

23 The written opinion for this appeal will be based
24 on the briefs the parties have submitted to the Office of
25 Tax Appeals, the exhibits that will be admitted into

1 evidence today, and the arguments presented at the
2 hearing. I have read all the briefs and exhibits, and I
3 will remind everyone that as an Administrative Law Judge
4 in this case, I do not engage in ex parte communication
5 with either party.

6 With that, let's move on to party introductions
7 and have each party introduce themselves for the record.
8 I'd like to start with the Appellants, please.

9 Ms. Rees, if you're there could you -- if we
10 could unmute Ms. Rees and Ms. Fumagalli, I'd like to ask
11 them to introduce themselves.

12 MS. REES: Yeah. I'm speaking for Martina
13 Fumagalli. My name is Aggie Rees, and I was here in the
14 last session.

15 JUDGE AKIN: Okay. And Ms. Rees, is either
16 Appellant with you today?

17 MS. FUMAGALLI: Yes. I'm here.

18 MS. REES: Yes. She's here with me.

19 JUDGE AKIN: Okay. Ms. Fumagalli, could you also
20 state your name for the record.

21 MS. FUMAGALLI: Yes. My name is Martina
22 Fumagalli.

23 JUDGE AKIN: Okay. Thank you.

24 And Franchise Tax Board.

25 MR. GARCIA-ROSENBLUM: Thank you. My name is

1 Noel Garcia-Rosenblum for Respondent Franchise Tax Board.

2 MS. PARKER: I'm Nancy Parker with the Franchise
3 Tax Board for Respondent.

4 JUDGE AKIN: Okay. Thank you.

5 Judge Akin speaking. As confirmed at the
6 prehearing conference and in my minutes and orders,
7 following that conference, the issues to be decided in
8 this appeal are one, whether Appellants have shown error
9 in Franchise Tax Board's proposed assessments for the 2009
10 and 2010 tax years, which were based on a final federal
11 determination. I'd note that this first issue also
12 includes the issue of the timeliness of FTB's actions for
13 2009 and 2010 tax years under the applicable statute of
14 limitations; and then issue two is whether Appellant's
15 have established a basis for the abatement of interest.

16 Is this consistent with the parties'
17 understanding of the issues to be decided in this appeal?
18 I'll start with Appellants.

19 So Ms. Rees?

20 MS. REES: Yes. I'm sorry. What was that again?

21 JUDGE AKIN: I just wanted to confirm that the
22 issue statement that I just read was consistent with your
23 understanding of the issues to be decided in this appeal.

24 MS. REES: Yes.

25 JUDGE AKIN: Okay. Thank you.

1 And as a reminder, please state your name before
2 speaking. I request that, especially, since we don't have
3 a visual of you. So our stenographer, in order to
4 properly identify who is speaking, needs to know which of
5 the two of you are speaking.

6 MS. REES: Aggie Rees speaking and yes, I
7 understood what you said.

8 JUDGE AKIN: Perfect. Thank you.

9 And Franchise Tax Board, was this consistent with
10 your understanding of the issues in this appeal?

11 MR. GARCIA-ROSENBLUM: This is Noel
12 Garcia-Rosenblum and yes, that's correct.

13 JUDGE AKIN: All right. Thank you.

14 I'd like to move next to the evidence. It looks
15 like Appellant submitted four exhibits, which Office of
16 Tax Appeals labeled Appellants Exhibits 1 through 4. At
17 the prehearing conference, Franchise Tax Board indicated
18 that they did not have any objections to these exhibits.
19 As such, Appellants' Exhibits 1 through 4 are now admitted
20 into the evidentiary record without objection.

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

23 Franchise Tax Board submitted 18 exhibits, which
24 were labeled Franchise Tax Board's Exhibits A through R.
25 In my prehearing conference minutes and orders, Appellants

1 were asked to review the Franchise Tax Board's exhibits
2 and indicate by February 9th whether Appellants had any
3 objections to these exhibits.

4 On February 9th Appellants did provide a document
5 stating that they object to the appeal for the 2009 and
6 2010 tax years, arguing that the statute of limitations
7 has expired, and that Franchise Tax Board is harassing
8 Appellants. While I did receive and understand this
9 objection, I wanted to note that this objection really
10 does not go to the admissibility of Franchise Tax Board's
11 exhibits, which was what I was requesting of Appellants in
12 my minutes and orders.

13 I would note that ultimately the timeliness of
14 Franchise Tax Board's actions is one of the issues that I
15 will ultimately be deciding in this appeal. Because this
16 objection really does not go to the admissibility of
17 Franchise Tax Board's proposed exhibits, I am planning on
18 overruling that objection and admitting the exhibits. But
19 I wanted to check with Appellants first and see if there's
20 any questions about that.

21 Ms. Rees?

22 MS. REES: No. We just want to make sure that
23 Franchise Tax does not think that the time limitation is
24 expired, and they still can come after us after 10 years.

25 JUDGE AKIN: Okay. Great. I would note that

1 feel free present that as part of your presentation, and I
2 will consider that in the decision that I ultimately make
3 in this appeal. So with that, Franchise Tax Board's
4 Exhibits A through R are now admitted into the evidentiary
5 record.

6 (Department's Exhibits A-R were received in
7 evidence by the Administrative Law Judge.)

8 All right. Finally, before I begin with the
9 parties' presentations, I did want to go quickly over the
10 order of the proceedings and the time estimates for today.
11 So it is my understanding that neither party intends to
12 call any witnesses. Is this still correct?

13 Let me start with Ms. Rees.

14 MS. REES: Yes, correct.

15 JUDGE AKIN: Okay.

16 And Franchise Tax Board?

17 MR. GARCIA-ROSENBLUM: Noel Garcia-Rosenblum.

18 That's correct.

19 JUDGE AKIN: Okay. Thank you.

20 I noted in my minutes and orders that Appellants
21 will begin and will have 30 minutes for their
22 presentation. Following Appellants' presentation, I will
23 ask any questions I have, if I have any, of Appellants.
24 Following that, Franchise Tax Board will have 10 minutes
25 for its presentation. Following FTB's presentation, I'll

1 ask any questions I may have of Franchise Tax Board before
2 turning it back to Appellant for a closing, which we have
3 allotted five minutes for. Again, after Appellants
4 closing, I will ask any final questions I may have of
5 either party before concluding the hearing.

6 Are there any questions about the general process
7 before I turn it over to Appellants to make their
8 presentation. Ms. Rees?

9 MS. REES: No.

10 JUDGE AKIN: And Franchise Tax Board, any
11 questions?

12 MR. GARCIA-ROSENBLUM: Noel Garcia-Rosenblum. No
13 questions.

14 JUDGE AKIN: Okay. Then we are ready to proceed.

15 Ms. Rees, you and/or Ms. Fumagalli have 30
16 minutes and may begin when you are ready.

17

18 PRESENTATION

19 MS. REES: Yes, I wanted to know -- my name is
20 Aggie Rees. I wanted to know on what basis Franchise Tax
21 after 10 years came back saying that we have not paid, and
22 the statute of limitations is long gone. It's only we
23 have 3 to 4 years to keep our records, and we don't have
24 anything. We have no recollection that we had not paid
25 our taxes, and everything was paid at the time. For now,

1 we don't have any records.

2 So Franchise Tax Board should not have a case
3 whatsoever, and that's -- I don't know on what basis they
4 want money or proof. We can't keep our records that long,
5 and it's not required.

6 JUDGE AKIN: Okay. This is Judge Akin speaking.
7 Does that conclude your presentation, or was there more
8 that you wanted to present before I turn it over to
9 Franchise Tax Board to present?

10 MS. REES: No. That's it because we have no
11 record since we are not required by law to keep our
12 records for 10 years if Franchise Tax had made a mistake
13 and found these papers on their desk miraculously after 10
14 years.

15 JUDGE AKIN: Okay. Thank you. I don't have any
16 questions for Appellants at this time.

17 So if that concludes Appellants presentation, I
18 will turn it over for -- excuse me -- over to Franchise
19 Tax Board for its presentation. I will note that
20 Appellants will be permitted a chance to respond during a
21 closing that will follow Franchise Tax Board's
22 presentation. So with that, let me turn it over to
23 Franchise Tax Board for its preparation.

24 You have 10 minutes and may begin when you are
25 ready.

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MR. GARCIA-ROSENBLUM: Thank you.

PRESENTATION

MR. GARCIA-ROSENBLUM: Good morning. My name is Noel Garcia-Rosenblum and I, along with my co- counsel Nancy Parker, represent Respondent Franchise Tax Board in this matter.

There are two issues before you today on appeal. The first issue is whether Appellants have established error in Respondent's proposed assessments for the 2009 and 2010 tax years, which are based on federal assessment. The second issue is whether there's any basis for Respondent to abate interest.

In this case, Respondent received information from the Internal Revenue Service or IRS indicating that the IRS had reviewed the Appellants' 2009 and 2010 tax returns and disallowed various expenses claimed on those returns resulting in an increased federal tax liability.

Accordingly, Respondent made corresponding adjustments as demonstrated and its Notices of Proposed Assessments for the 2009 and 2010 tax years, disallowing employee business expenses and car and truck expenses, resulting in additional tax due in the amounts of \$1,214 and \$1,000 for the 2009 and 2010 tax years respectively.

Revenue & Taxation Code Section 18622 requires

1 taxpayers to concede the accuracy of federal
2 determinations or state wherein the determinations are
3 erroneous. Under Todd V. McColgan, it is well-settled
4 that a deficiency assessment based on federal changes is
5 presumed to be correct, and the taxpayer bears the burden
6 of proving error when he or she challenges the validity of
7 Respondent's determinations.

8 Here, Appellants presented two arguments in
9 contention of Respondent's proposed assessments for the
10 2009 and 2010 tax years. First, during their protest,
11 Appellants claimed that amended tax returns were filed
12 with the IRS, which result in both the federal and
13 California tax liabilities for the years at issue.
14 However, Appellants have not provided any evidence
15 indicating that amended returns were filed with the IRS
16 throughout the protest or appeal proceedings.

17 And Appellant's federal account transcripts
18 included with Respondent's opening brief at Exhibits K and
19 L do not reflect that an amended return had ever been
20 filed with the IRS for either year, nor do they indicate
21 that the IRS made any subsequent adjustments to its
22 assessments.

23 Appellants' second argument is that Respondent's
24 assessments are unreasonable due to length of time since
25 the Notice of Proposed Assessments were issued. Under the

1 general statute of limitations provided under Revenue &
2 Taxation Code Section 19057 subsection (a), Respondent is
3 required to mail proposed deficiency assessments to a
4 taxpayer within four years after the filing date of a
5 taxpayer's return.

6 In this case, Appellants 2009 and 2010 tax
7 returns were filed on April 13th, 2010, and April 15th,
8 2011, respectively, require Respondent to issue its
9 deficiency assessments by April 13th, 2014, and
10 April 15th, 2015, for each of years at issue.

11 Respondent's Notices of Proposed Assessment were issued on
12 January 15th, 2014, for both tax years, well within the
13 statute of limitations period to propose a deficiency
14 assessment set forth under Section 19057.

15 Therefore, because Respondent timely mailed its
16 proposed assessments within the statute of limitations
17 period and Appellants have failed to satisfy their burden
18 of proving error in Respondent's assessments or the
19 federal adjustments on which the assessments are based,
20 Respondent's proposed assessments should be sustained.

21 The second issue of this appeal is whether
22 there's any basis for Respondent to abate interest. Taxes
23 are due and payable as of the original due date of a
24 taxpayer's return. And if taxes are not paid when they
25 are due, Revenue & Taxation Code Section 19101 provides

1 for the charging of interest on the resulting balance
2 compounded daily.

3 Interest is not a penalty, but rather is
4 compensation for the use of money after it should have
5 been paid to the State. The imposition of interest is
6 mandatory, and there's no reasonable cause exception
7 except where interest abatement is specifically authorized
8 under the law. In certain circumstances, Respondent may
9 abate interest pursuant to Revenue & Taxation Code
10 Section 19104 if the interest is attributable to an
11 unreasonable error or delay by Respondent in the
12 performance of a ministerial or managerial act.

13 Once Respondent makes an interest abatement
14 determination, the Office of Tax Appeals only has limited
15 jurisdiction under Section 19104 subsection (b) (2) to
16 determine whether Respondent's failure to abate interest
17 was an abuse of discretion. Here, as stated in its
18 opening brief, Respondent reviewed its records and
19 identified two delays supporting the total interest
20 abatement period of approximately six years and seven
21 months. However, apart from these two periods, the
22 imposed interest for the remaining time period was proper
23 and should be sustained.

24 I'm happy to answer any questions you may have.
25 Thank you.

1 JUDGE AKIN: Okay. Thank you,
2 Mr. Garcia-Rosenblum. I did have one question for
3 Franchise Tax Board. I wanted to ask if Franchise Tax
4 Board could please explain, you know, why there was such a
5 delay in the processing of Appellants protest. So it
6 looks to me like Appellants protested in March of 2014,
7 but I don't see any action taken until November of 2020.
8 And then the Notices of Action weren't issued until
9 January of 2022. So I'd just like to ask if there is any
10 reason for that delay.

11 MR. GARCIA-ROSENBLUM: Yes. This is Noel
12 Garcia-Rosenblum. Unfortunately, the record is silent on
13 that for the work performed. During their protest
14 Appellants claimed that they filed amended tax returns
15 with the IRS which would resolve the issue with both the
16 federal tax liability and the State tax liability or the
17 proposed assessment.

18 So when Respondent acknowledged the Appellants'
19 protest, they allowed time for the Appellants' amended
20 return to process so that they could show that the IRS
21 either accepted an amended return or changed their own
22 assessment. Unfortunately, Appellant never sent any
23 information to Respondent, and Respondent never followed
24 up on Appellant. So the reason for the interest abatement
25 is after about a year Respondent should have followed up

1 with Appellant to check the status of their amended return
2 or just affirm their assessment.

3 JUDGE AKIN: Okay. Thank you for the
4 explanation. I don't have any additional questions at
5 this time.

6 So I think at this point I can turn it back to
7 Appellant for their closing statement.

8 Ms. Rees, I believe we allotted 5 minutes for
9 your closing. But because you didn't use all of the time
10 for your presentation, if you do need to go a little
11 longer, that would be okay. But at this point you can
12 present your closing and may begin when you're ready.

13

14 CLOSING STATEMENT

15 MS. REES: My name is Aggie Rees, and I object to
16 Franchise Tax Board -- I'm sorry I forgot his name -- and
17 his presentation. If they, according to them, they mailed
18 us papers in 2014, they never followed up. They never
19 send them because we never got it in 2014, never received
20 anything otherwise, we would have persisted. Therefore,
21 even that, whatever they -- still, it's past the
22 limitation -- statute of limitations by law, and we are
23 not liable for any of their errors.

24 According to us, we had paid what we owed at the
25 time when we settled everything with IRS that was paid to

1 Franchise Tax also. They -- I can't go back to my bank
2 and say, hey, can I have records of 10 years ago. They
3 tell me to get lost lady. And unfortunately, that's not
4 how it works. But if Franchise Tax Board force people
5 like that, that is not correct, and we object to that.

6 So I'm sorry but this case needs to be dismissed.

7 JUDGE AKIN: Okay. Thank you, Ms. Rees.

8 MS. REES: One thing. What is there?

9 JUDGE AKIN: I apologize. I did not quite catch
10 what you said there. Could you repeat?

11 MS. REES: I'm sorry. What prevented them from
12 sending any correspondence during all these years?

13 JUDGE AKIN: Okay. Thank you, Ms. Rees. Does
14 that conclude your closing statement?

15 MS. REES: Yes.

16 JUDGE AKIN: Okay. Thank you so much for your
17 presentation today.

18 I don't have any additional questions for either
19 party. So I do believe we are ready to conclude the
20 hearing today. Before I do, let me just check with either
21 party to see if there's anything that either would like to
22 add before I conclude the hearing today.

23 I'll start with Ms. Rees.

24 MS. REES: No. Because like I said, by law the
25 statute of limitations is past and Franchise Tax made the

1 mistake. We can't pay for their mistakes. I'm sorry. We
2 are taxpayers. We can't be at their mercy whenever they
3 feel like coming back to us.

4 JUDGE AKIN: Okay. Thank you, Ms. Rees.

5 Franchise Tax Board, was there any final thing
6 that you wanted to add before I conclude the hearing
7 today?

8 MR. GARCIA-ROSENBLUM: Noel Garcia-Rosenblum for
9 Respondent. Nothing more to add.

10 JUDGE AKIN: Okay. Thank you.

11 We are ready to conclude the hearing. I'd like
12 to thank both parties for their presentations today. I
13 will decide this case based upon the arguments and the
14 evidence in the record and will issue a written decision
15 no later than 100 days from today. The case is now
16 submitted, and the record is now closed.

17 This concludes this hearing. The next hearing
18 will begin at approximately 10:30 a.m. Again, thank you
19 to both parties for making it here today and for your
20 presentations. I hope everyone has a wonderful day.
21 Thank you.

22 (Proceedings adjourned at 9:58 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 March, 2023.

ERNALYN M. ALONZO
HEARING REPORTER