

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
SQUARE, INC.,) OTA NO. 20025856
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, March 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 1:44 p.m. and concluding at 3:37 p.m. on
Friday, March 24, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ CHERYL AKIN

Panel Members: ALJ JOSHUA ALDRICH
ALJ ASAF KLETTER

For the Appellant: AMY SILVERSTEIN

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
MARGUERITE MOSNIER
KATIE FRANK

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-19 were received at page 7.)

(Department's Exhibits were received at page 8.)

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California; Friday, March 24, 2023

1:44 p.m.

JUDGE AKIN: So we are opening the record in the Appeal of Square, Inc., OTA Case Number 20025856. This matter is being held electronically before the Office of Tax Appeals. Today's date is Friday, March 24th, 2023, and the time is approximately 2:06 p.m.

My name is Cheryl Akin. I am the lead Administrative Law Judge for this appeal. With me today are Administrative Law Judges Asaf Kletter and Josh Aldrich. While I'm the lead Administrative Law Judge for purpose of conducting this hearing, all three Administrative Law Judges are coequal decision makers.

As a reminder, the Office of Tax Appeals is not a court. It is an independent appeals body. The office is staffed by tax experts and is independent of the State's taxing agencies, including the Franchise Tax Board. Because the Office of Tax Appeals is a separate and independent agency, the only information we have and will consider is the argument and evidence that the parties have submitted in this appeal to the Office of Tax Appeals.

With that, let me please have the parties introduce themselves for the record, starting with

1 Appellants.

2 MS. SILVERSTEIN: Good afternoon. My name is Amy
3 Silverstein, and I'm representing Square today.

4 MR. MEDINA: Good afternoon. My name is Mark
5 Medina. I'm here on behalf of Square today as well.

6 JUDGE AKIN: And Franchise Tax Board.

7 MS. MOSNIER: Good afternoon. Marguerite Mosnier
8 for Respondent Franchise Tax Board.

9 MS. FRANK: Hello. Katie Frank also with
10 Franchise Tax Board.

11 JUDGE AKIN: Okay. Thank you. Judge Akin
12 speaking. As confirmed at the prehearing conference and
13 in my minutes and orders following the prehearing
14 conference, the issue to be decided in this severed appeal
15 today is whether OTA has jurisdiction to hear and decide
16 the substantive tax issue of whether Appellant was a
17 financial corporation for California Franchise Tax
18 purposes for the 2013 and 2014 tax year.

19 The substantive tax issue of whether Appellant
20 was a financial corporation for these tax years has been
21 severed from this jurisdictional issue and will be decided
22 at a later time if OTA determines that it has jurisdiction
23 to decide that issue. I just wanted to check with the
24 parties and make sure that this is consistent with their
25 understanding of the issue for today's hearing.

1 Ms. Silverstein?

2 MS. SILVERSTEIN: Yes, that's correct.

3 JUDGE AKIN: Okay. And Ms. Mosnier?

4 MS. MOSNIER: Yes, that's correct.

5 JUDGE AKIN: Okay. Thank you.

6 With that, let's move onto the evidence in this
7 appeal. I'd like to start with Appellant's exhibits.
8 Appellant has submitted 19 exhibits which have been
9 labeled as Appellant's Exhibits 1 through 19. At the
10 prehearing conference, Franchise Tax Board indicated that
11 they do not have any objections to these exhibits, and
12 Appellant's Exhibits 1 through 19 are now admitted into
13 the evidentiary record without objection.

14 (Appellant's Exhibits 1-19 were received
15 in evidence by the Administrative Law Judge.)

16 Franchise Tax Board has submitted four exhibits
17 which it labeled FTB's Exhibits A through D. In my
18 prehearing conference minutes and orders, Appellant was
19 asked to review Franchise Tax Board's exhibits and
20 indicate in writing whether Appellant had any objections
21 to these exhibits. No written objections were received,
22 but I did want to just quickly check in with Appellant to
23 verify that there are not any objections to Franchise Tax
24 Board's proposed Exhibits A through D.

25 Ms. Silverstein?

1 MS. SILVERSTEIN: We have no objections.

2 JUDGE AKIN: And I think I'm having a bit of
3 delay, but I think you said no objections?

4 MS. SILVERSTEIN: Correct. No objections.

5 JUDGE AKIN: Okay. Thank you. Franchise Tax
6 Board's Exhibits 1 through 4 [sic] are now admitted into
7 the evidentiary record without objection.

8 (Department's Exhibits A-D were received in
9 evidence by the Administrative Law Judge.)

10 All right. Finally, before we get to the
11 parties' presentations, I'd like to quickly go over the
12 time estimates and the order of the proceeding today. It
13 is my understanding that neither party intends to present
14 any witness testimony.

15 Is that still correct, Ms. Silverstein?

16 MS. SILVERSTEIN: That's correct.

17 JUDGE AKIN: Okay. And Ms. Mosnier?

18 MS. MOSNIER: Yes, that's correct. And could I,
19 Judge Akin, just to bring up when you just admitted FTB's
20 exhibits into the record, you identified them as Exhibits
21 1 through 4 rather than Exhibits A through D. I know
22 that's just a technicality, but if you wanted to correct
23 it, I wanted to bring that to your attention. Thank you.

24 JUDGE AKIN: Thank you. No. I do appreciate
25 that. So this is to clarify that Appellant -- excuse

1 me -- that Franchise Tax Board's Exhibits A through D are
2 now admitted into the evidentiary record without
3 objections. Thank you. I appreciate that.

4 All right. So in my minutes and orders I
5 indicated that Appellant would have 45 minutes for its
6 presentation. Following Appellant's presentation, the
7 Panel of Administrative Law Judges will give an
8 opportunity to ask any questions they may have for
9 Appellant. Following that, Franchise Tax Board will have
10 30 minutes for its presentation. I will again turn it
11 over to my Panel to see if there's any questions for
12 Franchise Tax Board.

13 After that, it will be turned back to Appellant
14 for a closing or rebuttal statement, and 15 minutes has
15 been allotted for that. Following that rebuttal or
16 closing, I will again check with my Panel to see if there
17 are any final questions for either party before concluding
18 the hearing. Any questions before I turn it over to
19 Appellants for their presentation? Seeing --

20 MS. SILVERSTEIN: I have none. No, I have none.

21 JUDGE AKIN: Seeing none, I will turn it over to
22 Appellant.

23 Ms. Silverstein, you may begin when you're ready,
24 and you have 45 minutes for your presentation.

25 MS. SILVERSTEIN: Thank you.

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1 acted like what they did was very routine when they did
2 it, now they argue that it was invalid. But there's no
3 authority confirming this. They haven't cited any
4 statute, any regulation, any rule, any internal memo or
5 manual. They simply assert it, and they want you to take
6 their word.

7 The OTA case is cited by the Franchise Tax Board
8 shed no light on this question either. None of them
9 involve the Franchise Tax Board setting up a refund claim
10 procedure like this. In Appeal of C. Wright, the
11 Franchise Tax Board denied a refund claim that didn't
12 exist. So of course, that was a null act. In Cornerstone
13 Compounding Pharmacy, the taxpayer filed a refund claim
14 while it was suspended and later it was revived, and so
15 the refund claim was deemed valid.

16 In MJK Real Estate Fund II, LLC, the taxpayer
17 appeared to have filed the refund claim before they made
18 payment. And that was perfected when they did make the
19 payment effectively. So none of these involve the same
20 facts as this situation, and none of them are on point.
21 And finally, the documents and communications indicate
22 that the FTB did have authority for what they did.

23 Multiple supervisors were involved. Over and
24 over, they confirm that the proceeding was a refund claim.
25 There wasn't any handwringing or concern. They didn't

1 debate whether they did or did not have authority to do
2 it. They just did it. It looked very routine, as I said.
3 And it certainly wasn't obvious to the Franchise Tax Board
4 Legal Division that there was a problem. We filed our
5 appeal or our brief in November of 2020, and it wasn't
6 until seven months later that they alerted all of us that
7 there might be a problem.

8 So all signs point to the refund claim being
9 valid. And in summary, the Franchise Tax Board properly
10 bifurcated the financial corp issue. They had authority
11 to assign it \$800. They denied Square's claim. We timely
12 appealed, and the OTA has jurisdiction to decide the
13 financial corporation issue. Now, only if you disagree
14 with that and think the FTB did not have authority to do
15 what they did, then you need to reach the estoppel issue.

16 And in that case, the Franchise Tax Board mislead
17 and induced Square not to protest the NPACA. And so the
18 FTB is estopped from arguing that Square is barred from
19 OTA review because it didn't file that protest. There's
20 no dispute that if they had filed the protest of the
21 NPACA, then this case would properly be before the OTA.

22 The leading case on this is McKnight, and we
23 briefed it pretty extensively in both of our briefs. It
24 has virtually the same facts as this case. In both cases
25 the Franchise Tax Board affirmatively induced the taxpayer

1 to skip a procedural step. It wasn't a mere instruction
2 that the taxpayer read and said they relied on. It was an
3 affirmative act by the Franchise Tax Board directed
4 specifically at the taxpayer.

5 So in McKnight the Franchise Tax Board proposed
6 an early termination of McKnight's refund claim to
7 expedite resolution in court. McKnight took the offer and
8 was induced not to provide more information regarding its
9 claim. So the court decided that the FTB was estopped
10 from arguing that McKnight's suit was barred because he
11 didn't provide that additional information. He was
12 induced by the Franchise Tax Board not to provide it.

13 We cited many cases in our briefs involving
14 procedural estoppel, and what this shows is that this is
15 common. It's not specific to tax cases, and McKnight is
16 not an outlier. There are four requirements for estoppel,
17 and four of them are met here.

18 So first, the party be estopped must be apprised
19 of the facts. The facts here are that the Franchise Tax
20 Board -- if the Board were to -- if the court were to
21 decide this, Franchise Tax Board didn't really bifurcate
22 the financial corporation issue and assign it the \$800
23 because FTB didn't have the authority to do that. Now,
24 not surprisingly the Franchise Tax Board hasn't contested
25 this. The party is the FTB. So if it's true that they

1 didn't have authority to setup the refund structure, then
2 they knew that. That's essentially what they're arguing
3 here. So that requirement is satisfied.

4 Second, the FTB must intend that its conduct
5 would be acted on, or at least its actions had to have
6 given Square the right to believe that that's what was
7 intended. This can't reasonably be contested either. The
8 FTB couldn't have been more clear about what they were
9 doing and what they wanted Square to do. They wanted to
10 complete the audit, to close it out, to proceed with a
11 refund claim, and to give Square all of its rights of
12 appeal. So it's very clear from the record that's what
13 they intended, and they wanted Square to do just what
14 Square did.

15 Third, the other part is that Square must have
16 been ignorant of the true state of the facts. And again,
17 that's why the FTB didn't actually setup this refund claim
18 procedure, and it didn't have the authority to do it. And
19 obviously Square didn't know that. It wouldn't have
20 proceeded that way if it knew. And it couldn't have
21 possible figured it out on its own because even FTB can't
22 cite and hasn't cited any legal authority as to why this
23 was barred. So the FTB -- Square clearly was ignorant of
24 these facts, if they are fact.

25 And finally, the party asserting estoppel,

1 Square, must rely upon the conduct to its injury. And
2 this is the detrimental reliance requirement. The record
3 is very clear again that Square relied on the Franchise
4 Tax Board. Square didn't protest the NPACA because the
5 FTB said it would continue processing the financial corp
6 issue as a claim. And it said the -- FTB said that Square
7 would have all of its rights. And this is clearly in the
8 documents that we presented with our brief.

9 So they relied on the FTB and then the detriment
10 or injury is that according to the FTB Square is barred
11 from having its -- having the substantive issue heard by
12 the OTA. We lost our appeal rights. That's the injury.
13 So all four requirements for procedural estoppel are
14 satisfied.

15 When estoppel is against the government, there's
16 one last requirement. It's the policy prong. And as
17 McKnight said, it is that the injustice, which would
18 result from not applying estoppel, justifies any effect
19 upon public interest or policy which would result from
20 applying estoppel. So this is a balancing test. This is
21 the requirement where you would consider the level of harm
22 to Square, but only if there are countervailing public
23 policy considerations. And the Franchise Tax Board has
24 not identified a single one.

25 They haven't identified any reasons, other than

1 the technical ones, that the financial corp issue should
2 not be heard now. So there's nothing to balance harm
3 against. The balancing doesn't even come into play. And
4 to illustrate this, there's two public policy interest
5 that have been articulated as being potentially applicable
6 in tax cases.

7 One is protecting the fisc. And so that's like
8 not giving a refund that's not due. We're not trying to
9 get any refund that we're not due. We're just trying to
10 have our day in court. We're just trying to get a
11 hearing. So that consideration doesn't apply.

12 And then the other one is encouraging
13 administrative resolution of disputes, and that's like if
14 you proceed to court quickly and you don't go through the
15 exhaustion process. But as we demonstrated here -- this
16 is not disputed -- the Franchise Tax Board had ample
17 opportunity and did audit the financial corp issue. They
18 have all of the facts. And so, you know, if there was a
19 possibility of administrative resolution, you know, we --
20 we provided that possibility here. So that public policy
21 consideration doesn't come into play.

22 And last, I just want to submit that, actually,
23 public policy favors the OTA hearing this now. So they --
24 the legislature expressed its policy of having NOLs
25 decided at this point in time in a case by the OTA by

1 setting up the statutory right to appeal an NPACA and then
2 eventually get that to the OTA. So I would say that the
3 policy actually favors having this hearing now and not
4 making Square wait until there's a refund and going
5 through a claim for refund process.

6 And then the other reason that public policy
7 favors having this hearing now is efficiency and accuracy.
8 So this case dates back to 2013 and 2014. It's already
9 2023. The FTB wants us to wait until there's a refund
10 claim and go through that process to come back. But it's
11 better for all parties to have this substantive issue
12 heard now, first, because it's already teed up. The FTB
13 has gone through a full audit process. They have all of
14 the facts.

15 We filed an extensive opening brief on this
16 highly technical, highly factual issue. It's teed up
17 perfectly, and it's going to be more -- the result is
18 going to be more accurate if it's heard now rather than
19 waiting. It's already been ten years, waiting five years
20 or more. It's better for OTA to have the full set of
21 facts and to have them more quickly. So I would submit
22 that public policy actually favors having the OTA hearing
23 now.

24 I'm going to stop there and save my time for
25 rebuttal.

1 JUDGE AKIN: Okay. Judge Akin speaking. I just
2 want to make sure everyone can hear me okay. All right.
3 Great.

4 Thank you. And I'll note the extra time for your
5 rebuttal. And with that, let me turn to my Panel to see
6 if they have any questions for you.

7 Let me start with Judge Kletter. Any questions
8 for the Appellant?

9 JUDGE KLETTER: This is Judge Kletter. I do have
10 some questions, but I'll ask it actually after other Panel
11 members. Thank you.

12 JUDGE AKIN: And Judge Aldrich, any questions for
13 Appellant?

14 JUDGE ALDRICH: I may have questions for
15 Appellant, but I prefer to reserve until after FTB has
16 presented, if possible.

17 JUDGE AKIN: Not a problem. I will circle back
18 to everyone after both presentations.

19 I do have some questions. So let me just
20 organize my notes for one second. Okay. My first
21 question is, I couldn't entirely tell from the briefing,
22 but was 2013 the first year that Square was claiming to
23 meet the requirements to be a financial corporation?

24 MS. SILVERSTEIN: Yes. At least officially it
25 is.

1 JUDGE AKIN: Okay. I guess my follow up to that
2 then is, if this was the first year that Square was
3 claiming to meet the requirements to be a financial
4 corporation, I'm wondering how there could be any impact
5 to Appellant's net income or their net operating losses or
6 credit carry over items for the 2013 and 2014 tax years.

7 And to give you a little background on why I'm
8 asking this is it's because of the requirement in
9 Regulation Section 23183(b)(10), which requires that --
10 well, basically states that a corporation cannot change
11 its filing from a general corporation to a financial
12 corporation, basically, until its third year. You would
13 have to meet the requirements of the predominance test
14 based on the current years of gross income, along with the
15 preceding two years.

16 So if 2013 was the first year, I guess my
17 question is, would 2015 then be the first year that Square
18 could file as a financial corporation?

19 MS. SILVERSTEIN: Yeah. I guess I misunderstood
20 your question. We're aware of that requirement. And so
21 2013 is the first year that their claiming that it effects
22 their NOL. So I guess -- yeah. I think we're on the same
23 page in terms of factually they were a financial
24 corporation. Their business model hasn't changed, I guess
25 is the way to put it. So, factually, they would have been

1 a financial corporation. 2013 would be the first year
2 that their NOLs would be recomputed, if I think that's
3 what you're asking.

4 JUDGE AKIN: Yes. That is what I'm asking and
5 thank you for that clarification. I guess if I could have
6 you look at your Appellant's Exhibit Number 3, if you have
7 that handy, because I had a question about that as well.

8 MS. SILVERSTEIN: Can you tell me what it is
9 because I'm not sure.

10 JUDGE AKIN: Yeah. It is the October -- and
11 might get the exact date incorrect. It wasn't -- the
12 October letter where Square basically first asserts that
13 there potentially -- October 27th, 2017. It's the letter
14 where Square basically asserts for the first time that
15 they are potentially a financial corporation.

16 I can ask it a different way if --

17 MS. SILVERSTEIN: Okay. That might be helpful.
18 Yeah.

19 JUDGE AKIN: Okay. I guess my question is
20 looking at that document I see that Square explains that
21 99 and 98 percent of their gross receipts for 2013 and
22 2014 were the transaction-based revenues, which is what
23 Square contends were the financial, you know, qualifying
24 transactions. I guess I'm wondering if Square ever
25 provided Franchise Tax Board with information relating to

1 the two earlier? That would be the 2011 and 2012 tax
2 years.

3 MS. SILVERSTEIN: I don't have the full audit
4 record in front of me. I'm going to guess that they did,
5 but their business model hasn't changed. So those figures
6 have remained consistent. I mean, I can't say going, you
7 know, into the very present years. But throughout the
8 relevant years, those numbers have all been consistent.
9 So I -- I mean, factually, the data is the same. Is
10 that -- I don't know exactly what's in the record.

11 JUDGE AKIN: Okay. Understood. I think my next
12 question is did Square ever provide FTB with revised
13 computations of its net income for, you know, applying the
14 net operating loss carry forward for the 2013 and 2014 tax
15 years, you know, as they would be computed as a financial
16 corporation?

17 MS. SILVERSTEIN: Yeah. I mean, they don't have
18 income in these years, right. And so the issue is it's an
19 NOL issue. But yes, I do believe they provided
20 computations.

21 JUDGE AKIN: Okay. And just a follow up to that
22 as well. Did they then provide revised computations of
23 what the NOL carry forwards would be as of December 31st,
24 2014, if, you know, Square were allowed to file as a
25 financial corporation for the 2013 and '14 tax years?

1 MS. SILVERSTEIN: Again, I believe so. I don't
2 have the full audit record in front of me.

3 JUDGE AKIN: Okay. And then last question for
4 the time being. Thank you for your patience. I guess I
5 just would like to know the status of the 2016 audit. You
6 know, from Square's perspective, I will ask the same
7 question of Franchise Tax Board in a bit. I'm
8 specifically interested in the audit of Appellant's
9 Form 100X, you know the netted tax return claim for refund
10 for the 2016 tax year.

11 MS. SILVERSTEIN: Yeah. So the audit was
12 completed, and there was a Notice of Proposed -- NPACA
13 issued. We protested it timely, and it's in its beginning
14 stages, the protest.

15 JUDGE AKIN: Okay. So it's in the beginning
16 protest stages then?

17 MS. SILVERSTEIN: Yeah. It was assigned in
18 January, and the first letter went out in February.

19 JUDGE AKIN: Okay. That's all of the questions I
20 have for now. I know Judge Kletter had indicated that he
21 may have some questions after my questions. So let me
22 turn it to him to see if he has any questions at this
23 point.

24 JUDGE KLETTER: Yes. This is Judge Kletter. I
25 just have one question for Ms. Silverstein. Could you

1 please confirm whether Appellant filed the claim for
2 refund for the 2013 and 2014 tax years? And if so, please
3 direct me to which document in the record shows that
4 refund claim.

5 MS. SILVERSTEIN: The refund -- the refund claim
6 arose because the Franchise Tax Board treated the
7 proceeding as a refund claim. And all of the requirements
8 for a refund claim were in effect satisfied because we
9 made it clear, you know, what the basis for our position
10 is, you know, that Square is a financial corporation. And
11 that's rife throughout the record. FTB is on notice.
12 Claims for refund are -- the requirement is noticed,
13 essentially.

14 So there's not a document that says, you know,
15 that's signed by Square that says, you know, we hereby
16 request a refund on these grounds, but the FTB treated the
17 proceedings as a refund claim. And there's a letter from
18 the Franchise Tax Board confirming that's what they were
19 doing. It's in the record. It was around June of 2018.

20 JUDGE KLETTER: So this is Judge Kletter. Thanks
21 for clarifying that. So I just want to confirm. So for
22 the 2013 and 2014 tax year, you know, there was an NOL
23 issue but, you know, if they were treated as a financial
24 corporation, how would they be entitled to any refund for
25 the 2013 or 2014 tax years?

1 MS. SILVERSTEIN: Well, that was the basis of my
2 opening statement. Essentially, that the Franchise Tax
3 Board assigned the financial corporation issue \$800 and
4 proceeded to -- and then wrote a letter to Square saying
5 we are assigning this \$800 and treating the proceeding as
6 a refund claim.

7 When they audited it, they treated it as the
8 audit of a refund claim, and then they denied the refund
9 claim, and then we proceeded to appeal. Because they
10 assigned the financial corporation \$800, it's our position
11 that if we prevail on the financial corporation issue, we
12 are entitled to \$800 back. That's not the \$800 minimum
13 tax. It's necessarily this -- you know, it's a
14 different -- it was recast by the Franchise Tax Board.

15 So we would be entitled to a refund because of
16 the way the FTB set up the proceeding. And it's our
17 position too that the Franchise Tax Board had authority to
18 do this. They didn't, right. They didn't do it. They
19 didn't -- you know, they seemed to have done as a matter
20 of course. Every indication is that they had authority.
21 And they can't point to anything specific saying that they
22 were barred from doing this.

23 There doesn't seem to be any law any, you know,
24 internal policy procedure, legal memorandum, or anything
25 that says they're barred from doing this. From my

1 perspective they're just asserting that they couldn't do
2 it. It seems -- it's -- you know, the fact that they did
3 it and now can't say they don't have authority to do it
4 indicates to me that they did have the authority to do it.

5 JUDGE KLETTER: This is Judge Kletter. Thank
6 you, Ms. Silverstein. No further questions.

7 JUDGE AKIN: Okay. And checking one more time
8 with Judge Aldrich. Nothing at this time? You can just
9 give me a thumbs up if so.

10 Okay. Great. I think we are ready then to turn
11 it over to Franchise Tax Board for its presentation.

12 Ms. Mosnier, you have 30 minutes and may begin
13 when you are ready.

14

15 PRESENTATION

16 MS. MOSNIER: Good afternoon. Marguerite Mosnier
17 and Katie Frank for Respondent Franchise Tax Board.
18 Before I go on, can you all hear me okay? Thank you.

19 You've heard some of the relevant facts. Let me
20 perhaps fill in a little bit. We know that the Appellant
21 filed timely 2013 and 2014 returns. There are abbreviated
22 versions of them attached as FTB's Exhibits A and B. The
23 Appellant filed as a general corporation and reported and
24 paid the \$800 minimum franchise tax for both tax years.
25 FTB subsequently audited these tax years. And during the

1 audit, the Appellant asserted for the first time that it
2 was properly classified as a financial rather than a
3 general corporation for these tax years.

4 The corporate classification issue was not
5 decided in the audit. And near the conclusion of the
6 audit, FTB issued an audit issue presentation sheet or the
7 acronym AIPS. There's a copy enclosed as Exhibit D to
8 FTB's -- well, FTB's briefing Exhibit D. And FTB set out
9 what it believed were revised NOL and carry forward
10 numbers for these tax years.

11 The Appellant signed and noted its agreement with
12 revised numbers and returned the document to FTB. And FTB
13 subsequently issued a decision document at the conclusion
14 of audit titled "Notice of Proposed Adjust Carry Forward
15 Amount" or an NPACA. It is a protestable document.
16 Appellant did not protest it. FTB separately and
17 erroneously considered the corporate classification issue
18 as a refund claim for these tax years. It assigned a \$1
19 value to the 2013 year and a \$799 value to the 2014 year.
20 It considered the corporate classification issue, and on
21 November 18, 2019, issued a claim denial for both years.

22 The appeal -- this appeal lies from that decision
23 document, the claim denial letter. And OTA's jurisdiction
24 over this appeal rests on that Notice of Action solely on
25 the authority granted to hear the appeal based on that

1 document. As FTB will explain, that Notice of Action is
2 erroneous and is not a valid claim denial, and the OTA
3 lacks subject matter jurisdiction over the appeal. And
4 further, that the Appellant's equitable estoppel defense
5 is unpersuasive.

6 So turning first to the jurisdiction argument,
7 the OTA is a tribunal with limited jurisdiction. As it
8 noted in its 2019 precedential opinion Appeal of
9 Liljestrang Irrevocable Trust, its jurisdiction is limited
10 by statute and that pursuant to Board of Equalization's
11 decision in Appeal of Schillace a 1995 decision, an agency
12 cannot act in excess of jurisdictional limits that have
13 been conferred on it.

14 In general, the OTA's rules for tax appeals
15 Section 30103 subdivision (a)(3) confer subject matter
16 jurisdiction on OTA over appeals from claimed denials.
17 However, a timely filed appeal from a self-styled claim
18 denial is not by itself sufficient to confer jurisdiction
19 on the OTA. The Appellant's reliance on OTA's
20 precedential opinion Appeal of Cornerstone Compounding
21 Pharmacy, Incorporated, for that proposition is misplaced.
22 As OTA discussed in that opinion with citations to other
23 precedential OTA opinions, a taxpayer must establish the
24 existence of an overpayment. Which FTB will explain is an
25 impossibility for these tax years.

1 We know from two precedential opinions,
2 Liljestrand and the more recent 2022 precedential opinion,
3 MJK Real Estate Fund II, LLC, that OTA jurisdiction over
4 refund claim denials requires both a valid refund claim
5 and a claim denial, either actual or deemed. And
6 specifically in Liljestrand, the OTA found that no refund
7 claim had been filed, that no claim of overpaid tax had
8 been asserted and held a no jurisdiction, and it dismissed
9 the appeal.

10 The facts of MJK Real Estate are different, and
11 they yielded a different result. In that case, the OTA
12 found that the Appellant had filed a refund claim
13 asserting a zero-dollar tax liability as opposed to the
14 \$800 minimum tax that it had reported on its return and
15 had paid. In that case, OTA determined that the
16 requirements for denial had been satisfied and correctly
17 exercised jurisdiction over that appeal.

18 So to consider the facts in this case against
19 those in Liljestrand and in MJK Real Estate, we see that
20 they line up perfectly with those of Liljestrand. No
21 refund claim was filed in Liljestrand. We have just heard
22 the Appellant acknowledge it did not file a refund claim.
23 The requirements for a refund claim are set out in
24 Section 19322. A refund claim requires affirmative action
25 by a taxpayer.

1 The Appellant does not assert in response to
2 Judge Kletter's questions that it filed such document for
3 either tax year, and that somehow one was created by FTB's
4 consideration of an issue as a refund claim. That
5 argument finds no support in Section 19322. No claim was
6 filed. There is no claim evident in the record. That is
7 just like in Liljestrang. And no refund claim could be
8 filed because the Appellant reported and paid the minimum
9 tax owed.

10 To clear up Appellant's confusion about FTB's
11 authority and its mistake in having considered this issue
12 as a refund claim, we turn to Section 19301 of the Code,
13 which specifies first that Franchise Tax Board must
14 determine that there has been an overpayment on a
15 taxpayer's account for a tax year, and it proceeds to
16 direct that an overpayment may be credited and/or applied
17 as per the details in that statute.

18 So without the existence of an assertion of a
19 liability that is less than the liability originally
20 reported, there can be no overpayment, and there can be no
21 refund. These are not the facts of MJK Real Estate where
22 the OTA found that that Appellant had, in fact, asserted a
23 claim of less than \$800 because it asserted that it
24 revised its correct liability with zero dollars because it
25 was not subject to taxation by California at all.

1 The Appellant here is not making that claim. It
2 acknowledges that it is subject to taxation by California
3 and simply ultimately disputes whether that taxation
4 should be computed based on a classification as a
5 financial or a general corporation. Under either
6 classification for these tax years, the Appellant has an
7 \$800 tax liability. So it cannot state a claim for refund
8 for either year.

9 So what we see is that the facts line up with
10 Liljestrands and not MJK Real Estate. They require the
11 Liljestrands analysis, and these facts require a
12 determination in holding consistent with that in
13 Liljestrands, which there is no jurisdiction. The appeal
14 should be dismissed.

15 There is a more recent non-precedential opinion,
16 Appeal of Wright, also issued in 2021, that has facts that
17 are just like those before us. FTB issued a claim denial,
18 although no claim had been filed. OTA said in that
19 opinion that the Appellant did not file a claim for the
20 relevant tax year, and consequently there was no refund
21 claim for FTB to deny. The OTA specifically found that
22 the claim denial letter was an error and had no force or
23 effect.

24 The OTA held the evidence established error in
25 FTB's issuance of the claim denial letter, and the

1 disposition of the appeal was that the claim denial letter
2 is a nullity and should be of no force or effect. It's
3 exactly what we have before us today. The facts here are
4 the same as in Wright. They are the same as in
5 Liljestrang. No refund claim has been filed. No
6 overpayment of tax has been asserted. It is impossible
7 under Section 19301 to determine an overpayment on those
8 facts.

9 The OTA should apply the analysis -- the analyses
10 in Liljestrang and in Appeal of Wright and find first that
11 no refund claim has been filed for either tax year.
12 Second, that the November 18, 2019, claim denial was
13 issued in error, and the OTA should conclude that the
14 claim denial letter is a nullity, and that it lacks
15 subject matter jurisdiction over this appeal and dismiss
16 it.

17 To turn to the equitable estoppel argument raised
18 by the Appellant, a defense of equitable estoppel is not
19 applicable to this case. And it appears in Appellant's
20 briefing and in its argument today that the equitable
21 estoppel it is making, with respect to a decision document
22 that's not before the OTA; it appears to be raising this
23 defense to an argument it believed FTB would make that FTB
24 has not made and is not making, that it had not exhausted
25 its administrative remedies with respect to the NPACA.

1 In other words, the equitable estoppel argument
2 is a defense to Square's failure to have protested and
3 subsequently appealed the NPACA, but the NPACA is not
4 before the OTA. It is the claimed denial letter, not the
5 NPACA that is the subject of this appeal. And subject
6 matter jurisdiction rises or falls on the authority
7 conferred by that document alone. And the Appellant's
8 argument in Footnote 7 of its first jurisdiction brief
9 that OTA can consider the NOA that was filed in this
10 appeal as a Notice of Action denying a protest of the
11 NPACA is not supported by law.

12 The case the Appellant cites, a 1975 Board of
13 Equalization opinion Appeal of Peringer is factually
14 distinguishable. In that case, Mr. Peringer filed a
15 nonresident return for the year at issue, and he had
16 calculated both a liability as a nonresident, a lower
17 liability, and a higher liability as a California
18 resident. And he remitted the higher amount along with
19 his return and indicated the higher amount was paid under
20 protest because he really was a nonresident that year.

21 FTB subsequently reviewed the return and
22 erroneously determined that the lower rather than the
23 higher liability had been paid and issued a Notice of
24 Proposed Assessment for the difference, and that went
25 through protest. And FTB then issued a Notice of Action

1 that Mr. Peringer appealed, and the Board of Equalization
2 considered jurisdiction. FTB had withdrawn the Notice of
3 Action affirming the proposed assessment and had instead
4 offered one, denying the refund claim. And the Board of
5 Equalization said not necessary. We have deemed denial
6 jurisdiction over a refund claim.

7 So there was a refund claim issued there. There
8 has been a claimed denial. It implied that there had been
9 a refund claim filed. It was noted with the return.
10 There is no refund claim filed here. You know, the
11 Peringer case really supports FTB's position that a
12 document issued in error as the Notice of Action affirming
13 a proposed assessment in Peringer had been meaningless and
14 does not confer jurisdiction over the Appellate Tribunal,
15 then Board of Equalization and now the OTA.

16 It supports FTB's position, but no jurisdiction
17 is conferred when the wrong Notice of Action or when a
18 Notice of Action is issued in error. In the applicability
19 of an equitable estoppel offense to the jurisdiction issue
20 here today is illustrated by teasing out the Appellant's
21 arguments. Even if the OTA agreed that equitable estoppel
22 somehow conferred subject matter jurisdiction over this
23 appeal, the relief the Appellant is seeking, a
24 determination of corporate classification, does not flow
25 from a refund claim that could be filed for either of

1 these tax years.

2 There's no refund claim. There's no assertion of
3 overpayment of tax, and there can't be because the minimum
4 tax was reported and paid because the Appellant would owe
5 the minimum tax regardless of classification, and there's
6 just no legal theory under which the Appellant could argue
7 that it owes less than \$800 for either tax year. It's not
8 asserting, it's not subject to taxation by California,
9 which would be the only way to assert a claim -- to assert
10 a liability that would be less than \$800.

11 Nonetheless, FTB has complained in its briefing
12 how the Appellant has not shown that it meets the criteria
13 for this extraordinary equitable estoppel remedy with
14 respect to the Notice of Action on appeal. And FTB would
15 refer the OTA to its briefing -- to its arguments and its
16 briefing on that issue. And I'll wrap up with three
17 general observations about equitable estoppel.

18 First, the California Supreme Court said in a
19 2010 decision, *Steinhart versus County of Los Angeles* that
20 the law particularly disfavors estoppels where the party
21 attempting to raise the estoppel is represented by an
22 attorney. And if the OTA would consider Appellant's
23 Exhibit 5, which includes notes from a May 23rd, 2018,
24 meeting between the Franchise Tax Board and Appellant and
25 its representatives, and they, among other things, were

1 discussing corporate classification. The notes reflect
2 that Appellant was, in fact, represented by an attorney.

3 Second, the McKnight Ranch, California Appellate
4 Court decision is no help to Appellant here on a
5 jurisdiction issue. It is factually distinguishable. In
6 that case, FTB had audited McKnight Ranch, proposed an
7 assessment, and McKnight Ranch protested it. It did not
8 prevail at protest, and it subsequently paid the
9 additional assessment and filed a refund claim. FTB
10 commenced an audit of that claim but didn't go far in it.

11 The parties agreed that FTB could issue a claim
12 denial so that McKnight Ranch could proceed with a suit --
13 a refund suit directly in state court, which in fact it
14 did. FTB raised the issue that the taxpayer had not
15 exhausted its administrative remedies because it didn't
16 complete the audit. The taxpayer raised an equitable
17 estoppel defense and argued that FTB was well apprised of
18 every argument and fact in support of its position in the
19 refund claim because it had all been discussed and
20 evidence provided to FTB during the underlying audit that
21 preceded the Notice of Proposed Assessment.

22 And so the question really was whether a
23 notice -- whether adequate -- whether the standard was
24 simply putting FTB on notice of the claim and not
25 necessarily with the details in the suit or whether, as

1 FTB was arguing, the standard was notification in the
2 pleading. And what the court said was actual notice is
3 the standard and that FTB knew of the details of the claim
4 precisely because they've all been presented during the
5 original audit, and that satisfied the exhaustion of the
6 administrative remedies requirement.

7 So those are wholly different facts, a wholly
8 different analysis, and really addressed the issue of what
9 the standard of knowledge FTB needed to have shown in
10 terms of establishing a valid refund claim were. That is
11 what was really the crux of the McKnight Ranch decision.
12 So that is no help to the Appellant.

13 And finally, third, as the Board of Equalization
14 noted in its 1991 opinion Appeal of Smith, as a general
15 rule, government action will not be estopped unless the
16 facts establish that a grave injustice would otherwise
17 result. And here, no injustice grave or otherwise will
18 exist if the OTA determines that it lacks jurisdiction
19 over this appeal. The corporate classification issue can
20 be heard by this body, by the Office of Tax Appeals, and
21 an appeal in a subsequent year where a difference in the
22 classification matters so far as the tax liability
23 reported.

24 In fact, Exhibit 19 -- Appellant's Exhibit 19 is
25 a declaration of Phil Seabrease an employee of Appellant

1 who says in paragraph 14 that FTB was auditing the 2016
2 tax year. So it could, in fact, be that the Appellant
3 could protest and appeal that tax year if it felt that it
4 had an adverse outcome. And at that time, in that tax
5 year, before this body, it could get a determination of
6 the corporate classification issue.

7 Remember that the right to protest an adjusted
8 carry over amount, the right to protest it in a year where
9 there's no tax consequence, 2013 and 2014 tax years,
10 that's a relatively new addition to the Revenue & Taxation
11 Code. It simply offered a taxpayer an early opportunity
12 to challenge the reason for whatever the difference in the
13 proposed carry over rounds were. And the default was
14 always that the issue would be decided historically only
15 in a later tax year where the consequence was felt -- tax
16 consequence was felt.

17 So while absolutely Square could have protested
18 the NPACA and didn't, which is irrelevant to the
19 jurisdiction issue before you, it had agreed, in fact,
20 with those proposed NOL revised calculations. But
21 ultimately Appellant seems to be arguing that the grave
22 injustice is the passage of time without a resolution on
23 this issue, and that meanwhile has to file returns with
24 local jurisdictions and pay tax that it would not have to
25 pay if it were a financial corporation.

1 However, the Appellant acknowledged in the
2 December 21, 2022, opposition to FTB's request to file a
3 reply brief on jurisdiction, Appellant acknowledged that
4 it could raise the corporate classification issue directly
5 with the local jurisdictions. And it simply chose not to.
6 Obviously, the local jurisdiction then would be entitled
7 to reach a conclusion theoretically different from the
8 position FTB had taken. That remedy was available, has
9 been available, is available, and the Appellant has not
10 availed itself of that remedy.

11 So on those facts, it's difficult at best to
12 conclude that any injustice occurs when a taxpayer
13 concedes that it has an immediate remedy and fails to act
14 on it.

15 Thank you. And that concludes FTB's
16 presentation, and we will be happy to address your
17 questions.

18 JUDGE AKIN: Okay. Thank you very much. Let me
19 turn to my Panel to see if they have any questions.

20 Judge Kletter, any questions for Franchise Tax
21 Board at this time?

22 JUDGE KLETTER: This is Judge Kletter. I have no
23 questions. Thank you.

24 JUDGE AKIN: Judge Aldrich, any questions for
25 Franchise Tax Board at this time?

1 JUDGE ALDRICH: Hi. This the Judge Aldrich. I
2 do have a couple of questions for Franchise Tax Board. So
3 in your opening presentation you had mentioned what the
4 requirements were for filing a claim for refund. Is it
5 FTB's position that a claim for refund must be filed on an
6 FTB form?

7 MS. MOSNIER: Thank you. No. Judge Aldrich, it
8 isn't. Revenue & Taxation Code Section 19322 sets out
9 three requirements for a valid refund claim. They are
10 that a claim be in writing, signed by the taxpayer and/or
11 authorized representative, and state with particularity
12 the reasons or reasons the taxpayer believes it has
13 overpaid its tax liability for the year in question. And
14 that is what I would call, you know, the notice
15 requirement to put FTB on notice of the reason or reasons
16 why it believes it has overpaid its tax liability for the
17 year in question.

18 JUDGE ALDRICH: And with respect to the writing
19 component, could that -- is that necessarily one document
20 or could there be an aggregation of documents or writings?

21 MS. MOSNIER: I don't know that FTB has addressed
22 that question or that either the Board of Equalization or
23 the Office of Tax Appeals has opined on that.

24 JUDGE ALDRICH: Okay.

25 MS. MOSNIER: So I don't know today that FTB

1 would be prepared to address that. But if you would like
2 a response from FTB on that, if the OTA would grant -- if
3 this Panel would grant FTB a short period of time, we
4 would be happy to submit an additional brief on that
5 issue.

6 JUDGE ALDRICH: And so with respect to a
7 theoretical dispute between a taxpayer and FTB regarding a
8 general corp or a financial corp, could you walk me
9 through what the appropriate -- or what FTB's view of the
10 process would be like?

11 MS. MOSNIER: I'm happy to do that. This case,
12 so it would be a perfect example. The NOL calculations
13 for these tax years would be different based on
14 Appellant's classification as a financial corporation or
15 as a general corporation. And so in this case, since FTB
16 issued an NPACA simply adjusting the NOLs and carry
17 forward amounts just based on the general classification,
18 in other words, it simply agree -- disagreed with the
19 numbers Square had reported on its returns at that time.

20 One option is that Appellant could have protested
21 the NPACA. It has protest and appeal rights just the way
22 that Notice of Proposed Assessment does. That's one
23 option. Another option is to take no action at that time
24 on this change in carry over amounts, but wait until a
25 later tax year when a tax difference arises to raise the

1 issue.

2 For example -- and I don't know if this is the
3 case -- in the 2017 tax year, perhaps Appellant claimed
4 NOLs that by its numbers having qualified in its mind as a
5 financial corporation for 2013 and '14, it would have
6 available for use in 2017. And that FTB by its numbers,
7 having considered Appellant as a general corporation for
8 2013 and '14, FTB's NOL calculations would be different.
9 And if they were less, FTB would disallow claimed -- some
10 or all of the claimed NOL and either could end up issuing
11 an NPACA or, actually, an actual Notice of Proposed
12 Assessment if that changed the amount of the tax liability
13 that FTB calculated.

14 And then under either of those scenarios, either
15 with an NPA or an NPACA for that tax year, the Appellant
16 could exercise administrative remedies and argue and
17 establish, if it does, that it is entitled -- was entitled
18 to financial corporation classification for either or both
19 of the 2013 and '14 tax years. Because that determination
20 then would affect the NOL calculations from those years
21 coming forward and would affect in my example what would
22 be available for use in the later of this 2017 theoretical
23 tax year.

24 Have I answered your question?

25 JUDGE ALDRICH: Yes. Thank you.

1 MS. MOSNIER: Thank you.

2 JUDGE ALDRICH: No further questions for FTB at
3 this moment. But I did have a brief question for
4 Appellant.

5 So with respect to the 2013 and 2014 tax years
6 and the equitable estoppel argument, how does that -- how
7 do those years, if at all, relate to the 2016 tax year?

8 MS. SILVERSTEIN: I'm not sure I understand your
9 question. I mean, they relate in the sense that as
10 Judge Aldrich mentioned, taxpayer has to be a financial
11 corp in the two years prior to the year that they're
12 treated as a financial corp on the return. And so at
13 least '14 and '15 are relevant to '16, if that's what
14 you're asking.

15 JUDGE ALDRICH: Yeah. Thank you.

16 At this time, I'm going to refer it back to
17 Judge Akin. And thank you for both of the parties for
18 answering my questions.

19 JUDGE AKIN: Okay. Judge Akin speaking. I also
20 have some questions for Franchise Tax Board. Let me
21 organize my notes, and I'll be right with you.

22 Okay. This was somewhat covered by
23 Judge Aldrich, but I think I'm presenting it a little
24 differently. So I guess instead of for the 2013 and 2014,
25 you know, audit, those tax years, instead of giving the

1 bank or financial corporation issue a \$800 value and
2 stated that it would -- it stating that it would be
3 treated as a claim for refund. I guess I'm wondering what
4 Franchise Tax Board asserts it should have done with
5 respect to that issue for those tax years.

6 MS. MOSNIER: Procedurally, I think it could not
7 determine -- I think procedurally FTB could not have
8 determined that a valid refund claim could have been filed
9 for either of those tax years because a refund claim
10 asserts a lesser tax liability than was previously
11 determined or reported. And since the minimum amount was
12 self-assessed and paid, and it wouldn't change based on
13 the classification, there couldn't be a refund claim for
14 that year.

15 However, FTB -- the Notice of Proposed Adjusted
16 Carry Over Amount, which simply revised the carry over
17 amounts based on being a general corporation, which is the
18 way that Square filed for that tax year. If Appellant had
19 wanted to dispute the NOL calculations based on its
20 corporate classification, then that's not a refund claim.
21 But its remedy then would have been to exercise
22 administrative remedies with that decision document.

23 Square would not have a valid refund claim based
24 on the corporate classification issue until there were a
25 tax year where as a general corporation -- if it had filed

1 as a general corporation and reported a tax liability that
2 were higher than the tax liability it would report if it
3 had filed as a financial corporation for that year. And
4 as we said, that can't happen in 2013 and '14 because you
5 can't file as a financial until the third year that you
6 have qualified as a financial.

7 So I don't know enough about the actual numbers
8 that were reported on the return. So I can't tell you it
9 would have been in, you know, this, you know, 2015, 2018.
10 I don't know, but just generally speaking the refund claim
11 could not be valid and could not state an overpayment
12 until a tax year when Square could have filed and did file
13 as a general and then come back and file an amended return
14 as a financial that would result in a lower tax liability.

15 JUDGE AKIN: Okay. Thank you. Another question.
16 So is there anything that you're aware of in statute that
17 either expressly allows or expressly prohibits Franchise
18 Tax Board from, you know, assigning a dollar value, you
19 know. Just -- I don't want to use the word arbitrary but,
20 you know, just assigning a dollar value that's not
21 otherwise relevant, I guess, to an issue that would then
22 allow the taxpayer to be entitled to a refund, you know,
23 should they then prevail on that issue? I'm wondering if
24 there's anything expressly that either allows or prohibits
25 something like that.

1 MS. MOSNIER: I think the statutes that prohibit
2 a gift of public funds would be the governing -- it would
3 be the governing statute. Because pursuant to 19301, FTB
4 is limited to refunding or crediting to handing -- you
5 know, handing out money on behalf of the taxpayer or to
6 the taxpayer unless it determines that an overpayment
7 actually exists.

8 And so that is really what would prohibit FTB
9 from assigning a dollar value and saying well if you
10 prevail on issue X, I'm going to hand this money back to
11 you because handing money back has to occur only when an
12 overpayment has been established. I would note too
13 that --

14 JUDGE AKIN: Okay. Thank you.

15 MS. MOSNIER: Oh, excuse me. Marguerite Mosnier
16 still speaking.

17 A refund claim is issue based. It is not dollar
18 based. So to that extent, assigning a dollar value to any
19 refund claim is -- is somewhat illusory. And that would
20 be true more at the time when you are considering it if
21 can be determined. You file a refund claim and you say
22 oh, we had more NOLs. We could have reduced our
23 liability. And maybe could have, but maybe your NOL
24 calculation is off.

25 So maybe, actually, your liability has been

1 reduced. The FTB agrees to the revised NOL numbers.
2 Maybe you're going to get a higher refund or a lower
3 refund than what you might have stated in your claim. Or
4 maybe you didn't state a dollar claim. So refund claims
5 are at issue, not dollar based just as a general
6 proposition.

7 JUDGE AKIN: Okay. Thank you. And I guess
8 during the 2013, 2014 audit, did Square ever provide
9 Franchise Tax Board with, you know, revised computations
10 that would, you know, revise its net operating loss carry
11 forwards, you know, at December 31st, 2014? Or did they
12 ever expressly assert that the financial impact -- excuse
13 me -- that the financial corporation issue would impact
14 those net operating loss carryovers?

15 MS. MOSNIER: This is Marguerite Mosnier. You
16 know, I'll defer that question to Ms. Frank.

17 MS. FRANK: Yes. So during the course of the
18 audit -- audited review to see what the computation of the
19 income tax would be if Square was a financial during 2013
20 and 2014, and it actually would have increased their
21 income, but then NOLs would have offset that. So it would
22 have reduced their NOLs.

23 JUDGE AKIN: Okay. Thank you.

24 And then I ask this of Appellant, so I will --
25 and I said ask it of Franchise Tax Board also. I want to

1 check in regarding the status of the audit of the 2016 tax
2 year. I'm expressly interested in the Form 100X that
3 amended, you know, the original return for 2016 because I
4 believe Appellant states in that that they were revising
5 their net operating loss carry forwards based on their
6 status as a financial corporation in addition to the, you
7 know, the adjustments that were made by the Franchise Tax
8 Board during the 2013 and 2014 audit.

9 MS. FRANK: I'm sorry. Is this a question for
10 FTB?

11 JUDGE AKIN: I'm sorry for being unclear. Yes,
12 this is a question for Franchise Tax Board.

13 MS. FRANK: Yeah. So the amended return was
14 audited and a NPACA was issued for the 2016 year and
15 taxpayer timely protested. It is currently in protest.

16 JUDGE AKIN: Okay. That concludes my questions
17 for the time being. I just wanted to check how we are
18 doing. Should we proceed with Appellant's rebuttal, or
19 would everyone like a maybe five-minute break?

20 Okay. I'm not seeing anyone in dire need of a
21 break, so let's go ahead and move forward. I will turn it
22 over to Ms. Silverstein for the closing or rebuttal.

23 You had 15 minutes, but you also had
24 approximately 32 minutes from your opening. So it could
25 be up to 45 minutes.

1 Last call if anyone needs a break. Going once.
2 Going twice. Okay.

3 So you may proceed. You can use up to
4 45 minutes.

5 MS. SILVERSTEIN: Okay. Thank you, Your Honor.

6

7

CLOSING STATEMENT

8 MS. SILVERSTEIN: So I want to start out on the
9 issue of the Franchise Tax Board assigning the financial
10 corp the \$800 and setting up the proceeding as A refund
11 claim. And I, you know, I think that the Franchise Tax
12 Board didn't really respond to the point that we're
13 mistaking, and didn't -- and seemed to almost ignore the
14 fact that it was FTB that set it up this way.

15 We didn't choose to set it up this way. We
16 aren't trying to buck the system and say the OTA should
17 proceed even though we didn't file a refund claim. It's
18 our position that there is a refund claim. FTB
19 affirmatively setup the proceeding in that way. And I
20 appreciate Judge Akin's questions because I think you're
21 at least acknowledging that that's possible, right, that
22 that's acknowledging that that's what our argument is and
23 our position is.

24 The fact that FTB set it up that way makes it, in
25 our view, a refund claim. So that begs the question, of

1 course, if FTB is going to disavow this, what is the
2 authority that says they can't do it. And I appreciate
3 Ms. Mosnier's response of the gift of public funds. We
4 haven't briefed that. I don't think that it's necessary.

5 But I do want to point out that one, that the FTB
6 intentionally chose a nominal amount, \$800. So, you know,
7 whether that could be a violation of gift of public funds.
8 I kind of doubt it. It's not like they set it up at a
9 million dollars or even a thousand dollars. But also, you
10 know, there's -- the gift of public funds is, you know, is
11 pliable.

12 It recognizes, you know, practical realities.
13 And just by way of example, you know, the Franchise Tax
14 Board and, you know, all government agencies are allowed
15 to compromise claims, you know, to make deals not based on
16 the merits but to return money even where it's not
17 absolutely determined that a refund is due.

18 So while, you know, I don't know all of the, you
19 know, exceptions and all that may apply in this instance,
20 I, you know, that's -- I think that's at best an
21 incomplete result. There's no, you know, statute, reg,
22 internal memo, you know, any -- any document or authority
23 that the Franchise Tax Board can point to that
24 specifically addresses assigning, you know, establishing a
25 proceeding as a refund claim.

1 And, you know, that is what the FTB did here, and
2 their presumed to have authority for what they do. So I
3 think it's incumbent on FTB to point to something specific
4 that said they didn't have authority to do that. But in a
5 sense, you know, I -- we're going to get to the same
6 result even if OTA decides that FTB didn't have authority
7 to do that, and the reason is equitable estoppel. And I,
8 you know, I think there again or similarly, the FTB's
9 response is incomplete.

10 Maybe they don't completely understand what our
11 position is, but I think I want to frame it this way.
12 Does Square have a right to have the financial corp and
13 NOL determination heard by OTA now? And, you know, FTB
14 wants to say well, the NPACA is not before you. You
15 shouldn't consider it. Just focus on the refund claim,
16 but that's impossible. That's not right. That's not --
17 that doesn't do justice to these facts.

18 Because the facts are that Square was proceeding
19 through this audit. The NPACA was coming. And what FTB
20 did was to induce Square not to protest that NPACA to
21 forego its procedural right and instead go down this other
22 path. It's FTB's inducement that's what's relevant here
23 and what makes the NPACA relevant here. It can't be
24 ignored.

25 So, you know, FTB doesn't want to say this but,

1 you know, it's implicit in their position and answers to
2 the judges questions that, you know, if we had appealed
3 that, we would properly be before OTA. I don't -- that's
4 not disputable. So then the question is, you know, does
5 equitable estoppel come into play? Does that overcome the
6 problem that we have, which is we didn't protest the
7 NPACA? And yes, absolutely, equitable estoppel is
8 relevant here.

9 The FTB didn't go through the requirements. They
10 want you to refer to the briefs, and I think that's
11 telling. So, you know, I did go through, them, and they
12 are all satisfied. I'm happy to answer the Judges'
13 questions about the four requirements. Well, FTB's
14 response to all of that is we haven't proved grave
15 injustice. I explained in the brief that's not a
16 requirement.

17 There's, you know, some of the cases -- and I
18 think they are mostly BOE cases -- might use the word
19 grave. There's a court case that uses the word grave; the
20 Mansell case, I think it's called. But the important
21 point that cannot be ignored, because it's clear in the
22 case law, is that the injustice requirement arises in this
23 extra requirement that applies only to public agencies.

24 It's the public policy requirement, and it's a
25 balancing test. And it only requires us to prove

1 injustice if there are public policy concerns and, you
2 know, public policy -- public policies will be, like,
3 interfered with if OTA or a court, you know, allows an
4 estoppel. The FTB hasn't identified any reason not -- to
5 not let this go forward. They keep going back to the
6 refund claim, but that's not the point.

7 The point is that the legislature gave us the
8 right to have these NOLs and by extension the financial
9 corp issue decided at this stage. You know, FTB says oh,
10 this is a new right. And, you know, really the norm is to
11 wait for a refund claim, but it doesn't matter. It's in
12 the statutes. We have this right. I think, you know, I
13 would assert that the fact that it's a new right is even
14 more important. The legislature just, you know, said it
15 more recently. We have this right.

16 So FTB wants to deny us this right because we
17 said -- we did what they told us to do. If we had done
18 this right, we would -- if we had, you know, protested the
19 NPA, even though they didn't want us -- the NAPCA, they
20 didn't want us to. It's clear in the records. They
21 didn't want us to do that. We would be properly here.

22 We don't need to prove grave injustice because
23 they have no policy reason to say that we shouldn't be
24 here. There's no public policy that's going to be
25 interfered with or, you know, there's not any problem

1 that's going to be created for FTB or the fisc or anything
2 like that.

3 So the injustice is not letting us have our day
4 in court when the legislature clearly wanted taxpayers to
5 be able to do this. You know, I think Ms. Mosnier
6 referred to it as an early opportunity. That's a right,
7 not some kind of privilege or, you know, sometimes you get
8 it or sometimes you don't. It's a right that we are
9 asserting now. And I believe that estoppel is clearly
10 applicable to allow that right.

11 I also wanted to just address a few other points.
12 Let's see. Just a small point about being represented by
13 an attorney. I know it says that in the memo that
14 Ms. Mosnier is referring to. That was an accountant.
15 Maybe he's, you know, went through the law exam. I'm not
16 sure, but he works for an accounting firm. He was not
17 representing them as a lawyer. He would tell you that he
18 can't do that. He can't practice law in that capacity.

19 But more importantly, the McKnight case that
20 Ms. Mosnier talked about absolutely is on point, and
21 there's a number of issues in that case. She was actually
22 referring to a different issue. That issue was what is
23 required for a claim for refund, but there's a separate
24 part of the case that addresses estoppel. And the issue
25 there was whether FTB was estopped from saying that the

1 taxpayer hadn't exhausted their administrative remedies
2 because they didn't provide this extra information.

3 They didn't go through the claim for refund
4 process, but the taxpayer said, well, we were induced not
5 to do that. And the court said, yeah, you were induced
6 not to do that and now FTB can't stop you from having your
7 day in court because they saw something they caused you to
8 do. And that's exactly the facts here. So I want to go
9 back to one of the first points I made, which is McKnight
10 is the leading case on this issue. And McKnight is
11 directly on point, and that the facts that are virtually
12 identical to the facts here.

13 Oh, I guess the last point I wanted to make is I
14 know Judge Akin has asked about what's in the record,
15 what's not. And Ms. Frank said something about the NOLs
16 and, you know, what had happened, I guess, in the 2013 and
17 '14 audit. I don't know for sure. That was contrary to
18 my understanding. But I think the more important point is
19 that, you know, we're lawyers. We're not allowed to
20 testify, and that's not in the records. So, you know, I
21 would caution the Judges from taking what we say as
22 testimony.

23 That appears to be all of the points that I have.
24 I'm happy to answer questions.

25 JUDGE AKIN: Okay. Thank you, Ms. Silverstein.

1 Let me turn to my Panel to see if they have any
2 final questions for either party.

3 Judge Kletter?

4 JUDGE KLETTER: This is Judge Kletter. I don't
5 have any questions at this time. Thank you.

6 JUDGE AKIN: Okay. And Judge Aldrich?

7 JUDGE ALDRICH: Hi. This is Judge Aldrich. No
8 further questions. Thank you.

9 JUDGE AKIN: Okay. I just want to clarify one
10 thing. Ms. Silverstein, your point regarding testimony
11 versus argument, it is noted and understood. I just
12 wanted to check with you to see and verify that you don't
13 know for certain whether or not the net operating loss
14 would increase -- or excuse me -- the net operating loss
15 carry forwards would increase or decrease as a result of
16 the status as a financial corporation. I think that's
17 what you indicated?

18 MS. SILVERSTEIN: I mean, what's contrary to my
19 understanding is that they had income and then they would
20 have used their NOL. I think that's what she said. It's
21 contrary to my understanding. I think in -- well, I don't
22 want to testify anymore. But, yeah, I think that's all I
23 have to say.

24 JUDGE AKIN: Understood. Understood. I just
25 wanted to clarify and make sure I was understanding

1 correctly. I don't have any questions beyond that. Was
2 there anything that either party would quickly like to add
3 before we conclude? I will note that if Franchise Tax
4 Board would like to add anything, I will turn it back to
5 Appellant to respond before closing.

6 Anything from either party before we conclude?

7 MS. MOSNIER: Judge Akin, if the amount of NOL
8 carry forwards that you had asked about you think is
9 relevant to the jurisdiction determination, if you would
10 like to keep the record open and the parties could submit
11 the evidence they have on that point, that would be fine.
12 If you think it isn't, then ignore this comment. Thank
13 you.

14 JUDGE AKIN: Okay. Thank you. I'm just checking
15 with my panel to see if there --

16 Ms. Silverstein, how would you feel about that?
17 Would you want to keep the record open and provide
18 information regarding the impact the financial corporation
19 determination would have on the net operating loss carry
20 forwards as of the end of 2014. Would that be something
21 the parties would like to keep the record open to provide?

22 MS. SILVERSTEIN: Just I would object to anything
23 that's going to delay the proceedings any further because
24 we filed this appeal in November of 2020 and, you know, we
25 really want to keep it moving. Furthermore, you know,

1 it's our position and FTB actually agrees with this that
2 we had a right to appeal the NPACA, and that would have
3 resulted in a hearing but, you know, a hearing on the
4 substantive issues before OTA, and I think that's what's
5 relevant. So, you know, we wouldn't have gone through all
6 of this, you know, if it hadn't -- you know, if there
7 wasn't a purpose to it. And that's what I'd like OTA to
8 focus on.

9 JUDGE AKIN: Okay. Yeah. I think we are good
10 with the evidence we have. So I appreciate, you know,
11 both parties' responses to that. I do think we are going
12 to close the record. All right. Any last items before we
13 conclude for today?

14 All right.

15 MS. SILVERSTEIN: I appreciate your thoughtful
16 questions and your time today. Thank you.

17 JUDGE AKIN: Thank you.

18 Okay. So we are ready to conclude the hearing.
19 I would like to thank both parties for their presentations
20 today. I know it's late on a Friday afternoon, so thank
21 you everyone for being here and for your very well
22 thoughtful, you know, organized presentations. It is much
23 appreciated.

24 We will decide the case based upon the arguments
25 and the evidence in the record, and we will issue a

1 written decision within 100 days from today. The case is
2 now submitted and the record is now closed.

3 This concludes the hearing for today, and it also
4 concludes the hearing calendar for OTA for today. Thank
5 you again everyone. I do appreciate the presentations.

6 (Proceedings adjourned at 3:37 p.m.)

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I further certify that I am in no way interested
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I have hereunto subscribed my name this 25th day
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