

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
B. CONCANNON and C. CONCANNON,) OTA NO. 22039982
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, March 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 1:18 p.m. and concluding at 2:05 p.m. on
Thursday, March 23, 2023, reported by Ernalyn M.
Alonzo, Hearing Reporter, in and for the
State of California.

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APPEARANCES:

Panel Lead: ALJ MICHAEL GEARY

Panel Members: ALJ JOSHUA ALDRICH
ALJ TERESA STANLEY

For the Appellant: B. CONCANNON
KATHERINE GAN

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

ERIC BROWN
ERIC YADAO

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(Appellant's Exhibits 1-3 were received at page 7.)
(Department's Exhibits A-H were received at page 7.)

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California; Thursday, March 23, 2023

1:18 p.m.

JUDGE GEARY: Ms. Alonzo, let's go on the record.

Will the parties please identify themselves by stating their names and who they represent starting with the Appellant.

MS. GAN: Good afternoon. My name is Katherine Gan, and I'm the representative of Appellants, Mr. Brian Concannon and Mrs. Chandra Concannon.

JUDGE GEARY: All right. And I believe Mr. Concannon is participating and visible. Mr. Concannon, you do not need to identify yourself right now.

Let's have the representatives of FTB identify themselves, starting with Mr. Brown.

MR. BROWN: I'm Eric Brown from Franchise Tax Board.

MR. YADAO: Good afternoon. Eric Yadao, Tax Counsel for Franchise Tax Board.

JUDGE GEARY: Great. Thank you.

I should mention -- repeat something I said earlier and that is, we are hear for the Appeal of Concannon, which is OTA Case Number 22039982. Today is March 23rd, 2023, and the time is now 1:20 p.m.

For the benefit of those who may be viewing

1 through YouTube, we had a little problem with our stream,
2 and it delayed our start this morning or this afternoon, I
3 should say.

4 It's my understanding that Appellants will be
5 calling Mr. Concannon to testify today.

6 Is that correct, Ms. Gan.

7 MS. GAN: Yes.

8 JUDGE GEARY: All right. Will Respondent be
9 calling any witnesses today?

10 MR. BROWN: No. We have no witnesses to testify.

11 JUDGE GEARY: All right. The exhibits marked for
12 identification in this appeal consist of Appellants'
13 Exhibits marked 1 through 3 for identification and
14 Respondent's Exhibits marked A through H for
15 identification. The parties provided copies of the
16 exhibits to each other and to OTA, and OTA staff
17 incorporated all proposed exhibits into an electronic
18 hearing binder, which should be in the possession of the
19 parties and also in the possession of the judges.

20 Have Appellants confirmed that their exhibits
21 that have been incorporated into the binder are complete
22 and is as legible as the ones that were submitted to OTA?

23 MS. GAN: Yes. Confirmed.

24 JUDGE GEARY: Thank you.

25 And has Respondent also done that?

1 MR. BROWN: Yes.

2 JUDGE GEARY: Thank you.

3 The parties were instructed to state objections
4 to the proposed evidence in writing and neither party has
5 done that, nor has any party indicated that there are any
6 problems with the proposed exhibits as they appear in the
7 binder. Does the Respondent have any objection to the
8 admission of Appellants' Exhibits 1 through 3?

9 MR. BROWN: No, we don't.

10 JUDGE GEARY: Thank you.

11 And do Appellants have any objection to the
12 admission of Respondent's Exhibits A through H?

13 MS. GAN: No, we don't.

14 JUDGE GEARY: Thank you. All of those exhibits
15 are admitted.

16 (Appellants' Exhibits 1-3 were received
17 in evidence by the Administrative Law Judge.)

18 (Department's Exhibits A-H were received in
19 evidence by the Administrative Law Judge.)

20 Although as I indicated at the prehearing
21 conference, Exhibit 3, which is a copy of a federal
22 regulation I believe, it's admitted as argument only since
23 it does not tend to prove or disprove any disputed fact.

24 It has been agreed by the parties that the issue
25 to be decided by the Panel is whether the penalty imposed

1 on Appellants under Revenue & Taxation Code
2 Section 19011.5 for failing to pay taxes electronically
3 should be abated.

4 Let's just briefly discuss logistics and time
5 estimates. As discussed in our prehearing conference, the
6 parties have agreed that Appellant will have 25 minutes
7 for its presentation, including the witness testimony and
8 argument. And Appellant, of course, can reserve up to
9 about 5 minutes of that time to make a brief rebuttal
10 after Respondent makes its preparation. Respondent will
11 have 15 minutes for its only argument, approximately 15
12 minutes. And the parties should please try to keep track
13 of their own time.

14 Any questions before we begin? If you have any,
15 please speak up. I see no questions being asked.

16 Let me ask you, Ms. Gan, how do you want to make
17 your presentation? When you're ready to offer the
18 testimony for Mr. Concannon, I'll administer an oath to
19 him, but do plan -- do you want to give some oral argument
20 first and then call him? Or do you want to elicit
21 testimony from Mr. Concannon and then give your argument?
22 What's your preference?

23 MS. GAN: Thank you for asking. I will give the
24 opening statement and then have Mr. Concannon provide his
25 testimony in a Q and A form. And after that, I will then

1 present the arguments.

2 JUDGE GEARY: All right. In that case I'm going
3 to ask Mr. Concannon to please raise his right hand.

4 You might be muted. You might unmute your mic so
5 I hear you say some affirmative response to that question.

6

7 B. CONCANNON,

8 produced as a witness, and having been first duly sworn by
9 the Administrative Law Judge, was examined and testified
10 as follows:

11

12 JUDGE GEARY: Okay. Thank you. You can put your
13 hand down.

14 Ms. Gan, you can begin with your opening
15 statement, which I assume will be very brief, and then
16 just progress right into the Q and A's for Mr. Concannon
17 and finish up with your argument when you're ready.

18 MS. GAN: Thank you.

19

20 OPENING STATEMENT

21 MS. GAN: The penalty -- the e-pay penalty should
22 be abated on three grounds: First, reasonable cause
23 exists due to the obscurity of the law. Appellants did
24 not know and cannot be expected to know, according to the
25 IRS standard in the Internal Revenue Manual, which

1 California conforms to.

2 In fact, the mandatory e-pay requirement is so
3 obscure, that Respondent knew no middle- or low-income
4 taxpayers, such as Appellants, would know or had reason to
5 know. And that is apparently why Respondent sent an
6 individualized notice to effected taxpayers whenever the
7 mandate is triggered. Because of that, no reasonable
8 person in Appellants' situation having not received
9 Respondent's notice on this and having not had any problem
10 with check payments on taxes for over a half century,
11 could have complied with such an obscure law.

12 Second, reasonable cause also exists based on
13 Appellants reliance on their CPA for tax matters. Because
14 their CPA who had handled Appellants' tax returns for
15 25 years never told them to e-pay for 2020, even though
16 she had known that Appellants already -- always paid taxes
17 by check, and that Appellants' tax liability was over the
18 mandatory e-pay threshold for 2020.

19 Sir, for equitable and fairness reasons, the
20 e-pay penalty should not be applied in this case because
21 Respondent suffered no detriment whatsoever but instead
22 actually cashed Appellants' checks by the tax payment
23 deadline, not even a day later. Since the whole point
24 behind the mandatory e-pay is so the government can
25 receive taxpayers' payments sooner and more efficiently,

1 and here the government did receive Appellants' payments.
2 The legislative rationale to penalize taxpayers does not
3 exist in this case.

4 So before we go into the details of our
5 arguments, we would like to call upon our witness
6 Mr. Concannon to provide testimony in a Q and A form.

7
8 DIRECT EXAMINATION

9 BY MS. GAN:

10 Q So Mr. Concannon, how long have you been filing
11 and paying California taxes?

12 A Sorry about that. Approximately 45 years.

13 Q Did you do the tax return by yourself, or did you
14 hire a CPA?

15 A No, I used a CPA.

16 Q How long have you retained the CPA?

17 A I've been using the same one for about 25 years.

18 Q And how did you pay your taxes?

19 A Always by check.

20 Q Did your CPA know how you made your tax payments?

21 A Yes.

22 Q Did your CPA know you would pay the return
23 payment by check again for your 2020 tax, same as in the
24 past half century?

25 A We never discussed it, so I assumed so.

1 Q What was your gross income for 2019?

2 A It was --

3 JUDGE GEARY: Let me interrupt for a second, if
4 you folks don't mind. Ms. Gan, I take it your intent is
5 to establish that his -- that he for 2019, he was not
6 required to pay electronically. Is that your intent here?
7 Because he doesn't have to disclose his gross income, if
8 you can get at that information simply by asking him
9 whether his income in that year or any prior year exceeded
10 the threshold set forth in the statute. And so we can
11 protect that information which is private.

12 MS. GAN: Sure.

13 JUDGE GEARY: Will you do that, please?

14 MS. GAN: So the tax year at issue is 2020, but
15 the Appellants were eligible for one of the waivers stated
16 in the mandatory e-pay requirements notice. And one of
17 them is that if the previous year tax liability is less
18 than \$80,000, then Appellants can ask for a waiver for the
19 mandatory e-pay requirement. And what we would like to
20 show in this case is that Appellants were eligible for
21 that.

22 THE WITNESS: My tax liability was well under
23 that threshold.

24 JUDGE GEARY: There you go. Thank you.

25 MS. GAN: Okay. So may I continue?

1 JUDGE GEARY: Yes.

2 BY MS. GAN:

3 Q Okay. So Mr. Concannon was your income level for
4 the 2020 tax year similar to 2019 or prior years?

5 A No. No it was substantially more.

6 Q Okay. So what caused the difference?

7 A I'm sorry. Your question was, was it higher for
8 the 2020 or 2019?

9 Q The 2020.

10 A Yes. Yes. My 2020 was substantially higher than
11 '19. That was the first full year of operating a new
12 business that I opened in the fall of 2019.

13 Q So knowing that your 2020 return payment was
14 going to be much larger, did your CPA advise you not to
15 make the return payment by check?

16 A No.

17 Q How did you pay your bills, like utility or
18 credit card?

19 A Always by check.

20 Q Have you ever been told that a check payment is
21 not an acceptable method for tax payments?

22 A No.

23 Q Have you ever had any problems for past years in
24 paying by check?

25 A I have not.

1 Q At the time you were paying taxes, did you know
2 or have reason to know that your higher income level may
3 impact the required method for your tax payment?

4 A I did not know that. No.

5 Q Did you know of the mandatory e-pay obligation
6 before 2021?

7 A No.

8 Q If not, when did you first learn about the
9 mandatory e-pay obligation?

10 A When I received a notice of penalty for not
11 paying by e-pay.

12 Q Do you have any tax background, other than
13 working with your CPA on your tax returns?

14 A I'm sorry. Say it again.

15 Q Do you have any tax background, other than
16 working with your CPA?

17 A No.

18 Q Okay. Respondent said that they sent you a
19 mandatory Electronic Payment Notice issued on
20 January 19th, 2021. Did you receive it?

21 A I did not.

22 Q Did you have any troubles with receiving your
23 mail before, similar to your non-receipt of the mandatory
24 Electronic Payment Notice in this case?

25 A You know, it's hard to know what you don't get,

1 but I know there were a couple of occasions where my wife
2 or other neighbors have returned mail that was found
3 strewn around the cul-de-sac. But that was like two
4 occasions over a couple of years.

5 Q Okay. Did your check payments get cashed by FTB?

6 A Yes.

7 Q Yeah?

8 A Yes.

9 Q Okay. When did a check get cashed by FTB?

10 A It was cashed on 15th of April.

11 Q Okay. If you had received the mandatory
12 Electronic Payment Notice on time, would you comply with
13 the mandatory e-pay requirements?

14 A Yeah. Absolutely. I've complied with it since I
15 received that notice of the penalty.

16 Q Was there any financial or logical reason you
17 would not do e-pay had you received the notice?

18 A No. I sent the check. They received it on the
19 15th. If I was doing it electronically, I probably would
20 have just done it on the 15th. I don't have any
21 interest-bearing account. I had plenty of funds in the --
22 in that bank as I presented those statements. So no,
23 there's no reason.

24 Q So although I know this is highly unlikely, but
25 is it possible you did receive the notice dated

1 January 19th, 2021, but somehow forgot about it when you
2 made the return payment by check?

3 A I -- I never received it.

4 Q So do you think anyone else in a similar position
5 could have complied with a requirement they had no
6 knowledge of?

7 A No, I don't.

8 Q Thank you, Mr. Concannon. So those are all the
9 questions I have for you. Before we move on, do you have
10 anything else to add?

11 A I guess just a quick comment that, you know,
12 since I've been paying electronically, it's clearly much
13 easier. I would have done it had I known, and I've done
14 it since I was told. And just recently after reviewing
15 the letter that was sent to me, you know, there's a waiver
16 there that if there was some extenuating circumstances I
17 probably would have applied for, but I didn't. If I knew
18 about it, I would have done it. I have -- as the
19 gentleman from the tax service probably can tell, I have
20 never had a tax problem. I've always paid early or on
21 time for my entire life.

22 MS. GAN: Thank you.

23 JUDGE GEARY: Ms. Gan, let me interrupt you just
24 for a second to let FTB know and my colleagues know that
25 I'm going to let you continue and conclude your argument

1 before I offer FTB and my colleagues an opportunity to ask
2 questions of your client. Is that acceptable to you?

3 MS. GAN: Yeah.

4 JUDGE GEARY: Okay. Thank you. You may proceed
5 then.

6

7

PRESENTATION

8 MS. GAN: So from the witness testimony, it is
9 clear that Appellants have established reasonable cause
10 for their failure to comply with the mandatory e-pay
11 requirements. First, Appellants could show reasonable
12 cause based on their ignorance of the law, coupled with
13 all other evidence.

14 In 2019, Appellant started a new logistics
15 business and the taxable income they earned from the
16 business far exceeded their initial expectations resulting
17 in the higher-than-normal tax due for the 2020 tax year.
18 On January 14th, 2021, as a result of their higher tax
19 bill, Appellants paid \$50,000 in taxes by check.
20 Previously Appellants had never had to make a tax payment
21 of more than \$20,000.

22 Respondent states in their opening brief that
23 they sent a mandatory Electronic Payment Notice to
24 Appellants on January 19th, 2021, advising them that
25 future payments would be required to be paid

1 electronically. However, Appellants never received that
2 notice. Indeed, as Appellants just testified Appellants,
3 Appellants' 2019 state tax liability was about \$22,000,
4 which qualified for a waiver of the mandatory e-pay
5 obligation, quote, end quote, "A general waiver from
6 mandatory e-pay can be requested if the taxpayer's total
7 tax liability reported for the previous income year did
8 not exceed \$80,000."

9 Given that the waiver qualifications are
10 explicitly stated in the notice, Appellants non-receipt of
11 the notice was undisputable because Appellants would have
12 requested a waiver had they received a notice instead of
13 paying the mandatory e-pay penalty as soon as they could.
14 Without any notice that they had to make their future
15 payments electronically on April 15, 2021, Appellants
16 submitted a tax year 2020 return payment by check and
17 voucher of \$66,902, as well as a payment of \$45,000 for
18 the 2021 tax year by check.

19 What is important is that Appellants had made
20 their tax payments by check for about 50 years, and
21 Respondent has always accepted Appellants' check
22 throughout Appellants' entire lives, including Appellants'
23 \$50,000 made on January 14, 2021, and \$66,902 and \$45,000
24 payments made on April 15th, 2021.

25 We argue that Appellants have reasonable cause

1 and the penalty should probably be abated. Even though
2 the ignorance of law, in and of itself, does not
3 presumably count as reasonable cause, the IRS clearly says
4 in the Internal Revenue Manual Section 20.1.1.3.2.2.6 that
5 ignorance of law can establish reasonable cause if coupled
6 with other evidence showing that a reasonable and good
7 faith effort was made to comply with the law, or the
8 taxpayer was unaware of a requirement and cannot
9 reasonably be expected to know of the requirement.

10 That is exactly what happened here. First of
11 all, Appellants had made reasonable and good faith efforts
12 to comply with the mandatory e-pay obligation. Appellants
13 had always filed and paid their taxes correctly and timely
14 for about 50 years. And after they received the State
15 Income Tax Balance Due Notice, they promptly made a
16 reasonable and good faith effort to comply with the
17 requirement by doing e-pay timely.

18 It's also important to note that Appellants had
19 sufficient funds in their bank account from which the
20 checks were cashed. The balance of their account was
21 around \$125,000 as of April 14th, 2021, and about \$123,000
22 on April 16th, 2021. This clearly shows that the account
23 has sufficient fund before and after April 15th to cover
24 the total tax payments of \$111,902.

25 A person in his right mind with enough money in

1 his bank account would not willfully disregard the
2 mandatory e-pay obligation and let Respondent impose a
3 penalty on him. Therefore, there's no logical or
4 financial reason to say that Appellants willfully
5 neglected their mandatory e-pay obligation or attempted to
6 buy time.

7 Secondly, Appellants were unaware of the
8 mandatory e-pay requirement without any prior notice, and
9 they cannot reasonably be expected to know of it. The
10 e-pay requirement itself is a very obscure legal
11 requirement. And it is so little known that even
12 Respondent itself feels it necessary to send each effected
13 taxpayer an individualized notice.

14 On the other hand, however, Respondent never
15 sends individualized formal notice letters to inform
16 taxpayers of the tax filing deadline because April 15th is
17 the traditional tax deadline day of wild popularity. This
18 contrast shows that Respondent assumes the average
19 taxpayer does not have prior knowledge of an obscure
20 requirement like the mandatory e-pay obligation.

21 Once more, Respondent had received and accepted
22 Appellants' check payments without any problems for the
23 past 50 years, while the e-pay mandates only came into
24 effect in 2009 and mostly would only impact very
25 high-income earners, which Appellants were not.

1 Furthermore, Respondent accepted Appellants'
2 check payments made on January 14th, 2021, and April 15th,
3 2021. Therefore, without prior notice, Appellants
4 believed that paying by check was still an acceptable tax
5 payment method was in good faith. Appellants had reason
6 to believe that they had probably fulfilled their tax
7 obligations by checks.

8 In conclusion, although reasonable cause is not
9 presumed when ignorance of the law alone is claimed, there
10 is a reasonable cause for their noncompliance according to
11 the IRS rules because Appellants were unaware of the
12 requirements and cannot be reasonably expected to know of
13 the requirements. And Appellants made a reasonable and
14 good faith effort to comply with the law once they learned
15 of their mandatory e-pay obligation.

16 And also, Appellants had relied on their CPA to
17 help with their tax payments for about 25 years. And
18 according to Appellant's testimony, Appellants had never
19 encountered any problems with their tax payment method
20 throughout these 25 years before 2021. However, when it
21 came to the 2020 tax filing deadline, the CPA never
22 mentioned the e-pay requirement to Appellants even though
23 she had known or had reason to know that Appellants had
24 always paid their taxes by check.

25 Without any prior notice, Appellants should not

1 have been expected to discuss the acceptability of their
2 tax payment method with the CPA beforehand. And they had
3 reason to believe in reliance on the CPA's non-objection
4 to their tax payment method, that everything was business
5 as usual, and they could continue to pay their taxes by
6 check for the 2020 tax year. Given this background,
7 Appellants' reasonable reliance on their CPA's substantive
8 advice regarding how to properly fulfill their 2020 tax
9 liability, supports their reasonable cause argument.

10 Sir, in addition, the legislative intent of the
11 mandatory e-pay requirement is to improve efficiency in
12 tax collection so that the government can collect tax
13 payments sooner. But here, Appellants timely and
14 correctly made their 2020 tax payment which was cashed by
15 FTB on April 15th, 2021, and FTB received their checks
16 exactly on the same day. Therefore, Appellants paying
17 their 2020 tax by check in no way reduce the Respondent's
18 efficiency in collecting Appellants' tax.

19 On the contrary, imposing the mandatory e-pay
20 penalty on Appellants who had not received any notice of
21 the requirement and causing their confusion, would hinder
22 the government's effort to improve the efficiency of the
23 tax state system in California.

24 Therefore, based on the above reasons, Appellants
25 respectfully request that their appeal be granted to allow

1 an abatement of the mandatory e-pay penalty imposed.

2 Thank you.

3 JUDGE GEARY: Thank you, Ms. Gan.

4 Does FTB wish to ask the witness any questions?

5 MR. BROWN: No, Judge.

6 JUDGE GEARY: All right. And my colleagues
7 Judge Aldrich, do you wish to ask the witness or the rep
8 any questions now, or would you prefer to wait until FTB
9 has made its presentation?

10 JUDGE ALDRICH: I'd prefer to reserve until after
11 FTB has made its presentation but either is fine.

12 JUDGE GEARY: All right. Thank you.

13 Let me ask Judge Stanley.

14 Judge Stanley, would you like to ask questions
15 now or would you like to wait until FTB makes its
16 presentation?

17 JUDGE STANLEY: This is Judge Stanley. I was
18 just going to ask Mr. Concannon the question about
19 addresses. We noted in our record that the address on
20 your checks does not match the address on your payment
21 vouchers and the address that the Office of Tax Appeals
22 has for you. Is there a reason that the checks have a
23 different address.

24 MR. CONCANNON: One of the addresses is my office
25 where I receive most of my mail. The other is my primary

1 residence. So I collect mail from both locations daily.

2 JUDGE STANLEY: Okay. That's all. Thank you.

3 JUDGE GEARY: Thank you, Judge Stanley.

4 I will ask some questions -- may ask some
5 questions later. But since we're on the topic of
6 addresses, can you be more specific Mr. Concannon. Is the
7 address that's on the checks your office address or your
8 business address?

9 MR. CONCANNON: Office.

10 JUDGE GEARY: All right. Thank you. That's the
11 only question I have right now. I may have some follow up
12 after FTB gives its presentation.

13 Thank you, Ms. Gan, for your presentation.

14 And, FTB, you can begin your presentation when
15 you're ready.

16 MR. BROWN: Thank you, Judge Geary.

17

18 PRESENTATION

19 MR. BROWN: Good afternoon. I'm Eric Brown, Tax
20 Counsel with the Franchise Tax Board. And with me is Eric
21 Yadao, also Tax Counsel with the Franchise Tax Board.

22 The issue is whether Appellants have shown
23 reasonable cause to abate the mandatory e-pay penalty.
24 The law requires that an individual taxpayer must remit
25 payments electronically after the payment -- the taxpayer

1 makes a payment in excess of \$20,000, or if the tax
2 liability in a given year exceeds \$80,000. In
3 January 2021, Appellants remitted a payment that was well
4 above that threshold. Thereafter, the FTB sent notice to
5 Appellants that all future payments were required to be
6 paid electronically.

7 In April of 2021, Appellants remitted a payment
8 of -- that exceeded that amount. Thereafter -- I'm sorry.
9 One was a check in an amount that exceeded the threshold
10 and the other was by a check that also exceeded the
11 threshold. Thereafter, FTB imposed a mandatory e-pay
12 penalty which Appellants paid and then claimed a refund in
13 the amount of the penalty.

14 Appellants do not dispute their predicate payment
15 that exceeded the threshold, or that they made the two
16 payments by check. Instead, Appellants argue they did not
17 receive the FTB's courtesy letter. The FTB notes that the
18 letter was sent to Appellants' address and was not
19 returned unsent. Appellants imply that a taxpayer's
20 receipt of a letter from the FTB is a condition precedent
21 to a taxpayer's legal obligation to make mandatory
22 payments and to be subjected to mandatory e-pay penalty
23 for failing to do so.

24 Alternatively, Appellants argue that their
25 claimed non-receipt of a courtesy letter means they were

1 unaware of their legal obligation and therefore, their
2 unknowing violation of the law was done without willful
3 neglect. Appellants thus believe they have shown
4 reasonable cause.

5 A mandatory e-pay requirement is triggered by a
6 payment of \$20,000 or tax liability of \$80,000. This is
7 stated in Section 19011.5 of the Revenue & Taxation Code
8 which contains no mention of a threshold requirement that
9 the FTB provide notice of any kind. In the 2018
10 precedential opinion of Appeal of Porecca, the OTA held
11 that, quote, "Ignorance of the law is not reasonable cause
12 for failure to comply with statutory requirements. The
13 taxpayer does not exercise ordinary business care and
14 prudence when he fails to acquaint himself with the
15 requirements of California tax law," end quote.

16 In this regard, the OTA noted in Porecca that the
17 Form 540 Nonresident Instruction Booklet contained
18 references to mandatory e-payment requirements and
19 penalties. In the present appeal, even if we accept
20 Appellants' claim that they did not receive the FTB's
21 courtesy letter information regarding the mandatory e-pay
22 requirement, it was verifiable in the instruction booklet
23 for Tax Form 540 as indicated in Respondent's briefs.

24 Regarding obscurity, the legislature is who
25 passes and annex laws. Section 19011.5 was -- has been in

1 effect since September 30th, 2008. The law is applied to
2 everyone and there is no obscurity exception. Also, FTB
3 at no time received a request for a waiver of e-pay
4 requirement. Appellants' unfamiliarity with the law is
5 not reasonable cause. They fail to acquaint themselves
6 with the law, and their resulting noncompliance with the
7 law does not mean they are entitled to claim they have
8 shown reasonable cause.

9 And I would be happy to respond to any questions
10 the Panel may have.

11 JUDGE GEARY: Thank you, Mr. Brown.

12 All right. Let me turn to Judge Aldrich who
13 indicated he would have some questions.

14 Judge Aldrich, go ahead and ask your questions.

15 JUDGE ALDRICH: Hi. This the Judge Aldrich. The
16 first question is for Appellants' representative. So I
17 was just curious regarding the authority cited. From what
18 I see it's from Internal Revenue Manual. Did you refer to
19 that as a regulation or --

20 MS. GAN: So we are referring to the Internal
21 Revenue Manual as a guideline that helps the IRS to
22 address similar issues.

23 JUDGE ALDRICH: Okay. But it's not as -- doesn't
24 hold statutory weight or regulatory weight, does it?

25 MS. GAN: At this point, we believe that it is

1 serving as a persuasive authority that can provide some
2 guideline.

3 JUDGE ALDRICH: Okay. Thank you.

4 Let's see. This question is for FTB. Is there
5 any dispute that FTB received the funds timely?

6 MR. BROWN: No dispute at all, Judge.

7 JUDGE ALDRICH: Okay. So this is a substantive
8 question for FTB. The phrase "for reasonable cause then
9 was not the result of willful neglect," appears in other
10 penalty statute. Should we interpret it in the same way
11 in this penalty?

12 MR. BROWN: Well, respectfully, Judge, that's
13 already been done in the Porecca decision, which also
14 involved a mandatory e-pay penalty. And in that case, it
15 was deemed that it was not reasonable cause, given the
16 facts that were presented in that appeal.

17 JUDGE ALDRICH: Okay. And you had brought up the
18 fact that the e-pay penalty became effective in 2008, I
19 believe?

20 MR. BROWN: Correct, Judge.

21 JUDGE ALDRICH: And was it implemented at the
22 same time, meaning, were taxpayers required and billed for
23 failing to comply with e-payment penalties in 2008?

24 MR. YADAO: Judge Aldrich, I can handle that.

25 So FTB administratively deferred imposing the

1 penalty for two years based on discussions with the
2 taxpayer community just so that they can do outreach and
3 educate the taxpayers that the penalty was going to be
4 imposed. So beginning January 1, 2011, the penalty was --
5 we reinstated the law and started imposing the penalty,
6 but we were also issuing the courtesy notices to the
7 taxpayers, which is courtesy notice and is not required by
8 law.

9 And if I can just have one second to address the
10 IRM question just to clarify that the IRS does not have a
11 mandatory e-pay for individuals. So that would
12 effectively deprive the IRM with any guidance on how they
13 would handle that. And even if it had, the Porecca
14 holding as Mr. Brown indicated is -- is contrary to that
15 because it requires the taxpayers to acquire or to
16 acquaint themselves with the law, which hasn't happened
17 here.

18 JUDGE ALDRICH: Thank you.

19 I guess I was also curious. Is there an overall
20 compliance rate for the first year that taxpayers are
21 required to e-pay?

22 MR. YADAO: I don't know that we have any
23 statistics on that.

24 JUDGE ALDRICH: Okay. That's fine. And I know
25 that that wasn't briefed, but I was just curious. Okay.

1 Those are all the questions that I had. I'm going to
2 refer it back to Judge Geary. Thank you very much.

3 JUDGE GEARY: Thank you, Judge Aldrich.

4 Judge Stanley, did you have any questions for
5 either the witness or the parties?

6 JUDGE STANLEY: This is Judge Stanley. Yes, I
7 have a follow up to FTB's addressing the Internal Revenue
8 Manual as not being persuasive authority because of the
9 fact that the IRS does not have an e-pay penalty. So I
10 want to follow up with that and ask if it's FTB's position
11 that the reasonable cause found in the e-pay penalty
12 statute is somehow different from the reasonable cause
13 exception found for other penalties such as late-filing or
14 late-payment penalties?

15 MR. BROWN: I can answer that. The reasonable
16 cause is reasonable cause. The question is in what
17 context and what are the facts and circumstances
18 underlying determination of whether reasonable cause is or
19 is not present. One thing about the Internal Revenue
20 Manual since there is no e-pay requirement or penalty, and
21 not only that, but since it's a guideline it is really
22 hypothetical and it's speculative to know how a given IRS
23 representative would rule on a question of whether
24 reasonable cause has been presented in the circumstances
25 that we have before us.

1 Again, the Porecca case did make a determination
2 of reasonable cause based on the facts and circumstances
3 before them. Ignorance of the law was deemed to not be
4 reasonable cause, and they also found external sources of
5 information whereby the taxpayer could have learned of the
6 e-pay requirement.

7 So I hope that's responsive to your question,
8 Judge Stanley.

9 MR. YADAO: And if I can add a little bit to
10 that. If we focus on what the taxpayers -- what the
11 taxpayer argues is reasonable cause here is that they
12 didn't receive the courtesy notice that was sent to the
13 address that is on all of their mailings throughout the
14 record here, as well as what's not in the record, which
15 would be all of the prior year returns. The Appellant
16 acknowledges that that's his home address. It's the
17 address that Office of Tax Appeals has used, and he has
18 expressed no discontent with receiving all of those.

19 So I mean, if you look at the last known address
20 issue, we mailed it to the correct address. And if you
21 look at that issue in the context of filing enforcement,
22 the law -- Zolla, which is the U.S. Circuit Court case
23 that says all we have to prove is that we sent it to his
24 address. But, again, that's a courtesy notice.

25 And as Mr. Brown mentioned, Porecca already

1 addressed the reasonable cause side and how it applies to
2 the e-pay penalty, and it specifically holds that the
3 taxpayer is supposed to acquaint themselves with the law,
4 and again as Mr. Brown said, the law is there. It's
5 clear. It's not obscure, and it's even on the 540
6 notices. If to the extent that the Appellant delegates
7 filing and payment to his preparer and his preparer didn't
8 advise him that it was supposed to be made electronically,
9 then it's between the Appellant and his preparer.

10 JUDGE STANLEY: This is Judge Stanley. Thank
11 you. So you're not taking the position that the
12 reasonable cause exception is any different from what we
13 normally do with the other types of penalties and consider
14 what a reasonable businessperson would have done under
15 similar circumstances; is that correct?

16 MR. YADAO: I think --

17 MR. BROWN: That's the whole of Porecca that
18 indicated that reasonable cause is reasonable cause, and
19 it could be regardless of what context it's in. The
20 question is under the particular facts and circumstances,
21 has the taxpayer demonstrated that they acted as a
22 reasonable and prudent ordinary businessperson given those
23 facts and circumstances.

24 JUDGE STANLEY: This is Judge Stanley. Thank
25 you.

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JUDGE GEARY: Thank you, Judge Stanley.

And I'm advised that Judge Aldrich has another question, at least one. Go ahead, Judge Aldrich.

JUDGE ALDRICH: Hi. This is Judge Aldrich. This question is for Appellant. So Respondent's counsel made reference to instructions on the California income tax or Form 540 that indicates there are e-payment requirements there. Did you have -- do you have knowledge of going over that or -- with your CPA?

MR. CONCANNON: No. None. No, Your Honor. No.

JUDGE ALDRICH: All right. And then one more question. So I understand that with the e-payment that was new, but was making estimated tax payments new to you?

MR. CONCANNON: Yes.

JUDGE ALDRICH: For the 2020 year?

MR. CONCANNON: Yes.

JUDGE ALDRICH: Okay. Thank you. No further questions at this time.

JUDGE GEARY: Thank you, Judge Aldrich. I have no questions. Ms. Gan, I indicated to you that you would have an opportunity for a very brief rebuttal. If you are ready to do that, please proceed.

MS. GAN: Thank you.

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1 circumstantial evidence that Appellants had not requested
2 a waiver, even if they were qualified, that Appellant had
3 sufficient money in their bank account at that time and
4 that Appellants had timely and correctly filed and paid
5 their taxes for around 50 years, shows that Appellants had
6 not received the e-pay notice.

7 Moreover, in Porecca, Respondent had assisted and
8 imposed five e-pay penalties on the taxpayers, and that
9 taxpayer actually paid those penalties separately but
10 failed to comply with the e-pay requirements again and
11 again. There was evidence of willful neglect in that
12 case. However, Respondent in this case only imposed one
13 e-pay penalty on Appellants. And in Porecca, the OTA held
14 that reasonable cause would be found in the mandatory
15 e-pay penalty case if the taxpayers shows that their
16 failure to make a timely payment of the proper amount of
17 tax occurred despite the exercise of ordinary business
18 care and prudence.

19 Here, Appellants who had timely and correctly
20 paid their tax for decades and had never been informed of
21 the mandatory e-pay requirements sufficiently exercised
22 their due diligence by making sure their bank account has
23 sufficient funds to pay for their tax. And Appellants
24 promptly did e-pay after learning of the requirement as
25 soon as they could.

1 Appellants adequately exercised their ordinary
2 business care and prudence and did not willfully neglect
3 the requirement. Appellants' failure to make the
4 e-payment was the result of reasonable cause and was not
5 due to willful neglect.

6 Thank you.

7 JUDGE GEARY: Thank you.

8 Thank you to the parties. This case is now
9 concluded and is deemed submitted, and the record in this
10 appeal is now closed.

11 Thank you everyone for participating. In the
12 coming weeks the Panel will meet to consider the matter
13 and OTA will send you a written opinion within 100 days.
14 This hearing is now concluded, and my understanding is
15 that OTA is going to immediately begin the next hearing on
16 calendar. However, this hearing is concluded, and
17 everybody is dismissed from further participation today.

18 Thank you very much.

19 (Proceedings adjourned at 2:05)
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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
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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 3rd day
of April, 2023.

ERNALYN M. ALONZO
HEARING REPORTER