

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
R. BAHNASY, ) OTA NO. 220510433  
 )  
 APPELLANT. )  
 )  
 )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Friday, May 19, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 9:40 a.m. and concluding at 10:59 a.m. on  
Friday, May 19, 2023, reported by Ernalyn M.  
Alonzo, Hearing Reporter, in and for the  
State of California.

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APPEARANCES:

Panel Lead: ALJ TERESA STANLEY

Panel Members: ALJ TOMMY LEUNG  
ALJ ASAF KLETTER

For the Appellant: JAMES CREECH  
R. BAHNASY

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
  
PAIGE CHANG  
MARIA BROSTERHOUSE

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I N D E X

E X H I B I T S

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California; Friday, May 19, 2023

9:40 a.m.

JUDGE STANLEY: We're going to go on the record now.

Once again, this is Judge Stanley speaking. I'm going to ask that each of you state your name when you speak also because it's not always easy for our stenographer to catch who the speaker is when there are so many people on the screen in front of her.

This is Appeal of Bahnasy, Case Number 220510433. The date is May 19th, 2023, and it's 9:40 a.m.

Again, I'm Judge Stanley, and we have Judge Tommy Leung and Judge Asaf Kletter here with us. I'll conduct the hearing, but the panel will equally deliberate and issue an opinion within 100 days after the record closes.

I'm going to ask the parties to identify themselves on the record now, starting with Appellant.

MS. BAHNASY: Reema Bahnasy.

MR. CREECH: James Creech for Reema Bahnasy.

JUDGE STANLEY: Thank you.

And for Franchise Tax Board.

MS. CHANG: This is Paige Chang with the Franchise Tax Board.

MS. BROSTERHOUS: I'm Maria Brosterhous, also for

1 Franchise Tax Board.

2 JUDGE STANLEY: Okay. Welcome to the Office of  
3 Tax Appeals. I might refer to it as OTA sometimes. We  
4 are independent of the Franchise Tax Board and any other  
5 tax agency. The Office of Tax Appeals is not a court but  
6 is an independent appeals agency that's staffed with its  
7 own tax experts. The only evidence that is in our record  
8 is what was submitted during this appeal.

9 These proceedings are being live streamed on  
10 YouTube, and our stenographer Ms. Alonzo is reporting the  
11 proceeding and will produce a transcript after the  
12 hearing.

13 The issue as we've discussed it at the prehearing  
14 conference was whether Appellant has shown that the tax  
15 return filed for 2015 was a timely claim for refund.

16 Mr. Creech, do you agree that that's the issue?

17 MR. CREECH: That's correct, Your Honor.

18 JUDGE STANLEY: And Ms. Chang, do you agree?

19 MS. CHANG: Yes, we agree. Thank you.

20 JUDGE STANLEY: Okay. This is Judge Stanley  
21 again. With respect to exhibits, Appellant did not submit  
22 any exhibits. FTB submitted Exhibits A through G. There  
23 was no objection to those at the prehearing conference, so  
24 those will be admitted into the record without objection.

25 ///

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

3 And before we begin, Mr. Creech, you were  
4 uncertain whether Ms. Bahnasy would be testifying today.  
5 Do you want to have her testify, or are you just going to  
6 present argument today?

7 MR. CREECH: Your Honor, Ms. Bahnasy would like  
8 to testify today. She is the only witness from the  
9 Appellant.

10 JUDGE STANLEY: Okay. Thank you. This is Judge  
11 Stanley speaking.

12 Ms. Bahnasy will you please raise your right  
13 hand.

14 R. BAHNASY,  
15 produced as a witness, and having been first duly sworn by  
16 the Administrative Law Judge, was examined and testified  
17 as follows:

18  
19 JUDGE STANLEY: Okay. Thank you. And I'll  
20 explain for any outside viewers and for the Appellant that  
21 we don't -- we don't swear in people who are just  
22 presenting argument. So it may look one-sided, but  
23 Franchise Tax Board won't be sworn in because they won't  
24 be testifying as to facts.

25 So we'll go ahead and get started. Mr. Creech,

1 we'll start with you, and you can handle it any way you  
2 want with a narrative or question and answer for  
3 Ms. Bahnasy, or whichever way you want to handle it. You  
4 may begin when ready.

5 MR. CREECH: All right. I'm going to start with  
6 a short opening statement before I call Miss Bahnasy.

7  
8 PRESENTATION

9 MR. CREECH: So this matter appearing before you  
10 today is a single matter, but there are really two  
11 portions to this matter. The question is a statute of  
12 limitations question. Was the return filed timely? But  
13 in that question there are complex factors.

14 We have the standard statute, and then we have an  
15 overriding statute that is an adoption of 70 of the IRS  
16 Code Section or IRC Section 7508A. 7508A was passed by  
17 Congress. It was adopted by the State legislature. It  
18 has a corresponding Revenue & Taxation Code Section of  
19 18572, which adopts 7508A in its entirety. And for ease  
20 of purpose, I'm going to refer to both statutes under the  
21 7508A criteria.

22 So what 7508A does is it lets us consider both  
23 the strict statute and human policy. And the way it does  
24 that in 7508A introduces some equity into what is  
25 otherwise an extremely rigid standard. 7508A allows



1 Congress, it allows the state legislature, it allows the  
2 tax department, such as the department of revenue and  
3 vis-a-vis the OTA to interpret the code section in a way  
4 to provide relief for people in a federally declared  
5 disaster.

6 The reason for declaring relief for a 70 -- in a  
7 7508A disaster area is a matter of public policy. There  
8 are situations beyond our control that make filing  
9 returns, even delinquent returns, difficult or next to  
10 impossible. Now, normally 7508A has been in place since  
11 1977. Normally when we deal with a disaster, we deal with  
12 a very discreet disaster. A tornado in Missouri makes it  
13 difficult to file for a small window.

14 Just this year the rains we had in January gave  
15 rise to a major disaster. California pushed the filing  
16 deadlines for payments for close to ten months. The rains  
17 happened in January. The filing deadline this year for  
18 2022 returns for California, and all but something like  
19 three counties, is now October 16th. The reason why this  
20 happens is because it's fair.

21 There's equity in 7508. Not only is the equity  
22 in 7508 -- it's not even a tolling statute. It's a  
23 complete disregardance of time. It is the strongest  
24 language of equity that any section of the Internal  
25 Revenue Code or the Internal Revenue -- or the Revenue &

1 Taxation Code has.

2 So here we have strict statute. We have a broad  
3 equity grant. And now we're going to couple that with the  
4 greatest disaster that has faced America and California in  
5 our lifetimes. We're talking about Covid-19 of course.  
6 Covid-19 killed 100,000 Californians, and that number is  
7 probably under counted. It was indiscriminate in who it  
8 had targeted. It killed young. It killed old. It killed  
9 rich. It killed poor. It killed State of California  
10 workers.

11 And so in response to Covid-19, there was a grant  
12 under 7508, both at the federal and at the state level.  
13 In fact the California grant for a major disaster occurred  
14 before the federal. It happened on March 4th, 2020. The  
15 federal disaster was not declared until March 12th, 2020.  
16 The disaster was -- did not end until 2023. So that is a  
17 three-year disaster absolutely unprecedented in terms of  
18 the scope, the magnitude it impacted.

19 I mean, I am probably belaboring the point, but I  
20 think everyone in this room remembers wearing a mask to go  
21 to a grocery store. They remember the shifts that  
22 happened, the work from home, the fear or terror that  
23 seeing a stranger had for those months. And we may be  
24 past it now. The vaccines may be widely available, but  
25 most of the time that we are talking about during this --

1     this application of 7508, occurred before there were  
2     vaccines, while there was still strict social distancing.  
3     We could not eat inside a restaurant.

4             And so the request is to read 7508 and the  
5     Revenue & Taxation Code Section 18572 for the disaster  
6     that it was; to read the language of 7508 as it was  
7     intended to be written -- to be read. Think about what it  
8     took to file a return during this period; What it took to  
9     get information to a CPA; what it took to explain the  
10    facts and circumstances; what it took to make sure that a  
11    true and accurate complete return was filed.

12            Now, there is another time period we need to  
13    discuss, and that time period is the 2015 through 2020 --  
14    March 4th, 2020, period. And the petitioner, you know,  
15    acknowledges that we're talking about an old return.  
16    We're talking about a return that was still timely. The  
17    claim for refund was still timely on March 4th, on March  
18    12th, on March 20th, depending on the various number of  
19    code -- various number of disaster declarations because  
20    there had been something, like, 12 different modifications  
21    to the disaster during the last three years.

22            This is not a straightforward time period in  
23    terms of we can say this is the beginning, this is the  
24    end. This has been a rolling disaster. But we have to  
25    talk about the time period beforehand, and we have to talk

1 about what we're actually here to talk about. Like, what  
2 the return constitutes, I should say, and how the payments  
3 don't match the return.

4 This is not a situation where the return was  
5 filed in a vacuum. The return was filed to accurately and  
6 correctly reflect what the tax liability was for the year  
7 in question. And the reason this is a refund procedure is  
8 because Ms. Bahnasy has been making payments the entire  
9 time. She knew that she had to pay tax. She made those  
10 payments timely. She overpaid by a significant amount of  
11 money because she did not want to underpay. She took the  
12 responsibility to fund schools, to fund roads, to fund  
13 hospitals, to fund her social safety net seriously. She  
14 made all those payments timely.

15 The return that was filed delinquent only  
16 represents what the true and correct tax was. You know,  
17 it's important to consider that when we're talking about  
18 what granting relief means here, it means that we are  
19 talking about the right that's enumerated in the Taxpayer  
20 Bill of Rights to pay no more than the correct amount of  
21 tax, because the tax had already been paid. It had been  
22 paid and had been in the possession of the State of  
23 California for years. And this was just an effort to get  
24 back to the correct amount of tax.

25 So we're talking about correctness. We're not

1 talking about someone who has tried to skip out on their  
2 payments. We're talking about someone who is merely  
3 asking to set things right in the middle of a pandemic  
4 after suffering immense personal tragedy for years on end.  
5 And so when we talk about equity, and we talk about what  
6 is the right thing, this statute of limitations everyone  
7 acknowledges is not the right outcome.

8 It is overly harsh. It is punishing someone who  
9 was trying to do the right thing. There is a roadmap in  
10 granting relief on this. And ultimately, the question of  
11 if the refund should be granted comes out to what is  
12 easier. Is it easier for the tax agency to take tens of  
13 thousands of dollars and say, I'm sorry you waited too  
14 long. That money now escheats to the State of California?  
15 Or can we do right the thing?

16 Can we use the legal and statutory  
17 interpretations that is inherent in 7508? And can we say,  
18 we get to the correct result? Because that's the goal to  
19 get here, to get to the correct result to allow  
20 Ms. Bahnasy to pay the correct amount of tax for the year  
21 in question and to not be deprived of that money because  
22 of a tragedy that was outside of her control.

23 So with that, I would like to call Ms. Bahnasy to  
24 talk about what her experiences were during -- while this  
25 return was not filed.

1 May I proceed, Your Honors?

2 JUDGE STANLEY: This is Judge Stanley speaking.  
3 Yes, you may proceed with either question and answer or a  
4 narrative testimony, whichever you prefer.

5 MR. CREECH: I think it's important in this case  
6 that we hear Ms. Bahnasy in a narrative format. And I  
7 would ask that --

8 Ms. Bahnasy, will you just tell us a little bit  
9 about your life from 2015, from the beginning to Covid,  
10 please.

## 11

12 WITNESS TESTIMONY

13 MS. BAHNASY: Sure. Yeah. Thank you. And I'm  
14 also happy to answer questions, if that's helpful to  
15 clarify anything.

16 But the years 2015 to 2020 for me were five years  
17 of personal tragedy and grief. I'm the youngest in my  
18 family, but I had become -- and forgive me. I'm a little  
19 emotional.

20 Over that period, I had become sort of the  
21 central caregiver person in caring for my family. Just  
22 preceding that, my father was originally from Syria, had  
23 been in, like, Syria again and, you know, came -- I begged  
24 him to come back to the States because of the war in Syria  
25 that was closing in, while he could still come. And my

1 mother was in a long battle with cancer.

2 Those were just realities I was dealing with  
3 going into 2015. And in October of 2015 a very close  
4 cousin of mine was violently murdered. He was 32. This  
5 was in a period when my mother -- my father was there. My  
6 mother was living with me. I was her caretaker. We had  
7 sort of combined, you know, lives at that point.

8 My mother had a tough decline in the last year of  
9 that in particular as we were, you know, coming out of the  
10 grief of my cousin in 2017, October. So exactly two years  
11 later, my mother did pass after her -- an eight-year  
12 battle of metastatic breast cancer. That was a massive  
13 loss in my life and a very challenging time. And coming  
14 out of that grief, you know, it was really kind of a  
15 two-year period of healing.

16 As I rounded that two-year mark from my mother's  
17 passing in 2019, I was very much working on getting things  
18 back on track in life. A number of things had been --  
19 personally had been put aside as I became focused really  
20 on two things; on work as I run a business and employ  
21 people; and on, you know, just caring for family. And  
22 part of that in 2019, part of what I was trying to get  
23 back on track, I was very aware that I had not filed my  
24 taxes even though every quarter I had always paid the  
25 estimates.

1           And I was working to clean that all up and file  
2           everything. I was working with my CPA to complete the  
3           past years. 2015 was completed and ready to be shipped at  
4           the end of that year and working on the subsequent years.  
5           And January 31st I was buoyant going into 2020, honestly,  
6           moving life forward. But January 21st, 2020, my older  
7           brother, who had also been living with me for personal  
8           reasons at that time, he died unexpectedly at 52.

9           I found him that Tuesday morning returning from  
10          the MLK weekend. And, unfortunately, just as we had  
11          celebrated the life of my brother, my father died on  
12          March 2nd, so six weeks later, of Parkinson's. So in the  
13          course of those, you know, five years every, you know,  
14          less than a year to two years, I had a -- was hit with a  
15          Mack truck of really loss and grief of a dear family  
16          member. And each time, you know, to move through grief  
17          and move forward -- and my father, as we laid him to rest,  
18          the Covid lockdown came that following week.

19          So that -- all of that was my sort of personal  
20          journey that preceded the events of Covid. I became  
21          deeply grateful that I was able to celebrate both of their  
22          lives with friends and remaining family because that was a  
23          grace that was not afforded to others, you know, when they  
24          were lost after Covid started. All of that is the  
25          backdrop through which I failed to file my taxes in a



1       timely way.

2               But throughout that I never failed to pay. In  
3 fact, I made it a point to overpay. I have a business  
4 partner. We employ about 25 people in a business in San  
5 Francisco. And as we're 50/50 partners, to ensure that I  
6 was -- or, you know, so I thought in the good books in  
7 that sense, I was just matching her -- her filings for  
8 payments knowing her payments would be higher than mine  
9 would require, because she was partnered and married to a  
10 partner who was generating even more income that set her  
11 even higher.

12              So my every intention was always to pay in full,  
13 to pay timely. And, you now, I wholly own the mistake of  
14 not having -- not more than a mistake, but of not having  
15 filed in a timely manner. I share the event of those  
16 years for some context to part of what was taking me off  
17 track and holding me back from prioritizing my own  
18 personal business. The needs of my family and business  
19 were really the two things that came first that I  
20 prioritized.

21              Mr. Creech mentioned the difficulty of a true and  
22 accurate return. I would add to that the folly that I am  
23 a bit of a perfectionist and that I had been encouraged by  
24 a previous CPA to get to be good enough to just file. And  
25 I suppose being here today, a part of me wishes I had

1 followed that advice. But I felt an obligation to be  
2 accurate, to be thorough.

3 Over the year -- those -- that set of years my  
4 finances had become more complicated with sort of the  
5 combination with my mother becoming dependent and becoming  
6 financially woven. In my business I just -- I felt a real  
7 obligation to get it right and be accurate and do it once  
8 and do it cleanly in the filing knowing that I had well  
9 overpaid. So, you know, I wish I had known better at that  
10 time, but I hope that you'll hear from me my intention  
11 over that time was truly to do the right thing.

12 I believe in paying taxes. I'm a product of  
13 public schools. I've had to call the police and the fire  
14 department for various things over the years and have been  
15 grateful for their response. I understand the value of it  
16 all, and I'm -- you know, I happily pay my taxes. My only  
17 ask is to pay what is accurate and what I actually owed  
18 and not to be penalized for the attempt to do so. I hope  
19 that you will consider those factors and the intention  
20 around what brings me here today.

21 Thank you.

22 MR. CREECH: Thank you. Now just one point of  
23 clarification if I may. The return in question that's  
24 attached as an FTB exhibit, it shows a preparation date of  
25 2019. Can you tell me a little bit about your effort to

1 file, you know, to get compliant prior to those kinds of  
2 series of tragedies of deaths and then pandemic.

3 MS. BAHNASY: Yeah. Absolutely. I am -- well,  
4 the 2015 one that's in question is -- that coincided with  
5 my cousin being killed in October of 2017 -- I'm sorry.  
6 I'm mixing that. In October of 2015 my cousin was killed.  
7 So I was -- normally he would file 2015 in the 2016  
8 calendar year. That was sort of the first moment of  
9 derail where dealing with the grief and the family matters  
10 there, I did not complete in a timely manner.

11 And the it was followed up -- followed with  
12 additional tragedy with the loss of my mother and that --  
13 and so I continued to be delinquent in the filing itself.  
14 But my -- in 2019 I was working with a former CPA to  
15 complete and get caught up and up to date and submit my  
16 taxes, and had, in fact, completed 2015. I had simply not  
17 shipped it. I had the envelope. I had the final filing.  
18 I had not mailed it and was working on, you know, the  
19 subsequent 2016 as well and '17. And I had not done  
20 that -- sorry I'm losing my train of thought.

21 In January 2020 I was -- the loss of my brother  
22 was such an absolute shock to the system, I just didn't.  
23 I don't have any good explanation for not having dropped  
24 that in the mail other than going back to sort of being a  
25 perfectionist. I was trying to get the whole caboodle of

1       it done knowing I had 2015, '16, and '17, and '18 to file  
2       as well. I was working on them, obviously, sequentially.

3               MR. CREECH: And those returns -- you know, and  
4       we recognize that those years are not at issue in front of  
5       this tribunal. This is again James Creech for the  
6       Appellant. Those years are not in issue, but have those  
7       years been filed?

8               MS. BAHNASY: They have. Yes, I'm current in all  
9       my filings.

10              MR. CREECH: Were they filed by the same CPA that  
11       prepared the 2015?

12              MS. BAHNASY: No. It -- the -- no, they were  
13       not. I switched CPAs to pick -- or tell you over that --  
14       when I came back to it. So yeah, where I did not complete  
15       the period of my brother passing, my father passing,  
16       Covid, and the grief there, when I was able to pull myself  
17       back to address and complete the rest of the filings I --  
18       forgive me. I'm not sure when I finally put it in the  
19       mail.

20              I think it was '21, which I, you know, doesn't  
21       sound like logical sense that it was in my hands from 2019  
22       and didn't go into the mail until '21, except for the  
23       series of tragic events that happened that -- and what I  
24       was coping with, and I didn't take care of that.

25              MR. CREECH: I don't think I have any further

1 questions for the Appellant.

2 JUDGE STANLEY: Okay. This is Judge Stanley  
3 speaking. First, Ms. Bahnasy, I want to say I'm sorry for  
4 all of your losses in the past several years. It sounds  
5 horrific.

6 MS. BAHNASY: Thank you so much.

7 JUDGE STANLEY: I would like to check with my  
8 panel to see if anybody has questions for Ms. Bahnasy.  
9 Judge Leung?

10 JUDGE LEUNG: Yes. Thank you, Judge Stanley.  
11 But I think maybe we will let Franchise Tax Board ask  
12 questions first before I get into my questions, if  
13 Franchise has any questions.

14 JUDGE STANLEY: That's a good point, Judge Leung.  
15 Thank you.

16 Ms. Chang, do have any questions for the witness?

17 MS. CHANG: This is Paige Chang. No questions.  
18 Thank you.

19 JUDGE STANLEY: All right. Judge Leung, do you  
20 have questions now?

21 JUDGE LEUNG: Yes, I do. Thank you, Judge  
22 Stanley.

23 And, again, Ms. Bahnasy, deepest sympathies from  
24 OTA for your personal tragedies over these years.

25 MS. BAHNASY: Thank you so much.

1 JUDGE LEUNG: I'm curious about your federal  
2 returns during this time period. Were you in overpayment  
3 or underpayment status for your 2015 return? And if so,  
4 were those federal returns filed on time?

5 MS. BAHNASY: No. All -- I did them all like  
6 each year together, everything. So I overpaid across the  
7 board to FTB, to California, and to IRS. And in a few  
8 instances to New York and Massachusetts, I believe,  
9 because my business we qualify to pay taxes into those  
10 states with my business. And so no, it was the same thing  
11 across the board. I always paid the my, you know,  
12 estimated taxes, and my estimation I was mirroring that of  
13 my business partner who I knew had a greater tax liability  
14 than I did throughout. And then I filed them all at the  
15 same time. So California, IRS, everything for each year  
16 went at the same time.

17 JUDGE LEUNG: And so were you successful in  
18 claiming refunds from IRS and New York and Massachusetts?

19 MS. BAHNASY: And forgive. There's a lot. I'll  
20 ask Mr. Creech to help me address the -- there's a lot of  
21 this.

22 MR. CREECH: Can I address just the point on  
23 that?

24 JUDGE LEUNG: Of course.

25 MR. CREECH: I realize that it's unusual to have

1 the representative testifying as to a factual question,  
2 but I do have firsthand knowledge of that. We have made  
3 the claim.

4 JUDGE STANLEY: Excuse me. This is Judge Stanley  
5 speaking. Mr. Creech, would you like me to swear you in  
6 since you say you have personal firsthand knowledge?

7 MR. CREECH: I do. I would be happy to be sworn  
8 in for the -- and I think my statement should be limited  
9 to this particular question, but I could provide  
10 additional context to that as well.

11 JUDGE STANLEY: Okay. Why don't you raise your  
12 right hand.

13

14 J. CREECH,  
15 produced as a witness, and having been first duly sworn by  
16 the Administrative Law Judge, was examined and testified  
17 as follows:

18

19 JUDGE STANLEY: Okay. Thank you. You may  
20 proceed.

21

22 WITNESS TESTIMONY

23 MR. CREECH: So we have made the claims at the  
24 federal level, but we have been stuck in a, kind of,  
25 procedural issue in terms of the notices to generate are

1       AUR notices that were promulgated out of just IRS service  
2       center campuses, and the service center campus has not  
3       adequately kind of responded to the responses. You know,  
4       it's not a standard response. So we fully acknowledge  
5       that these -- the interplay of 7508A with the federal code  
6       Sections 6501, I mean, these are -- this is a very unusual  
7       set of circumstances.

8               You know, this is not -- we have had a rather  
9       unprecedented disaster. So we don't, you know,  
10      normally -- we fall outside of a lot of precedence, and we  
11      have been unable to get in front of a human being. We  
12      have been doing correspondence, and we have not -- the  
13      correspondence we have receive back has been automated  
14      versus a live human being.

15             We're, you know, attempting to get in front of an  
16      appeals officer or someone with decision making power. We  
17      just happen to catch California at a -- you know, the  
18      response that California sent triggered procedural rights  
19      that we have not been afforded at the federal level, but  
20      the arguments mirror the same. So California is ahead of  
21      the feds at this point.

22             JUDGE LEUNG: So Mr. Creech, if I hear you  
23      correctly, what type of notices are you referring to? You  
24      said AUR notices?

25             MR. CREECH: Automated Under Reporter. So they



1 are the computer-generated notices. These are the  
2 CP2000s. These are the -- these are the IRS computers.  
3 They are not IRS human beings.

4 JUDGE LEUNG: So did they deny the claim, or are  
5 you saying we're waiting for more guidance, or waiting or  
6 for more information? What do these notices tell you? Is  
7 the IRS done with it, or they are still in the admin  
8 process?

9 MR. CREECH: We're still in the admin process.  
10 The notices -- the notices have generally related to the  
11 carry forward of an overpayment. And so because the  
12 overpayment is not carrying forward from the 2015 year to  
13 2016 and 2017, and so we need -- we are trying to -- we're  
14 administratively attempting to get the overpayment  
15 applied.

16 But because we have been -- we have been writing  
17 letters to computers, that we have not received a hearing  
18 such as this at the federal level. So we're still  
19 proceeding administratively.

20 JUDGE LEUNG: Okay. Thank you, sir. That's all  
21 my questions.

22 Judge Stanley, thank you.

23 JUDGE STANLEY: Thank you, Judge Leung.

24 This is Judge Stanley speaking again. Since we  
25 had Mr. Creech testify just now, I wanted to check back

1 with Ms. Chang to see if she has any questions of him.

2 MS. CHANG: This is Paige Chang. No questions.  
3 Thank you.

4 JUDGE STANLEY: All right. This is Judge  
5 Stanley. Judge Kletter, do you have any questions?

6 JUDGE KLETTER: This is Judge Kletter. I do have  
7 just one question. But before I ask it, I just want to  
8 say, Ms. Bahnasy, I'm sorry. My condolences for your  
9 grief and everything you've been through. Just one  
10 question for you.

11 MS. BAHNASY: Thank you.

12 JUDGE KLETTER: I'm just a little confused in the  
13 20 -- I know that the 2015 return that's in the record, it  
14 was signed October 16th, 2019. I just want to confirm  
15 what the accountants told you at that time that it was  
16 signed about whether it needed to be timely filed or not.

17 MS. BAHNASY: I think at that time, I mean, they  
18 had sent that to me. And I think because of the timing,  
19 it could not be electronically filed at that point, if I  
20 recall, and it had to be the paper. And so they had sent  
21 me the package, and I think I probably had to give it a  
22 wet signature and literally, you know, put it in an  
23 envelope and send it. They just said send it. There was  
24 no conversation, like, around that.

25 Well, forgive me. I'm trying to remember. I

1 think there was -- I mean, there was some conversation  
2 because I was trying to complete and get '16 and '17, and  
3 I know those aren't at issue today. But for me in my  
4 mind, which this was erroneous, but they were all related.  
5 I was trying to get the whole thing done and get into the  
6 good books and clear the slate and, you know, file  
7 everything.

8 And I think that I -- something in me that I was  
9 like holding onto 2015. Like, let me get -- make sure  
10 everything is super accurate because I have to get 2016  
11 and '17, and was there anything -- again, I'll say my --  
12 for me at least, my taxes aren't super simple. My  
13 business is an S corp with an LLC and like just -- so I  
14 had this -- even if they're saying, like, just ship it,  
15 you know, sort of good enough, I was uncomfortable.

16 Like, I wanted to get it all done. And my intent  
17 and my plan had been to send everything, to get them all  
18 done and send everything. And before I could do that is  
19 when, you know, not long, a few months later, my brother  
20 died in January. It just sent me off that track. So I  
21 wish I had, obviously, just put it in the mail. I didn't.

22 MR. CREECH: Judge Kletter, may I ask a follow-up  
23 question to that, please?

24 JUDGE KLETTER: Sure. I just want to confirm,  
25 Mr. Creech, before you ask your follow-up question. So I

1       wasn't sure based on that response. I appreciate  
2       everything that you've said. I'm just curious, like, did  
3       your accountants tell you that there was a statute of  
4       limitations, or did they tell you that you had to file it?  
5       I know that you said they said to go ahead and file it,  
6       but did they inform you there was a deadline? Or are  
7       you --

8               MS. BAHNASY: No. I had no awareness of that or  
9       statute of limitations in that sense. No, I had never  
10      been in that spot. And so it didn't occur to me to ask  
11      either. I just -- I mean, of -- from a commonsense  
12      standpoint, I knew like get it in sooner. Better get it  
13      done. That's what I was trying to do. But no, I was  
14      never advised of that. Like, be sure no matter what you  
15      do, you get it in by this date because there's a statute.  
16      I had no -- I had no knowledge of that. No.

17             JUDGE KLETTER: Thank you. I really appreciate  
18      that. This is Judge Kletter. I'm actually going to just  
19      turn it over to Judge Stanley.

20             Judge Stanley, if you would like Mr. Creech to  
21      ask a follow-up question?

22             MS. BAHNASY: Actually, and forgive me,  
23      Judge Kletter. Could I -- just an additional note on that  
24      question. Believe me I -- I wish I had knowledge of that.  
25      I -- despite everything that was going on, you know, for

1 me in that background emotionally with my family and the  
2 events, I have a hard time thinking. Had known that, like  
3 it's so simple, I would have just like put it in, you  
4 know, in the mail. I wish -- I wish I had known that  
5 because that -- we wouldn't be here, and it would be so  
6 much simpler, right.

7 JUDGE KLETTER: Thank you, Ms. Bahnasy.

8 And Mr. Creech, please go ahead with your  
9 follow-up question.

10 MR. CREECH: What -- Ms. Bahnasy, what impact did  
11 the fact that you signed a tax return under penalty of  
12 perjury have in your mind?

13 MS. BAHNASY: Well, for me I think, honestly,  
14 it's -- this is to my perfectionist tendencies. I would  
15 never -- like the perjury thing is so extreme. I respect  
16 that, but I'm honestly living up to my own bar of I need  
17 to make sure I have every receipt. I have backup for  
18 everything that -- like, it's my own -- perfectionist is  
19 tied to procrastination too, like to get it perfect.  
20 Like, I let the perfect be the enemy of the good.

21 So, obviously, I respect that. But for my --  
22 for me that I would actually perjure myself, like, it's so  
23 far from my conception of like -- because if anything, I'm  
24 too attached to making sure I get it right. You know, at  
25 the end of the day, had I thought through logically well,

1 if you don't have that additional receipt and additional,  
2 you know, say write-off or whatever, okay. So you're  
3 paying a little more.

4 Like, I just let the perfect be the enemy of the  
5 good, but I'm a rule follower. Like I -- you know, I care  
6 that I get it accurate, and that I do it right but to a  
7 fault. To a significant fault in this, you know, in  
8 regards to how it's played out with this for sure.

9 MR. CREECH: Judge Kletter, that's the follow-up  
10 question to my --

11 JUDGE STANLEY: I'm sorry. Mr. Creech, I didn't  
12 hear what you were saying.

13 MR. CREECH: I said that was my only question. I  
14 have no further questions for the Appellant at this point.

15 JUDGE STANLEY: Okay. And Judge Kletter do you  
16 have any additional questions?

17 JUDGE KLETTER: This is Judge Kletter. I do not.  
18 Thank you.

19 JUDGE STANLEY: Okay. And I don't have  
20 additional questions at this time.

21 So I will turn it over to Ms. Chang for Franchise  
22 Tax Board's presentation. You may proceed when ready.

23 MS. CHANG: Thank you.

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1       you have it easily accessible.

2               MS. CHANG: I don't, unfortunately. I'm sorry.  
3       I'll try to speak up. Is this better?

4               JUDGE STANLEY: This is Judge Stanley. I think  
5       it would help if you do speak up and speak slowly too,  
6       because then your words will be more distinct. We'll give  
7       it a try.

8               MS. CHANG: Okay. Thank you.

9               Appellant contends that her claim for refund was  
10       timely because the statute of limitations due date was  
11       extended until the end of the Covid-19 pandemic. However,  
12       the due date was extended only to July 15, 2020. Certain  
13       tax-related deadlines, including claims for the refund may  
14       be postponed when a state of emergency is declared by the  
15       governor, pursuant to California Revenue & Taxation Code  
16       Section 18572, which conforms to Internal Revenue Code  
17       Section 7508A.

18              Due to the Covid-19 pandemic in March 2020,  
19       Governor Newsom declared a state of emergency in  
20       California and issued an executive order which permitted  
21       FTB to extend the statute of limitations due date.  
22       However, it is clear that FTB Notice 2020-02 extended the  
23       due date to a certain date, July 15, 2020. And the law  
24       does not provide for the statute of limitations to remain  
25       open until the end of the Covid-19 pandemic.



1           Thus, Appellant's claim for refund on October 29,  
2           2021, was filed well after the expiration of the statute  
3           of limitations on July 15, 2020. Appellant additionally  
4           contends that the statute of limitations should not bar  
5           her claim for refund due to reasonable cause. FTB is  
6           sympathetic to the difficulties that Appellant has  
7           experienced, including grieving the loss of several close  
8           family members. However, there is no reasonable cause or  
9           equitable basis for suspending the statute of limitations.

10           Fixed deadlines may appear harsh because they are  
11           missed. However, the resulting occasional harshness is  
12           redeemed by the clarity imparted. Based on the foregoing,  
13           Respondent's denial of Appellant's claim for refund is  
14           proper under the statute of limitations, and FTB's  
15           position should be sustained.

16           I'm happy to address any questions from the  
17           panel. Thank you.

18           JUDGE STANLEY: Thank you, Ms. Chang.

19           This is Judge Stanley speaking. First, I'd like  
20           to see if my panel has any questions.

21           Judge Leung, do you have questions for FTB?

22           JUDGE LEUNG: Yes. Thank you. First some  
23           housekeeping questions, Ms. Chang or Ms. Brosterhous.  
24           Prior to the 2015 return, what was the taxpayer's filing  
25           record? Were they generally on time? Is she consistently

1 late? Can you give us that information?

2 MS. BROSTERHOUS: I can take a look at her record  
3 right now, actually. This is Maria Brosterhous. It looks  
4 like her 2014 return was timely within the extension  
5 period. 2013 and 2012 were not, neither was 2008. But  
6 there's nothing for '09 through '11. Would you like me to  
7 go on, or is that sufficient?

8 JUDGE LEUNG: No. That's sufficient, at least  
9 for me. The next is a little bit more to the statute  
10 18572. There are two subdivisions. They are (a) and (b).  
11 What's the difference between the two of them?

12 MS. BROSTERHOUS: One moment while I page to  
13 that. You said 18572?

14 JUDGE LEUNG: Correct. That's the -- conforming  
15 to IRC 7805A.

16 MS. BROSTERHOUS: And you asked what's the  
17 difference between the two?

18 JUDGE LEUNG: Yes, subdivision (a) and  
19 subdivision (b).

20 MS. BROSTERHOUS: Yes. Well, B is specific to  
21 the Franchise Tax Board and the governor, and that we are  
22 affected by emergencies declared by the governor. Whereas  
23 (a) just simply explains that under 7508A of the IRC,  
24 certain tax-related deadlines shall apply.

25 JUDGE LEUNG: Is it safe to say that in case the

1 president does not declare disaster and the government of  
2 California does, you would rely on (b) for any type of  
3 extensions or postponements, and not rely on (a)? Is that  
4 how that works?

5 MS. BROSTERHOUS: I would say that's correct.  
6 Yes.

7 JUDGE LEUNG: Okay. And what would happen if the  
8 two conflicts? So for instance, the governor says the  
9 extension is for four months and the Feds say it's for  
10 five months.

11 MS. BROSTERHOUS: Well, generally, under 18572 we  
12 would I believe follow the IRC or follow whatever the  
13 federal did. I don't think that such a conflict would  
14 occur where we would purposely provide inconsistent  
15 guidance.

16 JUDGE LEUNG: So, basically, you're stuck with  
17 what the Feds do because otherwise taxpayers wouldn't be  
18 able to file a California return without having to file a  
19 federal return first; correct?

20 MS. BROSTERHOUS: I would say yes. But in the  
21 interest of making filing easier for taxpayers and being  
22 taxpayer friendly, we would do what the IRS required so  
23 that the California return is filed pursuant to the  
24 federal one.

25 JUDGE LEUNG: Why I'm going in this direction is

1 I'm trying to figure out if the IRS or any federal  
2 taxpayer have made the same type of argument that  
3 Mr. Creech has made that because there is no end point to  
4 the pandemic until this -- at least the Feds last week.  
5 Has any taxpayers in Tax Court or if you know it, during  
6 the admin proceedings, have made same types of arguments  
7 that Mr. Creech has made in which the IRS has either  
8 conceded or lost in Tax Court or any type of other court?

9 MS. BROSTERHOUS: Ms. Chang, you can correct me  
10 if I'm wrong, but I'm not aware of anything like that.  
11 And I'd like to also clarify that the IRS' guidance was  
12 clear that they extended to July 15th, 2020, and that's  
13 what we followed. The IRS guidance did not allow for an  
14 indefinite extension.

15 JUDGE LEUNG: Okay. Thank you, Ms. Brosterhous.  
16 Judge Stanley, I am done.

17 JUDGE STANLEY: This is Judge Stanley speaking.  
18 Judge Kletter, do you have any questions for the Franchise  
19 Tax Board?

20 JUDGE KLETTER: This is Judge Kletter. I do not  
21 have any questions for the Franchise Tax Board. Thank  
22 you.

23 JUDGE STANLEY: Okay. And I also do not have  
24 questions at this time. So Mr. Creech, I'm going to turn  
25 it back to you so that you can respond to any of the

1 statements that the Franchise Tax Board has made today.  
2 You can have the final -- the final rebuttal.

3 MR. CREECH: Thank you, Your Honor.

4

5 CLOSING STATEMENT

6 MR. CREECH: James Creech for Appellant.

7 So I would just -- I'd like to kind of just start  
8 out with the timing of the 2019 signature on the 2015  
9 return. So the 2015 return was due April 2016. The 2019  
10 signature was three years, six months from the date of the  
11 original due date. So if that return had been mailed at  
12 the time it was signed, it would have been a timely claim  
13 for refund. So just I think that's kind of an important  
14 point because it shows evidence of intent to correct the  
15 mistake within the time period.

16 The return -- even at the earliest of four years,  
17 we are past the declaration date of the pandemic and the  
18 beginning of the following period under 7508A. I do just  
19 want to point out, you know, I just would kind of walk  
20 through some of the jurisprudence and timing and statute  
21 interpretation that we believe should apply during this  
22 evaluation.

23 So one of the frequently cited cases in terms of  
24 the rigidity of a filing deadline claim for refunds is  
25 US v Brockamp that was decided early in 1997.

1 JUDGE KLETTER: Excuse me, Mr. Creech. This is  
2 Judge Kletter. Would you mind just spelling that for our  
3 stenographer, please. Thank you.

4 MR. CREECH: Sorry. US v Brockamp,  
5 B-r-o-c-k-a-m-p, 519 US 347. So that is an often-cited  
6 case for the proposition of strict -- strict timely  
7 filing, strict time for refunds. That's where a lot of  
8 language of finality for both the taxpayer and the tax  
9 agency comes from. From a statutory construction  
10 standpoint, 7508 was passed after Brockamp was decided and  
11 reported. So it's in effect a legislative overruling of  
12 portions of Brockamp.

13 Again, we're not talking about a wholesale  
14 repeal. We are talking about limited circumstances where  
15 Congress felt Brockamp was too heavy handed. And the fact  
16 is they chose to use a disregarding of time, almost a  
17 complete erasement of time in terms of concepts when they  
18 passed the language. And they could have chosen softer  
19 language. So I think that is an indicator that Congress  
20 and the state legislature expected that this would be a  
21 broadly interpreted code section.

22 I will also kind of -- I will also admit that the  
23 language of 7508 could be clearer. I think there are  
24 ambiguous portions of 7508 and that Congress in its  
25 infinite wisdom could have been a little more precise in

1 exactly when they expected going to the end. You know, so  
2 we do think there's some ambiguity in terms of the  
3 statutory language of 7508.

4           However, we have recently had a U.S. Supreme  
5 Court decision in Boechler, B-o-e-c-h-l-e-r, v  
6 Commissioner. That is 596 US, decided in 2022. And at  
7 that point, we got some very strong language in terms of  
8 the fact that jurisdictional deadlines need to be  
9 explicitly stated by Congress because otherwise everything  
10 is equitable to the point where, you know, they -- I mean,  
11 it is almost a u -- it is a very -- it's a sizable  
12 majority for such a divided court.

13           But they came out very strongly saying that for  
14 the purposes of a collections due process claim, that the  
15 statute was equitable. There exists equitable tolling  
16 where almost no one had believed there was equitable  
17 tolling before. They go as far as saying in a footnote  
18 that the Tax Court has equitable jurisdiction. And so we  
19 have had some recent developments in terms of statutory  
20 construction that let us look beyond just the language and  
21 of the hard statute into what is fair, and what was  
22 intended, you know, was relief.

23           7508 went -- I just want to kind of go back to  
24 the notice that was released that Ms. Chang referenced.  
25 So that notice giving a shorter window for filing a

1 delinquent return was done very early on in Covid. I  
2 think that notice was released when we were all expecting  
3 Covid to last three weeks and life to be back to normal,  
4 you know, by end of the April.

5           There was no subsequent follow-up to represent  
6 the fact that again, you know, it killed at least 100,000  
7 Californians, and it interrupted all our lives for years.  
8 I think that is important to note that the rains we  
9 received in January provided a longer tolling than Covid  
10 did. And if we look at kind of the scale of emergencies,  
11 the rains in January were an inconvenience. And if we  
12 look at this in the -- this harsh strict reading of the  
13 language, those rains were double the disaster of Covid,  
14 if we look at the tolling effect that was impacted by the  
15 FTB.

16           So what we're asking at this point is really to  
17 look at the magnitude of the human condition that was  
18 during Covid. Look at the statutory authority that allows  
19 the FTB, allows the OTA, to go in to read the statute with  
20 their own interpretation to provide equitable tolling.  
21 Again, if we go back to this Covid disaster declaration,  
22 Covid disaster declaration was modified something like 12  
23 times.

24           I mean, the last Covid declaration modification  
25 was a very recent one. You know, the -- there is



1     ambiguity in the fact that it was modified so many times.  
2     I mean, there was -- you know, the Covid disaster  
3     declaration was an imperfect one. And without going into  
4     too much detail in what a Stafford Act declaration is, a  
5     lot of it is tied to funding from FEMA. And lot of it  
6     allows money from the federal agencies to flow to the  
7     state and local municipalities so they can provide  
8     adequate relief.

9             And where Covid was impacting, like there was an  
10    ongoing disaster. And why in the vague nature of 7508, I  
11    mean, it could be read that 7508 is reactivated every time  
12    there's a re-declaration of a disaster because it all ties  
13    off in DM or DR number promulgated by FEMA. And so  
14    because there's a lot of interplay between agencies, and  
15    there's a lot of interplay between state and federal, we  
16    have expansive disappearing of time under the statute.

17            And we have instruction from the Supreme Court  
18    that federal statutes are to be read broadly and  
19    equitably. I believe that there is room for this Board to  
20    have equity in its heart when coming to what is the  
21    correct fairness of the 2015 return, that the barriers  
22    that exist in terms of a notice, which is not the law,  
23    which is an administrative prudent announcement do not  
24    govern in lieu -- you know, they do not override a  
25    statute.

1           So here we have a roadmap to coming to the  
2       correct results. And the Appellant has had an immense  
3       amount of tragedy in her life. But she has always  
4       attempted to do the right thing. She has attempted to  
5       pay. She overpaid. She struggled with care giving of her  
6       elderly relatives, the loss of dear family members, the  
7       burial upon burial of loved ones. But just before Covid  
8       within the statute, she prepared and was almost ready to  
9       file, and she could have filed finally but for Covid.

10           And because there is this ability to toll the  
11       statute, she should be allowed to file a 2015 return that  
12       is deemed timely, that has the correct amount of tax  
13       assessed, and allows her to pay no more than the correct  
14       amount of tax due.

15           JUDGE KLETTER: Mr. Creech, this is Judge  
16       Kletter. I'm so sorry to interrupt you. I just want to  
17       make sure. Judge Stanley just had a connection issue, so  
18       I just want to make sure she can hear you. Thank you.

19           JUDGE STANLEY: Yeah. I'm sorry about that. I  
20       am back. So you can continue, Mr. Creech.

21           MR. CREECH: I think I was finished. I think I  
22       was done recapping the arguments. I think you were there  
23       for the important part about the effect of Boechler, the  
24       effect 7508, you know, in eloquence. So I don't think I  
25       have any further remarks at this time.

1 JUDGE STANLEY: Okay. And I will just mention --  
2 this is Judge Stanley. I will mention that since we had  
3 our stenographer take down the whole thing, I can pick up  
4 the last couple of sentences that I missed after the  
5 hearing. So Mr. Creech, you're done? You don't have  
6 anything else to add?

7 MR. CREECH: I have finished my remarks. I'm  
8 open to any and all questions.

9 JUDGE STANLEY: Okay. Thank you. It looks like  
10 Judge Leung has a question.

11 JUDGE LEUNG: Thank you, Judge Stanley.

12 Mr. Creech, I have two questions. One just for  
13 you and the last one for both you and the Franchise Tax  
14 Board. And this is the same question I asked the  
15 Franchise Tax Board. Based on your argument, did you have  
16 any citations to Tax Court decisions, IRS pronouncements,  
17 notices, rulings, et cetera, that support what you're  
18 saying that the Covid-19 really had no end? And if there  
19 was an end, it was probably sometime last week, so meaning  
20 the extensions continue besides referring to 7508A.

21 MR. CREECH: No, I don't. I'm not aware of  
22 anything that's precedential here or could be informative.  
23 I think part of that reason is that we are just dealing  
24 with a unprecedented and I'm, you know, I'm knocking on  
25 wood as I speak hopefully once in my lifetime disaster.

1 It has a relatively small impact in terms of we are  
2 talking about three years.

3 So if we look at the history of the tax code, the  
4 tax code has been around, you know, essentially the modern  
5 version for, you know, 100 years. 1954 is the modern tax  
6 code. We've never had anything like this before. I hope  
7 we don't have anything like this again. So to the extent  
8 that we have prior jurisprudence or guidance, every other  
9 disaster in my lifetime has been a more traditional  
10 equivalent of like the January rains where it rained, and  
11 we got a major disaster declared, and there was a  
12 six-month extension.

13 I do know that from my practical experience, the  
14 IRS has been generally very accommodating to anything  
15 relating to disaster declarations. I mean, we do have a  
16 fairly lengthy history, unfortunately, in terms of  
17 disaster declarations in the state. I mean, if we look at  
18 just even modern history, you know, the CZU fires last  
19 year and the Campfire, those were all generated disaster  
20 declarations. But those are generally more limited  
21 because the disaster has discreet, you know, one week,  
22 three weeks. You know, in case of a tornado, it might  
23 only be a 15-minute occurrence.

24 And so there has not been this extended deadline  
25 or open-ended disaster. We know when the fire starts. We

1 know when it's under control. And at that point,  
2 taxpayers are on notice that they have an additional six  
3 months. We don't -- you know, we've never had to worry  
4 about what it takes to find a new CPA when you can't meet  
5 face to face. We don't know what it's like to not be able  
6 to go into your CPA's office; what it's like not to be  
7 able to go into your bank to get duplicate records.

8 You know, after the CZU fire, I mean, my heart  
9 goes out to the people who lost their homes. Or the  
10 Campfire, there were other branches. There were other  
11 unaffected areas in the country. You know, here, you just  
12 can't call up Chase and say, I need this and get it  
13 transferred to New York, because New York is impacted just  
14 the same way we are in California.

15 So this is -- this is a little unprecedented.  
16 And to the best of my knowledge, there is no informational  
17 jurisprudence elsewhere.

18 JUDGE LEUNG: Thank you for that. And for my  
19 final question for both you and Franchise Tax Board, you  
20 first. Should the IRS ever -- or if they ever come to a  
21 decision on your inquiries regarding your taxpayer, would  
22 that trigger a new statute of limitations for her to file  
23 a claim with the Franchise Tax Board?

24 MR. CREECH: I don't believe it would trigger a  
25 new statute. I think that the only way that I think that

1 a statute -- a new California statute may be triggered  
2 would be if they apply the refund and then audited 2015  
3 under a provision and then there was an adjustment. But I  
4 think it would have to rely on an adjustment at the  
5 federal level to trigger a new California statute of  
6 limitations.

7 And I know that when you get into adjustments at  
8 the federal level, the California statutes can be quite  
9 lengthy, you know, just in my kind of limited experience  
10 with the FTB and extending code sections. I mean,  
11 we're -- you know, we have four years as the standard. We  
12 have six years for substantial understatement. So again,  
13 you know, if we're talking about, you know, essentially  
14 horizontal equity, I mean, if they were alleging that the  
15 Appellant had understated her taxes by that, they may be  
16 able to open 2016 even today.

17 The FTB would also be able to open 2015 if they  
18 allege that there was a non-economic substance  
19 transaction. So I think the non-economic substance  
20 statute is 12 years. So I don't think it's not  
21 unprecedented that statutes go this long. I mean, 2015 --  
22 I mean, I think the FTB could argue now that they could  
23 open a 2011 tax year that had a timely filed return.

24 And so when we are talking about is this fair, I  
25 do think we need to keep in mind that applying overpayment

1       going forward, you know, yes, we acknowledge the standard  
2       years for, and there's a reason for that. But it's not  
3       unheard of where the FTB will get to open 2015 now. And  
4       so if we're talking about equity, it's not that old in  
5       terms of it when we're talking about can 2015 ever be open  
6       by anyone.

7               JUDGE LEUNG: Well, we're not talking about  
8       equity. We're talking about the 2015 year when you said  
9       that the IRS is still studying it, and it's still in the  
10      admin level. I'm just wondering from your perspective,  
11      should the IRS allow the 2015 overpayment -- I assume you  
12      have a 2015 federal overpayment also?

13             MR. CREECH: Correct. That's our position. We  
14      do have a federal 2015 overpayment.

15             JUDGE LEUNG: Or should they allow the  
16      overpayment to be either refunded back to Ms. Bahnasy or  
17      be applied to future years as carry forward? It's a quick  
18      yes or no. Do you believe that also opens the statute up  
19      on the California side in the 2015 year?

20             MR. CREECH: No. I don't believe it opens. I  
21      don't believe -- I don't believe allowance of the 2015  
22      federal payment opens the 2015 FTB.

23             JUDGE LEUNG: Okay. Thank you.

24             Ms. Chang or Ms. Brosterhous, your opinion on  
25      that?

1 MS. BROSTERHOUS: This is Maria Brosterhous. No,  
2 there isn't a -- unless there was an actual federal  
3 adjustment, the statute would remain closed. So the  
4 answer is no.

5 JUDGE LEUNG: Okay. Thank you.

6 Judge Stanley, back to you.

7 JUDGE STANLEY: Thank you, Judge Leung.

8 Judge Kletter, do you have any questions?

9 JUDGE KLETTER: Yes. This is Judge Kletter. I  
10 just have a question for Mr. Creech, and Franchise Tax  
11 Board can respond if they wish. You know in the briefing  
12 there was a discussion, and I think also in your argument  
13 you talked about 7508A, how when -- I just want to clarify  
14 my understanding. So 7508 is when the President of the  
15 United States declares a disaster, then the secretary of  
16 the IRS is authorized to specify a period that will be  
17 disregarded.

18 So I'm curious, you know, how you read that  
19 section in 7508A subsection (a) that was in effect for the  
20 tax year saying that they may specify a period of up to  
21 one year.

22 MR. CREECH: So I think that -- so I'm loading  
23 it. I should not have -- you know, I can answer this  
24 without looking at it. I think that is the -- that is the  
25 time limit in a normal situation. But again, I think



1       there's some ambiguity in terms of the nature and  
2       substance of the Covid disaster declarations, both with  
3       FEMA and within the IRS.

4               I think that there is ambiguity in terms of does  
5       the authorizations or modifications of the Covid-19  
6       disaster, do they trigger new one-year starting points?  
7       Or do they trigger the being mandatory three months?  
8       Because again, this is an unprecedented ongoing disaster  
9       up until February for California, you know, last week for  
10      the federal purposes. And if we look at what the intent  
11      behind 7508 was, to provide relief, I think there's a very  
12      open question if the reauthorization modification  
13      restatement of has a 7508 impact because it also has a  
14      FEMA impact.

15             And the way the code section was written was to  
16      key off the FEMA impacts. Because that's why 7508(b) with  
17      the mandatory three months is read. So I don't think that  
18      what -- my interpretation of the statute is that once the  
19      FEMA portion kicks in, there's a mandatory shall  
20      modification for 7508. There's a more automatic  
21      application, and I think there is some vagueness in the  
22      statute in terms of what the reauthorization reapplication  
23      of this Covid declarations for the last three years has  
24      been. And again, that's where I think the Boechler  
25      interpretation becomes relevant in terms of an expanded

1 equitable interpretation of 7508A.

2 JUDGE KLETTER: Sorry. This is Judge Kletter.  
3 Before I turn it over to FTB, just curious. When you say  
4 7508A, you know, the three-month period, are you referring  
5 to 7508A as it was amended over time or at a date certain?

6 MR. CREECH: No, when it was -- let me -- oh.  
7 Sorry. It's a 7508D is the mandatory extension. And I  
8 believe 7508D -- I would have to look when, you know, the  
9 7508A subdivision (d). I don't recall off the top of my  
10 head if that was part of the original 1997 enactment, or  
11 if that was part of a later 2019-2021 enactment. But  
12 there is a cap D. That a little D is a mandatory 60-day  
13 extension that may -- that we believe, you know, the  
14 modifications may re-trigger.

15 JUDGE KLETTER: This is Judge Kletter. So just  
16 to confirm, it sounds like you're looking at the current  
17 statute, the one in effect today?

18 MR. CREECH: That's correct.

19 JUDGE KLETTER: And then just the same question  
20 for FTB, if they have any comment on which version of  
21 7508A should be applicable or the one-year period that  
22 specified in subsection (a).

23 MS. BROSTERHOUS: I think that yes, A does  
24 mention a one-year period that the secretary may specify.  
25 But what we look to here is when disaster is declared and

1 the secretary provides a period of postponement, we look  
2 at that specific period. So here that specific period was  
3 to July 15, 2020. And so FTB followed that period. So  
4 that's the relevant period.

5 JUDGE KLETTER: And just to follow up. So if I  
6 understand correctly, even though the President may have  
7 updated or there may have been further declared disasters  
8 with respect to Covid or further notices, is your position  
9 that the secretary just did not specify a further period,  
10 which would be disregarded?

11 MS. BROSTERHOUS: Correct. The only statement  
12 the secretary made was to July 15, 2020, and there were no  
13 updates beyond that.

14 JUDGE KLETTER: Thank you so much. This is  
15 Judge Kletter. No further questions.

16 JUDGE STANLEY: Okay. This is Judge Stanley  
17 speaking. This concludes the hearing for today. The  
18 record is now closed, and the matter is submitted for  
19 deliberation.

20 The panel of judges will meet to jointly  
21 deliberate and decide the appeal and will mail a written  
22 opinion no later than 100 days from today.

23 I want to thank everybody for participating.

24 And once again, Ms. Bahnasy, we're so sorry for  
25 all of your losses.

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MS. BAHNASY: Thank you.

JUDGE STANLEY: At this time, we're going to  
recess, and we'll reconvene at 1:00 p.m. for another  
hearing.

(Proceedings adjourned at 10:59 a.m.)

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I, Ernalyne M. Alonzo, Hearing Reporter in and for  
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I have hereunto subscribed my name this 12th day  
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