

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
S. DESAI and S. DESAI, ) OTA NO. 221212063  
 )  
 APPELLANT. )  
 )  
 )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, June 15, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 1:05 p.m. and concluding at 1:19 p.m. on  
Thursday, June 15, 2023, reported by Ernalyn M.  
Alonzo, Hearing Reporter, in and for the State  
of California.

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APPEARANCES:

Administrative Law Judge: JUDGE HOSEY

For the Appellant: RICHARD GERMIC

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

JOSH RICAFORT  
ERIC YADAO

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received at page 6.)  
(Department's Exhibits A-K were received at page 6.)

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California; Thursday, June 15, 2023

1:05 p.m.

JUDGE HOSEY: We are now on the record in the Appeal of Desai, OTA Case Number 221212063. It is approximately 1:05 p.m. on June 15th, 2023. This appeal is being conducted electronically led by myself Judge Hosey. This appeal is being heard and decided by a single Administrative Law Judge under the Office of Tax Appeals Small Case Program.

I want to remind today's participants and viewers that the Office of Tax Appeals is not a court but an independent appeals body. The office is staffed by tax experts and is independent of the State's tax agencies. OTA does not engage in any ex parte communications with either party, and our decision will be based on the arguments and evidence provided by the parties on appeal, in conjunction with an appropriate application of the law. I have read the briefs and examined the submitted exhibits, and I'm looking forward to your arguments today.

So can I have the party representatives introduce themselves for the record, starting with Appellant.

MR. GERMIC: Richard Germic.

JUDGE HOSEY: Thank you.

And for Franchise Tax Board.

1 MR. RICAFORT: Josh Ricafort.  
2 MR. YADAO: Eric Yadao.  
3 JUDGE HOSEY: Thank you.  
4 The issue on --  
5 MR. GERMIC: I can't hear you.  
6 THE STENOGRAPHER: Judge Hosey, we can't hear  
7 you.  
8 JUDGE HOSEY: Oh, I'm sorry. Can you hear me.  
9 MR. GERMIC: Yes.  
10 JUDGE HOSEY: I'm sorry. I'll start over.  
11 The issue identified on appeal today is whether  
12 Appellants have established reasonable cause to abate the  
13 late-filing penalty. The exhibits submitted with briefing  
14 and in response to prehearing conference were Appellant's  
15 Exhibits 1 and 2 and Respondent's Exhibits A through K.  
16 No objections were made to the exhibits, and they are  
17 hereby admitted as evidence into the record.  
18 (Appellant's Exhibits 1-2 were received  
19 in evidence by the Administrative Law Judge.)  
20 (Department's Exhibits A-K were received in  
21 evidence by the Administrative Law Judge.)  
22 Any questions before we move on to the parties  
23 arguments?  
24 MR. GERMIC: No.  
25 JUDGE HOSEY: Seeing none, let's start with

1 Appellants.

2 Mr. Germic, please begin when you're ready.

3  
4 PRESENTATION

5 MR. GERMIC: Okay. Our normal procedure within  
6 our office -- and I do somewhere between 4 and 500 returns  
7 per year -- we prepare a hard copy and provide it to the  
8 client for review, at which point the client signs the  
9 electronic filing authorization and dates it. Once it's  
10 returned to us, we then will electronically transmit the  
11 file. It's a singular transmission that contains both the  
12 federal and state return. This is what we did.

13 The federal return was received without issue.  
14 We did not know the state return had not been received  
15 until the client received the request for the tax return  
16 that had not been filed, which was I guess about a year  
17 after that. As soon as we got the notice, we sent a copy  
18 of the return in. We electronically transmitted the  
19 return again.

20 The payment was made that was supposed to be made  
21 electronically with the additional transmission, and we  
22 requested that the late filing penalty be abated due to  
23 the fact that the client had done everything that they  
24 were supposed to do. They had signed and filed the return  
25 timely. Why the electronic transmission failed, we just

1       don't know. The client did not object to paying the  
2       interest since, in fact, the money had not been withdrawn  
3       from his account. It's just the late-filing penalty that  
4       the client feels is really not their fault. We submitted  
5       in evidence the dated 8879, and that's basically it.

6               I mean, reasonable cause is the clients' reliance  
7       upon competent counsel, and we've done this for 30-some  
8       years and never had an issue before. We just don't know  
9       what happened. And I can't say anything else. I can't  
10      gather anything to -- you know, this seems to be a perfect  
11      example of reasonable cause.

12             JUDGE HOSEY: Okay. Thank you, Mr. Germic.  
13      You'll have some time to respond to the Franchise Tax  
14      Board if you want to add anything after their  
15      presentation.

16             Mr. Ricafort, are you ready to begin your  
17      arguments?

18             MR. RICAFORT: I am.

19             JUDGE HOSEY: Please begin when ready. Thank  
20      you.

21

22                             PRESENTATION

23             MR. RICAFORT: Thank you. Good afternoon. My  
24      name is Josh Ricafort and along with Eric Yadao we  
25      represent the Respondent Franchise Tax Board.



1           The issue in this appeal is whether Appellants  
2     have established reasonable cause to abate the late-filing  
3     penalty imposed by FTB. Revenue & Taxation Code  
4     Section 19131 provides that a late-filing penalty shall be  
5     assessed when a taxpayer files their return late, unless  
6     the taxpayer establishes that their failure to timely file  
7     was due to reasonable cause and not willful neglect.

8           For the tax year 2020, individual returns were  
9     due no later than May 17th, 2021. FTB sent a notice to  
10    appellants on May 17th, 2022, advising them that it had no  
11    record of the return. And in response Appellants filed  
12    their return on June 6th, 2022, which was more than  
13    12 months after the due date. FTB then imposed a  
14    late-filing penalty. Appellant's assert that the  
15    late-filing penalty should be abated because they believe  
16    their tax preparer timely transmitted their California  
17    return and alleged that a software error was the cause of  
18    their failed return.

19           In spite of this argument, FTB had no record of  
20    receiving a 2020 return or any record of a failed attempt  
21    to file a return prior to the filing deadline. FTB has  
22    supported this fact with Exhibit I, the declaration of  
23    FTB's information technology specialist who is assigned  
24    responsibility over FTB's e-file system records.

25           The law is well settled that a taxpayer's

1 reliance on a tax professional to file a tax return is not  
2 reasonable cause to abate the late-filing penalty because  
3 each taxpayer has a nondelegable obligation to file a tax  
4 return by the due date. Therefore, any reliance by  
5 Appellants on their preparer fails under the law.

6 In its precedential opinion of Appeal of Quality  
7 Tax & Financial Services Incorporated, the Office of Tax  
8 Appeals held that in the absence of an acknowledgment that  
9 a return was transmitted, received, or accepted, an  
10 ordinarily prudent person would have its e-filing history  
11 and acknowledgment records to confirm whether the return  
12 has been transmitted, received, and accepted. Appellants  
13 have not provided any evidence that they made any effort  
14 to obtain and review confirmation that their 2020 return  
15 had been timely filed and, therefore, have not shown that  
16 they acted as an ordinary prudent person as set forth in  
17 the Appeal of Quality & Financial.

18 The facts in this appeal are like those in the  
19 precedential Appeal of Fisher. In Fisher, the Office of  
20 Tax Appeals did not find reasonable cause for abatement of  
21 the late-filing penalty based on taxpayer's reliance on  
22 their tax preparer's assertions that he had electronically  
23 filed the return timely. The Office of Tax Appeals stated  
24 that exercise of ordinary business care and prudence  
25 requires that taxpayers do more than merely perform and/or

1 delegate the task necessary to electronically file. It  
2 also requires the taxpayer to personally verify that the  
3 tax return was successfully transmitted.

4 In this appeal, Appellants failed to exercise  
5 ordinary business care and prudence because they have  
6 failed to verify that their return was successfully  
7 transmitted and accepted by FTB. The record shows that it  
8 was not until after the receipt of notice from FTB and the  
9 passing of more than 12 months that Appellants took any  
10 corrective action to file their missing return.

11 Because Appellants have not established that  
12 their failure to timely file their return by the due date  
13 was due to reasonable cause and not willful neglect, FTB  
14 requests that the Office of Tax Appeals sustain its denial  
15 of the Appellants' claim for refund of the late-filing  
16 penalty.

17 Thank you. And at this time I'm happy to answer  
18 any questions you may have, Judge Hosey.

19 JUDGE HOSEY: Thank you, Mr. Ricafort.

20 I'm going to go back to Mr. Germic and see if you  
21 would like to make any final statements in response to the  
22 Franchise Tax Board's presentation.

23

24 CLOSING STATEMENT

25 MR. GERMIC: I mean, obviously, I'm not an

1 attorney, and I don't -- I'm not familiar with everything  
2 that was cited. In our opinion, the client did -- let's  
3 see -- exercise the requirement for the filing. It was  
4 not willful neglect. The electronic transmission that was  
5 sent, we had no issue with the federal part of it. It's a  
6 singular file transaction. The federal return was  
7 received on time.

8 And, you know, we just -- we don't know if this  
9 is, in fact, reliance upon a preparer is not sufficient  
10 for a client to file a tax return, then I guess the  
11 standards are different than the federal because this was  
12 definitely not a willful neglect. We responded  
13 immediately upon receiving the first notice. We responded  
14 to every notice after that. We did not delay.

15 And we, you know, we feel that we complied with  
16 everything that we could. There was no -- there was no  
17 acceptance, and we wouldn't accept the Franchise Tax Board  
18 expert to find a transmission because, obviously, if they  
19 had it, would have been processed. So somewhere there was  
20 an error. It was not an error on the part of the client.  
21 It was either an error on our office error. It was an  
22 error on the software company. It was an error in the  
23 ether, you know, the cloud. I have no idea.

24 But that's all I can say is that our position is  
25 that the client did everything that they were supposed to

1 do and, you know, we -- we thought we had done everything  
2 that we were supposed to do.

3 JUDGE HOSEY: Thank you, Mr. Germic. I do have a  
4 quick question. Did the taxpayers reach out to you at any  
5 time before the notice, or was that their first  
6 realization of the error?

7 MR. GERMIC: That was the first time that they  
8 had found out anything. And within the transmission we  
9 had also setup to have their following years' prepayments  
10 deducted from their bank account automatically, and those  
11 were processed without issue. We -- we just don't know  
12 what happened to the return.

13 JUDGE HOSEY: And the payment was made at the  
14 time the error was determined?

15 MR. GERMIC: At the time it was discovered, yes.

16 JUDGE HOSEY: Okay. Thank you for the  
17 clarification. I don't have any other questions.

18 Do either party have any questions for me before  
19 we wrap things up for today?

20 Mr. Germic, any questions?

21 MR. GERMIC: No. Thank you.

22 JUDGE HOSEY: Okay.

23 Mr. Ricafort, do you have any questions for me?

24 MR. RICAFORT: No, Judge.

25 JUDGE HOSEY: Okay. Thank you.

1           So the evidence has been admitted into the  
2     record, and we have the arguments and the briefs as well  
3     as the oral arguments presented today. So we have a  
4     complete record from which to base a decision.

5           I want to thank both parties for their efforts in  
6     this matter. This concludes this hearing for this appeal.  
7     The parties should expect our written opinion no later  
8     than 100 days from today.

9           With that, we are now off the record, and the  
10    next OTA hearing should begin at approximately 2:00  
11    o'clock.

12           Thank you, everyone.

13           (Proceedings adjourned at 1:19 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 14th day of July, 2023.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER