

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
C, BERCUN and B. SIEGEL, ) OTA NO. 230112294  
 )  
 APPELLANT. )  
 )  
 )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Friday, September 22, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 9:37 a.m. and concluding at 9:59 a.m. on  
Friday, September 22, 2023, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Administrative Law Judge: JUDGE ANDREA LONG

For the Appellant: C. BERCUN

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
CHRISTOPHER TUTTLE

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I N D E X

E X H I B I T S

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

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California; Friday, September 22, 2023

9:37 a.m.

JUDGE LONG: We're ready to go on the record.

Good morning. I'm Andrea Long, the lead  
Administrative Law Judge deciding this appeal. We are  
here today for the Appeal of Bercun and Siegel. The OTA  
Case No. is 230112294. The hearing is taking place  
electronically on Friday, September 22nd, 2023. It is  
9:37 a.m.

We'll begin with the parties stating their names  
and who they represent for the record. We will begin with  
FTB.

MR. TUTTLE: My name is Topher Tuttle, and I  
represent Respondent the Franchise Tax Board.

JUDGE LONG: Thank you.

And then next we will have the Appellant  
introduce himself.

DR. BERCUN: My name is Dr. Corey Bercun.

JUDGE LONG: Thank you. And your witness?

DR. BERCUN: My witness is George Stameroff who  
has been my CPA for nearly 40 years.

JUDGE LONG: Thank you.

The parties have agreed that the issue before us  
today are whether Appellants have established reasonable

1       cause to abate the late payment penalty for the 2020 tax  
2       year, and whether Appellants have established a basis to  
3       abate the estimated tax penalty for the 2020 tax year.

4               FTB submitted Exhibits A through K, which was  
5       admitted into the record pursuant to the minutes and  
6       orders dated, August 17, 2023.

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

9               JUDGE LONG: So we are ready to begin with  
10      Mr. Stameroff's testimony and Appellant's presentation. I  
11      will have Mr. Stameroff and Mr. Bercun raise your right  
12      hand at the same time, and we can do it simultaneously.

13  
14                       C. BERGUN,  
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                       B. SIEGEL,  
20      produced as a witness, and having been first duly sworn by  
21      the Administrative Law Judge, was examined, and testified  
22      as follows:

23  
24               JUDGE LONG: Thank you. Appellants may begin  
25      when you're ready.

1 DR. BERCUN: Mr. Stameroff.

2 MR. STAMEROFF: Oh, okay. I didn't know that you  
3 wanted me to -- okay.

4

5 PRESENTATION

6 MR. STAMEROFF: Yeah. I have been Dr. Bercun and  
7 Brenda Siegel Bercun's CPA for, I think 39 years, since  
8 1982 as I recall. Dr. Bercun has always paid his taxes  
9 timely, has always complied with tax laws, and has made  
10 every effort to comply with the law. In this instance,  
11 case, he was using the Franchise Tax Board MyFTB account  
12 to make his estimated payments and also pay a balance due  
13 at the same time. And, apparently, as he will further  
14 state, there was some confusion.

15 I should point out that Dr. Bercun was working  
16 from home, was in the process of selling his business, and  
17 did not have administrative support that he normally  
18 relied on to assist with his tax matters. He ran a  
19 complex business that had gross receipts, so a large  
20 amount of money, several million dollars, and had multiple  
21 employees. And that was all taken away because of Covid  
22 and having to work from home. So I can just say that he's  
23 been an excellent model citizen in fulfilling his tax  
24 obligations and had every intent to pay everything that he  
25 owed in a timely basis.

1           And I'll answer any specific questions or add any  
2 additional information that's needed.

3           Corey, it's your turn.

4           DR. BERCUN: Okay. Thank you very much.

5           So Mr. Stameroff pointed out that I was working  
6 from home, and there were unusual circumstances, which is  
7 one of the criteria mentioned for potentially forgiving a  
8 penalty, and that is I was over the age of 62, and I did  
9 retire during 2021. I know that was one of the criteria.  
10 Additionally, the payment -- the intent to make the  
11 payments was not -- was demonstrated by the fact that they  
12 were made in a timely fashion. So, obviously, there was  
13 no willful neglect.

14           I should also point out these payments were made  
15 right after I paid the balance due for 2020. And on the  
16 FTB site there when you go to make the estimated payments,  
17 there's a drop down, and I took a screen shot of that,  
18 which I shared with Mr. Stameroff which shows 2020 and  
19 2021. I couldn't go back to it, but I can see on the  
20 current year. It shows -- if you did it today, it would  
21 show 2023 and 2022. So it's easy to see how that part of  
22 the website is not clear. It's really impossible to make  
23 estimated payments for the prior year.

24           So going back to the actual notice that was  
25 received, that was when this was brought to light. We



1 weren't aware that the estimated payments were not applied  
2 to the 2021 year. In fact, when the 20 -- when the  
3 payments were made, I received a confirmation from FTB by  
4 email. And in that confirmation it does not show anywhere  
5 what year it was applied to. So the FTB' assertion in  
6 their brief that I should have recognized this was not  
7 possible because the confirmation notice from FTB on the  
8 Web Pay did not indicate the year to which it was applied.

9 And the brief also suggested that monitoring bank  
10 accounts would have shown the amounts were applied to  
11 2020, rather than 2021. We did monitor the payments. The  
12 payments did clear the bank, but there's no way to see  
13 that it was misapplied to 2021 until FTB sent the notice.  
14 Once FTB sent the notice, the amount due was -- was paid  
15 in full with the penalties.

16 Given this, I believe we have established  
17 reasonable cause and unusual circumstances due to not  
18 being in the office, retiring after the age of 62 during  
19 20 -- pardon me -- during 2021, and that there was no  
20 willful neglect. Therefore, it's the request that the  
21 late payment penalty in the amount of the \$2,071.79 be  
22 abated as well as the underpayment of tax penalty of \$731.

23 And I wish to thank you for this consideration of  
24 this request.

25 MR. STAMEROFF: May I add something? The refund

1 amounts were simply checks received, and were not  
2 identified as to the specific year what the refund was  
3 for. So the point was made in the brief that the  
4 Appellant should have known by monitoring his bank  
5 account, but the reality is that the bank account had  
6 multiple transactions and there was no identification,  
7 which is really -- if you at this about it -- a failing of  
8 the Franchise Tax Board for lack of communication.

9           There should be an accompanying notice with the  
10 check to say what it's for, rather than just the check and  
11 trying to have the taxpayer figure it out. This is a  
12 complex matter, and there is a lot of confusion. In my  
13 experience in working with multiple clients over the  
14 years, that there's often a question, which year was it  
15 applied to? What is this for? I get, you know, countless  
16 communications from clients. And without a written notice  
17 with the check or subsequent to the check, it's virtually  
18 impossible to figure it out.

19           You have to often times call the Franchise Tax  
20 Board, be on hold for 30, 60, 90 minutes. It's a very  
21 frustrating process, and probably it's something that's  
22 very common that people experience. And even with all of  
23 this, they keep trying but they often give up because it's  
24 just too daunting of a task and I'm asked to intervene in  
25 a lot of cases. So along the way, I didn't know the

1 details, but I know the Dr. Bercun's financial  
2 transactions are complex and many, and there would be no  
3 reason for him to flag these refund payments and identify  
4 that it was a refund of an estimated tax payment that was  
5 made. That's maybe theoretically an appealing argument,  
6 but in practicality it doesn't really work that way.

7 JUDGE LONG: This is Judge Long. Thank you.

8 I'm going to turn it over to FTB.

9 Mr. Tuttle, do you have any questions for either  
10 Mr. Stameroff or Dr. Bercun?

11 MR. TUTTLE: No. I have no questions about their  
12 testimony.

13 JUDGE LONG: Thank you.

14 And we will turn it over to FTB's presentation.

15 Mr. Tuttle, you will have 10 minutes for your  
16 presentation. You may begin when you're ready.

17 MR. TUTTLE: Thank you.

18

19 PRESENTATION

20 MR. TUTTLE: Good morning.

21 My name is Topher Tuttle, and I'm representing  
22 Respondent, the Franchise Tax Board.

23 At issue is whether Appellants have established  
24 any grounds to abate the late payment penalty or the  
25 underpayment of estimated tax penalty.

1           Although, Appellant's reported estimated tax  
2     payments on their timely filed tax return for tax year  
3     2021, Appellants actually submitted these payments for tax  
4     year 2020. Since there was no balance due for tax year  
5     2020 at the time Appellants made these payments,  
6     Respondent issued refunds of these estimated tax payments  
7     shortly after they were received. As a result, Appellants  
8     underpaid their tax liability for tax year 2021, and  
9     Respondent properly imposed the late payment and  
10    underpayment of estimated tax penalties.

11           A taxpayer has the burden of proof to show that  
12    reasonable cause exists to support abatement of the late  
13    payment penalty. To establish reasonable cause,  
14    Appellants must demonstrate that the failure to timely pay  
15    occurred despite the exercise of ordinary business care  
16    and prudence. In this case, Appellants apparently  
17    accidentally made estimated tax payments intended for tax  
18    year 2021 on their 2020 tax year account.

19           Although, Appellants claimed they received no  
20    notice that their estimated payments were not successfully  
21    applied to tax year 2021, in both cases the payment  
22    amounts were refunded by Respondent within a week.  
23    Appellants should have known that their intended estimated  
24    tax payments for tax year 2021 were unsuccessful when the  
25    exact amount of the payments were returned to them so

1 quickly. Please to them so request I cannily.

2 Appellant states that they should not be  
3 penalized for an honest mistake, and that they have  
4 established reasonable cause to abate the late payment  
5 penalty because they acted reasonably in attempting to  
6 make their estimated tax payments. While it was a mistake  
7 that Appellants did not timely pay the estimated tax  
8 payments on the correct tax year, in the precedential  
9 opinion in Appeal of Friedman, the Office of Tax Appeals  
10 held that the failure to timely remit the balance due on a  
11 tax liability caused by an oversight does not by itself  
12 constitute reasonable cause. Therefore, Appellants have  
13 not met their burden of proof to establish reasonable  
14 cause abatement of the late payment penalty because they  
15 have not established that they exercised ordinary business  
16 care and prudence.

17 Finally, there is no reasonable cause abatement  
18 for the underpayment of estimated tax penalty. During  
19 this hearing, Appellants raised for the first time their  
20 eligibility for one of the limited exceptions to the  
21 abatement of the underpayment of estimated tax penalty.  
22 However, Appellant has not provided any documentary  
23 evidence in support of this argument, and it has not been  
24 briefed. Respondent request post-hearing briefing to  
25 address Appellants' argument.

1           As a result, the late payment and underpayment of  
2           estimated tax penalties may not be abated, and FTB's  
3           denial of Appellants' claim for refund should be  
4           sustained.

5           I'm happy to answer any questions the Panel may  
6           have. Thank you.

7           JUDGE LONG: This is Judge Long. Thank you,  
8           Mr. Tuttle.

9           I do have a question for FTB. It might have been  
10          Mr. Stameroff who mentioned this, but he mentioned that  
11          when a refund is issued, it doesn't state what the tax  
12          year the refund is related to. Is that correct,  
13          Mr. Tuttle? Is there any indication of what the refund is  
14          for, or what tax year it's related?

15          MR. TUTTLE: So the check is issued by the state  
16          controller's office and typically will not have  
17          identifying information for the tax year.

18          JUDGE LONG: Okay. Thank you.

19          So we have 5 additional minutes for Appellants'  
20          rebuttal, if you have any. Do you want to address  
21          anything else, Dr. Bercun? Would you like to have an  
22          additional 5 minutes?

23

24                                   CLOSING STATEMENT

25          MR. STAMEROFF: I would like to speak, if I may?

1 I heard Mr. Tuttle's explanation, but what it  
2 seems to me is it comes down to a matter of opinion and  
3 what is prudent and reasonable. And I think given the  
4 long history of compliance, that there could be some  
5 weight given to that, in that Dr. Bercun has made every  
6 effort to be compliant and has, in fact, been compliant  
7 for over three decades. And I know this from personal  
8 knowledge and from working with him on a very close  
9 intimate basis.

10 He's been very meticulous about complying with  
11 the law. And an honest mistake by clicking or allowing a  
12 year that he made a balance due payment and not realize  
13 that he had to change the year, I think, is certainly a  
14 mistake and I don't think can be considered a mere  
15 oversight. There's more than that because you have to  
16 give weight to who he is and what his actions have been.  
17 In fact, when he did get notice that specified what the  
18 details were, he immediately paid it, which shows his  
19 good-faith effort to comply.

20 So given his long history of compliance that  
21 making one mistake in over three decades is certainly  
22 something that we all can understand. I mean, we're not  
23 perfect machines. And the fact that the refund was not  
24 identified, I think, is really crucial to this matter  
25 because checks are issued from multiple sources that go

1 through his bank account. He has a large volume of  
2 financial transactions. In addition, because he's working  
3 from home because of Covid, he had no administrative  
4 support that he normally relied on.

5 So he's done everything that a prudent  
6 businessperson could do. Other than having some  
7 extrasensory perception or, you know, extraordinary  
8 powers, this is not a matter of, you know, willful or any  
9 type of bad motive. He simply didn't know. And as soon  
10 as he knew, he immediately complied. So I think it's  
11 really unfair to characterize this as a mere oversight,  
12 and compare it to this other case that was cited.

13 JUDGE LONG: This is Judge Long. Thank you.

14 Dr. Bercun, would you like -- we have a couple of  
15 more minutes. Would you like to add anything else?

16 DR. BERCUN: Yes. I think that Mr. Stameroff as  
17 my CPA can attest my age being over 62, and that I did  
18 retire during 2021, since Mr. Tuttle asked for that  
19 information. It's easy for him to confirm and verify  
20 that. And I think that the issues of reasonableness have  
21 really been addressed, and I hope, Your Honor, will seek  
22 to abate the penalties in light of all the information  
23 that has been provided today. I want to thank you all for  
24 your time.

25 MR. STAMEROFF: I can say, Dr. Bercun, Corey, you



1       can hold up your driver's license to show your date of  
2       birth. I know it's 1947.

3               DR. BERCUN: 1949.

4               MR. STAMEROFF: '49. Okay. Well, you're clearly  
5       over 62. I'm over 62. Just looking at our gray hair, I  
6       suppose might be evidence enough. Although, you know we  
7       could be prematurely gray, I suppose. But, I think, you  
8       know, your long compliance history really speaks volumes  
9       in this matter, and you did take every reasonable step.  
10      The checks did clear as you pointed out. The website has  
11      two drop down arrows, and the first drop down arrow is  
12      really not necessary for making estimated payments because  
13      by definition, they are paid for the subsequent year.

14              So the fact that you were on the site and paid  
15      the balance due for 2020, you just, unfortunately, left  
16      that year as the default without realizing that you had to  
17      change it. And that's a mistake that any of us could  
18      make, especially, during stressful times as happened  
19      during the pandemic.

20              DR. BERCUN: I might also add if I may, that this  
21      is the first time that I've used that system to make the  
22      estimated payments. And I think further exploration of  
23      that site would reveal and confirm when I am saying that  
24      it is potentially confusing.

25              JUDGE LONG: Thank you.

1           I suggest that post-hearing briefing is probably  
2   a good idea as FTB has suggested. Instead of just taking  
3   your word if you provide documentary evidence. I do not  
4   suggest putting your license information up on the screen  
5   because that is private information. But how about we  
6   have 30 days from today to submit any documentation or  
7   additional briefing on whether you meet that exception for  
8   the estimated tax penalty.

9           Dr. Bercun, how does that sound to you?

10          DR. BERCUN: Just I'm clear what documentation  
11   you're looking for, could you please specify what you  
12   would like me to submit?

13          JUDGE LONG: Sure. Something that would confirm  
14   that you are over the age of 62 and that you did retire in  
15   2021.

16          DR. BERCUN: Of course, I can do that. And who  
17   would I submit that to.

18          JUDGE LONG: I believe you can just submit  
19   it to -- I will send out post-hearing orders, and that  
20   will have all the information on that.

21          DR. BERCUN: Thank you.

22          JUDGE LONG: So you can also include a  
23   post-hearing brief, if you would like to add anything  
24   additional to that as well, or you are welcome to just  
25   submit that documentation. FTB will have a chance to look

1 at and then submit a response 30 days after we receive it.

2 DR. BERCUN: Okay. The other issues that were  
3 mentioned that show unusual circumstances, include not  
4 being in the office due to Covid, I assume you would not  
5 need any documentation of that since it fell during a  
6 period we're all aware of. Am I correct about that?

7 JUDGE LONG: That is correct. We're just  
8 limiting it to the issue you brought up today that has not  
9 been briefed.

10 DR. BERCUN: Okay.

11 JUDGE LONG: All right. And, Mr. Tuttle, do you  
12 have any additional comments or questions for me?

13 MR. TUTTLE: No. Thank you.

14 JUDGE LONG: All right. That sounds good.

15 So I believe we are ready to conclude this  
16 hearing. We're going to keep this appeal open. So we're  
17 not closing it today so that the parties can submit  
18 additional briefing after today.

19 Thank you, again, for everyone's participation  
20 today. We are going to be in -- the Office of Tax Appeals  
21 will now be in recess, and the next hearing will begin at  
22 10:15.

23 Thank you.

24 (Proceedings adjourned at 9:59 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 23rd day  
of October, 2023.

ERNALYN M. ALONZO  
HEARING REPORTER