

## BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF: )  
 )  
E. HERNANDEZ (GOMEZ), ) CASE NO. 21088374  
 )  
 ) APPELLANT.  
 )  
 )

**CERTIFIED COPY**

## TRANSCRIPT OF PROCEEDINGS

Friday, October 20, 2023

Reported by:

DONNA S. BADGER CRAMIN,  
CSR No. 14530

Job No. :  
44618 OTA(A)

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6   E. HERNANDEZ (GOMEZ),                ) CASE NO. 21088374  
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15                   TRANSCRIPT OF PROCEEDINGS, taken via  
16                   Zoom Videoconference, commencing at 9:50 a.m.  
17                   and concluding at 10:51 a.m. on Friday,  
18                   October 20, 2023, reported by  
19                   Donna S. Badger Cramin, CSR No. 14530, a  
20                   Certified Shorthand Reporter in and for the  
21                   State of California.

1 APPEARANCES:

2  
3 Panel Lead: ALJ Lauren Katagihara

4  
5 Panel Members: Judge Mike Le  
6 Judge Eddy Lam

7  
8 For Taxpayer: E. Hernandez (Gomez), Taxpayer  
9 Arthur Demerath, Representative

10 For Franchise Tax Board: Topher Tuttle, Attorney

11  
12 Also present: Maria Gonzalez-Cardenas,  
13 Spanish Interpreter

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-4 were received at page 7)

(Respondent's Exhibits A-N were received at page 7)

EXAMINATION

PAGE

By Mr. Demerath

9

REPORTER'S NOTE:

All quotations from exhibits are reflected in the manner in which they were read into the record and do not necessarily indicate an exact quote from the document

1 Remote Proceedings; Friday, October 20, 2023

2 9:50 a.m.

3  
4 MARIA CARDENAS,  
5 Spanish interpreter, was duly sworn by the Administrative  
6 Law Judge to translate from English to Spanish and Spanish  
7 to English the following proceedings.  
8

9 JUDGE KATAGIHARA: Okay. Let's go on the record.  
10 We are opening the record in the appeal -- Oh, I'm sorry.

11 Ms. Gonzales-Cardenas, I think this portion you  
12 will need to interpret.

13 THE INTERPRETER: That will be fine.

14 JUDGE KATAGIHARA: Okay. Thank you.  
15 We are opening the record in the appeal of Estela G.  
16 Hernandez Gomez before the Office of Tax Appeal.

17 This is OTA Case No. 210888374. Today is Friday,  
18 October 20th, 2023. The time is 9:51 a.m. We are holding  
19 this hearing electronically upon agreement of all the  
20 parties.

21 I'd like to begin by asking the parties to please  
22 identify themselves by stating their names for the record.

23 Let's begin with Appellant.

24 MR. DEMERATH: I am Arthur Demerath, TAB student  
25 representative here for Ms. Hernandez.

1 JUDGE KATAGIHARA: And if Ms. Hernandez Gomez can  
2 introduce herself as well, please.

3 MS. HERNANDEZ GOMEZ: Yes.

4 JUDGE KATAGIHARA: And who is here for Respondent  
5 FTB?

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

8 JUDGE KATAGIHARA: And we also have Ms.  
9 Gonzalez-Cardenas, who is a certified interpreter and is  
10 interpreting this hearing from English to Spanish and  
11 Spanish to English.

12 Ms. Gonzalez-Cardenas was sworn in prior to going  
13 on the record.

14 I am judge Lauren Katagihara, the lead  
15 Administrative Law Judge for this case, and with me today  
16 are Judges Mike Le and Eddy Lam.

17 The parties have not submitted any objections to  
18 the panel so we are the panel hearing and deciding today's  
19 case.

20 As we confirmed at the pre-hearing conference, we  
21 are considering one issue today and that is whether  
22 Appellant's claim for a refund for the 2006 tax year is  
23 barred by the statute of limitations.

24 Appellant has proposed Exhibits 1 through 4, and  
25 Respondent has proposed Exhibits A through N.

1           Since there were no objection filed by the  
2 parties, all the exhibits will be admitted into the record  
3 as evidence.

4           (Whereupon, Appellant's Exhibits 1 through 4 were  
5 received into evidence by the Administrative Law  
6 Judge.)

7           (Whereupon, Respondent's Exhibits A through N  
8 were received into evidence by the Administrative Law  
9 Judge.)

10          JUDGE KATAGIHARA: Will Respondent please confirm  
11 that it does not intend to call any witnesses?

12          MR. TUTTLE: That is correct. There will be no  
13 witnesses for Respondent.

14          JUDGE KATAGIHARA: And does Appellant still  
15 intend to testify as a witness?

16          MS. HERNANDEZ GOMEZ: Yes. Yes.

17          JUDGE KATAGIHARA: Okay. Then I will swear  
18 Ms. Hernandez Gomez in now.

19          Ms. Hernandez Gomez, please raise your right  
20 hand. I know that we cannot see since you called in.

21  
22                 ESTELA HERNANDEZ GOMEZ,  
23 called as a witness, and having been first duly sworn by  
24 the Administrative Law Judge, was examined and testified  
25 as follows:

1 THE WITNESS: Yes.

2  
3 JUDGE KATAGIHARA: Thank you.

4 Appellant, you have 15 minutes for your opening  
5 presentation and 10 minutes for testimony.

6 Mr. Demerath, I will ask you to notify Ms.  
7 Gonzales-Cardenas when you would like her to start  
8 interpreting again.

9 MR. DEMERATH: Thank you, your Honor.

10 The testimony will be fairly quick into the  
11 presentation.

12 JUDGE KATAGIHARA: And I'm sorry, before you  
13 begin I would like to have it on the record that Ms.  
14 Hernandez Gomez did agree to having the Appellant's  
15 presentation not be interpreted.

16 Mr. Demerath, you can begin.

17 MR. DEMERATH: Thank you.

18 Good morning, Your Honors.

19 The unrefunded amount of \$12,282.22 the State  
20 garnished from Ms. Hernandez's wages is an over-collection  
21 and should be returned to Ms. Hernandez because the FTB  
22 erroneously assessed tax of Ms. Hernandez's capital gains  
23 from the sale of her principal residence despite  
24 possessing or having ready access to a plethora of  
25 information showing at the time that this was her



1 principal residence.

2 Before I go into details, I will first ask  
3 Ms. Hernandez some questions.

4 So now, Ms. Gonzalez -- thank you.

5  
6 EXAMINATION

7 BY MR. DEMERATH:

8 Q So the first question is -- or Ms. Hernandez, can  
9 you please state your name for the record?

10 A Yes. Estela G. Hernandez.

11 Q Thank you. And what is your age?

12 A 63 years.

13 Q What languages do you speak, Ms. Hernandez?

14 A Spanish. Just Spanish.

15 Q Thank you. Did you own and reside on Welk  
16 Avenue, Pacoima, from 2001 to 2006?

17 THE INTERPRETER: Interpreter is going to ask for  
18 the streets. Was it wealth and --

19 MR. DEMERATH: Welk, W-E-L-K and Pacoima,  
20 P-A-C-O-I-M-A. Or Pacoima.

21 THE INTERPRETER: And then 2001 to 2006?

22 MR. DEMERATH: That's correct.

23 THE INTERPRETER: Interpreter clarification.

24 THE WITNESS: Yes, Ma'am.

25 ///

1 Q BY MR. DEMERATH: Was that your principal  
2 residence? That is, was that the house that you lived in  
3 most of the time during that duration?

4 A Yes.

5 Q Did you sell this home in February of 2006?

6 A Yes.

7 Q And did you work in California before the year of  
8 2006?

9 A Yes.

10 Q And for the work that you did, did you have a tax  
11 preparer do your taxes sometime between 2001 and 2006 when  
12 you were working?

13 A Yes. Yes.

14 Q And did you use -- on those taxes did you  
15 utilities Welk address as your residence for your returns?

16 A Yes, Ma'am.

17 Q Did you ever report any income other than wages  
18 such as rental properties that you were renting out or  
19 other kinds of investments?

20 A No.

21 Q Thank you.

22 That is all of my questions for Ms. Hernandez.

23 Thank you, Ms. Gonzales-Cardenas.

24 MR. DEMERATH: As we just heard through her  
25 testimony, Ms. Hernandez lived at the Welk's residence

1 property as her principal residence from 2001 to 2006.

2 She sold this property in 2006 for a small  
3 capital gain. It is undisputed that this qualified for  
4 the capital gain exclusion based off principal residence.  
5 The FTB became aware of the sale through IRS sharing the  
6 1099-S form. Subsequently instead of using all the  
7 information in its control to evaluate whether this was a  
8 taxable event, the FTB assessed, based on a partial  
9 transcription of the 1099-S form that the capital gain was  
10 not excludable. This culminated in an erroneous  
11 assessment of tax in the amount of \$9,669 with a  
12 delinquent filing penalty of \$2,417.25, plus interest.

13 Due to his Hernandez's language difficulties, she  
14 did not understand the FTB notices nor the reasons or  
15 basis for the FTB action. In 2021, after her wages had  
16 been garnished since 2014, the record was set straight and  
17 the FTB received her 2006 tax return indicating no tax  
18 liability due to the transaction qualifying for the  
19 principal residence exclusion. The FTB refunded only the  
20 amounts garnished over the last year relying on the  
21 statute of limitations precluding the remaining  
22 \$12,282.22.

23 However, in this instance the garnishment was not  
24 an overpayment which are susceptible to the statue of  
25 limitations, but an over-collection, which are not. We

1 will show that the Respondent failed to accurately assess  
2 the amount of tax due based on any available information.  
3 They did not utilize relevant available information in  
4 their assessment, and in making such a mistake, they  
5 caused an over-collection entitling Ms. Hernandez to the  
6 full return of her \$15,182.16.

7 Ms. Hernandez is an elderly non-English speaking  
8 California resident. She owned and resided in a home on  
9 Welk Avenue, Pacoima, California, the Welk residence, for  
10 five years, from 2001 through 2006. On February 9th,  
11 2006, Applicant sold the Welk residence and that  
12 transaction, over a decade and a half ago, formed the  
13 basis for our being here today.

14 As a result of the transaction, the escrow  
15 company, Pinnacle Estate Properties, submitted a 1099-S  
16 form to the IRS. Due to Ms. Hernandez's licensed tax  
17 professional Jose Orellana's failure to submit her tax  
18 return to the State, the FTB's integrated non-filer  
19 compliance program detected that Ms. Hernandez had sold  
20 her residence and issued a request for tax return in May  
21 of 2009, with a follow-up notice of proposed assessment  
22 issued July of the same year.

23 During this time, Ms. Hernandez, an elderly  
24 non-English speaker relying heavily on family and friends  
25 for her English needs, did not possess the sophistication

1 to understand who the FTB was, what they were seeking.  
2 From her perspective, she had paid a professional to  
3 handle her taxes, as many of us do, so any legal  
4 proceedings from some unknown State agency were best left  
5 avoided as she had done nothing wrong.

6 JUDGE KATAGIHARA: Mr. Demerath --

7 MR. DEMERATH: Yes?

8 JUDGE KATAGIHARA: -- I'm sorry to interrupt you.  
9 It looks like -- Mr. Tuttle, can you see and hear  
10 us?

11 MR. TUTTLE: I can. Sorry. It flipped out.

12 JUDGE KATAGIHARA: Thank you. You may continue,  
13 Mr. Demerath.

14 MR. DEMERATH: Thank you.

15 Eventually Ms. Hernandez came to understand her  
16 2006 tax refund had not been filed properly and found a  
17 different professional tax preparer, Mr. Miguel  
18 Guadalupe-Ocasio, to file the missing returns for her in  
19 2011. However, once again, her returns were not received  
20 by the FTB, and Ms. Hernandez once again went on with her  
21 affairs having done what she could to comply with what was  
22 requested.

23 She accepted the improper garnishment of her  
24 wages based on income that should never have been  
25 considered taxable for years until in 2021 when she sought

1 out Mr. Guadalupe-Ocasio to seek modification of the  
2 garnishment order. In his conversation with the FTB on  
3 February 1st, he learned they had never received the 2006  
4 returns, which was finally transmitted and received 11  
5 days later and a decade late.

6 The principal residence exclusion allows a tax  
7 payer to exclude gross income or gains up to a limit of  
8 \$250,00 for a single filer where the taxpayer owned the  
9 home and used it as their principal residence for at least  
10 two of the last five years. Ms. Hernandez has owned the  
11 Welk residence since 2001 and used it as her principal  
12 residence during that time. This qualified Ms. Hernandez  
13 for the exclusion legally resulting in no outstanding  
14 balance for the tax year 2006.

15 As a result, the FTB became aware that they had  
16 collected outside of their legal entitlements as evidenced  
17 by their prompt withdrawal of the withholding order on  
18 February 9th, following the communication with Mr.  
19 Guadalupe-Ocasio on February 1st, but prior to the returns  
20 being processed by the FTB on February 12th.

21 However, due to the ongoing duration of these  
22 proceedings, the FTB eventually returned only \$2,899.94  
23 based on application of the statute of limitations, and  
24 kept a total of \$12,282.22 based on income that should  
25 never have been recognized.

1           As you know, although the law provides a statute  
2 of limitations for refunds, there exists a type of  
3 collection that is not barred by the statute of  
4 limitations called over-collections. Over-collections  
5 are discussed extensively in the FTB Technical Advice  
6 Memorandum 2007-01. An over-collection occurs when the  
7 FTB collects, through its enforcement mechanisms such as  
8 garnishment of wages, more than the amount due under law  
9 as a result of some inaccuracy or error in the assessment  
10 of the amount of the taxpayer's liability.

11           The technical memorandum states: "The basic rule  
12 utilized in distinguishing between an over collection and  
13 a barred payment is whether amounts collected were based  
14 on an assessment that was accurate based on the  
15 information available to the FTB at the time the  
16 assessment was made."

17           On the topic of what qualifies as "available  
18 information," the memorandum states: "This information  
19 includes records from the Employment Development  
20 Department, the Internal Revenue Service, and various  
21 other reliable sources."

22           It is not in dispute that the funds at issue were  
23 collected through wage garnishment. So the collection  
24 prong is met. The only remaining question before you are  
25 on this issue then is whether the amounts collected were

1 based on an assessment that was accurate based on  
2 information available to the FTB at the time of the  
3 assessment was made. In other words, based on records  
4 form the Employment Development Department, the Internal  
5 Revenue Service and other various reliable sources.

6 Because the principal residence exclusion applies  
7 to Ms. Hernandez's 2006 property sale due to her owning  
8 and residing from 2001 to 2006 at the property and her  
9 gross proceeds being \$131,250, she should not have had any  
10 liability for the 2006 tax year.

11 In garnishing Ms. Hernandez's wages from 2014 to  
12 2021, the FTB over collected \$15,182.16, by erring in  
13 assessing Ms. Hernandez tax liability for the 2006 tax  
14 year based on available information. As discussed, the  
15 FTB became aware of the Welk address sale through a 1099-S  
16 form resulting in an assessment that Ms. Hernandez had  
17 income she had not paid tax on.

18 Also, as discussed, that income is excluded from  
19 her 2006 net income based on the principal residence  
20 exclusion. There are multiple sources of information the  
21 FTB had access to that would alert them to the presence of  
22 a principal residence exclusion for the Welk address.

23 Based on these sources of available information,  
24 the FTB should have made a correct assessment and excluded  
25 the principal residence from the calculation of



1 Ms. Hernandez's income.

2 First, the IRS is listed as a source of available  
3 information in the 2007-01 Technical Memorandum. The IRS  
4 would have had the principal address information as part  
5 of Ms. Hernandez's file from her 2006 and prior tax  
6 returns, which the FTB could have accessed to assess  
7 whether the principal residence exclusion applies.

8 As Ms. Hernandez lived at the Welk residence for  
9 more than the required two years, this would have resulted  
10 in the FTB correctly detecting her proper tax liability  
11 based on available information.

12 Additionally, had the FTB used the available  
13 information from the IRS, it would have learned  
14 Ms. Hernandez filed a federal tax return with the IRS.  
15 However, unlike the FTB, the IRS did not perform an  
16 adjustment to Ms. Hernandez's tax liability based on the  
17 1099-S and her federal returns, further indicating the  
18 sale of the Welk residence did not give rise to any tax  
19 liabilities. This information was accessible to the FTB  
20 in 2009 when they issued the notice of proposed  
21 assessment, and as part of IRS's information on Ms.  
22 Hernandez constitutes available information that should  
23 have been considered in their assessment for tax  
24 liability. The error from Respondent's failure to do so  
25 resulted in an over-collection.

1           Second, Ms. Hernandez had paid taxes for years in  
2 California with no problem with the FTB. In fact, her  
3 request for tax return, Exhibit A, paragraph 2, notes Ms.  
4 Hernandez has, and I quote, "an excellent history of  
5 filing her annual tax returns."

6           As a result, the FTB would have had her  
7 information on file, including the address of the Welk  
8 residence Ms. Hernandez testified to using on her returns  
9 in the prior years between 2011 and 2006. An examination  
10 of her address information on prior returns combined with  
11 her individual tax history would inform the FTB that,  
12 first, she was not an individual who had investment  
13 properties.

14           And second, the principal residence exclusion  
15 applied due to the home address being the same in her  
16 prior year's tax returns that the FTB did receive.

17           Third, the Welk's deed of sale displays that the  
18 address sold is the same as the address the FTB and the  
19 IRS would have had on file. If not fully conclusive  
20 independently, this would indicate to the FTB that  
21 Ms. Hernandez, who does not have a history of trading  
22 capital assets and used the Welk residence to file her  
23 past returns, is selling her own home and puts her in the  
24 realm of the principal residence exclusion. In failing to  
25 consider this available piece of evidence, the FTB erred

1 in their computation of the assessment, resulting in an  
2 over-collection.

3 Fourth, the Los Angeles County Assessor's office  
4 would qualify as a reliable source and may be considered  
5 available information. The office records a homeowner's  
6 exemption for the property at issue, which clearly  
7 indicates the property was Ms. Hernandez's principal  
8 residence, again informing the FTB of the exclusion based  
9 on available information.

10 Now, with all these pieces of available  
11 information, what did the FTB use for its assessment? The  
12 1099-S. Respondents based their assessment on data  
13 gathered from the 1099-S submitted to the IRS from the  
14 brokerage company.

15 The 1099-S form the FTB received would have the  
16 address of the residence sold and the seller's current  
17 residence, however, in Exhibit N the FTB's internal 1099-S  
18 information is flawed.

19 First, it does not display the address sold,  
20 which when compared with information on file for Ms.  
21 Hernandez would indicate the presence of a principal  
22 residence exclusion.

23 Second, the box labeled "Income Exclusion" the  
24 field is filled with the word "No." And no further  
25 evidence or reasoning can be found. This is certainly not

1 a conclusion that could be gleaned from the 1099-S, most  
2 notably because the principal residence exclusion did, in  
3 fact, apply. This represents a failure to capture the  
4 appropriate information on the part of the FTB resulting  
5 in their being unaware of the applicable principal  
6 residence exclusion.

7           Additionally, the FTB 1099-S information  
8 indicates there was no tax withholding on the property  
9 sale. The fact there was no tax withholding further  
10 indicates there is some kind of exempt status excluding  
11 the property sale from being considered income.

12           One of the common reasons for such an exclusion  
13 is, of course, the principal residence exclusion, which  
14 was in effect here and offers another reason the FTB  
15 should have known or been aware of the exclusion.

16           In view of all the information available and  
17 because of all the reasons discussed above, the FTB should  
18 have accessed the IRS information or at least its own  
19 internal database, not to mention the plethora of other  
20 sources at its disposal, in order to accurately assess  
21 Ms. Hernandez's tax liability based on available  
22 information.

23           In failing to do so, the FTB did not accurately  
24 assess the penalties based on available information and  
25 through their error over collected the \$15,182.16 from

1 Ms. Hernandez's wages.

2 Finally, the information the FTB based their  
3 assessment on, their capture of the 1099-S form, was  
4 neither accurate nor complete. This mistake on the part  
5 of the FTB resulted in a miscalculation of Ms. Hernandez's  
6 tax liability through ignorance of a clearly applicable  
7 exclusion, creating an over-collection.

8 Refund of the over-collected amount is not barred  
9 by the statute of limitations, and as such the remaining  
10 \$12,282.22 should be returned.

11 Thank you.

12 JUDGE KATAGIHARA: Thank you.

13 Do the panel members have any questions for the  
14 witness?

15 JUDGE LE: No question for me. Thank you.

16 JUDGE LAM: This is Judge Lam speaking. I don't  
17 have any questions. Thank you.

18 JUDGE KATAGIHARA: Mr. Demerath, thank you for  
19 your presentation.

20 I'm going to reserve questions from the panel  
21 until after Respondent's presentation.

22 JUDGE KATAGIHARA: Respondent, you have ten  
23 minutes for your presentation. You may begin now.

24 MR. TUTTLE: Thank you, and good morning.

25 My name is Topher Tuttle and I am representing

1 Respondent, the Franchise Tax Board.

2 The issue in this case is whether the Appellant's  
3 claim for refund for the 2006 tax year is barred by the  
4 statute of limitations. When Appellant failed to file a  
5 tax return for the 2006 tax year, Respondent's filing  
6 enforcement unit issued a notice of proposed assessment  
7 based on income Appellant received during the year from  
8 the sale of real estate.

9 When Appellant failed to contest the proposed  
10 assessment, it became a final liability on September 12th,  
11 2009, and FTB pursued collection action.

12 THE INTERPRETER: And interpreter wants a  
13 repetition. September 12th. What was the year?

14 MR. TUTTLE: 2009.

15 THE INTERPRETER: Interpreter requests repetition  
16 of that last part. My apologies, Mr. Tuttle.

17 MR. TUTTLE: And FTB pursued collection action  
18 after that date.

19 Appellant filed her tax return for the 2006 tax  
20 year on February 12th, 2021. After processing the tax  
21 return, FTB issued a refund of about \$2,900. This amount  
22 relates to overpayment credits within one year of the  
23 claim for refund.

24 The law prohibits Respondent from crediting or  
25 refunding an overpayment when a claim for refund is not

1 filed within four years of the due date of the return or  
2 within one year from the date of overpayment, whichever is  
3 later.

4 THE INTERPRETER: Repetition of the last part,  
5 "or one year..."

6 MR. TUTTLE: From the date of overpayment,  
7 whichever is later.

8 In this case, Appellant's tax return for 2006 was  
9 due on or before April 16th, 2007. However, Respondent  
10 did not receive Appellant's tax return for this year until  
11 2021, which was more than four years after the due date.

12 In addition, Respondent has already refunded all  
13 payments received within one year of the filing date of  
14 Appellant's claim for refund. The remaining overpayment  
15 credit at issue relates to payments made more than one  
16 year from the date of Appellant's claim for refund.

17 THE INTERPRETER: And interpreter repetition of  
18 the very last part. "More than..."

19 MR. TUTTLE: More than one year from the date of  
20 Appellant's claim for refund. Thus, Respondent is barred  
21 from issuing a refund.

22 Turning to FTB TAM 2007-01, the basic rule  
23 utilized in distinguishing between an over-collection and  
24 a barred overpayment is whether amounts collected were  
25 based on an assessment that was accurate based on the

1 information available to the FTB at the time the  
2 assessment was made. Collection of amounts pursuant to a  
3 valid assessment will never result in an over-collection  
4 situation.

5 And from Example 4, the following quote is  
6 applicable to this case: FTB properly based the  
7 assessment on correct information. It was the --

8 THE INTERPRETER: Interpreter repetition.

9 MR. TUTTLE: Sure.

10 FTB properly based the assessment on correct  
11 information.

12 THE INTERPRETER: Repetition again. I'm sorry.  
13 Because I'm not providing an exact interpretation of what  
14 you are saying. My apologies.

15 MR. TUTTLE: FTB properly based the assessment on  
16 correct information.

17 It was the taxpayer's failure to file a timely  
18 tax return that resulted in the overpayment, not a mistake  
19 by the FTB.

20 THE INTERPRETER: Interpreter repetition. And my  
21 apologies, Mr. Tuttle.

22 MR. TUTTLE: It was the taxpayer's failure to  
23 file a timely tax return that resulted in the overpayment,  
24 not a mistake by the FTB.

25 Accordingly, Respondent's denial of Appellant's



1 claim for refund is proper and should be sustained.

2 Thank you. That concludes my presentation.

3 JUDGE KATAGIHARA: Before we move on to  
4 Appellant's rebuttal and closing remarks, I'd like to ask  
5 a question and give my co-panelists the opportunity to ask  
6 questions that they may have.

7 Respondent, is there any dispute that the  
8 homeowner at issue was Appellant's principal residence and  
9 qualified for the exclusion?

10 MR. TUTTLE: There is not a current dispute that  
11 it was the primary residence. The only dispute is that we  
12 did not know that information at the time of the original  
13 assessment.

14 JUDGE KATAGIHARA: Thank you.

15 Judge Lam, do you have any questions for the  
16 parties?

17 JUDGE LAM: Question for the Franchise Tax Board.

18 Was there a reason that you would not have known  
19 that it is the sale of a principal residence since the  
20 property was sold and the property is located at the  
21 residence of the taxpayer?

22 MR. TUTTLE: Thank you, Judge Lam. To that I  
23 would respond that the 1099-S does not -- information that  
24 FTB received does not indicate that it was a primary  
25 residence.

1 JUDGE LAM: Sorry. This is a question for  
2 Franchise Tax Board. Would there be any other form that  
3 would indicate that it is a primary residence such as a  
4 Form 592?

5 MR. TUTTLE: Yes. Thank you, Judge Lam.

6 The Form 592 is often used for these kinds of  
7 real estate transactions; however, we would not  
8 necessarily receive a copy unless it's filed with the tax  
9 return so that we can identify the taxpayer with the real  
10 estate transaction. And in this case, we did not get the  
11 original tax return until 2021.

12 JUDGE LAM: This is Judge Lam speaking. I don't  
13 have any further questions. Thank you.

14 JUDGE KATAGIHARA: Judge Le, do you have any  
15 questions?

16 JUDGE LE: This is Judge Le. No questions, thank  
17 you.

18 JUDGE KATAGIHARA: Appellant, you may proceed  
19 with your rebuttal and closing remarks. You have five  
20 minutes.

21 MR. DEMERATH: Thank you, your Honor.

22 As you know, California's Revenue and Taxation  
23 Code section 19087(a) grants the FTB the power to estimate  
24 a taxpayer's net income from any available information in  
25 order to assess the amount of tax that is due when a tax

1 payer fails to file a return. On the topic of what  
2 qualifies as available information, the Technical  
3 Memorandum 2007-01 states: This information includes  
4 records from the Employment Development Department, the  
5 Internal Revenue Service, and various other reliable  
6 sources.

7 Under 19087(a) then, the Respondent has a duty to  
8 accurately estimate a tax payer's income and the tax due  
9 from available information, including records from the  
10 sources listed above, not only from information made  
11 available by the taxpayer.

12 THE INTERPRETER: And may Interpreter ask you to  
13 please break it down and pause?

14 MR. DEMERATH: Yeah.

15 So then under 19087(a), the Respondent has a duty  
16 to accurately estimate a tax payer's income and tax due  
17 from available information, including records from the  
18 sources listed above, not only from information made  
19 available by the taxpayer.

20 THE INTERPRETER: And may interpreter ask you to  
21 please break it down and pause?

22 In their failure to consider the IRS and internal  
23 FTB data available, the Respondent clearly failed to  
24 accurately assess the amount due and in doing so made a  
25 mistake resulting in amounts not owed by law collected.

1 Had Respondent only had access to the partial 1099 form  
2 and nothing else, perhaps we could find the decision  
3 reasonable; but given the breadth of available  
4 information, it is clear the FTB did not perform an  
5 accurate assessment.

6 THE INTERPRETER: Repetition of the very last  
7 part.

8 MR. DEMERATH: However, given the breadth of  
9 available information, it is clear the FTB did not perform  
10 an accurate assessment.

11 Respondent's garnishment due to an assessment  
12 based on an incomplete interpretation of the available  
13 information renders the assessment invalid. This resulted  
14 in an over-collection and we respectfully request that  
15 this appeal be granted to allow Ms. Hernandez to fully  
16 claim her unrefunded \$12,282.22.

17 Thank you.

18 JUDGE KATAGIHARA: Thank you for your closing.

19 Do the co-panelists have any final questions?

20 Judge Le?

21 JUDGE LE: This is Judge Le. No questions.

22 Thank you.

23 JUDGE KATAGIHARA: Judge Lam.

24 JUDGE LAM: This is Judge Lam speaking.

25 Question for Appellant. Are you aware that

1 Appellant filed any type of FTB form such as a 590  
2 withholding exemption certificates that would alert that  
3 the property sold is a principal residence?

4 This is Judge Lam speaking. Maybe like a 593.  
5 Sorry.

6 THE WITNESS: No, I didn't present anything.

7 Mr. Jose was the one that prepared everything for  
8 me. I would go to him with every letter that I received.

9 MR. DEMERATH: I'm not sure of the exact form. I  
10 would have to look through her tax returns again, but it  
11 does seem clear that once they spoke with Mr. Ocasio, her  
12 tax preparer, they immediately withdrew the withholding  
13 orders for her wages even before they even received the  
14 tax return to examine.

15 I can check and get back to you on that, though.

16 JUDGE LAM: This is judge Lam speaking. Thank  
17 you.

18 Can we take a five-minute recess?

19 JUDGE KATAGIHARA: Yes, we can do that. Let's  
20 take a five-minute recess. Everyone please go off camera  
21 and mute your microphones.

22 (Break taken.)

23 JUDGE KATAGIHARA: Appellant, we are going to ask  
24 that you produce the 593 form if one was provided to FTB,  
25 within the time prescribed by the form, in addition to a

1 proof of mailing if you have one.

2 We will leave the record open to give you time to  
3 do that, and we will submit -- I'm sorry. We will issue a  
4 post-hearing minutes and orders.

5 I'm sorry, Ms. Gonzales-Cardenas, that was quite  
6 long.

7 THE INTERPRETER: I've got it.

8 JUDGE KATAGIHARA: Just to confirm, Judge Lam,  
9 did you have any other final questions?

10 JUDGE LAM: This is Judge Lam speaking. No more  
11 questions for me. Thank you.

12 JUDGE KATAGIHARA: Judge Le, do you have any  
13 final questions?

14 JUDGE LE: No. Thank you.

15 JUDGE KATAGIHARA: Thank you. This will conclude  
16 the hearing. I want to thank the parties for their  
17 presentations.

18 The judges will meet and decide the case based on  
19 the evidence and testimony presented, but as I stated  
20 earlier, we will leave the record open to allow for  
21 post-hearing submissions. The post-hearing minutes and  
22 orders will provide a specific deadline for the  
23 submissions, but will not be less than 30 days from today.

24 Are there any final questions from the parties?

25 MR. TUTTLE: None from Franchise Tax Board.

1 MR. DEMERATH: None from the Appellant.

2 JUDGE KATAGIHARA: Okay. OTA will take a brief  
3 recess before for the next hearing, which is scheduled to  
4 begin at approximately 1:30 p.m.

5 (The court reporter asked for spellings.)

6 THE COURT REPORTER: Thank you.

7 JUDGE KATAGIHARA: Thank you very much. You may  
8 now exit the meeting.

9 (Whereupon, the proceedings concluded at 10:51  
10 a.m.)


1 REPORTER'S CERTIFICATE

2  
3 I, Donna S. Badger Cramin, a Certified Shorthand  
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12 I further certify that I am in no way interested  
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14 I have hereunto subscribed my name this 6th day  
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<hr/> <b>\$</b> <hr/>	14:11 16:8	<b>9:51</b> 5:18	<b>amount</b> 8:19
<b>\$12,282.22</b> 8:19	<b>2006</b> 6:22 9:16,21	<b>9th</b> 12:10 14:18	11:11 12:2 15:8,
11:22 14:24 21:10	10:5,8,11 11:1,2,	<hr/> <b>A</b> <hr/>	10 21:8 22:21
28:16	17 12:10,11 13:16		26:25 27:24
<b>\$131,250</b> 16:9	14:3,14 16:7,8,10,	<b>a.m.</b> 5:2,18 31:10	<b>amounts</b> 11:20
<b>\$15,182.16</b> 12:6	13,19 17:5 18:9	<b>accepted</b> 13:23	15:13,25 23:24
16:12 20:25	22:3,5,19 23:8	<b>access</b> 8:24	24:2 27:25
<b>\$2,417.25</b> 11:12	<b>2007</b> 23:9	16:21 28:1	<b>Angeles</b> 19:3
<b>\$2,899.94</b> 14:22	<b>2007-01</b> 15:6 17:3	<b>accessed</b> 17:6	<b>annual</b> 18:5
<b>\$2,900</b> 22:21	23:22 27:3	20:18	<b>apologies</b> 22:16
<b>\$250,00</b> 14:8	<b>2009</b> 12:21 17:20	<b>accessible</b> 17:19	24:14,21
<b>\$9,669</b> 11:11	22:11,14	<b>accurate</b> 15:14	<b>appeal</b> 5:10,15,16
<hr/> <b>1</b> <hr/>	<b>2011</b> 13:19 18:9	16:1 21:4 23:25	28:15
<b>1</b> 6:24 7:4	<b>2014</b> 11:16 16:11	28:5,10	<b>Appellant</b> 5:23
<b>10</b> 8:5	<b>2021</b> 11:15 13:25	<b>accurately</b> 12:1	6:24 7:14 8:4
<b>1099</b> 28:1	16:12 22:20 23:11	20:20,23 27:8,16,	22:4,7,9,19 26:18
<b>1099-S</b> 11:6,9	26:11	24	28:25 29:1,23
12:15 16:15 17:17	<b>2023</b> 5:1,18	<b>action</b> 11:15	31:1
19:12,13,15,17	<b>20th</b> 5:18	22:11,17	<b>Appellant's</b> 6:22
20:1,7 21:3 25:23	<b>210888374</b> 5:17	<b>addition</b> 23:12	7:4 8:14 22:2
<b>10:51</b> 31:9	<hr/> <b>3</b> <hr/>	29:25	23:8,10,14,16,20
<b>11</b> 14:4	<b>30</b> 30:23	<b>Additionally</b>	24:25 25:4,8
<b>12th</b> 14:20 22:10,	<hr/> <b>4</b> <hr/>	17:12 20:7	<b>applicable</b> 20:5
13,20	<b>4</b> 6:24 7:4 24:5	<b>address</b> 10:15	21:6 24:6
<b>15</b> 8:4	<hr/> <b>5</b> <hr/>	16:15,22 17:4	<b>Applicant</b> 12:11
<b>16th</b> 23:9	<b>590</b> 29:1	18:7,10,15,18	<b>application</b> 14:23
<b>19087(a)</b> 26:23	<b>592</b> 26:4,6	19:16,19	<b>applied</b> 18:15
27:7,15	<b>593</b> 29:4,24	<b>adjustment</b>	<b>applies</b> 16:6 17:7
<b>1:30</b> 31:4	<hr/> <b>6</b> <hr/>	17:16	<b>apply</b> 20:3
<b>1st</b> 14:3,19	<b>63</b> 9:12	<b>Administrative</b>	<b>approximately</b>
<hr/> <b>2</b> <hr/>	<hr/> <b>9</b> <hr/>	5:5 6:15 7:5,8,24	31:4
<b>2</b> 18:3	<b>9:50</b> 5:2	<b>admitted</b> 7:2	<b>April</b> 23:9
<b>20</b> 5:1		<b>Advice</b> 15:5	<b>Arthur</b> 5:24
<b>2001</b> 9:16,21		<b>affairs</b> 13:21	<b>assess</b> 12:1 17:6
10:11 11:1 12:10		<b>age</b> 9:11	20:20,24 26:25
		<b>agency</b> 13:4	27:24
		<b>agree</b> 8:14	<b>assessed</b> 8:22
		<b>agreement</b> 5:19	11:8
		<b>alert</b> 16:21 29:2	<b>assessing</b> 16:13
			<b>assessment</b>
			11:11 12:4,21
			15:9,14,16 16:1,3,
			16,24 17:21,23

19:1,11,12 21:3  
22:6,10 23:25  
24:2,3,7,10,15  
25:13 28:5,10,11,  
13

**Assessor's** 19:3

**assets** 18:22

**Avenue** 9:16 12:9

**avoided** 13:5

**aware** 11:5 14:15  
16:15 20:15 28:25

---

## B

---

**back** 29:15

**balance** 14:14

**barred** 6:23 15:3,  
13 21:8 22:3  
23:20,24

**based** 11:4,8 12:2  
13:24 14:23,24  
15:13,14 16:1,3,  
14,19,23 17:11,16  
19:8,12 20:21,24  
21:2 22:7 23:25  
24:6,10,15 28:12  
30:18

**basic** 15:11 23:22

**basis** 11:15 12:13

**begin** 5:21,23  
8:13,16 21:23  
31:4

**Board** 6:7 22:1  
25:17 26:2 30:25

**box** 19:23

**breadth** 28:3,8

**break** 27:13,21  
29:22

**brokerage** 19:14

---

## C

---

**calculation** 16:25

**California** 10:7  
12:8,9 18:2

**California's**  
26:22

**call** 7:11

**called** 7:20,23  
15:4

**camera** 29:20

**capital** 8:22 11:3,  
4,9 18:22

**capture** 20:3 21:3

**CARDENAS** 5:4

**case** 5:17 6:15,19  
22:2 23:8 24:6  
26:10 30:18

**caused** 12:5

**certificates** 29:2

**certified** 6:9

**check** 29:15

**claim** 6:22 22:3,  
23,25 23:14,16,20  
25:1 28:16

**clarification** 9:23

**clear** 28:4,9 29:11

**closing** 25:4  
26:19 28:18

**co-panelists**  
25:5 28:19

**Code** 26:23

**collected** 14:16  
15:13,23,25 16:12  
20:25 23:24 27:25

**collection** 15:3,  
12,23 22:11,17  
24:2

**collects** 15:7

**combined** 18:10

**common** 20:12

**communication**  
14:18

**company** 12:15  
19:14

**compared** 19:20

**complete** 21:4

**compliance**  
12:19

**comply** 13:21

**computation**  
19:1

**conclude** 30:15

**concluded** 31:9

**concludes** 25:2

**conclusion** 20:1

**conclusive** 18:19

**conference** 6:20

**confirm** 7:10 30:8

**confirmed** 6:20

**considered**  
13:25 17:23 19:4  
20:11

**constitutes**  
17:22

**contest** 22:9

**continue** 13:12

**control** 11:7

**conversation**  
14:2

**copy** 26:8

**correct** 7:12 9:22  
16:24 24:7,10,16

**correctly** 17:10

**County** 19:3

**court** 31:5,6

**creating** 21:7

**credit** 23:15

**crediting** 22:24

**credits** 22:22

**culminated** 11:10

**current** 19:16  
25:10

---

## D

---

**data** 19:12 27:23

**database** 20:19

**date** 22:18 23:1,2,  
6,11,13,16,19

**days** 14:5 30:23

**deadline** 30:22

**decade** 12:12  
14:5

**decide** 30:18

**deciding** 6:18

**decision** 28:2

**deed** 18:17

**delinquent** 11:12

**Demerath** 5:24  
8:6,9,16,17 9:7,  
19,22 10:1,24  
13:6,7,13,14  
21:18 26:21 27:14  
28:8 29:9 31:1

**denial** 24:25

**Department**  
15:20 16:4 27:4

**details** 9:2

**detected** 12:19

**detecting** 17:10

**Development**  
15:19 16:4 27:4

**difficulties** 11:13

**discussed** 15:5  
16:14,18 20:17

**display** 19:19

**displays** 18:17

**disposal** 20:20

**dispute** 15:22  
25:7,10,11

**distinguishing**  
15:12 23:23

**due** 11:13,18 12:2,  
16 14:21 15:8  
16:7 18:15 23:1,9,  
11 26:25 27:8,16,  
24 28:11

**duly** 5:5 7:23

**duration** 10:3  
14:21

**duty** 27:7,15

---

## E

---

**earlier** 30:20

**Eddy** 6:16

**effect** 20:14

**elderly** 12:7,23

**electronically**  
5:19

**Employment**  
15:19 16:4 27:4

**enforcement**  
15:7 22:6

**English** 5:6,7  
6:10,11 12:25

**entitlements**  
14:16

**entitling** 12:5

**erred** 18:25

**erring** 16:12

**erroneous** 11:10

**erroneously** 8:22

**error** 15:9 17:24  
20:25

**escrow** 12:14

**estate** 12:15 22:8  
26:7,10

**Estela** 5:15 7:22  
9:10

**estimate** 26:23  
27:8,16

**evaluate** 11:7

**event** 11:8

**eventually** 13:15  
14:22

**evidence** 7:3,5,8  
18:25 19:25 30:19

**evidenced** 14:16

**exact** 24:13 29:9

**examination** 9:6  
18:9

**examine** 29:14

**examined** 7:24

**excellent** 18:4

**excludable** 11:10

**exclude** 14:7

**excluded** 16:18,  
24

**excluding** 20:10

**exclusion** 11:4,  
19 14:6,13 16:6,  
20,22 17:7 18:14,  
24 19:8,22,23  
20:2,6,12,13,15  
21:7 25:9

**exempt** 20:10

**exemption** 19:6  
29:2

**Exhibit** 18:3  
19:17

**exhibits** 6:24,25  
7:2,4,7

**exists** 15:2

**exit** 31:8

**extensively** 15:5

---

## F

---

**fact** 18:2 20:3,9

**failed** 12:1 22:4,9  
27:23

**failing** 18:24  
20:23

**fails** 27:1

**failure** 12:17  
17:24 20:3 24:17,  
22 27:22

**fairly** 8:10

**family** 12:24

**February** 10:5  
12:10 14:3,18,19,  
20 22:20

**federal** 17:14,17

**field** 19:24

**file** 13:18 17:5  
18:7,19,22 19:20  
22:4 24:17,23  
27:1

**filed** 7:1 13:16  
17:14 22:19 23:1  
26:8 29:1

**filer** 14:8

**filing** 11:12 18:5  
22:5 23:13

**filled** 19:24

**final** 22:10 28:19  
30:9,13,24

**finally** 14:4 21:2

**find** 28:2

**fine** 5:13

**five-minute**  
29:18,20

**flawed** 19:18

**flipped** 13:11

**follow-up** 12:21

**form** 11:6,9 12:16  
16:4,16 19:15  
21:3 26:2,4,6 28:1  
29:1,9,24,25

**formed** 12:12

**found** 13:16 19:25

**Fourth** 19:3

**Franchise** 6:7  
22:1 25:17 26:2  
30:25

**Friday** 5:1,17

**friends** 12:24

**FTB** 6:5 8:21 11:5,  
8,14,15,17,19  
13:1,20 14:2,15,  
20,22 15:5,7,15  
16:2,12,15,21,24  
17:6,10,12,15,19  
18:2,6,11,16,18,  
20,25 19:8,11,15  
20:4,7,14,17,23  
21:2,5 22:11,17,  
21 23:22 24:1,6,  
10,15,19,24 25:24  
26:23 27:23 28:4,  
9 29:1,24

**FTB's** 12:18 19:17

**full** 12:6

**fully** 18:19 28:15

**funds** 15:22

---

## G

---

**gain** 11:3,4,9

**gains** 8:22 14:7

**garnished** 8:20  
11:16,20

**garnishing** 16:11

**garnishment**  
11:23 13:23 14:2  
15:8,23 28:11

**gathered** 19:13

**give** 17:18 25:5  
30:2

**gleaned** 20:1

**Gomez** 5:16 6:1,3  
7:16,18,19,22  
8:14

**Gonzales-cardenas** 5:11  
8:7 10:23 30:5

**Gonzalez** 9:4

**Gonzalez-cardenas** 6:9,12

**good** 8:18 21:24

**granted** 28:15

**grants** 26:23

**gross** 14:7 16:9

**Guadalupe-ocasio** 13:18  
14:1,19

---

## H

---

**half** 12:12

**hand** 7:20

**handle** 13:3

**hear** 13:9

**heard** 10:24

**hearing** 5:19  
6:10,18 30:16  
31:3

**heavily** 12:24

**Hernandez** 5:16,  
25 6:1,3 7:16,18,  
19,22 8:14,21 9:3,  
8,10,13 10:22,25  
12:5,7,19,23  
13:15,20 14:10,12  
16:13,16 17:8,14,  
22 18:1,4,8,21  
19:21 28:15

**Hernandez's**  
8:20,22 11:13  
12:16 16:7,11  
17:1,5,16 19:7  
20:21 21:1,5

**history** 18:4,11,  
21

**holding** 5:18

**home** 10:5 12:8  
14:9 18:15,23

**homeowner** 25:8

**homeowner's**  
19:5

**Honor** 8:9 26:21

**Honors** 8:18

**house** 10:2

---

## I

---

**identify** 5:22 26:9

**ignorance** 21:6

**immediately**  
29:12

**improper** 13:23

**inaccuracy** 15:9

**includes** 15:19  
27:3

**including** 18:7  
27:9,17

**income** 10:17  
13:24 14:7,24  
16:17,18,19 17:1  
19:23 20:11 22:7  
26:24 27:8,16

**incomplete** 28:12

**independently**  
18:20

**indicating** 11:17  
17:17

**individual** 18:11,  
12

**inform** 18:11

**information** 8:25  
11:7 12:2,3 15:15,  
18 16:2,14,20,23  
17:3,4,11,13,19,  
21,22 18:7,10  
19:5,9,11,18,20  
20:4,7,16,18,22,  
24 21:2 24:1,7,11,  
16 25:12,23 26:24

27:2,3,9,10,17,18  
28:4,9,13

**informing** 19:8

**instance** 11:23

**integrated** 12:18

**intend** 7:11,15

**interest** 11:12

**internal** 15:20  
16:4 19:17 20:19  
27:5,22

**interpret** 5:12

**interpretation**  
24:13 28:12

**interpreted** 8:15

**interpreter** 5:5,13  
6:9 9:17,21,23  
22:12,15 23:4,17  
24:8,12,20 27:12,  
20 28:6 30:7

**interpreting** 6:10  
8:8

**interrupt** 13:8

**introduce** 6:2

**invalid** 28:13

**investment** 18:12

**investments**  
10:19

**IRS** 11:5 12:16  
17:2,3,13,14,15  
18:19 19:13 20:18  
27:22

**IRS's** 17:21

**issue** 6:21 15:22,  
25 19:6 22:2  
23:15 25:8 30:3

**issued** 12:20,22  
17:20 22:6,21

**issuing** 23:21

---

## J

---

**Jose** 12:17 29:7

**judge** 5:6,9,14  
6:1,4,8,14,15 7:6,  
9,10,14,17,24 8:3,  
12 13:6,8,12  
21:12,15,16,18,22  
25:3,14,15,17,22  
26:1,5,12,14,16,  
18 28:18,20,21,  
23,24 29:4,16,19,  
23 30:8,10,12,14,  
15 31:2,7

**judges** 6:16 30:18

**July** 12:22

---

## K

---

**Katagihara** 5:9,  
14 6:1,4,8,14  
7:10,14,17 8:3,12  
13:6,8,12 21:12,  
18,22 25:3,14  
26:14,18 28:18,23  
29:19,23 30:8,12,  
15 31:2,7

**kind** 20:10

**kinds** 10:19 26:6

---

## L

---

**labeled** 19:23

**Lam** 6:16 21:16  
25:15,17,22 26:1,  
5,12 28:23,24  
29:4,16 30:8,10

**language** 11:13

**languages** 9:13

**late** 14:5

**Lauren** 6:14

**law** 5:6 6:15 7:5,8,  
24 15:1,8 22:24  
27:25

**Le** 6:16 21:15  
26:14,16 28:20,21  
30:12,14

**lead** 6:14

**learned** 14:3  
17:13

**leave** 30:2,20

**left** 13:4

**legal** 13:3 14:16

**legally** 14:13

**letter** 29:8

**liabilities** 17:19

**liability** 11:18  
15:10 16:10,13  
17:10,16,24 20:21  
21:6 22:10

**licensed** 12:16

**limit** 14:7

**limitations** 6:23  
11:21,25 14:23  
15:2,4 21:9 22:4

**listed** 17:2 27:10,  
18

**lived** 10:2,25 17:8

**located** 25:20

**long** 30:6

**Los** 19:3

---

## M

---

**made** 15:16 16:3,  
24 23:15 24:2  
27:10,18,24

**mailing** 30:1

**making** 12:4

**MARIA** 5:4

**mechanisms**  
15:7

**meet** 30:18

**meeting** 31:8

**members** 21:13

**memorandum**  
15:6,11,18 17:3  
27:3

**mention** 20:19

**met** 15:24

**microphones**  
29:21

**Miguel** 13:17

**Mike** 6:16

**minutes** 8:4,5  
21:23 26:20 30:4,  
21

**miscalculation**  
21:5

**missing** 13:18

**mistake** 12:4 21:4  
24:18,24 27:25

**modification**  
14:1

**morning** 8:18  
21:24

**move** 25:3

**multiple** 16:20

**mute** 29:21

---

## N

---

**names** 5:22

**necessarily** 26:8

**net** 16:19 26:24

**non-english**  
12:7,24

**non-filer** 12:18

**notably** 20:2

**notes** 18:3

**notice** 12:21  
17:20 22:6

**notices** 11:14

**notify** 8:6

---

## O

---

**objection** 7:1

**objections** 6:17

**Ocasio** 29:11

**occurs** 15:6

**October** 5:1,18

**offers** 20:14

**office** 5:16 19:3,5

**ongoing** 14:21

**open** 30:2,20

**opening** 5:10,15  
8:4

**opportunity** 25:5

**order** 14:2,17  
20:20 26:25

**orders** 29:13  
30:4,22

**Orellana's** 12:17

**original** 25:12  
26:11

**OTA** 5:17 31:2

**outstanding**  
14:13

**over-collected**  
21:8

**over-collection**  
8:20 11:25 12:5  
15:6 17:25 19:2  
21:7 23:23 24:3  
28:14

**over-collections**  
15:4

**overpayment**  
11:24 22:22,25  
23:2,6,14,24  
24:18,23

**owed** 27:25

**owned** 12:8 14:8,  
10

**owning** 16:7

---

## P

---

**P-A-C-O-I-M-A**  
9:20

**p.m.** 31:4

**Pacoima** 9:16,19,  
20 12:9

**paid** 13:2 16:17  
18:1

**panel** 6:18 21:13,  
20

**paragraph** 18:3

**part** 17:4,21 20:4  
21:4 22:16 23:4,  
18 28:7

**partial** 11:8 28:1

**parties** 5:20,21  
6:17 7:2 25:16  
30:16,24

**past** 18:23

**pause** 27:13,21

**payer** 14:7 27:1

**payer's** 27:8,16

**payment** 15:13

**payments** 23:13,  
15

**penalties** 20:24

**penalty** 11:12

**perform** 17:15  
28:4,9

**perspective** 13:2

**piece** 18:25

**pieces** 19:10

**Pinnacle** 12:15

**plethora** 8:24  
20:19

<b>portion</b> 5:11	<b>produce</b> 29:24	16 28:19,21 30:9, 11,13,24	<b>refunds</b> 15:2
<b>possess</b> 12:25	<b>professional</b> 12:17 13:2,17	<b>quick</b> 8:10	<b>relates</b> 22:22 23:15
<b>possessing</b> 8:24	<b>program</b> 12:19	<b>quote</b> 18:4 24:5	<b>relevant</b> 12:3
<b>post-hearing</b> 30:4,21	<b>prohibits</b> 22:24	<hr/>	<b>reliable</b> 15:21 16:5 19:4 27:5
<b>power</b> 26:23	<b>prompt</b> 14:17	<b>R</b>	<b>relying</b> 11:20 12:24
<b>pre-hearing</b> 6:20	<b>prong</b> 15:24	<b>raise</b> 7:19	<b>remaining</b> 11:21 15:24 21:9 23:14
<b>precluding</b> 11:21	<b>proof</b> 30:1	<b>ready</b> 8:24	<b>remarks</b> 25:4 26:19
<b>prepared</b> 29:7	<b>proper</b> 17:10 25:1	<b>real</b> 22:8 26:7,9	<b>Remote</b> 5:1
<b>preparer</b> 10:11 13:17 29:12	<b>properly</b> 13:16 24:6,10,15	<b>realm</b> 18:24	<b>renders</b> 28:13
<b>prescribed</b> 29:25	<b>properties</b> 10:18 12:15 18:13	<b>reason</b> 20:14 25:18	<b>rental</b> 10:18
<b>presence</b> 16:21 19:21	<b>property</b> 11:1,2 16:7,8 19:6,7 20:8,11 25:20 29:3	<b>reasonable</b> 28:3	<b>renting</b> 10:18
<b>present</b> 29:6	<b>proposed</b> 6:24,25 12:21 17:20 22:6, 9	<b>reasoning</b> 19:25	<b>repetition</b> 22:13, 15 23:4,17 24:8, 12,20 28:6
<b>presentation</b> 8:5, 11,15 21:19,21,23 25:2	<b>provide</b> 30:22	<b>reasons</b> 11:14 20:12,17	<b>report</b> 10:17
<b>presentations</b> 30:17	<b>provided</b> 29:24	<b>rebuttal</b> 25:4 26:19	<b>reporter</b> 31:5,6
<b>presented</b> 30:19	<b>providing</b> 24:13	<b>receive</b> 18:16 23:10 26:8	<b>represent</b> 6:7
<b>primary</b> 25:11,24 26:3	<b>pursuant</b> 24:2	<b>received</b> 7:5,8 11:17 13:19 14:3, 4 19:15 22:7 23:13 25:24 29:8, 13	<b>representative</b> 5:25
<b>principal</b> 8:23 9:1 10:1 11:1,4,19 14:6,9,11 16:6,19, 22,25 17:4,7 18:14,24 19:7,21 20:2,5,13 25:8,19 29:3	<b>pursued</b> 22:11,17	<b>recess</b> 29:18,20 31:3	<b>representing</b> 21:25
<b>prior</b> 6:12 14:19 17:5 18:9,10,16	<b>puts</b> 18:23	<b>recognized</b> 14:25	<b>represents</b> 20:3
<b>problem</b> 18:2	<hr/>	<b>record</b> 5:9,10,15, 22 6:13 7:2 8:13 9:9 11:16 30:2,20	<b>request</b> 12:20 18:3 28:14
<b>proceed</b> 26:18	<b>qualified</b> 11:3 14:12 25:9	<b>records</b> 15:19 16:3 19:5 27:4,9, 17	<b>requested</b> 13:22
<b>proceedings</b> 5:1, 7 13:4 14:22 31:9	<b>qualifies</b> 15:17 27:2	<b>refund</b> 6:22 13:16 21:8 22:3,21,23, 25 23:14,16,20,21 25:1	<b>requests</b> 22:15
<b>proceeds</b> 16:9	<b>qualify</b> 19:4	<b>refunded</b> 11:19 23:12	<b>required</b> 17:9
<b>processed</b> 14:20	<b>qualifying</b> 11:18	<b>refunding</b> 22:25	<b>reserve</b> 21:20
<b>processing</b> 22:20	<b>question</b> 9:8 15:24 21:15 25:5, 17 26:1 28:25		<b>reside</b> 9:15
	<b>questions</b> 9:3 10:22 21:13,17,20 25:6,15 26:13,15,		<b>resided</b> 12:8

17:7,8,18 18:8,14,  
22,24 19:8,16,17,  
22 20:2,6,13 25:8,  
11,19,21,25 26:3  
29:3

**resident** 12:8

**residing** 16:8

**respectfully**  
28:14

**respond** 25:23

**Respondent** 6:4,  
7,25 7:10,13 12:1  
21:22 22:1,24  
23:9,12,20 25:7  
27:7,15,23 28:1

**Respondent's**  
7:7 17:24 21:21  
22:5 24:25 28:11

**Respondents**  
19:12

**result** 12:14 14:15  
15:9 18:6 24:3

**resulted** 17:9,25  
21:5 24:18,23  
28:13

**resulting** 14:13  
16:16 19:1 20:4  
27:25

**return** 11:17 12:6,  
18,20 17:14 18:3  
22:5,19,21 23:1,8,  
10 24:18,23 26:9,  
11 27:1 29:14

**returned** 8:21  
14:22 21:10

**returns** 10:15  
13:18,19 14:4,19  
17:6,17 18:5,8,10,  
16,23 29:10

**Revenue** 15:20  
16:5 26:22 27:5

**rise** 17:18

**rule** 15:11 23:22

---

## S

---

**sale** 8:23 11:5  
16:7,15 17:18  
18:17 20:9,11  
22:8 25:19

**scheduled** 31:3

**section** 26:23

**seek** 14:1

**seeking** 13:1

**sell** 10:5

**seller's** 19:16

**selling** 18:23

**September**  
22:10,13

**Service** 15:20  
16:5 27:5

**set** 11:16

**sharing** 11:5

**show** 12:1

**showing** 8:25

**single** 14:8

**situation** 24:4

**small** 11:2

**sold** 11:2 12:11,19  
18:18 19:16,19  
25:20 29:3

**sophistication**  
12:25

**sought** 13:25

**source** 17:2 19:4

**sources** 15:21  
16:5,20,23 20:20  
27:6,10,18

**Spanish** 5:5,6  
6:10,11 9:14

**speak** 9:13

**speaker** 12:24

**speaking** 12:7  
21:16 26:12 28:24  
29:4,16 30:10

**specific** 30:22

**spellings** 31:5

**spoke** 29:11

**start** 8:7

**state** 8:19 9:9  
12:18 13:4

**stated** 30:19

**states** 15:11,18  
27:3

**stating** 5:22

**statue** 11:24

**status** 20:10

**statute** 6:23 11:21  
14:23 15:1,3 21:9  
22:4

**straight** 11:16

**streets** 9:18

**student** 5:24

**submissions**  
30:21,23

**submit** 12:17 30:3

**submitted** 6:17  
12:15 19:13

**Subsequently**  
11:6

**susceptible**  
11:24

**sustained** 25:1

**swear** 7:17

**sworn** 5:5 6:12  
7:23

---

## T

---

**TAB** 5:24

**TAM** 23:22

**tax** 5:16 6:7,22  
8:22 10:10 11:11,  
17 12:2,16,17,20  
13:16,17 14:6,14  
16:10,13,17 17:5,  
10,14,16,18,23  
18:3,5,11,16 20:8,  
9,21 21:6 22:1,3,  
5,19,20 23:8,10  
24:18,23 25:17  
26:2,8,11,25 27:8,  
16 29:10,12,14  
30:25

**taxable** 11:8  
13:25

**Taxation** 26:22

**taxes** 10:11,14  
13:3 18:1

**taxpayer** 14:8  
25:21 26:9 27:11,  
19

**taxpayer's** 15:10  
24:17,22 26:24

**technical** 15:5,11  
17:3 27:2

**ten** 21:22

**testified** 7:24  
18:8

**testify** 7:15

**testimony** 8:5,10  
10:25 30:19

**time** 5:18 8:25  
10:3 12:23 14:12  
15:15 16:2 24:1  
25:12 29:25 30:2

**timely** 24:17,23

**today** 5:17 6:15,  
21 12:13 30:23

**today's** 6:18

**Topher** 6:6 21:25

**topic** 15:17 27:1

**total** 14:24

**trading** 18:21

**transaction**  
11:18 12:12,14  
26:10

**transactions**  
26:7

**transcription**  
11:9

**translate** 5:6

**transmitted** 14:4

**Turning** 23:22

**Tuttle** 6:6 7:12  
13:9,11 21:24,25  
22:14,16,17 23:6,  
19 24:9,15,21,22  
25:10,22 26:5  
30:25

**type** 15:2 29:1

---

## U

---

**unaware** 20:5

**understand**  
11:14 13:1,15

**undisputed** 11:3

**unit** 22:6

**unknown** 13:4

**unlike** 17:15

**unrefunded** 8:19  
28:16

**utilities** 10:15

**utilize** 12:3

**utilized** 15:12  
23:23

---

## V

---

**valid** 24:3

**view** 20:16

---

## W

---

**W-E-L-K** 9:19

**wage** 15:23

**wages** 8:20 10:17  
11:15 13:24 15:8  
16:11 21:1 29:13

**wealth** 9:18

**Welk** 9:15,19  
10:15 12:9,11  
14:11 16:15,22  
17:8,18 18:7,22

**Welk's** 10:25  
18:17

**whichever** 23:2,7

**withdrawal** 14:17

**withdrew** 29:12

**withholding**  
14:17 20:8,9 29:2,  
12

**witnesses** 7:11,  
13

**word** 19:24

**words** 16:3

**work** 10:7,10

**working** 10:12

**wrong** 13:5

---

## Y

---

**year** 6:22 10:7  
11:20 12:22 14:14  
16:10,14 22:3,5,7,  
13,20,22 23:2,5,  
10,13,16,19

**year's** 18:16

**years** 9:12 12:10  
13:25 14:10 17:9  
18:1,9 23:1,11