

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
S. HORWITZ,) CASE NO. 220811247
)
 APPELLANT.)
)

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Friday, October 20, 2023

Reported by:

DONNA S. BADGER CRAMIN,
CSR No. 14530

Job No. :
44618 OTA(B)

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15 TRANSCRIPT OF PROCEEDINGS, taken via
16 Zoom Videoconference, commencing at 1:27 p.m.
17 and concluding at 2:07 p.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: Ovsep Akopchikyan

4
5 For Taxpayer: S. Horwitz, Taxpayer
6 Patrick Nguyen, Representative

7
8 For Franchise Tax Board: Gi Jung Nam, Attorney
9 Maria Brosterhous, Attorney

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-14 were received at page 7)

(FTB's Exhibits A-K were received at page 7)

EXAMINATION

PAGE

By Mr. Nam

10

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 1:27 p.m.

3
4 ALJ AKOPCHIKYAN: We are going on the record in
5 the Appeal of Horwitz before the Office of Tax Appeals.
6 The OTA Case Number is 220811247. Today is Friday,
7 October 20, 2023, and the time is approximately 1:30 p.m.

8 We are holding this hearing electronically via
9 Webex by the consent of all parties.

10 My name is Ovsep Akopchikyan and I am the
11 Administrative Law Judge deciding this appeal. I have
12 reviewed each side's briefs and exhibits and may ask
13 questions after your presentation to make sure I have all
14 the information I need to decide this appeal.

15 Now for introductions. Will the parties please
16 identify themselves by stating their name for the record,
17 beginning with Appellant.

18 MS. HORWITZ: Good afternoon. This is Shelly
19 Horwitz.

20 ALJ AKOPCHIKYAN: Ms. Horwitz.

21 Mr. Nguyen, will you please also introduce
22 yourself?

23 MR. NGUYEN: Yes. This is Patrick Nguyen,
24 Appellant's representative.

25 ALJ AKOPCHIKYAN: Thank you.

1 And for the Franchise Tax Board?

2 MR. NAM: Gi Jung Nam for the Franchise Tax
3 Board.

4 ALJ AKOPCHIKYAN: Thank you, Mr. Nam.

5 MS. BROSTERHOUS: Maria Brosterhous for
6 Respondent.

7 ALJ AKOPCHIKYAN: Thank you, Ms. Brosterhous.

8 As discussed and agreed upon by the parties at
9 the pre-hearing conference, and as noted in my pre-hearing
10 conference minutes and orders, there are three issues on
11 appeal.

12 First, whether Appellant has established
13 reasonable cause to abate the late payment penalty for the
14 2021 tax year.

15 Second, whether Appellant has established a basis
16 to abate the estimated tax penalty for the 2021 tax year.

17 Third, whether Appellant has established a basis
18 to abate interest for the 2021 tax year.

19 With respect to the evidentiary record, FTB
20 submitted Exhibits A through H during the briefing
21 process, and after the pre-hearing conference admitted
22 Exhibits I through K.

23 Appellant did not object to the admissibility of
24 these exhibits and, therefore, all of FTB's exhibits are
25 entered into the record.

1 (Franchise Tax Boards Exhibits A through K were
2 received into evidence.)

3 ALJ AKOPCHIKYAN: With respect to Appellant's
4 exhibits, Appellant submitted Exhibits 1 through 11 during
5 the briefing process, and after the pre-hearing conference
6 submitted Exhibits 12 through 14.

7 FTB did not object to the admissibility of these
8 exhibits and, therefore, all of Appellant's exhibits are
9 entered into the record.

10 (Appellant's Exhibits 1 through 14 were received
11 into evidence.)

12 ALJ AKOPCHIKYAN: Lastly, as discussed Ms.
13 Horwitz will be testifying at this hearing. The hearing
14 will begin with Appellant's presentation, including
15 Ms. Horwitz testimony for a total of up to 25 minutes.

16 FTB will then have 15 minutes for its
17 presentation, and Appellant will have five minutes for
18 final remarks.

19 Does anyone have any questions before I swear in
20 Ms. Horwitz for her testimony?

21 Hearing none.

22 MR. NGUYEN: Excuse me, Judge. I believe we
23 reserved more time for testimony and oral argument.

24 ALJ AKOPCHIKYAN: What is your understanding of
25 the time that's been reserved?

1 MR. NGUYEN: I believe we reserved 25 minutes for
2 testimony and then 15 minutes -- I mean, excuse me -- 15
3 minutes for testimony and 25 minutes for argument.

4 ALJ AKOPCHIKYAN: In my minutes and orders, which
5 I am looking at now, the signed version that was issued to
6 the parties, on page 2 under "Conduct of Hearing," it
7 says: Appellant's presentation and testimony, total of 25
8 minutes.

9 I did not get any objection to this minutes and
10 orders. I specifically included language saying if there
11 are any errors or concerns, please promptly notify OTA.

12 How much time do you think you need in total?

13 MR. NGUYEN: I believe a total of 30 minutes
14 should suffice.

15 ALJ AKOPCHIKYAN: Okay. So an extra five
16 minutes?

17 MR. NGUYEN: Yes.

18 ALJ AKOPCHIKYAN: Okay. I think that should be
19 fine.

20 Does FTB have any objections to the extended --
21 the request?

22 MR. NAM: Gi Nam, Franchise Tax Board. No
23 objections.

24 ALJ AKOPCHIKYAN: Okay. Thank you.

25 Okay. Ms. Horwitz, will you please raise your

1 right hand?

2
3 S. HORWITZ,
4 having first been duly sworn by the Administrative Law
5 Judge, was examined and testified as follows:

6 THE WITNESS: Yes, I do.
7

8 ALJ AKOPCHIKYAN: Thank you, Ms. Horwitz. You
9 can proceed with your presentation when you are ready.

10 I guess Mr. Nguyen will start.

11 MR. NGUYEN: Yes. Excuse me, Judge. So upon
12 reviewing the evidence with Ms. Horwitz, with Appellant,
13 we have decided to concede Issues Number 2 and 3. So I
14 just wanted to inform you before we continue.

15 ALJ AKOPCHIKYAN: I appreciate the update. So
16 I'll go ahead and notate that here.

17 So the only remaining issue on appeal is whether
18 Appellant has established reasonable cause to abate the
19 late payment penalty for the 2021 tax year; is that
20 correct?

21 MR. NGUYEN: Yes, Judge.

22 ALJ AKOPCHIKYAN: Thank you. You may proceed.

23 MR. NGUYEN: Thank you, Judge.

24 If I may, we are here today to discuss
25 Ms. Horwitz's reasonable actions when unbeknownst to her

1 her payment was dishonored even though she had more than
2 sufficient funds in her account and did not receive a
3 reasonable and timely notification from FTB.

4 I would like to begin by asking Ms. Horwitz a few
5 questions. Are you ready, Ms. Horwitz?

6 MS. HORWITZ: Yes, I am.

7
8 EXAMINATION

9 BY MR. NAM:

10 Q So, Ms. Horwitz, for the 2021 tax year at issue,
11 did you make your tax payment? And, if so, when did you
12 make your payment?

13 A Yes, I did make the payment on March 18th, 2022,
14 which was approximately a month before the deadline.

15 Q Now, regarding the payment, how did the FTB
16 require you to make this payment?

17 A So I am required to make electronic payments and
18 that requirement has been in place for some time, and so I
19 made the payment via the Web Pay portal. And when I did
20 the year-end -- 2021 21 year-end payment, I also entered
21 the 2022 quarterly estimated payments. And it's been my
22 practice to do it all at the same time so that I don't
23 have to worry about missing deadlines throughout the year.

24 Q Okay. And so you are required to use the FTB
25 portal payment. Have you used this payment procedure

1 before in the past?

2 A Yes. I've used it ever since it was required and
3 maybe even before then. My FTB payment history goes back
4 to 2007, and shows that I made regular use of Web Pay.

5 Q And so it seems like you've been using this for,
6 you know, over a decade at this point.

7 Now I'd like to turn to the confirmation. When
8 you made the 2021 payment, did you receive a confirmation?

9 A Yes, I did.

10 Q And upon receipt of the confirmation, how did you
11 review the confirmation?

12 A So the confirmation document, you know, pops up
13 almost instantaneously after you have entered the
14 information. And so I reviewed it. I made sure that it
15 had my correct contact information, the right last four
16 digits of my social security number, the name of my bank,
17 the routing number for the bank, and the correct last five
18 digits of the account number, which is all I'm able to
19 view. And then, of course, the correct dollar amount, and
20 the date.

21 Q Now, because you've seen -- you know, you used
22 this payment system many times, did you notice or is this
23 confirmation page very different from confirmation pages
24 you have witnessed in the past?

25 A No, I mean it looked pretty much the same to me.

1 You know, it's a one-page document. It has "confirmation"
2 in bold. It bolds all the sections, and it looked pretty
3 much the same to me as all the other ones I have seen.

4 Q Then in your many, many years of paying through
5 the FTB's portal system, has the system ever asked or
6 required you to review your bank account?

7 A Well, maybe. You know, at the bottom of the
8 confirmation notice that I received in 2022, there's some
9 unbolded language that says to allow up to two business
10 days for the transaction or for the bank to reflect the
11 payment. And it suggests that you contact your bank to
12 confirm that the payment has cleared.

13 And it goes on to give language about how to
14 cancel the payment. I really interpreted that to be like
15 an FYI, that if you want to know how long it's going to
16 take for things to clear, you can check it out.

17 Because this issue came up after I filed my
18 appeal and it was in the FTB brief, I actually went back
19 in my records and that language does not occur on all of
20 the confirmation notices. The most recent one that I had
21 available to me was 2018, which just says it will take two
22 business days -- you know, it could take up to two
23 business days for the bank to reflect the payment. But it
24 doesn't say anything about checking with your bank to see
25 if it cleared.

1 Q Yeah. That's when it does seem very confusing.

2 And so when it comes to your confirmations
3 handled by other entities, how are confirmations
4 usually -- how do you usually view these confirmations?

5 A I'm sure -- well, I do a lot of online
6 transactions in terms of, you know, paying bills and using
7 different portals from various organizations. And, in
8 fact -- first of all, you know, my FTB history shows that
9 I have 54 records. So of the 54, 35 are through the ACH
10 Web Pay.

11 I have used the same ACH system and the same
12 exact Charles Schwab checking account for property tax
13 payments and for college tuition and room and board fees.
14 So I have twins, a son and a daughter, who are now seniors
15 in college. They are at two separate universities, and
16 both universities have a similar type of financial portal
17 to pay the expenses.

18 And so all of these types of transactions I get a
19 confirmation notice. And generally they have a number.
20 Not always. But my -- these -- these notices serve as a
21 type of receipt and evidence of payment made. So quite
22 honestly, I thought the FTB's confirmation notice was the
23 same as these other organizations.

24 Q Yeah, so it seems like considering the
25 circumstances, it was probably reasonable for you to

1 believe that this confirmation showed your payment had
2 processed, right?

3 A It certainly doesn't say that it's not that.
4 It's just, you know, confirmation and the amount and the
5 number and allow two days for it to clear. I mean, it
6 appeared to me that the transaction was done and it was
7 proof of payment.

8 Q Okay. And so thank you. I would like to discuss
9 the checking account at issue.

10 Now you mentioned that you used a Charles Schwab
11 checking account to make the payment. Can you describe
12 exactly how that checking account works?

13 A Sure. So the checking account is linked to my
14 Charles Schwab brokerage account, which basically contains
15 my life savings. And the choking account is a sweep
16 account, and what that means is any payments that are
17 drawn on that account, whether it's electronically or if I
18 were to write a check, the funds automatically sweep from
19 my general investment account. And then I make sure that
20 I have adequate liquid assets in that investment account
21 to cover any checks that are written or any electronic
22 transactions that are made.

23 Q Thank you. Regarding this checking account, you
24 know, is this your by primary checking account?

25 A No, it's not. My primary checking account is my

1 Bank of America account and that's what I use for all my
2 daily living expenses.

3 The Schwab account, as I said, it's tied to my,
4 you know, basically my life savings. So the Schwab
5 account is used almost exclusively for tax liabilities,
6 federal, state, property, and college expenses.

7 Occasionally I might use the Schwab account to
8 pay, like, a large home repair bill or something of that
9 nature, but I don't generally use it for daily living
10 expenses.

11 Q Okay. And because it's not your primary checking
12 account, you know, what are your methods for monitoring
13 this account?

14 A Sure. So I meet with my Schwab representatives
15 on a quarterly basis, and the purpose of the meetings is
16 for me to communicate any upcoming cash needs that I have,
17 make sure that there is funds available for that, and
18 then, of course, we look over the performance of the
19 investment. And then I go online and review that account
20 periodically, like, just to see how things are going or
21 performing.

22 But when it comes to any use of the cash, I
23 always make sure that I've got adequate cash to pay
24 whatever expenses are coming up. And, as I said, that's
25 generally the taxes and college.

1 Q Okay. And then when you have had -- or when you
2 have used that checking account, in your experience, how
3 have dishonored payments been treated?

4 A Well, I never had a dishonored payment up until
5 this situation with the FTB, so -- if -- if you look at
6 the records, the 54 records, there's five dishonored
7 payments and those are all from the 2021 year-end payment
8 and the four quarterly estimated payments I made for 2022.
9 So I never had this situation arise before.

10 Q Thank you. So I would like to move to the funds
11 in your account. On the date of your FTB payment, now
12 what funds were actually available in the account?

13 A So on March 18th, 2022, I had \$271,679 in the
14 account.

15 Q Additionally, how much was your tax payment on
16 that date?

17 A 13,063.

18 Q So, yeah, I mean, you can see that there is
19 definitely more than adequate funds available in the
20 account for the payment.

21 Now let's move to the notice. Can you please
22 tell us around what date you received the notice of
23 deficiency from FTB?

24 A Yes, I received a balance-due notice of penalties
25 and interest for nonpayment of the taxes, plus penalties

1 and interest on June 13th, 2022. So almost three months
2 after I made the payment.

3 Q Right. Three months is definitely a long time.

4 Once you received the notice, what steps did you
5 take to actually resolve the problem and try to fix -- pay
6 your tax liability?

7 A Well, I -- excuse me -- I called the FTB right
8 away that day because I was so surprised and confused
9 about what was going on. There was a voicemail recording
10 that the FTB was not accepting phone calls. And I was
11 advised to send a secure message through MyFTB. So I did
12 send a secure message the next day. And I questioned the
13 reason for the balance-due notice. I provided the payment
14 information, you know, from the Web Pay along with the
15 confirmation number. And I really assumed that there was,
16 you know, some mistake in processing or posting my
17 payments, so I asked for clarification.

18 And then I also followed the instructions on the
19 balance-due notice. So there is a big bold faced section
20 of what you need to do. And if you agree, you pay the
21 amount. And there was a deadline of June 23rd and it
22 advises that if you don't pay it by the deadline, you can
23 have additional penalties and interest.

24 And if you disagree, it advises you to gather
25 certain documents before you contact the FTB. So since I

1 disagreed because I thought it was an error, I gathered
2 the documents and contacted the FTB. The notice, by the
3 way, doesn't say -- nowhere on the notice does it say that
4 if you disagree and you don't make a payment that you will
5 be subject to additional interest and penalties. So that
6 was, I think, kind of misleading to me.

7 Q And so you tried to contact the FTB and to figure
8 out how to resolve the problem, right? What was FTB's
9 response?

10 A Well, I didn't see a response right away from the
11 FTB, and so I contacted Nancy Skinner's office for
12 assistance. And I got a response from them on July 27th.
13 They had me complete a release of information, so I filled
14 that form out, submitted it to them on the 29th. And then
15 the congressional office got back to me and said that the
16 FTB had advised them that the dishonored status was due to
17 inadequate funds. I didn't even know what dishonored
18 meant.

19 So since I knew I had adequate funds, that kind
20 of further implied to me that there must have been some
21 sort of error, like, posting error. So I proceeded to go
22 to make more inquiries to the FTB and ask for follow up to
23 my prior messages. And then I also asked for information
24 from both the FTB and Nancy Skinner's office how to appeal
25 the charges of interest and penalties.

1 Q Yes, it must be very confusing to get this answer
2 that you had inadequate funds when you definitely knew
3 that you had the funds in your account.

4 After speaking with the congressional office, did
5 you have any further correspondence with FTB?

6 A Yeah, so there was a bit of a back and forth. I
7 did get a response on July 18th. And on this response I
8 was told there was no record of my payment. So I still
9 didn't understand what the problem was, but I figured I
10 could work it out, you know, retrospectively and so I just
11 went ahead and paid it.

12 So I paid the \$13,907 on July 18th. And when I
13 went onto Web Pay that time I changed the bank from Schwab
14 to Bank of America just as a precaution, because I didn't
15 understand, you know, what was happening.

16 And then a couple days later on the 22nd, I got a
17 second balance-due notice for additional penalties and
18 interest, and this was really a surprise because I thought
19 I had followed all the directions on the original
20 balance-due notice, which said nothing about risking
21 further penalties and interest. So I just paid that
22 immediately. So I paid the 178 on July 22nd.

23 And then I eventually heard from the FTB on
24 August 19th. So this is now, you know, several months
25 after the March 18th payment. And now I was informed that

1 there was invalid account information, but no specifics
2 were provided. And it was impossible for me to validate
3 what was invalid. Was it the routing number, the account
4 number? You know, what exactly was it? I kept asking for
5 information, but I didn't get anything.

6 On that message, the FTB did give me information
7 on how to seek a refund. And then just to add to the
8 confusion, the FTB's instructions on how to seek a refund
9 were different from Nancy Skinner's office who instructed
10 me to file an appeal.

11 So honestly, the whole situation was just very
12 confusing and lots of conflicts and just -- just made it
13 very unclear.

14 Q Yeah. I mean, I think that there is a lot of, I
15 guess, discrepancy regarding, you know, why the payment
16 was dishonored in addition to, you know, the process
17 afterwards.

18 And so I would like to talk about the FTB's
19 contention that you entered the incorrect information.

20 Can you just repeat when you -- when you
21 reviewed your confirmation, you know, the account details
22 or the confirmation details?

23 A Sure. So all the information that I can see on
24 the confirmation notice is accurate. So the date, the
25 amount, the last four digits of my social security number,

1 the name of my bank, the routing number and the last five
2 digits of the account number. So to this day I do not
3 know what was incorrect. Everything I can view is
4 correct.

5 Q Okay. Thank you, Ms. Horwitz.

6 This will conclude your section of witness
7 testimony.

8 (Reporter clarification.)

9 MR. NGUYEN: So I would like to continue with the
10 oral argument.

11 Drawing on the evidence at hand and the
12 provisions set forth in Revenue and Taxation code
13 19312(a), today's evidence illustrates that Ms. Horwitz's
14 actions satisfy the criteria necessary for penalty
15 abatement due to reasonable cause.

16 RTC19312(a) allows the abatement of penalties for
17 failure to make a timely tax payment due to reasonable
18 cause and not willful neglect.

19 So, first, I will begin by addressing reasonable
20 cause.

21 In Appeal of Horn the court held that the most
22 cautious approach is not the only reasonable and prudent
23 option. The court also stated that the determination of
24 whether reasonable cause exists to the abatement of late
25 penalty requires an analysis of the Appellant's actions

1 leading up to the payment, the timing of those actions,
2 and whether they reflect ordinary business care and
3 prudence, such as an ordinary intelligent and prudent
4 person would have performed under similar circumstances.

5 Moreover, in appeal of Curry, the court developed
6 the ordinary and prudent standard to include that useful
7 cause analysis should consider the circumstances of the
8 taxpayer.

9 Now, as you heard in her testimony, Ms. Horwitz
10 made a tax payment on March 18th, 2022, through the FTB
11 web portal. When she made the payment -- Ms. Horwitz is
12 very well-versed in the payment process because she had
13 used the payment system very many times to cover her tax
14 balances. Exhibit 14 shows that she made over 50
15 payments, and these payments date back all the way to
16 2007.

17 Additionally, on the date of payment, Ms. Horwitz
18 knew she had over 278,000 in her Schwab account, as
19 evidenced in Exhibit 9. This amount is significantly
20 greater than the tax liability she owed of approximately
21 13,000, so she had no reason to believe that her funds
22 would not go through due to inadequate funds.

23 After she made the tax payment, the FTB system
24 sent her a document that reads "confirmation" at the top
25 and even provides her with a confirmation number. If you

1 compare the 2021 confirmation in Exhibit 7 and her 2018
2 confirmation on Exhibit 12, we can recognize that these
3 confirmations look very similar at first glance.

4 As a reasonable and prudent person, Ms. Horwitz
5 truly believed that this confirmation represented her
6 payment was complete, especially because she had never
7 been required to confirm the payment had been processed
8 when making any of her past payments.

9 Next, Ms. Horwitz also testified that the
10 checking account she used was not her primary checking
11 account. She only uses this checking account for certain
12 payments, specifically her children's tuition and tax
13 payments. Therefore, she had never needed any reason to
14 monitor it on a regular basis.

15 Considering the fact that she is familiar with
16 the system, received confirmation, and had sufficient
17 funds in the checking account that was pretty much used
18 just for tax payments, it is reasonable to recognize she
19 acted with the same ordinary and prudent care that a
20 similar person would have acted in her circumstances when
21 she did not fixate on monitoring her Schwab account after
22 payment.

23 Now after the submission, neither FTB nor her
24 bank notified Ms. Horwitz that a payment was dishonored.
25 Though she was not aware that FTB has no duty to notify a

1 taxpayer about the dishonored payment, it would have been
2 reasonable for her to expect some form of notification
3 within three months before FTB sent her a notice of tax
4 balance due on June 8, 2022, and assessed a late penalty
5 for \$788.

6 Once Ms. Horwitz received this notice on June
7 14th, she immediately contacted FTB to try to understand
8 the error, but FTB was unable to provide a clear answer.
9 She eventually contacted the congressional office on July
10 29th, who spoke to FTB on her behalf, and relayed to her
11 that the payment was dishonored due to inadequate funds.
12 Even now, the FTB contends that the payment was dishonored
13 due to a different reason, inaccurate bank information;
14 however, when you review Exhibit 1, the last five digits
15 of her account number and confirmation number are correct
16 on her confirmation page.

17 Because Ms. Horwitz knew she had adequate funds
18 at the time of payment and knew it was unlikely she
19 entered the incorrect information, she continued to try to
20 get some form of explanation from FTB, but ultimately
21 decided to make her payment on July 22nd.

22 Any individual with these circumstances would
23 have definitely tried to inquire about the dishonored
24 payment as an attempt to resolve the issue by contacting
25 FTB, especially if the circumstances show that it would be

1 extremely unlikely that a payment could be dishonored
2 based on the lack of certainty from correspondence with
3 the FTB.

4 Ms. Horwitz clearly acted with ordinary care and
5 prudence from the time of notice to the time of payment.
6 While FTB contends Appellant lacked reasonable care based
7 on Appeal of Scanlon where the court held that a
8 reasonable prudent person is expected to monitor his bank
9 account to ascertain whether the electronic payment was
10 made, this decision should not be merely construed to
11 determine that any taxpayer who did not monitor his or her
12 checking account after tax payment lacked ordinary and
13 prudent care, and subsequently reasonable cause.

14 When Ms. Horwitz, acting as a reasonable
15 taxpayer, made her payment nearly a month before her
16 balance was due, she was familiar with the payment
17 procedure, received confirmation page and confirmation
18 number, had adequate funds and used a checking account
19 which she had little reason to monitor.

20 Without prior notification of a dishonored
21 payment, she received a notice of balance due and
22 assessment for penalty. Reasonably she went to great
23 lengths to inquire about the issue to find a resolution.
24 And ultimately paid her balance due, even though she was
25 never provided any clear explanation as to why her payment

1 was dishonored.

2 Upon complete review, Ms. Horwitz's actions show
3 that she acted with ordinary and prudent care as a
4 person would have acted in similar circumstances. Thus,
5 Appellant's actions in light of these circumstances
6 sufficiently establish a basis for reasonable cause for
7 failure to make a timely payment under Revenue and
8 Taxation code 19312(a).

9 Next I'd like to turn to addressing willful
10 neglect.

11 (The Court Reporter requested Mr. Nguyen turn up
12 his volume.)

13 MR. NGUYEN: Willful neglect was defined in the
14 United States v Boyle as a conscious intentional failure
15 of reckless indifference. In Ms. Horwitz's case the
16 evidence demonstrates that she timely filed her tax return
17 on March 18th, nearly one month before her tax liability
18 was due, and held more than adequate funds in her account,
19 as we have spoken about before.

20 When she received the first notice of deficiency,
21 she immediately contacted the FTB to ascertain why her
22 payment was not processed. As she mentioned in her
23 testimony, after many failed attempts to learn why the
24 payment was dishonored, to resolve her tax balance and
25 penalties assessed, she made payment.

1 When this tax payment -- tax payment was
2 dishonored, the facts show that she had every intention to
3 make the payment, even after she received the notice of
4 deficiency. Ms. Horwitz went to great lengths to resolve
5 the problem before paying the tax liability. Ultimately
6 this payment was a result of some sort of mistake rather
7 than a conscious, intentional failure or reckless
8 indifference. Thus, Ms. Horwitz was not willfully
9 neglectful for failure to pay her 2021 payment under
10 Revenue and Taxation code 19312.

11 Based on the facts before us, Appellant lacked
12 willful neglect and also established that she had
13 reasonable cause, not only for the period between her
14 dates of payment and notice of deficiency, but also and
15 especially for the time period between the notice of
16 deficiency and date of tax payment, and further, final
17 payment, for her failure to make a timely tax payment for
18 the 2021 tax year.

19 For the foregoing reasons, Appellant respectfully
20 requests the court abate her tax penalty imposed for
21 failure to make a timely payment for tax year 2021
22 pursuant to Revenue and Taxation code 19312.

23 That will conclude my argument.

24 ALJ AKOPCHIKYAN: Thank you, Mr. Nguyen.

25 And thank you, Ms. Horwitz, for your testimony.

1 Does the Franchise Tax board have any questions
2 for Ms. Horwitz?

3 MR. NAM: No questions from the Franchise Tax
4 Board.

5 ALJ AKOPCHIKYAN: Thank you.

6 I also do not have any questions. I understand
7 your position, Ms. Horwitz.

8 I'm going to go ahead and turn it over to the
9 Franchise Tax Board for its presentation.

10 Mr. Nam, you may proceed when you are ready.

11 MR. NAM: Thank you. My name is Gi Jung Nam.
12 And I am here with co-counsel Maria Brosterhous. We
13 represent Franchise Tax Board, Respondent, in this appeal.

14 We are here today primarily to determine if
15 Appellant has established reasonable cause to abate the
16 late payment penalty at issue.

17 Through the Office of Tax Appeals in the Appeal
18 of Scanlon, which is precedential, that appeal held that a
19 reasonably prudent taxpayer exercising due care and
20 diligence are expected to monitor their bank account and
21 quickly ascertain whether their scheduled electronic
22 payment was withdrawn from the bank account.

23 Here, the web payment confirmation page that
24 Appellant has testified to, to have reviewed informed
25 Appellant it can take up to two business days from the

1 payment date for her bank account to reflect her payment,
2 and to review her bank account statements or contact her
3 bank to confirm that her payment was cleared.

4 Appellant has not proven that her payment has
5 cleared in two business days after she made the Web Pay
6 request. She has not shown that she reviewed her bank
7 account to confirm that her payment was cleared before she
8 received FTB's notification about her late payment
9 penalty.

10 In addition, Respondent submitted Exhibit I,
11 which shows that Appellant's March 18, 2022, payment was
12 dishonored due to invalid account information. Appellant
13 offers assertions and evidence about her prior payment
14 history and her actions after she received FTB's
15 collection letter dated June 23rd, 2022.

16 Unfortunately the late payment penalty may not be
17 abated based on Appellant's prior payment history and her
18 actions that took place months after her dishonored
19 payment. And this is based on the precedential decision
20 on appeal of Scanlon.

21 Therefore, Respondent's action should be
22 sustained.

23 Thank you.

24 ALJ AKOPCHIKYAN: Thank you, Mr. Nam.

25 I do have a question for FTB.

1 Do you have any other additional information
2 regarding why the payment was dishonored?

3 MR. NAM: Besides Exhibit I, which we submitted,
4 we do not have additional information.

5 ALJ AKOPCHIKYAN: Thank you.

6 Okay. I don't have any additional questions for
7 FTB.

8 I'm going to go ahead and turn it over to
9 Appellant for final -- any final remarks.

10 You have about five minutes, Mr. Nguyen.

11 MR. HORWITZ: Okay. Thank you, your Honor.

12 I guess there are just a couple of things I would
13 like to say and it's already been pointed out, but if the
14 whole source of this problem was incorrect account
15 information, it certainly would be very helpful at the
16 time of data entry to be able to review the account
17 information and figure out what the problem was and
18 correct it before it turns into a such a horrendous
19 time-consuming matter. So, you know, I now know that it's
20 important to check my bank account to see that the payment
21 has cleared, but I'd also like to point out that even if I
22 had done that, I don't think it would have resulted in --
23 it still would have resulted in a late payment because
24 the -- I paid it on March 18th. If I gave it two days,
25 and I am not looking at a calendar to see Saturdays and

1 Sundays and whatnot, but let's just say it goes to March
2 20th, secure messaging makes it very clear not to expect a
3 response before 30 days. And, in fact, I didn't get one
4 for much longer than that, but let's say it's 30 days.
5 You know, that puts it at April 20th, and now I have
6 already missed the deadline for making the payment.

7 So I -- you know, I understand now
8 retrospectively, hindsight is everything. I understand
9 what needs to be done, but I would like to point out that
10 I think the overall system is designed to work only for
11 individuals, I think, who are demonstrating extraordinary
12 business care and tireless follow up.

13 You know, at the risk of being immodest, I just
14 want to say that I am an individual that pays attention to
15 detail. I'm a widowed single parent of twins. I've
16 raised my twins since they were four, and I haven't done
17 this without being responsible, efficient, practical, and
18 paying attention to detail. So I think there is a lot of
19 room for improvement, you know, in the system. I
20 certainly have a higher radar, but I'm also -- I'm really
21 concerned about future payments because if the tax return
22 isn't -- it's very hard to get a tax return done before
23 the beginning of March. So if it's not done by the
24 beginning or early March and there is any problem, the
25 likelihood of getting that resolved and making good on the

1 payment before the deadline seems very low.

2 So those are my final comments and I do
3 appreciate this opportunity to speak with all of you and
4 to be heard.

5 ALJ AKOPCHIKYAN: Thank you, Ms. Horwitz.

6 I do appreciate your testimony today.

7 I don't have any questions for either party at
8 this time.

9 So I think we are ready to conclude the hearing.
10 If there are no questions from either party -- are there
11 any final questions?

12 Mr. Nguyen, are you ready to conclude?

13 MR NGUYEN: No final questions, Judge. Thank
14 you.

15 ALJ AKOPCHIKYAN: Okay. Perfect.

16 So this case is submitted on October 20th, 2023,
17 and the record is now closed.

18 I want to thank the parties again for the
19 presentation today. We will decide this case based on the
20 arguments and evidence presented to the Office of Tax
21 Appeal, and we will issue our written decision within 100
22 days from today.

23 We are going to go ahead and take a brief recess
24 before we --

25 (Discussion held off the record with the Court

1 Reporter regarding spellings needed)

2 ALJ AKOPCHIKYAN: We are going to go ahead and
3 take a brief recess before we begin our next hearing.

4 Thank you all again for your presentation today.

5 Thank you.

6 MR. NGUYEN: Thank you.

7 MR. NAM: Thank you.

8 (Whereupon, the proceedings concluded at 2:07
9 p.m.)


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