

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF: )  
 )  
S. HORWITZ, ) CASE NO. 220811247  
 )  
 )  
 ) APPELLANT.  
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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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TRANSCRIPT OF PROCEEDINGS, taken via  
Zoom Videoconference, commencing at 1:27 p.m.  
and concluding at 2:07 p.m. on Friday,  
October 20, 2023, reported by  
Donna S. Badger Cramin, CSR No. 14530, a  
Certified Shorthand Reporter in and for the  
State of California.

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APPEARANCES :

Panel: Ovsep Akopchikyan

For Taxpayer: S. Horwitz, Taxpayer  
Patrick Nguyen, Representative

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

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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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