

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF: )  
 )  
R. O'HARE, ) CASE NO. 220911341  
 )  
 )  
 ) APPELLANT.  
 )  
 )  
\_\_\_\_\_ )

CERTIFIED COPY

TRANSCRIPT OF PROCEEDINGS

Friday, October 20, 2023

Reported by:

DONNA S. BADGER CRAMIN,  
CSR No. 14530

Job No. :  
44618 OTA(C)





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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-3 were received at page 7)  
(Appellant's Exhibits 4 and 5 were received at page 8)  
(Respondent's Exhibits A-H were received at page 7)

EXAMINATION

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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 3:27 p.m.

3  
4 ALJ RALSTON: We are opening the record for the  
5 Appeal of O'Hare. Office of Tax Appeals Case Number  
6 220911341. Today's date is October 20th, 2023, and the  
7 time is approximately 3:27 p.m.

8 My name is Natasha Ralston and I'm the lead  
9 Administrative Law Judge who will be conducting the  
10 hearing for this case. We also have Judge Geary and Judge  
11 Katagihara.

12 I'm going to ask the parties to please introduce  
13 themselves for the record starting with the respondent.

14 So if you could just go ahead and state your name  
15 and who you represent.

16 MS. CHANG: Paige Chang with FTB.

17 ALJ RALSTON: Thank you.

18 MS. BROSTERHOUS: Maria Brosterhous for  
19 Respondent.

20 ALJ RALSTON: Thank you.

21 And if we could go to the Appellant. If you  
22 could just introduce yourself and who you represent.

23 MS. YU: My name is Ingrid Yu. I'm the  
24 representative of TAAP Program, representing the  
25 Appellant, Mr. O'Hare and Andrea Dranco.

1 ALJ RALSTON: Thank you. I just want to go over  
2 a couple things before we get started. As you are aware,  
3 this hearing is being live streamed to the public and is  
4 being recorded. The transcript and this video recording  
5 are part of the public record and will be posted on the  
6 Office of Tax Appeals website, so that -- that being said,  
7 please make sure that you don't show any private or  
8 sensitive information on the screen.

9 Let's see. The Office of Tax Appeals is not a  
10 court, but is an independent appeals body, which is  
11 staffed by tax experts and is independent of any tax  
12 agency. While the Office of Tax Appeals is not a court,  
13 we must follow certain guidelines to ensure that we  
14 establish a proper record on which a decision is based and  
15 to conduct an orderly hearing.

16 Each party will have the opportunity to be heard,  
17 so please wait for your turn to present your side. Also,  
18 I may interrupt the hearing if we get out of order or if  
19 we have questions as part of my role as lead  
20 Administrative Law Judge.

21 Also present is our stenographer, Ms. Cramin, who  
22 is reporting this hearing verbatim. To ensure we have an  
23 accurate record, we ask that everyone speaks one at a time  
24 and does not speak over each other. Even if you think you  
25 know what we are going to ask, please let the speaker

1 finish their question before you answer. Also speak  
2 clearly and loudly. When needed, Ms. Cramin will stop the  
3 hearing process and ask for clarification.

4 After the hearing, Ms. Cramin will produce the  
5 official hearing transcript, which will be available on  
6 the Office of Tax Appeals' website.

7 So we held a pre-hearing conference for this  
8 matter on September 25th, 2023, and the Appellant  
9 submitted Exhibits 1 through 3. Respondent did not object  
10 to Appellant's exhibits.

11 Appellant's Exhibits 1 through 3 are admitted  
12 without objection.

13 (Appellant's Exhibits 1 through 3 were received  
14 into evidence by the Administrative Law Judge.)

15 ALJ RALSTON: Respondent has submitted Exhibits A  
16 through H. During the pre-hearing conference, Appellant  
17 objected to Respondent's Exhibit H being admitted into  
18 evidence; however, as explained in the minutes and orders,  
19 the objection was overruled. Thus Respondent's Exhibits A  
20 through H are admitted into evidence.

21 (Respondent's Exhibits A through H were received  
22 into evidence by the Administrative Law Judge.)

23 ALJ RALSTON: Neither party intends to call any  
24 witnesses. The Appellant will have 30 minutes to present  
25 their case. Respondent will also have 30 minutes to

1 present their case. And Appellant will have ten minutes  
2 for rebuttal. The panel may ask questions at any time  
3 during the proceedings.

4 Does anyone have any questions before we move on  
5 to our opening presentations?

6 Yes, Ms. Yu?

7 MS. YU: Yes, your Honor, I have also submit  
8 additional evidence, 4 to 5.

9 ALJ RALSTON: Okay. When was that submitted?

10 MS. YU: It was on the -- before the due date to  
11 submit additional evidence.

12 ALJ RALSTON: Okay. Let me just check that.  
13 Ms. Chang, did you receive a copy of Appellant's Exhibits  
14 4 and 5?

15 MS. CHANG: Yes, that's correct. We received it  
16 by e-mail, I think.

17 ALJ RALSTON: Okay. Did you have any objections  
18 to those exhibits?

19 MS. CHANG: No objections. Thank you.

20 ALJ RALSTON: Okay. Yeah, I see them here.

21 So that being said, we will admit Appellant's  
22 Exhibits 4 and 5 into evidence.

23 (Appellant's Exhibits 4 and 5 were received into  
24 evidence by the Administrative Law Judge.)

25 ALJ RALSTON: And I just want to double check

1 with you Ms. Yu, were you intending to have anyone testify  
2 at this hearing?

3 MS. YU: The Appellants, Mr. O'Hare and Ms.  
4 Andrea Dranco, the two of them will be witnesses here.

5 ALJ RALSTON: Okay. Does -- Ms. Chang, did you  
6 have any objection to the Appellants testifying?

7 MS. CHANG: No objection. Thank you.

8 ALJ RALSTON: Okay. So what we will do is before  
9 your presentation is I will swear them both in, and you  
10 can start your presentation and move right into your  
11 testimony.

12 The panel may have questions, and also since they  
13 are testifying under oath, FTB may also have questions for  
14 the two Appellants.

15 So I will let you know when I am ready to swear  
16 them in.

17 So thank you for clearing that up.

18 Let's see if I have anything. I'm just checking  
19 my notes to see if there is anything else I want to cover.

20 Does anyone have any questions before we proceed?  
21 Okay. Looks like we are ready to move forward.

22 So if I could have both witnesses please raise  
23 their right hand.

24 ///

25 ///

1                   R. O'HARE AND ANDREA DRANCO,  
2 called as witnesses, and having been first duly sworn by  
3 the Administrative Law Judge, were examined and testified  
4 as follows:

5                   MR. O'HARE: I do.

6                   MS. DRANCO: I do.

7                   ALJ RALSTON: Okay. Thank you. Just for the  
8 record, both Appellants have stated in the affirmative.

9                   And, Ms. Yu, you can go ahead and begin your  
10 presentation. You have approximately 30 minutes.

11                   MS. YU: Thank you, your Honor.

12                   THE COURT REPORTER: I'm sorry. I am going to  
13 need you to slow down a little bit for me, please.

14                   MS. YU: Oh, yeah. Sure.

15                   THE COURT REPORTER: Thank you.

16                   MS. YU: Shall I start from the beginning?

17                   THE COURT REPORTER: Please.

18                   MS. YU: Diligent and careful taxpayer who is  
19 simply paying his tax lone electronically, but follow with  
20 utmost detail to amend before the due date should be  
21 abated from mandated e-Pay penalty. Before we go into the  
22 detail of our arguments, we would like to call upon our  
23 witnesses, Mr. O'Hare and Ms. Dranco, to explain the  
24 length and extent of their care and prudence before --  
25 both before and after the circumstances that lead to the

1 penalty issues here.

2  
3 EXAMINATION

4 BY MS. YU:

5 Q To begin with Mr. O'Hare. Good afternoon.

6 A Good afternoon.

7 Q When did you start paying tax in California?

8 A I'm a California native and have been a  
9 California taxpayer most of my life, but most recently my  
10 family and I moved to New York City for two years from  
11 2017 to 2019, so I resumed paying California taxes when we  
12 moved back to California in 2019.

13 Q Do you do the tax yourself or do you hire a tax  
14 preparer, and for how long?

15 A I've been using a tax -- my wife and I have been  
16 using a tax preparer for about 15 years.

17 Q Thank you. So you are personally not well versed  
18 in tax matter or tax law at all?

19 A No, I am not.

20 Q For all those years you were paying California  
21 tax, how do you pay your tax?

22 A I think historically I primarily paid my taxes by  
23 check.

24 Q Did you ever run into any problem with your tax  
25 payment via checks?

1           A     No, I've never had an issue.

2           Q     So given that long history with no issue, would  
3 you say that you have come to find check payment reliable  
4 and dependable, and they always get accepted?

5           A     Yes, that's correct. That's been my experience.

6           Q     Did you know before 2020 that electronic  
7 payments are required if you either make an estimated tax  
8 or extension payment over 20,000, file an original return  
9 with a tax liability over 80,000?

10          A     No, I was not aware of that requirement until we  
11 received an e-Payment notice in May of 2020 following our  
12 2019 tax return.

13          Q     When did you fall into the threshold of mandated  
14 e-Payment?

15          A     Our 2019 tax year return triggered the e-Payment  
16 requirement. We were given the first notice of this  
17 requirement, as I mentioned, in May of 2020.

18          Q     How much was your tax liability for 2020 tax  
19 year?

20          A     For the year of 2020 it was a relatively small  
21 amount. It was roughly \$3600.

22          Q     How much tax do you pay for the 2021 tax year?  
23 You don't need to say the exact figure, but range?

24          A     It was a considerable sum. We owed nearly half a  
25 million dollars for the 2021 tax year return.

1 Q You mentioned that your 2021 tax payment was  
2 anomalously big, and what lead to this anomalously big tax  
3 payment?

4 A My employer went public in early 2021 and I was  
5 able to sell some shares that I held in the company and so  
6 I had income from the sale of those shares.

7 Q Was it unusual that you have to pay such an  
8 enormous amount?

9 A Yes. Very unusual.

10 Q Why you did not pay the 2021 tax electronically?

11 A It was one of the largest payments I've ever made  
12 in my life and I had some concerns around the FTB website  
13 based on a story I had heard from my tax preparer about a  
14 client of his that had had a duplicate tax payment pulled  
15 from the client's bank account by the FTB.

16 Q What do you do when you have such a hesitation  
17 and uncertainty?

18 A I followed my belief to pay in what I viewed to  
19 be the safest way to pay given the size of our tax  
20 obligation, as a reasonable and prudent person.

21 Q So you have doubts whether you should pay  
22 electronically or manually based on the reason you  
23 mentioned, on a reasonable business person standard?

24 A Yes. That's correct. I was focused on getting  
25 funds to the FTB ahead of the deadline and in a manner

1 that I viewed to be the safest way to pay, given the  
2 amount of money owed.

3 Q What did you ask your tax preparer, and what did  
4 you do after that?

5 A I had a miscommunication with my tax preparer and  
6 mailed the check before I was able to receive a final  
7 clarification from him.

8 Q So preparing the importance of paying on time and  
9 in full reliably to paying in a way that you have doubts  
10 on reliability, you chose the former to pay your tax on  
11 time and in full reliably, which you mailed out a big  
12 check due to a reasonable business person prudent care  
13 evaluation; is it correct?

14 A Yes, that's correct.

15 Q Why did you mail the check early, more than a  
16 week before the due date?

17 A I wanted to make sure the FTB was able to receive  
18 and process the check before the April 19th deadline and  
19 allow enough time for any contingencies.

20 Q What did you do after your tax preparer reply you  
21 that you need to pay electronically?

22 A We received the response from our tax preparer on  
23 a Sunday, so my wife and I made sure to reach out to the  
24 FTB on that following Monday to try to remedy the  
25 situation given we still had more than a week before the

1 tax payment deadline.

2 Q How many times you tried to contact the FTB and  
3 in what ways?

4 A Between my wife and I, we called the FTB over ten  
5 times on Monday. And I also sent a message to the FTB via  
6 the online message portal.

7 Q Did your wife successfully talk to FTB on April  
8 11, 2022?

9 A Yes. My wife successfully talked to the FTB on  
10 Monday, April 11th, 2022, after making many calls.

11 Q Did you successfully talk to any FTB staff on  
12 April 11?

13 A I did not personally. Just my wife, Andrea, had  
14 a conversation.

15 Q Thank you. So you contact FTB immediately after  
16 you heard from your tax preparer, and you called FTB and  
17 you wrote them a message via FTB portal the same day?

18 A Yes, that's correct. We reached out on the first  
19 business day possible after we learned of the mistake.

20 Q Thank you. Did you check the FTB portal on April  
21 11 that any lone e-Payment was made for the 2021 tax year?

22 A Yes, I did. And when I checked the FTB site on  
23 April 11th, the check had not yet been posted to our  
24 account.

25 Q Which day on your bank account statement showed

1 that the paper check was cleared by FTB?

2 A Our bank statement shows that the check was  
3 cashed on Tuesday, April 12th.

4 Q On April 11, 2022, when you checked the FTB  
5 portal it did not show that any lone e-Payment was made.  
6 So you reasonably believe that if you make another  
7 e-Payment on April 11, 2022, you could avoid an e-Pay  
8 penalty?

9 A I initially thought that by making an electronic  
10 payment I might be able to remedy, and that would help us  
11 avoid the tax penalty. However, based on my wife's  
12 conversation with the FTB, we did not pursue that path.  
13 We were told by the FTB and believed that the e-Payment  
14 waiver request form was the best route for us to pursue.

15 Q You mentioned that you messaged FTB via the  
16 portal. What did you write on the FTB portal?

17 A I'm happy to read it, if that's okay.

18 Q Yeah. Sure.

19 A I said, "Hello. I mistakenly mailed a check to  
20 cover the amount due in my 2021 return; however, I just  
21 learned that I needed to send an electronic payment  
22 instead, given the amount owed. I would like to correct  
23 this mistake and avoid any penalties. Can you let me know  
24 the best way to fix this? I would be happy to send an  
25 electronic payment now. Thanks."

1 Q So you clearly mentioned on the FTB portal that  
2 you were happy to pay electronically now. It means that  
3 you were able and willing to pay an extra amount  
4 electronically despite the check was mailed out and be  
5 cleared by FTB soon.

6 A Yes, that's correct.

7 Q Did you get any replay from FTB to your online  
8 portal since you wrote them on April 11, 2022?

9 A I received a reply from the FTB on April 28th.

10 Q What did they say?

11 A I'm just reading it, "Good afternoon. Thank you  
12 for your message. We have received your payment of --"  
13 blank "-- this payment will apply to your 2021 once the  
14 return is filed. If any penalties are assessed, you can  
15 fill out a claim for refund form once the balance is paid  
16 in full. Below is a link to the form. You also have a  
17 credit of \$4,605.00 on tax year 2020. A request has been  
18 made to be applied to your balance and the remaining 57  
19 cents will be refunded to you. Thank you for contacting  
20 Franchise Tax Board. Sincerely, Stacy Chavez."

21 Q So they mentioned something about 2020 tax year  
22 in that reply to address your 2021 e-Pay inquiry and said  
23 that you will get a credit of 4,000-something on tax year  
24 2020?

25 A Yeah. I feel compelled to point out that the

1 \$4,605.00 web payment to cover the e-Payment penalty was  
2 actually misapplied to my 2020 tax return, rather than the  
3 2021 open obligation on my account. And the FTB rep was  
4 confirming that they made a mistake and would correct that  
5 error.

6 As far as I can tell, the error was actually  
7 discovered by me and only corrected after I called the FTB  
8 to point out that the payment had been misapplied.

9 Q So the FTB made a mistake of applying your  
10 payment of 2021 e-Pay penalty to your 2020 tax year. So  
11 you still receive a tax due notice later requesting you to  
12 pay the \$4,603 e-Pay penalty. And I saw that FTB credits  
13 and debits the \$4,603.00 respectively on April 20 and May  
14 5th?

15 A Correct.

16 Q Okay. So you were showing your diligent and  
17 prudent business person duty by making efforts to find out  
18 the solution immediately after you learned the mandated  
19 e-Pay issue?

20 A Yes. We were doing our best to remedy the  
21 situation.

22 Q So you said that after you made several attempts  
23 to call FTB, the calls were automatically cut off and with  
24 no voicemail or call-back function and you asked your wife  
25 to continue calling FTB. And you mentioned that she

1 successfully contacted FTB finally after quite a number of  
2 call attempts?

3 A That's correct.

4 Q And how many times of attempts she could talk to  
5 FTB?

6 A I believe she called eight to ten times.

7 Q What was FTB instructions to her?

8 A The support representative advised her that we  
9 request an e-Payment waiver request form, and he didn't  
10 offer any other approaches.

11 Q So FTB gave you the answer was that you could not  
12 fix to avoid any payment -- any e-penalty -- e-Pay  
13 penalty. The only way that you could do at that moment  
14 was to sign a mandated e-Pay requirement waiver request  
15 form. And the day FTB said that was on April 11, 2022,  
16 correct?

17 A That's correct.

18 Q Was the check you issued to pay the tax got  
19 deposit by FTB on that day you call them on April 11,  
20 2022?

21 A According to our bank records, the check was  
22 cashed on the 12th of April, the following day.

23 Q Did you mention that you are happy to make the  
24 tax payment electronically now when you messaged FTB on  
25 portal on April 11, 2022?

1           A     I did, yes.

2           Q     Were you able and willing to pay again  
3 electronically, even though you have issued the check to  
4 FTB?

5           A     Yes, we would have been willing and able to make  
6 that payment.

7           Q     Did you have enough available funds sitting in  
8 the account?

9           A     Yes.

10          Q     So Exhibit 5 is show that in your bank account  
11 before and after your check was deposit by FTB on April 12  
12 you had enough available funds to make that double  
13 payment; is that correct?

14          A     That's correct.

15          Q     In order to avoid any penalty, you were willing  
16 and happy to make another payment online even after the  
17 check amount was debit; is it correct?

18          A     Yes.

19          Q     Why did you not make the payment on April 11,  
20 2022?

21          A     We were led to believe by the FTB agent that  
22 submitting an online payment would not be a path to  
23 avoiding the penalty.

24          Q     So you said that because FTB told you that you  
25 would get a penalty anyway, even you pay electronically,

1 on April 11, 2022. So you did not pay electronically,  
2 after the call with FTB even though you wanted to?

3 A That's correct.

4 Q Why did you mail the mandated e-Pay requirement  
5 request form on April 11, 2022, the same day your wife  
6 talked to FTB?

7 A We wanted to remedy the situation as soon as  
8 possible given the upcoming tax deadline on April 19th.

9 Q What made you believe that mailing the mandated  
10 e-Pay requirement request form would remedy the situation  
11 of e-Payment penalty?

12 A It was based on my wife's conversation with the  
13 representative at FTB on April 11th and what she was told.

14 Q You still mailed the waiver form on the same day  
15 because you rely on what FTB staff said, that your only  
16 option was to sign and submit that waiver form, and you  
17 believed that it was the only way to resolve it?

18 A Yes, that's correct.

19 Q Did you know anything about the waiver form  
20 before the FTB staff introduce it to you?

21 A No. We didn't have any prior experience with  
22 this particular process or the tax forms involved.

23 Q So you believed the FTB asking you to sign the  
24 waiver form was to address your question about e-Pay  
25 penalty in 2021?

1           A     Yes, that's correct. We believed that the form  
2 would be applied to our 2021 tax return payment.

3           Q     Is there any word in the waiver form indicating  
4 any limitation regarding tax year for applicants to  
5 request e-Pay waiver? Does it say anything on the form  
6 that taxpayer cannot request the same tax year waiver?

7           A     Not to my knowledge.

8           Q     If the waiver form did not limit which year the  
9 applicant to apply for a waiver, which year you intended  
10 to request for the waiver?

11          A     We intended to request it for the 2021 tax year.

12          Q     Were you expecting FTB would approve your  
13 mandated e-Payment requirement waiver request regarding  
14 your 2021 tax year e-Pay mandate?

15          A     Yes. We were hopeful given the conversation that  
16 my wife had with the FTB representative and the fact that  
17 he called out the waiver as the best path for us to  
18 pursue.

19          Q     After you filled out the waiver request form, did  
20 you keep track of it yourself and how?

21          A     Yes, I was periodically checking the FTB site.

22          Q     Were you expecting that FTB would approve your  
23 waiver request within a reasonable period of time?

24          A     Yes. I expected that it would be waived based on  
25 the language on the waiver form. I fulfilled the first

1 and second criteria, and it wouldn't be a concern for them  
2 to just let me continue to pay offline.

3 If I was denied, I was hopeful that there would  
4 be an allowance to amend my e-Pay because I had already  
5 alerted them via phone and mailed out the waiver request  
6 form.

7 Q Did you hear anything from FTB upon your waiver  
8 request that you request on April 11, 2022? If yes, when?

9 A Yes. Ultimately I received a phone call denying  
10 my request on September 22nd of 2023, roughly 17 months  
11 after we submitted the initial request. My understanding  
12 is that the FTB only responded because our TAAP rep  
13 pointed out the lack of response of the FTB as part of  
14 this appeal process.

15 Q So they reply you after one and a half years  
16 after you mailed the form to them?

17 A Yes, that's correct.

18 Q When did FTB penalize the 1 percent on you about  
19 the mandated e-Pay?

20 A The notice was dated April 25th, 2022.

21 Q Based on what you learned from the FTB staff on  
22 April 11, 2022, the staff confirmed you that you would  
23 have been penalized anyway even you pay electronically?

24 A Yes.

25 Q Why didn't FTB penalize you soon after they

1 deposit your check on April 12, 2022, but wait until after  
2 the tax year date on April 19, 2022, if according to the  
3 FTB staff mentioned on the form that you would get  
4 penalized anyway, once you mail out the check?

5 A It's now my understanding that we could have made  
6 an electronic payment before April 19th to avoid the  
7 penalty, so that penalty didn't actually apply until the  
8 deadline passed on April 19th.

9 Q Did you trust what the FTB staff instruct you to  
10 do to amend your issue when the time you called them for  
11 instructions?

12 A Yes, of course.

13 Q Did you have any doubt about what the FTB staff  
14 told you on the phone on April 11?

15 A No, none at all. They are the FTB. That's why  
16 we tried so hard to contact them, and they are the  
17 authority, obviously.

18 Q Because you believe in the FTB staff words, you  
19 rely on their every words, including that mailing out a  
20 waiver request form is the way to amend it, correct?

21 A Yes.

22 Q Do you know when FTB received the waiver form?

23 A I believe it was received on April 15th, 2022.

24 Q So it was still four days before the due date,  
25 which was on April 19, 2022?

1 A Yes.

2 Q When did you pay the 1 percent mandated e-Payment  
3 penalty?

4 A We paid that on April 20th, 2022.

5 Q When do you sign the Reasonable Cause -  
6 Individual and Fiduciary Claim for Refund form and mail  
7 out to FTB?

8 A On April 26th of 2022.

9 Q Do you know when the FTB receive it?

10 A The FTB documented that they received the claim  
11 for refund form on April 15th, 2022.

12 Q Do you know any reason the FTB could receive your  
13 claim for refund form before you sign it?

14 A No, I don't.

15 Q You did not sign and date it with future date?

16 A No.

17 MS. YU: This is suspectable (sic) that FTB make  
18 a mistake on the documentation and date regarding the  
19 receipt of your form, since they also dismissed your 4107  
20 mandated e-Payment requirement waiver request form request  
21 for one and a half years.

22 Your Honor, may I continue the -- testifying  
23 Ms. Dranco or is there any other questions?

24 ALJ RALSTON: You can go ahead and proceed and  
25 then we'll ask questions at the end.

1 MS. YU: Thank you, your Honor.

2  
3 EXAMINATION

4 BY MS. YU:

5 Q Ms. Andrea Dranco.

6 A Yes.

7 Q Good afternoon. How you doing?

8 A Good. Thank you.

9 Q I would like to ask you some questions. The  
10 first one is light.

11 Could you tell me your relationship with  
12 Mr. O'Hare?

13 A He's my husband.

14 Q So you are husband and wife and joint taxpayers?

15 A Correct.

16 Q Mr. O'Hare said that after his several attempts  
17 to contact the FTB, but in vain, you continued to call the  
18 FTB on the phone?

19 A Correct.

20 Q How many times you call FTB the hotline?

21 A At least five times. Every time you call, it  
22 takes roughly three minutes to go through all the prompts  
23 and you get routed to the correct waiting queue, but I  
24 think since it was tax time, every time I tried to call I  
25 would get the, "There are too many callers on hold right

1 now." And then it just disconnects you. So I just kept  
2 trying to call over and over again all throughout the day.

3 Q Why you call again instead of just waiting on the  
4 one single call wait?

5 A Because it wasn't an option. Every time I tried  
6 to call until the one time when I was able to wait on  
7 hold, I just got automatically disconnected.

8 Q Did you get through the call and long wait and  
9 able to talk to any FTB staff?

10 A Yeah. Eventually I got lucky and I was able to  
11 be put in the wait queue and I believe I was on hold for  
12 about 45 minutes before I was connected to a  
13 representative.

14 Q How long it took you to get there?

15 A About 45, and that was after all day of Rob and I  
16 trying to call.

17 Q Okay. The final call was 45 minutes, but  
18 including all the other calls is more than 45 minutes?

19 A Yeah. It takes -- because I called them recently  
20 to try and get the audio recording of that call. And,  
21 yeah, it takes three minutes just to wait for all the  
22 prompts to route to the right representative wait.

23 Q Thank you for clarification.

24 You are the person who called FTB successfully  
25 and talked to one of the staff. Could you tell me more

1 about the conversation?

2 A Yeah. So I explained the situation to the  
3 representative. He was able to look up and verify that it  
4 was me and our account. He could see that our check had  
5 not been processed or cashed yet. And when I asked if we  
6 could make an e-Payment and cancel the check, he said  
7 definitely not to do that.

8 He said that that would cause additional  
9 penalties, and then the FTB e-Pay and check payment  
10 systems don't talk to each other or sync, so he told me  
11 our only course of action was to file the waiver.

12 Q The waiver form? The waiver request form?

13 A Yes.

14 Q Based on what you learned from that FTB staff on  
15 the phone on April 11, 2022, the staff confirm you that  
16 you would have been penalized anyway even if you  
17 electronically make another payment.

18 The FTB staff told you to not pay online again  
19 because the two systems don't talk to each other?

20 A Yes. He said we would still be penalized for  
21 mailing in a check and we would be penalized for paying  
22 our filing twice. He said it would just further  
23 complicate our situation and not to submit an e-Payment  
24 since we had already mailed a check.

25 Q So like the FTB said, you would get penalized if

1 you pay your filing twice because you complicate the FTB  
2 system?

3 A Correct.

4 Q Did you know which two systems he was referring  
5 to?

6 A I assumed he meant that there's one system within  
7 the FTB that processes e-Payments and another that  
8 processes check payments.

9 Q So it would also mean that since the two systems  
10 don't communicate, it's a system defect. If you make the  
11 e-Pay and then send a check or vice versa, the FTB system  
12 will not recognize each other and impose penalty to  
13 taxpayer regardless.

14 As an ordinary, intelligent person like you, if  
15 the FTB staff did not tell you that there was a defect in  
16 the two systems, whether it was logical for you to think  
17 that you could avoid the penalty if you placed an e-Pay  
18 earlier than a lone e-Pay?

19 A Yeah, if I -- if he hadn't told me that there  
20 were two systems, then I would have thought that sending  
21 an e-Payment would have handled our issue. I would have  
22 thought that eventually the FTB would have realized that  
23 Rob and I had paid twice and then refunded us one of our  
24 payments.

25 Q Did you trust what the FTB staff instructed you

1 to do to amend your issue?

2 A Yes. 100 percent.

3 Q Do you have doubts about what the FTB staff told  
4 you on the phone on April 11th?

5 A No. I don't know anything about tax law, and so  
6 he seemed to know what he was talking about. And when he  
7 told me that that waiver was not a guarantee but it was  
8 our best chance, then that's what we did.

9 Q Because you believed in the FTB staff words, you  
10 rely on the words that mailing out a waiver request form  
11 is the only way to amend it, correct?

12 A Yes.

13 Q Because you believe in the words, you believe in  
14 what they said and make you believe that even you pay  
15 electronically on April 11, it would not avoid an e-Pay  
16 penalty, correct?

17 A Yes. He said that if we paid electronically and  
18 via check it would create issues within their system and  
19 would not negate the e-Pay penalty. So he told me to  
20 submit the waiver and wait until we heard back from the  
21 FTB.

22 Q According to the conversation, FTB instructs you  
23 to fill the waiver request form to fix your e-Pay issue  
24 while you only ask about your 2021 current year tax issue  
25 during the entire conversation?

1           A     Yes.  It was only about our 2021 tax filing  
2 mistake.  It was not discussing or thinking about any  
3 future filings at that point in time.

4           Q     Did you indicate on the phone to the FTB staff  
5 that you were inquiring anything about the subsequent year  
6 e-Pay requirement?

7           A     No.

8           Q     So you believe the FTB staff asked you to fill  
9 the waiver request form was to waive the 2021 mandated  
10 e-Pay requirement only?

11          A     Yes.

12          Q     When do you sign the form and mail it to FTB?

13          A     April 11th, 2022.

14          Q     The same day you talked to the FTB, you signed  
15 and mailed out the waiver form?

16          A     Yes.

17          Q     Did the FTB staff mention anything to you about  
18 the function and purpose of the e-Pay waiver request form?  
19 How he phrase it?

20          A     He only said it was a waiver for e-Payments and  
21 that, if approved, we wouldn't be penalized for mailing in  
22 the check.

23          Q     Did he mention to you in any way that the form  
24 is not retroactive for your current tax year waiver, but  
25 for the future years?

1           A     No.

2           Q     Did you know anything about the waiver form  
3 before that FTB staff introduce it to you?

4           A     No. I had never heard of it.

5           Q     So you believed that FTB asking you to sign the  
6 waiver form was to address your question about the e-Pay  
7 penalty in 2021, not any other years?

8           A     Yes. Because that was the year that I was  
9 calling about. And if he had mentioned anything about a  
10 future filing, then I would have, obviously, circled back  
11 to the issue we were currently facing, which was the 2021  
12 filing.

13          Q     As you are aware, is there any wordings in the  
14 waiver form indicating any limitation regarding the tax  
15 year for Applicant to waive e-Pay requirement?

16          A     Not to my knowledge.

17          Q     If the waiver form did not limit which year the  
18 Applicants to apply for a waiver, which year you intended  
19 to request the e-Pay waiver?

20          A     2021.

21          Q     The call happened on April 11. The check was not  
22 debit from your bank account to FTB at that time when you  
23 talked to him, correct?

24          A     Correct.

25          Q     Did the FTB staff on the phone told you that he

1 review your account before he answer you?

2 A He asked for my personal information so he could  
3 confirm he was looking into the correct account.

4 Q After he review your account, did he say that he  
5 saw any lone e-Payment was made on your account yet?

6 A He did not. Since we had mailed the check in, it  
7 hadn't been cashed yet.

8 Q Did you think FTB staff would know that you  
9 mailed the check to pay your tax without you telling him  
10 that fact?

11 A No, not at that point. He only knew that because  
12 I told him when I was explaining our situation.

13 Q So based on what you said during the conversation  
14 with FTB, you have reasonable believe that the FTB staff  
15 had no ground to learn that you have issued a check if you  
16 didn't tell him?

17 A Correct. The rep didn't have any information on  
18 our filing other than what I told him. When he looked at  
19 our account from his end, he could see what we owed, but  
20 he could not see that a check had been mailed or received.

21 Q When you talked to FTB staff on April 11, 2022,  
22 it was eight days before the tax due date and he already  
23 told you that you cannot fix it by paying online anymore?

24 A Correct.

25 Q Did he tell you if you pay online you will still

1 get 1 percent mandated e-Pay penalty?

2 A Yes, which I believe is verified by Exhibit 3.  
3 The rep told me that if we submitted an online payment we  
4 would still be charged the 1 percent penalty fee.

5 Q Did you indicate when you planned to pay online  
6 for purpose to avoid the penalty?

7 A Yeah, I said that we were ready to pay online  
8 then to avoid the penalty, and he said, No.

9 Q So he simply replied you that the 1 percent e-Pay  
10 penalty could not be avoided?

11 THE COURT REPORTER: Could you repeat that?

12 Q BY MS. YU: The question is: Did you indicate  
13 when you planned to pay online for the purpose to avoid  
14 the penalty?

15 A Yeah. I said that we were ready to pay the  
16 online fee or, yeah, filing to avoid the penalty.

17 And he said not to do that.

18 Q So he simply reply to you that the 1 percent  
19 e-Pay penalty could not be avoid except that you might get  
20 approved for e-Pay waiver after you submit the 4107 form?

21 A Correct.

22 Q What did he advise you further?

23 A He said not to cancel the check that we had  
24 already mailed, and not to submitted an e-Payment, but  
25 just to submit the waiver.

1 Q When he said in the call that "Do not cancel the  
2 check," meaning that the check wasn't cashed or received  
3 by FTB yet?

4 A Correct. There was no record of our check having  
5 been received by the FTB yet, as far as the rep could  
6 tell. I had asked him if we should cancel it on our end  
7 and then do the e-Payment and he said, "No, definitely do  
8 not do that. That will create a lot of other issues."

9 Q Well, it makes sense now because if the check is  
10 deposit in the FTB account, it doesn't matter if you  
11 cancel it or not. Cancellation was irrelevant and  
12 meaningless in the talk.

13 So based on what he said to not cancel the check,  
14 prove that the check amount wasn't placed in your account  
15 yet during your conversation. So when he advised you not  
16 to make another payment electronically on April 11, 2022,  
17 because it won't abate you from penalty, could be a bit  
18 misleading, because you could still have chance to make an  
19 e-Pay to comply with the mandate on April 11, 2022.

20 Did you in any way gave the FTB staff any clue  
21 that you were talking about other tax years in addition to  
22 your 2021 tax year?

23 A No. Definitely not. I was only asking questions  
24 about our 2021 filing payment and stated that.

25 Q So you only mentioned your concern regarding your

1 e-Payment mandate and penalty in the 2021 tax year, and  
2 you did not confuse him with other tax years, including  
3 future years?

4 A Correct. And I believe it says that in the  
5 exhibit. Future tax years were not even on my mind at  
6 that point in time. My only concern was not having to pay  
7 the 1 percent penalty fee for our 2021 filing.

8 Q How you believe that he was not -- how you  
9 believe that he was only addressing the 2021 tax year  
10 during the call?

11 A Because I stated that's what I calling in regards  
12 to and it was April 11th, 2022, which was the time when  
13 the 2021 tax filings and payments were being made.

14 Q Did he make you believe that the 4107 form that  
15 he asked you to fill for the purpose of waiving the  
16 e-Payment mandate was for 2021 tax year?

17 A Yes. We were discussing our 2021 tax filing, and  
18 we -- Rob and I -- accidentally paid via check instead of  
19 an e-Payment, and asking how we could resolve that issue.  
20 The rep said to submit the waiver and wait for a response  
21 for the 2021 tax year.

22 Q So the FTB rep said to submit the waiver form was  
23 for the purpose of 2021 tax year e-Payment date?

24 A Yes.

25 Q Did he say anything about the 4107 form that you

1 would sign was to apply for other tax years' e-Pay mandate  
2 waiver, not for 2021 tax year?

3 A No, because then I would have ended the  
4 conversation with him if he was only providing me  
5 information for future tax years when I was calling in  
6 regards to our 2021 tax filing.

7 Q Did he mention that the 4107 form was for  
8 subsequent years but cannot be used to waive e-Pay mandate  
9 retroactively?

10 A No, he did not.

11 Q Did he explain anything about the 410 (sic) form  
12 to you?

13 A He told me it was a waiver for e-Payments, and  
14 that although it wasn't a guarantee, it was our only  
15 chance of not being penalized for making our payment.

16 Q So he advised you that you cannot avoid any  
17 e-Payment penalty anyway, but he told you to sign a  
18 mandated e-Pay requirement waiver request form and the  
19 department would review it and give you a reply regarding  
20 the e-Payment penalty?

21 A That's correct.

22 Q Did you have any doubts on what the FTB staff  
23 told you and instruct you?

24 A No, I had no reason to doubt what he was telling  
25 me since he was a customer service rep for the FTB, so I

1 assumed that everything he told me was correct.

2 Q How long was your call with the FTB?

3 A It was 45 minutes or so. I think I -- I only  
4 spoke with him for about five to ten minutes.

5 ALJ RALSTON: Ms. Yu, it's been about 30 minutes,  
6 so you do still have time for rebuttal, but if you could  
7 wrap this up.

8 MS. YU: Yeah, this is already the last question  
9 that I ask. Thank you.

10 Do you have any other questions or I should  
11 continue -- I could continue my argument?

12 ALJ RALSTON: Well, we had discussed 30 minutes  
13 for the testimony and the argument and it's been over  
14 that.

15 Did you have a point you wanted to make, or how  
16 much time did you think you --

17 MS. YU: I think I have another 30 minutes for my  
18 argument and 10 -- I think I have 30, 30 and 10 minutes.  
19 Thirty minutes for testimony and 30 minutes for my  
20 argument. I don't need 30 minutes. I will try my best to  
21 limit it to the 15 or 20.

22 ALJ RALSTON: Okay. Thank you. Yeah, you have  
23 the 30 minutes for the argument if you wanted to go into  
24 that, so you can use your time however.

25 MS. YU: Thank you.

1 Can I go ahead with the argument?

2 ALJ RALSTON: Yeah, if you want to move into the  
3 argument, then you will have 30 minutes, or if you wanted  
4 to --

5 MS. YU: Yes. Okay. Thank you.

6 ALJ RALSTON: -- finish the testimony, but that  
7 would take from your argument time.

8 MS. YU: Thank you.

9 This appeal is about whether the Appellants have  
10 established reasonable cause for abatement of mandated  
11 e-Pay penalty under the California Revenue and Taxation  
12 code section for the Appellants' 2021 tax year.

13 The e-Pay penalty should be abated because --

14 THE COURT REPORTER: Slow down a little bit,  
15 please.

16 MS. YU: This appeal is about whether the  
17 Appellant has established reasonable cause for abatement  
18 of mandated e-Pay penalty under the California Revenue and  
19 Taxation code section for the Appellants' 2021 tax year.

20 The e-Pay penalty should be abated because,  
21 Number 1, the Appellants exercised reasonable care and  
22 prudent person's duty when the Appellants tried very hard  
23 to comply with the e-Payment mandate, but still failed to  
24 pay electronically despite the exercise of ordinary  
25 business person care and prudence. Reasonable cause is

1 established.

2           Number 2, they exercised reasonable care and  
3 prudence after the fact in an attempt to remedy the  
4 situation, especially given they may have been able to  
5 remedy it by making a duplicate payment electronically  
6 before the check clear, but missed the opportunity due to  
7 FTB advice.

8           Three, penalty is not proper when they comply  
9 with the intent and spirit of the e-Pay statute by getting  
10 the money into FTB's hands successfully and ahead of time.

11           California Revenue and Taxation code section  
12 19011.5(c) allows a payment of mandated electronic payment  
13 penalty upon showing that the taxpayer failure to make the  
14 e-Payment was a result of reasonable cause and not due to  
15 willful neglect.

16           A taxpayer demonstrates reasonable cause in the  
17 context of similar penalty, such as late payment  
18 penalties, when taxpayer show a failure to comply with the  
19 requirement despite the exercise of ordinary business care  
20 and prudence.

21           In Appeal of Howard G. And Mary Tons in 1979  
22 case, the standard of reasonable cause for e-Payment  
23 penalty is the same. In other words, reasonable cause is  
24 established if the taxpayer demonstrate that he acted as  
25 an ordinarily intelligent and prudent business person

1 would have under similar circumstances.

2 In appeal of GEF Operating, Incorporation, in  
3 2022, a standard of ordinary intelligence is not a high  
4 bar. As OTA held in its precedence, reasonable cause  
5 requires a showing that the taxpayer act as an ordinarily  
6 intelligent and prudent business person would have acted  
7 under similar circumstances, and further, the ordinarily  
8 intelligent and prudent business person standard is not a  
9 high bar and does not require the most cautious approach.  
10 In Marin case 2019.

11 Under this legal standard, Appellants' testimony  
12 demonstrate more than the ordinarily intelligent and  
13 prudent business person would do when they enter into  
14 similar situation.

15 Appellants clearly established that reasonable  
16 cause exists because Appellants demonstrate genuine effort  
17 to comply with tax law by first planning way ahead of the  
18 tax due date, leaving enough money, enough time for  
19 contingency. And then seeking professional advice when in  
20 doubt of the issue at hand.

21 And then diligently consulting FTB and following  
22 FTB advice efficiently to amend the payment issues,  
23 Appellants show no willful disregard, which FTB does not  
24 appear to dispute. Appellants were aware of the  
25 continuous requirement of e-Payment mandate to apply the

1 prudent person duty to make sure they pay the tax due  
2 properly and safely without any delay.

3           Number 1, Appellants act as an ordinary  
4 intelligent and prudent business person would have act  
5 under similar circumstances. For the 2021 tax year  
6 Appellants has to pay an enormous amount of tax, which was  
7 extraordinarily higher than their previous tax year bills.  
8 Soon after Appellant O'Hare learns from his tax preparer  
9 that his tax due to the California Tax Board was  
10 extraordinarily high, as a cautious and prudent person, he  
11 took careful assessment to prepare enough funds in the  
12 account to be ready for the payment.

13           Also, Appellant had reservations whether he  
14 should pay his -- this big amount of money electronically.  
15 Due to his ordinary business intelligence, business person  
16 understanding, and prudent business person care  
17 assessment, Appellants act in good faith to evaluate the  
18 tax payment method by trying to verify with his tax  
19 preparer.

20           He adopt his diligent person's duty and identify  
21 a reliable to pay, which he issue a check and mailed out  
22 to FTB based on a major reason that it was an enormous  
23 amount of tax payment that they had not made before.

24           Appellants evaluate with caution, based on his  
25 lengthy years of experience that mailing a check with such

1 a big amount is safer, more proper, and trustworthy. He  
2 accordingly act in good faith to make sure his tax payment  
3 was received by FTB timely before due date and also allow  
4 him time for contingency or any hiccup to comply with the  
5 tax payment rules.

6 So he sent out his payment ten days before his  
7 tax payment due date. As OTA explained in the precedent  
8 of Marin, the standard of reasonable cause is not a high  
9 bar and it does not require the most cautious approach.

10 Here Appellants show higher standard than  
11 ordinarily intelligent business person duty of care. In  
12 fixing the e-Pay issue by extensively contacting FTB in  
13 multiple channels, follow FTB instructions step-by-step,  
14 attempt to make another payment electronically far before  
15 the tax payment due date.

16 Referring to Appellants' Exhibit 2, on April 11,  
17 2022, Appellant O'Hare sent a message to FTB via MyFTB  
18 portal writing, quote, "I would like to correct this  
19 mistake and avoid any penalties. Can you let me know the  
20 best way to fix this? I will be happy to send an  
21 electronic payment now," unquote.

22 Without hearing back from FTB from portal,  
23 Appellants act tenaciously. He called FTB.

24 Evidence Exhibit 5 same day at 3:45, 3:56 p.m.  
25 Appellant O'Hare make two phone calls to FTB, and after a

1 long time wait, the calls were hung by the FTB system  
2 without being able to talk to any staff.

3 Mr. O'Hare e-mailed FTB on April 11, 2022, via  
4 MyFTB portal to clearly show their willingness to pay  
5 electronically to avoid the e-Pay penalty. Taxpayer has  
6 proved that he had available funds to be able to pay  
7 online on top of the lone e-Payment. Based on that  
8 endeavor and intent to resolve the issue and to avoid the  
9 e-Pay penalty, Mr. O'Hare and his wife did not stop to  
10 contact FTB, by calling FTB not less than ten times. This  
11 endeavor prove that Appellants' diligent and prudent care  
12 on tax payment issue, reasonable cause is unequivocally  
13 established.

14 Number 2, same day Appellant Mr. O'Hare's wife,  
15 Ms. Dranco, continued the effort to call FTB not less than  
16 five times and wait for hours. She finally spoke to FTB  
17 staff on the phone. She clearly told FTB staff that she  
18 want to fix the e-Payment issue for the tax year 2021, and  
19 ready to pay electronically at that moment in order to  
20 avoid an e-Pay penalty.

21 FTB staff told Appellant that e-Pay penalty could  
22 not be avoid because the two systems did not communicate.  
23 It implied to Appellants that penalty will be placed once  
24 any lone e-Payment was made, regardless an e-Payment was  
25 made or not. FTB seemingly has a defect in the system of

1 recognizing e-Payment and long e-Payment, but still impose  
2 penalty to taxpayers regardless.

3 Furthermore, at the time when Ms. Dranco and FTB  
4 staff talk, the FTB system did not show that any wrong  
5 e-Payment was made. Nevertheless, FTB staff gave  
6 instruction to Appellant to avoid the e-Pay penalty by  
7 filling out the 4107 form, which was the mandated e-Pay  
8 requirement waiver request form, claiming that it was the  
9 only option to avoid an e-Pay penalty.

10 Without further explaining the function and  
11 purpose of the form, FTB staff instructively told  
12 Appellant that she would receive response about being  
13 approved or denied based on their request. It gave her  
14 the impression, as an ordinarily intelligent person's  
15 understanding, that the waiver form was the option to  
16 abate the e-Pay penalty in 2021 tax year, because during  
17 the call she unequivocally mentioned only 2021 tax year  
18 and about that particular year e-Pay penalty only.

19 Appellants followed instruction from FTB step by  
20 step believing in what FTB told them to do would help them  
21 to fix the e-Pay issue. They carefully followed the  
22 instructions given by FTB staff, print out a form, sign  
23 it, mail it in the same day during that day, April 11.

24 Nowhere on the FTB portal showed that any lone  
25 e-Payment was made. FTB 4 shows that in the following day

1 after the phone call, the check payment was debited on  
2 April 12th, 2022, from taxpayer bank account.

3 From the above, taxpayer demonstrate reasonable  
4 cause by showing that they act more than an ordinarily  
5 intelligent and prudent person would have act under  
6 similar circumstances. The taxpayer tried very hard to  
7 comply with the e-Pay mandate, but still failed to pay it  
8 electronically despite the exercise of ordinary business  
9 person care. Reasonable cause is again established.

10 Number 3, we established beyond the preponderance  
11 of the evidence that the FTB provide Appellants incorrect  
12 information to induce Appellants to detrimentally rely on  
13 the instruction and delayed opportunity to avoid an e-Pay  
14 penalty. Providing inaccurate source of information or  
15 omission of material facts is misrepresentation.

16 Firstly, the 4107 form wasn't for 2021 e-Payment  
17 they waiver. On April 11, 2022, when the Appellant did  
18 not see any e-Pay was placed on FTB portal, Appellant  
19 persistently call FTB. Appellant Ms. Dranco successfully  
20 talked to FTB representative on the phone and mentioned to  
21 the staff that she post a check earlier, but it wasn't  
22 clear yet.

23 She was ready to pay electronically to avoid an  
24 e-Pay penalty. FTB staff told Ms. Dranco that she cannot  
25 avoid an e-Pay penalty due to the reason that the two

1 systems did not talk to each other. FTB staff did not  
2 further explain. Instead, FTB staff directly instruct  
3 Appellants to sign a 4107 form, which is the mandated  
4 e-Pay requirement waiver request form, indicating that it  
5 would help Appellants to ask for the FTB waiver or  
6 mandated e-Payment. It make Appellants as an ordinarily  
7 intelligent prudent person to believe that this form was  
8 for the 2021 tax year waiver request.

9 Appellant did not have any knowledge about that  
10 form nor got to know from the context of the form that the  
11 4107 form can only be used to request waiver for e-Payment  
12 date prospectivity, not retroactively. Without the FTB's  
13 further explanation about the function and prospect of  
14 filing the form was for prospective years, Appellant  
15 detrimentally rely on this form for e-Pay penalty  
16 abatement for 2021 tax year.

17 Secondly, can Appellants avoid the e-Pay penalty  
18 if they can timely make another payment electronically,  
19 despite the check was made, but before it got cleared from  
20 the bank? In the call the FTB staff conclude that the  
21 taxpayer cannot avoid the e-Pay penalty because the FTB  
22 disclosed that the two systems, the e-Pay system and the  
23 lone e-Pay system, don't communicate to each. If taxpayer  
24 make e-Pay and then on lone e-Pay or vice versa, the FTB  
25 system will not recognize each other and penalties will be

1 imposed to a taxpayer regardless.

2           However, there is no rule in place saying that  
3 taxpayer who pay both electronic and nonelectronic  
4 contemporaneously and still be subject to e-Pay penalty.

5           Nevertheless, at the time the taxpayer talked to  
6 FTB, the issued check was not debit from the taxpayer bank  
7 account nor credited to FTB system. It was reasonably  
8 believed by Appellants because their bank account show a  
9 debit on April 12, 2022, but not on April 11, 2022.

10           Also when Appellant check FTB portal on April 11,  
11 he could not see a balance from the portal. Furthermore,  
12 FTB asked Appellants not to cancel the check. It implies  
13 that it was not clear yet. If it was cancellation, it  
14 would be irrelevant. Appellants reasonably believe  
15 earlier that online payments should still be honored, but  
16 this was adversely objected by FTB staff.

17           All this show that the Appellants could still  
18 have opportunity to avoid an e-Pay penalty. Taxpayer  
19 clearly showed the intent to make the e-Pay before and  
20 after the call. It reasonably inferred that if taxpayer  
21 could make the e-Payment timely before or  
22 contemporaneously, the paper check being credited to FTB,  
23 they could have avoid the e-Pay penalty.

24           The focus, however, is not whether the systems  
25 really talk, but FTB's staff message delayed Appellants'

1 initial intent to make an e-Pay.

2 Thirdly, misrepresentation includes an omission  
3 of material fact. FTB staff erroneously instruct  
4 Appellants to use the 4107 form to abate the 2021 tax  
5 e-Pay penalty, while they have already made the check.  
6 FTB staff be glad to explain to Appellants that the 4107  
7 form would not effect retroactively. The tremendous  
8 reliance on misrepresented information, professional  
9 advice, constitute a reasonable cause and good faith if  
10 under ordinary circumstances such reliance was reasonable  
11 and the taxpayer acted in good faith.

12 FTB staff made the misrepresentation to the  
13 Appellants about signing the waiver form was a way to  
14 avoid the e-Pay penalty. The 4107 mandated e-Pay  
15 requirement waiver request form was not used to abate the  
16 e-Pay penalty nor to waive the e-Pay requirement  
17 retroactively. Here the FTB staff omitted to explain this  
18 material fact to taxpayer.

19 Taxpayer on the phone clearly focused on 2021 tax  
20 year. There was no clue that the FTB would gain any false  
21 belief from the Appellant that they were addressing any  
22 other tax years. Signing the 4107 waiver form was  
23 irrelevant as to the issue that taxpayer addressed.

24 Surprisingly, the FTB staff instructed the  
25 taxpayer to sign a waiver form as the way to avoid the

1 penalty, without further being explained the function and  
2 nature of the form, the taxpayer, who has no access to the  
3 form before, follow exactly what the FTB staff told them  
4 to do. They gave up their plan to pay electronically,  
5 despite that they intended to before the call.

6 Instead, they signed the waiver form and mail it  
7 out immediately after the call hoping that they could get  
8 approved and fix the e-Payment issue, or at least to be  
9 contacted by FTB with further resolutions. They again  
10 show an ordinarily intelligent and prudent business person  
11 would have act under similar circumstances.

12 This misrepresentation about the 4107 form  
13 substantially delayed their opportunity to avoid the e-Pay  
14 penalty. Taxpayer suffer harm from it.

15 Recently when we collectively reviewed the case,  
16 we found the FTB made multiple confusing and mistaken  
17 mistakes addressing the taxpayer issue.

18 First, they make mistake on the tax year at  
19 issue. On the April 28th, 2022, FTB portal, the FTB  
20 erroneously placed the 2021 penalty to the 2020 tax year.  
21 This error was discovered by the Appellant.

22 Second, in FTB opening brief it was mysterious  
23 that FTB could have received refund request form before  
24 the taxpayer sign on it. FTB received the form on April  
25 15, but Appellant sign on April 26.

1           Last but not least, in FTB opening, FTB  
2 erroneously list taxpayer 2019 total tax liability as a  
3 six figure, but the correct figure was only small five  
4 figures.

5           All this inaccurate information given by FTB  
6 could lead to misunderstanding, confusion, and  
7 consequently mislead the to taxpayer to make wrong  
8 decisions. Even though this free, independent incident  
9 may not relate directly to Appellants' e-Pay penalty, but  
10 it is worth paying attention to.

11           Thirdly, according to the legislative -- Advances  
12 for Revenue and Taxation code section 19011.5 the main  
13 statutory purpose was to increase revenue from interest.  
14 Because FTB receive Appellants' check and deposit them  
15 prior to the payment due date, no interest was lost, which  
16 counterbalanced the main legislative intent for imposing  
17 the penalty.

18           In addition, the Appellants, two Appellants, act  
19 as a reasonable prudent business person. Under the solemn  
20 standards described, the mandated e-Pay penalty should be  
21 abated.

22           That's the end of my argument. I would like to  
23 reserve about five to ten minutes for rebuttal.

24           ALJ RALSTON: Yes. Thank you.

25           Yeah, you definitely have the five minutes for

1 rebuttal after Respondent's presentation.

2 First, let me turn to the Respondent.

3 Did you have any questions for either of the two  
4 witnesses?

5 MS. CHANG: No questions. Thank you.

6 ALJ RALSTON: Okay. Thank you.

7 I want to check with my panel members.

8 Judge Geary, did you have any questions for  
9 either of the Appellants' witnesses or representative?

10 JUDGE GEARY: Yeah, I have a question or two.

11 Dragon, is that your last name, ma'am?

12 MS. DRANCO: Dranco.

13 JUDGE GEARY: Did you mention in your testimony  
14 that you contacted FTB recently to see if you could get a  
15 recording of the conversations that occurred between you  
16 and FTB some time ago?

17 MS. DRANCO: I did, yeah.

18 JUDGE GEARY: Did you obtain a recording of the  
19 conversations?

20 MS. DRANCO: They replied to my request. I sent  
21 it to Ingrid. They did not have an audio recording. You  
22 have to submit the request -- you have to e-mail it to  
23 them and then it says, like, within ten days we'll get  
24 back to you. And I think it was over -- I think it was,  
25 like, two and a half weeks before they got back to me.

1 And then so I was calling to follow up on it. And then  
2 they sent me a letter saying they didn't have an audio  
3 recording of that call. But we have representative's  
4 notes and summary of the call.

5 JUDGE GEARY: Thank you.

6 Mr. O'Hare, I wanted to ask you a couple of  
7 questions. I think you said in your testimony that you  
8 had actually paid a penalty -- similar penalty for the  
9 prior year; is that correct?

10 MR. O'HARE: No, sir. I paid this penalty that  
11 is being appealed today in this forum. I paid that  
12 penalty electronically. And when I made that payment, it  
13 was misapplied. That was what I was referring to in my  
14 penalty -- I'm sorry -- in my testimony.

15 JUDGE GEARY: Were you required to e-Pay for the  
16 2020 tax year also?

17 MR. O'HARE: 2020? Yes, I was.

18 JUDGE GEARY: Did you --

19 MR. O'HARE: I'm sorry.

20 JUDGE GEARY: Did you e-Pay that year?

21 MR. O'HARE: I did, yes.

22 JUDGE GEARY: And you didn't e-Pay for the 2021  
23 year initially because you were concerned about the  
24 security of the system?

25 MR. O'HARE: Correct. And also just the size of

1 the payment itself amplified those fears.

2 JUDGE GEARY: I think those are the only  
3 questions that I have for you.

4 I wanted to ask a question of your  
5 representative.

6 There have been a lot of references to the form,  
7 I think, 4107. Is that the form you were talking about in  
8 your argument?

9 MS. YU: Yes. 4107 form, it's -- the name is  
10 called "Mandated e-Pay Requirement Waiver Request Form."  
11 That was the form during the conversation between Ms.  
12 Dranco and FTB staff. The FTB staff instructed Ms. Dranco  
13 to sign.

14 JUDGE GEARY: Right. I thought that -- I  
15 understood that.

16 And your clients did submit that form?

17 MS. YU: Yes, they did. They did submit that  
18 form on the same day when they talked to FTB.

19 JUDGE GEARY: Is that form in evidence?

20 MS. YU: The form was submitted in evidence as  
21 Exhibit --

22 JUDGE GEARY: What exhibit is that?

23 MS. YU: Give me a moment. Exhibit D, for David.

24 JUDGE GEARY: All right. So it's part of the  
25 Respondent's exhibits?

1 MS. YU: Yes.

2 JUDGE GEARY: All right.

3 MS. YU: And I would like to add something to  
4 your prior question to Mr. O'Hare, if I am allowed to.

5 JUDGE GEARY: No. I've asked my question. I've  
6 received the information I needed.

7 If you have something additional to say, you can  
8 offer that in your closing remarks, I'm sure.

9 MS. YU: Thank you.

10 JUDGE GEARY: Thank you, Judge Ralston. Those  
11 are the only questions I have for the witnesses.

12 ALJ RALSTON: Thank you, Judge Geary.

13 Judge Katagihara, did you have any questions for  
14 Appellants' representative or the Appellants?

15 JUDGE KATAGIHARA: No questions at this time.  
16 Thank you.

17 ALJ RALSTON: Okay. Thank you.

18 Ms. Chang, if you are ready to begin, you can  
19 begin your presentation.

20 MS. CHANG: Thank you, Judge Ralston.

21 Good afternoon. My name is Paige Chang. I'm  
22 with my co-counsel, Maria Brosterhous, representing the  
23 Franchise Tax Board.

24 The issue on appeal is whether Appellant has  
25 established reasonable cause to abate the e-Payment

1 penalty for 2021 tax year.

2 The e-Payment requirement is triggered when a  
3 taxpayer makes an estimated tax or extension payment  
4 exceeding \$20,000 or their tax return has a total tax  
5 liability greater than \$80,000.

6 Once the e-Payment requirement is triggered,  
7 taxpayers are required to make all future payments  
8 electronically, otherwise the e-Payment penalty is  
9 imposed.

10 Here Appellant had --

11 (Zoom technology difficulty)

12 ALJ RALSTON: Yeah, you seem to be fading in and  
13 out. If you could just maybe move a little closer to the  
14 microphone.

15 Thank you.

16 MS. CHANG: Is that better?

17 THE COURT REPORTER: It seems to be.

18 ALJ RALSTON: Yes, thank you.

19 MS. CHANG: Here Appellant had an e-Payment  
20 requirement as of 2020. With regards to the mandatory  
21 e-Payment requirement waiver request, a taxpayer must  
22 receive an approved waiver in writing, which would apply  
23 to future payments only. FTB notes that. At the top of  
24 the form it states: "This form is used to request a  
25 waiver of the mandatory e-Payment requirement. Do not use

1 this form to request an abatement of a mandatory e-Payment  
2 penalty."

3           Additionally, about halfway down the page it  
4 states that: "You must continue to pay electronically  
5 until we notify you in writing that we have approved your  
6 waiver request."

7           Here because Appellants made a payment by check  
8 for 2021, FTB imposed the e-Payment penalty. FTB notes as  
9 well that the e-Pay penalty is imposed when a payment is  
10 made by other means than electronically and is not imposed  
11 on the due date of the payment.

12           When FTB imposes a penalty, the law presumes the  
13 penalty was imposed correctly, and the taxpayer bears the  
14 burden of proof to establish reasonable cause to abate the  
15 penalty.

16           ALJ RALSTON: Ms. Chang, I'm sorry to interrupt  
17 again, but we are having trouble hearing you. We want to  
18 make sure that we get your presentation down.

19           It just sounds a little muffled and your mic is  
20 kind of coming in and out.

21           MS. CHANG: Okay. I checked my sound settings.  
22 Is that better at all?

23           ALJ RALSTON: Yes, that sounds much better.  
24 Thank you.

25           MS. CHANG: Okay. Hopefully those changes

1 worked. Okay.

2 During this case Appellant contends that he was  
3 unaware of the e-Payment requirement; however, ignorance  
4 of the law does not constitute reasonable cause.

5 Additionally while the law imposes --

6 THE COURT REPORTER: I'm sorry. You are echoing  
7 for me.

8 ALJ RALSTON: You know what? Let us take a break  
9 for about five minutes or so, and we can see if we can  
10 help you get your settings fixed and then you can begin  
11 your testimony or your statement over when we get back.

12 MS. CHANG: Okay. Thank you.

13 ALJ RALSTON: Thank you.

14 THE COURT REPORTER: Thank you.

15 (Break taken)

16 ALJ RALSTON: So we are back on the record in the  
17 Appeal of O'Hare. We are going to start with Respondent's  
18 presentation and you can begin from -- you can start over.  
19 Thank you.

20 MS. CHANG: Thank you. Just to confirm, I should  
21 start my presentation from the beginning and not where I  
22 left off?

23 ALJ RALSTON: It's up to you. I know that some  
24 of it was coming in and out at the beginning, so it's up  
25 to you. If you would like to start over, you can. If you

1 would like to pick up from where you left off, that's  
2 fine.

3 MS. CHANG: For completeness, I'll start from the  
4 beginning.

5 Good morning -- it's afternoon. Good afternoon.  
6 My name is Paige Chang, along with my co-counsel, Maria  
7 Brosterhous, representing the Franchise Tax Board.

8 The issue on appeal is whether the Appellant has  
9 established reasonable cause to abate the e-Payment  
10 penalty for the 2021 tax year.

11 The e-Payment requirement is triggered when a  
12 taxpayer makes an estimated tax or extension payment  
13 exceeding \$20,000 or their return has a total tax  
14 liability greater than \$80,000.

15 Once the e-Payment requirement is triggered,  
16 taxpayers are required to make all future payments  
17 electronically, otherwise the e-Payment penalty is  
18 imposed.

19 Here Appellant had an e-Payment requirement as of  
20 2020. With regard to the e-Payment requirement waiver  
21 request, a taxpayer must receive an approved waiver in  
22 writing, which would apply to future payments only.

23 FTB notes that. At the top of the form it  
24 states: "This form is used to request a waiver of the  
25 mandatory e-Payment requirement. Do not use this form to

1 request an abatement of the mandatory e-Pay penalty."

2           Additionally, about halfway down the page it  
3 states that: "You must continue to pay electronically  
4 until we notify you in writing that we approved your  
5 waiver request."

6           Here, because Appellant made a payment by check  
7 for 2021, FTB imposed the e-Payment penalty. FTB notes as  
8 well that the e-Pay penalty is imposed when a payment is  
9 made by other means than electronically and is not imposed  
10 on the due date of the payment.

11           When FTB imposes a penalty, the law presumes the  
12 penalty was imposed correctly, and the taxpayer bears the  
13 burden of proof to establish reasonable cause to abate the  
14 penalty. Here, Appellant contends that he was unaware of  
15 the e-Payment requirement; however, ignorance of the law  
16 does not constitute reasonable cause.

17           Additionally, while the law imposes the e-Payment  
18 requirement, FTB also issued a mandatory electronic  
19 payment notice in May 2020 notifying Appellant of the  
20 requirement. Appellant further explains that he exercised  
21 ordinary business care and prudence because he asked his  
22 tax preparer whether he had a mandatory e-Payment  
23 requirement for 2021; however, he made the payment by  
24 check prior to receiving the response from his tax  
25 preparer.

1 Appellant explains that after submitting the  
2 payment by check, he then attempted to contact FTB. A  
3 taxpayer does not exercise ordinary business care and  
4 prudence when he fails to acquaint himself with the  
5 requirements of the law.

6 The ordinary, prudent, and intelligent business  
7 person would have, prior to making the payment,  
8 ascertained the e-Payment requirement, for example, by  
9 contacting FTB. Because Appellant did not take these  
10 ordinary and prudent steps, Appellant has not met his  
11 burden of proof to establish reasonable cause.

12 Additionally, a good filing and payment history  
13 alone does not establish reasonable cause. Therefore,  
14 Respondent's denial of Appellants' claim for refund was  
15 proper and FTB's position should be sustained.

16 Thank you.

17 I'm happy to answer any questions.

18 ALJ RALSTON: Okay. Thank you.

19 I'm going to check with my panel.

20 Judge Geary, did you have any questions for the  
21 Respondent?

22 JUDGE GEARY: Yes, I do. Thank you.

23 Ms. Chang, does Franchise Tax Board dispute any  
24 of the factual statements made by the Appellants regarding  
25 their contacts with Franchise Tax Board employees during

1 those days before the actual due date for the payment for  
2 2021?

3 MS. CHANG: Thank you, Judge Geary.

4 In the comment detail notes that are in Exhibit  
5 3, the comment detail shows only that FTB said that the  
6 taxpayers may fill out the waiver request form. It  
7 doesn't indicate whether the staff member said that the  
8 waiver would work retroactively. If I understand, that's  
9 what the taxpayers understood the staff member to be  
10 saying, and so it's not in FTB's records, at least to that  
11 fact.

12 Thank you.

13 JUDGE GEARY: All right. Does FTB have the  
14 ability to accept an e-Payment, a timely e-Payment, after  
15 a taxpayer mistakenly makes a timely payment by check?

16 MS. CHANG: Thank you. The FTB could accept a  
17 duplicated payment in principle; however, since it was  
18 duplicated it would most likely be refunded.

19 But as to -- I think what you are asking -- and  
20 feel free to correct me -- is that if the check payment --  
21 if the penalty imposed on a check payment would be abated  
22 if another timely e-Payment was made?

23 JUDGE GEARY: That was going to be my next  
24 question. If you would like to just answer that one now,  
25 too, that's fine.

1 MS. CHANG: Thank you. In the case that a second  
2 timely e-Payment was made, unfortunately the penalty would  
3 still be imposed on the check payment because the penalty  
4 is imposed when that payment is made and is not imposed on  
5 the due date of that payment. Thank you.

6 JUDGE GEARY: The Appellants testified that they  
7 contacted FTB prior to -- at least their understanding is  
8 prior to the check having cleared their bank. And I think  
9 they produced bank records to show that that particular  
10 check cleared the day after they had a conversation or one  
11 of them had a conversation with an FTB representative.

12 Does -- at that point having not received a  
13 check, does FTB have the ability to return the check  
14 that's been sent in, and in its stead accept a timely  
15 e-Payment?

16 MS. CHANG: I can check, and I'm not -- I can  
17 check --

18 JUDGE GEARY: Let me interrupt. I don't like  
19 asking factual questions of a representative because you  
20 are not here to testify. So let me just rephrase that  
21 question just a little bit to ask you if FTB contends in  
22 this case that it -- that it did not have the ability to  
23 return and not negotiate a check, if there is a timely  
24 request by a taxpayer to do that? Do you -- does FTB  
25 contend that?

1 MS. CHANG: In this case FTB contends that once  
2 the check had been received, then it was processed at that  
3 time, and there wouldn't have been an opportunity  
4 administratively to return the check to the taxpayers.

5 JUDGE GEARY: Okay. Thank you.

6 Thank you, Judge Ralston. Those are the only  
7 questions that I had.

8 ALJ RALSTON: Thank you, Judge Geary.

9 Judge Katagihara, did you have any questions for  
10 Respondent?

11 JUDGE KATAGIHARA: No questions for Respondent.  
12 Thank you.

13 ALJ RALSTON: Okay. Thank you.

14 Ms. Yu, you have your ten minutes for rebuttal.

15 MS. YU: Thank you, your Honor.

16 Firstly, I want to clarify something that Judge  
17 Geary just asked Mr. O'Hare about his mandated e-Payment  
18 requirement, when did it start.

19 So according to Exhibit A, the notice sent out by  
20 FTB, it was sent out on May 11, 2020. And it was the  
21 first mandated e-Pay notice to the Appellant. So the fact  
22 is before that day, May 11, 2020, there is no requirement  
23 for the mandated e-Payment requirement to Appellants.

24 So any move that Appellants pay electronically  
25 was his option, but not a requirement.

1           Okay. The penalty of mandated e-Payment imposed  
2 on Appellant should be abate because the Appellants have  
3 established reasonable cause to abate the penalty for  
4 failure to make electronic payment.

5           Opposing counsel once mentioned that ignorance of  
6 the law is not reasonable cause. We disagree because  
7 ignorance of the law alone is not reasonable cause, but  
8 Appellants here demonstrate higher standard than  
9 ordinarily intelligent and prudent person duty to comply  
10 with the e-Payment mandate.

11           The IRM also clearly states that ignorance of the  
12 law can still establish reasonable cause if coupled with  
13 other evidence showing that a reasonable and good-faith  
14 effort was made to comply with the law. And the standard  
15 of reasonable cause is not a high bar.

16           Here, Appellant was not ignorant about the law at  
17 all. On the contrary, he cared too much about the tax  
18 bill fully and timely and overly worried that they would  
19 miss anything. They act early, carefully. Even after  
20 they learn that they make a mistake, they try very hard to  
21 fix it. The amount of time that they spend, the work and  
22 efforts they use, were what a prudent person would do  
23 under similar circumstances.

24           The Appellants have demonstrated quality, not  
25 less than prudent care and due diligence in an ordinarily

1 intelligent and prudent business person.

2 As an ordinary intelligent, prudent business  
3 person, you would do just like what the pair have done.

4 In fact, Appellant have done more than that. I  
5 hope that all of you can feel that and also can hear from  
6 how they tried to fix the issue. And the point is they  
7 have time allowance to do it before the tax due date.

8 According to what Judge Geary just asked, I found  
9 it is very compelling to highlight that on April 11 that  
10 was the date that it was very critical, because the  
11 Appellants have time to fix the problem because they are  
12 willing to pay electronically before the paper check was  
13 cleared and was deposit by FTB.

14 And there is no rule saying that you cannot pay  
15 both electronically and lone e-Payment contemporaneously.  
16 If they could have done it, they could easily avoid an  
17 e-Pay penalty. Even though just like the FTB staff on the  
18 phone said that the two systems don't talk to each other,  
19 but I believe that if they had followed their path, the  
20 appeal position would be more straightforward. The  
21 reasonable cause would be much stronger.

22 And because of the FTB information and omission  
23 of facts without explaining them that the form alternative  
24 method, which is filling out a 4107 form, was the way --  
25 and the best way for them to get approved. They have

1 given up initial intent to pay electronically, but follow  
2 what the FTB staff instruct them to do.

3 And then I repeatedly ask two Appellants that how  
4 they trust the FTB when they are making the call. And  
5 they have no doubt, and without any trace of doubt that  
6 they don't trust what the FTB told them. They are  
7 intelligent person, they are business person, they are  
8 ordinary person, and they are very prudent.

9 They have made all -- tried all the attempts to  
10 resolve their problem. They did not do anything opposite  
11 to what the FTB staff told them. So I want everybody to  
12 try to think in the shoes of the person. If you are an  
13 ordinary person, you face this kind of problem, what would  
14 you do?

15 Would you do just like what the Appellants have  
16 done or would you do more than them or would you have any  
17 better ideas that you could have done to avoid this?

18 So as an ordinary intelligent, prudent person --  
19 business person duty and standard, I think they have  
20 achieved more than that. And reasonable cause should be  
21 established.

22 Two, we thought the Respondent's argument about  
23 the form -- 4107 form, on the top it say that -- very  
24 clearly that it's not for payment of e-penalty. I didn't  
25 say that the Appellants have filled the form to abate the

1 2021 e-Pay penalty. Instead they fill another form, which  
2 is the refund claim form. They fill it on the -- April  
3 26, 2022.

4 The 4107 form was instructed by FTB staff to let  
5 them -- to ask for a waiver of mandated e-Payment  
6 requirement in 2021 year -- tax year. They have the hopes  
7 that if before the due date that if they got approved that  
8 they don't need to pay electronically for their 2021 year.  
9 They could have just left the check be clear and not  
10 double pay electronically. And it makes sense to them as  
11 an ordinary and intelligent person.

12 And me, as an ordinary intelligent person, and  
13 everyone else, I believe that you will think in this way,  
14 if somebody from the authority told you to do so.

15 I think the main point here is, like, they rely  
16 so much on the FTB phone call. If they don't rely on it,  
17 they wouldn't try so many times to get to talk to them.  
18 If you try to make a phone call and it always get cut off,  
19 I think everybody most likely they would just hang up  
20 after two times; but they have tried more than five times,  
21 almost ten times to get -- reach to FTB staff.

22 Luckily, at the tenth time they get reach to  
23 them; but I believe that if ten times does not work, they  
24 would continue to do this. So besides making a phone  
25 call, they also sent an e-mail via the FTB portal to ask

1 question. But that answer came one-and-a-half years  
2 later. So they have tried very hard. They could not get  
3 the answer. They contact FTB, but got the wrong message  
4 or misleading message -- or you would say that it's not an  
5 accurate message. And then they follow it strictly. What  
6 would you see in an ordinarily intelligent and prudent  
7 person would do in similar circumstances like the  
8 Appellants?

9           Okay. So the paper check was not clear on April  
10 11. I believe that I highlight a lot on the -- how to  
11 prove this in the Appellants' brief. The check was clear  
12 by FTB on April 12th, not April 11. Clearly shown by the  
13 bank account statement that the Appellant submit. And it  
14 was also clearly proved by the conversations that the  
15 money was not in the FTB system yet, because they were  
16 asked not to cancel the check.

17           So during that day -- arguably, April 11, 2022,  
18 was a critical day that they still have a chance to amend  
19 the problem. If FTB, let's say the system  
20 administratively, they don't allow paying electronically  
21 after a lone e-Payment. It still doesn't matter to this  
22 issue because they could still have a chance to resolve  
23 this problem on April 11 if they were not lead by an  
24 inaccurate instruction by the the FTB staff.

25           So I would like to conclude in this way: The

1 Appellants have demonstrated quality, not less than a  
2 prudent care and due diligence in an ordinarily  
3 intelligent and prudent business person. As an ordinarily  
4 intelligent and prudent business person, they have  
5 demonstrate the quality by several way. And there were  
6 several facts demonstrating strong intelligent and prudent  
7 business person standard in them.

8 Number 1, the Appellants' 2021 tax amount was  
9 enormously large.

10 Number 2, Appellants' check was sent long before  
11 the tax due date in good faith to pay the tax early to  
12 avoid any unexpected event and allow time for contingency.

13 Number 3, Appellants showed diligent and prudent  
14 efforts to amend the payment issue immediately after he  
15 learned that he should make the payment electronically.

16 Number 4, the Franchise Tax Board receive and  
17 deposit the check prior to the due date for the payment.

18 And Number 5, Appellants rely tremendously on the  
19 FTB advice of not pay electronically.

20 Number 6, the Appellant rely tremendously on FTB  
21 erroneous advice of filling the mandated e-Pay waiver  
22 request form for the purpose of their 2021 tax year  
23 requirement.

24 So Appellants intend to do the tax correctly,  
25 timely, fully. They apply utmost care to pay early before

1 the due date. Even though it was an enormous amount,  
2 Appellant called the FTB to sort out the solutions, they  
3 amend the e-Payment issue to comply with the mandate.

4 About -- the taxpayer demonstrate reasonable  
5 cause by showing that they act more than an ordinary,  
6 intelligent and prudent business person would have act  
7 under similar circumstances, and this standard is not  
8 high.

9 (Court Reporter clarification)

10 MS. YU: I just said, the standard of the  
11 prudent -- ordinary, intelligent and prudent business  
12 person standard is not high, according to the Marin case.

13 The taxpayer try very hard to comply with the  
14 e-Payment date but still failed to pay electronically  
15 despite his exercise of ordinary business care. So  
16 reasonable cause is established and, therefore, the e-Pay  
17 penalty should be abated.

18 Thank you.

19 ALJ RALSTON: Thank you.

20 It looks like we are almost ready to conclude.  
21 Before we do, I'm going to check with my panel members one  
22 more time to see if they have any questions.

23 Judge Geary, did you have any questions?

24 JUDGE GEARY: I do not. Thank you, Judge  
25 Ralston.

1 ALJ RALSTON: Thank you.

2 Judge Katagihara, did you have any questions for  
3 either party?

4 JUDGE KATAGIHARA: Ms. Chang, can you tell me  
5 what day the e-Pay penalty was imposed?

6 MS. CHANG: Thank you. Yes. Let me pull it up.  
7 Sorry. Just a minute.

8 MR. O'HARE: I'm not sure if I'm allowed to  
9 answer. I mean, I have the notice here.

10 JUDGE KATAGIHARA: I would actually like FTB to  
11 answer because I want to know what date it was posted in  
12 their account.

13 MR. O'HARE: Okay. Thank you.

14 MS. BROSTERHOUS: If we can't find it in the next  
15 couple minutes, we would be happy to provide it later to  
16 you in the briefing.

17 JUDGE KATAGIHARA: Okay. So I guess the question  
18 that sort of leads into that is if the e-Pay penalty is  
19 imposed on the day that you receive and process the  
20 check -- if an e-Pay payment -- if a payment is made  
21 through the e-Pay system, I'm assuming that that's  
22 automatic, so if the payment is made through e-Pay prior  
23 to the day that you receive the check or the date that  
24 that e-Pay penalty was imposed, you would have two checks,  
25 one e-Pay, one paper check. And so in that case would

1 there be an e-Pay penalty imposed?

2 MS. CHANG: In that scenario where an e-Payment  
3 was made prior to a check payment being made, whether --  
4 with their mandatory e-Payment requirement and no waiver  
5 had been received, yes, there would still be an e-Pay  
6 penalty imposed on the check payment even if it was after  
7 the e-Pay -- a different e-Payment prior.

8 Thank you.

9 JUDGE KATAGIHARA: Thank you. No further  
10 questions.

11 ALJ RALSTON: Okay. Thank you.

12 It looks like we are ready to conclude this  
13 hearing. Today's hearing in the Appeal of O'Hare is now  
14 adjourned and the record is closed.

15 Excuse me one second. I just want to check a  
16 note. Thank you.

17 So today's hearing in the Appeal of O'Hare is now  
18 adjourned and the record is closed.

19 The panel is going to meet and decide your case  
20 later on, and we'll send you a written opinion of our  
21 decision within 100 days.

22 So thank you everyone for attending.

23 (The proceedings concluded at 5:10 p.m.)  
24  
25

1 REPORTER'S CERTIFICATE

2  
3 I, Donna S. Badger Cramin, a Certified Shorthand  
4 Reporter for the State of California, do hereby certify:

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

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

14 I have hereunto subscribed my name this 8th day  
15 of November, 2023.

16  
17   
18 Donna S. Badger Cramin, CSR No. 14530  
19 Certified Shorthand Reporter  
20 For The State of California

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