

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
D. ASSH and C. LEMAY, ) OTA NO. 220911455  
 )  
 APPELLANTS. )  
 )  
 )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Wednesday, December 13, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 1:11 p.m. and concluding at 1:37 p.m. on  
Wednesday, December 13, 2023, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Administrative Law Judge: JUDGE OVSEP AKOPCHIKYAN

For the Appellant: D. ASSH

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
  
NOEL GARCIA-ROSENBLUM  
BRADLEY COUTINHO

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I N D E X

E X H I B I T S

(Appellants' Exhibits 1-5 were received at page 7.)  
(Department's Exhibits A-F were received at page 6.)

P R E S E N T A T I O N

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By Mr. Assh	8
By Mr. Garcia-Rosenblum	11

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California; Wednesday, December 13, 2023  
1:11 p.m.

JUDGE AKOPCHIKYAN: We're going on the record in the Appeal of Assh and Lemay before the Office of Tax Appeals. The OTA Case No. is 220911455. Today is Wednesday, December 13th, 2023, and the time is approximately 1:11 p.m. We're holding this appeal electronically via Webex by the consent of all parties.

My name is Ovsep Akopchikyan, and I'm the Administrative Law Judge deciding this appeal. I have reviewed the parties' briefs and exhibits and may ask questions to make sure I have all the information I need to decide this appeal.

Now for introductions, will the parties please identify themselves by stating their name for the record, beginning with Appellant.

MR. ASSH: Daniel Assh.

JUDGE AKOPCHIKYAN: Thank you, Mr. Assh.  
For Franchise Tax Board?

MR. GARCIA-ROSENBLUM: Good afternoon. Noel Garcia-Rosenblum for Respondent Franchise Tax Board.

JUDGE AKOPCHIKYAN: Thank you.

MR. COUTINHO: And Brad Coutinho, also for Respondent Franchise Tax Board.

1 JUDGE AKOPCHIKYAN: Thank you.

2 MR. ASSH: And if possible, I would prefer to be  
3 addressed by Dan or Daniel.

4 JUDGE AKOPCHIKYAN: I prefer to keep Mr. Assh, if  
5 that's okay with you.

6 MR. ASSH: Your choice.

7 JUDGE AKOPCHIKYAN: Thank you.

8 As discussed and agreed upon by the parties at  
9 the prehearing conference and as noted in my prehearing  
10 conference minutes and orders, there are two issues on  
11 appeal: Issue One, whether Appellants have established  
12 reasonable cause to abate the late-payment penalty for the  
13 2021 tax year; Issue Two, whether Appellants have  
14 established a basis to abate interest for the 2021 tax  
15 year.

16 With respect to the evidentiary record, FTB  
17 submitted Exhibits A through F during the briefing  
18 process. Appellant did not object to the admissibility of  
19 these exhibits and, therefore, all of FTB's exhibits are  
20 entered into the record.

21 (Department's Exhibits A-F were received in  
22 evidence by the Administrative Law Judge.)

23 JUDGE AKOPCHIKYAN: With respect to Appellants'  
24 exhibits, Appellants submitted five documents during the  
25 briefing process, which I relabeled as Exhibits 1

1 through 5 in my prehearing conference minutes and orders.  
2 FTB did not object to the admissibility of these exhibits  
3 and, therefore, all of Appellants' exhibits are entered  
4 into the record.

5 (Appellants' Exhibits 1-5 were received  
6 in evidence by the Administrative Law Judge.)

7 JUDGE AKOPCHIKYAN: Lastly, as discussed Mr. Assh  
8 will be testifying at this hearing. As agreed, the  
9 hearing will begin with Appellants' presentation,  
10 including Mr. Assh's testimony, for a total up to  
11 15 minutes. FTB will then have 10 minutes for its  
12 presentation, and Appellants will have 5 minutes for final  
13 remarks.

14 Does anyone have any questions before I swear in  
15 Mr. Assh for his testimony? Thank you. Hearing none,  
16 Mr. Assh, will you please raise your right hand.

17  
18 D. ASSH,  
19 produced as a witness, and having been first duly sworn by  
20 the Administrative Law Judge, was examined, and testified  
21 as follows:

22  
23 JUDGE AKOPCHIKYAN: Thank you, Mr. Assh. You can  
24 proceed with your preparation when you are ready.

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1 the form. And the tax preparing software -- and I don't  
2 have the name of the software she was using -- also  
3 couldn't find anything.

4 And I searched Bing, and I searched Google for  
5 the worksheet that was in question. And because we  
6 couldn't find it -- and that was prior to filing our  
7 taxes -- and had I known back in April that I owed money,  
8 I would have put the money in and got it back. Normally,  
9 I get a refund. It's not a big deal. I was not strapped  
10 for cash. I proceeded under what I believe was the  
11 reasonable man. If my accountant says this is what the  
12 State of California owes you in a tax credit, I'm not  
13 going to argue you, but I did my due diligence to make  
14 sure that I did try to confirm it.

15 And then we just -- it was during Covid, and  
16 there was the American Civil Right that did a whole bunch  
17 of other things, and we just couldn't find anything. So  
18 I'm at the mercy of the Court. I think I went -- in fact,  
19 I actually paid more for my accountant to research this  
20 than the interest and penalties, which I find rather  
21 ironic. And I believe that the Franchise Tax Board will  
22 agree that as soon as I received notice, within two days  
23 they had payment.

24 It was not something that, oh, I have to get  
25 money out and it's an issue and I'm trying to withhold

1       taxes. I've always paid my taxes on time. Maybe it's  
2       something my father taught me. And I can go into all the  
3       other explanations if you wish, but I think bottom line is  
4       I did my due diligence. My accountant did her due  
5       diligence. The tax preparing software, that does it for  
6       thousands of accounts, did their due diligence, and nobody  
7       could find anything. And if you search Google, there  
8       isn't anything. However, there is the draft that says,  
9       "Do not use this." So I didn't use it.

10               Do you have any questions? Because I can go and  
11       redo what is written, but I believe you've already read  
12       it. And for expediency, unless you have any questions, I  
13       think -- I've done my due diligence, and I'm sort of  
14       asking -- I'd like to make this quick for you. I know  
15       we've probably spent more on your time and the two  
16       Franchise Tax Board's time than the amount in question.

17               JUDGE AKOPCHIKYAN: Thank you, Mr. Assh. I don't  
18       have any questions at this time.

19               I'm going to ask if the Franchise Tax Board has  
20       any questions.

21               MR. GARCIA-ROSENBLUM: Noel Garcia-Rosenblum. No  
22       questions.

23               JUDGE AKOPCHIKYAN: Thank you.

24               Okay. Well, that concludes your presentation,  
25       Mr. Assh?

1 MR. ASSH: Yes, it does.

2 JUDGE AKOPCHIKYAN: Thank you.

3 I'll go ahead and turn it over to the Franchise  
4 Tax Board. You have about 10 minutes. You can proceed  
5 when you're ready.

6 MR. GARCIA-ROSENBLUM: Thank you.

7

8 PRESENTATION

9 MR. GARCIA-ROSENBLUM: My name is Noel  
10 Garcia-Rosenblum, and I, along with my co-Counsel Bradley  
11 Coutinho, represent Respondent Franchise Tax Board in this  
12 matter.

13 There are two issues at appeal today: Whether  
14 the Appellants have shown reasonable cause to abate the  
15 late-payment penalty imposed during the 2021 taxable year,  
16 and whether the Appellants are entitled to the abatement  
17 of interest.

18 Respondent received Appellants' 2021 tax return  
19 on July 19th, 2022, reporting a total tax due in the  
20 amount of \$7,559. After applying the Net Premium  
21 Assistance Subsidy of \$15,056, Appellants reported an  
22 overpayment and corresponding refund of \$7,497.  
23 Respondent reviewed the Appellants' tax return and  
24 disallowed the Net Premium Assistance Subsidy in full,  
25 resulting in a revised tax assessment of \$7,636.

1           Additionally, because the balance due is not paid  
2     by the payment due date, a late-payment penalty of \$529.13  
3     was imposed for the 2021 taxable year. Appellants paid  
4     their revised balance due in full on August 5th, 2021, and  
5     filed a claim for refund requesting the penalty be abated  
6     for reasonable cause. According to their request,  
7     Appellants worked with her accountant and made a mistake  
8     completing California Form 3849, the Premium Assistance  
9     Subsidy form, because they could not locate the reference  
10    worksheets and tables on that form.

11           Instead, Appellants and their accountant assumed  
12    Respondent followed IRS Form 8962, the Premium Tax Credit,  
13    and use the worksheets to this form to complete  
14    California's Premium Assistance Subsidy Form. This caused  
15    the Appellants to claim the subsidy when they were not  
16    eligible, resulting in an improperly claimed overpayment.  
17    Appellants contend that they have established the  
18    reasonable cause by exercising due diligence when  
19    completing the return, and because they promptly paid the  
20    revised balance due upon learning of their mistake. After  
21    review, Respondent denied the claim for refund because the  
22    information provided did not constitute reasonable cause,  
23    and Appellants filed this timely appeal.

24           California law under Revenue & Taxation Code  
25    section 19132 provides that a late-payment penalty is

1 imposed when a taxpayer fails to pay the amount due on the  
2 tax return on or before the due date of the return. Here,  
3 Respondent calculated the late-payment penalty based on  
4 the unpaid tax balance of \$7,559, which resulted in a  
5 penalty amount of \$529.13. It does not appear that  
6 Appellants dispute the imposition or the calculation of  
7 the late-payment penalty but instead, contend that their  
8 actions constitute reasonable cause based on the reliance  
9 in their tax professional in claiming the Premium  
10 Assistance Subsidy.

11 To establish reasonable cause, a taxpayer must  
12 show that the failure to timely pay the amount shown on a  
13 tax return occurred despite the exercise of ordinary care  
14 and business prudence. As explained in the United  
15 States v. Boil, while a taxpayer's reliance on the  
16 improper advice of a tax professional may be considered  
17 reasonable cause, the advice relied upon must be made as  
18 to a matter of substantive tax law. In calculating the  
19 Net Premium Assistance Subsidy, California Form 3849  
20 instructs taxpayers to use Worksheet 2 and Table 1-2,  
21 located in the form's instructions, to determine whether  
22 or not they are eligible to take the subsidy. Appellants  
23 properly calculated that their household income was  
24 829 percent of the federal poverty line which, according  
25 to Table 1-2, confirms that the Appellants were not

1 eligible to claim the Premium Assistance Subsidy for the  
2 2021 tax year.

3 While Respondent appreciates Appellants'  
4 circumstances, the mistake here appears to be a  
5 computational error, rather than a substantive question of  
6 legal interpretation. A prudent taxpayer exercising both  
7 business care and due diligence refers to the specific  
8 form instructions when directed to do so, rather than rely  
9 on unreferenced [sic] federal form for guidance.  
10 Therefore, Appellants' failure to follow the directions  
11 listed on both Form 3849 and its accompanying instructions  
12 does not constitute reasonable cause for abatement of the  
13 late-payment penalty, and FTB's imposition of the  
14 late-payment penalty should be sustained.

15 Lastly, the imposition of interest is mandatory,  
16 and Respondent is not allowed to abate interest except  
17 where authorized by law. Appellants have not raised any  
18 issues which would allow interest abatement.  
19 Additionally, after review, Respondent has confirmed that  
20 there were no unreasonable delays warranting interest  
21 abatement. Therefore, the Appellants are not entitled to  
22 the abatement of interest.

23 I'm happy to answer any questions you may have.  
24 Thank you.

25 JUDGE AKOPCHIKYAN: Thank you,

1 Mr. Garcia-Rosenblum.

2 Mr. Assh, I see your hand. I'm going to give you  
3 an opportunity to speak in a minute. You are muted, so I  
4 can't hear you, but I'll give you an opportunity in a  
5 minute.

6 I don't have any questions for the Franchise Tax  
7 Board. I'll go ahead and allow Mr. Assh his five minutes  
8 for rebuttal.

9 Mr. Assh, you may proceed, unless you have a  
10 specific question.

11 MR. ASSH: I have a specific question to start  
12 with.

13 JUDGE AKOPCHIKYAN: Okay. Go ahead.

14 MR. ASSH: Daniel Assh. To the Franchise Tax  
15 Board, can you explain why in the draft the worksheets  
16 were included with the tax form? And for some reason,  
17 unbeknownst to my accountant or her tax preparing software  
18 specialist, why were the forms moved to the instructions  
19 instead of being part of the tax form? I -- I'm at a  
20 loss.

21 JUDGE AKOPCHIKYAN: Mr. Assh, this is not an  
22 opportunity for you to ask questions to the Franchise Tax  
23 Board. This is to direct any question you have to me.

24 MR. ASSH: Oh, I thought --

25 JUDGE AKOPCHIKYAN: Yeah. It's okay.

1           MR. ASSH:  -- I was allowed to ask questions  
2     first and then a rebuttal.

3           JUDGE AKOPCHIKYAN:  No worries.

4           MR. ASSH:  Am I incorrect?

5           JUDGE AKOPCHIKYAN:  No, you don't have any  
6     opportunity to ask questions.  Mr. Garcia-Rosenblum is not  
7     testifying as a witness.  He was just presenting his --  
8     the FTB's position.  So there's no opportunity to  
9     cross-examine him or ask him any follow-up questions  
10    because he was not giving his testimony.  I understand  
11    your question, and I'm not going to relay that question to  
12    FTB.  Because for me, I'll take it under consideration  
13    that you have a question, but I don't think it's important  
14    to ask FTB that question at that time.  But I do have a  
15    question for you, but I'll go ahead and wait until after  
16    your rebuttal, and we could take it from there.

17

18                           CLOSING STATEMENT

19           MR. ASSH:  Again, I think I did my utmost to find  
20    the proper information.  I don't understand why from a  
21    draft to a final version the tables were moved to a  
22    different location.  As a reasonable man, I think I did my  
23    due diligence.  I went beyond the call by paying two hours  
24    of my accountant's time to research the item, which she in  
25    turn researched with her accounting software provider.



1       You know, I can't do anymore. I don't understand it, and  
2       I don't think I'll ever understand it.

3               I'm done.

4               JUDGE AKOPCHIKYAN: Thank you, sir.

5               Now my question for you is what draft are you  
6       referring to?

7               MR. ASSH: Can I show it to you?

8               JUDGE AKOPCHIKYAN: Show it to me how? Sorry.  
9       With the --

10              MR. ASSH: Share my screen, and I'll give you  
11       the --

12              JUDGE AKOPCHIKYAN: Wait. Was it part of your  
13       exhibit?

14              MR. ASSH: Yes. It's just easier for me to --

15              JUDGE AKOPCHIKYAN: Just tell me -- you reference  
16       what exhibit you're referring to, and I can just take a  
17       look at that.

18              MR. ASSH: It would be -- it would -- I don't --  
19       it would be hard for me to pull up which exhibit, but it  
20       will be the one that is identical to this. It's 2020  
21       Premium Assistance Subsidy. It says, "Draft of" -- "as of  
22       11/12/2020. Do not file." And the information --

23              JUDGE AKOPCHIKYAN: Is that something you --

24              MR. ASSH: Say it again?

25              JUDGE AKOPCHIKYAN: Wait. Is that something

1       that's --

2               MR. ASSH:   And that's what we relied on was --

3               JUDGE AKOPCHIKYAN:   Okay.   I --

4               MR. ASSH:   -- the form, the draft form.

5               JUDGE AKOPCHIKYAN:   I feel like we're speaking  
6 over each other.   So give me a minute to finish my  
7 question before you proceed.

8               This draft document, did that have your  
9 confidential information on there?

10              MR. ASSH:   No, it doesn't.

11              JUDGE AKOPCHIKYAN:   It doesn't.   Okay.   This is  
12 2020 instruction.   Now, give me a minute while I look  
13 through your exhibits to see which exhibit this is.

14              MR. ASSH:   It would be one of the first ones.

15              JUDGE AKOPCHIKYAN:   Give me a minute, please.  
16 Thank you.

17              Okay.   At this time I'm going to ask you to stop  
18 sharing your screen while I look for this document.

19              I'm going through the file.   I don't see any  
20 document that says the term, like, watermarked "draft" on  
21 there.   Is that something the Franchise Tax Board  
22 submitted?   Because I don't see it with your submissions.

23              MR. ASSH:   It was with my initial submission to  
24 -- for the --

25              JUDGE AKOPCHIKYAN:   To the Franchise Tax Board or

1 to the Office of Tax Appeals?

2 MR. ASSH: Franchise Tax Board.

3 JUDGE AKOPCHIKYAN: Got it. So we are an  
4 independent agency. We do not have any documents you  
5 submitted to the Franchise Tax Board before you filed your  
6 appeal. Therefore --

7 MR. ASSH: But in my -- in the appeal, I did  
8 quote the tax form.

9 JUDGE AKOPCHIKYAN: Okay. So you included  
10 language on that form, but you did not actually include  
11 that form. Okay.

12 MR. ASSH: I included it.

13 JUDGE AKOPCHIKYAN: You included, not to the  
14 Office of Tax Appeals. Just -- I'm just trying to  
15 understand what's going on here. I'm not trying to argue  
16 or anything. So this document, I don't see a copy of it.  
17 It seems like it was not submitted as part of the appeal  
18 package. I remember your briefing had some quoted  
19 language. I can pull that up. But if you included the  
20 relevant portion of that draft in your brief, that should  
21 be fine. But I just want to understand now with respect  
22 to what the timeline of events.

23 You looked at a draft of the 2020 instruction,  
24 not the 2021 instruction and got -- you're saying that  
25 document didn't -- I guess you could just tell me what you

1 mean when you say you looked at the draft and what is the  
2 significance of your position again, because I don't  
3 totally understand.

4 MR. ASSH: Normally in October of -- before the  
5 filing, my accountant and I go over our tax returns. And  
6 because it was only a draft, we used the draft. And in  
7 the draft it clearly showed that we were not eligible for  
8 the Premium Tax Assistance because it was in the form  
9 draft and said "did not use."

10 JUDGE AKOPCHIKYAN: Okay.

11 MR. ASSH: When we came to file the taxes, we no  
12 longer pulled up the form that was draft. We pulled up  
13 the final form, but this form did not include any  
14 worksheets. We searched the web for the worksheets, and  
15 the only place we could find the worksheets was what  
16 labeled draft. Therefore, I asked my accountant to  
17 research the issue and move on with the accounting  
18 software firm because she uses -- to research the issue.  
19 Neither of them could find the worksheets in a final  
20 version of the form. Therefore, we assumed that it was  
21 not included.

22 JUDGE AKOPCHIKYAN: Right. Because I'm --

23 MR. ASSH: Later, after the fact, when I got the  
24 notice from the Franchise Tax Board that I owed money,  
25 they showed that it wasn't the instructions and not in the

1 tax form. Obviously, seeing that they told me where it  
2 was, although I couldn't find it through Google or Bing, I  
3 had no argument because I agreed with them. But I didn't  
4 agree with them was the moving of the information from the  
5 tax form draft to take out information, have a tax form  
6 without the information included that we could use, and we  
7 couldn't find one.

8 Is that clear.

9 JUDGE AKOPCHIKYAN: Yeah, I think I understand.  
10 But the document that you just shared was a 2020 tax year.  
11 It was definitely the 2020 tax year, but when I look at  
12 the 2021, which is the year at issue, the Form 3849, Item  
13 6 on part 1 says, "Go to Worksheet 2 and Table 1-2 in the  
14 instructions." So I don't --

15 MR. ASSH: That is what --

16 JUDGE AKOPCHIKYAN: From my --

17 MR. ASSH: That is where the misunderstanding is,  
18 is it says, "Go to the instructions," but it's Table 1 and  
19 2 of worksheet and Table 1. We misunderstood that as to  
20 mean use the worksheet, but the worksheet wasn't there.

21 JUDGE AKOPCHIKYAN: I mean, I am looking at the  
22 instructions.

23 MR. ASSH: And we looked for --

24 JUDGE AKOPCHIKYAN: Okay. I understand your  
25 position. I'm just letting you know I looked up the 2021

1 instructions, and it has that worksheet in there as FTB  
2 referenced in its briefing. So that's what I was trying  
3 to understand what --

4 MR. ASSH: And I agree. That's why when I got  
5 the --

6 JUDGE AKOPCHIKYAN: Okay.

7 MR. ASSH: -- the notification --

8 JUDGE AKOPCHIKYAN: Okay. I understand you. So  
9 to summarize your position, you saw this document. You  
10 saw the Form 3849 for the 2021 tax year. You saw Line 6  
11 referencing the instructions. You just couldn't locate  
12 what instruction this form was referring to. Neither you  
13 nor your tax professional could pull up the instruction  
14 for Form 3849 and look at that table. Is that correct?

15 MR. ASSH: I believe that in error, neither of  
16 them actually looked at the instructions on how to fill  
17 out the form because they knew how to fill out the form.  
18 Neither of them and myself thought that the worksheet  
19 would actually be included in the instructions and not in  
20 the tax form.

21 JUDGE AKOPCHIKYAN: Got it. Okay. I think I  
22 understand your position now. Sorry for the back and  
23 forth, but yeah, I get it now. Okay. I don't have any  
24 follow-up questions for you, Mr. Assh.

25 Does anybody have any questions for me? No.

1       Okay. So I think we are ready to conclude this hearing.

2               This case is submitted on December 13th, 2023,  
3       and the record is now closed.

4               I want to thank the parties for their  
5       presentation today.

6               And thank you, Mr. Assh, for your testimony.

7               We will decide this case based on the arguments  
8       and evidence presented to the Office of Tax Appeals and  
9       issue our written decision within 100 days from today.

10              We're going to take a brief recess before the  
11       next hearing, which is scheduled to begin at approximately  
12       1:50 p.m.

13              Thank you.

14              (Proceedings adjourned at 1:37 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 26th day  
of December, 2023.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER