

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,           )  
   )  
G. SMITH and P. REYES,                      ) OTA NO. 230312709  
   )  
                        APPELLANTS.         )  
   )  
   )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, December 14, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 10:20 a.m. and concluding at 10:40 a.m. on  
Thursday, December 14, 2023, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Administrative Law Judge: JUDGE KEITH LONG

For the Appellants: G. SMITH

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

BRADLEY COUTINHO

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I N D E X

E X H I B I T S

(Department's A-I Exhibits were received at page 7.)

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California; Thursday, December 14, 2023

10:20 a.m.

JUDGE LONG: We are opening the record in the Appeal of Smith and Reyes. The OTA Case No. is 230312709. This matter is being held before the Office of Tax Appeals. Today's date is December 14th, 2023, and the time is approximately 10:20 a.m. This hearing is being held electronically with the agreement of both the taxpayer and the agency's representatives.

Today's hearing is being heard and decided by a single Administrative Law Judge under the Office of Tax Appeals Small Case Program. The Office of Tax Appeals is an independent and neutral agency. It is not a Tax Court. My name is Keith Long, and I will be conducting the hearing and deciding the appeal.

Also present is a stenographer, Ms. Alonzo, who is reporting this hearing verbatim. To ensure we have an accurate record, we ask that everyone speaks one at a time and does not speak over each other. Also, speak clearly and loudly. When needed, Ms. Alonzo will stop the hearing process and ask for clarification. After the hearing, Ms. Alonzo will produce the official hearing transcript, which will be available on the Office of Tax Appeals website.

1           I'd like to offer a few reminders to help the  
2       process run as smoothly as possible. First, please ensure  
3       your microphone is not muted when you speak. Otherwise,  
4       your voice will not be picked up on the live stream.  
5       Second, please ensure that your microphone is muted when  
6       you are not speaking to avoid any interference. As a  
7       reminder these proceedings are being broadcast live and  
8       anything said today and any information shared today is  
9       publicly viewable on the live stream.

10           For the record, will the parties please state  
11       their names, beginning with Appellant.

12           MR. SMITH: Is that me?

13           JUDGE LONG: Yes.

14           MR. SMITH: Gregory M. Smith.

15           JUDGE LONG: And for Franchise Tax Board.

16           MR. COUTINHO: Good morning. This is Brad  
17       Coutinho representing Respondent Franchise Tax Board.

18           JUDGE LONG: Thank you.

19           At the prehearing conference, Mr. Smith indicated  
20       that he may wish to provide witness testimony. FTB did  
21       not have any objections at that time. To be clear,  
22       witness testimony is not required. However, testimony  
23       given under oath may be considered as evidence.  
24       Otherwise, statements made by appellants are considered to  
25       be arguments about the case. In addition, when testimony

1 is provided under oath, FTB is given the opportunity to  
2 cross-examine the witness.

3 Mr. Smith, have you decided whether you would  
4 like to provide witness testimony today?

5 MR. SMITH: Yeah, I think I -- it won't be long,  
6 but yes, sir.

7 JUDGE LONG: Okay. Then we will go ahead and ask  
8 you to raise your right hand.

9  
10 G. SMITH,  
11 produced as a witness, and having been first duly sworn by  
12 the Administrative Law Judge, was examined, and testified  
13 as follows:

14  
15 JUDGE LONG: Thank you.

16 Prior to this hearing, FTB submitted an exhibit  
17 index identifying Exhibits A through I. At the prehearing  
18 conference there were no objection to FTB's exhibits. No  
19 other exhibits were submitted. Accordingly, FTB's  
20 Exhibits A through I are admitted without objection.

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

23 JUDGE LONG: There are three issues in this  
24 appeal. They are: One, whether Appellants have  
25 established reasonable cause to abate the late-filing

1 penalties under R&TC section 19131 of the 2019 and 2020  
2 tax years; two, whether Appellants have established  
3 reasonable cause to abate the underpayment of estimated  
4 tax penalty under R&TC section 19136 for the 2020 tax  
5 year; and three, whether Appellants are entitled to  
6 interest abatement.

7 Mr. Smith, you indicated that you needed 10  
8 minutes to make your opening presentation, and you may  
9 begin when you are ready.

10 MR. SMITH: Okay. Yeah. I don't think it'll  
11 take that long.

12  
13 PRESENTATION

14 MR. SMITH: But, first of all, thanks for take  
15 taking the time to meet with me today. I appreciate it.  
16 I know that everybody is busy.

17 So as I indicated in my initial writings to the  
18 Tax Board, I made a mistake in '19 and 2020. I own my own  
19 business so, you know, it's just like myself. I do  
20 consulting work, and it's been successful. And I had a  
21 long-time accountant that was a family friend that had  
22 been, you know, doing my taxes for me. I opened my  
23 business in 2016, and in 2019 and 2020 I did not due my  
24 due diligence and make -- you know, follow up with him to  
25 make sure he was filing the returns that I thought he was



1       doing on my behalf.

2               And so what I came to find out -- and he was an  
3       older, like I said, a family friend, and older accountant.  
4       And he had several personal issues during that time. If  
5       you remember during Covid, it was a challenging time for  
6       everyone, and he did -- he lost his wife. He was very  
7       sick himself and just behind with my stuff and all the  
8       other people that he worked with. So I don't know if  
9       these are, you know, valid reasons. But when I found out  
10      that my returns weren't filed I, you know, spoke with him  
11      and then got a new accountant and then filed the returns  
12      as quickly as possible.

13             So again, that's -- you know, I'm hoping to get  
14      some forgiveness because I know it's happened for other  
15      people, you know, in the past. So again, I take  
16      responsibility. I made a mistake but, you know, it was  
17      some circumstances that I wasn't aware of, and I just  
18      thought they had been taken care of like he had done in  
19      the past. Subsequently, like I said, I have a new  
20      accountant. I filed my returns every year on time and  
21      paid -- you know, paid what I owe.

22             So again, I'm not a lawyer. I'm not a tax  
23      attorney. I'm not a specialist just, you know, like I  
24      said, hard-working person with a family. And these  
25      penalties, you know, if they could be forgiven or reduced,

1 I would greatly appreciate. It was not my intention not  
2 to file on time. I wasn't trying to avoid paying taxes.  
3 And, you know, like I said, I've been on time every year  
4 since. I have a new accountant. It's been going great.  
5 A friend of mine who is closer to me.

6 And my accountant lived in Las Vegas at the time,  
7 and he's -- like right now, he doesn't even have a license  
8 anymore because, again, he's older, and he was doing it.  
9 He worked with my father-in-law for several years who also  
10 owns his own business. And he was doing them for me for  
11 free. So, you know, that's kind of why I wasn't thinking  
12 about switching. But as soon as I found out what had  
13 happened, you know, I took immediate steps to get it  
14 corrected, and then I filed both returns immediately.

15 So that's -- I don't have a lot of other evidence  
16 or any other explanation than that it was an oversight,  
17 and I apologize. And, hopefully, the Court can take into  
18 consideration the circumstances. And the penalties, I  
19 have two young children, you know, it would be kind of not  
20 great. I guess, I don't know how to phrase it. But other  
21 than that, I guess that's kind of my explanation.

22 Again, thanks for your time and, hopefully, you  
23 can take that into consideration. Again, I apologize.  
24 And it is on me to file my own returns. He also filed my  
25 business returns as well. So that's the explanation for

1       being late, and I tried to remedy it as soon as I found  
2       out.

3               And, again, I appreciate your time.

4               JUDGE LONG: Thank you. Just a couple of quick  
5       questions for you. First, in the prior years of 2016,  
6       '17, and '18, can you walk me through what the process was  
7       with respect to filing your returns. Did you meet with  
8       your accountant after they were completed and signed them  
9       or were they signed on your behalf?

10              MR. SMITH: Yeah. The first couple of years,  
11       like, he was -- he would come to L.A. like once every four  
12       weeks because he had other customers. Like, he moved to  
13       Las Vegas, I think like -- I don't know -- three or  
14       four years prior to that. I guess he said that it was  
15       getting too expensive for him to live in L.A. So when had  
16       filed the returns, he would, you know, come around. He  
17       would come back, like, once a month or once every other  
18       month and meet with various people that he did taxes for.

19              Again, like I said, he had been doing it for a  
20       long time. He would come to the house. We would hang  
21       out, you know, just talk a little bit. And he would say,  
22       hey, I need you to sign this, or I'm going to file this  
23       for you. Or if I owed a check, you know, then, you know,  
24       we would kind of just work it out. And then during 2019,  
25       you know, obviously, it was 2020 to file the 2019 returns,

1 he wasn't traveling like everybody else. And he's, like,  
2 just take care of it -- I'll take care of it. Just email  
3 me, you know, the figures for both the business and then  
4 we have, you know, our personal returns as well.

5 So I would just email him, and he would sometimes  
6 respond and sometimes wouldn't. And so, you know, I  
7 would -- he was, like, I'll take care of it, essentially.  
8 And for context and I think in 2020 or 2021, one of the  
9 two years, he would email me, like, send a check to the  
10 feds with your estimated tax. And I overpaid by, like,  
11 \$50,000. So he was, like, way off. And there was clearly  
12 something going on, but -- which I ended up getting a  
13 refund from the feds a couple -- like, two years later.

14 It was kind of like -- you know, again, I own my  
15 own business. It's just myself. I have an S corp. Once  
16 I did that the whole tax thing changed, right. It was a  
17 lot more confusing, you know, complicated. And he helped  
18 me actually open my corporation. So he's, you know, very  
19 beneficial, very helpful, but it just -- since during that  
20 time nobody was -- he wasn't traveling. You know, I was  
21 working from home, and so, like, those interactions  
22 stopped. And I just figured, you know, again incorrectly  
23 that he -- he said he was taking care of it, but he  
24 clearly wasn't and was falling way behind.

25 And like I said, he lost his wife. Then he got

1 Covid and was, like, in the hospital. And so it was just  
2 a myriad of things and -- but prior to that it was never a  
3 problem. Like I said, he would show up. But I don't know  
4 anything about taxes. I don't pretend to know anything  
5 about taxes. So that's why I have an accountant, and my  
6 new accountant is great. But prior to that, that was kind  
7 of the situation.

8 JUDGE LONG: Okay. Thank you. I don't have any  
9 other questions.

10 Franchise Tax Board, you also requested 10  
11 minutes to make your presentation. If you would like to  
12 begin when you're ready, that would be great.

13 MR. COUTINHO: Thank you.

14  
15 PRESENTATION

16 MR. COUTINHO: Good morning. My name is Brad  
17 Coutinho, and I represent the Franchise Tax Board in this  
18 matter.

19 FTB correctly imposed late-filing penalties for  
20 the 2019 and 2020 tax years because Appellants filed their  
21 tax returns over a year late for both years. Moreover,  
22 Appellants failed to remit sufficient estimated tax  
23 payments and, thus, incurred an estimated tax penalty for  
24 the 2020 tax year. While Appellants' justification for  
25 penalty abatement is sympathetic, they have yet to

1 establish a basis to abate the penalties based on  
2 precedential opinions from the Office of Tax Appeals.

3 Regarding the delinquent filing penalties,  
4 Appellants have not demonstrated reasonable cause. As  
5 Appellants have stated -- as Appellant-husband stated  
6 today, they believe their accountant had been filing their  
7 tax returns but found out that he had not because of  
8 health issues and the untimely passing of Appellants'  
9 accountant's wife. While the facts of this case are  
10 sympathetic, precedential opinions from the OTA reflect  
11 that Appellants have not established reasonable cause.

12 In the appeal of Quality Tax and Financial  
13 Services, Inc., the OTA Panel held that each taxpayer has  
14 a personal nondelegable obligation to file a tax return by  
15 the due date. In that decision, the OTA Panel relied on  
16 United States versus Boyle, a U.S. Supreme Court case, for  
17 the proposition that a taxpayer's reliance on an agent,  
18 such as an accountant, to file a return by the due date is  
19 not reasonable cause. In another precedential opinion,  
20 the Appeal of Belcher, the OTA Panel held that to  
21 establish reasonable cause, the taxpayer must present  
22 proof that they were continuously prevented from filing a  
23 tax return.

24 FTB can appreciate the circumstances that  
25 Appellant-husband has mentioned, specifically, the

1 personal matters that affected their former accountant.  
2 However, Appellants filed their 2019 tax return two years  
3 late and their 2020 tax return one year late. Appellants  
4 have not provided what efforts were taken to file their  
5 returns timely in the frequency in which it followed up  
6 with their preparer to ensure the returns were timely  
7 filed. As such, Appellants have not demonstrated  
8 reasonable cause to abate the delinquent filing penalties  
9 imposed.

10 Regarding the estimated tax penalty, Appellants  
11 have not offered any argument or evidence for why either  
12 of the two provisions for waiver of the penalty exist in  
13 this appeal. Accordingly, there are no grounds to abate  
14 the delinquent filing and/or the estimate tax penalties in  
15 this case, and FTB respectfully request that it be  
16 sustained.

17 I'd be happy to address any questions or concerns  
18 Judge Long may have. Thank you.

19 JUDGE LONG: Thank you. I don't have any  
20 questions.

21 Mr. Smith, you have 5 minutes to make you're  
22 final statement, if you would like.

23  
24 CLOSING STATEMENT

25 MR. SMITH: Yeah. I think the only final

1 statement that I would have is that I was mistakenly  
2 unaware that the returns weren't filed, and as soon as I  
3 found -- even though it was a long period of time, as soon  
4 as I found out, I filed -- I got a new accountant and  
5 filed them both at the same time. So I mistakenly thought  
6 that, you know, again, maybe ignorance, if that's a -- not  
7 a defense but a -- ignorance on my own, I guess.

8 And I thought it had been taken care of, you  
9 know, because he said, when I was sending him the figures,  
10 he would take care of it. And he -- and he said, you  
11 know, and I didn't have to make any payments. So I  
12 followed up via email with him and some emails got  
13 returned and some didn't. Phone calls were very hard  
14 to -- you know, again, he -- not to -- or to put it  
15 bluntly, on the phone it was hard to communicate with him  
16 based on the circumstances and his mental health.

17 So I -- as soon as I found out that it didn't  
18 happen, I made every effort to remedy it. So, again,  
19 apologies. My mistake. I'm just hoping for, you know,  
20 some sort of lenience. And I've been super diligent ever  
21 since and never have made that mistake, nor will I again,  
22 both as a responsible, you know, citizen and business  
23 owner and a, you know, resident of the state. So ever  
24 since then it's never been an issue. Everything has been  
25 filed.



1           So that's all I -- I think I'll close with that.

2       Thank you so much.

3           JUDGE LONG: Thank you. I believe we are ready  
4       to conclude now.

5           So this case is submitted on Thursday,  
6       December 14th, 2023. The record is now closed.

7           I want to thank you both for coming today. I  
8       will make sure to send a written opinion of the decision  
9       within 100 days from today. Today's hearing in the Appeal  
10      of Smith and Reyes is now adjourned.

11                 (Proceedings adjourned at 10:40 a.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 2nd day  
of January, 2024.

ERNALYN M. ALONZO  
HEARING REPORTER