

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
B. GOLDMAN and L. BENICE, ) OTA NO. 220710879  
 )  
 APPELLANTS. )  
 )  
 )

## TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, January 18, 2024

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
B. GOLDMAN and L. BENCE, ) OTA NO. 220710879  
 )  
 ) APPELLANTS. )  
 )  
 )  
\_\_\_\_\_ )

Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 10:40 a.m. and concluding at 11:18 a.m. on  
Thursday, January 18, 2024, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES:

Panel Lead: ALJ VERONICA LONG

Panel Members: ALJ TOMMY LEUNG  
ALJ OVSEP AKOPCHIKYAN

For the Appellant: B. GOLDMAN  
JEREMY DUBOW

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

JOSH RICAFORT  
MARIA BROSTERHOUS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received at page 6.)  
(Department's Exhibits A-E were received at page 7.)

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

|                 | <u>PAGE</u> |
|-----------------|-------------|
| By Mr. Dubow    | 8           |
| By Mr. Ricafort | 25          |

APPELLANT'S  
WITNESSES:

|            | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|------------|---------------|--------------|-----------------|----------------|
| B. Goldman | 12            |              |                 |                |

CLOSING STATEMENT

|              | <u>PAGE</u> |
|--------------|-------------|
| By Mr. Dubow | 33          |

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

California; Thursday, January 18, 2024

10:40 a.m.

JUDGE LONG: With that, we are on the record.

We are opening the record in the Appeal of Goldman and Bence, OTA Case Number 220710879. This matter is being held before the Office of Tax Appeals. Today's date is Thursday, January 18th, 2024, and the time is approximately 10:40 a.m.

My name is Veronica Long, and I am the lead Administrative Law Judge for this appeal. With me today are Administrative Law Judges Tommy Leung and Ovsep Akopchikyan. As a reminder, the Office of Tax Appeals is not a court. It is an independent appeals body. The office is staffed by tax experts and is independent of the State's tax agencies.

With that, let me please have the parties introduce themselves for the record. Starting with the Appellants.

MR. DUBOW: Hi, Judge. I am Jeremy Dubow. I partner at NDH Advisors, and I represent the Appellant Brent Goldman and Lauren Bence. And Brent is on with us today as well.

MR. GOLDMAN: Hello. I'm Brent Goldman. I'm the Appellant in question, and I'm just getting over the flu.

1 I apologize if I forget to mute. Doing my best.

2 JUDGE LONG: All right. Thank you.

3 And Franchise Tax Board.

4 MR. RICAFORT: Good morning. My name is Josh  
5 Ricafort representing the Franchise Tax Board along with  
6 my Co-Counsel Maria Brosterhous.

7 JUDGE LONG: All right. Thank you.

8 As confirmed at the prehearing conference and in  
9 my minutes and orders following that conference, the  
10 issues to be decided in this appeal are: Whether  
11 Appellants have established reasonable cause to abate the  
12 late payment penalty; and whether Appellants have  
13 established reasonable cause to abate the estimated tax  
14 penalty.

15 Next, I'd like to move to the evidence in this  
16 appeal. Appellants submitted Exhibits 1 and 2.

17 FTB, do you have any objection to Appellants'  
18 exhibits?

19 MR. RICAFORT: No objections, Judge.

20 JUDGE LONG: Thank you.

21 Hearing none, Appellants' Exhibits 1 and 2 are  
22 now admitted and entered into the record.

23 (Appellant's Exhibits 1-2 were received  
24 in evidence by the Administrative Law Judge.)

25 JUDGE LONG: FTB has submitted Exhibits A

1 through E.

2 Appellants, do you have any objection to FTB's  
3 exhibits?

4 MR. DUBOW: No, Judge.

5 JUDGE LONG: All right. Hearing no objections,  
6 FTB's Exhibits A through E are now admitted and entered  
7 into the record.

8 (Department's Exhibits A-E were received in  
9 evidence by the Administrative Law Judge.)

10 JUDGE LONG: Now I'd like to briefly go over the  
11 order of the proceedings today. In my minutes and orders,  
12 I indicated that Appellants' presentation, including  
13 Mr. Bence's witness testimony -- I mean, Mr. Goldman's  
14 testimony, will be 15 minutes. Then FTB will have  
15 15 minutes for its presentation, and then Appellants will  
16 have 5 minutes for closing remarks or rebuttal. And I  
17 believe Mr. Goldman intended to testify today.

18 Mr. Goldman, is that still correct?

19 MR. GOLDMAN: That is correct.

20 JUDGE LONG: All right. Then I'm going to go  
21 ahead and swear you in if you're ready. Mr. Goldman, I'm  
22 going to ask you to please raise your right hand.

23 ///

24 ///

25 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

B. GOLDMAN,

produced as a witness, and having been first duly sworn by the Administrative Law Judge, was examined, and testified as follows:

JUDGE LONG: All right. Thank you, Mr. Goldman.

Appellants, you may begin your presentation when you are ready. You have 15 minutes.

MR. DUBOW: Okay. Thank you, Judge.

PRESENTATION

MR. DUBOW: We plan to -- I plan to open with an opening statement and then move on to a quick interview of Brent Goldman.

So simply put this is a relatively simple case. We all agree on the facts of the case. We are requesting an abatement of a late payment penalty and an estimated tax penalty for reasonable cause. Brent, the taxpayer, simply followed the advice of his accounting team with respect to remitting a California extension payment for the -- so this is 2020 case. So this would have been in April of 2022. His accounting firm, NDH, provided a recommendation for a payment which Brent followed.

It turned out the payment was less than the amount owed, which we'll get into in a moment. When he



1 filed his tax run in October, he remitted the remaining  
2 tax and was assessed a penalty. So a couple of comments  
3 on what led to the underpayment of his extension payment  
4 before I move into the interview.

5 So first and foremost, Brent and his wife Lauren  
6 are model taxpayers. They pay the amount that is due with  
7 their tax return every year on or before April 15th. Or  
8 in some years when California has extended, perhaps they  
9 pay it a little bit later if there is a disaster  
10 declaration. They also remit quarterly estimated tax  
11 payments on either a safe harbor basis or an actual basis  
12 so that they're not short with respect with any estimated  
13 tax payments on a quarterly basis.

14 Most relevantly, Brent is a sophisticated  
15 investor. He is someone who works in a financial field.  
16 So he is involved in the preparation of his tax returns.  
17 He's involved in providing information to his tax  
18 advisors, and is sophisticated enough to look at estimates  
19 and try to understand whether the amount that is being  
20 recommended to be paid is in line with what he believes is  
21 the amount that is due. As part of his job, he is an  
22 owner of a financial firm that issues a K-1. So a  
23 majority of Brent's income is via schedule K- 1 from the  
24 firm in which he is employed, and he is also an owner.

25 It's a financial firm that issues a sophisticated

1 K-1 that includes a variety of income, including capital  
2 gains, section 1256 income, their straddle income, income  
3 from self-employment, guaranteed payments, as well as a  
4 W-2. So it certainly would qualify as something that is  
5 complicated and sophisticated. And because of all the  
6 complexity with respect to the investment income, Brent  
7 does not receive a final K-1 until September 15th.

8 Prior to September 15th, on or about April 10th,  
9 he receives an estimate from his employer of the types and  
10 the character of income that's going to be included in his  
11 return. This typically comes out just a handful of days  
12 prior to the filing deadline. Brent shares that  
13 information with his tax advisors who update the tax  
14 projection to come up with a final amount that is due and  
15 make a recommendation for a payment. And oftentimes the  
16 amount of the income on the final K-1 is different than  
17 the amount that's on the estimated K-1 causing a potential  
18 increase or decrease of tax. Brent typically takes the  
19 advice of his advisors, which includes some cushion. So  
20 he intends to pay in 100 percent of his tax liability,  
21 plus perhaps a 5 to 10 percent cushion to ensure that  
22 everything is covered.

23 And for the 2020 tax year with all the  
24 sophistication and complication in this particular  
25 investment, he ended up being short. He relied entirely

1 on the estimate and the projection of his preparers, which  
2 has been in line and on point every other year, and it was  
3 a unique year for 2020. Noteworthy, had this occurred in  
4 2022 or beyond, the Franchise Tax Board has adopted a  
5 first time penalty abatement regime, and the failure to  
6 pay penalty would have been abated as Brent is a good  
7 taxpayer who pays his liability and pays all of his tax on  
8 time.

9 So in light of the fact that there are  
10 complications in his return, there is sophisticated  
11 investments. There was every effort met to apply his or  
12 to remit the tax that was due, not to mention all of the  
13 available liquidity to pay the tax. So this isn't someone  
14 who spent his money on other things and couldn't pay his  
15 tax on April 15th. He has his dollars available but  
16 simply relied on the advice of his competent and  
17 sophisticated tax professionals based on a sophisticated  
18 tax return with lots of income from K-1s that have  
19 different characters that included estimates. He did  
20 everything right. It turned out that the K-1 estimate  
21 wasn't perfect, and he was short for the first time in  
22 four or five years. And as a result, we believe he has  
23 reasonable basis doing all the right things that a prudent  
24 taxpayer would do to abate the penalty.

25 With that, Brent, I would like to ask you a few

1 questions if you are ready.

2 MR. GOLDMAN: Yeah. I'm all set.

3 MR. DUBOW: Okay. Sounds good.

4

5 DIRECT EXAMINATION

6 BY MR. DUBOW:

7 Q Brent, would you mind telling the Judge and the  
8 Panel just what you do for a living?

9 A Uh, yeah. Up between 20 -- 2009 and 2023, I was  
10 a trader at Bluefin Capital Venture and managing director  
11 for part of that time as well.

12 Q Thanks, Brent. And how are you compensated from  
13 that position?

14 A I had a small base pay from a W-2. It was a  
15 portion of my income, and then a majority was an  
16 investment return and then a guaranteed payment based on  
17 the performance of my individual trading unit.

18 Q Got it. And why do you file an extension every  
19 year? Why do we file an extension?

20 A Because the way the firm is structured and the  
21 timelines are on there, I believe our K-1s, we don't  
22 receive those until October. The final K-1 doesn't come  
23 out until October.

24 Q And would you consider yourself a sophisticated  
25 financial person?

1           A    Yes.

2           Q    And as a sophisticated financial person have you  
3 ever looked at your K-1?

4           A    I have attempted to.  Complicated.

5           Q    Yeah.  And what -- and what --

6           A    Very complicated.

7           Q    Yeah.  What are some of the challenges that you  
8 see in it for even a sophisticated financial person?

9           A    There's a tremendous amount of arcane tax law  
10 around derivatives.  The firm I worked for was primarily  
11 focused in the derivatives markets.  It had offices in  
12 London, Hong Kong, U.S., and Brazil.  So, you know,  
13 there's a lot of foreign income.  There's a lot of mixed  
14 straddles as Jeremy pointed out, and other portions of tax  
15 code that are just very unfamiliar to me, my colleagues,  
16 and including tax professionals.  Several of my younger  
17 colleagues over the years came to me looking for a  
18 recommendations for accountants because their existing  
19 accountants had dispatched them once they began working at  
20 this firm.

21           A    A lot of trading firms are W-2.  Our trading firm  
22 was K-1 for a large number of the employees, and their  
23 accountants subsequently, basically booted them out of  
24 their practice because they didn't want to deal with them.  
25 It's a very, very complicated return.

1           Q    Yeah. Understood. And because of the  
2 complications and the complexities, is it fair to say that  
3 you rely on your tax advisers to make strong estimates of  
4 the amount of liability that you have due while you are at  
5 least ball parking and running your own estimates to see  
6 if the amount of tax that is paid is in line with what  
7 your expectation is based on your cash that you've taken  
8 out of the company or W-2 income?

9           A    Yes. I rely entirely on professional advice. I  
10 have dabbled and tried to plug numbers into Turbo Tax or  
11 Quicken or other apps. It's not possible to do it on my  
12 own.

13          Q    And do you typically maintain sufficient  
14 liquidity throughout the year to cover your tax payments?

15          A    Yes. I'd say I'm overly conservative with how I  
16 invest. So, yes, I always have enough liquidity to pay  
17 things down if needed.

18          Q    Is it also one of the reasons that you have your  
19 tax team prepare year-end tax projections so that you can  
20 plan for the next four or five months so you're not  
21 planning for the next day or scrambling to cut a check  
22 when someone says you have a liability?

23          A    Yeah. I mean, trading is highly volatile work.  
24 You don't know -- you never know or if you're going to get  
25 paid at the end of the year and, if so, how much. So,

1       yeah, I'm always staying ahead of taxes and other  
2       obligations, you know, mortgages, et cetera, because I  
3       don't want any surprises.

4           Q     And despite the --

5           A     Yes.

6           Q     Sorry.  Despite the penalty that you incurred in  
7       2020, practically, have you done anything differently with  
8       your tax return?  Is there anything differently you could  
9       have done with respect to the preparation of your returns  
10      and the timing of the information that comes out as a  
11      trader?

12          A     The way that our firm's accounting -- I believe  
13      what you're trying to ask -- the way -- the way they  
14      deliver documents to us and the timeline in which they  
15      deliver them, no.  There's -- I mean, we -- you know, I'm  
16      trying to be more astute and reviewing everything, but  
17      given the timelines and the short turnarounds between when  
18      they deliver the draft K-1 and then the final K-1, there's  
19      not a whole lot that I could -- you know, there's not a  
20      whole lot else that could be done.

21          Q     And then finally, you know, in light of the --  
22      the relationship with some of your colleagues and whatnot,  
23      do you think there is, you know, any of these  
24      sophisticated financial professionals who could prepare  
25      their tax returns on their own without high-level tax

1 advice?

2 A No. I mean, I -- no. Given the number of  
3 professional CPAs and accounting firms that have indicated  
4 to me that they don't want to look at this and to my  
5 colleagues that they're not equipped to deal with this  
6 sort of a K-1, then no. I don't think any of them could do  
7 it solo.

8 MR. DUBOW: Okay. All right. Thanks, Brent. I  
9 have nothing further.

10 Judge, that concludes our testimony and so, we'll  
11 turn it over to you and the State.

12 JUDGE LONG: All right. Franchise Tax Board, do  
13 you have any questions for Mr. Goldman as a witness?

14 MR. RICAFORT: No questions, Judge.

15 JUDGE LONG: All right. Mr. Goldman, I have a  
16 question for you.

17 MR. GOLDMAN: Yes.

18 JUDGE LONG: It sounds like you're saying that  
19 you made, and you usually make -- you make payments based  
20 on an estimate that you received from your tax preparer,  
21 and I have a question about what that estimate is based  
22 on.

23 MR. GOLDMAN: Okay.

24 JUDGE LONG: You said it's based on an estimate  
25 that you forward to them that's provided by your company.



1       So, in this particular tax year, was the problem that the  
2       information that you provided to the return preparer  
3       turned out not to be correct and was later updated, or was  
4       the estimate that you received from the preparer incorrect  
5       based on the information you provided?

6               MR. GOLDMAN:  The -- I believe it's both.  The  
7       information I received from my preparer was definitely  
8       incorrect.  I submitted my checks based on the information  
9       I receive from them.  And the Bluefin draft K-1s that come  
10      out April 10th are always slightly different than those  
11      which ensue in -- on October 10th -- excuse me.  So, I  
12      believe there was a slight difference between the two.  
13      And I'm not sure to what degree the estimate I got was off  
14      based on what Jeremy mentioned as the discrepancy between  
15      the draft and the final K-1, and to what extent it was a  
16      mistake.  And --

17             MR. DUBOW:  But I had submitted --

18             MR. GOLDMAN:  I'm sorry.  Go ahead, Jeremy.

19             MR. DUBOW:  Jeremy Dubow talking.  Judge, I'll  
20      add one comment to that.  So every year there are  
21      differences between the actual and estimate.  Some years  
22      the differences are greater than others.  Sometimes the  
23      character of the income is different.  So, there is a  
24      variety of things that could potentially change between  
25      April and October.

1           The other challenge is the timing of the K-1  
2       delivery or the estimated K-1 delivery on April 10th. So  
3       on April 10th, you know, any accounting firm that is any  
4       good at what they do tends to be fairly busy around that  
5       time. So there was a combination of a change in numbers  
6       as Brent mentioned, as well as, you know, not a perfectly  
7       prepared tax projection. There were some errors in the  
8       projection that were run as well on behalf of my firm that  
9       prepared the return and -- or prepared the projection.

10           Once again, everything is being done within a  
11       handful of days prior to the deadline, taking a very  
12       complicated and sophisticated estimate. It's not on a  
13       schedule K-1, so it's information that's provided manually  
14       and almost by hand versus on a standard form that would be  
15       concluded. And so my team didn't have a -- didn't run a  
16       perfect computation, or there were some computational  
17       errors as well as a result of the -- and the timing of the  
18       data. And there were some differences in the actual  
19       numbers.

20           JUDGE LONG: Mr. Dubow, because the information  
21       that you just stated seems to be based on personal  
22       knowledge, I'd like to actually go ahead and swear you in  
23       and then have you affirm your previous statement, if  
24       that's all right with you? All right.

25           Mr. Dubow, I'm going to ask you to raise your

1 right hand.

2 J. DUBOW,

3 produced as a witness, and having been first duly sworn by  
4 the Administrative Law Judge, was examined, and testified  
5 as follows:

6

7 JUDGE LONG: Okay. And do you affirm your  
8 previous statement?

9 MR. DUBOW: I do.

10 JUDGE LONG: All right. Thank you.

11 I don't have any further questions. So I'm going  
12 to turn it over to my co-Panelists.

13 Judge Leung, do you have any questions?

14 JUDGE LEUNG: Yes, Judge Long. Thank you.

15 To the taxpayer, you mentioned that 2020 was a  
16 year different from other years. Could you enlighten us  
17 as to what was different about the year 2020, other  
18 than -- we're just talking financial difference, not any  
19 other things like the pandemic. So, please enlighten us  
20 about your firm.

21 MR. GOLDMAN: I don't -- if I gave that  
22 impression, I didn't mean to. I mean 20 -- the returns  
23 from my firm looked to me, to my untrained eye, looked  
24 similar most years. There were years where my income from  
25 the various buckets vary dramatically, and I can't -- you

1 know, as far as investor income, guaranteed payment  
2 income, I don't think -- Jeremy, I don't know if you have  
3 any -- I don't think -- I didn't mean to give that  
4 impression though. 2020 was, you know, the timeline might  
5 have been slightly different the way Jeremy -- I trust  
6 what Jeremy is saying that the data from my firm came in  
7 very late. I mean, that was definitely mid -- right in  
8 the middle of the pandemic. So, I suspect that their  
9 auditors and their accounting came -- was delivered very  
10 late, but I can't say with any certainty when it arrived  
11 at Jeremy's office.

12 MR. DUBOW: I can add.

13 JUDGE LEUNG: Go ahead.

14 MR. DUBOW: Excuse me. Jeremy Dubow jumping in  
15 here. I'll add that the character of income on the 2020  
16 K-1 looks similarly to the character of income on prior  
17 K-1s or future K-1s. The amount of the income, of course,  
18 fluctuates based on earnings of a trader, which will go up  
19 and down. The way information was presented does change  
20 and fluctuates a little bit every year as the firm  
21 enhances its approach to providing data. I think the --  
22 you know, the couple big differences between 2020 and  
23 other years were -- it's possible without -- I don't -- I  
24 didn't do the math on it. But it's possible that the  
25 differences between the estimate and the actual might have

1       been more significant, but I don't have the math. So I  
2       can't attest to that, as well as the computational error I  
3       think that was made by our firm in coming up with the  
4       right payment to remit.

5               JUDGE LEUNG: As regards to estimated payments, I  
6       mean, there's -- there's the payment people make on  
7       April 15th or thereabouts, there's other estimated  
8       payments made throughout the year. Comparably speaking,  
9       2020, 2019, 2018, 2017, were the estimated payments about  
10      the same, or did you adjust them? Or how did you  
11      determine what your estimated payments were for 2020? How  
12      did you make that determination?

13             MR. GOLDMAN: Sure. So the estimated payments  
14      for -- as I alluded to earlier, in trading your income is  
15      highly variable, so I have a W-2. And then I would be in  
16      communication with Jeremy's office typically quarterly to  
17      indicate, depending on the performance of my team and the  
18      performance of firm, income could vary, you know, from  
19      zero to, you know, multiples of my W-2 income. So,  
20      typically, quarterly, I would report to them what the  
21      firm's performance was and what my individual trading  
22      team's performance was, and we try to handicap a general  
23      idea of where we might land at the end of the year. But  
24      it's exceedingly difficult to give them a number.

25             So, as we got towards the fourth -- so we would

1       make estimated payments based on, you know, pretty rosy  
2       projections just to be conservative. But as the year  
3       would unfold and towards the fourth quarter, we would have  
4       a better sense of where those final numbers would land,  
5       and we would either make catch-up payments, or I'd back  
6       off estimated payments. So every year was entirely  
7       different insofar as that goes.

8               JUDGE LEUNG: So would you say your estimated  
9       payments for 2020 are the same as 2019? More or less than  
10      2019?

11             MR. GOLDMAN: More.

12             JUDGE LEUNG: More. Okay.

13             MR. GOLDMAN: 2020, if I recall, was a pretty  
14      good year. There was a lot of trading during the  
15      pandemic.

16             JUDGE LEUNG: That was my recollection too. I  
17      gather from what you're telling us also that the IRS gave  
18      you one, that one time abatement. So I imagine you also  
19      underpaid -- of paying late for the federal return?

20             MR. GOLDMAN: Correct. The IRS allowed for the  
21      abatement. Yes.

22             JUDGE LEUNG: Okay. Those are all my questions,  
23      Judge Long. I'll throw it back to you.

24             JUDGE LONG: All right. Thank you.

25             Judge Akopchikyan, do you have any questions?

1 JUDGE AKOPCHIKYAN: I do have a quick question,  
2 and this is probably more for Mr. Dubow, if I'm  
3 pronouncing your last name correctly. And if I'm not, I  
4 apologize.

5 Was the difference in the estimated payment in  
6 April and the final payment in October, would you say,  
7 mostly due to a CPA calculation error or more to do with  
8 the mistake in the draft?

9 MR. DUBOW: Yeah. Sure. So Jeremy Dubow  
10 speaking. As I mentioned earlier there was a -- there was  
11 a minor difference in the estimate of the -- the K-1  
12 estimate compared to the final K-1. But every year there  
13 are minor differences, and we attempt to create enough  
14 cushion with our April payment to ensure that we are not  
15 short to avoid surprises. So the majority -- not  
16 necessarily all, but the majority of the difference was a  
17 result of a computational error. Anything -- anything  
18 separate from the majority of the difference, we try to  
19 cover with cushion. So we recognize the likelihood or the  
20 potential for adjustments and we add cushion, but the  
21 cushion, obviously, wasn't sufficient to cover  
22 computational error.

23 JUDGE AKOPCHIKYAN: And every year the draft K-1,  
24 you said, comes up sometime in April, April 10th, I think  
25 you said. Is that because the investment firm is not a

1       calendar-year end or --

2               MR. DUBOW: The investment firm is a calendar  
3       year taxpayer, and it has to file its tax return like any  
4       other partnership. Initially, it's due on March 15th, and  
5       the extended due date is September 15th. It files its  
6       final -- it files its actual tax return probably right  
7       before the September 15th deadline which is why we receive  
8       K-1s -- final K-1s right before September 15th. So it's  
9       working with its tax advisers or its internal CFO and  
10      controller to provide an estimate prior to April 15th so  
11      that its stakeholders can do their best to prepare a tax  
12      projection and remit the right amount of tax. But it  
13      certainly does not issue a, quote, unquote, "Draft K-1."  
14      It issues information to the stakeholders to provide to  
15      their tax team -- or presumably if they are preparing  
16      their return a personally -- to attempt to run a  
17      projection.

18             JUDGE AKOPCHIKYAN: I understand. Okay. I don't  
19      have any other questions. Thank you.

20             JUDGE LONG: All right. Franchise Tax Board,  
21      since I've sworn in Mr. Dubow, do you have any questions  
22      for him?

23             MR. RICAFORT: No questions, Judge.

24             JUDGE LONG: All right. With that, I think we're  
25      ready for Franchise Tax Board to begin its presentation.



1                   MR. RICAFORT: Thank you very much, Judge.

2

3                                   PRESENTATION

4                   MR. RICAFORT: Good morning, everyone. My name  
5 is Josh Ricafort and, along with my Co-Counsel Maria  
6 Brosterhous, we represent the Respondent Franchise Tax  
7 Board.

8                   The issues on appeal are: Whether Appellants  
9 have established reasonable cause to abate the late  
10 payment penalty; and whether Appellants have established  
11 the basis for abating the estimated penalty.

12                  The law requires FTB to assess a late payment  
13 penalty when a taxpayer pays the taxes due on their return  
14 late, unless the taxpayer establishes that their failure  
15 to pay timely was due to reasonable cause and not willful  
16 neglect. For the tax year 2020, there is no dispute that  
17 FTB received the payment that satisfied Appellants'  
18 balance reported on their 2020 tax return more than five  
19 months after the due date. Therefore, FTB properly  
20 imposed a late payment penalty.

21                  Appellants request abatement of the late payment  
22 penalty based on their assertion that they do not receive  
23 their schedule K-1 until September and, for extension  
24 purposes, have historically relied on draft financials  
25 despite fluctuating income and the tax preparer to timely

1 and accurately determine their tax payments. Appellants  
2 state that when they received their final K-1 in  
3 September, after the payment due date, their income was  
4 much higher than expected, resulting in a large balance  
5 due.

6 It is well-established law that a taxpayer's  
7 inability to pay the amount of tax shown on their return  
8 because of lack of necessary information or inaccurate  
9 information is not considered reasonable cause. While  
10 Appellant state that they relied on incomplete and  
11 inaccurate information, the Board of Equalization has long  
12 held in the Appeals of Scott and Sleight, that the fact  
13 that tax information is inaccurate is insufficient to meet  
14 the taxpayer's burden of establishing reasonable cause.  
15 Additionally, the Office of Tax Appeals held in the Appeal  
16 of Moren that an assertion that records were difficult to  
17 obtain without substantiation of efforts made to retrieve  
18 those records or otherwise showing they were unobtainable  
19 is not sufficient to show reasonable cause.

20 Appellants have not provided any evidence to  
21 substantiate what efforts they undertook to obtain  
22 information to timely pay the accurate amount of taxes  
23 reflected on their return. Appellant, as a matter of  
24 fact, admitted that he was part owner of the firm and  
25 easily has access to the firm's financial information. So

1 absent any evidence to show that despite Appellants'  
2 diligent efforts that their income was obtainable prior to  
3 the payment due date, Appellants simply have not shown or  
4 established that they exercised ordinary business care and  
5 prudence to support a reasonable assertion -- or a  
6 reasonable cause -- or to support reasonable cause  
7 abatement of the late payment penalty.

8 In response to Appellants' admission that  
9 complexity of tax law led the delay and the payment,  
10 complexity of tax law which leads to the delay in  
11 computing tax liability and, therefore, a delay in paying  
12 the balance due on the return is not reasonable cause.  
13 It's also been long held by the Board of Equalization in  
14 the Appeal of Berolzheimer, as well as the Appeal of  
15 Sleight, as I previously mentioned earlier.

16 Additionally, the law only allows for abatement  
17 of the late payment penalty based on the reliance of a tax  
18 professional if certain elements are met. In this appeal,  
19 Appellants failed to meet that requirement that a full  
20 disclosure of relevant facts and documents to the tax  
21 professional because Appellants acknowledge they did not  
22 receive the K-1 until after the due date of the payment  
23 for taxes. And thus, you know, they were just unable to  
24 provide the complete information to their tax preparer by  
25 the due date for the payment of taxes. So, accordingly,

1 Appellants have not established reasonable cause for the  
2 abatement of the late payment penalty.

3 With regards to the estimate penalty, Appellants  
4 have not provided any arguments supported by objective and  
5 contemporaneous evidence that they fall within the narrow  
6 exceptions required by the law for abating the estimate  
7 penalty. Therefore, the estimate penalty was properly  
8 imposed by FTB and cannot be abated. Accordingly, FTB  
9 respectfully requests that the Office of Tax Appeals  
10 sustain the late payment and estimate penalties.

11 And at this time, I'm happy to answer any  
12 questions the Office of Tax Appeals may have.

13 JUDGE LONG: All right. Thank you, FTB. I do  
14 have a question.

15 I want to ask, it sounds like, based on  
16 Appellants' statements here today, that the underpayment  
17 may have been due to a miscalculation of their return  
18 preparer. FTB, would a miscalculation by the return  
19 preparer constitute reasonable cause for abatement of the  
20 late payment penalty?

21 MR. RICAFORT: It does not, Judge. As I  
22 previously mentioned, it's been long held by the Board of  
23 Equalization in the Appeal of Berolzheimer that  
24 calculations by a tax preparer is not grounds for -- an  
25 error of calculation by a tax preparer is not grounds for

1 reasonable cause abatement of the late payment penalty.

2 JUDGE LONG: All right. Thank you.

3 I have no further questions. I'm going to turn  
4 it over to my co-Panelists.

5 Judge Leung, do you have any questions for  
6 Franchise Tax Board or Appellant at this time?

7 JUDGE LEUNG: Yes, I do. Thank you.

8 For Franchise Tax Board, you mentioned there's a  
9 narrow exception as far as the estimated tax penalty.  
10 Would you give us a brief summary of what those exceptions  
11 might be.

12 MR. RICAFORT: I'll certainly be happy to, Judge.  
13 One of the exceptions is an unusual circumstance. And  
14 that usually requires a catastrophic circumstance as the  
15 Office of Tax Appeals held in the Appeal of Saltzman. And  
16 what that usually means, as stated by the IRS in their  
17 Internal Revenue Manual, are situations wherein the  
18 taxpayer lost their records because of a flood, fire, or  
19 natural disaster, or the taxpayer became seriously ill.  
20 Essentially, it's got to be a disaster or an unusual  
21 circumstance that results in an unexpected hardship.

22 Here, the taxpayer may argue that the payments  
23 that they gain is unusual, but it's not of a catastrophic  
24 event. They're gaining some funds. They are not  
25 suffering as result of a catastrophe, so that exception

1 does not apply.

2 And the other most common narrow exception is  
3 when a taxpayer retires at the age of 62, which there's no  
4 facts really in this case or on the record to show that  
5 Appellant retired upon obtaining the age 62 and became  
6 disabled, which is the other requirement that's required  
7 along with that exception.

8 JUDGE LEUNG: Mr. Ricafort, I sort of recall --  
9 maybe it's been taken out of the law already -- but for  
10 individuals, if they paid 100 percent of their last year's  
11 taxes, they would be -- the estimate -- the underpayment  
12 tax penalty would be forgiven. Is that exception still  
13 there or --

14 MR. RICAFORT: My understanding is that if the  
15 taxpayer has an adjusted -- under California law, if a  
16 taxpayer has an adjusted gross income that exceeds a  
17 million dollars, which is the case here, they have to make  
18 100 percent of their estimate payments for the tax year at  
19 issue, which is what's going on in this case.

20 JUDGE LEUNG: Okay. Thank you.

21 MR. RICAFORT: Thank you, Judge.

22 JUDGE LEUNG: Those are all my questions. Thank  
23 you.

24 JUDGE LONG: All right. Judge Akopchikyan, do  
25 you have any questions?

1 JUDGE AKOPCHIKYAN: I don't have question for the  
2 Franchise Tax Board, but I do have a question for  
3 Appellant based on what Franchise Tax Board argued.

4 And it seems like Appellants' position is that  
5 there was a mistake in the estimated payment because one,  
6 they received the draft K-1. I'm going to call it a draft  
7 K-1 even though I understand one was not issued. You got  
8 that very close to the April 15th deadline. And second,  
9 the calculation itself was a very complicated calculation.  
10 It was not an ordinary calculation. And FTB's response  
11 seems to be that Appellant could have provided that  
12 information to his preparer before they didn't have to  
13 wait for the firm to provide a K-1 before April 10th. It  
14 didn't have to wait for the firm to provide the draft K-1.

15 Can you provide some insight as to what  
16 Appellant -- if Appellant could have provided that  
17 information to his preparer before the April 10th deadline  
18 or April 10th draft K-1?

19 MR. GOLDMAN: No, I could not have. As I said, I  
20 reach out to the firm quarterly with updates on the  
21 performance of my group and my estimated performances of  
22 the firm. Those are purely based on sort of -- I'm not an  
23 owner. I think Jeremy actually misspoke. I was not a  
24 full owner of the firm. I was a junior limited partner, I  
25 guess is what they call us. So, I don't -- I can't walk

1 in and get access to the firm's accounting and see  
2 up-to-the minute performance. So any -- any updates I've  
3 given them is based on, sort of, water cooler, my  
4 impression of how it's doing. And then I do insight into  
5 my own group's performance, which is, you know,  
6 five percent of the overall firm's performance. So no, I  
7 wait. In terms of actual hard numbers and data that I can  
8 provide -- reliably provide for tax preparation, I do not  
9 get those until our firm's auditor and accounting firm  
10 delivers that to our CFO. And he then immediately e-mails  
11 out to us. Typically, yeah, between April 5th and  
12 April 10th is when that comes out.

13 MR. DUBOW: And I'll add that is also why that  
14 there is a request for an abatement for the estimated tax  
15 penalty in addition to the failure to pay penalty. Brent  
16 is, as he mentioned, a limited partner. I called him an  
17 owner because he receives a K-1, which is true. He  
18 receives a K-1 from the business. But as a limited  
19 partner, his access to financial information is different.  
20 But I'll even go further that even if he had access to all  
21 the financial information, you know, the amount of complex  
22 computations that go into a financial term like this make  
23 it nearly impossible for most of the key stakeholders to  
24 have a strong understanding of how much taxable income  
25 which could be very different than the amount of financial



1 income.

2 I'll also add that as a flow through business,  
3 Brent and the other limited partners are not taxable on  
4 the cash that they take out of a business. They are  
5 taxable on their allocable share of income, which could be  
6 very different than the cash that they received, based on  
7 the partnership's method of accounting or how it  
8 recognizes income or the requirements to maintain a  
9 certain amount of capital in the business. And so, you  
10 know, with all due respect, I don't think it's quite as  
11 easy to simply say someone is a business owner, therefore,  
12 they have a strong understanding of exactly what's going  
13 to be reported or allocated to them on a K-1 for a very  
14 sophisticated financial firm.

15 JUDGE AKOPCHIKYAN: Thank you both. I do not  
16 have any other questions.

17 JUDGE LONG: All right. With that we're ready  
18 for Appellants' closing remarks. You have five minutes.

19 MR. DUBOW: Okay. Thank you, Judge.  
20

21 CLOSING STATEMENT

22 MR. DUBOW: Look, we spent a lot of time today  
23 talking about the sophistication of this financial firm in  
24 which Brent worked. You know, I think what it comes down  
25 to is, did the taxpayer exercise due care? Was he prudent

1 with respect to how he submitted his estimated tax  
2 payments, and how he remitted his April 15th, or whatever  
3 the date was due to COVID extension payment during the  
4 year?

5 And I think it's clear from the evidence and from  
6 the conversation that we've had today that we've got a  
7 sophisticated taxpayer who does everything in his power to  
8 pay the right amount of tax at the right time. There  
9 wasn't any games played in this situation. A combination  
10 of factors led to an underpayment here. Two of which were  
11 a difference and a potential difference in the estimate  
12 between the projected K-1 and the final K-1, and then the  
13 majority of the difference was a computational error from  
14 the accounting firm which does this work on an annual  
15 basis.

16 He understands the K-1 deals with the  
17 complexities, but at the same time has imperfect  
18 information, is preparing an estimate on April 10th, there  
19 about, you know a handful of days before a filing deadline  
20 and with the intention of paying in 100 percent of the tax  
21 liability. So for all these those reasons, we have a  
22 situation where the taxpayer did exercise due care, was,  
23 prudent, would have qualified for a first-time penalty  
24 abatement if this had happened in 2022 or later.

25 And so for all those reasons, we respectfully

1 request from this Panel that it does abate the penalties  
2 because we have a taxpayer who couldn't have done anything  
3 different, just in this case ended up short the one time  
4 out of all the years he's paid tax in California.

5 JUDGE LONG: All right. Mr. Dubow, does that  
6 conclude your case presentation?

7 MR. DUBOW: It does, and that concludes my  
8 presentation. Thank you.

9 JUDGE LONG: All right. I'm going to turn it  
10 over to my co-Panelists to see if there's any final  
11 questions.

12 Judge Leung, do you have any final questions?

13 JUDGE LEUNG: No final questions. Thank you.

14 JUDGE LONG: All right. Judge Akopchikyan, do  
15 you have any final questions?

16 JUDGE AKOPCHIKYAN: No final questions here  
17 either. Thank you everybody.

18 JUDGE LONG: All right. I also do not have any  
19 final questions. With that, we are ready to conclude the  
20 hearing.

21 I want to thank the parties for their  
22 presentations today. The Panel of Administrative Law  
23 Judges will meet and decide the case based upon the  
24 arguments, testimony, and evidence in the record. We will  
25 issue our written decision no later than 100 days from

1       today. The case is submitted, and the record is now  
2       closed.

3               This concludes our morning calendar. The  
4       afternoon calendar will reconvene at 1:00 o'clock. Thank  
5       you.

6               (Proceedings adjourned at 11:18 a.m.)

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 8th day  
of February, 2024.

ERNALYN M. ALONZO  
HEARING REPORTER