

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
N. TUPPER and J. TUPPER,) OTA NO. 230212644
)
 APPELLANTS.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, January 18, 2024

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 1:23 p.m. and concluding at 1:36 p.m. on
Thursday, January 18, 2024, reported by
Ernaly M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Administrative Law Judge: TOMMY LEUNG

For the Appellant: N. TUPPER

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

VIVIAN HO
MARIA BROSTERHOUS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received at page 5.)
(Department's Exhibits A-E were received at page 5.)

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

	<u>PAGE</u>
By Mrs. Tupper	7
By Ms. Ho	8

CLOSING STATEMENT

	<u>PAGE</u>
By Mrs. Tupper	11

1
2
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California; Thursday, January 18, 2024

1:23 p.m.

JUDGE LEUNG: Today is January 18th, 2024. The time is about 1:15 -- 1:20. This is Case Number 230212644, the Appeal of Tupper, tax year 2021. And the issues to be decided for the 2021 tax year, whether there's reasonable cause for a late payment of the tax and whether interest should be abated.

We have from the Franchise Tax Board Exhibits A through E and for Appellants Exhibits 1 and 2, which all be admitted into the record.

(Appellants' Exhibits 1-2 were received in evidence by the Administrative Law Judge.)
(Department's Exhibits A-E were received in evidence by the Administrative Law Judge.)

I will now have the parties introduce themselves for the record, beginning with the Appellants.

Mrs. Tupper.

MRS. TUPPER: My name is Natalie Tupper, and I'm going to be speaking on behalf of myself and my husband Jason Tupper.

JUDGE LEUNG: Welcome.

MRS. TUPPER: I'm the taxpayer.

JUDGE LEUNG: Thank you.

1 MRS. TUPPER: Thank you.

2 JUDGE LEUNG: Thank you.

3 Franchise Tax Board.

4 MS. HO: This is Vivian Ho for the Franchise Tax
5 Board.

6 MS. BROSTERHOUS: Good afternoon. This is Maria
7 Brosterhous also for the Franchise Tax Board.

8 JUDGE LEUNG: Good afternoon. Welcome to all.
9 And let's see. My timing schedule here says the taxpayer
10 has 10 minutes for her presentation. Franchise Tax Board
11 has 10 minutes for their presentation, and taxpayer has 5
12 minutes for rebuttal.

13 Ms. Tupper, since you'll be providing some
14 testimony also, I'm going to ask you to raise your right
15 hand so I can swear you in.

16 MRS. TUPPER: I'm raising it.

17 JUDGE LEUNG: Okay.

18

19 N. TUPPER,
20 produced as a witness, and having been first duly sworn by
21 the Administrative Law Judge, was examined, and testified
22 as follows:

23

24 JUDGE LEUNG: Thank you. Please put your hand
25 down, and you may start your presentation when you're

1 ready. Thank you.

2

3

PRESENTATION

4

MRS. TUPPER: Okay. Thank you for your time.

5

6 My name Natalie Tupper and, again, I'm speaking
7 on behalf of myself and my husband Jason Tupper. We were
8 requesting that the \$866.62 penalty be refunded to us. We
9 had provided our CPA all our tax documents for the 2021
10 tax year in February of 2022. We received an email
11 stating what we owed on April 15th, 2022, when taxes were
12 due April 18th, 2022. We were informed that we owed our
13 large sum of money to the state and the fed.

14 We informed our CPA that it was completely unfair
15 that he let us know three days before our due date. We
16 informed him that we had to liquidate that money from our
17 stocks in order to pay it, which takes five days minimum.
18 That is exactly what we did, was to liquidate stocks and
19 we received the money and paid what we owed in full on
20 April 20th, 2022. We were two days late. However, we do
21 not believe that we should be penalized when we paid our
22 taxes in full and the timing was out of our hands because
23 our CPA's lack of notice.

24 Please refund us the penalty of \$866.62 as we
25 always pay our taxes on time, and we thank you for your
time and your consideration.

1 JUDGE LEUNG: Thank you, Ms. Tupper.

2 Franchise Tax Board, do you have any questions
3 for Ms. Tupper?

4 MS. HO: This is Vivian Ho. No questions for
5 Ms. Tupper. Thank you.

6 JUDGE LEUNG: Okay. Then, Franchise Tax Board,
7 please again with your presentation.

8 MS. HO: Thank you, Judge.

9

10 PRESENTATION

11 MS. HO: Good afternoon. My name is Vivian Ho.
12 I, along with my co-Counsel Maria Brosterhous, represent
13 Respondent the Franchise Tax Board.

14 The issues presented before you today are whether
15 Appellants established reasonable cause for the abatement
16 of the late penalty and whether there is grounds for the
17 abatement of interest for the 2021 tax year. FTB's
18 position is that Appellants have not established
19 reasonable cause for the abatement of the late payment
20 penalty and have not established grounds for the abatement
21 of interest. The law provides that Respondent must impose
22 a late payment penalty when the amount shown as due on any
23 tax return is not timely paid.

24 Because Appellants failed to make payment by the
25 due date, Respondent correctly imposed the late payment

1 penalty. The late payment penalty may be abated if the
2 taxpayer establishes that the late payment was due to
3 reasonable cause. To establish reasonable cause a
4 taxpayer must show that the failure to timely pay occurred
5 despite the exercise of ordinary business care and
6 prudence. The burden of proof is on the taxpayer to show
7 that reasonable cause exists to support abatement.

8 Appellants have not established reasonable cause
9 for the abatement of their late payment penalty.

10 Appellants assert that they were late in payment due to
11 the additional time required for their fund transfer from
12 their financial institution. As stated in the
13 precedential opinion of Appeal of Friedman, an oversight
14 is not reasonable cause. Appellants did not exercise
15 ordinary business care and prudence when they did not
16 account for the processing time of their payment method.
17 Appellants know of the payment deadline well in advance
18 and could have made arrangements to pay and obtain their
19 funds timely. However, Appellants failed to do so and
20 failed to exercise ordinary business care and prudence.

21 Appellants also state that they did not have
22 sufficient time to make payment because their tax preparer
23 did not provide them enough time. Appellants are
24 presumably arguing that they did not have the calculation
25 of their tax liability. As held in the Appeal of

1 Berolzheimer, issues with calculating a tax liability is
2 not reasonable cause for late payment. As held in the
3 Appeal of Rougeau, a taxpayer has a duty to make timely
4 payment based on the reasonable estimate of their tax
5 liability. Appellants choosing to rely on a tax preparer
6 to provide calculations does not negate Appellants' duty
7 to make timely payment based on the reasonable estimate.

8 In addition, the fact that tax information lost,
9 lacking, or difficult to obtain is insufficient by itself
10 to meet the standard for reasonable cause. Appellants
11 must also demonstrate efforts to gather the necessary
12 information and demonstrate that they could not have
13 acquired the necessary information in order to satisfy
14 reasonable cause. Appellants have not alleged nor
15 established they were missing essential tax information
16 without which they cannot make a reasonable estimate of
17 their tax liability. Appellants have also not alleged
18 that they made efforts to gather essential tax information
19 and was prevented from doing so. As such, Appellants have
20 not established reasonable cause for the abatement of the
21 late payment penalty.

22 Appellants also request a first-time penalty
23 waiver. However, for tax years prior to 2022, there is no
24 legal authority that allows for a first-time penalty
25 waiver. Regarding the abatement of interest, the

1 imposition of interest is mandatory under the law. As
2 stated in the Appeal of Moren, interest is not a penalty,
3 but is compensation for a taxpayer's use of money which
4 have been paid to the State. There is no reasonable cause
5 exception to the imposition of interest.

6 Accordingly, FTB respectfully request Appellants'
7 claim for refund for the late payment penalty in the
8 amount of \$843.92 and interest be denied.

9 Thank you. I can answer any questions that you
10 may have.

11 JUDGE LEUNG: Thank you, Ms. Ho. I may have some
12 later on, but let's go back to Mrs. Tupper.

13 Mrs. Tupper your rebuttal. Thank you.
14

15 CLOSING STATEMENT

16 MRS. TUPPER: I completely understand everything
17 that has been laid out. However, our tax liability
18 changes every year, and the amount we owe changes every
19 year. There's no possible way for me to know exactly what
20 we have owed, which is why I do rely on the
21 professionalism and the timeliness of my CPA, which is
22 also why I gave him all of our stuff well in advance to be
23 able to do that.

24 And he did apologize, which is as seen in the
25 exhibit that I provided with the emails that he was very

1 apologetic of what he did. And he was taking ownership of
2 the fact that he didn't spend enough time -- he didn't
3 have enough time to do everything because he took more on
4 than he needed to.

5 But at the same time as Ms. Ho also did say, this
6 is a first-time waiver for us that we are requesting as we
7 always pay our taxes on time. And we see no just cause as
8 to why we should have to pay a penalty when it was paid in
9 full two days later with all of this.

10 Thank you.

11 JUDGE LEUNG: Okay. Mrs. Tupper, I looked at
12 that chain of emails between yourselves and the tax
13 preparer. It seems to me that he gave your return
14 sometime -- was that April 15th a Friday afternoon or
15 evening?

16 MRS. TUPPER: Yes, a Friday afternoon.

17 JUDGE LEUNG: Okay.

18 MRS. TUPPER: Yes.

19 JUDGE LEUNG: And I guess during that year the
20 returns were not due until 16th, 17th, 18th.

21 MRS. TUPPER: The 18th.

22 JUDGE LEUNG: Okay. And you so you gathered your
23 information, got your money together, and you were able to
24 pay on the 20th. So did you also pay late to the IRS?

25 MRS. TUPPER: Yes.

1 JUDGE LEUNG: And the IRS --

2 MRS. TUPPER: I was not -- they did not charge
3 me.

4 JUDGE LEUNG: They did not charge you because of
5 the first-time abatement or was for some other reason?

6 MRS. TUPPER: I believe it was the first-time
7 abatement.

8 JUDGE LEUNG: Okay. And you're telling us that
9 up until 2021 tax year that this is basically the first
10 time you've paid late?

11 MRS. TUPPER: Yes. We currently are paying to
12 the IRS from previous tax years. Like, we have a loan
13 program -- or not a loan program -- where we're repaying
14 it in full. But that's something that's been authorized
15 by the IRS to pay our taxes, but we've never paid our
16 taxes late ever.

17 JUDGE LEUNG: So we're talking about an
18 installment agreement?

19 MRS. TUPPER: Yes.

20 JUDGE LEUNG: Is that what you're talking --

21 MRS. TUPPER: An installment plan, yes.

22 JUDGE LEUNG: What year was that for?

23 MRS. TUPPER: 2017.

24 JUDGE LEUNG: So tell me about the 2021 tax year.
25 Was it like an unusual year for you folks? Did you --

1 MRS. TUPPER: Yes.

2 JUDGE LEUNG: Was it a really nice financial
3 year?

4 MRS. TUPPER: It -- it --

5 JUDGE LEUNG: Just hit the jackpot or something
6 like that?

7 MRS. TUPPER: No. I wish. No. We have stocks
8 that we have invested in and that year they did really
9 well, which is why we ended up having a much large tax
10 amount due. And on top of it, I think it was probably --
11 I'm assuming -- a big year for a lot of people because of
12 him not being able to get everybody's taxes done. I don't
13 know.

14 But yes, it wasn't -- it was more than we
15 expected to pay, and it's -- and we keep our money in our
16 stocks, not in an account so that we can, you know, make
17 the most amount of money that we can. And so that's why
18 we have to liquidate it, which is why him giving us notice
19 on a Friday doesn't help us when the stock markets are
20 closed after a certain time on Friday and then Saturday
21 and Sunday and then they are due on Monday. So that's --
22 that's also part of it is why we felt very stuck.

23 JUDGE LEUNG: To the Franchise Tax Board, Ms. Ho,
24 so the return for that year and payment were due
25 April 18th, Monday, correct?

1 MS. HO: Yes, that's correct.

2 JUDGE LEUNG: And the taxpayer's record, this is

3 basically the first time they've been late?

4 MS. HO: I believe that's correct.

5 JUDGE LEUNG: Okay. I have no further questions

6 for either party. I understand the case. I understand

7 what your explanations are. I will take that into

8 consideration. I'm going to close the record now and have

9 this case submitted. I will endeavor to have the written

10 decision out to everybody within 100 days.

11 Thank you very much. You have a great day. This

12 is the last hearing for today for OTA. So I guess we're

13 basically signing off.

14 Good day, everyone. Thank you.

15 (Proceedings adjourned at 1:36 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 9th day
of February, 2024.

ERNALYN M. ALONZO
HEARING REPORTER