

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
L. BELLEY,) OTA NO. 221011713
)
 APPELLANT.)
)
)

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, February 14, 2024

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings,
taken at 12900 Park Plaza Dr., Suite 300,
Cerritos, California, 90703, commencing at
1:40 p.m. and concluding at 2:09 p.m. on
Wednesday, February 14, 2024, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ ASAF KLETTER

Panel Members: ALJ KEITH LONG
ALJ KENNY GAST

For the Appellant: L. BELLEY
R. SCHNARR

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

SARAH FASSETT
JACLYN ZUMAETA

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I N D E X

E X H I B I T S

(Appellant's Exhibit 1 was received at page 8.)

(Department's Exhibits A-L were received at page 8.)

OPENING STATEMENT

PAGE

By Mr. Schnarr 10

By Ms. Fassett 18

CLOSING STATEMENT

PAGE

By Mr. Schnarr 22

1 Cerritos, California; Wednesday, February 14, 2024

2 1:40 p.m.

3
4 JUDGE KLETTER: Let's go ahead and go on the
5 record.

6 Great. This is the Appeal of Belley. It's OTA
7 Case No. 221011713. Today is Wednesday, February 14th,
8 and the time is 1:40 p.m.

9 As I mentioned, I'm Administrative Law Judge Asaf
10 Kletter, and with me are Administrative Law Judges Keith
11 Long and Kenny Gast. While I'm the lead Administrative
12 Law Judge in conducting this hearing, all three judges are
13 coequal decision makers.

14 Also present is our stenographer Ms. Alonzo who
15 is reporting this hearing verbatim. To ensure we have an
16 accurate record, we ask that everyone speaks one at a time
17 and does not speak over each other. Please try to speak
18 clearly and loudly. And please mute your microphone when
19 you're not speaking just to avoid feedback or background
20 noise. When needed, Ms. Alonzo will stop the hearing
21 process to ask for clarification. And after the hearing,
22 Ms. Alonzo will produce the official hearing transcript
23 which will be available on the OTA website. The hearing
24 transcript and video recording are part of the public
25 record.

1 This proceeding is a live broadcast and just be
2 aware of that. The Office of Tax Appeals is not a court.
3 We are an independent appeals body. The Office of Tax
4 Appeals is staffed by tax experts and is independent of
5 the State's tax agencies.

6 If anyone has any questions during this process,
7 please direct them to me. I ask that you just please wait
8 for me to acknowledge you so I can hear the question.

9 Now, I'd like to begin by identifying the
10 parties. So can the parties please each identify yourself
11 by stating your name for the record, beginning with
12 Appellant.

13 MS. BELLEY: Louise Belley, B-e-l-l-e-y.

14 MR. SCHNARR: I am her husband Richard Schnarr,
15 S-c-h-n-a-r-r. Thank you.

16 JUDGE KLETTER: Thank you.

17 And just a thing about the mics. Ms. Belley, if
18 you could just please repeat your name. There's a little
19 push button so the mic will pick you up.

20 MS. BELLEY: Louise Belley, B-e-l-l-e-y.

21 JUDGE KLETTER: Thank you so much.

22 And for Respondent Franchise Tax Board.

23 MS. FASSETT: Sarah Fassett for Franchise Tax
24 Board.

25 MS. ZUMAETA: Jackie Zumaeta for Franchise Tax

1 Board.

2 JUDGE KLETTER: Thank you so much.

3 So we met for a prehearing conference to discuss
4 this appeal on January 23rd, 2024. As reflected in the
5 minutes and orders that were issued on January 30th, 2024,
6 we discussed an issue which was described as following:
7 Whether California taxable -- whether the California --
8 I'm so sorry. Let me see if I can just pull it up so I
9 can correctly say it. Whether California taxable income
10 excludes Canadian pension income. And in those minutes
11 and orders, the parties were invited to suggest alternate
12 issue statements at the oral hearing. And this is not the
13 final issue statement. It's just what was generally
14 discussed at the minutes and orders.

15 With respect to the evidentiary record, the
16 Franchise Tax Board provided Exhibits A through L with its
17 opening brief.

18 Franchise Tax Board, are there any new exhibits?

19 MS. FASSETT: Nothing new. Thank you.

20 JUDGE KLETTER: Now as noted in response to the
21 minutes and orders, Appellant objected to FTB's Exhibits A
22 through L as irrelevant. Office of Tax Appeals
23 Regulations state that all relevant evidence shall be
24 admissible. Relevant evidence tends to prove or disprove
25 any disputed fact of significance to the appeal.

1 I have considered Appellant's objection, and I
2 will admit Franchise Tax Board's exhibits because I find
3 they may be relevant to an issue in dispute. The Panel
4 will determine the weight, if any, to give the exhibits.
5 Therefore, Exhibits A through L are entered into the
6 record.

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

9 JUDGE KLETTER: Appellant provided what was
10 renumbered Exhibit 1.

11 Appellant, do you have any new exhibits today?

12 MR. SCHNARR: Nothing new but I have -- we have a
13 copy identical that we want to speak from, and it's
14 available for everybody.

15 JUDGE KLETTER: Thank you so much.

16 Franchise Tax Board did not object to the
17 admissibility of the renumbered Exhibit 1, and they should
18 have a copy. Therefore, the Exhibit 1 is entered into the
19 record.

20 (Appellant's Exhibit 1 is received in
21 evidence by the Administrative Law Judge.)

22 JUDGE KLETTER: Now, in response to the
23 prehearing conference minutes and orders, Appellant, you
24 indicated that you would like to testify. Testifying
25 allows OTA to -- I'm sorry -- Office of Tax Appeals to

1 accept your statements as evidence to the extent they
2 concern facts of which you have personal knowledge. So
3 I'll swear you in for you testimony.

4 Can you please raise your right hand, and I will
5 swear you in in accordance with the Office of Tax Appeals
6 Regulations.

7
8 L. BELLEY,
9 produced as a witness, and having been first duly sworn by
10 the Administrative Law Judge, was examined, and testified
11 as follows:

12
13 R. SCHNARR,
14 produced as a witness, and having been first duly sworn by
15 the Administrative Law Judge, was examined, and testified
16 as follows:

17
18 JUDGE KLETTER: Thank you so much.

19 Now, as a reminder before we begin the
20 presentation, we have 15 minutes for Appellant's
21 presentation and testimony, 15 minutes for Franchise Tax
22 Board's presentation, and 5 minutes, Appellant, you'll
23 have a response and closing statement and rebuttal too, if
24 you would like to reply to what Franchise Tax Board says.

25 Ms. Belley and Mr. Schnarr, are you ready to

1 begin your presentation.

2 MR. SCHNARR: Yes we are. And I wonder about
3 these. This is a copy of what we want to say. Would you
4 like that?

5 JUDGE KLETTER: So.

6 MR. SCHNARR: It's a summary. Like it's exactly
7 the same and would be to follow along or reflect upon
8 after, whatever you like.

9 JUDGE KLETTER: So what you have in your hands
10 it's your argument? Or --

11 MR. SCHNARR: It's exactly what we are saying on
12 paper.

13 JUDGE KLETTER: So that will be transcribed --

14 MR. SCHNARR: Okay. Fair enough.

15 JUDGE KLETTER: -- and we don't need a copy. But
16 please go ahead and --

17 MR. SCHNARR: Sure. Thank you.

18

19 PRESENTATION

20 MR. SCHNARR: First of all, we appreciate this
21 opportunity to present our position to the Appeal Board.
22 And it is a California tax matter that arises every year
23 when we do our taxes. And we hope we are correct in our
24 judgment and understanding and ask for your consideration.

25 MS. BELLEY: I expect my husband Richard to be

1 accurate and truthful in his all his statements. We
2 always discuss our viewpoints with each other, and with
3 taxes we do too. I understand the issues at stake here
4 today, and I would like Richard to speak on my behalf.

5 MR. SCHNARR: Our personal situation I just
6 wanted to describe. Louise and I have been together since
7 December of '78, and we have completed our personal income
8 taxes each year ever since. We are married to each other
9 even though we have different last names, and we have been
10 married for more than 35 years.

11 Neither one of us is a tax adviser, accountant,
12 or lawyer, but we have diligently studied tax rules, read
13 publications, tried to understand everything in order to
14 complete our taxes correctly over the years. Basically,
15 we have been teachers all our working years, and so our
16 tax situation is fairly simple. We moved here to
17 California with our daughter from Ottawa in the fall of
18 '97 as a one-year experiment, and we have been residents
19 here in California ever since. We obtained our green
20 cards in '08 and became citizens in 2012. We are both
21 Canadian/U.S. citizens.

22 Now specific to Louise's tax situation. Louise
23 started obtaining income from Canada about eight or nine
24 years ago when she was first eligible to receive her
25 Ontario Teachers Pension. In 2018, which is the year

1 we're talking about here, her annual pension income was
2 very close to \$24,000. And according to the tax treaty
3 between Canada and the United States, or of the NAFTA
4 Agreement originally, her income taxes are deducted at
5 source at a designated rate of 15 percent. So she pays
6 approximately \$3,600 income tax and receives about \$2,400
7 after tax -- \$20,000 -- thank you -- \$20,400 after tax,
8 subtracting the \$3,600 in taxes that are paid at source.

9 As required, she reports this income on her 1040
10 federal form. And at the end of the form in the "tax due"
11 line, she is given credit for the \$3,600 of taxes paid.
12 She receives full credit because she has received no
13 income in the United States, let alone California. And
14 the \$3,600 figure is subtracted from the bottom line. The
15 IRS provides for this credit on Form 1116 called the
16 "Foreign Tax Credit," and that sounds fair to us.

17 But what happens in California? In California
18 Louise is required to pay tax all over again. Yes, all
19 over again. It's true. I say this, all over again,
20 because she is taxed again on the original \$24,000 amount
21 pension, even though she has already paid \$3,600 in income
22 tax. California disregards the fact that she has already
23 paid \$3,600 to the IRS, the 15 percent at source as
24 required. California taxes her again on the full amount,
25 \$24,000.

1 So she is really paying a double tax, not just a
2 second tax, but tax on money that has already been taxed,
3 effectively paying tax on the \$3,600 that she never
4 received. How is this fair? California, we believe,
5 should provide at least a tax credit like the IRS does,
6 but California does not. Now, this is not to say that we
7 object to paying income tax anywhere and even in
8 California. We do. We pay taxes in California on all
9 Canadian income that is not taxed at source.

10 And we have two small pensions from the Canadian
11 government called Canada Pension Plan and OAS, Old Age
12 Security, amounting to approximately in Louise's case
13 \$8,000 for 2018. We don't pay tax on that in Canada. The
14 government says we'll trust you, but we pay tax on that in
15 the United States and in California because it's included
16 in our income.

17 I'll try to be more quick. I'll talk more
18 quickly perhaps.

19 Now, I refer to the tax treaty of -- between
20 Canada, United States, and Mexico. So we're talking
21 Canada and the United States. It's Article 18. And it is
22 now important to look at the wording of the Canada/U.S.
23 Tax Treaty and consider how it could or should apply. We
24 have provided reference to Article 18 and the wording in
25 our earlier submission. So that should be available to

1 you.

2 Article 18 relates specifically to periodic
3 pension payments, i.e., the very kind that we receive from
4 our Canada Teachers Pension fund. So I would like to
5 discuss a few details of the wording of Article 18. It
6 refers to periodic pension income, an income that is paid
7 on a regular basis, like monthly. It is the same amount
8 each month and is probably not a lot. In Louise's case it
9 amounts to, after tax, \$20,400 annually. It comes after
10 many years of service, and you only get it when you
11 retire.

12 The amount you receive is dependent upon the
13 number of years of your service, generally thought to be
14 70 percent of yearly salary after 35 years of service. So
15 Article 18 separates periodic pension income from other
16 income and for good reason. It's regarded as passive as
17 opposed to -- I guess the term might be active income not
18 generated by daily work and a weekly paycheck. Now, a
19 specific deduction rate of 15 percent is designated at
20 source in Article 18. I believe a lot of thought went
21 into the designation of this figure rate of 15 percent.

22 It could be regarded as a reasonable amount for a
23 pensioner to pay not too high but a little above what might
24 be regarded as a minimum tax rate bracket of 10 percent.
25 Now -- and most importantly is the wording in the

1 Article 18, the tax shall not exceed 15 percent. This
2 indicates a limitation in the fulfillment of our
3 obligation. It is sufficient and complete, suggesting
4 that no more should be taken. The tax treaty is of
5 ultimate importance, and it is the foundation actually of
6 the IRS taxation between when two countries are involved.

7 Now, California taxes. The California Franchise
8 Tax Board argues that state taxes are separate, and the
9 federal tax treaty is not relevant for state tax
10 purposes -- or wording to that effect. In reality, this
11 is not the case at all. Federal and California taxes are
12 closely linked as evidenced by the fact that California
13 utilizes the federal form, specifically, the adjusted
14 gross income line of Form 1040 in the calculation of their
15 five -- of their 5 -- in the 540 form, California 540. So
16 that adjusted gross income line goes onto the 540. It's
17 pretty closely related.

18 Now, I have a precedent case to present. It's
19 not -- I hear that precedent cases are important. This is
20 not an obscure case but my own personal California State
21 tax situation in 2016, two years previous to Louise's
22 2018. We referenced my case in the documentation that we
23 have submitted. And in 2016 the California Franchise Tax
24 Board acknowledged the validity of an appeal that I
25 submitted and, accordingly, approved the exclusion -- and

1 this is the part -- of my Canadian pension income from my
2 California income, income that is already taxed at a
3 15 percent rate. And my argument was the same as it is
4 here today at that time in 2016.

5 The Franchise Tax Board responds to my case of
6 2016 by saying, basically, that this should not have
7 happened. Well, it did, and I was content. We were happy
8 because we've been thinking about this issue for many
9 years because it usually comes up. So my situation -- and
10 I felt happy about it because I thought, hm, there's
11 fairness coming through here.

12 Now, I just want to quickly summarize -- sum up
13 very fast. We were encouraged last year when we heard
14 about the Taxpayer Transparency and Fairness Act of 2017.
15 And we like the sound of the word "fairness", really. We
16 just ask that you consider the fairness of the following:
17 Number one, California taxed dollars. You're really
18 taxing money that you never received? No provision for a
19 tax credit by California for taxes paid at source.
20 Article 18 of the tax treaty in the limitation in the
21 words shall not exceed 15 percent, my precedent situation
22 of 2016.

23 Is there something I forgot.

24 MS. BELLEY: No. I think you're great.

25 MR. SCHNARR: We thank you kindly for listening,

1 and we welcome any comments you might have now or any time
2 in the future. This is an issue that has concerned us
3 almost every year, depending on how much income we
4 receive. So thank you again.

5 JUDGE KLETTER: Thank you so much for your
6 presentation. I just have a quick question before I turn
7 it over to my Judges. So in 2016 it looks like that 2016
8 return was a joint return. And I just want to confirm for
9 the year that we're discussing now, the 2018 return,
10 Ms. Belley filed a single return?

11 MR. SCHNARR: Yes. I believe it is. Although,
12 you know, I didn't double check that, but you very well
13 might be correct and it may not, you know. Yeah.

14 JUDGE KLETTER: Okay. Thank you. Now I'd like
15 to ask my other Judges.

16 Judge Gast, do you have any questions for
17 Appellants?

18 JUDGE GAST: This is Judge Gast. I do not have
19 any questions. Thank you.

20 JUDGE KLETTER: Judge Long, do you have any
21 questions for Appellants.

22 JUDGE LONG: This is Judge Long. I do. I just
23 have a follow-up questions for -- regarding the 2018
24 return being filed as single. Was there a change in your,
25 like, legal marital status at all between 2016 and now? I

1 understand that today you've told us that you're married.

2 MR. SCHNARR: Yes, there has been. Sometimes
3 maybe worthwhile to file under married single or
4 married -- jointly married. I forget the exact
5 terminology.

6 JUDGE LONG: Sure there is a married filing
7 separately status.

8 MR. SCHNARR: Yes.

9 JUDGE LONG: But in this case we're looking at a
10 single return. So that's why --

11 MR. SCHNARR: Right. That's correct.

12 JUDGE LONG: Okay. Thank you. No further
13 questions.

14 JUDGE KLETTER: Thank you.

15 I'd now like to turn it over to the Franchise Tax
16 Board for their presentation.

17 Ms. Fassett, are you ready begin?

18 MS. FASSETT: I am. Thank you, Judge Kletter.

19 JUDGE KLETTER: Please go ahead. Thank you.

20 MS. FASSETT: Okay. Thank --

21 JUDGE KLETTER: I'm sorry. You'll just have
22 15 minutes.

23 MS. FASSETT: Okay. Thank you.

24

25 PRESENTATION

1 MS. FASSETT: So, good afternoon. My name is
2 Sarah Fasset and I, along with Jaclyn Zumaeta, represent
3 the Franchise Tax Board or FTB.

4 For the reason set forth in FTB's opening brief,
5 as well as what I'm going to discuss today, FTB's action
6 should be sustained as the evidence in the record clearly
7 shows that Appellant has not established error in FTB's
8 proposed assessment of additional tax for the 2018 tax
9 year. Here, Appellant has continuously argued that her
10 Canadian pension income is not subject to California
11 taxation based on the federal treatment of that income and
12 a U.S./Canada Tax Treaty.

13 FTB's determination of tax is presumed correct,
14 and Appellant bears the burden of proving error.
15 Appellant also bears the burden of proving entitlement to
16 a deduction or exclusion of income. Mere assertions of
17 error or entitlement are never sufficient to meet a
18 taxpayer's burden of proof. Appellant's reported federal
19 AGI on both her original and amended California income tax
20 returns filed for the 2018 tax year do not match the
21 amount reported on her federal return and accepted by the
22 IRS. As a California resident, all of Appellant's income,
23 regardless of source, is subject to California taxation.
24 Appellant incorrectly argues that because the income in
25 question is taxed by Canada, it cannot also be subject to

1 state taxation.

2 The U.S./Canada Tax Treaty Appellant relies on
3 only applies to the United States and Canada. No state is
4 a party to that treaty. California Revenue & Taxation
5 Code specifically provides that California does not
6 conform to the federal law regarding the foreign earned
7 income exclusion which may have allowed some or all of
8 Appellant's foreign income to be excluded from federal tax
9 taxation. Nothing in California law allows the exclusion
10 of this income.

11 Appellant has not provided any information or
12 documentation showing the IRS has revised or reduced
13 Appellant's federal AGI, nor has she established error in
14 FTB's assessment, which is based on her federal AGI. As
15 such, Appellant as a California resident improperly
16 excluded her Canadian pension income, and FTB's proposed
17 assessment corrects that improper exclusion of income and
18 increases her California taxable income accordingly.

19 With respect to Appellant's arguments concerning
20 the 2016 tax year, there is no evidence or record of an
21 appeal or an argument made. FTB did accept that return as
22 filed by the Appellant and her spouse. However, it was
23 not selected for examination and, therefore, not fully
24 reviewed. Acceptance of a return does not equate to a
25 concession or settlement or to a ruling being made on any

1 given issue. Additionally, as each tax year stands on its
2 own, FTB is not bound by its prior year determinations and
3 therefore, is not relevant to this appeal.

4 Therefore, on the facts and evidence in the
5 record, Franchise Tax Board respectfully request you stain
6 its position.

7 I'm happy address any questions you may have.
8 Thank you.

9 JUDGE KLETTER: Thank you so much for your
10 presentation. I do not have any questions, but I would
11 like to turn it over to my Judges.

12 Judge Gast, do you have any questions for
13 Franchise Tax Board or either party?

14 JUDGE GAST: I do not have any questions. Thank
15 you both.

16 JUDGE KLETTER: And, Judge Long, do you have any
17 questions for either party?

18 JUDGE LONG: No questions. Thank you.

19 JUDGE KLETTER: Now, Appellants -- Appellant, you
20 will have five minutes to respond to Franchise Tax Board's
21 presentation and provide a closing statement. Are you
22 ready to begin?

23 MR. SCHNARR: Yes.

24 JUDGE KLETTER: Please go ahead. Thank you.

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13 But we wonder about fairness here as the issue of
14 taxing income that was really never received when you
15 think about. \$24,000 from her income from Canadian was
16 not received by Louise. She received \$20,400. But
17 because we have to include it in our IRS adjusted gross
18 income line, we're -- the California -- it's on pay. It's
19 a law, right. It's on paper. That's why we're required
20 to pay that tax again on the amount that we -- an amount
21 that was not even received. Now, that's the issue of
22 fairness that we're wondering about. And, obviously, we
23 have no concern about paying taxes on income that was
24 never taxed.

25

1 provide a tax credit at the end, and that gives fairness
2 to the situation because is -- this is, I think, classic
3 double taxation. Taxes on -- taxes on funds where taxes
4 have already been paid.

5 Do you have anything to say, honey?

6 MS. BELLEY: No. I think it's --

7 MR. SCHNARR: Thank you.

8 JUDGE KLETTER: I'd like to thank the parties for
9 their preparations today. This concludes this hearing,
10 and the Judges will meet and decide the case based on the
11 documents and also on the testimony that was presented.
12 We will issue our written decision no later than 100 days
13 from today. This case is submitted, and the record is now
14 closed.

15 This also concludes this hearing session. Thank
16 to you everyone.

17 (Proceedings adjourned at 2:09 p.m.)
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HEARING REPORTER'S CERTIFICATE

I, Ernalyn 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 March, 2024.

ERNALYN M. ALONZO
HEARING REPORTER