

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF.)
)
 R. LOEB,) OTA NO. 230212552
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, February 22, 2024

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:32 a.m. and concluding at 9:49 a.m. on
Thursday, February 22, 2024, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Administrative Law Judge: JUDGE JOSHUA LAMBERT

For the Appellant: R. LOEB

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

ERIC BROWN
CYNTHIA KENT

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I N D E X

E X H I B I T S

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

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California; Thursday, February 22, 2024
9:32 a.m.

JUDGE LAMBERT: We are now on the record in the Office of Tax Appeals oral hearing for the Appeal of Rory Loeb, Case No. 230212552. The date is February 22nd, 2024, and the time is 9:32 a.m. My name is Josh Lambert and I'm the Administrative Law Judge for this hearing.

FTB, could you please introduce yourselves for the record.

MR. BROWN: I'm Eric Brown, California Franchise Tax Board.

MS. KENT: I'm Cynthia Kent, also with the California Franchise Tax Board. Good morning.

JUDGE LAMBERT: Hi. Good morning.

And for Appellant, Mr. Loeb, could you introduce yourself for the record.

MR. LOEB: Sure thing. I am Rory Loeb.

JUDGE LAMBERT: Hi. Thanks. Thanks all for attending.

As agreed to by the parties, the issue is whether Appellant has shown reasonable cause for the late payment of tax for the 2020 tax year.

Appellant provides Exhibits 1 through 7. FTB provides exhibits A through E. There are no objections,

1 and that evidence is now in the record.

2 (Appellant's Exhibits 1-7 were received
3 in evidence by the Administrative Law Judge.)

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

6 As discussed, Mr. Loeb, you'll be testifying as a
7 witness; is that correct?

8 MR. LOEB: That's correct.

9 JUDGE LAMBERT: Okay. Then at this time I'll
10 swear you in before your presentation. Can you please
11 raise your right hand.

12

13 R. LOEB,

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 LAMBERT: Thank you. So this is your
19 opportunity to explain your position, and you have
20 30 minutes. So you can proceed with your presentation.
21 Thanks.

22

23 PRESENTATION

24 MR. LOEB: Thank you very much, Your Honor. And
25 thank you everybody for making the time for me today.

1 I believe Counsel for the Franchise Tax Board
2 agrees that the underlying facts are not in dispute here.
3 Rather, it is whether those facts meet the reasonable
4 cause standard to abate the late-penalty payment that has
5 been imposed. I do not have any background in accounting
6 or tax law. I believe the facts of my particular case
7 meet all of the elements as Counsel for the FTB laid out
8 in his brief.

9 I've always filed and timely paid my income
10 taxes. For many years before and since 2020, I have used
11 the services of a tax professional. This is not a
12 situation where I am disputing what the IRS and Franchise
13 Tax Board had determined what my actual tax liability for
14 2020 was. Rather, I'm simply asking for relief from the
15 penalties assessed on my for reasonably relying upon a tax
16 professional. And though it turns out he was ultimately
17 wrong in his advice and determination of my tax liability
18 and his professional malfeasance in failing to submit my
19 return at all.

20 The IRS has provided the relief that I am asking
21 for from the Franchise Tax Board. I do not know whether
22 it was because they determined that there was good cause,
23 or if they simply provided me the one-time relief
24 provided, given the fact that this was the first penalty
25 ever assessed on my. I understand the Franchise Tax

1 Board's one-time abatement policy unfortunately came into
2 effect starting with the 2022 tax year. However, it seems
3 to me that the tax law is intended to provide some level
4 of protection to an innocent taxpayer who reasonably
5 relies upon the advice and counsel of a tax professional
6 to help navigate a complicated and difficult to understand
7 tax laws.

8 I believe my particular case meets the elements
9 for relief here. Excuse me. I retained Keith West of
10 West Tax Financial Services Incorporated. He was
11 recommended by a close friend who had used his services
12 for tax preparation. West Tax provides various
13 tax-related services, including accounting and tax
14 preparation services for individuals, businesses, and
15 estates. I had no reasonable basis to think Mr. West did
16 not have the required knowledge for providing the tax and
17 other financial services he offers. Though I tried to be
18 more proactive, Mr. West was not able to meet with me
19 until close to the deadline for the 2020 tax year.

20 We met in person so he that could prepare my tax
21 return during our meeting, and he filed in a timely
22 fashion. At the start of our in-person meeting, I
23 provided Mr. West with a full set of documents that he
24 requested. I have provided a copy of those documents.
25 It's Exhibit 1. During our several-hour meeting, I

1 discussed the complexity of my taxes due to stock options
2 and employee stock purchase program, and I relied on his
3 advice and representations as to how these would be
4 handled in my taxes.

5 He made no indication that further information
6 was needed or that he needed additional time. In fact,
7 the discussion was that my taxes were done and since
8 provided me with the required forms to submit the
9 additional payment owed to IRS. I believe I have that as
10 Exhibit 2, page 80. And I paid for his services at the
11 conclusion of the meeting, shown as Exhibit 2, page 82. I
12 promptly paid what he told me my outstanding tax balance
13 was to the IRS. I also confirmed to him that I sent
14 payment and followed up with one outstanding item, which
15 was his review of 2019 taxes to make sure that there were
16 no glaring errors there.

17 Had he disclosed at the time that he had made an
18 error on my returns -- or sorry -- or that my returns were
19 not timely filed, I could have addressed all of it. But
20 there was nothing to make me question that my returns were
21 not e-filed at the time of our meeting. I have no
22 background in anything related to accounting or the laws
23 that relates to taxes, and I do not have the competency to
24 discern any error in his substantive advice. It is indeed
25 because I am a lay person as to these matters that I have

1 historically and continue to retain a tax professional to
2 provide tax advice and preparation services.

3 I was made aware of my tax professional's
4 failures and fraud long after it was too late, including
5 filing for extension without my knowledge or consent, and
6 ultimately that he did not ever file my taxes. I do not
7 know what errors he made in the advice he provided to me
8 regarding my tax liability. And had he actually filed the
9 tax forms he had prepared and was supposed to have e-filed
10 that day, I would have been able to retain some expert
11 counsel to determine what substantive errors he made and
12 provide that information to the court and Franchise Tax
13 Board. But that's impossible here.

14 However, given a significant discrepancy between
15 what he concluded my tax liability was and what it
16 actually was determined to be by the IRS and Franchise Tax
17 Board, it seems to be a reasonable conclusion that
18 Mr. West either misunderstood or misapplied some
19 applicable tax law as opposed to making a simple
20 miscalculation. This seems especially true given that he
21 is a tax professional who used some form of industry
22 standard software to prepare my taxes during our meeting.
23 If there was some glaring error in the program's
24 calculation, given my tax professional's experience and
25 superior knowledge, I think he would have and should have

1 flagged it at the time.

2 In summary, Your Honor, I believe that the law
3 leans in favor of providing the innocent taxpayer relief
4 from penalties due to the reasonable reliance on the
5 advice and counsel of a tax professional. Otherwise, it
6 would put a lay person like me in a position of having to
7 monitor or otherwise second guess them. This is not a
8 case where I simply turned over a stack of documents to a
9 tax professional and washed my hands of any
10 responsibility. I had no reason to question his
11 representations that the returns were being e-filed that
12 day, and it seems to be contrary to the purpose of seeking
13 the assistance of a presumed expert in the first place.

14 It also seems that imposing a penalty on the
15 reasonably diligent taxpayer in good standing for the
16 negligence or malfeasance of a tax professional
17 effectively puts me in a position of having to warranty
18 the competency or accuracy of their professional work. I
19 do not believe that there was anything further I could
20 have done at the time, nor was there anything to indicate
21 that I should have known something was amiss. However, as
22 soon as I had noticed of Mr. West's failures, I took all
23 reasonable steps to rectify the situation immediately, and
24 without question, fulfilled my tax obligations as I had
25 done for every year prior.

1 In view of these circumstances, I respectfully
2 submit that I have established reasonable cause to abate
3 the late-payment penalty and associated interest and ask
4 that you rule in my favor.

5 JUDGE LAMBERT: Thank you, Mr. Loeb. At this
6 time I'll ask FTB if they have any questions for you.

7 Mr. Brown, was there any questions that you had?

8 MR. BROWN: I have no questions.

9 JUDGE LAMBERT: Okay. Thank you.

10 I had a couple of questions. Mr. Loeb, I was
11 wondering is your CPA, was he a California CPA?

12 MR. LOEB: He is based in California, yes.

13 JUDGE LAMBERT: Okay. And did he just not
14 respond to any of your requests for information at all?
15 Because you're not exactly sure of what his mistake was,
16 but he wasn't responding?

17 MR. LOEB: He was not responding for the first
18 several months of our communication. And then when he
19 ultimately responded, he just gave me a barrage of excuses
20 and, you know, follow ups, as in I will. I will get back
21 to you. I will raise hell in the office. And did not
22 continue to follow up, at which point, I performed my own
23 taxes.

24 JUDGE LAMBERT: Okay. But he did tell you the
25 tax amount for the federal tax with IRS?

1 MR. LOEB: That is correct.

2 JUDGE LAMBERT: Okay. Why do you think he was
3 able to give you the IRS tax payment information?

4 MR. LOEB: So he performed -- when he did the
5 calculations on his tax preparation software at our
6 meeting, you know, he performed -- I mean, he gave him the
7 refund -- sorry -- the taxes owed from the IRS. And
8 printed that out, you know, as the 1040-V form and gave
9 that to me as the, you know, the slip to pay my taxes.
10 And that's when I discovered, you know, that's -- that's
11 what I presumed I owed.

12 JUDGE LAMBERT: Okay. Thank you. I think that's
13 all the questions I have at this time, but I appreciate
14 your testimony and presentation.

15 Now we can move on to FTB's presentation for 10
16 minutes.

17 Mr. Brown, you may proceed when you're ready.
18 Thanks.

19 MR. BROWN: Thank you, Judge Lambert.

20

21 PRESENTATION

22 MR. BROWN: Good morning. I'm Eric Brown, Tax
23 Counsel with the Franchise Tax Board.

24 In this appeal, Appellant has failed to show
25 reasonable cause to abate the late-payment penalty.

1 Appellant argues his tax preparer told him prior to the
2 original filing and payment deadline that he would owe no
3 tax in respect to his California tax liability, and
4 Appellant argues he reasonably relied on the
5 representation. However, the law is clear that a finding
6 of reasonable cause for the late payment of tax based on
7 reliance on a tax preparer must involve a matter of
8 substantive tax law.

9 Appellant argues that his tax preparer's advice
10 about his tax liability was on a matter of substantive tax
11 law, but there is nothing in the record to support this
12 conclusion. At most, the tax preparer's representation
13 that Appellant owed no California tax was based on a
14 miscalculation, not a matter of substantive tax law. The
15 law is well settled that miscalculation of tax does not
16 involve a matter of substantive tax law and does not
17 constitute reasonable cause to abate the late-payment
18 penalty.

19 In the 1986 tax Appeal of Berolzheimer, the Board
20 of Equalization rejected the Appellant's contention that
21 their tax professional's miscalculation of their tax
22 liability involved a matter of a substantive tax law. The
23 opinion stated, and I quote, "As this was a simple
24 computational problem, not a legal interpretation,
25 Appellants cannot hide behind an expert for the failure to

1 properly determine the tax that was due," unquote.

2 The present appeal, likewise, involves a
3 miscalculation of tax not a matter of substantive tax law.
4 Appellant has failed to provide any evidence that his
5 preparer's advice that he would not owe any state tax was
6 based on an any substantive tax issue or law. He has not
7 provided any schedules, correspondence, or any evidence
8 prior to the due date of the tax as to the tax preparer's
9 alleged erroneous substantive advice.

10 The importance of providing evidence of
11 Appellant's actions prior to the late payment were
12 discussed in the 2019 precedential opinion of Appeal of
13 Moren. In that case, the Office of Tax Appeals stated,
14 quote, "The determination of what reasonable cause exists
15 for the late payment requires an analysis of Appellant's
16 actions leading up to the late payment, the timing of
17 those actions, and whether they reflect ordinary business
18 care and prudence such an ordinarily intelligent and
19 prudent as this person would have performed under similar
20 circumstances," unquote.

21 In the present appeal, Appellant has not provided
22 evidence of what efforts he took to ascertain his correct
23 tax liability prior to the payment deadline of
24 May 17, 2021, other than relying on his preparer's stated
25 miscalculation. He has not provided any evidence of any

1 communications with his preparer prior to the payment
2 deadline as to the erroneous substantive advice made by
3 his preparer but simply argues that his preparer must have
4 misapplied the relevant tax laws and made gross errors.

5 He has, therefore, failed to prove reasonable
6 cause to abate the late-payment penalty. Appellant has
7 failed to show reasonable cause, and so FTB's denial of
8 Appellant's claim for refund should be sustained.

9 I would be happy to answer any questions for FTB.

10 JUDGE LAMBERT: Thank you, Mr. Brown.

11 Can you mute your microphone. I think I hear
12 some feedback. Okay. Thanks.

13 I guess I have a question for Mr. Loeb, kind of
14 related to what Mr. Brown was talking about in terms of
15 whether it's a miscalculation or substantive tax advice.

16 Mr. Loeb, it seems you were saying -- it's not
17 clear the exact reason why -- you're not sure if there was
18 any mistake or not, you just didn't hear back from him?

19 MR. LOEB: That is correct. And I relied on his
20 expertise as a tax professional to, you know, exercise due
21 diligence during our -- at least during our in-person
22 meeting, you know, with all of the documentation that I
23 provided, again, as shown in Evidence 1.

24 JUDGE LAMBERT: Okay. Thank you.

25 And thank you, Mr. Brown, for the presentation.

1 So at this time, Mr. Loeb, if you make your
2 closing remarks for 5 minutes, you can proceed. Thanks.

3 MR. LOEB: Thank you. With pleasure.

4
5 CLOSING STATEMENT

6 MR. LOEB: I understand Counsel's position as
7 they are obligated to represent the interest of the
8 Franchise Tax Board. In my particular case, I exercised
9 due diligence and prudent business actions as a taxpayer
10 in the beginning, retaining a highly recommended tax
11 professional, providing all the requested pertinent
12 documentation, paying the amounts that Mr. West concluded
13 I owed, following up repeatedly on the phone and email to
14 confirm e-filing, again, that's also documented in
15 evidence. But hearing -- after hearing no response,
16 confirming with the IRS directly by requesting a
17 transcript, and then determining at that point that he had
18 filed for an extension without my prior knowledge or
19 consent, continuing to follow up with Mr. West and,
20 ultimately, acting swiftly to perform my own tax return,
21 immediately filing my tax obligations as they became very
22 clear to me that any subsequent penalties and interest
23 requested by the IRS and Franchise Tax Board.

24 I reassert that I am no tax professional or law
25 professional. And given the complexity of my taxes for

1 the 2020 filing year, retaining a tax professional was the
2 measured and appropriate action, I hope, Your Honor, will
3 see these circumstances have established some form of
4 reasonable cause to abate the late penalty and associated
5 interest and respectfully await your decision.

6 JUDGE LAMBERT: Thank you, Mr. Loeb.

7 If there's nothing further, I'm going to conclude
8 the hearing. And I want to thank both parties for
9 appearing today. We will issue a written opinion within
10 100 days.

11 Thank you. The record is now closed, and have a
12 nice day.

13 Thank you.

14 (Proceedings adjourned at 9:49 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 13th day
of March, 2024.

ERNALYN M. ALONZO
HEARING REPORTER