

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
M. PERSKY,) OTA NO. 230613531
)
)
) APPELLANT.
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Tuesday, August 13, 2024

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
M. PERSKY,) OTA NO. 230613531
APPELLANT.)
_____)

Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 9:31 a.m. and concluding at 9:43 a.m. on
Tuesday, August 13, 2024, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSHUA LAMBERT

Panel Members: ALJ ASAF KLETTER
ALJ EDDY Y. H. LAM

For the Appellant: M. PERSKY

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
TRISTEN THALHUBER
CYNTHIA KENT

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I N D E X

E X H I B I T S

(Appellant's Exhibits were received into evidence at page)

(Department's Exhibits were received into evidence at page)

O P E N I N G S T A T E M E N T

	<u>P A G E</u>
By Mr. Persky	7
By Mr. Thalhuber	9

C L O S I N G S T A T E M E N T

	<u>P A G E</u>
By Mr. Persky	13

1 Cerritos, California; Tuesday, August 13, 2024

2 9:30 a.m.

3
4 JUDGE LAMBERT: We're now on the record in the
5 Office of Tax Appeals oral hearing for the Appeal of
6 Michael Persky, Case Number 230613531. The date is
7 August 13th, 2024, and the time is 9:31 a.m. My name is
8 Josh Lambert, and I'm the lead Administrative Law Judge
9 for this hearing. And my Co-Panelists today are Judge Lam
10 and Judge Kletter.

11 FTB, could you please introduce yourselves for
12 the record.

13 MR. THALHUBER: Yes. This is Tristen Thalhuber,
14 and with me is Cynthia Kent on behalf of Franchise Tax
15 Board.

16 JUDGE LAMBERT: Thank you.

17 And for Appellant, could you please introduce
18 yourself for the record.

19 MR. PERSKY: Yes. Michael Persky.

20 JUDGE LAMBERT: Hi.

21 Thank you for attending everyone.

22 The issue in this appeal is whether Appellant's
23 claim for refund is barred by the statute of limitations.
24 FTB provided Exhibits A through D, and Mr. Persky has
25 stated in an order you provided Exhibits 1 through 5.

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M. PERSKY,

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

JUDGE LAMBERT: Okay. Thanks.

So, Mr. Persky, this is your opportunity to explain your position, and as stated in the order, you have 10 minutes. So you can proceed when you're ready and provide what you have to say about this case. Thanks.

MR. PERSKY: All right. Thank you.

PRESENTATION

MR. PERSKY: Thank you to everybody for attending.

My issue is -- is that as of 2009 I left the State of California and was no longer a resident of California. I earned no income effectively from 2010 going forward, and I had no responsibility to file any state income taxes whatsoever. Sometime between me leaving and me moving to Oregon in 2014, '15, I found out that California had filed taxes on my behalf and subsequently did a writ of execution and began collecting the tax liability by ways of levying bank accounts, safe deposit boxes, and so on.

1 I then went ahead and filed taxes just because I
2 wanted to reclaim the money. I filed the taxes for 2010,
3 '11, '12, I think through 2017 proving that I didn't owe
4 the State any income and requested a refund. The State of
5 California refused to give me any refund. I provided
6 facts that I didn't live in the state, I had no income,
7 and that their collections was, you know, in bad faith and
8 that they needed to return the money. And to this point,
9 they refused to do so.

10 So that's it.

11 JUDGE LAMBERT: Okay. Thank you, Mr. Persky.

12 So now I'll turn to FTB.

13 Did you have any questions for the witness?

14 MR. THALHUBER: No questions. Thank you.

15 JUDGE LAMBERT: Okay. This is Judge Lambert
16 again. I'll now ask the Panel if they have any questions.

17 Judge Kletter, did you have any questions?

18 JUDGE KLETTER: Good morning. This is
19 Judge Kletter. No, I do not have any questions. Thank
20 you.

21 JUDGE LAMBERT: Thanks.

22 And, Judge Lam, did you have any questions?

23 JUDGE LAM: This is Judge Lam speaking. No
24 questions. Thank you.

25 JUDGE LAMBERT: Okay. Thanks.

1 over payment.

2 For the 2010 tax year, the four-year statute of
3 limitations expired before Appellant filed his 2010 tax
4 return, and the one-year statute of limitations expired as
5 to the barred overpayment on Appellant's 2010 tax year
6 account. Appellant late filed his 2010 tax return on
7 January 30th, 2023, well after the four-year statute of
8 limitations period had expired in 2015. All payments made
9 within one year of the filing of Appellant's 2010 tax
10 return were refunded to him. All remaining payments were
11 made prior to the one-year statute of limitations.
12 Therefore, the one-year statute of limitations is
13 unavailable to allow a refund of Appellant's remaining
14 overpayment for the 2010 tax year.

15 Appellant contends he did not earn any income in
16 2010 and that the over payment is a result of FTB's
17 collection action. However, when Appellant failed to file
18 a timely 2010 tax return or file a return in response to
19 FTB's demand, FTB properly issued it's NPA, which went
20 final pursuant to law. As such, all collection action was
21 done pursuant to this valid assessment, and it was
22 Appellant's failure to file a timely return claiming the
23 refund prior to the expiration of the statute of
24 limitations that resulted in the barred overpayment.

25 Furthermore, the Office of Tax Appeals in its

1 precedential opinion in the Appeal of Benemi Partners
2 found that the language of the statute of limitations is
3 explicit and must be strictly construed. The United
4 States Supreme Court in United States v Dalm explained
5 that this is true even when it is later shown that the tax
6 was not owed in the first place. Appellant has not
7 provided any additional evidence that would allow FTB by
8 law to grant his claim for refund. Therefore, FTB
9 respectfully requests that the Office of Tax Appeals
10 sustain the Franchise Tax Board's claim for refund denial
11 for the 2010 tax year.

12 Thank you, and I am happy to answer any
13 questions.

14 JUDGE LAMBERT: This is Judge Lambert. Thank
15 you, Mr. Thalhuber.

16 So I'll turn to the Panel now so see if they have
17 any questions.

18 Judge Kletter, did you have any questions?

19 JUDGE KLETTER: This is Judge Kletter. No, I do
20 not have any questions. Thank you.

21 JUDGE LAMBERT: Thanks.

22 And, Judge Lam, did you have any questions?

23 JUDGE LAMB: This is Judge Lam speaking. No
24 questions.

25 JUDGE LAMBERT: Thanks.

1 And this is Judge Lambert. I have no questions
2 either.

3 So at this time, Mr. Persky, you can have five
4 minutes for closing remark or respond to anything that FTB
5 said if you want to do that at this time.

6 MR. PERSKY: Yeah, I do -- I do have a question
7 for the State, if I may have?

8 JUDGE LAMBERT: Sure. You could direct it to the
9 Panel, and we'll ask FTB that question. What is your
10 question?

11 MR. PERSKY: The question is, the way I
12 understand is I would have or the taxpayer would have four
13 years to try to claim the money back from the State. How
14 long does the State have to try to collect the money?

15 JUDGE LAMBERT: FTB, if you wanted to respond to
16 that, if you understood the question.

17 MR. THALHUBER: My understanding is how long the
18 State has in order to collect the tax due. I believe it
19 would be until the tax is fully collected.

20 MS. KENT: This is Cynthia Kent for the Franchise
21 Tax Board. I believe our collection statutes allow for a
22 20-year period.

23 JUDGE LAMBERT: Mr. Persky, did that answer your
24 question, or did you have anything else to add?

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CLOSING STATEMENT

MR. PERSKY: That answers my question. What I have to add is, you know, I have four years to try to reclaim it from the State. And the way I'm understanding it is the State has, one said indefinitely and the other said up to 20 years to collect it from us. Is that how I understand it, or can they confirm? Is it indefinitely or is it 20 years?

JUDGE LAMBERT: I'm not really sure. That would have to be something that we'd have to look up more. But I believe FTB said it was 20 years, and they're saying the statute of limitations for you to file was four years in this case. So I think that's what they're saying.

MR. PERSKY: Okay. I understand. Thank you.

JUDGE LAMBERT: Okay. Thank you, Mr. Persky.

So if there's nothing further, I want to thank both parties for appearing today.

We will issue written opinion within 100 days.

Thank you and the record is now closed.

(Proceedings adjourned at 9:43 a.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 26th day of August, 2024.

ERNALYN M. ALONZO
HEARING REPORTER