

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
S. MCCARTHY,) OTA NO. 230513448
)
)
 APPELLANT.)
)
)
 _____)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, September 19, 2024

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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APPEARANCES:

Panel Lead: ALJ KEITH LONG

Panel Members: ALJ ASAF KLETTER
ALJ TOMMY LEUNG

For the Appellant: S. MCCARTHY
K. WILLIAMS

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD
ERIC A. YADAO

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I N D E X

E X H I B I T S

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

(Department's Exhibits A-G were received into evidence at page 7.)

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

	<u>PAGE</u>
By Mr. McCarthy	8
By Mr. Yadao	17

<u>APPELLANT'S WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
K. Williams	12			

CLOSING STATEMENT

	<u>PAGE</u>
By Mr. McCarthy	22

1
2
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4
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California; Thursday, September 19, 2024

1:45 p.m.

JUDGE LONG: We are opening the record in the Appeal of McCarthy. The OTA Case No. is 230513448. This matter is being held before the Office of Tax Appeals. Today's date is September 19th, 2024, and the time is approximately 1:45 p.m. This hearing is being convened electronically.

Today's hearing is being heard by a panel of three Administrative Law Judges. My name is Keith Long, and I will be the lead Administrative Law Judge. Judge Asaf Kletter and Judge Tommy Leung are the other members of this tax appeals panel. All three judges will meet after the hearing and produce a written decision as equal participants. Although, I will conduct the hearing, any judge on this panel may ask questions or otherwise participate to ensure that we have all the information needed to decide this appeal.

As a reminder, the Office of Tax Appeals is not a Tax Court. It is an independent appeals body. The panel does not engage in ex parte communications with either party. OTA will issue an opinion based on the parties' arguments, the admitted evidence, and the relevant law.

For the record, will the parties please state

1 their names and who they represent, starting with the
2 representative for Franchise Tax Board.

3 MR. YADAO: Good afternoon. My name is Eric
4 Yadao, representing Franchise Tax Board.

5 JUDGE LONG: And for Appellant.

6 MR. MCCARTHY: I'm Scott McCarthy, the taxpayer.

7 JUDGE LONG: Thank you.

8 The issue to be heard today is whether Appellant
9 has shown reasonable cause for the late filing of his 2021
10 California income tax return. After the prehearing
11 conference, Appellant identified Kristen Williams as a
12 witness. As a reminder witness testimony is not required
13 at an oral hearing. However, testimony given under oath
14 may be considered as evidence. Additionally, FTB is given
15 the opportunity to cross-examine any witness.

16 Would Appellant please confirm that it will
17 present witness testimony during this hearing.

18 MR. MCCARTHY: Confirmed.

19 JUDGE LONG: And, Mr. Yadao, does Franchise Tax
20 Board have any objection to the witness?

21 MR. YADAO: No objections.

22 JUDGE LONG: Thank you.

23 Then I will take the witness affirmations now.

24 Ms. Williams, will you please raise your right
25 hand.

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KRISTEN WILLIAMS,

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

JUDGE LONG: Thank you. You may lower your hand.

Okay. Moving forward, prior to the prehearing conference, FTB identified Exhibits A through E. At the prehearing conference Appellant had no objections to these exhibits. After the prehearing conference, FTB timely submitted Additional Exhibits F and G.

Does Appellant have any objection to these exhibits?

MR. MCCARTHY: No.

JUDGE LONG: Thank you. FTB Exhibits A through G are admitted without objection.

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

JUDGE LONG: Additionally, at the prehearing conference, Appellant Exhibit 1, Letter from L. J. Burzell, MD, was identified. FTB did not have any objections to this exhibit at the prehearing conference.

Can FTB confirm that there are no objections now.

MR. YADAO: FTB has no objections to the Appellant's exhibit. Thank you.

1 JUDGE LONG: Thank you. Exhibit 1, Letter from
2 L. J. Burzell, MD, is admitted without objection.

3 (Appellant's Exhibit 1 was received in
4 evidence by the Administrative Law Judge.)

5 JUDGE LONG: Today's hearing is estimated to take
6 approximately 30 minutes and begins with Appellant's
7 opening presentation and witness testimony.

8 Mr. McCarthy, you requested five minutes, but
9 that was prior to identifying your witness. Do you need a
10 little bit longer today?

11 MR. MCCARTHY: I don't expect it would be more
12 than 10 minutes total.

13 JUDGE LONG: Okay. Ten minutes it is.

14 Mr. McCarthy, you may begin when ready.

15 MR. MCCARTHY: Thank you. And I just want to
16 thank you all. I appreciate your time today.

17

18 PRESENTATION

19 MR. MCCARTHY: So I -- I have filed this appeal
20 because I genuinely believe that I have established the
21 reasonable cause to -- to obtain a refund. When I
22 first -- during the tax year, as is part of the letter
23 from my Doctor Linden Burzell, around tax time in 2022,
24 the filing time, I had several medical issues. One was
25 shingles. I had shingles all over my face. It took a

1 long time to go away. It ultimately came back. I
2 subsequently then also had COVID. I had COVID right at or
3 right around the normal tax filing time.

4 I have never, to the best my knowledge, filed my
5 taxes late. So, historically, I have always paid on time.
6 During the time I had COVID, around the tax filing time,
7 my doctor said -- at the time, you know, it was right in
8 the middle of the pandemic. I don't know that anyone was
9 fully familiar with the notion of long COVID or
10 potentially the ramification of long COVID, but,
11 ultimately, that was what I was diagnosed with.

12 And so once -- once I was fully able to
13 recover -- or not even fully recover -- but once I began
14 to recover, I realized, I think, in the beginning of the
15 year of 2023 that I had neglected to file my taxes.
16 Interestingly enough, this was probably the most
17 significant tax year of my life. I was fortunate enough
18 to sell some stock in a company that I had cofounded. And
19 so this turned out to be the single most significant tax
20 payment year of my life. Of course, I would not willfully
21 file that late, if it wasn't for the fact that I was
22 suffering from a few medical issues.

23 As soon as I found or came to realize that I had
24 not filed, I contacted my accountant. Interestingly
25 enough, my accountant also -- I think because of the chaos

1 during the COVID -- had not caught it either. And we
2 filed as quickly as we possibly can. Obviously, we paid
3 the late penalty at that time. My accountant informed me
4 that I could file an appeal.

5 And my understanding of the legal issue here is
6 that I have to establish my failure to file in a timely
7 manner is due to reasonable cause, so reasonable cause and
8 not willful neglect. And my understanding of the word
9 willful is intentional or deliberate. I think that my
10 doctor's note shows that I was going through significant
11 medical issues at the time. When the initial appeal was
12 declined, it was declined and the reason said was that
13 because I had basically -- let's see. I want to use the
14 word properly here -- that I had -- that I had -- let me
15 look for it -- that I had been unable to -- to file my
16 taxes and yet, I was able to continue my-- my position. I
17 had not been placed on leave, and I had not been
18 terminated from my employment.

19 So I don't believe that that fact alone says
20 anything about whether or not I had willfully, so
21 intentionally or deliberately, not filed my taxes on time.
22 The fact that I ultimately filed my taxes, the fact that
23 I've never filed late before, and the fact I was going
24 through shingles and long COVID for an extended period of
25 time, in my opinion, shows that -- that I had every

1 intention of filing my taxes as I have always had. And if
2 it wasn't for a global pandemic and the subsequent
3 difficulty of recovering from COVID, I -- I would
4 certainly would have done so as well.

5 And so, you know, the definition of -- of long
6 COVID includes forgetfulness, the inability -- the
7 inability to think clearly. Those are all things that in
8 my mind that's what the American medical association says
9 about COVID and long COVID. Those are all things that I
10 think would -- would show that I was not willfully,
11 intentionally, or deliberately filing my taxes late.

12 The reason that I have asked Kristen to join was
13 because of the specific -- the fact that I was declined
14 initially and then, ultimately, subsequently appealed
15 here. And it was pointed out that I had not lost my
16 position. I had not lost my job. And so I'm the
17 president of a small company. We are a logistics company.
18 We do grocery logistics and government logistics. We --
19 we move people in the military from one place to another.
20 We're a company of about 15 or 16 employees. We have
21 shrunk since COVID. I have asked Kristen to come -- she
22 runs the finance team and the human resources team -- to
23 ask --

24 Is it okay if I ask her a few questions that I
25 wanted to ask at this point?

1 JUDGE LONG: Yes. That's fine. Go ahead.

2 MR. MCCARTHY: Okay. Thank you.

3

4 DIRECT EXAMINATION

5 BY MR. MCCARTHY:

6 Q So, the question that I have for Kristen is
7 during -- during COVID, during the initial part of the
8 pandemic, did we have multiple people from the company
9 have COVID and people who suffered from -- from long
10 COVID?

11 A Yes.

12 Q Did any of those people lose their job? Did we
13 as a company say that none of those people can continue to
14 work during that time?

15 A Absolutely not.

16 Q And is it true that we allowed people to take as
17 much time as they needed to fully recover? And in one
18 case -- without revealing any personal information or
19 health information -- is it true that we had a person that
20 was out four to five months with COVID and, ultimately,
21 was hospitalized, and that person kept their job and was
22 not terminated as an employee of our company?

23 A Yes, that's correct.

24 Q So in that same vein, am I one of those people
25 that COVID and -- and, you know, was suffering through an

1 extended period of the illness and also did not lose their
2 job as a result?

3 A Yes, that's correct.

4 MR. MCCARTHY: Okay. So those are the only
5 questions that I had for Kristen.

6 I think what that shows is that there were a
7 number of people in our company and many other companies
8 that, obviously, had significant issues with COVID,
9 suffered some serious health-related issues, dealt with
10 long COVID for extended periods of time. I would also
11 like to point out in my note from the doctor, he starts
12 out by saying that as of the time of his writing in -- in
13 May of 2023, that I was still under his medical care.

14 And, yeah, I think that's it. So, you know,
15 again, in the end my summation would be that -- well,
16 maybe I -- there's time for summation later; is that
17 correct?

18 JUDGE LONG: Yes. You'll have additional time to
19 make a final statement at the end of the hearing but --
20 but, you know, feel free to conclude here. And we're
21 going to come back to you anyway.

22 MR. MCCARTHY: So in conclusion, it has never
23 been my intention to file taxes late. I certainly would
24 not want to do it in a very consequential tax year where I
25 would face severe penalty. I was suffering from shingles.

1 I was suffering from COVID. I ended up having long COVID
2 as well. There -- there is no precedent at our company
3 that said that somebody who had COVID and was
4 incapacitated for a long period of time would have to be
5 placed on leave, or -- or terminated, or put on
6 disability. So I believe that those things together show
7 that I had no willful, so again, intentional or deliberate
8 basis or -- or reason to not -- not file my taxes on time,
9 and I was just generally struggling and -- and working as
10 best I could at times.

11 But, again, suffering from long COVID, which, you
12 know, brain fog is real. And -- and for me the -- the --
13 the way that manifested itself was I flat out forgot to
14 file my taxes, you know, while I was recovering in bed for
15 a long period of time. And I would respectfully ask that
16 the panel of judges reverse the initial order.

17 Thank you. Thank you for your time.

18 JUDGE LONG: Thank you. I have some questions,
19 but before I ask my questions, does Franchise Tax Board
20 have any questions for the witness?

21 MR. YADAO: No questions at this time. Thank
22 you.

23 JUDGE LONG: Thank you. Do my Co-Panelists have
24 any questions for Appellants, starting with Judge Leung?

25 JUDGE LEUNG: No question for me, Judge Long.

1 Thank you.

2 JUDGE LONG: Judge Kletter, do you have any
3 questions?

4 JUDGE KLETTER: This is Judge Kletter. I do not
5 have any questions. Thank you.

6 JUDGE LONG: Thank you.

7 I just want to know -- so I'm looking at the
8 letter from your doctor. Is there any documentation from
9 your doctor to show that you had long COVID as opposed to
10 just regular COVID?

11 MR. MCCARTHY: I would think so. I visited my
12 doctor multiple times. I didn't submit any of that
13 because in the initial request, it -- it said that I
14 needed to show that I had a legitimate medical reason. It
15 didn't, sort of, say that you had to, kind of, get into
16 very specifics. And when I asked my doctor to -- to write
17 the letter, I actually initially did not even see what he
18 wrote. He sent it directly on to the Franchise Tax Board.
19 So it wasn't clear to me how specific he -- he had gotten
20 or how, you know, whatever lack of specificity. It wasn't
21 until later on when I actually saw the appeal denial that
22 I saw the letter that my doctor had -- had written.

23 JUDGE LONG: Okay. And then sort of similarly
24 with the shingles question, do you have documentation for
25 how long you were suffering from the shingles diagnoses?

1 MR. MCCARTHY: Well, he does say that there were
2 two cases of shingles in this particular letter, and --

3 JUDGE LONG: Right.

4 MR. MCCARTHY: -- and so I -- I could go back and
5 get the charts from him as to all of my medical care
6 during that time. Again, I did not -- was not aware that
7 level of specificity would be required. It just didn't
8 occur to me.

9 JUDGE LONG: I think that would be helpful to me
10 to have all of the information if possible. If I leave
11 the record open after this hearing for 30 days for you
12 submit, would that be enough time for you to get any
13 additional documentation?

14 MR. MCCARTHY: I believe so. I'm -- I'm fairly
15 certain that my physician has an online health portal and
16 that I could download the patient charts for that period
17 of time. I have not looked at them myself. I don't know
18 exactly what they say, and I don't -- you know, I don't
19 know how -- how much he was charting at that time. Some
20 of our visits were virtual. Some of -- a couple of them
21 were in -- in person. So I haven't seen those, but I --
22 if that -- if that would help in this scenario, I would
23 certainly go and look to download those records. Or if I
24 can't get them online, I would go and request them myself.

25 JUDGE LONG: Okay. I'm going to ask that you to

1 do so. I'm going to leave the record open for 30 days for
2 you to do that. And then Franchise Tax Board will also
3 have an opportunity to respond to any submissions that you
4 make. Okay.

5 MR. MCCARTHY: Okay.

6 JUDGE LONG: All right. With that, does that
7 conclude your opening presentation, Mr. McCarthy?

8 MR. MCCARTHY: It does. Thank you.

9 JUDGE LONG: Okay. Then we'll move to Franchise
10 Tax Board's presentation.

11 Franchise Tax Board, you also requested 10
12 minutes. You can begin when you're ready.

13 MR. YADAO: Great. Thank you.

14

15 PRESENTATION

16 MR. YADAO: Good afternoon. Again, my name is
17 Eric Yadao representing the Franchise Tax Board.

18 As you stated, the issue is whether Appellant has
19 shown reasonable cause for failure to timely file his
20 taxable year 2021 return. Appellant's return was due no
21 later than April 2022. And when he filed that return late
22 in January 2023, FTB imposed a late-filing penalty.

23 Appellant has argued that he is entitled to a refund of
24 that penalty because he was ill of shingles on/or around
25 the original filing deadline, and then he contracted COVID

1 and later suffered from the effects of long COVID.

2 Appellant provided evidence of his shingles
3 illness contemporaneous to the original filing deadline.
4 And then his physician states he had COVID in May, but
5 Appellant has not provided any evidence of a diagnoses or
6 treatment of long COVID during the automatic extension
7 period that ended October 15th, 2022, or for any period
8 afterward. FTB has cited in its pleading to precedential
9 case law, specifically, Head and Feliciano and Triple
10 Crown Baseball LLC, that hold that when a taxpayer
11 sacrifices the timeliness of his affairs to pursue other
12 aspects, the taxpayer bears the consequences of that
13 choice.

14 FTB has provided evidence to show that those
15 precedential opinions should apply to Appellant here. He
16 continued to earn income throughout the tax year, as
17 illustrated in FTB's Exhibit D. Appellant stated in
18 Exhibit E that work was his top priority while he was ill.
19 And FTB recently submitted Exhibit F, Appellant conducted
20 numerous trades of stock during the 2021 extended filing
21 period, in the period in which he states he had COVID.
22 Appellant also indicated in his claim for refund attached
23 to his appeal that he needed to spend a fair amount of
24 time to audit his expensed from his Airbnb properties
25 before he could file.

1 Collectively, this evidence supports the
2 conclusion that Appellant was able to attend to other
3 affairs during the original and the extended filing
4 period. In the Appeal of Belcher, the Office of Tax
5 Appeals held that illness or other personal difficulties
6 may be considered reasonable cause if taxpayer presents
7 credible and competent proof that they were continuously
8 prevented from filing a tax return.

9 When taxpayers allege reasonable cause based on
10 incapacity due to illness, the duration of the incapacity
11 must approximate that of the tax obligation deadline. The
12 Office of Tax Appeals stated that because Belcher did not
13 file by the original deadline, its focus was on the
14 automatic extension period. Belcher was found to have
15 enrolled in college courses on at least a half-time basis
16 during the extended filing period and to have maintained
17 rental properties. The Office of Tax Appeals stated that
18 these facts showing that Belcher was active in nontax
19 matters weighed against her ability to prove that her
20 illness rendered her incapable of ordinary business care
21 and prudence during the period in which the failure to
22 file continued.

23 Despite testimony here, and even any evidence
24 that Appellant can provide after the fact, we know for a
25 fact by looking at this evidence that Appellant

1 facilitated a number of stock trades in May and June of
2 2022. He maintained rental properties during the extended
3 filing period, and he continued to earn wage income
4 throughout the year, which is consistent with his own
5 words in Exhibit E, that he worked a lot from home during
6 this period, and that was his top priority.

7 FTB would point out that even if Appellant could
8 establish reasonable cause to abate the late-filing
9 penalty, the late-payment penalty would apply instead
10 because he did not pay his liability timely. Regardless,
11 it is FTB's position that Appellant has not established
12 with his evidence or testimony that his circumstances
13 continuously prevented him from filing a timely return
14 because despite any illness, the evidence shows his
15 ability during the extended filing period, like the
16 taxpayer in Belcher, he was able to attend to other nontax
17 affairs. Therefore, FTB requests that the Office of Tax
18 Appeals sustain its denial of Appellant's claim of refund
19 of the late late-filing penalty.

20 Thank you. I'm happy to answer any quest --
21 excuse me -- any questions you may have.

22 JUDGE LONG: Thank you.

23 Do my Co-Panelists have any questions?

24 Judge Leung, do you have any questions?

25 JUDGE LEUNG: I think just one.

1 Mr. Yadao, taxpayer states that he's never been
2 late before. Do you agree with that?

3 MR. YADAO: I believe -- I do agree with that,
4 yes.

5 JUDGE LEUNG: Thank you.

6 That's all, Judge Long.

7 JUDGE LONG: Thank you.

8 Judge Kletter, do you have any questions?

9 JUDGE KLETTER: Yes. This is Judge Kletter. I
10 just have one clarifying question for Mr. Yadao.

11 Is FTB asserting that Appellant demonstrated
12 willful neglect, or just that Appellant has not shown
13 reasonable cause?

14 MR. YADAO: I don't believe there is any willful
15 neglect but, certainly, there's an absence of reasonable
16 cause.

17 JUDGE KLETTER: This is Judge Kletter. Thank
18 you.

19 JUDGE LONG: Thank you.

20 I don't have any questions. So we will move on
21 to Appellant's final statement.

22 Mr. McCarthy, you have five minutes, and you may
23 begin when ready.

24 MR. MCCARTHY: Thank you.

25 ///

1 know -- I'm not an expert in stock trading, but I do that
2 occasionally.

3 Again, I don't want to dispute that I made those
4 trades. I would dispute that I might have been actively
5 managing money at that time. My best, again, recollection
6 or best notion from that time is that those are probably
7 trades that were auto executed based on things I had put
8 into my account, what you call a GTC trading,
9 "Good-Til-Canceled" trade. And those trades get triggered
10 when a stock hits a particular threshold. I don't recall
11 making any stock trades during that time. So there's
12 that.

13 I think that's all I would like to add at this
14 point. Thank you.

15 I can't hear anything.

16 THE STENOGRAPHER: Judge Long, you're on mute.

17 JUDGE LONG: My apologies.

18 I just want to double check with my Co-Panelists
19 there are no questions before we close today's hearing.

20 Judge Leung, do you have any questions?

21 JUDGE LEUNG: One brief one for Mr. McCarthy.

22 Sir, what happened on the federal side? Did you
23 file your federal return on time? If not, what happened?

24 MR. MCCARTHY: No, I did not file the federal
25 return on time. I did not file. I filed the federal

1 return at the same time in conjunction with my accountant.
2 The -- the federal return did not have a tax consequence,
3 a penalty, I believe. It was a sort of a unique aspect to
4 that particular tax year for me. I owned some stock in a
5 company that I founded. When we setup that company, we
6 set it up where you have what's called a qualifying small
7 business tax exemption. And so the -- a certain amount of
8 the initial sale of a founder stock is exempt from federal
9 taxes.

10 So I ended up that year only really paying a
11 significant amount of money to California and not to the
12 fed. And I think -- I don't recall if there was a
13 penalty. If there was, it was insignificant enough to not
14 cause me to appeal it and maybe -- I don't know that my
15 recollection is perfect, but I think that maybe the
16 federal timeline was changed because of COVID. I'm not
17 sure about that. But there was a much bigger delta
18 between what I owed to California and what I owed to the
19 fed. They were both filed at the same -- at the same
20 time, both in January.

21 JUDGE LEUNG: Okay. Thank you.

22 JUDGE LONG: Judge Kletter, do you have any
23 questions?

24 JUDGE KLETTER: This is Judge Kletter. I do not
25 have any further questions. Thank you.

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JUDGE LONG: Thank you.

With that, we are ready to conclude this hearing. The record will be held open until Monday, October 21st, 2024, for Appellant to provide briefing and evidence on the duration of his illnesses. As noted earlier in the hearing, Franchise Tax Board will be given the opportunity to review anything that Appellant submits in response to it. Thereafter, we will send a written opinion of the decision within 100 days of closing the record.

Thank you everyone for coming in today or calling in today.

Today's hearing in the Appeal of McCarthy is now adjourned.

This concludes our hearings for today.

(Proceedings adjourned at 2:13 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 15th day of October, 2024.

ERNALYN M. ALONZO
HEARING REPORTER