

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
MCDONNELL LANE, INC., ) OTA NO. 240115255  
 )  
 APPELLANT. )  
 )  
 )

TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Wednesday, March 12, 2025

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken  
at 12900 Park Plaza Drive, Cerritos, California,  
90703, commencing at 9:37 a.m. and concluding  
at 10:32 a.m. on Wednesday, March 12, 2025,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSH LAMBERT

Panel Members: ALJ STEVEN KIM  
ALJ KENNETH GAST

For the Appellant: RICHARD "BROCK" SHAMBERG

For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
CHRISTOPHER T. TUTTLE  
JACKIE ZUMAETA

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-12 were received into evidence at page 7.)

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

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1 Cerritos, California; Wednesday, March 12, 2025

2 9:37 a.m.

3

4 JUDGE LAMBERT: We are now on the record in the  
5 Office of Tax Appeals oral hearing for the Appeal of  
6 McDonnell Lane, Inc., Case No. 240115255. The date is  
7 March 12th, 2025, and time is 9:37 a.m.

8 My name is Josh Lambert, and I am the lead  
9 Administrative Law Judge for this hearing. And my  
10 co-panelists today are Judge Gast and Judge Kim.

11 FTB can you please introduce yourselves for the  
12 record by stating your names.

13 MR. TUTTLE: My name is Topher Tuttle.

14 MS. ZUMAETA: Jackie Zumaeta.

15 JUDGE LAMBERT: Thank you.

16 And for the Appellant, could you please introduce  
17 yourself for the record by stating your name.

18 MR. SHAMBERG: Brock Shamberg.

19 JUDGE LAMBERT: Thank you.

20 Thanks everyone for attending.

21 The issues today are: Whether Appellant was  
22 doing business in California for the taxable year ending  
23 December 31st, 2020; whether Appellant established a basis  
24 to abate the late-filing penalty; whether Appellant  
25 established a basis to abate the demand penalty; whether

1 the filing enforcement cost recovery fee is abated; and  
2 whether interest it abated.

3 FTB provided Exhibits A through H, and Appellant  
4 provides Exhibits 1 through 12. Exhibit 8 was a web link  
5 and no PDF was provided, which I discussed in the Minutes  
6 and Orders. So I'm not going to include that as an  
7 exhibit. And I added Exhibit 12 to the Minutes and  
8 Orders, which are attachments to Appellant's opening  
9 brief. Just to be sure that all the documents that you  
10 submitted are included as exhibits, so these were  
11 renumbered exhibits are 1 through 12.

12 FTB, were there any objections to Appellant's  
13 exhibits?

14 MR. TUTTLE: No objections.

15 JUDGE LAMBERT: And, Mr. Shamberg, are there any  
16 objections to FTB's exhibits?

17 MR. SHAMBERG: Thank you. I have no objections  
18 to the exhibits. I do have concern that there are  
19 exhibits and information that postdate  
20 December 31st, 2020. When I first got the letters from  
21 the taxing authority, I just -- I answered them with all  
22 the information, but that information was current at a  
23 much later date. So I would request, Your Honors, that  
24 you would, in reviewing any of this information, take into  
25 account that the -- we are -- I'm sorry. Very nervous.

1           That you would take into account that things  
2       changed after December 31st, 2020, and that -- thank you  
3       very much -- and that exhibits that might be there -- I  
4       have no objection to them -- but that the relevancy -- I  
5       do object that the relevancy has only to do with the issue  
6       at hand, which is the tax year 2020.

7           JUDGE LAMBERT: Yes. We will definitely take  
8       into account the relevant facts as the tax year, and we  
9       will be aware of any documents are dated later -- or the  
10      date of it is procedural because it's just a notice sent  
11      after the facts. And you can make clarifications, if you  
12      want, during your presentation of anything we should be --

13           MR. SHAMBERG: Thank you.

14           JUDGE LAMBERT: -- you know, should look to.

15           MR. SHAMBERG: Thank you, sir.

16           JUDGE LAMBERT: Okay. So that evidence is now in  
17      the record.

18           (Appellant's Exhibits 1-12 were received  
19      into evidence by the Administrative Law Judge.)  
20      (Department's Exhibits A-H were received  
21      into evidence by the Administrative Law  
22      Judge.)

23           JUDGE LAMBERT: Mr. Shamberg, this will be your  
24      opportunity to explain your position, and you have 20  
25      minutes. And I can swear you in before your presentation,

1 and you don't have to stand.

2 MR. SHAMBERG: Understood thank you.

3

4 R. SHAMBERG,

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

8

9 JUDGE LAMBERT: Okay. Thank you, Mr. Shamberg,  
10 and you can proceed when you're ready.

11 MR. SHAMBERG: Thank you.

12 I'm not sure whether to begin with information  
13 that's already been submitted to you or ask the panel if  
14 you have any questions based on what you've seen. I don't  
15 know the procedures, but I'm certainly willing to begin by  
16 answering questions.

17 JUDGE LAMBERT: Mr. Shamberg, you can just  
18 provide your presentation --

19 MR. SHAMBERG: All right.

20 JUDGE LAMBERT: -- and after that, then FTB and  
21 the panel can ask you questions.

22 MR. SHAMBERG: Thank you.

23

24 PRESENTATION

25 MR. SHAMBERG: This is a very simply case. And



1     it's simple because throughout the year 2020 there were  
2     absolutely no business done by McDonnell Lane. How is  
3     that possible? It's possible because the payments, when  
4     McDonnell Lane sold the prop -- the last -- the piece of  
5     property that it owned and setup the payment schedule, all  
6     was to be handled automatically. The payments were made  
7     by the debtor to an escrow. The escrow company then send  
8     it to an international banking operation. The  
9     international banking operation accumulated those funds.  
10    And at some time during the year, because this is a  
11    subchapter S corporation, the other partners and I would  
12    make a decision whether or not to actually distribute  
13    funds or not. There was no transactions outside of that,  
14    other than paying internal bills during that year.

15           Now, the other partner, that it was a 50 percent  
16    owner, died unexpectedly in November -- I don't remember  
17    the exact date -- in November of 2020. No distributions  
18    had been made. No additional business was conducted. And  
19    when I say no other, no transactions or profit or gain  
20    were made, other than perhaps internally. I think there  
21    may have been some interest that came into the account,  
22    but no additional funds went in. No other transactions.

23           When the other partner died, we had already moved  
24    to California. And let me be perfectly clear. I always  
25    paid my federal and income -- state California income tax.

1 Even during 2020, even though there was no distribution to  
2 us from McDonnell Lane -- and, although, we were entitled  
3 to it, we didn't -- the other partner and I just didn't --  
4 you know, there was no question. We never even discussed  
5 whether there would be a distribution because she didn't  
6 survive until the end of the year.

7 But what I'm saying is, even though there was no  
8 distribution because it's a subchapter S corporation, we  
9 are taxable. And so Mr. Tuttle's -- I think it's  
10 Mr. Tuttle's office. But anyway, the taxing authority had  
11 all of that information because I declared my share of the  
12 income, and it was on -- I say my -- our because it was my  
13 wife and I. We declared the income on our California  
14 income tax return, and we, of course, paid our California  
15 taxes. So when the party -- when she died, she was the  
16 treasurer. She was the operating person because she was  
17 living in Alaska. Everything was done. That was the  
18 mailing address.

19 There was no office. The business had shut down,  
20 and there was no office. All there was a mailing address.  
21 That was her mailing address. When she died unexpectedly,  
22 we had to do something. So in December -- about  
23 December 15th, I changed the address to my address care --  
24 McDonnell Lane care of. It wasn't McDonnell Lane's new  
25 address. It was in care of me. And that means, of

1 course, that it is not a regular address of the company.  
2 The domicile, as opposed to the State's position, is  
3 Alaska. The funds are in Alaska. You know, the single  
4 piece of property is in Alaska. The accountant is in  
5 Alaska. The records -- the financial records are all in  
6 Alaska.

7 The only records that I had were the corporate  
8 book. Anything I did was strictly internal work of the  
9 company. There were no businesses transactions. So she  
10 dies. I changed the address so I could get the tax return  
11 done. It was prepared in Alaska. My address care of  
12 Brock Shamberg, all right, until we could settle her --  
13 get her estate settled, and perhaps we would have another  
14 address in Alaska. But as it turns out, after all the  
15 problems of her estate, it was her daughter who lives in  
16 Washington that became the primary -- that became heir --  
17 or primary heir and took this asset.

18 So we have an interstate problem as well. We  
19 have an Alaska situation, funds, domicile in Alaska.  
20 Banking international company, and distributions would be  
21 made after September -- excuse me -- after 2020 to both  
22 Washington and to us here in California. So you've got  
23 a -- you -- there's really a legal question here as to the  
24 commerce clause, the international operation that is very  
25 tiny little company; one asset, one corporation, no tax

1 structure of any kind of loopholes or anything like that.

2 I lost my train of thought.

3 So we've got a question as to the commerce clause  
4 in international taxing, the restrictive taxing of a --  
5 something an international -- excuse me -- in national  
6 commerce. So that's the situation. I changed the  
7 address, care of me, get the -- did the tax return, signed  
8 the tax return with my -- with my address.

9 Now, there's another question. This may sound --  
10 a strict construction. If this is a penalty situation --  
11 and I realize you're going to be considering a penalty  
12 situation -- nowhere in the statute does it say I have to  
13 file, or nor was I told by the taxing authority that I had  
14 to file a California tax return for McDonnell Lane. What  
15 I sent him was the Alaska tax return for the corporation.  
16 And, of course, he had the federal tax return already.  
17 The same information in the Alaska tax return and the  
18 federal would have been the same thing in the California  
19 return. There's nothing different. He had all of this  
20 information.

21 It's duplicitous to ask that we would to then  
22 file this and penalize us because I didn't understand that  
23 they were asking for a California return. The statute  
24 says to file a tax return. That's what -- it doesn't say  
25 file a California tax return. Excuse me. Let me talk

1 about domicile for just a minute. I think the Bass case  
2 in 1987. Somebody told me about where working on the  
3 internal structure and finances of a corporation is not,  
4 quote, unquote, "doing business." That's taking care of  
5 the internal work of the company.

6 I wrote a check. I wrote a check to the  
7 accountant, yes. I am the signator [sic] on that check  
8 for preparing the tax return. I think I also -- during at  
9 that tax year, I think my partner perhaps reimbursed  
10 herself for the post office expense. There may be one  
11 other thing that I can't -- that I'm not thinking about.  
12 Oh, I think it was the snow -- reimburse the snow plow so  
13 they could get to the P.O. Box. That's all that was done.  
14 Nobody bought anything. Nobody sold anything. The money  
15 went in.

16 I guess you call -- I was told that this is a  
17 passive situation, that it's totally passive. And when  
18 we're talking about domicile, everything was done in  
19 Alaska up until she died late November. Eleven -- over,  
20 you know, 11 -- 11 months. The address was changed in  
21 care of me for two weeks in 2020. I think I quoted a  
22 couple of statutes that I found that it says, "Foreign  
23 corporation shall not be considered to transact interstate  
24 business by holding board meetings," okay, "or carrying on  
25 other activities." I think that's under Chapter 1,

1 sub c -- and other activities of its internal affairs.

2 That's my -- that's my role. That's what I was doing.

3 If we're going to look at that two weeks as being  
4 domiciled here, the domicile, I think it's important to  
5 also say you can have -- can't have just domiciliary  
6 issues without also some kind -- I find it it's commercial  
7 domicile. And the commercial domicile is still in Alaska.  
8 That's where all the transactions happened. There was no  
9 transactions happening here, except for preparing -- I  
10 didn't prepare -- except signing that tax return. So this  
11 is a very simple case with a very, very tight two-week  
12 period. And I've been told that the issue that you can  
13 have one financial transaction, and then that's enough  
14 to -- to then become subject to it, to the taxing  
15 authority.

16 There wasn't one. Not a single -- single  
17 transaction. All passive. All in Alaska. No even -- no  
18 distribution of funds, okay, to me at all even here. And  
19 so -- actually, there were -- let me point out. There  
20 were no distributions of any kind until 2022, I believe,  
21 when the other person became -- anyway, there were no  
22 distributions in 2020. But yet, I declared it on my  
23 taxes, and I paid them.

24 So there was -- the domiciliary issue requires  
25 some kind of -- I saw some kind of a note that -- let me

1     see if I can find it. I can't remember if it was the --  
2     which particular case it was at this moment, but it  
3     pointed out that you cannot have it commercial domiciliary  
4     without a commercial activity. It just -- it doesn't --  
5     it doesn't happen, and that is a -- it was a -- mentioned  
6     in a Supreme Court case.

7             All right. So it seems to me, after reading the  
8     statutes, that foreign corporations can do a lot here  
9     without being subject to a tax. They can have a bank  
10    account. They can have an office as long as they're not  
11    soliciting sales. They can do other aspects without  
12    qualifying to do business here. There's no office here.  
13    We don't maintain an office for McDonnell Lane. I  
14    maintain the corporate book. The only thing I do is the  
15    internal work, and I only did it possibly -- what did I  
16    do? I didn't write a check until 2000 -- for the tax  
17    return, it wasn't written in 2020. It was -- it was  
18    subsequent.

19            So the interstate aspect of this, really, becomes  
20    a burden having to require because California is already  
21    getting the tax from my -- our share. But now it also  
22    wants to tax the other person's share by requiring  
23    McDonnell Lane to do business. That is a burden on  
24    interstate commerce. They live in Washington, but she  
25    didn't -- she didn't in 2020. Everything was simply

1 Alaska and California at that time.

2 There's a class action pending that I understand  
3 that this case might be a member of that class. Do I need  
4 to -- do I need to reference that? I believe it's the  
5 Ball versus Cal, FTB, Case No. CGC16554150. And I believe  
6 that a -- I -- I was told that there's a class action  
7 order in that case that defines the class. I have not  
8 seen it, but my understanding is that this may -- this  
9 case may fall under that class.

10 One of the other things that I noticed in the  
11 statute is that holding a mortgage on California property  
12 can be done by certain companies without requiring them to  
13 do business here. So if holding a mortgage is excluded  
14 here, why isn't it possibly excluded if it's an Alaska  
15 mortgage and everything is done out-of-state?

16 Give me a moment, please, to review.

17 Oh, and I think -- excuse me, if I didn't --  
18 wasn't clear. The passive movement of those funds is done  
19 without any operation of anybody in the corporation. It  
20 is all done automatic. It was setup in 2019. Nobody does  
21 anything. It moves totally under the written instructions  
22 that were made in 2019. The only thing that would have  
23 been done in 2020 is a distribution of those funds between  
24 the partners and the subchapter S corporation, and that  
25 was not done. No distribution. But as I mentioned many



1 times, taxes were paid. And the Alaska tax return was  
2 filed, and the federal tax return was filed, and the  
3 taxing authority had both of those.

4 So is -- again, I was saying any -- filing any  
5 kind of a California return from McDonnell Lane would have  
6 simply been duplicitous in terms of the information it  
7 provided. And what's the purpose of the return? To see  
8 if it's a -- to see if it's taxable; to see if there's  
9 taxable income. Well, California did have all of that.

10 When mail is sent to someone in care of someone,  
11 it means the mail is sent to an address where the intended  
12 recipient does not normally receive mail. That was the  
13 postal definition that I had looked up.

14 There's also the issue of that this is a tax, and  
15 the issue of whether or not it can fair -- that California  
16 can fairly reach that economic activity in Alaska where  
17 there's really no benefit to the corporate -- excuse me --  
18 there's really no benefit to the foreign corporation for  
19 requiring it to register. There's -- there's no economic  
20 benefit whatsoever, and it's also duplicitous. By the  
21 way, there's no wages of any kind that are paid by this  
22 corporation. There were none in 2020. There are -- and  
23 there are none.

24 So the purpose of filing a California tax return  
25 was to compute the tax amount under the R&TC

1 section 23251, And the federal tax -- and the state taxing  
2 authority had the information. So it was inconsequential  
3 and punitive in nature to require -- to -- for us to be  
4 penalized now for not filing it. Especially, as I pointed  
5 out, when the statute itself it never mentions California  
6 tax return. It just says tax return.

7 JUDGE LAMBERT: Mr. Shamberg, I think your time  
8 is almost up. So if you want --

9 MR. SHAMBERG: All right.

10 JUDGE LAMBERT: -- you could finish.

11 MR. SHAMBERG: Thanks I will. Thank you.

12 Here it is. Judge Cheng's order in October  
13 of '24 in that case denied similar judgment in the Bahl  
14 Media case. It says, "Due process requires some definite  
15 link, some minimum connection, some property, a  
16 transaction before it can tax."

17 And finally, Article 1 in the Definitions in  
18 General Provisions provide that doing business means a  
19 financial for pecuniary gain as you -- as the Board -- the  
20 Judges are fully aware.

21 Thank you.

22 JUDGE LAMBERT: Thank you, Mr. Shamberg.

23 I will turn to FTB.

24 Mr. Tuttle, did you have any questions for  
25 Mr. Shamberg?

1 MR. TUTTLE: No questions.

2 JUDGE LAMBERT: Okay. Thanks.

3 I'll ask the panel if they have any questions.

4 Judge Gast, do you have any questions?

5 JUDGE GAST: This is Judge Gast. I don't have  
6 any questions at this time. Thank you.

7 MR. SHAMBERG: Thank you, Your Honor.

8 JUDGE LAMBERT: Judge Kim?

9 JUDGE KIM: I don't have any questions at this  
10 time.

11 JUDGE LAMBERT: Okay. Thank you, Judge Kim. I  
12 had some questions that I wanted to ask you.

13 MR. SHAMBERG: Thank you, sir.

14 JUDGE LAMBERT: I just wanted to clarify some  
15 of -- some facts. So I believe it was stated there were  
16 Zoom meetings that occurred during 2020; is that true?

17 MR. SHAMBERG: I'm sorry. Let me -- let me think  
18 for a minute.

19 JUDGE LAMBERT: In one of your briefs you said  
20 that having a Zoom meeting does not count as doing  
21 business. So I was clarifying if there were any Zoom  
22 meetings that happened.

23 MR. SHAMBERG: I -- I do not remember that  
24 back -- that far. I don't remember any Zoom meetings. It  
25 does not mean that they could not have happened. However,

1 if there was a meeting, it would have -- in 2020, it would  
2 have either been with the deceased partner or their  
3 attorney -- or the estate attorneys, or the accountant.  
4 No Zoom meeting would have happened with regard to any  
5 financial transaction other than something internally for  
6 the company -- for the corporation, such as did a -- did  
7 the estate need any documents that, you know, Mary --  
8 they couldn't find in Mary's files because she -- she had  
9 everything.

10 In fact, it had to have been -- it had to be sent  
11 to me subsequently. Or it may have been the accountant  
12 who needed information that I would have gotten or had  
13 directed from the mortgage company because it wouldn't  
14 have been set. But it all -- anything that would have  
15 happened, I can honestly testify to the fact one, I don't  
16 remember but two, if it was, it would have only been  
17 internal information -- internal workings. Nothing --  
18 there's nothing external ever happened.

19 JUDGE LAMBERT: Okay. Thanks. And there's --  
20 after the other shareholder passed away, her trust took  
21 over her ownership percentage. And I was wondering the  
22 trust and the trustees, like, how much control or  
23 management they asserted after she passed away. Did they  
24 contribute in terms of, you know, any responsibility in  
25 terms of managing?

1           MR. SHAMBERG: Well, at that time, I was the  
2 minority shareholder. I had less -- yeah, I was the  
3 minority shareholder. Subsequently, we have created the  
4 trust. She was 50 percent. She was the controlling  
5 shareholder. And yes, she -- she -- we did whatever she  
6 wanted done. If she wanted a distribution, we do the  
7 distribution. There's -- I never remember any discussion  
8 about doing any additional business outside of the funds  
9 that were coming in automatically. So the answer is yes,  
10 she was the 50 percent shareholder at that time.

11           JUDGE LAMBERT: Okay. Thanks. And you were you  
12 the minority shareholder, but then there's a  
13 Mrs. Shamberg -- Ms. Shamberg that was also a shareholder  
14 too, right?

15           MR. SHAMBERG: That's correct.

16           JUDGE LAMBERT: Okay. And was Ms. Shier as  
17 direct -- was she a director prior to --

18           MR. SHAMBERG: Yes.

19           JUDGE LAMBERT: -- passing away?

20           MR. SHAMBERG: I -- I mean, I don't have the  
21 documents in front of me, but my understanding is that she  
22 was -- she was a director. She was a shareholder, and she  
23 was the treasurer at that time. And she was the signator.  
24 She is the person who signed the checks. And actually,  
25 I -- my recollection is I won't say she signed all of

1       them, but I think she was the only one. And I think she  
2       signed the tax returns, but I'm not positive about that.

3               JUDGE LAMBERT: Okay. Thanks. And on the tax  
4       return for McDonnell Lane, it states there was an  
5       installment sale payment. Was that related to the  
6       property that was sold?

7               MR. SHAMBERG: That was the only thing. Yes,  
8       sir. That was the installment sale done in 2019 with  
9       payments coming in automatically each month.

10              JUDGE LAMBERT: Okay. And there's a payment made  
11      on December 31st, 2020. And so these payments, they went  
12      to an accountant in Alaska and --

13              MR. SHAMBERG: That's -- that's -- well, it's an  
14      international company but, yes. The office in the --

15              JUDGE LAMBERT: Okay.

16              MR. SHAMBERG: -- that we had set it up with was  
17      in Alaska.

18              JUDGE LAMBERT: Okay.

19              MR. SHAMBERG: It has an Alaskan number. It --  
20      and that's -- Alaskan mortgage company collected it. Sent  
21      it on to the Alaska account.

22              JUDGE LAMBERT: Okay. And some payments it  
23      looked like they flowed through. The payments -- some  
24      payments flowed through to your K-1s. It looked like  
25      there were some 1231 and 1250 gain?

1           MR. SHAMBERG: Correct. They flowed through to  
2 us without any distribution.

3           JUDGE LAMBERT: Okay.

4           MR. SHAMBERG: So we received no funds, but they  
5 flowed through tax-wise.

6           JUDGE LAMBERT: Okay. And on the McDonnell Lane  
7 tax return there's -- and on your K-1 there's interest and  
8 dividends. Were those from separate accounts? Because on  
9 McDonnell Lane it looks like there's different types of  
10 accounts maybe?

11          MR. SHAMBERG: No, sir. There's my recollection  
12 and yeah. I'm almost positive. There's one bank account  
13 during 2020. There may have been other accountant in  
14 prior years. I don't remember how she did it. But in  
15 2020 there's one account. Funds flowed from that sale --  
16 that installment sale into that account. There may have  
17 been interest and dividends from position -- in position  
18 held in that one account.

19          JUDGE LAMBERT: Okay. And --

20          MR. SHAMBERG: And she may have -- and she may  
21 have made -- she may have moved some funds in the account  
22 from interest bearing, from one interest bearing to  
23 another, but it would have taken -- it would all been  
24 internal. It would not have been from source outside.  
25 Because to my knowledge, there was never any other source.

1 JUDGE LAMBERT: Okay. Thanks. And was the  
2 purpose of the corporation to -- well, what was the  
3 purpose of the corporation? Was it to just sell that  
4 property and then receive money into the trust?

5 MR. SHAMBERG: Right. The purpose of the  
6 corporation originally was to hold that property. It was  
7 a rental. It had a couple of buildings on it. One, I  
8 think, was a -- I guess you could call it a house.  
9 Anyway, it had a couple of buildings, and it was rented.  
10 And it was held for many years. I don't remember the  
11 original. I think it probably tells in the tax return  
12 what the original date was, but for many years.

13 It was decided in about 2017, I think, to go  
14 ahead and sell it off. It took awhile, maybe 2018. I  
15 don't remember. Anyway the sale was completed and all the  
16 documents signed in I believe 2019. So there was no other  
17 work, no other business of the corporation. That was the  
18 end of it.

19 JUDGE LAMBERT: So the corporation would just --  
20 so you're saying that the activity for the corporation was  
21 done and now payments would just be received into the  
22 international account --

23 MR. SHAMBERG: Right.

24 JUDGE LAMBERT: -- on the note?

25 MR. SHAMBERG: Right.



1 JUDGE LAMBERT: And is there -- were there, like,  
2 some plan to receive distributions in the future or --

3 MR. SHAMBERG: The plan was to let the  
4 instructions that were made in 2019 workout completely.  
5 So that would have been at the choice of the owner -- the  
6 buyer and according to whatever -- whatever the  
7 instructions were -- the terms -- whatever the terms of  
8 the note in the mortgage were at that time.

9 JUDGE LAMBERT: Okay.

10 MR. SHAMBERG: And that -- it was all done by  
11 Alaska attorneys, Alaska counsel.

12 JUDGE LAMBERT: Okay. Okay. Thank you. That's  
13 all the questions I have. So thank you. I appreciate it.

14 MR. SHAMBERG: Of course.

15 JUDGE LAMBERT: Now, we can move onto FTB's  
16 presentation for 10 minutes.

17 So, Mr. Tuttle, you can proceed when you're  
18 ready.

19 MR. TUTTLE: Thank you.

20

21 PRESENTATION

22 MR. TUTTLE: Good morning. My name is Topher  
23 Tuttle. I'm representing the Franchise Tax Board or FTB.  
24 With me is Jackie Zumaeta, also representing FTB.

25 The issues in this appeal are whether Appellant

1 owes the minimum franchise tax; and whether Appellant has  
2 established a basis to abate the delinquent filing  
3 penalty, the demand penalty, the filing enforcement fee,  
4 or interest. The facts of the case are simple. After  
5 Appellant's Alaska-based shareholder, who is also a  
6 corporate officer, passed away during tax year 2020,  
7 management fell to the remaining two shareholders who are  
8 located in California. FTB's proposed assessment for tax  
9 year 2020 is based on Appellant's California activities.

10 First, I will discuss whether Appellant owes the  
11 minimum franchise tax. If a corporation is doing business  
12 in California, as described in Revenue & Taxation Code  
13 section 23101, it must pay at least the \$800 minimum  
14 franchise tax to California and file a California tax  
15 return. In the precedential Office of Tax Appeals  
16 opinion, Appeal of GEF Operating Incorporated, the panel  
17 found that Section 23101 included two alternative tests to  
18 determine whether taxpayer is doing business in  
19 California.

20 The first test is found in subsection (a) and  
21 states a taxpayer is doing business if it is actively  
22 engaging in any transaction for the purpose of financial  
23 or pecuniary gain or profit in California. The second  
24 test is found in subsection (b) and includes a list of  
25 specific conditions, which if satisfied, will establish a

1 taxpayer is doing business in California. Appeal of GEF  
2 specifically states that these conditions are not minimum  
3 thresholds and do not provide any safe harbor from the  
4 general definition of doing business found in  
5 subsection (a). In fact, the Office of Tax Appeals found  
6 that subsection (b) was intended to broaden the scope of  
7 doing business to explicitly encompass owners of  
8 pass-through entities with economic presence in  
9 California.

10 FTB agrees that Appellant does not appear to  
11 satisfy any of the conditions in subsection (b) for doing  
12 business. However, this does not prevent FTB from finding  
13 Appellant is doing business under subsection (a). In this  
14 case, FTB received information that Appellant used a  
15 California address on its federal tax return. Appellant  
16 has confirmed that its corporate address was changed on  
17 December 15th, 2020, from an address in Alaska to an  
18 address in California. Therefore, Appellant actively  
19 engaged in a transaction in California by changing its  
20 corporate address for the convenience of its managing  
21 officers and shareholders.

22 Since Appellant remains an active corporation,  
23 Appellant's change of address was for the purpose of  
24 financial or pecuniary gain or pecuniary gain or profit.  
25 Appellant continues to receive an income stream related to

1 the sale of its real estate asset. And Appellant's  
2 California shareholders managed Appellant's business from  
3 California after the managing shareholder in Alaska passed  
4 away. Thus, Appellant was doing business in California  
5 and must pay the minimum California franchise tax.

6 Next, I will discuss whether Appellant has  
7 established a basis to abate the late-filing penalty and  
8 the demand penalty. Both the late-filing and demand  
9 penalties were properly imposed because Appellant failed  
10 to timely file a tax return by the due date and failed to  
11 do so upon notice and demand by FTB. Appellant has not  
12 alleged error in the imposition or calculation of the  
13 penalties, only that it did not have a filing requirement.  
14 Even if a taxpayer is unaware of a filing requirement,  
15 ignorance of the law is not an excuse for failing to file  
16 a timely return or failing to file a return upon notice  
17 and demand. As such, Appellant has not established  
18 reasonable cause to abate either the late-filing penalty  
19 or the demand penalty.

20 Next, I will discuss the filing enforcement fee.  
21 FTB notified Appellant it had a filing requirement, and  
22 Appellant failed to file a return by the prescribed due  
23 date. As such, FTB properly imposed the filing  
24 enforcement fee. And once the filing enforcement fee is  
25 properly imposed, there is no provision that excuses the

1 imposition of the fee. As such, Appellant has failed to  
2 establish a basis to abate the filing enforcement fee.

3 Finally, I will discuss interest. If the tax is  
4 not paid by the original due date, interest must be  
5 charged on the resulting balance due compounded daily.  
6 Interest is also charged on penalties if they're not paid  
7 within 15 days of notice and demand. Interest is not a  
8 penalty but is merely compensation for a taxpayer's use of  
9 money after it should have been paid to the state. There  
10 is no reasonable cause exception to the imposition of  
11 interest. In this case, Appellant has not established  
12 that any of the limited exceptions for abating interest  
13 applies. Furthermore, FTB's review of this matter shows  
14 no irregularities in the processing or treatment of this  
15 case such that abatement of interest is warranted under  
16 the law. Therefore, FTB properly charged the mandatory  
17 interest, and Appellant has not established any  
18 entitlement to its abatement.

19 In conclusion, Appellant has a filing requirement  
20 because it was doing business in California during tax  
21 year 2020. In addition, Appellant has failed to establish  
22 a basis to abate the delinquency penalty -- delinquent  
23 filing penalty, the demand penalty, the filing enforcement  
24 fee and interest. Therefore, based on the facts and  
25 evidence in the record, FTB respectfully requests you

1 sustain its position.

2 I'm happy to address any questions you may have.  
3 Thank you.

4 JUDGE LAMBERT: Thank you, Mr. Tuttle.

5 I will turn to the panel to see if there's in  
6 questions.

7 Judge Gast, do you have any questions?

8 JUDGE GAST: Yeah. I have a few questions. So  
9 you said that FTB doesn't contest doing business under  
10 23101(b); is that correct?

11 MR. TUTTLE: That's correct.

12 JUDGE GAST: Okay. So commercial domicile was in  
13 Alaska in 2020 under (b)(1)?

14 MR. TUTTLE: That's a good question. And that's  
15 not something that we briefed, and that -- if the panel is  
16 interested, FTB is interested in briefing it post hearing.

17 JUDGE GAST: Okay. Thank you. And then your  
18 position is basically that the taxpayer had -- was doing  
19 business in California because of a shareholder  
20 controlling the company in 2020?

21 MR. TUTTLE: Right. So the California  
22 shareholders were also corporate officers. And so their  
23 activities, their management of the business of the  
24 corporation are the activities that FTB asserts rise to  
25 the level of doing business.

1 JUDGE GAST: Okay. And then in that same kind of  
2 vein, Regulation 23101 -- which Appellant cited in its  
3 brief -- (b) says the mere receipt of dividends and  
4 interest by a corporation and the distribution of such  
5 income to its shareholders does not constitute doing  
6 business. Is that any different from what happened here?

7 MR. TUTTLE: So I would -- I would argue that the  
8 taxpayer's use of a California address to conduct business  
9 is more than the passive receipt of income.

10 JUDGE GAST: Okay. And what was the business?  
11 Because that corporation -- the S corporation sold its  
12 only asset the year before and seemed to be just  
13 collecting interest on the sale. So in your view, what  
14 was the business after that?

15 MR. TUTTLE: Yeah. So the existence of the  
16 corporation and its continued receipt of the funds  
17 relating to the sale of its sole asset is its ongoing  
18 business is its very existence. And the minimum franchise  
19 tax is imposed on corporations for their existence and  
20 active receipt of those funds related to the transaction,  
21 you know, that had previously occurred. But it's the  
22 business of the corporation holding an address, filing tax  
23 returns that remains an essential part of its function to  
24 obtain that income stream.

25 And for it to continue to be a valid entity, it

1 must, you know, jump through the procedural hoops of  
2 maintaining an active address where it can receive service  
3 of process, filing tax returns. It still exist as an  
4 entity. And so those activities of managing its existence  
5 and continued receipt of those funds is -- rises to the  
6 level of doing business under 23101(a).

7 JUDGE GAST: Thank you. Sorry. Just one more  
8 question here. Regulation 23101(a) does say that doing  
9 business occurs when the company has liquidating  
10 activities consisting of collections on notes. And then  
11 (b) then says, you know, mere receipt of interest. Do you  
12 know what the difference is between collection on notes  
13 versus the mere receipt of interest?

14 MR. TUTTLE: That's something FTB has not  
15 briefed --

16 JUDGE GAST: Okay.

17 MR. TUTTLE: -- and would be willing to brief  
18 post hearing. Thank you.

19 JUDGE GAST: Okay. No problem. Thank you very  
20 much.

21 JUDGE LAMBERT: Thank you.

22 Judge Kim, did you have any questions?

23 JUDGE KIM: I think my questions have been  
24 answered. Thank you.

25 JUDGE LAMBERT: Okay. Thanks.



1           And the brief for FTB did mention 23101(b), the  
2       commercial domicile. So it was briefed, like, briefly.  
3       So would you say it's still at issue for FTB?

4           MR. TUTTLE: Yes. And I may have misspoke  
5       earlier in my presentation when I discounted its  
6       applicability to -- in my mind, when I made that argument,  
7       I was referring to the thresholds for economic nexus,  
8       rather than the commercial domicile prong of that  
9       analysis.

10          JUDGE LAMBERT: Okay. Thanks.

11          I don't have any further questions.

12          Actually, Judge Gast may have a question.

13          JUDGE GAST: Yeah. I'm sorry. This one is for  
14       Appellant Mr. Shamberg.

15          MR. SHAMBERG: Yes, sir.

16          JUDGE GAST: Can you touch on again in 2020 what  
17       kind of control, if any, you exerted -- and your wife. I  
18       know that you said about 25 percent. She had about 25  
19       percent. So that's about 50 percent. So the other  
20       shareholder also had 50 percent. So it seems equal there.  
21       Can you touch on what -- because we don't have, you know,  
22       the agreement of -- the operating agreement of the LLC --  
23       or the S corporation and file. So you can touch on who  
24       had control over the entity during that year.

25          MR. SHAMBERG: Interest --

1 JUDGE GAST: And after she -- she -- the other  
2 shareholder --

3 MR. SHAMBERG: Right.

4 JUDGE GAST: -- passed away.

5 MR. SHAMBERG: Thank you. Thank you. There is  
6 no operating agreement. There was -- there never was an  
7 operating agreement as such. These are two people who  
8 lived, basically, a couple of doors away from each other  
9 that bought a piece of land and decided to -- decided to  
10 buy a piece of land and rent it. And that's the way it  
11 went for -- I don't know -- 15 years or whatever the  
12 amount of time was. So no operating agreement.  
13 Everything was done by consensus.

14 I was, as I said, was the minority shareholder.  
15 My wife was 25 percent. Mary had 50 percent until the --  
16 I guess -- yeah. I guess it was in a trust at that time.  
17 But anyway, she was the controller. What control did we  
18 have? All I can tell you is we never -- we never --  
19 what's the word I want -- we never manifested control. We  
20 never did anything without total agreement between Mary,  
21 my wife, and I. We would not -- we would not so much as  
22 buy lunch unless we were all together and pay for it that  
23 way.

24 This was just a little small situation where we  
25 had that piece of property. So we -- we -- whether we

1       20 -- 50 percent together or not, we never ever did  
2       anything separately from working with Mary. Mary was --  
3       she was the boss, you know. She never ruled over us. But  
4       it was, you know, she had an idea. She'd bring it to us,  
5       and we'd do. If we had an idea, we'd talk with her.

6               Does that answer the question? I'm sorry.

7               JUDGE GAST: Yeah. Yeah. Yeah. And then one  
8       more quick question. I'm sorry. When the property sold  
9       in 2019, after that the whole purpose of company -- or any  
10      activities you did in California was limited to winding up  
11      the business?

12              MR. SHAMBERG: Total.

13              JUDGE GAST: Total business. And that's --

14              MR. SHAMBERG: Total. Whether I was in -- in --  
15      and I was going back and forth. I was -- I was still  
16      in -- I can't remember. But yeah, anything we did after  
17      2019 was -- literally, that's why it was sold; winding up  
18      the business, trying to get an income stream to support  
19      Mary and -- and us.

20              JUDGE GAST: Thank you very much. I don't have  
21      anymore question.

22              MR. SHAMBERG: Thank you.

23              JUDGE LAMBERT: I just wanted to follow up on  
24      just one thing that Judge Gast was saying about how much  
25      control was exerted on each side, and you were discussing

1 before the other shareholder passed away. But after she  
2 passed away in December was -- was the situation the same  
3 in terms of control with you and Ms. Shamberg and the  
4 co-trustees in a trust?

5 MR. SHAMBERG: Our -- our percentages of  
6 ownership had not changed. Everybody was in such shock.  
7 I can tell you, from the time Mary died until the end of  
8 that year, nothing was done, other than trying to  
9 determine her heirs and the whole legal issue about, you  
10 know, what was going to happen. We certainly would never  
11 have done anything, nor probably could we that would have  
12 been in contravention of -- of that situation. I  
13 certainly -- we didn't take any kind of distribution, and  
14 the trust did not ask for one.

15 JUDGE LAMBERT: Okay. Thank you. So  
16 Mr. Shamberg, you can make your closing remarks now for 10  
17 minutes.

18 MR. SHAMBERG: Thank you.

19

20 CLOSING STATEMENT

21 MR. SHAMBERG: Listening to counsel, it was an  
22 interesting argument, and I -- one I wasn't aware of, that  
23 continuation of the corporation is, in fact, kind of like  
24 doing business and therefore, we should register. But  
25 that's not what happened in 2020. In 2020 there was no

1 business, other than -- it's already been explained many  
2 times -- about the internal work.

3 Now, the address is not necessary for service of  
4 process. The registered agent of the corporation resides  
5 in, lives in, and is not just a corporation. I mean, I'm  
6 not a -- what do you call it -- a hired gun. I mean, the  
7 registered agent lives in Alaska. Still there. It's  
8 still the registered agent. Russ Minkemann is the -- was  
9 the accountant. He's the registered agent for service of  
10 process. I used the address here because something has to  
11 come to me so I could pay my personal California income  
12 tax. So I have to -- the tax return. Federal has to be  
13 done, and I have to pay my California tax, which I've  
14 always done.

15 The -- I want to point out that one case that I  
16 mentioned, which is Complete Auto Transit versus Brady 430  
17 United States 274 1977. And basically, the case says  
18 nonexistent activity cannot have substantial nexus to  
19 California. The first prong of the complete auto test is  
20 that there must be some actual financial activity that is  
21 not simply internal. California Corporation Code 191 -- I  
22 think that's a 2024 -- says without excluding other  
23 activities that may not constitute transacting business,  
24 that holding meetings of its board of shareholders or  
25 carrying other activities concerning its internal affairs

1       -- that's sub (2) -- is not transacting business. No. 7,  
2       the engaged -- engaging in activities necessary or  
3       appropriate to carry out any of the foregoing activities  
4       is permitted. It's not conducting business, even though I  
5       live here and there's an address here.

6               Thank you very much, gentlemen.

7               JUDGE LAMBERT: Thank you.

8               I'll ask my co-panelists if they have any final  
9       questions of either party.

10              Judge Gast, do you have any questions?

11              JUDGE GAST: No questions.

12              JUDGE LAMBERT: Okay. Judge Kim, did you have  
13       any questions?

14              JUDGE KIM: No questions. Thank you.

15              JUDGE LAMBERT: Okay. Thanks.

16              If there's nothing further, I'm going to conclude  
17       the hearing. I want to thank both parties for appearing  
18       today. We will issue a written opinion within 100 days.

19              Thank you.

20              The record is now closed.

21              (Proceedings adjourned at 10:32)

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