

1 Josh Lambert  
 2 Tax Counsel  
 3 Board of Equalization, Appeals Division  
 4 450 N Street, MIC: 85  
 5 P.O. Box 942879  
 6 Sacramento, CA 95814  
 7 Tel: (916) 322-3284  
 8 Fax: (916) 324-2618

9 Attorney for the Appeals Division

10 **BOARD OF EQUALIZATION**  
 11 **STATE OF CALIFORNIA**

12 In the Consolidated Matter of the Appeals of: ) **HEARING SUMMARY**  
 13 ) **PERSONAL INCOME TAX APPEAL**  
 14 **JEFFREY A. FORESTA**<sup>1</sup> ) Case Nos. 762692, 763560, 763561<sup>2</sup>

	<u>Years</u>	<u>Proposed Assessments</u>	
		<u>Additional Tax</u>	<u>Penalties and Fee</u> <sup>3</sup>
	2008	\$4,135.50	\$2,067.50 <sup>4</sup>
	2009	\$768.00 <sup>5</sup>	\$1,228.25
	2010	\$1,453.00	\$814.50

15  
16  
17  
18  
19 <sup>1</sup> Appellant currently resides in Riverside County.

20 <sup>2</sup> These appeals (Case ID Numbers 762692, 763560, and 763561, relating to tax years 2008, 2009, and 2010, respectively)  
 21 were consolidated by the Board Proceedings Division in accordance with California Code of Regulations, title 18,  
 22 section 5522.4.

23 <sup>3</sup> The penalty and fee amounts consist of the following: (1) for 2008, a late filing penalty of \$1,033.75 and a notice and  
 24 demand penalty of \$1,033.75; (2) for 2009, a late filing penalty of \$192.00 and a notice and demand penalty of \$1,036.25;  
 25 and (3) for 2010, a late filing penalty of \$363.25, a notice and demand penalty of \$363.25, and a filing enforcement fee of  
 26 \$88.00.

27 <sup>4</sup> Respondent notes that appellant's \$4,183.63 withholding for tax year 2008 exceeds the proposed assessment of tax on the  
 28 Notice of Action (NOA) for 2008. Therefore, respondent has agreed to abate the late filing penalty of \$1,033.75 for tax year  
 2008.

<sup>5</sup> Respondent notes that the 2009 NOA affirmed the 2009 Notice of Proposed Assessment (NPA) on which a total tax of  
 \$4,145 was proposed. The \$4,145 is the amount of tax in controversy for the 2009 tax year. The \$768 noted in the caption  
 above and in the Board's acknowledgement letter represents the unpaid tax proposed on the NPA after accounting for  
 \$3,377 of withholding. However, the withholding was incorrectly refunded prior to the issuance of the 2009 NPA and  
 NOA.

1 Representing the Parties:

2 For Appellant: Jeffrey A. Foresta

3 For Franchise Tax Board: Brian Werking, Tax Counsel

- 4
- 5 QUESTIONS: (1) Whether appellant has demonstrated any error in the Franchise Tax Board’s  
6 (FTB or respondent) proposed assessments for tax years 2008, 2009, and 2010;  
7 (2) Whether appellant has demonstrated reasonable cause to abate the late filing  
8 penalties for tax years 2009 and 2010;<sup>6</sup>  
9 (3) Whether appellant has demonstrated reasonable cause to abate the notice and  
10 demand penalties (demand penalties) imposed for tax years 2008, 2009, and  
11 2010;  
12 (4) Whether the filing enforcement fee can be abated for tax year 2010; and  
13 (5) Whether the Board should impose a frivolous appeal penalty.

14

15 HEARING SUMMARY

16 Background

17 2008

18 Appellant has not filed a California personal income tax return (Form 540) for the 2008  
19 tax year. (Respondent’s opening brief (ROB), p. 2.) Respondent received information from the  
20 Employment Development Department (EDD) through its Integrated Non-Filer Compliance (INC)  
21 program indicating that appellant earned sufficient income from ADEA Solutions Inc. to prompt a  
22 return-filing requirement.<sup>7</sup> (ROB, Ex. A.) According to appellant’s 2008 Internal Revenue Service  
23 (IRS) Wage and Income Transcript, appellant had \$73,963.50 of wage compensation from  
24 ADEA Solutions, Inc. in that year. (ROB, Ex. A.)

25

---

26 <sup>6</sup> As noted above, respondent has agreed to abate the late filing penalty assessed for tax year 2008.

27 <sup>7</sup> For tax year 2008, a single person with gross income from all sources in excess of the minimum filing requirement of  
28 \$14,845 was required to file a return regardless of the amount of his or her adjusted gross income, pursuant to Revenue and  
Taxation Code (R&TC) section 18501, subdivision (a)(3).

1 Appellant filed a 2008 California fiduciary income tax return (Form 541), on which  
2 appellant identified himself as the trustee for “JEFFREY A FORESTA” and reported “other income” of  
3 \$73,964 described as “w2”. Appellant also deducted reported fiduciary fees of \$73,964 from his  
4 income, which resulted in a zero tax liability. (ROB, Ex. B.) Appellant reported withholdings and an  
5 overpayment of \$4,184. (ROB, Ex. B.) Appellant attached a 2008 Wage and Tax Statement Form W-2  
6 issued by ADEA Solutions, Inc. that reported wages of \$73,963.50 to appellant, and withholdings of  
7 \$4,183.63. (ROB, Ex. A.) Appellant also attached a letter, described as a “commercial affidavit,”  
8 stating that appellant received no income in 2008, that all withholdings should be released to appellant  
9 as a secured party, and that the commercial affidavit was being filed in lieu of the Form 540. (ROB,  
10 Ex. B, p. 4.) Subsequently, a refund of \$4,184 was issued incorrectly to appellant based on the  
11 submitted Form 541. (ROB, Ex. C.)

12 Respondent reviewed appellant’s Form 541 and supplemental documentation and  
13 determined the return to be an invalid California “personal” income tax return.<sup>8</sup> On March 17, 2011,  
14 respondent sent appellant a “Notice of Frivolous Return Determination and Demand for Tax Return”  
15 (Frivolous Demand Notice) which informed appellant that his 2008 Form 541 was frivolous and  
16 demanded that appellant file a valid tax return within 30 days. (ROB, p. 3, Ex. D.) Appellant replied in  
17 a letter with attachments, indicating that he was not subject to tax and did not have a filing obligation.  
18 (ROB, Ex. E.)

19 Because appellant did not file a valid personal 2008 tax return, respondent issued a  
20 Notice of Proposed Assessment (NPA) on January 27, 2012, which proposed a tax of \$4,135.00, a late  
21 filing penalty, and a demand penalty of \$1,033.75, plus interest. (ROB, Ex. F.) Withholding credits  
22 were not included in the NPA because appellant’s 2008 withholding was refunded incorrectly to  
23 appellant prior to the issuance of the NPA. (ROB, p. 3.)

24 ///

25 ///

26 \_\_\_\_\_  
27 <sup>8</sup> An individual attributing income to a trust and deducting the income as fiduciary fees has been identified in  
28 Internal Revenue Service (IRS) Notice 2010-33 as a frivolous position for the purposes of imposing penalties for filing a  
frivolous tax return or a frivolous submission under Internal Revenue Code (IRC) sections 6702(a) and (b).

1 Respondent received a letter with attachments that protested the NPA for tax year 2008.<sup>9</sup>  
2 (ROB, p. 3, Ex. G.) In the letter, appellant explained that he was not subject to tax. Enclosed with the  
3 letter was a copy of the 2008 NPA with a stamp indicating that the debt had been discharged and that  
4 the NPA letter constituted a money order payable to the FTB as a tax credit. (ROB, Ex G, p. 1.)  
5 Respondent acknowledged the receipt of appellant's protest and request for hearing and explained that  
6 appellant's protest had been forwarded to a district office near appellant. (ROB, Exs. H & I.)  
7 Respondent then informed appellant that his protest hearing was scheduled for May 20, 2013.  
8 Appellant sent a letter to respondent requesting that the hearing for 2008 be postponed for 45 days, to  
9 which respondent replied that the protest hearing would be rescheduled to July 8, 2013.<sup>10</sup> (ROB, Exs.  
10 J, K, & L.)

11 The protest hearing for 2008, and the other tax years at issue, took place on July 8,  
12 2013.<sup>11</sup> (ROB, p. 4.) After the protest hearing, respondent's hearing officer recommended that the  
13 NPA for 2008 be affirmed. Respondent affirmed the NPA by issuing an NOA on August 1, 2013.  
14 (Appellant's opening brief (AOB) Case No. 762692, attachments.) Appellant timely appealed the  
15 NOA. (ROB, p. 4.)

#### 16 2009

17 Appellant has not filed a Form 540 for the 2009 tax year. (ROB, p. 4.) Respondent  
18 received information from the EDD through its INC program indicating that appellant earned sufficient  
19 income from Managed Staffing, Inc. to prompt a return-filing requirement.<sup>12</sup> (ROB, p. 4.) According  
20 to appellant's 2009 IRS Wage and Income Transcript, appellant had \$71,856 of wages from  
21 Managed Staffing, Inc. in that year. (ROB, Ex. M.)

22 \_\_\_\_\_  
23 <sup>9</sup> Appellant's letter protested proposed assessments for tax years 2003 through 2008. However, respondent did not propose  
24 an assessment for tax year 2007 and the assessments for tax years 2003 through 2006 are final because no protest was filed  
25 within the period set forth in R&TC section 19041.

26 <sup>10</sup> Appellant's letter included a request to postpone the protest hearings for tax years 2008, 2009, and 2010.

27 <sup>11</sup> The 2008, 2009, and 2010 tax year protest hearings were consolidated and held on the same date at the same time.

28 <sup>12</sup> For tax year 2009, a single person with gross income from all sources in excess of the minimum filing requirement of  
\$14,622 was required to file a return regardless of the amount of his or her adjusted gross income, pursuant to R&TC  
section 18501, subdivision (a)(3).

1 Appellant filed a 2009 Form 541, on which he identified himself as the trustee for  
2 “JEFFREY A FORESTA” and reported “other income” of \$71,856 described as “W2”. (ROB, p. 4,  
3 Ex. N.) Appellant also deducted reported fiduciary fees of \$71,856 from his income, which resulted in  
4 a zero tax liability. (ROB, Ex. N.) Appellant reported withholdings of \$3,378 and an overpayment of  
5 the same amount. (ROB, Ex. N.) Appellant attached a 2009 Form W-2 issued by Managed Staffing,  
6 Inc. that reported wages of \$71,856.00 and withholdings of \$3,377.76. (ROB, Ex. M.) Appellant also  
7 attached a letter, described as a “commercial affidavit,” asserting that appellant received no income in  
8 2009, that all withholdings should be released to appellant as a secured party, and that the commercial  
9 affidavit was being filed in lieu of a Form 540. (ROB, Ex. N, p. 4.) Subsequently, a refund of  
10 \$3,404.01 (i.e. \$3,378.00 (withholding) + \$26.01 (interest allowed) was issued incorrectly to appellant  
11 based on the submitted Form 541. (ROB, p. 4, Ex. O.)

12 On February 2, 2011, respondent issued a Demand for Tax Return (Demand Notice) to  
13 appellant, requiring that appellant either show that a return had been filed, or explain why a return was  
14 not required. (ROB, p. 4, Ex. P.) Appellant replied in a letter with attachments, indicating that he  
15 already mailed a tax return. (ROB, Ex. Q.)

16 Respondent reviewed appellant’s Form 541 and supplemental documentation and  
17 determined the return to be an invalid California “personal” income tax return.<sup>13</sup> (ROB, p. 5.) On  
18 March 17, 2011, respondent sent appellant a Frivolous Demand Notice which informed appellant that  
19 his 2009 Form 541 was frivolous and demanded that appellant file a valid tax return within 30 days.  
20 (ROB, Ex. R.) Appellant replied in a letter with attachments, arguing that he was not subject to tax.  
21 (ROB, Ex. S.)

22 Because appellant did not file a valid personal 2009 tax return, respondent issued an  
23 NPA on December 27, 2011, which proposed a total tax of \$4,145.00, a late filing penalty of \$192.00,  
24 and a demand penalty of \$1,036.25, plus interest. The proposed total tax was reduced to \$768 after  
25 applying withholding credits of \$3,377 which were incorrectly refunded to appellant. (ROB, p. 5,  
26 Ex. T.)

27  
28 \_\_\_\_\_  
<sup>13</sup> See footnote 8.

1 Respondent received a letter with attachments that protested the NPA for tax year  
2 2009.<sup>14</sup> (ROB, p. 5, Ex. U.) In the letter, appellant explained that he was not subject to tax. Enclosed  
3 with the letter was a copy of the 2009 NPA with a stamp indicating that the debt had been discharged  
4 and that the NPA letter constituted a money order payable to the FTB as a tax credit. (ROB, Ex. U,  
5 p. 1.) Respondent acknowledged the receipt of appellant’s protest and request for hearing and  
6 explained that appellant’s protest had been forwarded to a district office near appellant. (ROB, Exs. V  
7 & W.) Respondent informed appellant that his protest hearing was scheduled for May 20, 2013, and  
8 appellant requested that the hearing for 2009 be postponed for 45 days, to which respondent replied that  
9 the protest hearing would be rescheduled to July 8, 2013.<sup>15</sup> (ROB, Exs. X, K, & Y.)

10 The protest hearing for 2009, and the other tax years at issue, took place on July 8, 2013.  
11 (ROB, p. 5.) After the protest hearing, respondent’s hearing officer recommended that the NPA for  
12 2009 be affirmed. Respondent affirmed the NPA by issuing an NOA on August 1, 2013. (AOB  
13 Case No. 763560, attachments.) Appellant timely appealed the NOA. (ROB, p. 6.)

#### 14 2010

15 Appellant has not filed a Form 540 for tax year 2010. (ROB, p. 6.) Respondent  
16 received information from the EDD through its INC program indicating that appellant earned sufficient  
17 income from Managed Staffing, Inc. to prompt a return-filing requirement.<sup>16</sup> (ROB, p. 6, Ex. Z.)  
18 According to appellant’s 2010 IRS Wage and Income Transcript, appellant had \$42,848 of wages from  
19 Managed Staffing, Inc. in that year. (ROB, p. 6, Ex. Z.)

20 Appellant filed a 2010 Form 541 which identified himself as the trustee for  
21 “JEFFREY A FORESTA” and reported “other income” of \$42,848 described as “W2”. (ROB, p. 6,  
22 Ex. AA.) Appellant also deducted reported fiduciary fees of \$42,848 from his income, which resulted  
23 \_\_\_\_\_

24 <sup>14</sup> Appellant’s letter protested proposed assessments for tax years 2003 through 2009. However, respondent did not propose  
25 an assessment for tax year 2007 and the assessments for tax years 2003 through 2006 are final because no protest was filed  
26 within the period set forth in R&TC section 19041.

27 <sup>15</sup> Appellant’s letter included a request to postpone the protest hearings for tax years 2008, 2009, and 2010.

28 <sup>16</sup> For tax year 2010, a single person with gross income from all sources in excess of the minimum filing requirement of  
\$14,754 was required to file a return regardless of the amount of his or her adjusted gross income, pursuant to R&TC  
section 18501, subdivision (a)(3).

1 in a zero tax liability. (ROB, Ex. AA.) Appellant reported no withholdings. (ROB, Ex. AA.)  
2 Appellant attached a 2010 Form W-2 issued by Managed Staffing, Inc. that reported wages of \$42,848  
3 and withholdings of zero. (ROB, Ex. Z.) Appellant also attached a letter, described as a “commercial  
4 affidavit,” asserting that appellant received no income in 2010, that all withholdings should be released  
5 to appellant as a secured party, and that the commercial affidavit was being filed in lieu of a Form 540.  
6 (ROB, Ex. AA, p. 4.)

7 Respondent reviewed appellant’s Form 541 and supplemental documentation and  
8 determined the return to be an invalid California “personal” income tax return.<sup>17</sup> On May 18, 2011,  
9 respondent sent appellant a Frivolous Demand Notice which informed appellant that his 2010 Form 541  
10 was frivolous and demanded that appellant file a valid tax return within 30 days. (ROB, Ex. BB.)  
11 Appellant replied in a letter with attachments, arguing that he was not subject to tax. (ROB, Ex. CC.)

12 On December 29, 2011, respondent issued a Demand Notice to appellant, requiring that  
13 appellant either show that a return had been filed, or explain why a return was not required. (ROB,  
14 Ex. DD.) Appellant replied in a letter with attachments, indicating that he already filed a Form 541.  
15 (ROB, Ex. EE.)

16 Respondent sent appellant a letter explaining respondent’s authority to assess, enforce,  
17 and collect taxes and a Determination of Filing Requirement notice requiring appellant to file his 2010  
18 return by a certain date. (ROB, p. 7, Exs. FF & GG.) Appellant replied in a letter with attachments,  
19 indicating that he was not subject to tax and did not have a filing obligation. (ROB, Ex. HH.)

20 Because appellant did not file a valid personal 2010 tax return, respondent issued an  
21 NPA on May 29, 2012, which proposed a tax of \$1,453.00, a late filing penalty of \$363.25, a demand  
22 penalty of \$363.25, and a filing enforcement fee of \$88.00, plus interest. (ROB, Ex. II.)

23 Respondent received a letter with attachments that protested the NPA for tax year  
24 2010.<sup>18</sup> (ROB, p. 7, Ex. JJ.) In the letter, appellant explained that he was not subject to tax. Enclosed

---

26 <sup>17</sup> See footnote 8.

27 <sup>18</sup> Appellant’s letter protested proposed assessments for tax years 2003 through 2010. However, respondent did not propose  
28 an assessment for tax year 2007 and the assessments for tax years 2003 through 2006 are final because no protest was filed  
within the period set forth in R&TC section 19041.

1 with the letter was a copy of the 2010 NPA with a stamp indicating that the debt had been discharged  
2 and that the NPA letter constituted a money order payable to the FTB as a tax credit. (ROB, Ex JJ,  
3 p. 1.) Respondent acknowledged the receipt of appellant's protest and request for hearing and  
4 explained that appellant's protest had been forwarded to a district office near appellant. (ROB, Exs.  
5 KK & LL.) Respondent informed appellant that the protest hearing was scheduled for May 20, 2013,  
6 and appellant sent a letter to respondent requesting that the hearing for 2010 be postponed for 45 days,  
7 to which respondent replied that the protest hearing would be rescheduled to July 8, 2013.<sup>19</sup> (ROB,  
8 Exs. K, MM, & NN.)

9 The protest hearing for 2010, and the other tax years at issue, took place on July 8, 2013.  
10 (ROB, p. 7.) After the protest hearing, respondent's hearing officer recommended that the NPA for  
11 2010 be affirmed. Respondent affirmed the NPA by issuing an NOA on August 1, 2013. (AOB Case  
12 No. 763561, attachments.) Appellant timely appealed the NOA. (ROB, p. 7.)

### 13 Contentions

#### 14 Appellant's Contentions

15 Appellant contends that "the practice of law cannot be licensed by any state," citing  
16 *Schware v. Board of Examiners* (1957) 353 U.S. 238, 239, and that "the California state bar has not  
17 renewed its charter since 1957." Therefore, appellant argues, "under the clean hands rule [the Chief  
18 Counsel of the FTB] cannot come into equity" and "there is a conflict of interest as he/she is paid with  
19 tax dollars." (AOB, p. 2.) Appellant contends that because "no court order or roll call of any monies  
20 owed" was placed against his "good name with the county recorder," he therefore does not have a  
21 proper lien or levy on his unpaid taxes, citing Internal Revenue Code (IRC) section 6331. (AOB,  
22 pp. 2-3.) Appellant contends that income tax is not legal and that "the only existing law on taxation can  
23 be found in the Statutes at Large and it relates to Excise tax only." (AOB, p. 8.) Appellant argues that  
24 his appeal is not based on frivolous terms because it is his belief that his arguments are true and correct.  
25 (AOB, p. 9.)

26 In his reply brief, appellant contends that, because the FTB is using IRC section 6331  
27

28 <sup>19</sup> Appellant's letter included a request to postpone the protest hearings for tax years 2008, 2009, and 2010.

1 out of context, the proposed assessments constitute a “taking of property without due process of law.”  
2 (Appellant’s reply brief (ARB), p. 2.) Appellant argues that the FTB has: (1) no assessment authority;  
3 (2) violated the law; (3) violated his due process rights; (4) signed false documents; and (5) committed  
4 mail fraud. (ARB, pp. 3 & 5.) Appellant states that Managed Staffing, Inc. is a subdivision of  
5 ADEA Solutions, Inc., and that he submitted a Voluntary Withholding Agreement Form W-4T<sup>20</sup> and a  
6 Withholding Exemption Certificate Form 590 to terminate his withholdings. (ARB, p. 5, Ex. 3.)  
7 Appellant contends that he emailed Managed Staffing, Inc. a 2009 Form W-4 and Form 590 to claim  
8 that he was exempt from withholdings. (ARB, p. 5, Ex. 4.) Appellant argues that Managed Staffing,  
9 Inc. is in Dallas, Texas, and has no office or building in California. (ARB, p. 5.) Appellant argues that  
10 the FTB has no enforcement capability, has failed to “provide [the] burden of proof of gross income  
11 from all sources,” and that he is owed a refund for “fines, penalties, and interest that were withheld” by  
12 the FTB for 2003 through 2007. (ARB, pp. 5 & 7.) Appellant contends that he “has accepted and  
13 returned for value any and all instruments” and is now the “creditor by returning it to the issuer, who  
14 becomes the debtor” and by “altering the terms of the offer” he has created a “counteroffer.” (ARB,  
15 pp. 10, 12, & 13.)

#### 16 Respondent’s Contentions

17 Respondent contends that appellant has refused to file a personal return for which he is  
18 legally obligated for tax years 2008, 2009, and 2010 and has not provided any specific income  
19 information about his income for those years that would refute the proposed assessments. (ROB, p. 8.)  
20 Respondent contends that appellant has never denied receiving the income the payor reported to him in  
21 the years at issue, which was the basis for the proposed assessments. (ROB, p. 8.) Respondent argues  
22 that appellant has made no attempt to prove that the proposed assessments are incorrect and that  
23 appellant has not satisfied his burden of proof. (ROB, p. 9.)

24 Respondent contends that it has provided a reasonable foundation for the proposed  
25 assessments by using the income information reported on the Forms W-2 by the distributor of income.  
26 Respondent contends that the FTB has the authority to administer and enforce the California Personal  
27

---

28 <sup>20</sup> The Form W-4T is not a valid or official IRS or FTB form.

1 Income Tax Law under Revenue and Taxation Code (R&TC) section 19501. Respondent contends that  
2 pursuant to R&TC section 18501, every individual subject to tax under the California Personal Income  
3 Tax Law and realizing a specified amount of gross income or adjusted gross income must make a  
4 return which specifically states the items of gross income received from all sources and the allowable  
5 deductions and credits. (ROB, p. 9.)

6 Respondent argues that, in the absence of a return providing the information necessary  
7 to accurately determine a tax liability, respondent is empowered to estimate appellant's net income  
8 from "any available information" and assess the amount of tax, interest, and penalties due. Respondent  
9 argues that the use of this source of income information as the basis for the proposed assessments for  
10 the years at issue is rational and reasonable and that it has met its initial burden. Therefore, respondent  
11 contends the Board must presume that respondent's determinations are correct and assign the burden of  
12 proving error to appellant. Respondent argues that, absent any specific information contradicting the  
13 proposed assessments, the Board must conclude that appellant has failed to carry that burden. (ROB,  
14 p. 9.)

15 Respondent further contends that appellant is attempting to avoid his tax liability  
16 through the assertion of frivolous arguments which the Board, the IRS, respondent, and the courts have  
17 consistently and emphatically rejected. Respondent notes that the IRS published a list of identified  
18 frivolous positions, including the arguments asserted by appellant, in IRS Notice 2008-14, IRS Notice  
19 2010-33, and the IRS publication, "The Truth About Frivolous Tax Arguments,"<sup>21</sup> and that respondent  
20 followed the IRS's response to these frivolous positions. Respondent argues that, according to  
21 California Code of Regulations, title 18, section (Regulation) 5412, subdivision (b), the Board  
22 determined that any arguments based on alleged violations of substantive or procedural rights are not  
23 issues the Board will consider. (ROB, p. 8.)

24 With respect to the late filing penalties for 2009 and 2010, respondent contends that the  
25 penalties were imposed properly pursuant to R&TC section 19131 and that appellant failed to  
26 demonstrate reasonable cause to abate the late filing penalties. Respondent states that it has agreed to  
27

28 

---

<sup>21</sup> See <http://www.irs.gov/Tax-Professionals/The-Truth-About-Frivolous-Tax-Arguments-Introduction>.

1 abate the late filing penalty of \$1,033.75 for 2008. (ROB, p. 10.)

2 Respondent also contends that the demand penalties for 2008, 2009, and 2010 were  
3 imposed properly pursuant to R&TC section 19133, which requires that respondent propose an  
4 assessment of tax after the taxpayer failed to timely respond to a Request for Tax Return or a Demand  
5 for Tax Return at any time during the four-taxable-year period preceding the taxable year for which the  
6 current Demand for Tax Return is issued. Respondent states that it issued a Demand for Tax Return  
7 and NPA for 2006. Respondent also states that it issued Demands for Tax Return for 2008, 2009, and  
8 2010 and, when appellant failed to respond, respondent issued NPAs for those years. (ROB, p. 10,  
9 Exs. D, F, P, T, DD, II, & QQ.) Respondent argues that appellant has not presented evidence of  
10 reasonable cause to support an abatement of the demand penalties. (ROB, p. 10.)

11 Respondent asserts that the filing enforcement fee was imposed properly pursuant to  
12 R&TC section 19254 and that there is no reasonable cause exception to the fee. (ROB, p. 10.)

13 Finally, the FTB contends that appellant is maintaining a frivolous appeal and requests  
14 that the Board impose a frivolous appeal penalty. Respondent states that appellant has not filed an  
15 individual California income tax return for any tax year. In addition, respondent notes that it issued  
16 filing enforcement NPAs against appellant for the 2000, 2001, 2002, 2004, 2005, and 2006 tax years,  
17 all of which are final because no protest was filed within the period set forth in R&TC section 19041.  
18 (ROB, pp. 10 & 11.)

19 Applicable Law

20 Proposed Assessments

21 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every  
22 resident of this state . . .”<sup>22</sup> R&TC section 18501 requires every individual subject to the Personal  
23 Income Tax to make and file a return with the FTB “stating specifically the items of the individual’s  
24 gross income from all sources and the deductions and credits allowable . . .” R&TC section 19087,  
25 subdivision (a), provides:

26 ///

27 \_\_\_\_\_  
28 <sup>22</sup> It appears undisputed that appellant resided in California during tax years 2008, 2009, and 2010.

1 If any taxpayer fails to file a return, or files a false or fraudulent return with intent to  
2 evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a  
3 return or an amended return under penalties of perjury or may make an estimate of the net  
4 income, from any available information, and may propose to assess the amount of tax,  
5 interest, and penalties due.

6 If the FTB makes a tax assessment based on an estimate of income, the FTB's initial  
7 burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949)  
8 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Federal courts have  
9 held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported  
10 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) When a taxpayer fails to file a  
11 valid return, respondent's use of income information from various sources to estimate a taxpayer's  
12 taxable income is a reasonable and rational method of estimating taxable income. (See *Palmer v.*  
13 *Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313; *Andrews v. Commissioner*, T.C. Memo  
14 1998-316; *Giddio v. Commissioner* (1970) 54 T.C. 1530, 1533; *Appeal of Walter R. Bailey*,  
15 92-SBE-001, Feb. 20, 1992; *Appeal of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

16 Once the FTB has met its initial burden, the assessment is presumed correct and the  
17 taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of*  
18 *Michael E. Myers, supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of  
19 proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of  
20 uncontradicted, credible, competent, and relevant evidence showing error in the FTB's determinations,  
21 respondent's proposed assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*,  
22 80-SBE-154, Nov. 18, 1980.) A taxpayer's failure to produce evidence that is within his or her control  
23 gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of Don A. Cookston*,  
24 83-SBE-048, Jan. 3, 1983.)

#### 25 Constitutional/Due Process Issues

26 The Board is precluded from determining the constitutional validity of California  
27 statutes, and has an established policy of declining to consider constitutional issues. (Cal. Const.,  
28 art. III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeal of Walter R. Bailey, supra*.)  
In *Bailey, supra*, the Board stated:

1 [D]ue process is satisfied with respect to tax matters so long as an opportunity is given to  
2 question the validity of a tax at some stage of the proceedings. It has long been held that  
3 more summary proceedings are permitted in the field of taxation because taxes are the  
4 lifeblood of government and their prompt collection is critical.

#### 4 Late Filing Penalties

5 R&TC section 19131 provides that a late filing penalty shall be imposed when a  
6 taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late  
7 filing was due to reasonable cause and not due to willful neglect. When the FTB imposes a late filing  
8 penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan, supra; Appeal*  
9 *of Yvonne M. Goodwin, 97-SBE-003, Mar. 19, 1997.*) The burden is on the taxpayer to prove that  
10 reasonable cause prevented him from responding to the demand. (*Appeal of Kerry and Cheryl James,*  
11 *83-SBE-009, Jan. 3, 1983.*) To establish reasonable cause, a taxpayer must show that the failure to file  
12 a return occurred despite the exercise of ordinary business care. (*Appeal of Howard G. and Mary Tons,*  
13 *79-SBE-027, Jan. 9, 1979; Appeal of Stephen C. Bieneman, 82-SBE-148, July 26, 1982.*) The  
14 taxpayer's reason for failing to file must be such that an ordinarily intelligent and prudent business  
15 person would have acted similarly under the circumstances. (*Appeal of Joseph W. and Elsie M.*  
16 *Cummings, 60-SBE-040, Dec. 13, 1960.*)

#### 17 Demand Penalties

18 California imposes a penalty for the failure to file a return or to provide information  
19 upon the FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to  
20 the demand. (Rev. & Tax. Code, § 19133.) The FTB will only impose a demand penalty if the  
21 taxpayer fails to respond to a current Demand for Tax Return and the FTB issues an NPA under the  
22 authority of R&TC section 19087, subdivision (a), after the taxpayer failed to timely respond to a  
23 Request for Tax Return or a Demand for Tax Return at any time during the four taxable years  
24 preceding the year for which the current Demand for Tax Return is being issued. (Cal. Code Regs.,  
25 tit. 18, § 19133, subd. (b).)<sup>23</sup> When the FTB imposes a demand penalty, the law presumes that the  
26 penalty was imposed correctly. (*Todd v. McColgan, supra; Appeal of Yvonne M. Goodwin, supra.*)  
27

28 <sup>23</sup> Regulation section 19133 became operative on December 23, 2004.

1 The burden is on the taxpayer to prove that reasonable cause prevented him or her from responding to  
2 the demand. (*Appeal of Kerry and Cheryl James, supra.*) To establish reasonable cause, a taxpayer  
3 must show that the failure to respond to a demand occurred despite the exercise of ordinary business  
4 care. (*Appeal of Stephen C. Bieneman, supra.*) The taxpayer's reason for failing to respond must be  
5 such that an ordinarily intelligent and prudent business person would have acted similarly under the  
6 circumstances. (*Appeal of Joseph W. and Elsie M. Cummings, supra.*)

#### 7 Filing Enforcement Fee

8 R&TC section 19254 provides that if the FTB mails a formal legal demand for a tax  
9 return to a taxpayer, a filing enforcement cost recovery fee is required to be imposed when the taxpayer  
10 fails or refuses to file the return within the 25-day period. (Rev. & Tax. Code, § 19254, subd. (a)(2).)  
11 Once properly imposed, there is no provision in the Revenue and Taxation Code which would excuse  
12 the FTB from imposing the filing enforcement cost recovery fee for any circumstances, including  
13 reasonable cause. (Rev. & Tax. Code, § 19254.)

#### 14 Frivolous Appeal Penalty

15 The Board may impose a penalty of up to \$5,000 whenever it appears to the Board that  
16 proceedings before it have been instituted or maintained primarily for delay or that the position is  
17 frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., tit., 18, § 5454.) The following  
18 factors are considered in determining whether, and in what amount, to impose the penalty: (1) whether  
19 the taxpayer is making arguments that have been previously rejected by the Board in a Formal Opinion  
20 or by courts; (2) whether the taxpayer is repeating arguments that he or she made in prior appeals;  
21 (3) whether the taxpayer filed the appeal with the intent of delaying legitimate tax proceedings or the  
22 legitimate collection of tax owed; and (4) whether the taxpayer has a history of filing frivolous appeals  
23 or failing to comply with California's tax laws. (Cal. Code Regs., tit. 18, § 5454.) The Board may  
24 consider other relevant factors in addition to the factors listed above. (Cal. Code Regs., tit. 18, § 5454.)  
25 A taxpayer's prior pattern and practice of conduct is relevant when determining whether to impose a  
26 frivolous appeal penalty and in what amount. (*Appeal of Alfons Castillo, 92-SBE-020, July 20, 1992.*)

#### 27 STAFF COMMENTS

28 At the hearing, appellant should be prepared to provide evidence that demonstrates error

1 in the FTB's determination and reasonable cause to abate the late filing and demand penalties.  
2 Respondent apparently has provided a reasonable foundation for the proposed assessments, based on  
3 wage information from the EDD. Appellant has not provided any evidence demonstrating error in  
4 respondent's proposed assessments or any reasonable cause to abate the remaining late filing or  
5 demand penalties. Pursuant to California Code of Regulations, title 18, section 5523.6, appellant  
6 should provide any additional evidence to the Board Proceedings Division at least 14 days prior to the  
7 oral hearing.<sup>24</sup>

8           Additionally, both parties should be prepared to discuss whether, and in what amount, a  
9 frivolous appeal penalty should be imposed, as the Board has the authority under the Revenue and  
10 Taxation Code to determine whether, and in what amount, to impose such a penalty. Staff notes that  
11 appellant's arguments, such as: (1) that respondent violated his due process rights; (2) that respondent  
12 does not have the authority to propose the assessment; and (3) that the proposed assessment constitutes  
13 a "taking" of property without due process of law, are the types of arguments that have been  
14 consistently rejected by the IRS, the federal courts, respondent, and the Board, over long periods of  
15 time. (See, e.g., *Appeal of Michael E. Myers, supra*; *Appeal of Fred R. Dauberger, et al.*, 82-SBE-082,  
16 Mar. 31, 1982; *Appeal of Alfons Castillo, supra*; *Appeal of Walter R. Bailey, supra*.) Appellant was  
17 notified that the Board may impose a frivolous appeal penalty in the NOAs for 2008, 2009, and 2010,  
18 and in a letter from Board staff dated October 11, 2013.

19           It appears to staff that this is appellant's first appeal of this nature. However, staff also  
20 notes that respondent's records indicate that appellant has not filed an individual California income tax  
21 return for any tax year and respondent issued filing enforcement NPAs against appellant for the 2000,  
22 2001, 2002, 2004, 2005, and 2006 tax years, all of which are final, and that the 2006 NPA was issued  
23 after a demand notice was issued to appellant.

24 ///

25 ///

26 Foresta\_jl.doc

27 \_\_\_\_\_  
28 <sup>24</sup> Evidence exhibits should be sent to: Khaaliq Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of  
Equalization, P.O. Box 942879 MIC: 80, Sacramento, California, 94279-0080.