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

Attorney for the Appeals Division

BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**[2]
	PERSONAL INCOME TAX APPEAL
CLOVUS M. SYKES[1]	Case No. 790625

Year	Proposed Assessment	
	Additional Tax	Penalties and Fee[3]
2009	$427.00	$301.50

Representing the Parties:

For Appellant: Clovus M. Sykes

For Franchise Tax Board: Patrice C. Gau-Johnson, Specialist

QUESTIONS: (1) Whether appellant has demonstrated any error in the Franchise Tax Board's (FTB or respondent) proposed assessment;

(2) Whether appellant has demonstrated reasonable cause to abate the late filing

[1] Appellant currently resides in Sacramento County, California.

[2] This appeal was originally scheduled for an oral hearing at the Board's September 23, 2014 meeting. However, appellant requested a postponement due to a scheduling conflict. The request was granted and the matter was rescheduled to the November 19-20, 2014 oral hearing calendar.

[3] The penalties and fee amount consist of the following: (1) a late filing penalty of $106.75; (2) a notice and demand penalty (demand penalty) of $106.75; and (3) a filing enforcement fee of $88.00.

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

penalty;

(3) Whether appellant has demonstrated reasonable cause to abate the notice and demand penalty (demand penalty);

(4) Whether the filing enforcement fee can be abated; and

(5) Whether the Board should impose a frivolous appeal penalty.[4]

HEARING SUMMARY

Background

Appellant has not filed a California personal income tax return for the 2009 tax year. (Respondent's opening brief (ROB), p. 2.) Respondent received information from reporting sources through its Integrated Non-Filer Compliance program indicating that appellant earned sufficient income to prompt a return-filing requirement.[5] (ROB, p. 1.) Respondent issued a Demand for Tax Return (Demand) on November 17, 2011, demanding that appellant file a 2009 tax return, provide a copy of the tax return if already filed, or explain why he was not required to file. (ROB, Ex. A.) When no response was received by the deadline provided by the Demand, respondent issued a Notice of Proposed Assessment (NPA) on January 23, 2012, that proposed a tax of $427.00, a late filing penalty of $106.75, a demand penalty of $106.75, and a filing enforcement fee of $88.00, plus interest, for tax year 2009. (ROB, Ex. B.) Respondent based the NPA tax calculation on a total income of $25,542, which consists

///

///

[4] Appellant has not filed a valid California income tax return for any tax year since 1995. Respondent issued filing enforcement NPAs against appellant for tax years 2000 through 2011. The NPAs for 2000 through 2008 and 2010 are final, and the NPA for 2011 is being protested. This is appellant's fifth appeal of this nature. Appellant filed appeals for tax years 2001 (Case No. 492696) and 2004 (Case No. 492702), which were consolidated, and in which the Board found against appellant and imposed frivolous appeal penalties of $375 for 2001 and $375 for 2004. Appellant then filed a petition for rehearing, which was denied on September 14, 2010. Appellant filed an appeal for tax year 2006 (Case No. 512493) in which the Board found against appellant and imposed a frivolous appeal penalty of $750. Appellant then filed a petition for rehearing, which was denied on December 14, 2010. Appellant filed an appeal for tax year 2007 (Case No. 529645) in which the Board found against appellant and imposed a frivolous appeal penalty of $2,500. Appellant then filed a petition for rehearing, which was denied on June 21, 2011.

[5] For tax year 2009, a single individual under age 65 with no dependents realizing a California gross income of $14,622 or a California adjusted gross income of $11,698 was required to file a California income tax return.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

of income indicated on appellant's federal Wage and Income Transcript.[6] (ROB, p. 2, Ex. F.)

Appellant timely protested the NPA and requested a protest hearing. (Appeal Letter (AL), Ex. B.) The protest hearing was conducted on November 22, 2013, at respondent's Sacramento District Office. (ROB, Ex. C.) After a review of appellant's protest, respondent issued a Notice of Action (NOA) on December 11, 2013, affirming the NPA. (AL, Ex. A.) Appellant timely appealed the NOA. (ROB, p. 2.)

Contentions

Appellant's Contentions

Appellant contends that: (1) "he performed, without exception, all of his services within his state of domicile, California;" (AL, p. 2); (2) payments he received from "payors" were inappropriately reported to the Internal Revenue Service (IRS) and FTB; (AL, p. 2); (3) he is a "payee who is a U.S. person/exempt recipient," which excludes him from statutory reporting provisions; (AL, p. 2); (4) he does not qualify as a resident, nonresident, or part-year resident; (AL, p. 14); (5) his due process rights were abridged; (AL, p. 5); (6) respondent purposely obstructed his right to satisfy his burden of proof; (AL, p. 6); (7) respondent's determination does not comply with federal or California tax law; (AL, p. 6); (8) third-party information reported to the FTB is hearsay; (AL, p. 14) (9) respondent has not shared the results of its review of appellant's protest; (Appellant's reply brief (ARB), p. 5); (10) he is not legally obligated to file a 2009 return and did not have any 2009 adjusted gross income; (ARB, p. 9); (11) respondent does not have the authority to propose the assessment; (ARB, p. 12); and (12) respondent does not have the presumption of correctness. (ARB, p. 12.)

Respondent's Contentions

Respondent contends that appellant has refused to file a 2009 personal return for which

---

[6] Appellant's federal Wage and Income Transcript states that he received taxable income during 2009 in the amount of: (1) $11,550 from Health Net of California, Inc. reported on a Form 1099-MISC (Miscellaneous Income); (2) $5,910 from CA Public Employees' Retirement System reported on a Form 1099-R (Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.); (3) $3,963 from H. Gradie Johnson & Associates reported on a Form 1099-MISC; (4) $2,785 from CHCS Services Inc. reported on a Form 1099-MISC; (5) $1,334 from Aetna Life Insurance Company reported on a Form 1099-MISC; and (6) $627 from Aviva Life & Annuity Company reported on a Form W-2 Wage and Tax Statement. (ROB, Ex. F.) Respondent notes that the income of $627 from Aviva Life & Annuity Company was unknown to the FTB at the time that the NPA was issued, but that it will not reissue the NPA to include this income at this time. (ROB, p. 3, Ex. B, p. 2.)

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

he is legally obligated and has not provided any specific income information about his income for the year that would refute the proposed assessment. (ROB, pp. 2 & 3.) Respondent contends that appellant never denied receiving the income reported to him and has not satisfied his burden of proof. (ROB, p. 3.) Respondent argues that it provided a reasonable foundation for the proposed assessment by using the income information reported on the Forms 1099-MISC and 1099-R by the distributors of income. (ROB, p. 3.) Respondent contends that appellant has not provided any substantiation for his position that he is not a California resident. (ROB, p. 4.) In addition, the FTB asserts that the Board has an established policy of declining to decide constitutional/due process issues. (ROB, p. 3.)

With respect to the late filing penalty, respondent contends that the penalty was imposed properly pursuant to R&TC section 19131 and that appellant failed to demonstrate reasonable cause to abate the late filing penalty. (ROB, p. 5.)

Respondent argues that the demand penalty was imposed properly pursuant to R&TC section 19133, which requires that respondent propose an assessment of tax after the taxpayer failed to timely respond to a Request for Tax Return (Request) or a Demand at any time during the four taxable years preceding the taxable year for which the current Demand is issued. Respondent states that it issued to appellant Demands and NPAs for 2000 through 2011 and on appeal attached copies of the 2008 Demand and NPA. (ROB, p. 5, Ex. H.) Respondent argues that appellant has not presented evidence of reasonable cause to support an abatement of the demand penalty. (ROB, p. 5.)

Respondent contends that the filing enforcement fee was imposed properly pursuant to R&TC section 19254 and that there is no reasonable cause exception to the fee. (ROB, p. 6.)

Respondent further contends that appellant is attempting to avoid his tax liability through the assertion of frivolous arguments which the Board, the IRS, respondent, and the courts have consistently and emphatically rejected and requests that the Board impose a frivolous appeal penalty. (ROB, pp. 2, 3, & 6.)

Applicable Law

Proposed Assessment

R&TC section 17041 imposes a tax ". . . upon the entire taxable income of every resident of this state . . ." R&TC section 18501 requires every individual subject to the Personal

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

Income Tax to make and file a return with the FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable . . ." R&TC section 19087, subdivision (a), provides:

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

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

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

---

[7] Board of Equalization cases (designated "SBE") may generally be found at: www.boe.ca.gov

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

Residency

California residents are taxed upon their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (Rev. & Tax. Code, § 17041, subds. (a), (b), and (i); Rev. & Tax. Code, § 17951.) Part-year residents are taxed on their income earned while residents of this state, as well as all income derived from California sources. (Rev. & Tax. Code, § 17041, subds. (b) & (i).) R&TC section 17014, subdivision (a), provides that the term "resident" includes: (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. Thus, an individual domiciled in California remains a resident until he leaves for other than a temporary or transitory purpose. (Cal. Code Regs., tit. 18, § 17014; see also Rev. & Tax. Code, § 17014.) The FTB's determination of residency is presumptively correct. (*Appeals of John R. Young*, 86-SBE-199, Nov. 19, 1986.)

Constitutional/Due Process Issues

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

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

Information Practices Act

Issues related to the Information Practices Act (IPA), which concerns the collection, maintenance, and dissemination of information related to individuals who are the subjects of state agency records, are not within the Board's jurisdiction. (See Cal. Code Regs., tit. 18 § 5412, subd. (b)(4) [expressly stating that the Board lacks jurisdiction to determine whether the FTB violated the IPA]. In the *Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, decided by the Board on March 31, 1982, the Board stated that "the only power that [the] Board has is to determine the correct amount of an appellant's California personal income tax liability for the appeal years."

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

In *Bates v. Franchise Tax Board* (2004) 124 Cal.App.4th 367, the court discussed whether alleged IPA violations could be used to defeat a proposed tax assessment. The *Bates* court held that the Revenue and Taxation Code provisions governing the estimation of income for persons who do not file tax returns, and the related provisions for the assessment and collection of taxes, are not superseded by the IPA. (See also *Appeals of Robert E. Wesley, et al*., 2005-SBE-002, Nov. 15, 2005.) Additionally, R&TC section 19570 prohibits the application of the IPA to the determination of any liability under the Personal Income Tax Law.

Late Filing Penalty

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

Demand Penalty

California imposes a penalty for the failure to file a return or to provide information upon the FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the Demand. (Rev. & Tax. Code, § 19133.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current Demand and the FTB issues an NPA under the authority of R&TC section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request or a Demand at any time during the four taxable years preceding the year for which the current Demand is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).) When the FTB imposes a demand penalty, the law

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

presumes that the penalty was imposed correctly. (*Todd v. McColgan*, *supra*; *Appeal of Yvonne M. Goodwin*, *supra*.) The burden is on the taxpayer to prove that reasonable cause prevented him from responding to the Demand. (*Appeal of Kerry and Cheryl James*, *supra*.) To establish reasonable cause, a taxpayer must show that the failure to respond to a Demand occurred despite the exercise of ordinary business care. (*Appeal of Stephen C. Bieneman*, *supra*.) The taxpayer's reason for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Joseph W. and Elsie M. Cummings*, *supra*.)

Filing Enforcement Fee

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

Frivolous Appeal Penalty

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

///

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

STAFF COMMENTS

At the hearing, appellant should be prepared to provide evidence which demonstrates error in the FTB's determination and reasonable cause to abate the late filing and demand penalties. It appears that respondent has provided a reasonable foundation for the proposed assessment, based on income information from federal Forms 1099. The Board previously concluded that methods of estimating income like this are rational and reasonable and, thus, the burden of proof has shifted to appellant in this matter. Appellant has not provided any evidence demonstrating error in respondent's proposed assessment or any reasonable cause to abate the late filing or demand penalties. Pursuant to Rules for Tax Appeals Regulation 5523.6, appellant should provide any additional evidence in support of his position to the Board Proceedings Division at least 14 days prior to the oral hearing.[8]

Additionally, both parties should be prepared to discuss whether, and in what amount, a frivolous appeal penalty should be imposed, as the Board has the authority under the Revenue and Taxation Code to determine whether, and in what amount, to impose such a penalty. Appellant's arguments, such as: (1) respondent violated his due process rights; (2) respondent does not have the authority to propose the assessment; and (3) the income information received by the FTB is "hearsay", are the types of arguments that have been consistently rejected by the IRS, the federal courts, respondent, and the Board, for many years. (See, e.g., *Appeal of Michael E. Myers*, *supra*; *Appeal of Fred R. Dauberger*, *et al.*, *supra*; *Appeal of Alfons Castillo*, *supra*; *Appeals of Walter R. Bailey*, *supra*; *Appeals of Robert E. Wesley*, *et al.*, *supra*.) Appellant was notified that the Board may impose a frivolous appeal penalty in the 2009 NOA and in a letter from Board staff dated January 23, 2014.

Based upon the facts and circumstances present in this appeal, it appears to staff that the Board may wish to consider a frivolous appeal penalty of $5,000. However, whether, and in what amount, to impose this penalty is entirely in the Board's discretion under section 5454 of the Board's Rules for Tax Appeals.

---

[8] 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.