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7 **BOARD OF EQUALIZATION**  
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **STEVEN B. AVERY** ) Case No. 785074

	<u>Years</u>	<u>Claims for Refund<sup>1</sup></u>
	2012	\$5,414.38
	2013	\$4,667.00

16 Representing the Parties:

17 For Appellant: Tax Appeals Assistance Program (TAAP)<sup>2</sup>  
18 For Franchise Tax Board: Eric A. Yadao, Tax Counsel

20 QUESTION: Whether appellant has shown reasonable cause for the abatement of the mandatory  
21 electronic payment (e-pay) penalty.

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26 <sup>1</sup> The total amount at issue in this appeal is \$10,101.39, including one-percent e-pay penalties imposed pursuant to R&TC  
27 section 19011.5, subdivision (c). The Appeals Division staff calculated the penalty amounts set forth above because the  
28 appeal record failed to clarify the individual penalty amounts for each respective tax year. The above-stated penalties total  
\$10,081.38, which differs by \$20.01 from the total amount at issue (i.e., \$10,101.39 - \$10,081.38), apparently due to interest.

<sup>2</sup> Appellant filed the appeal letter, Grant Blanco for TAAP filed appellant's reply brief, and Jessica Frey for TAAP filed  
appellant's supplemental brief.

1 HEARING SUMMARY

2 Background

3 On September 30, 2008, Assembly Bill 1389 was signed, adding Revenue and  
4 Taxation Code (R&TC) section 19011.5 to the Revenue and Taxation Code. R&TC section 19011.5  
5 requires certain individuals to submit their tax payments electronically beginning on January 1, 2009,  
6 or be subject to an e-pay penalty of one percent of the amount paid. In November 2008, respondent  
7 began sending courtesy letters to all taxpayers who would be required to make payments  
8 electronically under R&TC section 19011.5. Although the e-pay penalty statute became effective on  
9 January 1, 2009, the Franchise Tax Board (respondent or FTB) did not begin imposing the penalty  
10 until January 1, 2011, in order to provide taxpayers and their representatives with adequate time to  
11 establish compliance systems.

12 On April 15, 2012, appellant remitted a 2011 extension payment of \$49,829.<sup>3</sup>  
13 (Respondent's Opening Brief (ROB), p. 1; Ex. A, ln. 5; Ex. B.) Appellant filed a timely 2011  
14 California income tax return on May 15, 2012. (ROB, p. 1; Ex. C.) According to the FTB,  
15 respondent issued a Mandatory e-Pay Program Participation Notice "FTB 4106 MEO (REV 03-  
16 2012)" (Courtesy Notice) to appellant on August 24, 2012, stating that, based on a payment made or a  
17 tax liability on a filed return, appellant was required to remit all future payments electronically.<sup>4</sup>  
18 (ROB, p. 1; Ex. D & E; Appellant's Appeal Letter (AAL), attachments.)

19 Subsequently, appellant made a 2012 estimated tax payment in the amount of \$29,300  
20 with a written check dated January 2, 2013. (ROB, p. 1; Ex. F.) Thereafter, respondent issued a Notice  
21 of State Income Tax Due (Tax Due Notice) to appellant imposing an e-pay penalty of \$293 (i.e.,

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25 <sup>3</sup> Respondent states that Exhibit A lists the payment as an estimate payment, but that Exhibit B, appellant's check, indicates  
26 that the payment is for "taxes 2011."

27 <sup>4</sup> Respondent states that it does not retain copies of these system-generated notices, but provides a sample of the Courtesy  
28 Notice as Exhibit D to its opening brief. Respondent also states that appellant's Taxpayer Information Display (Exhibit E of  
its opening brief) states "MANDATORY E-PAY/DATE: M / 08/24/12", indicating that the notice was issued on  
August 24, 2012. According to respondent's claim for refund denial letter, attached to appellant's appeal letter, the  
Courtesy Notice was sent in June 2012, and appellant was required to pay electronically as of August 24, 2012.

1 \$29,300 x 1 percent), which appellant paid on January 15, 2013.<sup>5</sup> (ROB, p. 2; Ex. A, ln. 6.) Appellant  
2 filed a timely 2012 California income tax return and remitted a payment with his return in the amount of  
3 \$541,438 with a written check dated April 7, 2013. (ROB, p. 2; Ex. H, ln. 3; Ex. I.) Thereafter,  
4 respondent issued a Tax Due Notice to appellant imposing an e-pay penalty of \$5,414.38 (i.e., \$541,438  
5 x 1 percent), which appellant paid.<sup>6</sup> (ROB, p. 2; Ex. H, lns. 11 & 17.)

6 Appellant made a 2013 estimated tax payment in the amount of \$200,000 with a written  
7 check dated April 7, 2013. (ROB, p. 2; Ex. G.) Thereafter, respondent issued a Tax Due Notice to  
8 appellant imposing an e-pay penalty in the amount of \$2,000 (i.e., \$200,000 x 1 percent), which  
9 appellant paid on May 1, 2013. (ROB, p. 2; Ex. A, ln. 7.) Appellant made a 2013 estimated tax  
10 payment in the amount of \$266,700 with a written check dated May 23, 2013. (ROB, p. 2; Ex. J.)  
11 Thereafter, respondent issued a Tax Due Notice to appellant imposing an e-pay penalty in the amount  
12 of \$2,667 (i.e., \$266,700 x 1 percent), which appellant paid on June 19, 2013.<sup>7</sup> (ROB, p. 2; Ex. H,  
13 ln. 10.)

14 Appellant's mother contacted respondent to request an abatement of the penalties,  
15 contending that appellant was unaware of the e-pay requirement. Respondent replied that appellant's  
16 ignorance was not an excuse for failing to comply with the law. Respondent waived the first e-pay  
17 penalty of \$293 as a one-time courtesy and advised appellant's mother that the remaining e-pay  
18 penalties could not be abated. Appellant's mother stated that the remaining e-pay penalties were  
19 excessive and she was advised to file a formal claim for refund. (ROB, p. 2, Ex. K.)

20 Subsequently, appellant filed a claim for refund, stating that he received letters assessing  
21 penalties, but that he "didn't read them carefully enough and kept assuming they were due to  
22 \_\_\_\_\_

23 <sup>5</sup> Respondent states that it does not retain copies of these system-generated penalty notices. Attached to appellant's appeal  
24 letter, however, are two Tax Due Notices, dated June 4, 2013 and June 24, 2013, notifying appellant of e-pay penalties of  
25 \$2,690.53 and \$8,112.01, respectively.

26 <sup>6</sup> Respondent states that appellant paid this penalty by (1) applying a credit balance in his FTB account in the amount of  
27 \$1,827.61 on June 19, 2013, and (2) making an electronic payment in the amount of \$3,590.76 on July 1, 2013, as indicated  
28 by lines 11 and 17 in Exhibit H of respondent's opening brief. Respondent states that the payment amount of \$3,590.76 is  
indicated on line 6. Line 6, however, shows the amount to be \$3,590.01, not \$3,590.76.

<sup>7</sup> Respondent states that appellant paid a penalty of \$2,761.61, but that Exhibit H of its opening brief indicates that appellant  
paid \$2,671.61. The proper calculation of the one-percent penalty is \$2,667 and, therefore, the "amount paid" apparently  
includes interest.

1 underestimating [his] tax liability, because [his] business [had] grown rapidly.” Appellant stated that  
2 he “was very surprised to learn that [he] hadn’t read the letters correctly.” Appellant contended that he  
3 tried to accurately assess his taxes, but “figured [he] wasn’t calculating too well” and, therefore, “paid  
4 each bill without another thought.” Appellant stated that he “had never been in a position before to  
5 worry about payments reaching the \$20,000 level” and “didn’t realize there was a requirement to [pay  
6 electronically].” Appellant contended that he went online to pay, but saw that there was a fee and  
7 decided to pay by check. Appellant asserted that “it would have been so simple to [pay electronically]”  
8 and that he immediately signed up to pay electronically and made a payment for his outstanding  
9 balance. Appellant also asserted that his “intent was clearly to pay whatever [he] owed immediately”  
10 and that he would “make all future payments [electronically].” (Appellant’s Appeal Letter (AAL),  
11 attachments.)

12 Respondent denied appellant’s claim for refund, stating that, based on the information  
13 provided, appellant did not establish reasonable cause for the failure to pay electronically. Respondent  
14 also stated that, pursuant to R&TC section 19011.5, appellant was required to make all future payments  
15 electronically as of August 24, 2012, and that appellant was notified of the e-pay requirement in a  
16 June 2012 Courtesy Notice. (AAL, attachments.)

17 This timely appeal followed. (ROB, p. 2.)

18 Contentions

19 Appellant’s Appeal Letter

20 Appellant contends that he did not carefully read the FTB’s notices because he was busy  
21 running his rapidly-growing business. Appellant states that his estimated taxes became substantial and  
22 escalated quickly in a short period of time. Appellant notes that his penalty payments were \$293,  
23 \$2,000, \$2,667, and \$5,414. Appellant contends that, because his payments were substantial and  
24 because he always mailed his payments early, he assumed that the penalties were underpayment of  
25 estimated tax penalties (estimated tax penalties). Appellant states that it was “clearly [his]  
26 responsibility to pay online, and [he] made mistakes by assuming what the letters said.” (AAL, p. 1.)

27 Appellant attaches a Tax Due Notice dated June 4, 2013, indicating an e-pay penalty and  
28 liability of \$2,690.53, and a Tax Due Notice dated June 24, 2013, indicating an e-pay penalty and

1 liability of \$8,112.01. (AAL, attachments.)

2 Respondent's Opening Brief

3 Respondent asserts that the FTB's determinations with respect to penalties are  
4 presumptively correct and that the burden is on the taxpayer to prove that such determinations are  
5 erroneous. Respondent contends that it properly imposed the e-pay penalties because appellant's 2011  
6 estimated tax payment of \$49,829 on April 15, 2012, exceeded \$20,000 and, therefore, appellant was  
7 required to make all future payments by electronic means pursuant to respondent's Courtesy Notice and  
8 R&TC section 19011.5, subdivision (a)(1).<sup>8</sup> Respondent asserts that the e-pay penalty may be abated if  
9 appellant shows that the failure to make the electronic payment was due to reasonable cause and not  
10 willful neglect. Respondent states that reasonable cause is such cause that would prompt an ordinary  
11 intelligent and prudent businessperson to have so acted under similar circumstances. Respondent states  
12 that a Courtesy Notice was sent to appellant and attaches an example of a Courtesy Notice. (ROB,  
13 pp. 3-4; Ex. D.)

14 Respondent argues that appellant does not offer a reasonable cause explanation and  
15 instead asserts that he was too busy to read the notices and, as a result, did not understand the nature of  
16 the penalties and the necessary action to avoid subsequent penalties. Respondent asserts that the Board  
17 has held that, if difficulties simply cause a taxpayer to sacrifice the timeliness of one aspect of the  
18 taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice.  
19 Respondent states that appellant asserts that he was too busy operating his business and, without  
20 reviewing the FTB's letters, operated on the mistaken assumption that the notices pertained to the  
21 estimated tax penalty. Respondent contends that a reasonable and prudent businessperson would have  
22 reviewed respondent's notices and avoided subsequent penalties. Instead, respondent contends,  
23 appellant elected to sacrifice the minimal time it would have taken to read respondent's notices in order  
24 to pursue business endeavors and, therefore, reasonable cause has not been established. (ROB, p. 4.)

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28 <sup>8</sup> Respondent states that the payment was made after January 1, 2009, which was the effective date for the application of  
R&TC section 19011.5. Respondent also states that it administratively deferred the imposition of the penalty until  
January 1, 2011, to conduct outreach and education to the taxpayer community (i.e., Courtesy Notices). (ROB, p. 4.)

1                    Appellant’s Reply Brief

2                    Appellant argues that the “defective nature of the notice provided to appellant is  
3 sufficient to establish reasonable cause for failing to make the payments electronically.” (Appellant’s  
4 Reply Brief (ARB), p. 3.) Appellant contends that he believed the notices were informing him of an  
5 “underpayment of previous taxes” until June 20, 2013, when he “realized that the foregoing payments  
6 were for penalties.” Appellant contends that his representative (previously referred to as appellant’s  
7 mother) contacted respondent to request the abatement of the penalties because the notices were  
8 “ambiguous and did not sufficiently notify the appellant that he was required to make future payments  
9 electronically” and respondent waived the first e-pay penalty of \$293. (ARB, pp. 1-2)

10                   Appellant states that he does not dispute that he meets the e-pay qualifications under the  
11 requirements of R&TC section 19011.5. (ARB, p. 3.) Appellant argues that he paid all of his taxes in a  
12 timely manner, showing that he did not ignore the notices or wilfully defy the requirements. (ARB,  
13 p. 4.)

14                   Appellant asserts that he started his business immediately after college in 2008 at the age  
15 of 22, and that his business grew rapidly, especially after the first two years of operation, causing his  
16 tax liability to grow exponentially from 2011 to 2013.<sup>9</sup> Therefore, appellant argues, the e-pay  
17 requirement was “entirely new to appellant.” (ARB, p. 3.)

18                   Appellant contends that the first notice received regarding the electronic payment  
19 requirement occurred in January 2013 in the form of a Tax Due Notice. Appellant states that all  
20 subsequent notices were identical, but with different liability amounts “each time as the penalties had  
21 accumulated unbeknownst to appellant.” (ARB, p. 3; Ex. E.)

22                   Appellant contends that no copy of the Courtesy Notice is in respondent’s records and  
23 the only evidence offered by respondent to prove the existence of the Courtesy Notice is a line reading  
24 “MANDATORY E-PAY/DATE : M / 08/24/12” on appellant’s Taxpayer Information Display. (ARB,  
25 p. 2; Ex. B.) Appellant contends that he never received the Courtesy Notice, and attaches a statement  
26 from appellant stating that “under penalty of perjury” he has “seen the FTB 4106 MEO (REV 03-

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28 <sup>9</sup> Appellant states that his tax liability grew progressively higher, with tax liabilities of \$623 for 2008, \$8,541 for 2009,  
\$18,068 for 2010, \$68,334 for 2011, \$631,019 for 2012, and \$1,118,442 for 2013. (ARB, p. 3; Ex. D.)

1 2012), and at no time did [he] receive a copy of this form dated August 24, 2012, from the Franchise  
2 Tax Board.” (ARB, p. 3; Ex. C.) Appellant argues that, without receiving an express notice explaining  
3 that appellant had reached an income threshold that required him to make electronic payments,  
4 appellant cannot have been expected to know of this requirement. (ARB, p. 3.)

5 Appellant argues that the “ambiguous, misleading, and confusing nature of the  
6 respondent’s notices” establishes reasonable cause for the failure to pay electronically. Appellant  
7 argues that “when one examines the form and language of the notices sent by respondent, it is unclear  
8 that the notice is regarding an electronic payment penalty rather than an underpayment of tax.”  
9 Appellant contends that “the very title is misleading, as ‘Notice of State Income Tax Due’ leads the  
10 taxpayer to believe that the amount at the bottom represents taxes owed, rather than any sort of  
11 penalty.” Appellant contends that the first use of the word “penalty” on the Tax Due Notice does not  
12 state what the penalty is for, or why it is being assessed. Appellant states that the notice states that a  
13 “taxpayer penalty has been assessed” which “does not sufficiently inform the reader that the entire  
14 amount is a penalty, rather than part penalty and part tax owed.” (ARB, pp. 3-4.)

15 Appellant argues that after informing the reader of “this vague penalty,” the notice  
16 “encourages the taxpayer to not read the entire notice” by stating that “if you paid the full amount after  
17 this date, please disregard this notice.” Appellant argues that the e-pay requirement is not discussed  
18 until after the notice states to disregard the rest of the notice. (ARB, p. 4.)

19 Appellant argues that “it is conceivable that a reasonable and prudent businessperson  
20 such as appellant with dramatic increases in income would misinterpret this vague notice to be a notice  
21 of underpaid tax and not a mandatory electronic payment penalty.” Appellant argues that the notice  
22 does not adequately inform a taxpayer who has newly qualified for the e-pay requirement of his new  
23 obligation and that the explanation of R&TC section 19011.5 on the notice does not affirmatively  
24 inform the reader that he qualifies. (ARB, p. 4.)

25 Appellant argues that the Courtesy Notice more clearly informs the taxpayer that he  
26 qualifies for the e-pay program. Appellant states that the Courtesy Notice states “[t]his letter is to  
27 notify you that based on a payment you made, or tax liability on a return you filed, you meet the  
28 mandatory electronic payment requirement and should remit all future tax payments electronically.”

1 Appellant argues that previous versions of the Courtesy Notice could not be found on the FTB's  
2 website and that it appears that the FTB knew that it had a problem with its notification to taxpayers  
3 regarding their e-pay qualification and, subsequently, began circulating the Courtesy Notice three years  
4 after R&TC section 19011.5 went into effect to minimize the confusion and misunderstanding suffered  
5 by newly qualifying taxpayers such as appellant. Appellant argues that, if appellant had received the  
6 Courtesy Notice, then he would not have hesitated to remit all future payments electronically. (ARB,  
7 p. 4.)

8 Appellant argues that a taxpayer should not be penalized for paying his taxes in full and  
9 ahead of schedule because the FTB provided vague and misleading notices and did not provide  
10 sufficiently clear notice that the amounts owed were e-pay penalties. Appellant requests that the Board  
11 "issue a formal opinion in this matter." (ARB, p. 5.)

12 Finally, appellant argues that respondent improperly cites authority defining the  
13 elements of reasonable cause as it applies to the abatement of late filing penalties and not e-pay  
14 penalties and that the Board never has articulated a definition of reasonable cause as applied to e-pay  
15 penalties. (ARB, p. 3.)

#### 16 Respondent's Reply Brief

17 Respondent argues that appellant previously stated that he never read the Courtesy  
18 Notice and makes a new argument that the Courtesy Notice was not received. With regard to  
19 appellant's contention that he never received the Courtesy Notice, respondent asserts that R&TC  
20 section 18416 provides that any notice mailed to a taxpayer shall be sufficient if mailed to a taxpayer's  
21 last-known address, which is the address that appears on the taxpayer's last return filed with the FTB,  
22 unless the taxpayer has provided clear and concise written or electronic notification of a different  
23 address. Respondent contends that it sent appellant a Courtesy Notice on August 24, 2012, advising  
24 him that he was required to submit all future payments electronically. Respondent states that the notice  
25 was sent to appellant's last-known address, which was used on appellant's last filed return for 2011  
26 (filed on May 15, 2012) and used on his 2012 estimated tax payments dated June 13, 2012, and  
27 January 2, 2013. Respondent argues that the address listed on those items "would have been the only  
28 address contained in appellant's account on respondent's computer system at the time the Courtesy

1 Notice was issued.” Therefore, respondent argues, the Courtesy Notice was sufficient notice.  
2 (Respondent’s Reply Brief (RRB), pp. 1-2; Exs. M, N, & O.)

3 With regard to appellant’s argument that the FTB’s notices are vague, respondent states  
4 that the Courtesy Notice was sent to appellant in August 2012 and that appellant admits that the  
5 Courtesy Notice was sufficiently clear.<sup>10</sup> Respondent states that its Tax Due Notices are sufficiently  
6 clear and state in the body of the notice that “A TAXPAYER PENALTY HAS BEEN ASSESSED.  
7 SEE THE OTHER LIABILITY CODE LISTED IN THE SUMMARY BALANCE DUE.” (RRB, p. 2;  
8 Ex. P.) Respondent states that in the summary of balance due, the notices to appellant state that “Other  
9 Liability Code ==> 4” with a footnote advising appellant that “[p]enalty codes and other liability codes  
10 are listed on the back.” Respondent states that the back of the form states that a coding of “4”  
11 represents the e-pay penalty. Therefore, respondent argues, just like the Courtesy Notice that advised  
12 appellant of the e-pay requirement, the Tax Due Notices explained the basis of the penalties. (RRB,  
13 pp. 2-3.)

14 Respondent states that appellant offers two reasons why the penalties should not apply,  
15 which are that appellant did not read the Tax Due Notices, and that appellant did not receive  
16 respondent’s original Courtesy Notice. Respondent states that it is not aware of any case law that has  
17 held that a taxpayer established reasonable cause when the taxpayer explained that he was too busy to  
18 read a tax agency’s billing notices. Respondent states that the Board has adopted the opposite  
19 conclusion. Respondent argues that appellant’s latter argument does not establish reasonable cause  
20 because R&TC section 18416 and published authorities preclude a taxpayer from denying the receipt of  
21 respondent’s notices when those notices are sent to a taxpayer’s last-known address. (RRB, p. 3.)

22 Respondent states that appellant admitted that he was too busy to carefully read the  
23 letters in his claim for refund, his opening brief, and his reply brief, which respondent argues does not  
24 establish reasonable cause. Respondent argues that it is the law and not respondent’s notices that  
25 require appellant to make electronic payments and that ignorance of the law does not constitute  
26 reasonable cause. (RRB, p. 3; Ex. Q.)

27 \_\_\_\_\_  
28 <sup>10</sup> Respondent asserts that appellant incorrectly states in his reply brief that the Courtesy Notice was issued in 2011.

1 With regard to appellant's argument that he should not be penalized for paying his taxes  
2 in full and ahead of schedule, respondent states that this is a matter for the Legislature, which mandated  
3 the method of payment and imposed a penalty upon a taxpayer's failure to comply with that mandate,  
4 as it has done with other laws that mandate when taxes are due and impose penalties for a taxpayer's  
5 failures to pay timely. (RRB, pp. 3-4.)

6 With regard to appellant's argument criticizing respondent's application of the  
7 reasonable cause standard as it applies to the late filing penalty, respondent asserts that the Board has  
8 applied such a reasonable cause standard in numerous published decisions where the statutes provide  
9 for an abatement of the penalty (e.g., the late payment penalty, late filing penalty, demand penalty, and  
10 the accuracy-related penalty) when a taxpayer establishes that his failure to comply with the law was  
11 due to reasonable cause. Respondent asserts that the reasonable cause standard is not defined or  
12 applied differently among the penalties and, therefore, those published authorities are applicable in this  
13 case. (RRB, p. 3.)

14 Appellant's Supplemental Brief

15 With regard to respondent's statement that appellant was too busy to read the notices,  
16 appellant asserts that, in a letter dated June 28, 2013, appellant stated "I didn't read them carefully  
17 enough" and, therefore, the notices were read and misinterpreted. Appellant asserts that he always paid  
18 the assessed penalties without question and argues that a normal businessperson would have  
19 misinterpreted the notices because the notices were vague and misleading. (Appellant's Supplemental  
20 Brief (ASB), p. 1.)

21 Appellant contends that, although respondent states that the Courtesy Notice was mailed  
22 to appellant's last-known address, appellant never received the Courtesy Notice. Appellant argues that  
23 if the Courtesy Notice was received, the notice would have been compiled with "other paperwork" and  
24 the penalties would not exist. Appellant also argues that mailing the notice to the last-known address  
25 does not prove that appellant received the notice. (ASB, p. 1.)

26 Appellant contends that, even if he had received the Courtesy Notice, it would not  
27 excuse the Tax Due Notices, which appellant argues were unclear. Appellant argues that, because  
28 appellant did not receive the Courtesy Notice, the subsequent notices that he did receive were

1 misleading and did not sufficiently notify appellant that he was required to make future payments  
2 electronically. Appellant argues that the “Notice of State Income Tax Due” title implies that the  
3 amount at the bottom represents taxes owed instead of a penalty. Additionally, appellant argues, the  
4 Tax Due Notice states that a “taxpayer penalty has been assessed,” but does not sufficiently let the  
5 taxpayer know the reason for the penalty. (ASB, p. 1.)

6 Appellant contends that his mother also read the notices and was unable to correctly  
7 determine the reason for the penalties. Appellant states that she contacted the FTB on appellant’s  
8 behalf and learned that appellant was missing the Courtesy Notice. Appellant contends that he always  
9 gave his mother the documents he received “when she was going to assist him with an issue” and that  
10 there was no Courtesy Notice. Appellant contends that no one at the FTB knew how to interpret the  
11 notices and they only knew the amounts of the penalties. Appellant contends that it was not until  
12 appellant read the FTB’s brief indicating numeric codes that he was able to understand how to interpret  
13 the reason for the penalties. (ASB, p. 1.)

14 Appellant argues that a prudent and reasonable businessperson with dramatic tax  
15 increases like appellant would be misled by the FTB’s notices into thinking the Tax Due Notices were  
16 for underestimated tax liabilities. With regard to respondent’s argument that ignorance of the law does  
17 not constitute reasonable cause, appellant argues that “this does not make sense, because that would  
18 leave no room for appeals.” Appellant contends that this situation deals with a “brand new law” and  
19 suggests the Board “issue a formal opinion in this case, as [he] could not locate any other decision or  
20 opinion discussing this penalty.” (ASB, p. 2.)

#### 21 Applicable Law

#### 22 Burden of Proof

23 The FTB’s determination is presumed correct and the taxpayer has the burden of  
24 proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,  
25 2001-SBE-001, May 31, 2001.)<sup>11</sup> In the absence of uncontradicted, credible, competent, and relevant  
26 evidence showing an error in the FTB’s determinations, respondent’s proposed assessment must be  
27

28 <sup>11</sup> Board of Equalization cases may be found on the Board’s website: [www.boe.ca.gov](http://www.boe.ca.gov).

1 upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

2 Mandatory Electronic Payment Penalty

3 R&TC section 19011.5, subdivision (a), requires individuals to remit all future payments  
4 electronically if they make an estimated tax or extension payment in excess of \$20,000 beginning on or  
5 after January 1, 2009, or if they file an original return with a tax liability over \$80,000 for a taxable  
6 year beginning on or after January 1, 2009. R&TC section 19011.5, subdivision (c), provides that  
7 individuals who do not comply with the e-pay requirement shall pay a penalty of one percent of the  
8 amount paid, unless it is shown that the failure to make the payment as required was due to reasonable  
9 cause and was not the result of willful neglect.

10 Although R&TC section 19011.5 does not define “reasonable cause”, the Board has  
11 addressed what is considered “reasonable cause” within the context of the late filing penalty.<sup>12</sup> To  
12 establish reasonable cause for the failure to comply with the e-pay requirement, a taxpayer must show  
13 that the failure to comply occurred despite the exercise of ordinary business care and prudence, or that  
14 cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under  
15 similar circumstances. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) The  
16 taxpayer bears the burden of proving reasonable cause to excuse the penalty. (*Appeal of*  
17 *Winston R. Schwyhart*, 75-SBE-035, Apr. 22, 1975.)

18 A taxpayer’s selective inability to perform tax obligations, while participating in regular  
19 business activities, does not establish reasonable cause. (*Watts v. Commissioner* (1999) T.C. Memo.  
20 1999-416.) If personal difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of  
21 his affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of*  
22 *William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968.) Ignorance of the law does not establish  
23 reasonable cause. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967; *Appeal of*  
24 *Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.) As stated in the *Appeal of Diebold, Incorporated*,

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26  
27 <sup>12</sup> As the issue of whether a taxpayer has demonstrated reasonable cause for the failure to make an electronic payment asks  
28 the same questions and weighs the same evidence as the inquiry of whether reasonable cause exists for the failure to timely  
file a tax return, judicial interpretations involving the inquiry of whether reasonable cause exists for the failure to timely  
file a tax return are persuasive authority for determining whether reasonable cause exists for the failure to make an  
electronic payment. (*See Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986.)

1 *supra*, a taxpayer does not exercise ordinary business care and prudence when he fails to acquaint  
2 himself with the requirements of California tax law.

3 STAFF COMMENTS

4           At the hearing, appellant should be prepared to meet his burden of establishing that he  
5 had reasonable cause for not complying with the e-pay requirement. Appellant initially argued his  
6 ignorance of the penalties because he did not carefully read the FTB notices. Specifically, appellant  
7 asserted in his appeal letter that he was too busy to sufficiently read the notices and had assumed that  
8 the notices were referring to estimated tax penalties. However, a taxpayer's asserted inability to  
9 perform tax obligations does not establish reasonable cause if, during the same time period, he was  
10 participating in his normal business activities. (*Watts v. Commissioner, supra.*) With regard to the  
11 ordinary and prudent businessperson standard, appellant is asked to explain why he did not sufficiently  
12 read the notices, or inquire as to the penalties, considering the substantial amounts of the penalties and  
13 the frequency with which the notices were received and the penalties were imposed. In his reply and  
14 supplemental briefs, however, appellant contradicts his earlier statements by arguing that his ignorance  
15 of the e-pay requirement was due to misleading notices and his lack of awareness that the notices  
16 related to any type of penalty. With respect to this new argument, ignorance of the law does not  
17 establish reasonable cause. (*Appeal of Diebold, Incorporated, supra.*)

18           Appellant is asked to clarify how he was misled by the Tax Due Notices when he also  
19 admits that he did not sufficiently read the notices and made assumptions. It appears that these two  
20 statements are in conflict because how can it be said that the notices were misleading if the notices  
21 were not carefully read. The Appeals Division notes that these notices are irrelevant as to reasonable  
22 cause for the failure to comply because the notices were not sent until *after* appellant's noncompliance.

23           Appellant also appears to make contradictory arguments. Appellant states in his appeal  
24 letter that he assumed the notices were informing him of estimated tax penalties. However, appellant  
25 makes contradictory statements in his reply brief and supplemental brief, stating that he believed the  
26 notices did not indicate penalties. Appellant contends that, because the notices were labeled "Notice of  
27 State Income Tax Due," a taxpayer could be led to "believe that the amount at the bottom represents  
28 taxes owed, rather than any sort of penalty." However, in his appeal letter, appellant already admits

1 that he was aware that the notices imposed penalties. Appellant is asked to explain this contradiction in  
2 his contentions. (The Appeals Division again notes that these notices are irrelevant as to reasonable  
3 cause for the failure to comply because the notices were not sent until *after* appellant's noncompliance.)

4 It appears to the Appeals Division that other statements in appellant's appeal letter are in  
5 conflict with statements in his reply brief and supplemental brief. Appellant appears to no longer  
6 contend that he did not sufficiently read the notices, instead contending that the notices were  
7 misleading. For example, the FTB's records indicate that appellant's mother stated to the FTB that  
8 appellant did not carefully read the notices. However, appellant claims in his reply brief that his  
9 mother stated to the FTB that the notices were misleading and ambiguous. Appellant is asked to  
10 explain this contradiction in his contentions.

11 As for the Tax Due Notices that are in the appeal record (appellant submitted with his  
12 appeal letter notices dated June 4, 2013, and June 24, 2013), such notices include the following  
13 information on the front page of the notice:

14 . . . If your estimated tax or extension payments exceed \$20,000 or your total tax  
15 liabilities exceed \$80,000, you must make all payments electronically, regardless of the  
16 tax year or amount (Revenue and Taxation Code 19011.5). Payments made by other  
17 means result in a penalty of 1 percent of the amount paid. For more information, refer to  
the enclosed FTB 1140, *Personal Income Tax Collection Information*, or go to **ftb.ca.gov**  
and search for **mandatory e-pay**. . . . (Bolding and italics in original.)

18 In the opinion of the Appeals Division, these notices are not misleading, but quite  
19 explicit as the notices also state that "A TAXPAYER PENALTY HAS BEEN ASSESSED. SEE THE  
20 OTHER LIABILITY CODE LISTED IN THE SUMMARY OF BALANCE DUE." The "Other  
21 Liability Code" is listed as "4" and the notice states "Penalty codes and other liability codes are listed  
22 on the back." The back of the notice indicates that a code of "4" means that an e-pay penalty has been  
23 assessed. Furthermore, the notices (in the quoted language above) explain the e-pay requirements and  
24 identify R&TC section 19011.5 as the relevant statute. Therefore, it appears to the Appeals Division  
25 that appellant received notice which clearly indicated that he was required to pay electronically and  
26 owed e-pay penalties.

27 The Appeals Division also notes that the original notification issue (i.e., the receipt of  
28 the Courtesy Notice) is irrelevant in this appeal because there is no statutory requirement that

1 respondent provide notice under the instant circumstances. Additionally, with respect to the notices  
2 imposing the penalties (as noted above), such notices are irrelevant as to reasonable cause for the  
3 failure to comply because the notices were not sent until *after* appellant’s noncompliance.

4           Although there is a dispute as to appellant’s receipt of the Courtesy Notice, the  
5 Appeals Division notes that appellant made a payment using a written check on January 2, 2013, and  
6 was sent a Tax Due Notice indicating his first e-pay penalty, which appellant paid on January 15, 2013  
7 (the FTB later abated this e-pay penalty as a one-time courtesy). Subsequently, appellant made another  
8 payment (a 2013 estimated tax payment) using a written check on April 7, 2013. Then, appellant  
9 received another Tax Due Notice from the FTB assessing a second e-pay penalty, which appellant paid  
10 on May 1, 2013. Thereafter, appellant made yet another payment using a written check on May 23,  
11 2013, and then received another Tax Due Notice indicating an e-pay penalty. It appears to the  
12 Appeals Division that under these circumstances, even in the absence of a Courtesy Notice, an  
13 inference may be drawn that an ordinary intelligent and prudent businessperson would have sufficiently  
14 been put on notice from the first penalty Tax Due Notice that electronic payments to the FTB would be  
15 required going forward.

16           If either party has any additional evidence to present, they should provide their evidence  
17 to the Board Proceedings Division at least 14 days prior to the oral hearing pursuant to California Code  
18 of Regulations, title 18, section 5523.6.<sup>13</sup>

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<sup>13</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.