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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9  
10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **MATTHEW G. KRANE** ) Case No. 813532

	<u>Years</u>	<u>Claim For Refund<sup>1</sup></u>
	2007	\$6,328.45 <sup>2</sup>
	2008	\$479.63 <sup>3</sup>

16 Representing the Parties:

17 For Appellant: Matthew G. Krane

18 For Franchise Tax Board: Anne Mazur, Specialist

19  
20 **QUESTIONS:** (1) Whether appellant has shown that his claim for refund should be granted.  
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22 <sup>1</sup> The claim for refund is for \$6,854.61. The FTB notes that the claim for refund consists of \$6,328.45 for tax year 2007;  
23 \$479.63 for tax year 2008; and \$46.53 for a mandatory E-pay penalty. The FTB states in its opening brief that it will abate  
24 the \$46.53 E-pay penalty since it was not properly imposed. In addition, the FTB states in its reply brief, as discussed below,  
25 that it will abate interest in the amount of \$4.23 for 2007 and \$0.21 for 2008. (Resp. Opening Br., p. 1; Resp. Reply Br.,  
26 p. 6.)

27 <sup>2</sup> According to the FTB, this amount was applied to (1) the \$1,091.17 remaining balance of the late filing penalty (the late filing  
28 penalty of \$5,064.00 was satisfied in part by appellant's previous payments), (2) the estimated tax penalty of \$242.27,  
and (3) total interest of \$4,995.01. (Resp. Reply Br., p. 6; Ex. P.)

<sup>3</sup> According to the FTB, this amount was applied to (1) the \$109.06 remaining balance of the late filing penalty (the late filing  
penalty of \$266.75 was satisfied in part by appellant's previous payments), (2) the estimated tax penalty of \$39.90, (3) a  
collection cost recovery fee of \$154.00, (4) a \$16.00 lien fee, and (5) total interest of \$160.67. (Resp. Reply Br., p. 6; Ex. Q.)

1 (2) Whether appellant has shown reasonable cause for failing to timely file his 2007  
2 and 2008 tax returns.

3 (3) Whether appellant has shown that the collection cost recovery fee and the lien fee  
4 should be abated.

5 (4) Whether appellant has shown that interest should be abated.  
6

7 HEARING SUMMARY

8 Background

9 For 2007, appellant filed an untimely California return (Form 540) on September 6, 2011,  
10 reporting federal adjusted gross income (AGI) of \$641,299, less California adjustments of \$278, and  
11 itemized deductions of \$6,710, resulting in a taxable income of \$634,311, and tax of \$56,796. After  
12 applying estimated tax and other payments of \$36,540, appellant reported tax due of \$20,256. Appellant  
13 also self-assessed an underpayment of estimated tax penalty of \$242, for a total amount due of \$20,498.  
14 It appears that appellant remitted two payments, totaling \$24,228.83, with the 2007 return of \$20,498.00  
15 and \$3,730.83, which satisfied the amount due, plus interest. (Resp. Opening Br., p. 1, Ex. A; Appeal  
16 Letter; Ex. 35.)

17 For 2008, appellant filed an untimely California return (Form 540) on September 6, 2011,  
18 reporting federal AGI of \$73,203, less itemized deductions of \$33,636, resulting in a taxable income of  
19 \$39,567, and tax of \$1,475. After subtracting exemption credits totaling \$408, appellant reported tax  
20 due of \$1,067. Appellant also self-assessed an underpayment of estimated tax penalty of \$40, and a total  
21 amount due of \$1,107. It appears that appellant remitted a payment of \$1,224.69 with the 2008 return,  
22 which satisfied the amount due, plus interest. (Resp. Opening Br., p. 2, Ex. B; Appeal Letter; Ex. 36.)

23 It appears that the FTB accepted appellant's returns as filed. However, because appellant  
24 did not file his 2007 tax return by the April 15, 2008 due date, the FTB imposed a late filing penalty of  
25 \$5,064. In addition, because appellant did not file his 2008 tax return by the April 15, 2009 due date,  
26 the FTB imposed a late filing penalty of \$266.75. (Resp. Opening Br., p. 2, Exs. A and B.)

27 On or about September 8, 2011, the FTB applied \$3,730.83 of the payment appellant  
28 remitted for tax year 2007 toward appellant's 2008 tax year. After accounting for the late filing penalty

1 of \$266.75, plus interest, the FTB transferred the remaining 2008 credit balance of \$3,445.19 to  
2 appellant's 2007 tax year. On September 27, 2011, the FTB issued appellant a Return Information  
3 Notice (RIN) dated September 27, 2011 for the 2007 tax year which showed a total tax liability of  
4 \$56,796.00, payments totaling \$57,038.00 (i.e., \$36,540.00 + \$20,498.00), a late filing penalty of  
5 \$5,064.00, an underpayment of estimated tax penalty of \$242.27, and interest of \$4,628.15, for a total  
6 balance due of \$9,692.42. On November 8, 2011, the FTB sent appellant an Income Tax Due Notice for  
7 the 2007 tax year which showed tax of \$56,796.00, penalties totaling \$5,306.27 (i.e., \$5,064.00 +  
8 \$242.27), interest of \$4,649.75, and payments totaling \$60,483.19 (i.e., \$57,038.00 + \$3,445.19), for a  
9 balance due of \$6,266.83. On December 8, 2011, the FTB made the correction of applying \$3,730.23 to  
10 appellant's 2007 tax year, as directed by appellant; however, the FTB did not cancel the credit transfer  
11 of \$3,445.19 from the 2008 tax year to the 2007 tax year. On December 14, 2011, the FTB issued  
12 appellant a Notice of State Income Tax Due for the 2008 tax year which showed tax of \$1,067.00,  
13 penalties totaling \$306.65 (i.e., \$266.75 + \$40.00), interest of \$166.48, and payments and adjustments  
14 totaling \$2,220.50,<sup>4</sup> for a total due of \$3,760.63. According to the FTB, even though it did not cancel  
15 the credit transfer of \$3,445.19 from the 2008 tax year to the 2007 tax year, the account balances as a  
16 whole for the 2007 and 2008 tax years were correct, except for the effect of accrued interest. The FTB  
17 corrected this error by February 2, 2012, which included re-computing applicable interest as of the  
18 original September 8, 2011<sup>5</sup> payment date; therefore, it appears that appellant paid no additional interest  
19 as a result of the error. (Resp. Opening Br., p. 2, Exs. C, D, and E.)

20 When appellant did not satisfy his balance due for the 2007 and 2008 tax years, the FTB  
21 issued a Final Notice Before Levy on January 24, 2012, demanding the payment of \$6,312.68

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26 <sup>4</sup> It is unclear to staff what payments and adjustments the FTB applied to the 2008 tax year to calculate total payments and  
27 adjustments of \$2,220.50. It appears to staff that appellant has paid \$1,224.69 towards the 2008 tax year (i.e., the \$1,224.69  
28 payment remitted with the return). The FTB should be prepared to explain its calculation at the hearing.

<sup>5</sup> As discussed below, the FTB stated in its reply brief that it agrees that appellant filed the 2007 and 2008 returns on  
September 6, 2011, and recomputed interest accordingly.

1 (\$2,536.90<sup>6</sup> for the 2007 tax year and payment of \$3,775.78<sup>7</sup> for the 2008 tax year). The notice stated  
2 that a failure to pay by February 8, 2012, could result in the filing of a state tax lien. The notice also  
3 stated that the FTB could begin voluntary collection action, including the imposition of a  
4 \$154 collection fee, contacting third parties, seizing accounts, seizing and selling real and personal  
5 property, and garnishing 25 percent of appellant's wages. When appellant failed to make any payments,  
6 the FTB sent appellant a Tax Lien Notice on March 19, 2012, notifying appellant of a balance due of  
7 \$6,520.72<sup>8</sup> and that the FTB filed a tax lien against appellant in Los Angeles County, which attached to  
8 all real property appellant owns or acquires in the county, for the 2007 and 2008 tax years. When  
9 appellant sought to sell real property he owned in Los Angeles, the FTB sent a Demand for Payment of  
10 State Tax Lien to appellant's escrow company on September 4, 2013, demanding the payment of  
11 \$6,854.61. The FTB received a payment of \$6,854.61, with an effective date of August 6, 2013, which  
12 satisfied the amount due, and released the lien. Thereafter, appellant filed a claim for refund requesting  
13 the abatement of the penalties, which the FTB denied based on a lack of reasonable cause. This timely  
14 appeal followed. (Resp. Opening Br., p. 2, Exs. F, G, and H; Appeal Letter, Exs. 1, 2, and 8.)

### 15 Contentions

#### 16 Appellant's Appeal Letter

17 Appellant contends that the claim for refund should be granted. Appellant asserts that he  
18 is appealing the FTB's denial of his claim for refund on three grounds: (1) the amount the FTB asserts  
19 appellant owes is "entirely arbitrary, having no basis under the California laws;" (2) appellant paid the  
20

21 <sup>6</sup> This amount consists of tax of \$56,796.00, penalties totaling \$5,306.27, interest of \$4,648.65, and payments totaling  
22 \$64,214.02. It is unclear to staff how the FTB calculated payments totaling \$64,214.02 for the 2007 tax year on the Final  
23 Notice Before Levy. It appears to staff that appellant has paid \$60,768.83 towards the 2007 tax year (i.e., reported estimated  
24 tax and other payments of \$36,540.00 + two payments remitted with the return totaling \$24,228.83). The FTB should be  
25 prepared to explain its calculation at the hearing.

26 <sup>7</sup> It is unclear to staff how the FTB calculated tax due of \$3,775.78 for the 2008 tax year on the Final Notice Before Levy.  
27 Using the amounts listed on the notice, which states tax of \$1,067.00, penalties totaling \$306.65, interest of \$181.63, and  
28 payments totaling \$2,220.50 (as discussed above, it is unclear to staff how the FTB calculated payments totaling \$2,220.50),  
it appears to staff that there is a credit of \$665.22 for the 2008 tax year (i.e., \$1,067.00 + \$306.65 + \$181.63 - \$2,220.50).  
The FTB should be prepared to explain its calculation at the hearing.

<sup>8</sup> It is unclear to staff how the FTB determined a balance due of \$6,520.72. For example, it is unclear if the balance is due to  
accrued interest from the date the Final Notice Before Levy was issued, or if the FTB recomputed possible miscalculations.  
The FTB should be prepared to explain its calculation at the hearing.

1 estimated tax penalties when he filed his 2007 and 2008 tax returns; and (3) appellant's failure to timely  
2 file his 2007 and 2008 returns was due to reasonable cause. (Appeal letter, pp. 1-2.)

3 Appellant asserts that the amount the FTB asserts appellant owes is "arbitrary and  
4 without any basis under law." Appellant contends that, when he filed his 2007 and 2008 tax returns, he  
5 remitted two checks for each tax year: (1) for 2007, he remitted one check in the amount of \$20,498.00,  
6 for the self-assessed total amount due, and the second in the amount of \$3,730.83, for the payment of the  
7 accrued interest, as indicated on the check's memo line; and (2) for 2008, he remitted one check in the  
8 amount of \$1,107.00, for the self-assessed total amount due, and the second in the amount of \$117.69,  
9 for the payment of the accrued interest, as indicated on the check's memo line. (Appeal letter, p. 2,  
10 Exs. 3, 9, and 10.) With concern to the September 27, 2011 RIN, appellant asserts that: (1) the  
11 "computations in the notice were incomprehensible;" (2) "there was simply no way" an additional  
12 \$4,628.15 of interest could have accrued in less than a month from the filing; and (3) even with the  
13 imposition of the penalties, the revised balance due "was well in excess" of any amount owed by  
14 appellant. Appellant states that, after receiving a facsimile from the FTB concerning his 2007 and 2008  
15 liabilities, he requested that the \$3,730.83 that he remitted with his 2007 tax return, which an FTB  
16 employee applied to his 2008 tax year, be applied to 2007. (Appeal letter, pp. 2-3, Exs. 12, and 13.)  
17 Appellant indicates that thereafter he received the November 8, 2011 Income Tax Due Notice for the  
18 2007 tax year, which appellant asserts did not reflect the \$3,730.83 being applied to his 2007 tax year  
19 since the "Balance Due" of \$60,483.19 "continued to include only \$3,445.19 of the \$3,730.83" appellant  
20 paid toward the accrued interest. With concern to the December 14, 2011 Notice of State Income Tax  
21 Due for the 2008 tax year, appellant asserts that the notice was "decidedly incomprehensible" as no  
22 explanation was given regarding the "Payments and Adjustments" amount of \$2,220.50, and the  
23 "Balance Due" of \$3,760.63 was more than three times the amount due with the return. Appellant  
24 contends that the receipt of the Final Notice Before Levy, dated January 24, 2012, "did nothing to clear  
25 up the confusion" as the "Tax Year Amount" of \$2,536.90 for 2007 was an amount not shown in prior  
26 notices, and for tax year 2008, the "Payments" of \$2,220.50 was added to the amounts owed. (Appeal  
27 Letter, pp. 1-3, Exs. 3, and 9-17.)

28 Appellant asserts that, on February 2, 2012, he sent the FTB an email noting his

1 objections to the Final Notice Before Levy and informing the FTB that he would be disputing the late  
2 filing penalty, as well as the “interest computations, ‘since the FTB as never disclosed its computations  
3 of interest.’” Appellant contends that the FTB responded by stating that the FTB was “definitely  
4 working on it” and that it “too [was] confused” and that the FTB “WILL sort it out.” (Appeal Letter,  
5 p. 4, Ex. 18.) Appellant asserts that, on February 2, 2012, his lawyer also telephoned the FTB and the  
6 FTB informed his lawyer that “the amounts described in the Final Notice were wrong” that the amounts  
7 “were the result of a ‘mistaken double transfer,’ a clerical error,” and that the FTB instructed appellant  
8 to wait until he received a corrected Final Notice before filing a protest. Appellant contends that he  
9 never received the corrected Final Notice, despite numerous attempts to contact the FTB requesting the  
10 document. (Appeal Letter, p. 4, Ex. 19.) Appellant argues that the FTB has refused his request for  
11 “accurate accountings.” (Appeal Letter, pp. 4-5, Exs. 8, 18, and 19.)

12           With concern to the 2007 and 2008 estimated tax penalty, appellant asserts that he paid  
13 all estimated tax underpayments that were due for the 2007 and 2008 tax years when he filed his returns  
14 and, therefore, no additional estimated tax penalties may be imposed for those tax years. (Appeal Letter,  
15 p. 5.)

16           Appellant also contends that his failure to timely file his 2007 and 2007 returns was due  
17 to reasonable cause. Specifically, appellant contends that: (1) the Internal Revenue Service (IRS) found  
18 reasonable cause for the late filing of appellant’s 2007 return;<sup>9</sup> (2) it was “physically impossible” for  
19 appellant to prepare and file his 2007 and 2008 tax returns while incarcerated; (3) appellant’s  
20 incarceration precluded appellant from attending to any of his other financial or personal affairs; (4) the  
21 circumstances involving appellant’s legal affairs further made it “impossible” for appellant to file his  
22 2007 and 2008 tax returns while incarcerated as well as while appellant was out on bail; and (5) prior to  
23 2007, appellant timely filed his returns for 30 years. (Appeal Letter, pp. 5-15.)

24           With regard to the federal abatement of the 2007 late filing penalty, appellant asserts that  
25 the IRS abated the late filing penalty based on reasonable cause, as evidenced by his 2007 federal  
26 Account Transcript. Appellant contends that a “final federal determination” of reasonable cause for the  
27

28 <sup>9</sup> Appellant asserts that no federal income tax was owed for the 2008 tax year and, therefore, there was no federal penalty imposed for 2008.

1 late filing of a return “should carry significant weight in the State’s determination of the same issue.”  
2 (Appeal Letter, pp. 5-7, Exs. 23, 26, and 27.)

3 Appellant asserts that he had until October 15, 2008, to file his 2007 tax return on  
4 extension<sup>10</sup> and that, on July 18, 2008, he was arrested and taken to the Metropolitan Detention Center in  
5 Los Angeles (MDC), where he remained until he was released on bail in December 2009. Appellant  
6 contends that his failure to timely file his 2007 and 2008 tax returns while incarcerated at MDC was due  
7 to reasonable cause, because it was “physically impossible” for appellant to prepare the returns.  
8 Specifically, appellant contentions include, but are not limited to, the following: (1) no one but  
9 appellant had “even the remotest familiarity” with appellant’s taxes or his financial information;  
10 (2) MDC did not allow appellant visitors other than immediate family, attorneys, and their assistants;  
11 (3) MDC telephone procedures allowed only out-going telephone calls with restrictions on time allowed;  
12 (4) MDC inmates did not have access to facsimile machines, the internet, calculators, or tax forms;  
13 (5) the financial information and documentation necessary for appellant to prepare his returns were  
14 located at his residence which was broken into and burglarized numerous times during his incarceration;  
15 (6) soon after appellant’s arrest, the United States Post Office stopped delivering mail to appellant’s  
16 residence, either because his mailbox was full or because of a fraudulent change of address submission;  
17 (7) it was an “inordinately time-consuming and difficult exercise” to obtain duplicates of the stolen  
18 and/or incorrectly mailed documentation; (8) even “the most cursory examination” of appellant’s returns  
19 and documentation, including information regarding appellant’s shares of stocks, demonstrates that it  
20 was “manifestly impossible” for appellant to obtain the information while incarcerated and that the  
21 returns required “several excruciatingly complex computations;” (9) appellant did not have access to his  
22 monetary funds while at MDC; and (10) appellant’s life “literally fell apart” while incarcerated at MDC  
23 and that “not even by exercising extraordinary -- even superhuman -- business care and prudence” could  
24 appellant have been able to timely file his 2007 and 2008 tax returns “under the circumstances [he]  
25 faced.” (Appeal letter, pp. 7-13, Exs. 29-46.)

26 In addition, appellant asserts that the circumstances involving his legal affairs further  
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28 <sup>10</sup> Pursuant to R&TC section 18566, tax returns are due April 15th of the year following the tax year with an automatic filing extension until October 15th of that year.

1 made it “impossible” for appellant to file his 2007 and 2008 tax returns before September 2011, even  
2 while out on bail. Specifically, appellant contentions include, but are not limited to, the following:  
3 (1) when appellant was informed in 2007 that he was under investigation for tax evasion,<sup>11</sup> appellant’s  
4 legal counsel informed him that he was in “criminal jeopardy” and that any subsequent filing of tax  
5 returns before appellant’s sentencing would “adversely implicate” appellant’s right against self-  
6 incrimination; (2) that after appellant was released on bail, the exercise of ordinary business care and  
7 prudence “dictated” that appellant could not file the returns any earlier than when he did; (3) it would  
8 have “been insane” for appellant to file any tax return “while the negotiations were in process” and that  
9 the negotiation agreements “clearly vindicated” appellant’s position that filing his tax returns at any time  
10 prior was “legally untenable;” and (4) appellant filed his delinquent returns in September 2011, more  
11 than two months prior to the six-month deadline of November 2011 set forth in the “Master  
12 Agreement.” (Appeal Letter, pp. 13-15, Exs. 8, 48-54.)

13 Furthermore, appellant asserts that, prior to 2007, he timely filed his tax returns for  
14 30 years and that, based on the appellant’s compliance history, it is evident that appellant as “always  
15 exercised extraordinary” business care and prudence in filing his returns. (Appeal Letter, p. 15.)

#### 16 Respondent’s Opening Brief

17 The FTB asserts that appellant has not demonstrated that he is entitled to a refund or  
18 credit. The FTB asserts that there must be an overpayment of tax for which a refund can be granted and  
19 that it is the taxpayer’s burden to prove an entitlement to the claimed refund or credit. The FTB asserts  
20 that a claimed overpayment of income tax may not be refunded where a correct computation shows that  
21 the amount paid does not exceed the amount of tax, which might have been properly assessed and  
22 demanded. (Citing *Lewis v. Reynolds* (1932) 284 U.S. 281, 283; Rev. Rul. 81-87, 1981-1 C.B. 580.)

23 With regard to appellant’s contention that the balances due on his 2007 and 2008 accounts were  
24 arbitrary and without basis, the FTB contends that appellant appears to be referring to the FTB’s  
25 misapplication of his return payments. The FTB asserts that, while the balance due notices reflected the  
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28 <sup>11</sup> Appellant asserts that, while he was initially charged with, and arrested for, making a false statement on a passport application and aggravated identity theft, the focus of the government’s case against appellant “from the very onset” was tax evasion. (Appeal Letter, p. 13; Ex. 8.)

1 misapplication error, the FTB subsequently corrected the error, including accrued interest, prior to filing  
2 the lien on March 19, 2012. The FTB contends that appellant has not demonstrated that the amounts he  
3 paid, either voluntarily or as a result of the lien, exceed the amount of tax, penalties, and fees properly  
4 assessed and due. (Resp. Opening Br., pp. 3-4.)

5 Concerning the estimated tax penalties, the FTB notes that appellant self-reported  
6 estimated tax penalties of \$242.27 and \$39.90 for the 2007 and 2008 tax years, respectively. The FTB  
7 asserts that, when it processed appellant's returns, it computed the estimated tax penalties in the same  
8 amounts that appellant self-reported. The FTB contends that, since it posted the penalties to appellant's  
9 accounts for 2007 and 2008 in the same amounts as was reported on appellant's returns, there appears to  
10 be no disagreement regarding the estimated tax penalties.<sup>12</sup> (Resp. Opening Br., p. 3.)

11 With concern to the late filing penalties, the FTB contends that appellant has not  
12 demonstrated reasonable cause for failing to timely file his 2007 and 2008 tax returns. The FTB  
13 contends that it properly imposed the late filing penalties pursuant to R&TC section 19131 because  
14 appellant did not file his 2007 or 2008 tax returns until September 2011, well past the respective due  
15 dates. The FTB states that the late filing penalty pursuant to R&TC section 19131 is computed at  
16 five percent of the tax due, after allowing for timely payments, for every month that the return is late, up  
17 to a maximum of twenty-five percent. The FTB asserts that, when it imposes a late filing penalty, the  
18 law presumes that the penalty is correct, citing *Todd v. McColgan* (1949) 89 Cal.App.2d 509.  
19 Accordingly, the FTB contends that it properly imposed the 2007 and 2008 late filing penalties, unless  
20 appellant can show reasonable cause for the late returns. The FTB contends that, to establish reasonable  
21 cause, an appellant must show that the failure to timely file the return occurred despite the exercise of  
22 ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and  
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24  
25 <sup>12</sup> Appellant self-reported estimated tax penalties of \$242 and \$40 for the 2007 and 2008 tax years, respectively, and it  
26 appears to staff that the FTB did not impose additional estimated tax penalties for the 2007 and 2008 tax years, as reflected  
27 on appellant's 2007 and 2008 Tax Year Current Values Display. (Resp. Opening Br., Exs. A and B.) It also appears to staff  
28 that appellant included the self-reported estimated tax penalties of \$242.00 and \$40.00 in his remitted payments of  
\$20,498.00 and \$1,224.69 for the 2007 and 2008 tax years, respectively. Staff notes that the FTB indicates in its reply brief  
that a portion of the \$6,854.61 it received on August 6, 2013 (the amount at issue for the claim for refund), was applied to the  
estimated tax penalty of \$242.27 for the 2007 tax year and the estimated tax penalty of \$39.90 for the 2008 tax year. (Resp.  
Reply Br., p. 6.) At the hearing, the FTB should be prepared to clarify whether appellant paid the 2007 and 2008 estimated  
tax penalties twice (i.e., once with the remitted payments and again out of a portion of the \$6,854.61).

1 prudent businessperson to have so acted under similar circumstances. (Citing *Appeal of*  
2 *Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027,  
3 Jan. 9, 1979.)<sup>13</sup> (Resp. Opening Br., p. 4; Ex. J.)

4           Regarding appellant’s contention that, due to his incarceration and his residence being  
5 burglarized and flooded during his incarceration, which resulted in a loss of important documentation  
6 necessary to file his returns, the FTB contends that a taxpayer’s inability to file a return by the due date  
7 because of a lack of necessary information or documents is not considered reasonable cause (citing the  
8 *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968). The FTB contends that the fact that  
9 tax information is lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer’s  
10 burden of establishing reasonable cause (citing the *Appeal of Stephen C. Bieneman, supra*). The FTB  
11 contends that, to establish reasonable cause, the taxpayer must establish why a timely return could not  
12 have been filed and that efforts were taken to obtain the information in time to file a return. The FTB  
13 also asserts that a taxpayer can file an amended return when he receives the missing information. (Resp.  
14 Opening Br., pp. 4-5; Ex. J.)

15           In addition, the FTB asserts that incarceration is not a reasonable cause for failing to file  
16 a timely return, citing *Llorente v. Commissioner* (1980) 74 T.C. 260, affd. in part, rev’d and rem’d in  
17 part, on other grounds 649 F.2d 152 (2d Cir. 1981). The FTB contends, citing *Cherry v. Commissioner*,  
18 T.C. Memo. 2013-3, and *Thrower v. Commissioner* T.C. Memo. 2003-139, that the United States Tax  
19 Court has held that a taxpayer’s “unavoidable absence” due to incarceration is not in itself reasonable  
20 cause for a late filing, and that a taxpayer’s arrest, incarceration, and a confiscation of his records is not  
21 reasonable cause. The FTB notes that, while an illness or other personal difficulties which prevent a  
22 taxpayer from filing a timely return may be considered reasonable cause in some cases, if the difficulties  
23 simply cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer’s affairs to pursue  
24 other aspects, the taxpayer must bear the consequences of that choice, citing the *Appeal of W.L. Bryant*,  
25 83-SBE-180, decided by this Board on August 17, 1983. (Resp. Opening Br., pp. 4-5; Ex. J.)

26           The FTB argues that the law requires appellant to show credible and competent proof that  
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<sup>13</sup> Board of Equalization cases (designated “SBE”) may generally be found at: [www.boe.ca.gov](http://www.boe.ca.gov).

1 the asserted circumstances “completely prevented” appellant from timely filing his 2007 and 2008 tax  
2 returns, which the FTB contends appellant has failed to demonstrate. The FTB asserts that, while  
3 appellant indicates that MDC allowed visits from immediate family and attorneys, appellant has not  
4 explained why he did not seek the assistance of his allowed visitors to file his tax returns, even if those  
5 returns contained incomplete and estimated figures as appellant could have subsequently filed amended  
6 returns. The FTB also contends that it appears that appellant continued to address his criminal matter, as  
7 well as the civil matters involving his former client, during the period of his incarceration, and, therefore,  
8 he was able to attend to other aspects of his personal affairs. (Resp. Opening Br., pp. 6-7; Appeal Letter,  
9 Exs. 8, 30, 49, and 51.)

10 In addition, the FTB notes that appellant states that he did not file his returns, even after  
11 he was released from jail, because he did not want to incriminate himself in his criminal matter based on  
12 his Fifth Amendment rights. The FTB notes that appellant stated in his claim for refund that the  
13 criminal tax evasion matter “centered on a \$36 million payment in 2001 of legal fees earned in  
14 connection with a corporate acquisition transaction” and his failure to report that payment as income on  
15 his 2001 tax return. (Resp. Opening Br., p. 6; Appeal Letter, Exs. 8 and 49.) The FTB asserts that the  
16 United States Supreme Court has held that a taxpayer’s privilege against self-incrimination does not  
17 excuse the taxpayer from filing a return. (Citing *United States v. Sullivan* (1927) 274 U.S. 259.) The  
18 FTB contends that appellant has not shown by credible and competent proof that his incarceration and  
19 related difficulties “completely prevented” him from timely filing his 2007 and 2008 returns. The FTB  
20 asserts that appellant has provided no evidence of any efforts he made to meet his 2007 and 2008 tax  
21 return filing deadlines. Regarding appellant’s contention that he exercised ordinary and business care  
22 and prudence by not filing his 2007 and 2008 tax return, the FTB asserts that ordinary and business care  
23 and prudence would seem to require the timely filing of a return, even if such return was estimated or  
24 incomplete and raised privilege objections. The FTB argues that appellant acknowledges his filing  
25 obligations but chose not to fulfill the obligations until his criminal matter was resolved. (Resp.  
26 Opening Br., pp. 6-7; Appeal Letter, Exs. 8, 30, 49, and 51.)

27 With concern to appellant’s contention that the IRS abated his 2007 late filing penalty  
28 based on reasonable cause, the FTB contends that a review of appellant’s 2007 federal Individual Master

1 File (IMF) transcript indicated that the late filing penalty was based on an appeals settlement.<sup>14</sup>  
2 Specifically, the FTB contends that, according to appellant's 2007 federal IMF, transaction code (TC)  
3 161 indicates that the late filing penalty was abated on April 22, 2013, and that at TC 290, assertion  
4 reason code (ARC) of 065 followed by 040, indicates that the late filing penalty was abated as a result of  
5 an appeals settlement based on hazards of litigation. In addition, the FTB argues that neither the  
6 May 2011 "Master Agreement" between appellant, appellant's client, the IRS, and the FTB, nor the  
7 June 2011 "Closing Agreement" between the FTB and appellant, provide for a waiver of the late filing  
8 penalties. The FTB contends that, instead, the "Master Agreement" requires appellant to file within  
9 six months of the agreement date all federal and state income tax returns for the 2007 through 2010 tax  
10 years, "for which such returns are delinquent and shall pay all income taxes, penalties and interest due  
11 for these years," and the "Closing Agreement" states that appellant "has agreed to file tax returns . . .  
12 and pay all taxes, interest, and penalties with respect to those returns." (Resp. Opening Br., pp. 7-8,  
13 Exs. K and L; Appeal Letter, Exs. 54 and 55.)

14           Regarding the collection fees, the FTB contends that appellant has not demonstrated that  
15 the fees should be abated. The FTB argues that the collection cost recovery fees were properly imposed  
16 under R&TC section 19254 because the FTB issued valid notices to appellant prior to the imposition of  
17 the fees. The FTB asserts that after the issuance of the collection notices, appellant continued to fail to  
18 pay his liability. Accordingly, the FTB asserts that it properly imposed the collection cost recovery fee  
19 of \$154, properly secured the lien, and that it properly charged appellant a lien fee of \$16. The FTB  
20 asserts that there is no provision in the Revenue and Taxation Code that will excuse the FTB from  
21 imposing such lien/collection fees for any circumstances, including reasonable cause, citing R&TC  
22 sections 19221 and 19376. (Resp. Opening Br., p. 8.)

23           In addition, the FTB contends that appellant has not demonstrated that interest should be  
24 abated. The FTB asserts that it "fully corrected" its misapplication of appellant's return payments,  
25 including recomputing interest, before the lien was filed against appellant's property, and, therefore,  
26 appellant paid no interest in excess of what he was properly charged. The FTB states that interest  
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28 <sup>14</sup> The FTB notes that, according to appellant's 2008 federal IMF transcript, appellant did not have a tax liability and, therefore, a federal late filing penalty was not imposed for the 2008 tax year.

1 accrues on unpaid tax if the tax is not paid by the due date, citing R&TC section 19101. The FTB also  
2 states that R&TC section 19101, subdivision (c)(2), requires the imposition of interest on penalties.  
3 The FTB asserts that, with respect to the late filing penalties, interest is imposed for the period that  
4 begins on the due date of the return (including any extensions), and ends on the date the penalty is paid.  
5 The FTB contends that interest is mandatory, citing this Board's decision in the *Appeal of*  
6 *Amy M. Yamachi*, 77-SBE-095, decided by this Board on June 28, 1977. The FTB contends that  
7 interest may not be abated based on reasonable cause arguments. The FTB asserts that interest  
8 abatement may be available under certain circumstances, pursuant to R&TC section 19104, subdivision  
9 (a). The FTB asserts that appellant has not alleged that the circumstances defined in R&TC section  
10 19104 are present in this case and that interest cannot be abated. (Resp. Opening Br., pp. 8-9.)

11 Appellant's Reply Brief

12 Appellant contends that the 2007 and 2008 late filing penalties should be abated based on  
13 reasonable cause. Regarding the FTB's contention that incarceration is not reasonable cause for failing  
14 to file a timely return, appellant contends that, in each of the cases cited by the FTB, the court did not  
15 articulate a general rule regarding incarceration, but rather found that the taxpayer failed to present any  
16 evidence showing that his incarceration prevented him from filing a return. Appellant argues that,  
17 unlike the taxpayers in the cited cases, appellant has provided "extensive evidence" substantiating his  
18 contention that the conditions of his incarceration made it "physically impossible" for him to file his  
19 2007 and 2008 tax returns. Appellant asserts that the case of *Hayes v. Commissioner*, T.C. Memo.  
20 1967-80 (*Hayes*) is "controlling authority" that appellant's 2007 and 2008 late filing penalties should be  
21 abated based on reasonable cause. Appellant asserts that, in *Hayes*, the taxpayer lived in Maine but left  
22 for California in February for work, during which time his wife suffered a ruptured appendix in April,  
23 and that, in June, the taxpayer suffered a physical and mental collapse, returning to Maine in July.  
24 Appellant contends that, during his time in California, the taxpayer had a business manager in California  
25 preparing his 1960 tax return, which the taxpayer failed to timely file. Appellant contends that the  
26 *Hayes* court found that, since the taxpayer maintained in Maine all of the records needed by his business  
27 manager to complete the 1960 return, the taxpayer could not have obtained the necessary records and,  
28 therefore, had reasonable cause for the late filing of the return. Appellant contends that the

1 “fundamental basis” for the court’s holding in *Hayes* was the taxpayer’s inability to access files located  
2 in his residence in Maine while he was ill in California, and that, similarly, appellant, while at MDC,  
3 was “entirely unable” to access his files in his home that were necessary for filing his return. Appellant  
4 argues that the circumstances in *Hayes* are “remarkably similar” to those of appellant’s, and that “[i]n  
5 many respects” the taxpayer in *Hayes* “was in a better position to file than appellant” since: (1) it does  
6 not appear that in *Hayes* “crucial documents” were stolen or incorrectly mailed; (2) the taxpayer had a  
7 business manager, while appellant prepared his own returns; (3) nothing indicates that the taxpayer was  
8 prevented from communicating with his business manager, while appellant was “severely restricted” in  
9 his ability to communicate with those outside of MDC; and (4) the taxpayer’s business manager had  
10 access to the necessary tax forms on which to prepare the returns, while appellant was “completely  
11 unable” to acquire the necessary forms. (App. Reply Br., pp. 1-3.)

12           Regarding the FTB’s contention that a taxpayer must show that his circumstances  
13 “completely” prevented the filing of his tax return, appellant contends that the cases cited by the FTB do  
14 not include “the word ‘complete,’ ‘completely,’ ‘completion,’ or anything remotely similar in  
15 meaning.” Appellant argues that, nevertheless, appellant has demonstrated that he was “completely  
16 prevented” from filing his returns while incarcerated at MDC. With concern to the FTB’s contention  
17 that a taxpayer’s inability to timely file a return because of the lack of necessary information or  
18 documents is not reasonable cause, citing the *Appeal of William T. and Joy P. Orr, supra*, appellant  
19 contends that the ruling “is hardly an enunciation of a substantive rule for the determination of  
20 reasonable cause,” but rather is “an evidentiary finding . . . applicable to the specific facts.” (App. Reply  
21 Br., pp. 3-4.)

22           Regarding the cases the FTB cites to support its contention that tax information that is  
23 lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer’s burden on  
24 establishing reasonable cause, appellant contends that none of the cases “can properly be seen as support  
25 for the kind of rule formulation” that the FTB asserts. Appellant asserts that “several cases,” such as  
26 *Hayes* and *Hornberger v. Commissioner* T.C. Memo. 2000-42 (*Hornberger*), have found reasonable  
27 cause based on the unavailability of records. Appellant asserts that there is “a line of cases” that stands  
28 for the proposition that, once a taxpayer has established his inability to obtain records and information

1 necessary to prepare his tax return due to circumstances beyond his control, no further inquiry is  
2 required to ascertain whether the taxpayer exercised ordinary business care and prudence. Appellant  
3 asserts that “[n]evertheless” the FTB “brings forward actions it imagines appellant could have taken  
4 while at MDC,” to which appellant asserts: (1) the only immediate family who visited appellant was his  
5 85-year-old mother, who was in ill health, and his 10-year-old daughter; (2) appellant could not have  
6 enlisted his attorneys to help him file his returns because while at MDC appellant “had no idea what  
7 documents he possessed at his home that contained information” necessary to file the returns and,  
8 therefore, it was “impossible” for appellant to communicate to anyone, including his attorneys, where  
9 they could obtain any relevant information, because appellant himself did not know; and (3) to the  
10 extent appellant was able to attend to his criminal and civil litigation matters, it was because such  
11 matters did not require appellant to provide documents he was “incapable of providing” and, therefore,  
12 dealing with the litigation was possible while filing the returns was not possible. (App. Reply Br., pp. 3-  
13 6.)

14           Regarding the IRS’s abatement of appellant’s 2007 federal late filing penalty, appellant  
15 contends that an IRS Appeals officer informed appellant that he recommended that the late penalty be  
16 abated due to reasonable cause. As for what appellant’s 2007 federal IMF “purports” to show, appellant  
17 contends that he has no control over how the IRS coded the abatement reason into its computer data  
18 base. Appellant asserts that “[r]egardless of the IRS computer coding, as a factual matter, there was no  
19 ‘settlement’ with the IRS; there was no ‘settlement’ negotiations and no compromise of a claim.” In  
20 addition, appellant contends that, if the IRS did abate the penalty in full based on the “hazards of  
21 litigation,” then the IRS must have concluded that it had “zero chance of prevailing in any ensuing  
22 litigation” because the late filing was due to reasonable cause. (App. Reply Br., p. 7.)

23           Regarding appellant’s reliance on his attorney’s advice not to file his tax returns until his  
24 criminal case was settled, appellant contends that his reliance on advice from his counsel was  
25 reasonable. In support of his contention, appellant asserts that the United States Supreme Court held in  
26 *United States v. Boyle* (1985) 469 U.S. 241 (*Boyle*), that “‘reasonable cause’ is established when a  
27 taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was  
28 unnecessary to file a return, even when such advice turned out to have been mistaken,” and that the

1 United States Tax Court held in *Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, that “a  
2 taxpayer who retains a qualified attorney and relies in good faith on the attorney’s advice with respect to  
3 a legal question has exercised ordinary business care and prudence.” In addition, appellant asserts that  
4 “[a]t least one court has found reasonable cause for a late filing where the advice relied upon had  
5 nothing to do with the interpretation of the tax laws, but was in part advice regarding the possibility that  
6 [a] timely filing would subject the person responsible for filing the return to non-tax legal and economic  
7 exposure.” Specifically, appellant asserts that *In re I.J. Knight Realty Corp.* (E.D. Penn. 1977)  
8 431 F.Supp. 946 (*I.J. Knight Realty Corp.*), the trustee-taxpayer failed to timely file tax returns based on  
9 the advice of counsel. Appellant asserts that the trustee-taxpayer’s attorney’s advice to delay the filing  
10 rested on two grounds: (1) there was at the time an unresolved legal question as to whether the trustee,  
11 as a non-operating trustee, was liable for income taxes; and (2) the “possibility that filing the returns  
12 could subject the trustee to legal and economic exposure . . . that had nothing to do with potential tax  
13 liabilities, but rather with the cost of the tax return preparation.” Appellant contends that the  
14 *I.J. Knight Realty Corp.* court stated that “[a] long line of cases holds that advice of reputable counsel  
15 that a taxpayer is not liable for a certain tax or not required to file a return establishes that [the] failure to  
16 file within the prescribed time is due to reasonable cause and not willful neglect,” and found reasonable  
17 cause for the late filing of returns based on the taxpayer’s reliance on the advice of competent tax  
18 counsel. (App. Reply Br., pp. 7-9.)

19 In support of appellant’s contention that his reliance on advice from counsel was  
20 reasonable, appellant attached to his reply brief a declaration signed by Joseph C. Longo, one of  
21 appellant’s attorneys, under the penalty of perjury. In the declaration, Mr. Longo states, among other  
22 things, that: (1) when appellant was released from MDC in December of 2009, his criminal defense  
23 attorney was Robert Barnes, a well-known and highly respected federal criminal defense attorney  
24 specializing in federal criminal tax cases; (2) Mr. Barnes was fully apprised of every deal of appellant’s  
25 situation; (3) appellant had a long career practicing tax law, and no one doubted his expertise in the area;  
26 (4) appellant specialized in partnership and international transactions and had no experience in criminal  
27 tax matters or any other criminal law; (5) on at least one occasion, either shortly before or after  
28 appellant’s release from MDC [in December of 2009], Mr. Longo witnessed Mr. Barnes unequivocally

1 advise appellant that he was not required to file any unfiled tax returns until his liabilities had been  
2 agreed and settled with the IRS pursuant to paragraph 10 of appellant's plea agreement; and (6) that  
3 Mr. Barnes' advice was based on the substantially increased criminal jeopardy such filing would create  
4 for appellant. Appellant contends that the declaration demonstrates that, after appellant's release from  
5 MDC, he relied in good faith, after the full disclosure of all of the relevant facts, on the advice from a  
6 competent attorney that appellant was not required to file his 2007 and 2008 tax returns until his tax  
7 liabilities were resolved by a plea agreement. Appellant asserts that, even if the advice may have been  
8 erroneous, appellant had the right to rely on the advice in good faith. (App. Reply Br., p. 9, Ex. 1.)

9 Appellant also contends that he submitted an overpayment for the 2007 tax year on  
10 September 6, 2011<sup>15</sup> when he remitted a payment with the return. Appellant asserts that he erroneously  
11 computed interest on the entire sum of \$20,498, which included the estimated tax penalty of \$242.  
12 Appellant contends that "[s]ince interest did not accrue on the estimated tax penalty, interest should have  
13 been computed only on the amount of tax due (\$20,256)."<sup>16</sup> Appellant attached to his reply brief a table  
14 titled "Corrected Interest Computation on 2007 Tax Due" (App. Reply Br., p. 9, Ex. 2), showing the  
15 total interest due of \$3,686.78. Appellant asserts that he submitted with his 2007 return a check in the  
16 amount of \$3,730.83 and, therefore, he overpaid interest for the 2007 tax year by \$44.05 (i.e., \$3,730.83  
17 - \$3,686.78). Appellant asserts that the \$44.05 overpayment should be applied to reduce the late filing  
18 penalty, citing the *Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140 (*Malakoff*), decided by this  
19 Board on June 21, 1983. In addition, appellant notes that, according to the FTB's opening brief, "[f]or  
20 the 2007 tax year, the amount of \$6,328.45 consists of a delinquent filing penalty of \$5,064.00, plus  
21 interest," and, therefore, appellant asserts that the FTB incorrectly charged interest of \$1,264.45 on the  
22 \$5,064.00 late filing penalty (i.e., \$6,328.45 - \$5,064.00) for the 2007 tax year. (App. Reply Br., p. 10;

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25 <sup>15</sup> Appellant also contends in his reply brief that he filed his 2007 and 2008 tax returns on September 6, 2011, as opposed to  
26 September 8, 2011, as evidenced by the proof of mailing appellant provided with this opening brief. As discussed below, the  
27 FTB agrees to the September 6, 2011 date and the adjusted interest accordingly. (Appeal letter, Ex. 4; App. Reply Br., pp. 9-  
10; Resp. Reply Br., p. 6.)

28 <sup>16</sup> At the hearing, both parties should be prepared to discuss appellant's contention that he paid interest on the estimated tax  
penalty for the 2007 tax year.

1 Resp. Opening Br., p. 1.)<sup>17</sup> Appellant attached to his reply brief a table titled “Corrected Computation of  
2 Penalty and Interest Thereon” (App. Reply Br., p. 10, Ex. 3), which appellant contends “shows the  
3 correct computation of penalty and interest, if appellant is found not to have reasonable cause for filing  
4 his return late.” Appellant contends that the “correct amount” is \$6,227.63, as opposed to the \$6,328.45  
5 appellant paid, for an overpayment of \$100.82. Appellant also contends that “[e]ven if the  
6 overpayment” of \$44.05 “is not applied against the penalty,” the FTB’s interest computation is incorrect.  
7 Appellant attached to his reply brief a table titled “Corrected Penalty Interest Computation (w/o  
8 applying overpayment to penalty)” (App. Reply Br., p. 10, Ex. 4), which appellant contends shows the  
9 correct amount of interest “in this case” of \$1,207.68, as opposed to the \$1,264.45 charged by the FTB.  
10 Appellant asserts that interest begins to accrue on October 15, 2008 since, under R&TC section 19101,  
11 subdivision (c)(2)(B), interest on a penalty imposed under R&TC section 19131 “begins on the due date  
12 of the return, including extensions,” and appellant “filed a timely federal extension for 2007, which  
13 extended the due date for California purposes to October 15, 2008.” (App. Reply Br., pp. 9-10, Exs. 2-  
14 4; Resp. Opening Br., Ex. K.)

#### 15 Respondent’s Reply Brief

16 The FTB contends that appellant has not established that the late filing of his 2007 and  
17 2008 returns was due to reasonable cause. The FTB contends that *Hornberger* is “distinguishable on its  
18 facts.” The FTB asserts that the court, in finding reasonable cause, was persuaded by the taxpayer’s  
19 young age of 25-years-old, and “other circumstances surrounding [the taxpayer’s] failure to file . . .  
20 circumstances that do not exist for appellant.” The FTB contends that, in *Hornberger*, the information  
21 necessary to file a return was being actively and deliberately withheld from the taxpayer by the principal  
22 trustee such that the taxpayer was unable to file her return. The FTB argues that “[t]here is simply no  
23 reasonable comparison” between appellant and the facts of *Hornberger*. The FTB contends that  
24 appellant is “a well-educated and very sophisticated tax lawyer” who prepares his own tax returns and,  
25 therefore, appellant “was not ignorant of the nature or approximate value of his assets and income.” The  
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28 <sup>17</sup> The FTB asserts in its reply brief that the statement it made in footnote 1 of its opening brief was a “misstatement” and provides information in its reply brief how the amounts were applied for each tax year, which are indicated above in footnotes 2 and 3 of this hearing summary. (Resp. Opening Br., p. 1; Resp. Reply Br., p. 6.)

1 FTB also contends that appellant has provided no evidence to substantiate what steps, if any, he took to  
2 obtain the information necessary to prepare his tax returns. (Resp. Reply Br., pp. 1 and 3.)

3           Regarding appellant's contention that *Hayes* is "controlling authority", that appellant's  
4 late filing penalties should be abated based on reasonable cause and that the "sole basis" for the court's  
5 finding in *Hayes* of reasonable cause was the taxpayer's inability to access his records due to his illness,  
6 the FTB contends that "a closer read" of the court's decision reveals that the court not only considered  
7 the taxpayer's illness, but also the fact that his children were seriously ill early in the filing year along  
8 with his wife's incapacitation due to emergency surgery. The FTB asserts that the court stated that  
9 illness may be reasonable cause if it can be shown that the taxpayer is preventing from filing a timely  
10 return because of the illness, and the court concluded that, considering all of the taxpayer's and the  
11 taxpayer's family's circumstances, the taxpayer could not have obtained the necessary records and thus  
12 had reasonable cause for the late filing. The FTB argues that *Hayes* is distinguishable from appellant's  
13 circumstances in that it was not illness that allegedly prevented appellant from timely filing his returns,  
14 but rather incarceration. (Resp. Reply Br., pp. 1-2.)

15           The FTB contends that incarceration has not been approved by the courts as constituting  
16 reasonable cause for a late filing, citing *Hoeffner v. Commissioner* (2014) 587 Fed. Appx. 147  
17 (*Hoeffner*). The FTB asserts that the taxpayers in *Hoeffner* argued reasonable cause for their late filing  
18 based on the taxpayers being barred by a court from communicating with their accountant who was the  
19 only person that possessed the necessary documents and records. The FTB contends that the *Hoeffner*  
20 court, in finding that the taxpayer's did not have reasonable cause, stated that the taxpayer's "argument  
21 also fails because neither the unavailability of records nor complex tax affairs constitutes reasonable  
22 cause," and that, in citing *Ferguson v. Commissioner* (2009) 568 F.3d 498, 501, the "unavailability (to  
23 the taxpayer) of 'information or records does not necessarily establish reasonable cause for [the] failure  
24 to file timely a tax return,' because even without full information, '[a] taxpayer is required to file timely  
25 based upon the best information available and to file thereafter an amended return if necessary.'" The  
26 FTB also contends that, in the *Appeal of Howard G. and Mary Tons, supra*, this Board, in finding that  
27 the taxpayers did not have reasonable cause for the late filing of their returns, found that the taxpayers  
28 provided no evidence other than their self-serving written statements that the information in their

1 possession was insufficient to file their return, and that the taxpayers “have not actually proved that it  
2 was impossible to obtain any necessary additional information from [the bank] or from another source  
3 within the time required.” The FTB argues that, here, appellant has provided no evidence of his efforts  
4 to timely satisfy his 2007 and 2008 filing obligations while incarcerated and, therefore, appellant has not  
5 established that his failures occurred despite the exercise of ordinary business care and prudence. (Resp.  
6 Reply Br., pp. 2-3.)

7           The FTB also contends that appellant has not shown that his failure to timely file his  
8 2007 and 2008 tax returns was due to his good faith reliance on advice from his attorney. The FTB  
9 asserts that the facts in *I.J. Knight Realty Corp.* are distinguishable from the present case in that the  
10 court found that, during the relevant period, it was not clear whether a non-operating trustee was liable  
11 for income tax, and that it was this uncertainty, along with the concern that return-related accounting  
12 expenses would exhaust the estate and expose it to a surcharge, that counsel advised the trustee that the  
13 preparation of the returns would not be justified. The FTB asserts that the court in *I.J. Knight Realty*  
14 *Corp.* stated that “in view of the state of the law during the relevant period, counsel’s advice was  
15 reasonable.” The FTB contends that here there is no similar ambiguity in the tax law, that “it is (and  
16 was during the relevant periods) clear that appellant’s 2007 and 2008 [tax] returns were due on April 15,  
17 2008, and April 15, 2009, respectively.” The FTB contends that the Supreme Court stated in *Boyle* that  
18 “Congress’ purpose in the prescribed civil penalty was to ensure timely filing of tax returns to the end  
19 that tax liability will be ascertained and paid promptly.” (Resp. Reply Br., p. 4.)

20           With concern to Mr. Longo’s declaration, the FTB notes that Mr. Longo states that he  
21 witnessed “on at least one occasion, either shortly before or after” appellant’s December 3, 2009 release  
22 from MDC, Mr. Barnes advised appellant that he was not required to file any unfiled returns until his tax  
23 liabilities had been agreed and settled with the IRS pursuant to paragraph 10 of appellant’s<sup>18</sup> plea  
24 agreement. The FTB contends that by the time appellant was released from MDC in December of 2009,  
25 the maximum twenty-five percent penalty for the late filing of returns had already accrued for both the  
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27 <sup>18</sup> The FTB asserts that paragraph 10 of the plea agreement “essentially states” that the tax loss will be determined at  
28 sentencing and that the IRS is not precluded from determining and assessing any additional civil tax, penalties, and interest  
that may be owed by appellant, nor is appellant precluded from pursuing civil remedies with respect to the ascertainment and  
collection of any federal tax liabilities. (Resp. Reply Br., p. 5; App. Opening Br., Ex. 48, p. 6.)

1 2007 and 2008 tax years. The FTB asserts that, for the 2007 tax year, the maximum penalty accrued by  
2 July 18, 2008, before appellant hired Mr. Barnes on or about July 23, 2009, and that, for the 2008 tax  
3 year, the maximum penalty accrued by September 15, 2009, before appellant received any alleged  
4 advice from Mr. Barnes not to file his tax returns. The FTB contends that “any asserted good faith  
5 reliance cannot be reasonable cause for appellant’s inaction before the alleged advice was given.” The  
6 FTB also contends that both the May 2011 “Master Agreement” and the June 2011 “Closing  
7 Agreement” required appellant to file his delinquent returns for 2007 through 2010, and pay all taxes,  
8 penalties, and interest due. The FTB asserts that even if appellant established good faith reliance on  
9 Mr. Barnes’ advice not to file, which the FTB is not conceding, “appellant’s agreement to pay penalties  
10 relating to the delinquent returns superseded any such alleged reliance.” In addition, the FTB contends  
11 that, while appellant may have chosen to follow the alleged advice, appellant cannot in good faith rely  
12 on advice that he was not required to file since, as a “sophisticated, Harvard educated, California tax  
13 lawyer,” appellant is “well aware of tax deadlines.” The FTB contends that, in *Boyle*, the  
14 Supreme Court stated that one does not need to be tax expert to know that tax returns have fixed filing  
15 dates and taxes must be paid when due, and that a taxpayer’s reliance on an accountant or attorney  
16 cannot be a substitute for compliance with an unambiguous statute. The FTB argues that appellant  
17 “knew there would be civil consequences to any calculated decision not to timely file his 2007 and 2008  
18 returns” and, therefore, any alleged reliance was not in good faith. (Resp. Reply Br., pp. 4-8, Ex. O;  
19 Appeal Letter, Exs. 54 and 55; App. Reply Br., Ex. 1.)

20           Regarding appellant’s revised interest computations, the FTB notes that footnote 1 in its  
21 opening brief was a “misstatement,” and indicates that “contrary” to the statement in footnote 1, for  
22 2007, the amount of \$6,328.45 was applied to the \$1,091.17 remaining balance of the late filing penalty,  
23 the estimated tax penalty of \$242.27, and total interest of \$4,995.01, and for 2008, the amount of  
24 \$479.63 was applied to the \$109.06 remaining balance of the late filing penalty, the estimated tax  
25 penalty of \$39.90, a collection cost recovery fee of \$154.00, a \$16.00 lien fee, and total interest of  
26 \$160.67. (Resp. Opening Br., p. 1; Resp. Reply Br., p. 6; Exs. P and Q.) The FTB also indicates that,  
27 upon further review, it is in agreement with appellant that he filed his 2007 and 2008 returns, with  
28 remitted payments, on September 6, 2011, as opposed to September 8, 2011. The FTB states that it

1 recomputed interest accordingly with respects to the payments appellant remitted with the 2007 and  
2 2008 tax returns of \$24,228.83 and \$1,224.69, respectively. The FTB asserts that the revised amount of  
3 interest charged for 2007 is \$4,990.78, resulting in an overpayment of \$4.23 (i.e., \$4,995.01 -  
4 \$4,990.78), and that the revised amount of interest charged for 2008 is \$160.46, resulting in an  
5 overpayment of \$0.21 (i.e., \$160.67 - \$160.46). The FTB states that it will abate interest of \$4.23 for  
6 2007 and interest of \$0.21 for 2008 upon the conclusion of this appeal. (Resp. Reply Br., pp. 6-8,  
7 Exs. R and S.)

8           With concern to appellant's contention that the overpayment of interest should be applied  
9 to reduce the amount of the 2007 late filing penalty, citing *Malakoff*, the FTB asserts that the  
10 overpayment of interest is available for refund or credit but will not reduce the amount of the penalty  
11 imposed. The FTB asserts that *Malakoff* involved a penalty for failing to file on demand (demand  
12 penalty), which is computed on the tax liability without a reduction for timely payments and credits, and  
13 that this Board rejected the taxpayer's argument that the demand penalty should be reduced by  
14 withholding credits. The FTB states that the late filing penalty, pursuant to R&TC section 19131, is  
15 computed at five percent of the tax due, after allowing for timely payments (unlike the demand penalty),  
16 for every month that the return is late, up to a maximum of twenty-five percent. The FTB contends that  
17 when computing the late filing penalties, it allowed all timely payments (i.e., payments made on or  
18 before April 15, 2008, and April 15, 2009, for the 2007 and 2008 tax year, respectively). The FTB  
19 asserts that, for the 2007 tax year, the \$5,064.00 late filing penalty was correctly computed based on  
20 twenty-five percent of \$20,256.00 (i.e., tax liability of \$56,796.00 – timely estimated tax payments of  
21 \$36,540.00), and that, for the 2008 tax year, the \$266.75 late filing penalty was correctly computed  
22 based on twenty-five percent of \$1,067.00, as appellant made no timely payments for the 2008 tax year.  
23 The FTB argues that any overpayment of interest for the 2007 tax year was not made until the August 6,  
24 2013 payment of \$6,328, several years after the April 15, 2008 due date and, therefore, is not a timely  
25 payment or credit. The FTB contends that an overpayment which is not a timely payment or credit is  
26 not considered in computing the late filing penalty. In addition, the FTB notes that interest applies to a  
27 late filing penalty pursuant to R&TC section 19101, which provides that interest is charged from the due  
28 date of the return, including extensions, to the date it is paid. The FTB contends that, because appellant

1 failed to file his 2007 tax return by the October 15, 2008 extended due date, no valid extension existed  
2 for California purposes, pursuant to R&TC section 18567, and California Code of Regulations, title 18,  
3 section 18567, and, therefore, the FTB properly computed interest on the 2007 late filing penalty from  
4 the April 15, 2008 filing deadline. (Resp. Reply Br., pp. 7-8.)

5 Applicable Law

6 Claim for Refund

7 R&TC section 19301, subdivision (a), provides that a refund is authorized when there has  
8 been an overpayment of taxes, penalties, or interest. In order to be entitled to a refund, an appellant  
9 must prove there was an overpayment of tax for which a refund can be granted. (*Jones v. Liberty Glass*  
10 *Co.* (1947) 332 U.S. 524, 532.) A claimed overpayment of income tax may not be refunded where a  
11 correct computation shows the amount paid does not exceed the amount of tax that was properly  
12 assessed and demanded. (*Lewis v. Reynolds, supra.*)

13 Late Filing Penalty

14 R&TC section 19131 provides that a late filing penalty shall be imposed when a  
15 taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late  
16 filing was due to reasonable cause and was not due to willful neglect. Taxpayers have until April 15th  
17 of the year following the tax year to file returns without triggering the penalty. (Rev. & Tax. Code,  
18 § 18566.) If taxpayers file by October 15th, they receive an automatic extension and the penalty is not  
19 triggered. (Cal. Code Regs., tit. 18, § 18567.) The late filing penalty is computed at a rate of  
20 five percent of the tax due for every month that the return is late, up to a maximum of  
21 twenty-five percent. (Rev. & Tax. Code, § 19131, subd. (a).) The minimum amount of the late filing  
22 penalty for individuals is the lesser of \$100 or 100 percent of the tax required to be shown on the  
23 return. (*Id.* at subd. (b).) The tax amount upon which the penalty is based is the amount of tax required  
24 to be shown on the return, reduced by any amount of tax paid on or before the prescribed due date for  
25 the payment of the tax and any credit against the tax which may be claimed upon the return. (*Id.* at  
26 subd. (c); *Appeal of Mary Kay Cosmetics, Inc.*, 81-SBE-042, May 19, 1981.)

27 To establish reasonable cause, the taxpayer “must show that the failure to file timely  
28 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as

1 would prompt an ordinary intelligent and prudent businessman to have so acted under similar  
2 circumstances.” (*Appeal of Howard G. and Mary Tons, supra.*) Personal difficulties may be considered  
3 reasonable cause to abate the penalty so long as the taxpayer presents credible and competent proof that  
4 the circumstances of the personal difficulty prevented the taxpayer from filing a timely return. (*Appeal*  
5 *of Allen L. and Jacqueline M. Seaman, 75-SBE-080, Dec. 16, 1975; Appeal of Kerry and Cheryl James,*  
6 *83-SBE-009, Jan. 3, 1983.*) It is well settled that incarceration, standing alone, does not constitute  
7 reasonable cause for a failure to file a return. (*Lobato v. Commissioner, T.C. Memo. 2001-40; Veto v.*  
8 *Commissioner, T.C. Memo. 1993-557; Krause v. Commissioner, T.C. Memo. 1991-13; Llorente v.*  
9 *Commissioner, supra.*) In previous appeals, this Board has determined that a taxpayer’s discovery of  
10 reportable income after the original due date (*Appeal of Elixir Industries, 83-SBE-248, Dec. 14, 1983*), a  
11 taxpayer’s difficulty in obtaining necessary information (*Appeal of J.B. and P.R. Campbell,*  
12 *85-SBE-112, Oct. 9, 1985*), the complexity and problems in accumulating the information necessary to  
13 complete a return (*Appeal of Incom International, Inc., 82-SBE-053, Mar. 31, 1982*), a taxpayer’s  
14 difficulty in resolving accounting problems (*Appeal of Cerwin-Vega International, 78-SBE-070,*  
15 *Aug. 15, 1978*), a taxpayer’s difficulty in determining income with exactitude (*Appeal of*  
16 *Roger W. Sleight, 83-SBE-244, Oct. 26, 1983; Appeal of Avco Financial Services, Inc., 79-SBE-084,*  
17 *May 9, 1979*), a taxpayer’s unresolved business matters (*Appeal of Bild Industries, Inc., 82-SBE-212,*  
18 *Sept. 21, 1982*), or the failure of the taxpayer’s accountant to properly account for income (*Appeal of*  
19 *M.B. and G.M. Scott, 82-SBE-249, Oct. 14, 1982*), did not constitute reasonable cause for abating  
20 penalties.

21 In *Boyle*, the Supreme Court stated that it is reasonable for a taxpayer to rely on the  
22 advice of an accountant or attorney when that accountant or attorney advises a taxpayer on a  
23 substantive matter of tax law; however, the Supreme Court also stated that one does not need to be a tax  
24 expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.*, at 251-  
25 252.) In addition, the Supreme Court stated that a taxpayer’s reliance on an accountant or attorney  
26 cannot be a substitute for compliance with an unambiguous statute. (*Id.*) In the *Appeal of Philip C.*  
27 *and Anne Berolzheimer, 86-SBE-172, Nov. 19, 1986*, this Board distinguished between relying on a tax  
28 professional’s expert advice about a matter of substantive tax law and relying on a tax professional

1 merely as an agent to file the return and to pay taxes by the deadline. “Reasonable cause” for late filing  
2 might exist where a taxpayer reasonably relied on the expert opinion of a tax professional, even if that  
3 expert opinion was later determined to be incorrect. In the *Appeal of Michael E. Myers*  
4 (2001-SBE-001), decided by this Board on May 31, 2001, this Board held that the argument of not  
5 being able to file a tax return because it would subject a person to perjury was groundless. The courts  
6 have consistently held that the privilege against self-incrimination does not justify a refusal to file an  
7 income tax return. (See *United States v. Sullivan*, supra; *United States v. Neff* (9th Cir. 1980)  
8 615 F.2d 1235.)

#### 9 Collection Cost Recovery and Lien Fees

10 R&TC section 19254, subdivision (a), provides that, if a taxpayer fails to pay a liability  
11 for taxes, penalties, interest, or other liability, a collection cost recovery fee shall be imposed if the FTB  
12 has mailed a notice for payment which advises that the continued failure to pay the amount due may  
13 result in a collection action, including the imposition of a collection cost recovery fee. There is no  
14 reasonable cause exception or any other provision in the statute allowing for relief from the imposition  
15 of the collection cost recovery fee. (*Appeal of Michael E. Myers*, supra.)

16 R&TC section 19221, subdivision (a), provides that, if a taxpayer fails to pay the  
17 amount of a liability at the time that it becomes due and payable, that liability which includes taxes,  
18 penalties, interest, and any costs shall be a perfected and enforceable state tax lien. There is no  
19 reasonable cause exception or any other provision in the statute allowing for relief from the imposition  
20 of the lien fee. Government Code section 71741, subdivision (d), allows the FTB to collect the various  
21 fees associated with recording and releasing the state tax lien.

#### 22 Interest Abatement

23 Interest is not a penalty but is merely compensation for the taxpayers’ use of the money.  
24 (Rev. & Tax. Code, § 19101, subd. (a); *Appeal of Amy M. Yamachi*, supra; *Appeal of Audrey C. Jaegle*,  
25 76-SBE-070, June 22, 1976.) To obtain interest abatement, an appellant must qualify under one of the  
26 following three statutes: R&TC sections 19104, 19112, or 21012. R&TC section 21012 does not  
27 appear applicable here because there has been no reliance on any written advice requested of respondent.  
28 Under R&TC section 19112, interest may be waived for any period for which respondent determines

1 that an individual or fiduciary demonstrates an inability to pay that interest solely because of extreme  
2 financial hardship caused by a significant disability or other catastrophic circumstance. This statute  
3 does not provide any authority for this Board to review the FTB's determination whether to abate  
4 interest for extreme financial hardship.

5 Under R&TC section 19104, respondent may abate all or a part of any interest on a  
6 deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay  
7 committed by respondent in the performance of a ministerial or managerial act.<sup>19</sup> (Rev. & Tax. Code,  
8 § 19104, subd. (a)(1).) An error or delay can only be considered when no significant aspect of the error  
9 or delay is attributable to the appellant and after respondent has contacted the appellant in writing with  
10 respect to the deficiency or payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).) There is no reasonable  
11 cause exception to the imposition of interest. (*Appeal of Audrey C. Jaegle, supra.*)

12 This Board's jurisdiction in an interest abatement case is limited by statute to a review of  
13 respondent's determination for an abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).)  
14 To show an abuse of discretion, an appellant must establish that, in refusing to abate interest, respondent  
15 exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v.*  
16 *Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely  
17 used to avoid the payment of interest, thus interest abatement should be ordered only "where failure to  
18 abate interest would be widely perceived as grossly unfair." (*Lee v. Commissioner* (1999) 113 T.C. 145,  
19

20 <sup>19</sup> In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29, 1999, the Board adopted the language  
21 from Treasury Regulation section 301.6404-2(b)(2), defining a "ministerial act" as:

22 [A] procedural or mechanical act that does not involve the exercise of judgment or discretion, and that  
23 occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and  
24 review by supervisors, have taken place. A decision concerning the proper application of federal tax law  
(or other federal or state law) is not a ministerial act.

25 The Board has not yet adopted a definition for the term "managerial act." However, when a California statute is substantially  
26 identical to a federal statute (such as with the interest abatement statute in this case), the Board may consider federal law  
27 interpreting the federal statute as highly persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing *Douglas v. State of*  
*California* (1942) 48 Cal.App.2d 835.)) In this regard, Treasury Regulation section 301.6404-2(b)(1) defines a "managerial  
28 act" as:

[A]n administrative act that occurs during the processing of a taxpayer's case involving the temporary or  
permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A  
decision concerning the proper application of federal tax law (or other federal or state law) is not a  
managerial act.

1 149.) The mere passage of time does not establish error or delay that can be the basis of an abatement of  
2 interest. (*Id.* at p. 150.)

3 STAFF COMMENTS

4 Claim for Refund

5 Here, it appears to staff that there was not an overpayment of tax for which a refund can  
6 be granted, as appellant self-assessed the tax due. The FTB asserts that, while the balance due notices  
7 reflected the FTB's misapplication of appellant's payments remitted with his returns, the FTB  
8 subsequently corrected the error, including accrued interest, prior to filing the lien on March 19, 2012.  
9 The Tax Lien Notice issued on March 19, 2012, stated a balance due of \$6,520.72. The FTB should be  
10 prepared to explain its calculation for the \$6,520.72 amount. The FTB should submit computations  
11 addressing the concerns raised regarding the Tax Lien Notice at least fourteen days prior to the oral  
12 hearing.<sup>20</sup>

13 In addition, the FTB should also submit at least fourteen days prior to the oral hearing  
14 computations addressing the concerns raised in footnotes 4, 6, and 7 of this hearing summary, regarding  
15 the Notice of State Income Tax Due, dated December 14, 2011, and the Final Notice Before Levy,  
16 dated January 24, 2012, as well computations addressing the concerns raised in footnote 12 of this  
17 hearing summary, regarding a possible double payment towards appellant's estimated tax penalties.

18 Late Filing Penalty

19 Appellant's 2007 return was due on April 15, 2008, with an extended due date of  
20 October 15, 2008. Appellant filed his 2007 return on September 6, 2011. Because appellant did not file  
21 his 2007 return by October 15, 2008, appellant did not have an extension to file and his 2007 return was  
22 filed over three years late. Appellant's 2008 return was due on April 15, 2009, with an extended due  
23 date of October 15, 2009. Appellant filed his 2008 return on September 6, 2011. Because appellant did  
24 not file his 2008 return by October 15, 2009, appellant did not have an extension to file and his 2008  
25 return was filed over two years late.

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<sup>20</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.

1 Appellant contends that reasonable cause, not willful neglect, caused the late filing of the  
2 returns. Appellant contends that he was unable to timely file his returns due to his incarceration at MDC.  
3 While personal difficulties may be considered reasonable cause to abate the penalty so long as the  
4 taxpayer presents credible and competent proof that the circumstances of the personal difficulty  
5 prevented the taxpayer from filing a timely return, it is well settled that incarceration, standing alone,  
6 does not constitute reasonable cause for the failure to file a return. Appellant contends that the  
7 conditions of his incarceration made it “physically impossible” for him to file his 2007 and 2008 tax  
8 returns and, therefore, appellant was unable to timely file his tax returns based on reasonable cause.

9 Appellant asserts circumstances such as: no one but appellant had “even the remotest  
10 familiarity” with appellant’s taxes or his financial information; it was an “inordinately time-consuming  
11 and difficult exercise” to obtain duplicates of the “crucial documents” that were stolen or incorrectly  
12 mailed; not having access to electronic equipment and tax forms; “crucial documents” were stolen or  
13 incorrectly mailed; and even “the most cursory examination” of appellant’s returns and documentation,  
14 including information regarding appellant’s shares of stocks, demonstrates that it was “manifestly  
15 impossible” for appellant to obtain the information while incarcerated and that the returns required  
16 “several excruciatingly complex computations.” As noted above, however, this Board has previously  
17 considered and rejected appellant’s contentions and similar contentions, finding that such assertions did  
18 not constitute reasonable cause for abating penalties.

19 In addition, appellant contends that he did not file his returns based on his good faith  
20 reliance on the advice of counsel. Appellant asserts that the circumstances involving his legal affairs  
21 further made it “impossible” for him to file his 2007 and 2008 tax returns before September 2011, even  
22 while out on bail. Appellant contends that he was advised that he was not required to file any unfiled  
23 tax returns until his liabilities had been agreed and settled with the IRS pursuant to paragraph 10 of  
24 appellant’s plea agreement and that the advice was based on the substantially increased criminal  
25 jeopardy such filing would create for appellant. Appellant asserts that he relied on his attorney’s advice  
26 and that his attorney had full knowledge of the facts. While ignorance of the law does not constitute  
27 reasonable cause, it appears that appellant should have known, regardless of his education and  
28 profession as an attorney with “expertise in the area” of tax law, that late filing penalties would be

1 imposed since he did not timely file his 2007 and 2008 returns. Appellant asserts that his attorney  
2 advised him that filing his returns could create potential criminal jeopardy issues; therefore, it appears  
3 that appellant chose of his own volition to not file his returns. Appellant has offered no evidence  
4 indicating that his attorney advised him that he would not be liable for late filing penalties when he  
5 chose not to timely file his returns. In addition, both the Master Agreement (Appeal Letter, Ex. 54, p. 6)  
6 and Closing Agreement (Appeal Letter, Ex. 55, p. 2), which appellant agreed to and signed on May 19,  
7 2011 and June 14, 2011, respectively, stated that appellant would file his 2007 through 2010 tax returns  
8 and pay all taxes, interest, and *penalties* with respect to those returns. Therefore, it appears that  
9 appellant agreed to pay the penalties he is now contending should be abated.

#### 10 Collection Cost Recovery and Lien Fees

11 There are no statutory provisions which excuse the imposition of the collection cost  
12 recovery fees or the lien fees under any circumstances, including reasonable cause.

#### 13 Interest Abatement

14 On appeal, the FTB has conceded interest abatement in the amounts of \$4.23 and \$0.21  
15 for the 2007 and 2008 tax years, respectively. With regard to the remaining interest, as noted above,  
16 California law only permits the abatement of interest in certain limited circumstances. There is no  
17 reasonable cause exception to the imposition of interest. At the hearing, appellant should be prepared to  
18 state the specific grounds for the abatement of interest as outlined in the applicable law section above,  
19 and provide substantiating documentation.

#### 20 Additional Evidence

21 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has  
22 any additional evidence to present, they should provide their evidence to the Board Proceedings  
23 Division at least fourteen days prior to the oral hearing.

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