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

10 In the Matter of the Appeal of:

) **HEARING SUMMARY**

) **PERSONAL INCOME TAX APPEAL<sup>1</sup>**

12 **THOMAS L. WILSON**

) Case No. 780908

		<u>Proposed</u>	
		<u>Assessment</u> <sup>2</sup>	
	<u>Year</u>	<u>Tax</u>	<u>Penalties</u>
	2000 <sup>3</sup>	\$4,774.00	\$3,082.03 <sup>4</sup>

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18 <sup>1</sup> This matter was originally scheduled for a hearing at the Board's September 23, 2014 Sacramento meeting. At appellant's  
19 request, this matter was rescheduled to the Board's November 18-20, 2014 Sacramento meeting. Appellant then requested a  
20 postponement from the November calendar due to a scheduling conflict. This matter was then rescheduled for a Board  
21 hearing at the Board's December 17-18, 2014 Sacramento meeting. Appellant then requested that the matter be deferred  
22 due to a scheduling conflict. The matter was then rescheduled for a hearing at the Board's March 25-26, 2015 Sacramento  
23 meeting. Appellant then requested a postponement for additional time to prepare for the hearing and the matter was then  
24 rescheduled for a Board hearing at the Board's July 28-30, 2015 Sacramento meeting.

22 <sup>2</sup> In a memorandum dated April 9, 2015, respondent states that it has revised the additional tax amount to \$3,472 and the late  
23 filing penalty to \$868, consistent with the stipulated decision entered by the United States Tax Court relating to appellant's  
24 2000 federal liability. The stipulated decision (Exhibit J to respondent's opening brief) does not specify the amount of the  
reduction of appellant's federal taxable income. (See footnote 4 below for more information regarding the penalties  
originally assessed.)

25 <sup>3</sup> Respondent states that the length of time between the 2000 tax year at issue and the filing of this appeal is due to  
26 appellant's failure to notify respondent of adjustments resulting from a federal audit and due to the Internal Revenue Service  
(IRS) not notifying respondent of the federal changes until August 1, 2012. (Resp. Opening Br., p. 1.)

27 <sup>4</sup> This amount includes a late filing penalty of \$1,193.50, an accuracy-related penalty of \$954.80, and an estimated  
28 post-amnesty penalty of \$933.73. On appeal, respondent has determined to abate the accuracy-related penalty. Respondent  
states that the post-amnesty penalty will be recomputed on any remaining final liability. (Resp. Opening Br., p. 1.)

1 Representing the Parties:

2 For Appellant: Thomas L. Wilson

3 For Franchise Tax Board: Anne Mazur, Specialist

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5 QUESTIONS: (1) Whether appellant established error in the Franchise Tax Board's (respondent  
6 or FTB) proposed assessment, which is based on a final federal determination for  
7 the tax year at issue;  
8 (2) Whether appellant has established reasonable cause for the late filing of his  
9 return to abate the late filing penalty;  
10 (3) Whether the Board has jurisdiction to review the proposed post-amnesty  
11 penalty; and  
12 (4) Whether the Board should impose a frivolous appeal penalty.<sup>5</sup>  
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14 HEARING SUMMARY

15 Appellant filed a 2000 California tax return on December 8, 2006, designating his filing  
16 status as married filing separate. Appellant reported both federal and California adjusted gross income  
17 (AGI) of \$27,567 and claimed itemized deductions of \$13,653, resulting in taxable income of \$13,914.  
18 Appellant reported a self-assessed tax of \$243 and exemption credits of \$545, resulting in a zero tax  
19 liability. Appellant's return showed no overpaid tax or tax due. Appellant included a copy of his  
20 federal tax return with his California return, which included two Schedules C, Profit or Loss from  
21 Business. The first Schedule C reported gross income of \$42,500, total expenses of \$38,934, and net  
22 profit of \$3,566 from appellant's business "Optimal Health Center." The second Schedule C reported  
23 gross income of \$37,891, total expenses of \$22,540 (totaling \$61,474 in expenses, when added to the  
24 first Schedule C's expenses), and a net profit of \$15,351 from appellant's business "Nutri Harmony  
25 Associate." (Resp. Opening Br., pp. 1-2, Ex. A.)

26 On August 1, 2012, respondent received a federal audit report from the Internal Revenue  
27

28 <sup>5</sup> The record does not include appellant's filing history.

1 Service (IRS) which showed adjustments made to appellant's 2000 federal return, including the  
2 disallowance of \$61,474 in Schedule C expenses (which were all of the Schedule C expenses claimed).  
3 On February 14, 2013, respondent issued a Notice of Proposed Assessment (NPA) which made similar  
4 adjustments as the federal audit report. The NPA increased appellant's taxable income from \$13,914 to  
5 \$71,045, an increase of \$57,131.<sup>6</sup> The NPA proposed additional tax of \$4,774.00, a late filing penalty  
6 of \$1,193.50, an accuracy-related penalty of \$954.80, and a post-amnesty penalty of \$933.73, plus  
7 accrued interest. (Resp. Opening Br., p. 2, Exs. B & C.)

8 Appellant timely protested the NPA challenging respondent's imposition of tax and  
9 method of collection. Appellant asserted that he requested an official federal tax assessment record and  
10 has not received a response to his request. Appellant requested a hearing. On August 29, 2013,  
11 respondent acknowledged appellant's protest in a letter and enclosed a copy of the federal audit  
12 information that respondent received from the IRS showing details of the adjustments made on  
13 appellant's federal account for tax year 2000. Respondent requested that appellant respond by  
14 September 30, 2013, if he still wanted a hearing. When appellant failed to respond, respondent issued a  
15 Notice of Action on October 10, 2013, affirming the NPA. This timely appeal then followed. (Resp.  
16 Opening Br., p. 2, Exs. D, E, & F.)

#### 17 Appellant's Contentions

18 On appeal, appellant makes the same contentions as in his protest letter. Appellant  
19 contends that "the Federal tax liability is void or zero" because the IRS failed to respond to his request  
20 under Internal Revenue Code (IRC) section 6203 to provide a copy of the federal tax assessment  
21 record. Appellant contends that, since the NPA is based on the federal action, it is likewise "zero, and  
22 the burden of proof shifts to the State of California to prove that a Federal tax liability actually exists."  
23 Appellant asserts that respondent's procedures "have been incorrect in the request and collection" of his  
24 taxes and he is appealing the improper procedures. (App. Opening Br.)

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27 <sup>6</sup> The \$57,131 increase in taxable income is composed of the following: (1) a \$38,934 disallowance of Schedule C1  
28 expenses; (2) a \$22,540 disallowance of Schedule C2 expenses; and (3) a \$4,343 increase in the one-half self-employment  
tax AGI deduction.

1                   Respondent's Contentions

2                   Respondent contends that appellant failed to demonstrate error in the proposed  
3 assessment based on the federal adjustments. Respondent contends that, when the IRS makes changes  
4 or corrections to a taxpayer's return, the taxpayer must either concede the accuracy of the federal  
5 determination or prove that the federal changes are erroneous, citing Revenue and Taxation Code  
6 (R&TC) section 18622, subdivision (a). Respondent contends that its adjustments to appellant's  
7 taxable income and proposed additional tax liability, as set forth in the NPA, followed the federal  
8 adjustments. Respondent notes that its review of appellant's federal Individual Master File (IMF)  
9 transcript for the 2000 tax year shows no change or abatement of the federal deficiency assessments.  
10 Respondent contends that the additional tax, the late filing penalty, and the accuracy-related penalty  
11 were all assessed as a result of a decision in the United States Tax Court pursuant to an agreement  
12 between appellant and the IRS. Respondent contends that appellant's IMF transcript clearly shows the  
13 federal assessment and appellant's agreement with that assessment. Respondent contends that appellant  
14 has not provided any information to prove that the federal adjustments were in error. Without evidence  
15 to support his claims, respondent contends that appellant failed to establish that the federal action, and  
16 the proposed assessment based thereon, was in error. (Resp. Opening Br., pp. 3-4, Exs. G, I & J.)

17                   Respondent explains that appellant is arguing that the federal tax liability is "void or  
18 zero" because the IRS allegedly failed to respond to appellant's request under IRC section 6203 to  
19 provide a copy of the record of assessment. Respondent contends that appellant erroneously argues  
20 that, because the NPA is also based on the federal action, it is likewise "zero." According to  
21 respondent, appellant is attempting to avoid his tax liability through the assertion of frivolous  
22 arguments which the Board, the IRS, respondent, and the courts have consistently and emphatically  
23 rejected. Respondent notes that the IRS published a list of identified frivolous positions, including the  
24 argument asserted by appellant, in IRS Notice 2008-14, IRS Notice 2010-33, and the IRS publication,  
25 "The Truth About Frivolous Tax Arguments," and that respondent followed the IRS's response to these  
26 frivolous positions. Respondent asserts that Revenue Ruling 2007-21, as cited in IRS Notice 2010-33  
27 frivolous position #30, discusses and refutes frivolous positions taken by some taxpayers, stating that,  
28 before the IRS may collect overdue taxes, it must provide taxpayers with a summary record of the

1 assessment made on a Form 23C, Assessment Certificate Summary Record of Assessments, or on  
2 another particular form. Respondent asserts that the IRS ruled that an assessment is not invalid on the  
3 basis that a summary record of assessment was not provided to the taxpayer. Respondent contends that  
4 appellant's argument is without merit to the extent that appellant's argument is based on him not  
5 receiving the requested record of assessment. (Resp. Opening Br., pp. 3-4, Ex. I.)

6 Respondent further contends that the late filing penalty was imposed properly and that  
7 appellant has not demonstrated reasonable cause to abate the late filing penalty for the 2000 tax year as  
8 appellant's 2000 tax return was filed on December 8, 2006. Respondent contends that this return was  
9 filed well past the original due date of April 15, 2001.<sup>7</sup> Respondent contends that, as appellant has not  
10 made any specific argument as to why the return was untimely and has also failed to provide any  
11 evidence to demonstrate that reasonable cause, and not willful neglect, caused the late filing, appellant  
12 failed to carry his burden of proof and the penalty should not be abated.

13 With regard to the post-amnesty penalty, respondent contends that the Board does not  
14 currently have jurisdiction to consider respondent's imposition of the penalty. Respondent contends  
15 that, pursuant to R&TC section 19777.5, subdivisions (e)(1) and (2), the Board's jurisdiction is limited  
16 to when the post-amnesty penalty is assessed as a final liability and has been paid and the taxpayer files  
17 a refund claim on the grounds that the amount paid to satisfy the penalty was not computed properly by  
18 respondent. With regard to the imposition of the accuracy-related penalty, respondent asserts that this  
19 penalty was not assessed properly and that it will abate the \$954.80 accuracy-related penalty. (Resp.  
20 Opening Br., p. 5, Ex. L.)

### 21 Applicable Law

#### 22 Accuracy of Assessment

23 R&TC section 18622, subdivision (a), provides that a taxpayer shall either concede the  
24 accuracy of a federal determination or state wherein it is erroneous. It is well-settled that a deficiency  
25 assessment based on a federal audit report is presumptively correct and that an appellant bears the  
26 burden of proving that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*,

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28 <sup>7</sup> Respondent asserts that appellant filed his federal tax return late on December 11, 2006. (Resp. Opening Br., p. 5, Ex. I.)

1 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions  
2 are not sufficient to satisfy an appellant's burden of proof with respect to an assessment based on a  
3 federal action. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

4 Deductions from gross income are a matter of legislative grace and a taxpayer has the  
5 burden of proving an entitlement to the deductions claimed. Unsupported assertions are not sufficient  
6 to satisfy a taxpayer's burden of proof. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435;  
7 *Appeal of James C. and Monablanche A. Walshe*, 75-SBE-073, Oct. 20, 1975.) To carry the burden of  
8 proof, a taxpayer must point to an applicable statute and show by credible evidence that the deductions  
9 claimed come within its terms. (*Appeal of Robert R. Telles*, 86-SBE-061, Mar. 4, 1986.) In the  
10 absence of uncontradicted, credible, competent, and relevant evidence showing that respondent's  
11 determinations are incorrect, respondent's determination must be upheld. (*Appeal of Oscar D. and*  
12 *Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

#### 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. The penalty is specified as  
17 5 percent of the tax due for each month that a valid tax return is not filed after it is due, not to exceed  
18 25 percent of the tax. (Rev. & Tax. Code, § 19131, subd. (a).) To establish reasonable cause, a  
19 taxpayer "must show that the failure to file timely returns occurred despite the exercise of ordinary  
20 business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent  
21 businessman to have so acted under similar circumstances." (*Appeal of Howard G. and Mary Tons*,  
22 79-SBE-027, Jan. 9, 1979.)

#### 23 Post-Amnesty Penalty

24 In 2004, the Legislature enacted Senate Bill 1100 which authorized respondent to  
25 institute an income tax amnesty program. (Rev. & Tax. Code, §§ 19730-19738.) Under R&TC  
26 section 19777.5, there are essentially two amnesty penalties: one for unpaid liabilities that existed at the  
27 time of amnesty, and a second post-amnesty penalty based on subsequent assessments, including  
28 self-assessments. (Rev. & Tax. Code, § 19777.5, subs. (a)(1) and (a)(2).) As relevant to this appeal,

1 the post-amnesty penalty is calculated as the amount equal to 50 percent of the interest computed under  
2 R&TC section 19101 on the tax underpayment for the period beginning on the last date prescribed by  
3 law for the payment of tax and ending on March 31, 2005. (Rev. & Tax. Code, § 19777.5, subd. (a)(2).)

4 The Board's jurisdiction to review an amnesty penalty is extremely limited. For  
5 example, taxpayers have no right to an administrative protest or appeal of an unpaid amnesty penalty.  
6 (Rev. & Tax. Code, § 19777.5, subd. (d).) Taxpayers also have no right to file an administrative claim  
7 for refund of a paid amnesty penalty, except upon the basis that the penalty was not properly computed.  
8 (*Id.* subd. (e).) Therefore, the Board's jurisdiction to review an amnesty penalty is limited to situations  
9 where the penalty is assessed and paid, the taxpayer files a timely appeal from a denial of a refund  
10 claim, and the taxpayer attempts to show a computational error in the penalty.

#### 11 Frivolous Appeal Penalty

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

#### 24 STAFF COMMENTS

25 At the hearing, appellant should be prepared to provide evidence that demonstrates error  
26 in respondent's determination and reasonable cause to abate the late filing penalty. Respondent has  
27 provided a reasonable foundation for the proposed assessments based on appellant's IMF transcript. To  
28 date, appellant has not provided any evidence demonstrating error in respondent's proposed assessment

1 or any reasonable cause to abate the late filing penalty.

2 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has  
3 any additional evidence to present, they should provide their evidence to the Board Proceedings  
4 Division at least 14 days prior to the oral hearing.<sup>8</sup>

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<sup>8</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.