

1 Linda Frenklak  
2 Tax Counsel III  
3 Board of Equalization, Appeals Division  
4 450 N Street, MIC: 85  
5 PO Box 942879  
6 Sacramento CA 95814  
7 Tel: (916) 323-3087  
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **DAVID HALLER AND** ) Case No. 872918  
13 **VANESSA CHAU HALLER** )

14 \_\_\_\_\_  
15 Year Claim  
16 2012 For Refund  
17 \$11,895<sup>1</sup>

17 Representing the Parties:

19 For Appellants: David Haller and Vanessa Chau Haller<sup>2</sup>  
20 For Franchise Tax Board: Maria Brosterhous, Tax Counsel III

22 QUESTIONS: (1) Whether the Board has jurisdiction to hear this appeal.  
23 (2) Whether appellants have shown that the Franchise Tax Board (FTB or  
24 respondent) erred in denying their claim for refund, which is based on a claimed  
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27 <sup>1</sup> This amount represents the refund amount claimed by appellants in their appeal letter consisting of a disallowed new jobs  
28 credit of \$8,472, the late filing penalty of \$2,918, and interest of \$505. These three items are listed in appellant's protest  
letter dated June 3, 2014. (Resp. Opening Br., exhibit F.)

<sup>2</sup> Appellants are currently represented by Bich Loan Nguyen, appellants' tax preparer.

1 new jobs credit.

2 (3) Whether appellants have shown reasonable cause for the late filing of their 2002  
3 California income tax return.

4 (4) Whether appellants have demonstrated that respondent erred by not abating the  
5 underpayment of estimated tax penalty.

6 (5) Whether interest should be abated.<sup>3</sup>

7  
8 HEARING SUMMARY

9 Background

10 On March 30, 2014, appellants filed a joint California return for 2012, reporting  
11 California adjusted gross income of \$555,678. After applying itemized deductions of \$85,037,  
12 appellants reported taxable income of \$470,641 and a tax of \$38,976. After claiming a new jobs credit  
13 of \$8,472, appellants reported a tax liability of \$30,504. After applying income tax withholdings of  
14 \$2,262 and estimated tax payments of \$20,539, appellants reported a tax due of \$7,703. Appellants  
15 remitted a payment of \$6,115 on April 15, 2013, and another payment of \$1,612, effective on April 11,  
16 2014. Respondent applied overpaid estimated taxes for 2011 in the amount of \$3,822 to appellants'  
17 2012 account effective on April 15, 2012. (Resp. Op. Br., p. 1, exhibits B-D.)

18 After reviewing appellants' 2012 return, respondent issued appellants an RIN dated  
19 May 7, 2014.<sup>4</sup> Respondent's records indicate that appellants made 2012 estimated tax payments of  
20 \$15,105, whereas they claimed estimated tax payments of \$20,539 on their 2012 return. Respondent's  
21 records also indicate that respondent disallowed the claimed new jobs credit of \$8,472.00 and imposed  
22 a late payment penalty of \$4,446.75 and an estimated tax penalty of \$3.22, plus interest. On  
23 December 16, 2014, respondent imposed a collection cost fee of \$194 after appellants failed to pay the  
24 balance due. (Resp. Op. Br., pp. 2, 5, exhibits C-E.)

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26  
27 <sup>3</sup> Appellant does not dispute the imposition of the collection cost fee of \$194, although respondent contends that, pursuant to  
28 R&TC section 19254, it properly imposed the fee after issuing a notice in the form of a Return Information Notice (RIN).  
The collection cost fee will thus not be discussed in this hearing summary.

<sup>4</sup> A copy of the RIN is not in the appeal file. Respondent's records indicate that, as of July 29, 2015, appellants had a  
balance due of \$15,785.07 consisting of debits of \$44,701.07 less credits of \$28,916.00. (Resp. Opening Br., exhibit D.)

1 In a letter to respondent dated June 3, 2014, appellants' tax preparer stated that  
2 appellants' 2012 return was not successfully filed electronically due to a technical issue with the tax  
3 software, which he was not aware of until after appellants received a notice from respondent requesting  
4 that they file their 2012 return. He requested that respondent allow the new jobs tax credit of \$8,472  
5 and abate the late filing penalty of \$2,918 and interest of \$505. The tax preparer conceded that  
6 appellants incorrectly reported estimated tax payments of \$20,539 when they only made payments of  
7 \$18,927 consisting of the 2012 estimated tax payments of \$15,105 and the transferred 2011 estimated  
8 tax payments of \$3,822. The tax preparer stated that he was enclosing a check for the remaining  
9 balance of \$1,612 (i.e., \$20,539 - \$18,927).<sup>5</sup> (Resp. Opening Br., p. 2, exhibit F.)

10 Respondent treated the tax preparer's June 3, 2014 letter as a claim for refund.  
11 Respondent issued appellants a Denial of Claim for Tax Refund (denial letter) dated February 9, 2015,  
12 stating that respondent denied appellants' claim for refund. (Resp. Opening Br., p. 2, exhibit H.)

13 This timely appeal followed.

14 ISSUE ONE: Whether the Board has jurisdiction to hear appellants' appeal.

15 Contentions

16 Appellants' Contentions

17 Appellants concede that they have not paid the disputed amount that respondent claims  
18 they owe. They offer to deposit the amount in dispute into an escrow account pending the resolution of  
19 this matter and they request to settle this appeal. Appellants argue that respondent improperly claims  
20 that they owe \$11,895 due to "an honest e-filing technical error." Appellants assert that, due to  
21 technical problems with the tax software that appellants' tax preparer used, their 2012 federal return  
22 was filed electronically but their 2012 California return was rejected, as indicated on the 2012 e-file  
23 activity report for appellants dated September 23, 2014. They state, "Once notified by the state in  
24 March of 2014[,] we investigated the issue and determined there was a technical problem with my  
25 agent[']s software." According to appellants, their tax preparer contacted the software company, which  
26 resolved the software issue, and appellants then successfully filed their 2012 California return.

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28 <sup>5</sup> This is apparently the above-referenced remitted payment of \$1,612, which was effective on April 11, 2014.

1 Referring to the 2012 e-file activity report, appellants state that they “supplied ample proof that a return  
2 was filed *timely*.” They also state that it “was a simple oversight” on their part that the tax software  
3 accepted their 2012 federal return but not their 2012 California return for electronic filing. According  
4 to appellants, they remitted a payment to respondent for the 2012 balance due.<sup>6</sup> (Appeal letter,  
5 attachments; Apps. Reply Br., p. 1.)

6 Respondent’s Contentions

7 Respondent argues that, under the full payment rule, appellants must pay the outstanding  
8 balance for their 2012 tax year account to perfect their claim for refund and, until they do so, the Board  
9 does not have jurisdiction to hear this appeal. Respondent contends that, pursuant to R&TC section  
10 19322.1, a refund claim is only deemed filed upon the payment of the entire assessed tax. Respondent  
11 contends that pursuant to California Code of Regulations, title 18, section (“Rule”) 5412, subdivision  
12 (a)(3), the Board has jurisdiction only for perfected refund claims, which are claims for refund for  
13 amounts that have been fully paid. Furthermore, respondent asserts that Article XIII, section 32, of the  
14 California Constitution prohibits an action against the state to prevent or enjoin the collection of any  
15 tax, other than an action after the payment of the tax to recover the tax paid. Respondent asserts that a  
16 partial payment does not satisfy the full payment rule because, until the tax is fully paid, there is no  
17 valid claim. Respondent notes that, under R&TC section 19306, a claim for refund without the full  
18 payment of the tax assessed or asserted may only be filed for purposes of tolling the four-year statute of  
19 limitations. (Resp. Opening Br., pp. 2-3.)

20 Respondent contends that, at the time it received the tax preparer’s June 3, 2014 letter,  
21 appellants had an outstanding 2012 balance of \$13,503.56, including the disallowed new jobs credit of  
22 \$8,472.00, the late filing penalty of \$4,446.75, the estimated tax penalty, and interest. Respondent  
23 asserts that appellants have not yet made the full payment of the amount at issue. Respondent also  
24 asserts that appellants still have the right to appeal after they pay the full amount at issue and file a  
25 claim for refund. Respondent further asserts that, if either respondent denies appellants’ claim for  
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28 <sup>6</sup> Attached to the appeal letter is a 2012 e-file activity report for appellants dated September 23, 2014, which indicates that appellants’ 2012 California return was “e-postmarked” and rejected by the FTB on March 21, 2014, and accepted on March 30, 2014.

1 refund or the refund claim is deemed denied after a period of six months, appellants may file an appeal  
2 with the Board. Accordingly, respondent contends that this appeal is premature and should be  
3 dismissed. (Resp. Opening Br., pp. 2-3, exhibit G.)

4 Respondent argues that, even though it erroneously treated the tax preparer's June 3,  
5 2014 letter as a claim for refund by issuing a denial letter, the Board still lacks jurisdiction to hear this  
6 appeal. Respondent contends that, in the *Appeal of George S. Allen*, 57-SBE-032, decided on  
7 December 17, 1957, the Board determined that respondent's erroneous advise to a taxpayer that he had  
8 a right to appeal the denial of a refund claim when there was a balance due and the tax had not been  
9 paid in full did not constitute a waiver or prohibit respondent from arguing that the Board lacked the  
10 jurisdiction to hear the appeal. Citing *Shiseido Cosmetics (America), Ltd. v. FTB (Shiseido)* (1991)  
11 235 Cal.App.3d 478, respondent contends that neither the Board nor respondent has the statutory  
12 authority to waive or refuse to comply with statutory administrative provisions. Citing *Loebner v.*  
13 *Franchise Tax Board* (1986) 193 Cal.App.3d 64, and the *Appeal of General Telephone Co. of*  
14 *California*, 78-SBE-076, decided on September 27, 1978, respondent states, "The full payment rule  
15 pertains to subject matter jurisdiction and cannot be waived." (Resp. Op. Br., p. 3.)

#### 16 Applicable Law

##### 17 Burden of Proof

18 Respondent's determination is presumed correct and it is a taxpayer's burden to prove  
19 entitlement to the refund. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Jun. 29, 1980.)  
20 Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and*  
21 *Eloise Magidow, supra.*) When a taxpayer fails to present uncontradicted, credible, competent, and  
22 relevant evidence as to the issues in dispute, respondent's determination must be upheld. (*Appeal of*  
23 *Oscar D. and Agatha E. Seltzer, supra.*)

##### 24 Full Payment Rule

25 A taxpayer is required to pay all of the taxes assessed or asserted before filing a claim  
26 for refund and before the claim for refund could be acted on administratively. This is commonly  
27 referred to as the "full payment rule." Article XIII, section 32, of the California Constitution provides:

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1 No legal or equitable process shall issue in any proceeding in any court against this State  
2 or any officer thereof to prevent or enjoin the collection of any tax. After payment of a  
3 tax claimed to be illegal, an action may be maintained to recover the tax paid, with  
interest, in such manner as may be provided by the Legislature.

4 The California Supreme Court has stated that the policy behind the full payment rule “is to ensure that  
5 the state may continue to collect tax revenue during litigation in order to avoid the unnecessary  
6 disruption of public services that are dependent on that revenue.” (*Loeffler v. Target Corp.* (2014)  
7 58 Cal. 4th 1081, 1101 (citing *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d  
8 277).) The California Supreme Court also has held that Article XIII, section 32, mandates “that tax  
9 refund actions be brought solely according to *procedures* established by the Legislature.” (*Id.* at  
10 p. 1102.) Article XIII, section 33, provides, “The Legislature shall pass all laws necessary to carry out  
11 the provisions of this article.”

12 R&TC section 19306 provides that a taxpayer must file a claim for refund within  
13 four years of the last date prescribed for filing the return (without regard to any extension for filing the  
14 return), or within one year from the date of the overpayment of the tax, whichever period expires later.

15 R&TC section 19322 provides that every claim for refund shall be in writing, signed by  
16 the taxpayer (or the taxpayer’s representative), and shall state the specific grounds upon which the  
17 claim is based.

18 R&TC Section 19322.1, subdivision (a), provides that a claim for refund of tax that is  
19 otherwise valid under R&TC section 19322, but is made before the full payment of the disputed tax has  
20 been made, shall be a claim only for purposes of tolling the statute of limitations. This informal claim  
21 for refund will be perfected and deemed filed on the date when the full payment of the tax is made.  
22 (*Id.*) Perfected refund claims are claims for refund for amounts that have been paid in full. (FTB  
23 Notice 2003-5.)

24 R&TC section 19324 provides the Board with the jurisdiction to consider appeals from  
25 the FTB’s action in denying a claim for refund. Rule 5412, subdivision (a)(3), provides the Board with  
26 “jurisdiction to hear and decide a timely filed appeal” after the FTB “issues a notice denying any  
27 portion of a *perfected* claim for a refund of tax, penalties, fees, or interest.” (Emphasis added.)

28 To perfect the refund claim with respect to amounts that are due and payable, i.e.,

1 billable, as in the present appeal, all amounts due, including tax, penalty, and interest, must be paid.  
2 R&TC section 19164, subdivision (g), incorporates IRC section 6665(a)(2). IRC section 6665(a)(2)  
3 defines the term “tax” to include penalties, additions to tax, and additional amounts. R&TC section  
4 19101, subdivision (c)(1), provides that, except for references relating to deficiency assessments, any  
5 reference to any tax imposed by Part 10 or 11 of the Revenue and Taxation Code “shall be deemed also  
6 to refer to interest imposed by this article on that tax.” The FTB issued FTB Notice 2003-5 to “clarif[y]  
7 that all amounts due for the year, including tax, penalty and interest, must be paid to perfect an informal  
8 claim under RTC section 19322.1.” (FTB Notice 2005-6.)

9           Neither the Board nor respondent has the authority to waive or refuse to follow statutory  
10 provisions for tax refunds that the Legislature enacted pursuant to article XIII, section 32, of the  
11 California Constitution. In the *Appeal of George S. Allen, supra*, the Board found that an erroneous  
12 letter issued by the FTB, stating that the taxpayer had the right to appeal when in fact he did not, did  
13 not operate either to waive the lack of jurisdiction of the Board or to estop the FTB from contesting the  
14 Board’s jurisdiction. The Board held that it lacked jurisdiction over the appeal.

#### 15 STAFF COMMENTS

16           As stated above, the law provides that, other than for purposes of tolling the statute of  
17 limitations, a claim for refund may only be filed after the entire balance due has been paid, including  
18 tax, penalties, and interest. Although they contend that respondent improperly disallowed their claimed  
19 new jobs credit and imposed penalties, appellants do not dispute that they had an outstanding 2012 tax  
20 liability at the time respondent received their tax preparer’s June 3, 2014 letter or that they currently  
21 have an outstanding 2012 tax liability. Moreover, appellants do not dispute that they failed to pay the  
22 full amount their estimated tax payments, which means that they owed taxes at the time respondent  
23 received appellants’ tax preparer’s June 3, 2014 letter separate and apart from the disallowed new jobs  
24 credit, the imposed penalties and accrued collection fee and interest. It thus appears that the Board  
25 should dismiss this appeal based on a lack of jurisdiction.

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1 ISSUE TWO: Whether appellants have shown respondent erred in denying their claim for refund,  
2 based on a claimed new jobs credit.

3 Contentions

4 Appellants' Contentions

5 With respect to respondent's disallowance of the claimed new jobs credit because  
6 appellants' 2012 California return was not timely filed, appellants contend in their reply brief that the  
7 submitted proof of filing form is "ample proof" that they filed their 2012 California return by the  
8 statutory deadline. They state that it "was a simple oversight on our part that the federal return was  
9 accepted and the state return rejected on the e-filing software and that we did in fact file a return timely  
10 just that by error the return was not accepted." According to appellants, they have claimed an  
11 enterprise zone tax credit for the last five to 10 years. (Appeal Letter, p. 2; Reply Br., p. 1.)

12 Respondent's Contentions

13 Respondent contends that, should the Board find that it has jurisdiction to hear this  
14 appeal, appellants are not entitled to the claimed new jobs credit, because they failed to claim the credit  
15 on a timely-filed return. Respondent asserts that appellants filed their 2012 California return on  
16 March 30, 2014, and the filing deadline was April 15, 2013. Respondent contends that former R&TC  
17 section 17053.80 provided qualified employers a new jobs credit of up to \$3,000 for each additional  
18 qualified full-time employee hired during the tax year for tax years beginning on or after January 1,  
19 2009, and before January 1, 2014. Respondent further contends that former R&TC section 17053.80,  
20 subdivision (g)(1)(A), required that a taxpayer claim a new jobs credit on a timely-filed original return.  
21 (Resp. Opening Br., p. 4.)

22 Applicable Law

23 Burden of Proof

24 The law is well-settled that tax deductions and credits are a matter of legislative grace  
25 and that the taxpayer has the burden of proving an entitlement to the claimed credits. (See, e.g.,  
26 *INDPOCO, Inc. v. Comm'r* (1992) 503 U.S. 79, 84; *New Colonial Ice Co. v. Helvering* (1934)  
27 292 U.S. 435, 440; *Appeal of Robert R. Telles*, 86-SBE-061, March 2, 1986.) Statutes granting tax  
28 credits are to be construed strictly against the taxpayer with any doubts resolved in respondent's favor.

1 (*Dicon Fiberoptics, Inc. v. Franchise Tax Board* (2012) 53 Cal.4th 1227, 1236. See also *Tax &*  
2 *Accounting Software Corp. v. United States* (10th Cir. 2002), 301 F.3d 1254, 1261; *Medchem Inc. v.*  
3 *Comm’r* (1st Cir. 2002) 295 F.3d 118, 123.)

#### 4 New Jobs Credit

5 As in effect in 2012, former R&TC section 17053.80 provided a \$3,000 tax credit for  
6 each new qualified full-time employee that a qualified small business hired during a taxable year  
7 beginning on or after January 1, 2009, and before January 1, 2014.<sup>7</sup> Former R&TC section 17053.80,  
8 subdivision (g)(1)(A), provided that the new jobs credit under this section “shall be allowed only for  
9 credits claimed on timely filed original returns received by the [FTB] on or before the cut-off date  
10 established by the [FTB].” Former R&TC section 17053.80, subdivision (g)(2), provided that “[t]he  
11 date a return is received shall be determined by the [FTB].” Former R&TC section 17053.80,  
12 subdivision (g)(3), provides that the FTB’s determination concerning “the cutoff date, the date a return  
13 is received, and whether a return has been timely filed for purposes of this subdivision may not be  
14 reviewed in any administrative or judicial proceeding.”

#### 15 STAFF COMMENTS

16 If the Board determines that it has jurisdiction to consider this appeal, the Board will  
17 need to determine whether it has the statutory authority to review respondent’s disallowance of the  
18 claimed new jobs credit. It appears that the Board is prohibited by statute to review whether respondent  
19 properly disallowed the claimed new jobs credit based on a determination that appellants failed to claim  
20 the credit on a timely-filed original return. The express language of former R&TC section 17053.80,  
21 subdivision (g)(3), provides that respondent’s determination that appellants failed to claim the credit on  
22 a timely filed original return may not be reviewed in any administrative proceeding, such as this  
23 proceeding. The parties should be prepared to discuss at the oral hearing any legal authority that allows  
24 the Board to review the FTB’s determination with respect to this issue.

25 If the Board determines that it is authorized to review respondent’s determination that  
26 appellants failed to claim the new jobs credit for 2012 on a timely-filed original return, appellants  
27

28 <sup>7</sup> Former R&TC section 17053.80, as amended, ceased to be operative for tax years beginning on or after January 1, 2014,  
and was repealed on December 1, 2014. (Rev. & Tax. Code, § 17058.80, subd. (i).)

1 should be prepared to clarify whether they contend that 1) they had reasonable cause for failing to  
2 timely file their 2012 California return due to a defect in their tax preparer’s software, as they  
3 apparently assert in the appeal letter, or 2) they timely filed a 2012 California return, as asserted in their  
4 reply brief. In the appeal letter, appellants assert that they reasonably believed that they electronically  
5 filed their 2012 California return by the statutory filing deadline and did not know that their return was  
6 rejected by respondent until March 2014 when they were “notified by the state.” Appellants do not  
7 assert the date when they reasonably but erroneously believed that they electronically filed their 2012  
8 California return. It is therefore unclear whether appellants contend that they attempted to  
9 electronically file their 2012 California return on or before the original filing deadline of April 15,  
10 2013, or on or before the extended filing deadline of October 15, 2013. Furthermore, appellants have  
11 not submitted any document from respondent that they purportedly received in March 2014, informing  
12 them that their 2012 California return was not successfully filed. According to respondent, it sent  
13 appellants an RIN dated May 7, 2014, after receiving appellants’ 2012 California return on March 30,  
14 2014.

15 Appellants submitted a 2012 e-file activity report dated September 23, 2014, which they  
16 claim in their reply brief proves that they originally attempted to electronically file their 2012  
17 California return with the FTB by the statutory filing deadline. Although this submitted report  
18 indicates that appellants’ 2012 California return was rejected by respondent on March 21, 2014, it does  
19 not show any earlier date when appellants’ 2012 California return was submitted to respondent by an  
20 electronic filing. Appeals staff notes, however, that appellants indicate in their reply brief that, after  
21 they filed their 2012 California return, they discovered “months down the road that the tax preparer’s  
22 software was defective and that the state did not accept the return.” Appellants apparently contend that  
23 the tax preparer’s software problem did not prevent them from timely filing electronically their 2012  
24 federal return.

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1 ISSUE THREE: Whether appellants have shown reasonable cause for the late filing of their 2012  
2 California income tax return.

3 Contentions

4 Appellants' Contentions

5 Appellants argue that the late filing penalty should be abated because there was  
6 reasonable cause for failing to timely file their 2012 California return. Appellants contend the  
7 following: 1) they filed federal and state returns for 2012; 2) the Internal Revenue Service (IRS)  
8 accepted their 2012 federal return; 3) their tax preparer assured them that both returns were  
9 electronically filed; and 4) they discovered "months down the road that the tax preparer's software was  
10 defective and that the state did not accept the return." Appellants indicate that they acted reasonably  
11 and they request "some common sense from the taxing authority here." (Appeal Letter, p. 2; Apps.  
12 Reply Br., p. 2.)

13 Respondent's Contentions

14 Respondent contends that it properly imposed the late filing penalty for 2012, pursuant  
15 to R&TC section 19131, because appellants did not timely file their 2012 California return.  
16 Respondent also contends that appellants have not met their burden of proving that their failure to  
17 timely file their 2012 California return was due to reasonable cause. Respondent argues that appellants  
18 have not proven that they successfully filed their 2012 California return by the statutory deadline.  
19 According to respondent, appellants assert that they tried to timely file their 2012 California return but  
20 submitted documents showing that their 2012 California return was rejected on March 21, 2014.<sup>8</sup>  
21 Respondent thus contends that there is no grounds for abating the late filing penalty in this appeal.  
22 (Resp. Opening Br., pp. 4-5.)

23 Applicable Law

24 Burden of Proof

25 On appeal, there is a presumption of correctness of a penalty assessed by respondent.  
26 (*Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983; *Appeal of Myron E. and Alice Z. Gire*,

27 \_\_\_\_\_  
28 <sup>8</sup> In its brief, respondent states that the submitted document shows that appellants' 2012 return was rejected on March 21, 2012. In actuality, the activity report submitted by appellants states that the return was rejected on March 21, 2014.

1 69-SBE-029, Sept. 10, 1969.) To overcome the presumption of correctness afforded respondent's  
2 penalty determinations, an appellant must provide credible and competent evidence to support the claim  
3 of reasonable cause; otherwise, the penalties will not be abated. (*Appeal of Michael E. Myers*, 2001-  
4 SBE-01, May 31, 2001.)

#### 5 Late Filing Penalty

6 Individual taxpayers, such as appellants, are required to file California income tax  
7 returns on or before April 15, or on or before the extended due date of October 15, of the following  
8 year. (Rev. & Tax. Code, §§ 18566 & 18567; Cal. Code Regs., tit. 18, § 18567, subd. (a).) R&TC  
9 section 19131 provides that a late filing penalty shall be imposed when a taxpayer fails to file a tax  
10 return on or before the filing due date, unless the taxpayer establishes that the late filing was due to  
11 reasonable cause and was not due to willful neglect. The penalty is specified as five percent of the tax  
12 due for each month that a valid tax return is not filed after it is due, not to exceed 25 percent of the tax.  
13 (Rev. & Tax. Code, § 19131, subd. (a).) To establish reasonable cause, the taxpayer "must show that  
14 the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or  
15 that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted  
16 under similar circumstances." (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) A  
17 taxpayer's reliance on a tax professional to timely file a return does not constitute reasonable cause for  
18 the abatement of a late filing penalty. (*United States v. Boyle* (1985) 469 U.S. 241.) The burden is on  
19 the taxpayer to prove that the difficulties experienced prevented him or her from filing a timely return.  
20 (*Appeal of David and Marilee Duff*, 2001-SBE-007, Dec. 20, 2001.)

#### 21 STAFF COMMENTS

22 Appellants should be prepared to discuss why they and/or their tax preparer did not  
23 know or should not have known on or about the date when their 2012 California return was purportedly  
24 submitted for electronic filing within the statutory filing deadline that the return was not successfully  
25 filed electronically. Appellants should also be prepared to explain what efforts, if any, they or their tax  
26 preparer made to ascertain the status of their 2012 California return after it was purportedly submitted  
27 for electronic filing within the statutory filing deadline.

28 As discussed in the staff comments section concerning the new jobs credit, it appears

1 that appellants have not substantiated that they attempted to file their 2012 California return by the  
2 statutory filing deadline. In the absence of proof that appellants made a good faith effort to file their  
3 2012 California return by the statutory filing deadline, their reasonable cause argument for the  
4 abatement of the late filing penalty appears to lack merit.

5 It is unclear why the tax preparer refers in his June 3, 2014 letter to a late filing penalty  
6 of \$2,918.00, rather than a late filing penalty of \$4,446.75. Appeals Division staff notes, however, that  
7 respondent's records list a credit of \$2,918.00 effective June 6, 2015, and a credit of \$1,528.75  
8 effective June 3, 2014, neither of which is not discussed in respondent's opening brief. The sum total  
9 of these two credits is \$4,446.75. At least 14 days prior to the oral hearing,<sup>9</sup> respondent should be  
10 prepared to discuss why its records reflect two credits that total the amount of the late filing penalty of  
11 \$4,446.75 (i.e., \$2,918.00 + \$1,528.75). (Resp. Opening Br., exhibit G.)

12 ISSUE FOUR: Whether appellants have demonstrated that respondent erred by not abating the  
13 underpayment of estimated tax penalty.

14 Contentions

15 Appellants' Contentions

16 Appellants argue that respondent improperly imposed the estimated tax penalty.  
17 Appellants apparently contend that they are entitled to a waiver of the estimated tax penalty because the  
18 imposition of the penalty would be against equity and good conscience due to unusual circumstances.  
19 Appellants state, "Unelected employees of the tax board make rules and interpret laws selectively."  
20 Appellants reiterate that they made a reasonable mistake in failing to timely file electronically their  
21 2012 California return due to their tax preparer's software problem and that their 2012 federal return  
22 was timely filed electronically. (Apps. Reply Br., p. 2.)

23 Respondent's Contentions

24 Respondent contends that the estimated tax penalty was properly imposed because  
25 appellants failed to pay the first required installment of their estimated tax payments for 2012 pursuant  
26 to R&TC sections 19136 and 19136.1 and Internal Revenue Code (IRC) section 6654. Respondent  
27

28 <sup>9</sup> Evidence exhibits should be sent to: Khaaliq A. Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of  
Equalization, P.O. Box 942879 MIC: 80, Sacramento, California, 94279-0080.

1 contends that appellants were required to pay estimated tax payments of \$4,305.30 for the first quarter  
2 of 2012, but they only paid \$3,822.00 of estimated tax payments for the first quarter of 2012.<sup>10</sup>  
3 Respondent asserts that appellants' 2011 overpayment of estimated taxes in the amount of \$3,822 was  
4 applied as appellants' first installment payment of estimated taxes. Respondent concedes that  
5 appellants satisfied the remaining required estimated tax payments for 2012 by making second quarter  
6 estimated payments totaling \$8,203 on June 15, 2012, and fourth quarter estimated payments totaling  
7 \$6,902 on an unspecified date. (Resp. Opening Br., pp. 5-6.)

8 Respondent contends that appellants do not qualify for a waiver of the estimated tax  
9 penalty because there is no evidence showing that 1) by reason of a casualty, disaster, or other unusual  
10 circumstance, the imposition of the penalty would be against equity and good conscience; or 2) the  
11 underpayment was due to reasonable cause and appellants were either retired after having reached the  
12 age of 62, or appellants became disabled in the tax year for which estimated tax payments were  
13 required to be paid or in the previous tax year. (Resp. Opening Br., pp. 5-6.)

#### 14 Applicable Law

##### 15 Underpayment of Estimated Tax Penalty

16 R&TC section 19136 incorporates by reference, with certain modifications, IRC  
17 section 6654, which imposes a penalty for the underpayment of estimated tax if a taxpayer fails to make  
18 estimated tax payments in a timely manner. The amount charged is similar to an interest charge and  
19 applies from the date the estimated tax payment is due until the date it is paid.

20 Neither R&TC section 19136 nor IRC section 6654 provides for a general reasonable  
21 cause exception or a "lack of willful neglect" for the underpayment of the estimated tax penalty.  
22 (*Appeal of George S. and Jean D. McEwen*, 85-SBE-091, Aug. 20, 1985; *Appeal of J. Ray Risser*,  
23 84-SBE-044, Feb. 28, 1984.) Rather, IRC section 6654(e)(3) provides for a waiver of the penalty based  
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25 <sup>10</sup> Citing R&TC sections 19136, subdivision (e)(2)(A), and 19136.1 and IRC section 6654(d)(1)(B), respondent asserts that  
26 appellants' required annual payment for 2012 amounts to \$16,613.30, which is 110 percent of \$15,103.00, the tax amount  
27 shown on appellants' prior year's return and the first required installment is 30 percent of the required annual payment of  
28 \$16,613.30. After subtracting appellants' income tax withholdings of \$2,262.00 from the required annual payment of  
\$16,613.00, respondent determined that the net required annual payment amounts to \$14,351.00 and that the first required  
installment is \$4,305.30, which is 30 percent of the net required annual payment of \$14,351.00. (Resp. Opening Br., pp. 5-  
6.)

1 on specified circumstances as follows:

- 2 • the IRS determines that, by reason of a casualty, death, or other unusual circumstances, the  
3 imposition of the penalty would be “against equity and good conscience;” (Int.Rev. Code,  
4 § 6654(e)(3)(A)); or
- 5 • the taxpayer retired after attaining the age of 62 or became disabled, in the taxable year for  
6 which the estimated tax payments were required to be made, or in the preceding taxable year,  
7 and the underpayment was due to “reasonable cause and not to willful neglect.” (Int.Rev. Code,  
8 § 6654(e)(3)(B).)

9 In relation to IRC section 6654(e)(3)(A), the Internal Revenue Manual (“IRM”) states,  
10 “The penalty for [the] underpayment of estimated tax cannot be removed or waived for reasonable  
11 cause alone.” (IRM, § 20.1.3.1.6.1.1 (December 10, 2013).) The IRM also states, “The waiver  
12 provisions of IRC section 6654(e)(3)(A) are not equivalent to reasonable cause.” (IRM,  
13 § 20.1.3.2.2.1.2 (Dec. 10, 2013).) The IRM provides the following example of a situation where a  
14 waiver may be granted if it is determined that the imposition of the penalty would be against equity and  
15 good conscience: “The taxpayer becomes seriously ill or is seriously injured and is unable to manage  
16 his affairs.” (IRM, § 20.1.3.2.2.1.2.4 (Dec. 10, 2013).)

17 R&TC section 19136, subdivision (g)(1), provides: “No addition to tax shall be  
18 imposed under this section to the extent that the underpayment was created or increased by any  
19 provision of law that is chaptered during and operative for the taxable year of the underpayment.”

## 20 STAFF COMMENTS

21 Appellants do not dispute that they failed to pay the full amount of the required  
22 estimated tax for the first quarter of 2012. With respect to the estimated tax penalty, appellants argue  
23 that the software defect caused their 2012 California return to be rejected from electronic filing, which  
24 is not relevant to the payment of the first quarter estimated tax payments. There is no reasonable cause  
25 exception to the estimated tax penalty, as relief from the penalty is not available upon a showing of  
26 reasonable cause. (*Appeal of George S. and Jean D. McEwen, supra; Appeal of J. Ray Risser, supra.*)  
27 IRC section 6654(e)(3) provides relief from the estimated tax penalty in the case of a casualty, disaster,  
28 or other unusual circumstances, or the taxpayer is disabled or retired at the age of 62 or older. There is

1 no evidence that this appeal involves a casualty or disaster or that appellants were either disabled or  
2 retired at the age of 62 or older. (Int.Rev. Code, § 6654(3)(3)(A) & (B).) It thus appears that  
3 appellants have failed to establish that they are entitled to an abatement of the estimated tax penalty.

4 ISSUE FIVE: Whether interest should be abated.

5 Contentions

6 Appellants' Contentions

7 In the appeal letter, appellants request the abatement of interest of \$505 in addition to  
8 the allowance of the claimed new jobs credit and the abatement of the late filing penalty. Appellants do  
9 not specifically discuss any legal authority supporting their request for the abatement of interest.

10 Respondent's Contentions

11 Respondent does not address the issue of the abatement of interest in its brief.

12 Applicable Law

13 The imposition of interest is mandatory. (*Appeal of Amy M. Yamachi*, 77-SBE-095,  
14 June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) If a taxpayer fails to pay tax  
15 by the due date, or if respondent assesses additional tax, the law imposes interest on the balance due.  
16 (Rev. & Tax. Code, § 19101.) Interest is not a penalty but is simply compensation for a taxpayer's use  
17 of money after the due date of the tax. (*Appeal of Audrey C. Jaegle, supra.*) There is no reasonable  
18 cause exception to the imposition of interest. (*Id.*) An abatement of interest should be ordered only  
19 "where failure to abate interest would be widely perceived as grossly unfair." (*Lee v. Comm'r* (1999)  
20 113 T.C. 145, 149.)

21 For interest abatement, appellants must qualify under one of the following three statutes:  
22 R&TC sections 19104, 19112, or 21012. R&TC section 19104 addresses interest abatement when the  
23 interest is attributable in whole or in part to any unreasonable error or delay committed by respondent

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1 in the performance of a ministerial or managerial act.<sup>11</sup> (Rev. & Tax. Code, § 19104, subd. (a)(1).)

2 R&TC section 19112 requires a showing of extreme financial hardship caused by a  
3 significant disability or other catastrophic circumstance. R&TC section 21012 requires a showing that  
4 appellants relied on written advice requested of respondent with respect to the tax year at issue. Unlike  
5 R&TC section 19104, it appears that neither R&TC section 19112 nor R&TC section 21012 provides  
6 the Board with the jurisdiction to review respondent's determination with respect to the abatement of  
7 interest. (See Rev. & Tax. Code, § 19104, subd. (b)(2)(A).)

8 STAFF COMMENTS

9 At the oral hearing, the parties should be prepared to discuss whether appellants have  
10 demonstrated any grounds for the abatement of interest. Appellants do not allege, and the evidence  
11 does not appear to show, that the accrued interest is attributable in whole or in part to any unreasonable  
12 error or delay by an officer or employee of respondent when performing a ministerial or managerial act,  
13 as required by R&TC section 19104. Appellants have not provided supporting evidence to show that  
14 they incurred an extreme financial hardship caused by a significant disability or other catastrophic  
15 circumstance, as required by R&TC section 19112. Lastly, appellants do not allege, and the evidence  
16 does not appear to show, that they relied on any written advice requested of respondent with respect to  
17 2012, as required by R&TC section 2012.

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19  
20 <sup>11</sup> In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29, 1999, the Board adopted the  
21 language 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  
26 substantially identical to a federal statute (such as with the interest abatement statute in this case), the Board may consider  
27 federal law interpreting the federal statute as highly persuasive. (*Appeal of Michael and Sonia Kishner, supra* (citing  
28 *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 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.