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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**

12 **GREGORY WIMMER**

) Case No. 842007¹

14 Proposed
15 Assessment

16 Year
17 2011

15 Late Filing Penalty²
16 \$5,166

17 Representing the Parties:

18 For Appellant: Gregory Wimmer

19 For Franchise Tax Board: David Muradyan, Tax Counsel

21 QUESTION: Whether appellant has shown reasonable cause for the abatement of the late filing
22 penalty.

24 ¹ This matter was previously scheduled for hearing at the Board's June 23-25, 2015 meeting, but was postponed due to a
25 scheduling conflict. The matter was then rescheduled for the Board's November 17-19, 2015 meeting. However,
26 appellant requested a postponement due to a scheduling conflict and this matter was then rescheduled for hearing at the
27 Board's March 29-30, 2016 meeting. In addition, just prior to the November 17-19, 2015 Board meeting, appellant
submitted additional briefing and the matter was deferred, at the request of the Appeals Division, to conduct additional
briefing. This matter was then rescheduled for an oral hearing at the Board's May 24-26, 2016 Sacramento meeting.

28 ² The Franchise Tax Board (FTB or respondent) issued a Notice of Action (NOA), listing an additional tax of \$21,970 and a
late filing penalty of \$5,166, plus applicable interest. On appeal, appellant is disputing only the late filing penalty.

1 HEARING SUMMARY

2 Background

3 Appellant, a certified public accountant (CPA),³ did not file a 2011 California income
4 tax return by the original due date of April 15, 2012, or by the extended due date of October 15, 2012.
5 Subsequently, appellant filed a 2011 California return late on November 15, 2012. Appellant's return
6 reported California wages of \$287,058, various rental loss deductions, a California adjusted gross
7 income of \$-57,202, and itemized deductions of \$14,869, resulting in negative taxable income which
8 appellant reported as zero on his return. (FTB opening brief (FTB OB), p. 1 & Ex. A.)

9 The FTB audited appellant's 2011 California return and issued a Notice of Proposed
10 Assessment (NPA), disallowing a rental loss deduction of \$334,688, which increased appellant's
11 California taxable income from -\$72,062 (which was reported as zero on the return) to \$262,626. The
12 NPA set forth an additional tax of \$21,970 and a late filing penalty of \$5,166, plus interest. (FTB OB,
13 p. 2 & Ex. G.)

14 Appellant timely protested the NPA, arguing that (i) he incurred deductible real estate
15 losses that reduced his 2011 California taxable income to zero, and (ii) he had a net operating loss
16 (NOL) carry-forward that reduced his 2011 California taxable income to zero. In addition, appellant
17 asserted that, because he did not owe California income tax for the 2011 tax year, he did not owe a late
18 filing penalty or interest. After reviewing the matter, the FTB affirmed the NPA in an NOA dated
19 July 25, 2014. In response, appellant filed this timely appeal. (FTB OB, p. 2.)

20 Contentions

21 Appellant's Contentions

22 Appellant states that a month or so before the filing due date, he submitted "a mass of
23 information" to the Internal Revenue Service (IRS) concerning an audit and was anticipating "a final
24 ruling" that would have a material effect on the 2011 tax year. Appellant asserts that, when he realized
25 that the IRS was not issuing a ruling, he immediately filed a California return. Appellant also asserts
26 that "a passive activity error" was caused by a default selection of his preparation software, TurboTax
27

28 ³ Appellant has been a licensed CPA in California since 1989.

1 Pro Series (TurboTax), which the return preparer has to remove, but which was “missed” by appellant.
2 Appellant states that at the time of filing there was no tax due and “the tax due only arose after catching
3 the software error on CA Passive Activities.” In addition, appellant contends that a “23.5% delinquent
4 penalty” due to an IRS ruling delay and a software bug seems excessive for a compliant taxpayer with
5 an “unblemished” filing history. (Appeal Letter, pp. 1-2; App. Reply Br., Ex. C.)

6 Next, appellant contends that reasonable cause exists for the abatement of the late filing
7 penalty because the IRS delayed issuing a decision on appellant’s 2007-2010 federal NOL carry-
8 forwards, which appellant alleges caused the late filing of appellant’s 2011 California return.
9 Specifically, appellant contends that, in 2012, his 2007-2010 federal tax returns were being examined
10 by IRS and he reasonably believed that the IRS would make a decision on his claimed federal NOL
11 carry-forwards for those tax years in September of 2012, as appellant had an IRS appeals conference
12 scheduled for September 14, 2012. Appellant asserts that he reasonably believed that the results of the
13 IRS’s examination for tax years 2007-2010 would have a material impact on his 2011 California return
14 due to his claimed federal NOL carry-forwards from 2007 through 2010. Appellant asserts that he
15 waited to file his 2011 California return until after the IRS made a decision so that he would not need to
16 file an amended 2011 California return. Appellant contends that he exercised ordinary business care
17 and prudence in his effort to avoid filing an amended return. However, appellant asserts that, once it
18 became clear to him that the IRS would not be issuing a prompt decision on his claimed federal NOL
19 carry-forwards for the 2007-2010 tax years, he immediately filed his 2011 California return. (App.
20 Reply Br., p. 1.)

21 Appellant also contends that he used reasonable care in preparing his 2011 California
22 return, as “there was no way to override the default settings in TurboTax” In support of the
23 alleged TurboTax error, appellant refers to a TurboTax “California Schedule E Worksheet,” a copy of
24 which appellant provides with his reply brief. The Worksheet has a box for “Other passive
25 exceptions,” and appellant asserts that “there was no way to override the default settings in Turbo Tax.”
26 Appellant states that he was due a refund and, accordingly, he timely filed his 2011 California return
27 within the statute of limitations for filing a claim for refund—e.g., four years from the original return
28 due date, citing R&TC section 19306. (App. Reply Br., p. 1 & Ex. C.)

1 In subsequent briefing filed on November 17, 2015, appellant reiterates arguments that
2 he made in prior briefing. First, appellant reiterates that, before the due date of his return, he submitted
3 information to the IRS and was anticipating a final ruling, which he asserts would have had a material
4 effect on his 2011 tax year. Second, he asserts that the reason the passive activity error occurred was
5 due to a TurboTax Pro Series error, with the apparent conclusion that, had TurboTax calculated the tax
6 correctly, he would have timely paid the tax and no penalty would exist under R&TC section 19131
7 because the late filing penalty is measured with respect to the unpaid tax. Third, appellant reiterates
8 that he had an otherwise “unblemished” filing history with respect to his tax returns. In addition to
9 those arguments, appellant asserts that his return was filed “on [a] valid Federal and State Extension.”
10 Also, appellant asserts that he is considering entering into a settlement agreement with the IRS
11 regarding some proposed adjustments to which he has not yet stipulated. (App. November 17, 2015
12 Submission.)

13 The FTB’s Contentions

14 The FTB argues that appellant’s contention that he was waiting for a final IRS ruling is
15 meritless because the tax years under IRS review were 2007-2010, not 2011. In addition, the FTB
16 asserts that NOLs (including NOL carryovers) do not apply to the 2011 tax year because R&TC
17 section 17276.21 generally provides that no NOL deductions shall be allowed for any taxable year
18 beginning on or after January 1, 2008, and before January 1, 2012. (FTB OB, pp. 3-4.)

19 Next, in response to appellant’s argument that a passive activity error was caused by the
20 default provisions of his TurboTax program, the FTB argues that a reasonably prudent taxpayer who
21 earned wages of \$287,058 could not have expected his or her tax liability to be zero, especially when
22 the tax liability ended up being \$21,970. In addition, the FTB argues that a reasonably prudent
23 taxpayer who saw that his or her taxable income was reported as -\$72,062 would have questioned why
24 it was negative when in fact it should have been \$262,626—and the FTB asserts that this is especially
25 true given the fact that appellant was a CPA. Also, in relation to the calculation of the late filing
26 penalty (which is based on the amount of tax due as of April 15, 2012), the FTB asserts that appellant
27 has provided no evidence showing that, even if the amount of tax had been correctly reported, appellant
28 would have paid the tax by April 15, 2012, as appellant alleges. And the FTB asserts that appellant had

1 a non-delegable obligation to file a tax return by the due date, citing the *Appeal of Roger D. and*
2 *Mary Miller*, 86-SBE-057, decided by the Board on March 4, 1986.⁴ Finally, in relation to appellant’s
3 contention that he has an “unblemished” filing history, the FTB asserts that it does not have authority to
4 abate the late filing history based on a taxpayer’s good compliance history. (FTB OB, pp. 3-4.)

5 In response to appellant’s November 17, 2015 submission, the FTB asserts that
6 appellant’s argument regarding his anticipated IRS ruling is unpersuasive because the documents from
7 the IRS that appellant provided to the FTB clearly show that the tax years under IRS review were 2007
8 through 2010—not the 2011 tax year that is at issue in this appeal. Moreover, the FTB asserts that
9 appellant’s argument regarding his anticipated IRS ruling is especially weak given that NOLs,
10 including the NOL carryovers, do not apply to the 2011 tax year, from the prior years under review,
11 because R&TC section 17276.21 expressly states that no net operating loss deductions shall be allowed
12 for any taxable year beginning on or after January 1, 2008, and before January 1, 2012. (FTB
13 Additional Brief (AB), p. 2.)

14 Next, in relation to appellant’s argument that he is considering entering into a settlement
15 agreement with the IRS regarding some proposed adjustments to which he has not yet stipulated, the
16 FTB asserts that appellant has not provided the terms of the proposed adjustments, and even if he had,
17 it is unknown whether the adjustments would have any impact under California law. Furthermore, the
18 FTB notes that by appellant’s own admission, he has yet to stipulate to any proposed adjustments.
19 (FTB AB, p. 2.)

20 Next, in relation to appellant’s argument that the reason the passive activity error
21 occurred was due to a TurboTax Pro Series error, the FTB argues that the alleged TurboTax error does
22 not constitute reasonable cause for the abatement of the late filing penalty, as a reasonably prudent
23 taxpayer could not have expected his or her tax liability to be zero based on income of \$287,058 from
24 state wages, especially when the resulting tax liability ended up being \$21,970. Also, the FTB
25 contends that a reasonably prudent taxpayer who saw that his or her taxable income was listed
26 as -\$72,062 would have questioned why it was negative when in fact it should have been \$262,626.

27
28 ⁴ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 (FTB AB, pp. 2-3.)

2 Next, the FTB asserts that a late filing penalty would have been imposed, in any event,
3 with or without any alleged software error because appellant filed his 2011 tax return seven months
4 late. In relation to appellant's argument that his return was filed "on [a] valid Federal and State
5 Extension," the FTB contends that it provides every taxpayer with an automatic six-month extension to
6 file a return so, in this case, the extension ran until October 15, 2012, but appellant failed to file his
7 return by that date. Finally, in relation to appellant's argument that he has an "unblemished" filing
8 history, the FTB asserts that, unlike the IRS, the FTB does not have the authority to abate the late filing
9 penalty based on a taxpayer's good compliance history. (FTB AB, p. 3.)

10 Applicable Law

11 Burden of Proof

12 The FTB's determination is presumed to be correct, and a taxpayer has the burden of
13 proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,
14 2001-SBE-001, May 31, 2001.) An appellant's unsupported assertions are insufficient to carry the
15 appellant's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

16 Late Filing Penalty

17 California imposes a penalty for the failure to file a return by its due date, unless the
18 failure to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.)
19 The late filing penalty is generally computed as five percent of the tax due, after allowing for timely
20 payments, for every month that the return is late, up to a maximum of 25 percent. (*Id.*)

21 To establish reasonable cause for a late filing, a taxpayer "must show that the failure to
22 file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause
23 existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar
24 circumstances." (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Ignorance of a
25 filing requirement or a misunderstanding of the law generally does not excuse a late filing. (*Appeal of*
26 *Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.) Each taxpayer has a non-delegable obligation to
27 file a tax return by the due date. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6,
28 1985.) In addition, this Board has determined that a taxpayer's difficulty in obtaining necessary

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1 information (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985) and the failure of the
2 taxpayer's accountant to properly account for income (*Appeal of M.B. and G.M. Scott*, 82-SBE-249,
3 Oct. 14, 1982) did not constitute reasonable cause for abating penalties.

4 STAFF COMMENTS

5 Staff notes that, in appellant's appeal letter, appellant asserts that he waited until after
6 April 15, 2012, to file his California return because he wanted to avoid the need to file an original
7 California return and an amended California return after the IRS decided his federal liability. At the
8 oral hearing, appellant should be prepared to explain why he did not file his 2011 California return by
9 the original due date of April 15, 2012 (or by the extended due date of October 15, 2012), based on his
10 view of the proper reporting based on the information available at the time. In this connection, he
11 should be prepared to explain why he did not file a return until November 15, 2012, when the IRS
12 appeals conference was apparently conducted on September 14, 2012, and it appears that he was aware
13 that he would not receive an IRS decision by the October 15, 2012 extended deadline. Appellant
14 should be prepared to provide support for his argument that a desire to avoid the possibility of having to
15 file an amended tax return constitutes reasonable cause for failing to file a tax return by the deadline.
16 Also, appellant should be prepared to address the FTB's contention that appellant's argument regarding
17 his anticipated IRS ruling is unfounded given that NOLs, including the NOL carryovers, do not apply
18 to the 2011 tax year.

19 Also, appellant should be prepared to substantiate his contention that he would have paid
20 the tax in full by April 15 2012, but for a passive activity error caused by the default selection of
21 TurboTax. In addition, appellant should be prepared to show (as he states in his reply brief) that "there
22 was no way to override the default settings in TurboTax" and that he used reasonable care in relying
23 upon the default settings.

24 Pursuant to California Code of Regulations, title 18, section 5523.6, if a party has
25 additional evidence that it wants the Board to consider, that party should provide such evidence to
26 Board Proceedings at least 14 days prior to the oral hearing.⁵

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28 ⁵ 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.