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9 **BOARD OF EQUALIZATION**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Appeal of:) **HEARING SUMMARY**
12) **PERSONAL INCOME TAX APPEAL**
13 **KENNETH PILLAY**¹) Case No. 487771

14 Proposed Assessment²

	<u>Year</u>	<u>Tax</u>	<u>Penalties</u>
	2003	\$9,260.26	\$2,315.24 (Late Filing) \$6,793.25 (Notice and Demand)

15 Representing the Parties:

16 For Appellant: Kenneth Pillay
17 For Franchise Tax Board: Suzanne L. Small, Tax Counsel III

18 QUESTIONS: (1) Whether appellant has shown that respondent's proposed assessment is barred by
19 the statute of limitations.
20 (2) Whether appellant has shown error in respondent's determination of his
21 underlying tax for 2003.
22 (3) Whether appellant has shown the late filing penalty and the notice and demand
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27 ¹ Appellant resides in Sunnyvale, Santa Clara County, California.

28 ² Respondent should be prepared to provide the accrued interest amount at the time of the oral hearing.

1 penalty imposed by respondent should be abated.

2 (4) Whether a frivolous appeal penalty should be imposed.

3 HEARING SUMMARY

4 Background

5 According to respondent, appellant did not file a California tax return for 2003.³
6 Through its Integrated Non-Filer Compliance Program, respondent obtained computer information from
7 reporting sources, which indicated that appellant had sufficient income to require the filing of a tax
8 return for 2003. Records from the Employment Development Department (EDD) indicated that Cisco
9 Technology, Inc. reported paying wages of \$230,445 to appellant during 2003. In addition, National
10 Investor Services Corporation filed federal Forms 1099-B and reported paying gross proceeds of
11 \$304,130 from multiple stock sales; it also filed a federal Form 1099-INT and reported paying interest
12 income of \$1,135.⁴ (Resp. Opening Br., p. 1.) On June 12, 2008, respondent issued a written demand
13 that appellant file a return for 2003 within 25 days and pay the balance due. The demand letter states
14 that failure to file a return may result in assessed tax, penalties and interest based on available
15 information. (*Id.*, Exhibit A.)

16 When appellant did not file a return (or explain why he was not required to file) by the
17 deadline, respondent issued a Notice of Proposed Assessment (NPA) dated August 25, 2008.⁵ The NPA
18 identifies taxable income of \$313,666 consisting of reported wages of \$230,445 from Cisco Technology
19 Inc., \$85,156 of income from National Investor Services Corporation reported on federal Forms 1099-B,
20 \$1,135 of income from National Investor Services Corporation reported on a federal Form 1099-INT
21 less a standard deduction of \$3,070. After applying a personal exemption credit of \$82.00, the NPA
22 proposes a tax liability of \$27,173.00 less an additional withholding credit of \$17,912.04 for additional
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24 ³ As discussed below, appellant contends that on October 15, 2004, a tax preparer filed a 2003 return on his behalf.

25 ⁴ As discussed below, respondent estimated capital gains realized from the reported stock transactions as equal to 28
26 percent of the gross proceeds shown on federal Forms 1099-B. Although the federal Form 1099-INT information is listed
27 on the Notice of Proposed Assessment, respondent failed to mention it on page 1 of its opening brief.

28 ⁵ Respondent inadvertently stated in its opening brief that the NPA was issued on August 5, 2008. (Resp. Opening Br., p. 2.)

1 tax of \$9,260.96. The NPA imposes a delinquent return penalty of \$2,315.24 and a notice and demand
2 penalty of \$6,793.25 plus interest. (App. Opening Br., Attachment.) In a letter dated October 6, 2008,
3 appellant protested the NPA and requested an oral protest hearing.⁶ (App. Opening Br., ¶ 20, p. 4; Resp.
4 Opening Br., p. 2.) In a letter dated November 5, 2008, respondent acknowledged receiving appellant's
5 protest letter and stated that it would be contacting appellant to schedule a protest hearing. (Resp.
6 Opening Br., Exhibit B.) In a letter dated December 3, 2008, respondent informed appellant that a
7 hearing on the protest would be held at 9:00 a.m. on January 6, 2009, in respondent's Oakland district
8 office. (*Id.*, Exhibit C.) According to appellant, he appeared at the January 6, 2009, oral hearing and the
9 hearing officer granted his request for a continuation in order to compel witnesses to attend the oral
10 hearing. (App. Opening Br., ¶¶ 23-24, p. 5.) Appellant contends that respondent continued the protest
11 hearing to March 10, 2009, and he attended it. (*Id.*, ¶ 26, p. 5.) After considering the available
12 information, respondent affirmed the NPA in a Notice of Action (NOA) dated March 25, 2009. (App.
13 Opening Br., Attachment.) Appellant filed this timely appeal.

14 Appellant's Contentions

15 Appellant's primary contention is that a paid tax preparer, Kenneth E. Hall, prepared and
16 signed a return for tax year 2003 on appellant's behalf on or about September 30, 2004, and filed it on
17 October 15, 2004. (App. Opening Br., ¶ 4, p. 2.) Appellant contends that a 2003 Schedule D (540)
18 Form was attached to the filed 2003 return that reported a capital loss of approximately 20.67 percent for
19 the stock transactions at issue. (App. Reply Br., ¶ 4, p. 2.) Appellant further contends that the proposed
20 assessment is barred by the four-year statute of limitations due to the filing of the 2003 return on
21 October 15, 2004. (App. Opening Br., ¶ 31, p. 7.)

22 Appellant also contends that the proposed assessment is invalid because he was
23 improperly denied an oral hearing before this Board in another appeal concerning tax year 2003.
24 Appellant contends that on December 14, 2004, the California State Controller issued him a refund

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28 ⁶ A copy of the October 6, 2008, protest letter is not in the file.

1 warrant (number 23-068953) in the amount of \$5,667.34⁷ after respondent processed his 2003 return.
2 (*Id.*, ¶ 5, p. 2.) Appellant contends that respondent subsequently caused the refund warrant to be voided
3 and then issued an NPA dated January 16, 2007, for tax year 2003 in the amount of \$8,471.62. (*Id.*, ¶ 6,
4 p. 2.) Appellant contends that he sent respondent a protest letter on March 15, 2007, concerning the
5 January 16, 2007, NPA. (*Id.*, ¶ 7, p. 2.) Appellant contends that, notwithstanding his protest letter,
6 respondent issued a Notice of State Income Tax Due on May 16, 2007, in the amount of \$8,640.37,
7 which states that the proposed assessment for tax year 2003 is now final and must be paid. (*Id.*, ¶ 8,
8 p. 2.) Appellant contends that an oral protest hearing was held on June 12, 2007, at respondent's
9 Oakland district office, which appellant attended. (*Id.*, ¶ 10, p. 3.) Appellant contends that respondent
10 reaffirmed the January 16, 2007, NPA in an NOA dated June 29, 2007, in the amount of \$8,781.65.
11 (*Ibid.*) Appellant contends that he filed a timely appeal with this Board on July 30, 2007 (Case I.D.
12 422894, hereinafter referred to as the "prior appeal"). (*Id.*, ¶ 11, p. 3.)

13 Appellant contends that in a memorandum dated January 15, 2008, respondent requested
14 this Board to dismiss the prior appeal without cause, and it reserved the right to reissue another NPA for
15 tax year 2003. According to appellant, respondent's January 15, 2008, memorandum "obstructed" him
16 from obtaining a hearing in the prior appeal. (*Id.*, ¶ 12, p. 3.) Appellant contends that he received a
17 letter from this Board dated May 9, 2008, informing him that it dismissed the prior appeal without cause,
18 and he also received a Notice of Determination On Appeal from respondent dated May 29, 2008, stating
19 that the January 16, 2007, NPA was withdrawn. Appellant contends he sent correspondence via
20 electronic mail to this Board on June 5, 2008, and June 16, 2008, contesting the dismissal and requesting
21 a hearing on the prior appeal. Appellant contends that this Board sent him letters dated June 9, 2008,
22 and June 17, 2008, stating that the prior appeal was properly dismissed. (*Id.*, ¶¶ 12-19, pp. 3-4.)

23 Appellant further contends that the proposed assessment "appears bizarre and
24 unjustified." (*Id.*, ¶ 29, p. 6.) Appellant contends that respondent improperly waited more than five
25 years to send him a demand letter for 2003 and he did not respond to the demand letter because a 2003
26 return had been filed bearing his taxpayer identification number. (App. Reply Br., ¶ 2, pp. 1-2.)

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28 ⁷ According to appellant, a copy of the refund warrant was attached to his prior appeal letter. (App. Reply Br., ¶ 1, p. 1.)

1 Appellant contends that respondent improperly determined a cost/basis of 72 percent for the stock sales
2 at issue, the sampling of stock transactions reported by other California taxpayers for 2003 is irrelevant
3 to appellant, and the sampling should have no impact or influence over the proposed assessment of his
4 income tax for 2003. (App. Suppl. Br., ¶¶ 1-2, p. 1.) Appellant contends that the August 25, 2008, NPA
5 for an amount in excess of the January 16, 2007, NPA for tax year 2003 was “unjustified and appeared
6 to be a bullying tactic.” (App. Opening Br., ¶ 19, p. 4.) Appellant contends that respondent also issued
7 an unlawful NOA on November 12, 2008, in the amount of \$22,307.96 for tax year 2003 in response to
8 his October 6, 2008, protest letter before granting him an oral protest hearing for January 6, 2009, which
9 was continued at his request in order to have Mr. Hall appear at the oral protest hearing.⁸ (*Id.* ¶¶ 21-24,
10 p. 5.) Appellant contends that, although he requested Mr. Hall’s appearance, Mr. Hall failed to attend
11 the March 10, 2009, oral protest hearing. (*Id.* ¶¶ 25-26, p. 5.)

12 Appellant contends that respondent’s comments regarding his filing history appears to be
13 “a shameful attempt at discrediting [his] filing history.” Appellant contends that he is now filing returns
14 using single filing status and he has been the respondent in a marriage dissolution action since 2002,
15 which has resulted in some delays in the filing of returns for the 2002 and 2004 tax years. Appellant
16 contends that other than those delays, and the dispute concerning tax year 2003, appellant has timely
17 filed his returns since tax year 1996. (App. Reply Br., ¶ 5, p. 2.)

18 Appellant’s Requests

19 In his opening brief, appellant makes several procedural requests. Appellant requests the
20 Board to compel Mr. Hall and Elaine Alquist to appear at the oral hearing.⁹ Appellant requests those
21 members of this Board who are also board members of the FTB to recuse themselves from the oral
22 hearing, including John Chiang and Betty Yee. Appellant also requests Bill Leonard to recuse himself
23 from the oral hearing on the ground that he contacted appellant privately via electronic mail on June 17,
24 2008. Appellant also requests the Board to vacate with prejudice the March 25, 2008, NOA. Lastly,

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27 ⁸ A copy of the November 12, 2008, NOA is not in the file.

28 ⁹ Other than appellant’s request for her appearance at the oral hearing, staff finds no mention of Ms. Alquist in the record.

1 appellant requests any further relief in his favor against respondent “as may be deemed just and proper.”
2 (App. Opening Br., ¶¶ 1-5, p. 8.)

3 Respondent’s Contentions

4 Respondent contends that it timely issued the August 25, 2008, NPA. Respondent
5 contends that it has no record of having received a 2003 return from appellant and appellant has not
6 provided a copy of it in response to its filing enforcement action. Respondent therefore contends that
7 there is no time limit (statute of limitations) for the assessment of tax for tax year 2003. Alternatively,
8 respondent contends that, even if appellant had filed a 2003 return on October 15, 2004, the August 25,
9 2008, NPA would have been issued within the four-year statute of limitations set forth in R&TC section
10 19057. (Resp. Opening Br., p. 4.)

11 Respondent contends that appellant has failed to meet his burden of demonstrating any
12 error in respondent’s proposed assessment. Respondent contends that the proposed assessment is
13 reasonable and rational because appellant is linked to unreported income through the use of EDD
14 records and federal 1099-INT and 1099-B Forms. Respondent asserts that in estimating appellant’s
15 income for 2003 it determined a cost/basis of 72 percent and capital gains of 28 percent with respect to
16 the stock sales of \$304,130 that National Investor Services Corporation reported on federal forms
17 1099-B for the 2003 tax year. According to respondent, this method was based on a sampling of stock
18 transactions reported by California taxpayers for tax year 2003. Respondent contends that the Board
19 presumes that respondent’s determination is correct, and appellant has the burden of proving it wrong.
20 Furthermore, respondent contends that a late filing penalty and a notice and demand penalty were
21 properly imposed because appellant has not demonstrated reasonable cause for abatement. (Resp.
22 Opening Br., pp. 3-4.)

23 Respondent does not discuss the facts or circumstances of the prior appeal or the
24 purported November 12, 2008, NOA for tax year 2003.¹⁰ It is not clear whether respondent is
25 requesting that a frivolous appeal penalty be imposed against appellant based on his arguments and
26 previous compliance history.

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28 ¹⁰ Board records indicate that Case ID 422894 was closed on May 9, 2008.

1 Applicable Law

2 Statute of Limitations

3 R&TC section 19087, subdivision (a), provides that if an individual fails to file a return,
4 respondent may, at any time, make an estimate of the net income, from any available information, and
5 may propose assessment of the amount of tax, interest, and penalties due.

6 R&TC section 19057 provides that, except in cases of a false or fraudulent return and
7 except as otherwise expressly provided in that part (Part 10.2 Administration of Franchise and Income
8 Tax Laws and Regulations), every NPA shall be mailed to the taxpayer within four years after the
9 return was filed. When an NPA was issued within the four-year statutory period, the fact that the
10 corresponding NOA was not issued within the four-year period is irrelevant. (*Appeal of Jenkel-*
11 *Davidson Optical Co.*, 81-SBE-101, May 19, 1981.)

12 Respondent is not limited to one review of a taxpayer's liability within the time it is
13 permitted by statute to issue a proposed assessment and thus may issue more than one NPA for the same
14 tax year. (*Appeal of Nicholas Phillips*, 82-SBE-133, June 29, 1982; Rev. & Tax. Code, § 19057.)

15 Due Process

16 Appellant apparently argues that the Board and the FTB denied his right to due process in
17 the handling of his prior appeal. This Board is precluded from determining the constitutional validity of
18 California statutes and has an established policy of declining to consider constitutional issues. (Cal.
19 Const., art. III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeal of Walter R. Bailey*,
20 92-SBE-001, Feb. 20, 1992.) This policy is based upon the absence of any specific statutory authority
21 that would allow respondent to obtain judicial review of a decision in such cases and the Board's belief
22 that judicial review should be available for questions of constitutional importance. (*Appeals of Fred R.*
23 *Dauberger, et al.*, 82-SBE-082, March 31, 1982.) To the extent that appellant is making constitutional
24 arguments, these arguments should be made in the appropriate court of law. Moreover, the Board held
25 in the *Appeal of Walter R. Bailey, supra*, that "due process is satisfied with respect to tax matters so long
26 as an opportunity is given to question the validity of a tax at some stage of the proceeding."

27 Furthermore, the Board's Rules for Tax Appeals, Chapter 4, section 5412, subdivision
28 (b), provides that the Board does not have jurisdiction to consider any of the following: 1) whether a

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1 California statute or regulation is invalid or unenforceable under the Federal or California Constitutions,
2 unless a federal or California appellate court already made such a determination; and 2) whether
3 appellant is entitled to a remedy for the FTB's actual or alleged violation of any substantive or
4 procedural right, unless the violation affects the adequacy of a notice, the validity of an action from
5 which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, div. 2.1,
6 § 5412, subd. (b).)

7 Proposed Assessment

8 R&TC section 17041 imposes a tax upon the entire taxable income of every resident of
9 California and upon the taxable income of every nonresident or part-year resident that is derived from
10 sources in California. R&TC section 18501 requires every individual subject to the Personal Income
11 Tax to make and file a return with respondent "stating specifically the items of the individual's gross
12 income from all sources[.]"

13 R&TC sections 17071 defines "gross income" by referring to and incorporating into
14 California law Internal Revenue Code (IRC) sections 61. IRC section 61 provides that unless otherwise
15 provided "gross income means all income from whatever source derived," including wages, interest, and
16 realized capital gains.

17 When respondent makes a tax assessment based on an estimate of income, respondent
18 bears the initial burden of showing why its assessment is reasonable and rational. (*Todd v. McColgan*
19 (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 01-SBE-001, May 31, 2001.) Federal courts
20 hold that the taxing agency need only introduce some evidence linking the taxpayer with the unreported
21 income. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) Respondent's use of income
22 information from the EDD and federal forms 1099 to estimate taxable income where an appellant has
23 failed to file a return is reasonable and rational. (See *Appeal of Walter R. Bailey, supra; Appeal of R.*
24 *and Sonja J. Tonsberg*, 85-SBE-034, April 9, 1985.)

25 Once respondent has met its initial burden, the assessment is presumed correct and
26 appellant has the burden of proving it to be wrong. (*Todd v. McColgan, supra; Appeal of Michael E.*
27 *Myers, supra*.) Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal*
28 *of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,

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1 competent, and relevant evidence showing error in respondent's determinations, they must be upheld.
2 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's failure to
3 produce evidence within his or her control gives rise to a presumption that such evidence is unfavorable
4 to his or her case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

5 Late Filing Penalty

6 Individuals must file California income tax returns on or before April 15, or on or before
7 the extended due date of October 15, following the tax year. (Rev. & Tax. Code, § 18566.) R&TC
8 section 19131 imposes a penalty when a taxpayer fails to file a return on or before the due date, unless it
9 is shown that the failure is due to reasonable cause and not due to willful neglect. A taxpayer's
10 unsupported statement that a timely return was filed is insufficient to carry his burden of proof. (*Appeal*
11 *of David A. and Barbara L. Beadling*, 77-SBE-021, Feb. 3, 1977.) To establish reasonable cause, the
12 taxpayer "must show that the failure to file timely returns occurred despite the exercise of ordinary
13 business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent
14 businessman to have so acted under similar circumstances." (*Appeal of Howard G. and Mary Tons*, 79-
15 SBE-027, Jan. 9, 1979.) The burden is on the taxpayer to prove that the difficulties experienced
16 prevented him or her from filing a timely return. (*Appeal of Kerry and Cheryl James*, 83-SBE-009,
17 Jan. 3, 1983.) Ignorance of the filing requirement or misunderstanding of the law does not excuse late
18 filing. (*Appeal of Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.)

19 Notice and Demand Penalty

20 R&TC section 19133 provides that if any taxpayer fails or refuses to file a return upon
21 notice and demand by respondent, then a penalty shall be imposed, unless the failure is due to
22 reasonable cause and not willful neglect. The penalty is computed as 25 percent of the tax liability
23 determined without applying payments or other credits.¹¹ (*Appeal of Elmer R. and Barbars Malakoff*,
24 83-SBE-140, June 21, 1983; *Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983.) The FTB will only
25 impose the notice and demand penalty if the taxpayer fails to respond to a current Demand for Tax
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28 ¹¹ Internal Revenue Code section 6641(b) specifically provides that the penalty is imposed in the amount of tax shown on
the return reduced by the amount of tax paid as of the due date and any credits to which the taxpayer is entitled, whereas
R&TC section 19133 does not so provide.

1 Return and the FTB issued an NPA under the authority of R&TC section 19087, subdivision (a), after
2 the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return at any
3 time during the four-taxable-year preceding the year for which the current Demand for Tax Return is
4 being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b)(1) and (2).)¹² The notice and demand
5 penalty was designed to penalize the taxpayer's failure to respond to the notice and demand, and not
6 the taxpayer's failure to pay the proper tax. (*Appeal of Robert Scott, supra.*) The burden of proving
7 "reasonable cause" for failure to file upon demand is on the taxpayer. (*Appeal of David A. and*
8 *Barbara L. Beadling, supra.*)

9 Frivolous Appeal Penalty

10 R&TC section 19714 imposes a penalty of up to \$5,000 whenever it appears to the Board
11 that proceedings before it have been instituted or maintained primarily for delay or that the position is
12 frivolous or groundless. Appellant was notified of the potential imposition of a frivolous appeal penalty
13 in the March 25, 2009, NOA, and by the Board in a letter dated May 26, 2009.

14 The Board held in the *Appeal of Alfons Castillo (92-SBE-020)* decided on July 20, 1992,
15 that appellant's pattern and practice of conduct in prior years is relevant to determining whether to
16 impose a frivolous appeal penalty for the year on appeal. Respondent states that appellant has not filed a
17 timely return for tax years 2002 and 2004, it pursued filing enforcement action and issued NPAs for tax
18 years 2002 and 2004, which became final, and appellant subsequently filed returns for tax years 2002,
19 2004, and 2006. As discussed above, there is a factual dispute as to whether appellant has filed a valid
20 tax return for 2003.

21 Staff Comments

22 Statute of Limitations

23 Appellant contends that respondent is barred by the statute of limitations from issuing
24 any notice of deficiency assessment after October 14, 2008, which is four years from the date when Mr.
25 Hall purportedly filed a 2003 return on appellant's behalf. Assuming that a 2003 return was filed on
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27 ¹² Regulation 19133 became operative on December 23, 2004.
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1 behalf of appellant on October 14, 2004, it appears that the August 25, 2008, NPA was issued within the
2 four-year statute of limitations. It appears that appellant is confused about the type of notice that must
3 be issued within the four-year statute of limitations period, because the relevant deadline at issue was
4 met by the mailing of the NPA (not the mailing of the NOA). Therefore, the fact that the March 25,
5 2009, NOA was not issued until more than four years after the date on which Mr. Hall purportedly filed
6 appellant's 2003 return has no bearing on the validity of the assessment.

7 Moreover, appellant has not substantiated his claim that a third party filed a valid 2003
8 return on his behalf on October 14, 2004. Assuming that appellant failed to file a 2003 return, R&TC
9 section 19087, subdivision (a), provides that at any time respondent may make an estimate of the net
10 income from any available information and may propose assessment of the amount of tax, interest, and
11 penalties due.

12 Proposed Assessment

13 Respondent's use of income information reported by EDD and federal 1099 forms
14 appears to be reasonable and rational. It thus appears that respondent has met its initial burden, the
15 proposed assessment is presumed correct, and the burden of proof is on appellant. It appears that
16 appellant does not deny receiving in 2003 the income reported by Cisco Technology Inc. and National
17 Investor Services Corporation, which is listed on the August 25, 2008, NPA. It appears that appellant
18 has yet to produce any substantial evidence tending to show error in the proposed assessment or in any
19 of respondent's underlying factual determinations for 2003. Appellant should be prepared to discuss at
20 the oral hearing why respondent's determination is incorrect, or he should introduce evidence that shows
21 respondent's determination is incorrect. Appellant should be prepared to discuss why only the tax
22 preparer purportedly signed the return. Appellant should submit to the Board and respondent at least 14
23 days prior to the hearing date¹³ any documentary evidence supporting his positions, including copies of
24 the 2003 return and the attached Schedule D purportedly filed on October 15, 2004, any other
25 documents that would establish whether appellant had capital gains or losses with respect to the sales of
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27 ¹³ Exhibits should be submitted to: Claudia Madrigal, Board Proceedings Division, Board of Equalization. P. O. Box 942879 MIC: 80,
28 Sacramento, CA 94279-0080.

1 stock National Investor Services Corporation reported on Federal Form 1099-B, and the November 12,
2 2008, NOA.

3 Staff also notes that no provision in the R&TC prevents respondent from issuing multiple
4 NPAs for the same tax year, so long as each NPA is issued within the statute of limitations. At the
5 hearing, for informational purposes, respondent should be prepared to explain the procedural history of
6 the prior appeal and the reasons why it was dismissed. Appellant should be prepared to discuss why he
7 believes respondent could not issue the second NPA for 2003. Respondent should also be prepared to
8 discuss whether it issued an NOA to appellant on November 12, 2008, for tax year 2003 and, if so,
9 whether it was ever withdrawn.

10 Penalties

11 As discussed above, appellant has yet to establish with supporting evidence that a 2003
12 return was filed on his behalf on October 15, 2004. Appellant should be prepared to discuss whether his
13 failure to file a timely 2003 return was due to reasonable cause and not due to willful neglect.
14 Respondent should indicate whether it issued a request for tax return or a demand for tax return with
15 respect to the NPA issued for either 2002 or 2004, such that the demand penalty it proposes in this
16 appeal was properly included in the 2003 NPA. Appellant should be prepared to discuss whether his
17 failure to file a 2003 return upon notice and demand was due to reasonable cause and not willful neglect.
18 Finally, both parties should be prepared to discuss whether a frivolous appeal penalty should be
19 imposed, and if so, in what amount.

20 Appellant's Requests Related to the Oral Hearing

21 The Board may issue subpoenas for the attendance of witnesses (or the production of
22 records), in accordance with Government Code section 15613, but is not required to do so. (Cal. Code
23 Regs., tit. 18, § 5523.5, subdivision (b). A subpoena must be signed by a Board Member, the Board's
24 Executive Director, or other person designated by the Executive Director. Taxpayers are required to
25 serve subpoenas issued pursuant to their request upon the witnesses identified in the subpoenas and will
26 bear any expenses incurred. (*Id.*) The taxpayer or department (here, FTB) may offer the testimony of
27 any person who can provide relevant information concerning the matter, however, the Board will not
28 compel witnesses to answer questions in any particular manner. (Cal. Code Regs., tit. 18, § 5523.7,

1 subds. (a), (e).) Here, appellant does not specify the reason(s) the witness testimony of the two
2 individuals named is relevant to this matter. Presumably, Mr. Hall would testify as to the signing and
3 mailing of the 2003 tax return, facts that can be demonstrated by producing a copy of the tax return.

4 With respect to appellant’s request that three of the five members of the Board recuse
5 themselves from his oral hearing, staff notes that a quorum (any three of the Board Members) must be
6 present for the Board to take any action. (Cal. Code Regs., tit. 18, § 5550, subd. (a).) Further, there is no
7 legal authority for the proposition that the Controller (or Controller’s Deputy) or the Chairperson of the
8 Board refrain from participating in any Board action that is otherwise proper pursuant to the contribution
9 disclosure statute (Gov. Code §15626), the Political Reform Act (Gov. Code § 81000, et seq.), and (with
10 respect to the Controller’s deputy), Government Code section 7.6 or 7.9 (as interpreted by the Attorney
11 General), relating to constitutional functions. (See Cal. Code Regs., tit. 18, § 5550, subds. (a), (b).)

12 Furthermore, with respect to Mr. Leonard’s purported email correspondence with
13 appellant, California Code of Regulations, title 18, section 5523.8, expressly provides that Board
14 Members shall remain accessible to their constituents and taxpayers at all times in order to execute their
15 constitutional and statutory duties.

16 In addition, appellant requests that the Board “vacate” the March 28, 2008 NOA (it
17 appears appellant may refer to the March 28, 2009, NOA that is the subject of this appeal). The Board
18 does not have the authority to vacate the NOA. Instead, the Board has a statutory obligation to hear and
19 determine the appeal. (Rev. & Tax. Code, § 19047; see also Rev. & Tax. Code, §19045.) Finally, with
20 respect to the dismissal of the previous 2003 appeal, appeals must be dismissed under specific
21 enumerated circumstances, such as when one of the parties submits a written, signed request for
22 dismissal. (Cal. Code Regs., tit. 18, § 5522.8, subd. (a).)

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