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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9
 10 In the Matter of the Appeal of:) **HEARING SUMMARY**
 11) **PERSONAL INCOME TAX APPEAL**
 12 **ELISABETH BOSSINGHAM**¹) Case No. 486595
 13

| Years | Proposed Assessments ² | |
|-------------------|-----------------------------------|-----------------------|
| | Tax | Late Filing Penalties |
| 2000 ³ | \$ 6,480.00 | \$1,620.00 |
| 2001 | \$13,117.00 | \$3,279.25 |
| 2002 | \$10,031.00 | \$2,507.75 |
| 2003 | \$11,399.00 | \$2,849.75 |
| 2004 | \$11,198.00 | \$2,799.50 |
| 2005 | \$ 9,211.00 | \$2,302.75 |

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 19 Representing the Parties:

20 For Appellant: Elisabeth Bossingham
 21 For Franchise Tax Board: Suzanne L. Small, Tax Counsel III
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 25 ¹ Appellant currently resides in Tulare County, California.

26 ² The FTB should be prepared to provide the accrued interest amounts at the time of the oral hearing.

27 ³ Tax year 2000 was also the subject of a prior appeal filed by appellant and heard by the Board. The FTB subsequently
 28 issued a second Notice of Action (NOA) for 2000 based on a federal adjustment; the appeal from the second NOA is the subject of this appeal.

- 1 QUESTIONS: (1) Whether appellant has demonstrated error in the underlying tax assessments.
2 (2) Whether appellant has shown reasonable cause for abatement of the late filing
3 penalties imposed for each of the appeal years.
4 (3) Whether the Board should impose a frivolous appeal penalty.⁴

5 HEARING SUMMARY

6 Background

7 2000

8 Having received information from various reporting sources that appellant received
9 sufficient income to trigger the tax year 2000 filing requirement, the Franchise Tax Board (FTB or
10 respondent) issued a notice dated May 6, 2002, requesting that appellant file a return or explain why no
11 return was required. When appellant neither filed a return nor demonstrated why a return was not
12 required, the FTB issued a Notice of Proposed Assessment (first NPA for 2000). Appellant timely
13 protested the first NPA for 2000. Later, the FTB affirmed its assessment in a Notice of Action (first
14 NOA for 2000). Appellant then filed a timely appeal with the Board. Afterwards, the Board sustained
15 the first NOA for 2000 and imposed a \$750 frivolous appeal penalty on September 20, 2005.

16 On or about April 6, 2007, appellant filed a 2000 California income tax return, reporting
17 a federal adjusted gross income (AGI) of \$45,551 and California taxable income of \$39,279.

18 Upon reviewing this return, FTB determined that appellant had underreported her 2000
19 income significantly because she had only reported \$45,551 of the total income of \$104,898 upon which
20 it had previously assessed tax. The FTB based its computation of the second NPA on the taxable
21 income of the \$104,898 from the first NPA, plus the following previously unreported amounts from her
22 tax return:

| | | |
|----|-------------------------------|--------------|
| 23 | Capital gains | \$ 18,163.00 |
| 24 | Taxable interest | \$ 2,932.00 |
| 25 | Partnership income of \$4,963 | \$ 4,963.00 |

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28 ⁴ This is appellant's second appeal of this nature. As discussed below, in appellant's first appeal (for tax year 2000, case no 269712), this Board found against appellant and imposed a \$750 frivolous appeal penalty on September 20, 2005. Appellant then filed a petition for rehearing, which was denied by this Board on May 17, 2006.

1 FTB issued a second NPA (second NPA for 2000) on October 14, 2008. Appellant
2 timely protested the second NPA for 2000, and she attended a protest hearing on March 5, 2009. At the
3 hearing, appellant disagreed with the facts set forth in the second NPA for 2000; however, after
4 considering appellant's arguments, the FTB affirmed its assessment for the 2000 tax year in an NOA
5 (second NOA for 2000) issued on March 23, 2009. Appellant then filed this timely appeal.

6 2001

7 Having received information from various reporting sources that appellant received
8 sufficient income to trigger the tax year 2001 filing requirement, the FTB issued two notices demanding
9 that appellant file a return or explain why no return was required. When appellant neither filed a return
10 nor demonstrated why a return was not required in response to either notice, the FTB issued an NPA
11 (first NPA for 2001). When appellant did not timely protest the first NPA for 2001, it became final.

12 On or about April 15, 2007, appellant filed a 2001 California income tax return, reporting
13 a federal AGI of \$29,392.57 and a California taxable income of \$9,821.64. Appellant attached a
14 substitute W-2 to her return entering \$7,883 in wages paid by Visalia Medical Group and \$345.99 in
15 California state income tax withheld. As a reason for changing the income and withholding amounts on
16 the form, appellant stated "records provided by payor and payee's records show these amounts are
17 correct for payee's wages and status". As a reason for why her employer did not furnish a substitute W-
18 2, appellant stated: "Unknown. Contacted payor but issue was not resolved in time."

19 FTB subsequently reviewed appellant's return and determined that appellant had
20 significantly underreported her income because she had only reported \$29,292.57 of the total income of
21 \$171,129 upon which respondent had previously assessed tax (\$171,126 wages from Visalia Medical
22 Clinic, Inc. and \$3 in partnership income paid to appellant by Vileasco and reported on federal Form K-
23 1). The FTB based its computation of the second NPA on the taxable income of \$171,126 from the first
24 NPA, plus the following previously unreported amounts from her tax return:

| | | |
|----|------------------|--------------|
| 25 | Capital gains | \$ 15,190.00 |
| 26 | Taxable interest | \$ 5,248.21 |

27 FTB issued the second NPA on November 19, 2008. Appellant timely protested the
28 second NPA for 2001, and she attended a protest hearing on March 5, 2009. At the hearing, appellant

1 disagreed with the second NPA for 2001; however, after considering appellant's arguments, the FTB
2 affirmed its assessment for the 2001 tax year in an NOA issued on March 23, 2009. Appellant then filed
3 this timely appeal.

4 2002

5 Having received information from various reporting sources that appellant received
6 sufficient income to trigger the tax year 2002 filing requirement, the FTB issued a notice dated
7 January 20, 2004, demanding that appellant file a return or explain why no return was required. (Visalia
8 Medical Clinic, Inc., reported paying appellant \$137,614 in wages and Vileasco reported paying
9 appellant \$3 on a federal Form K-1.) Appellant made several requests for additional time to respond.

10 On or about April 15, 2007, appellant filed a 2002 California income tax return, reporting
11 a federal AGI of \$16,544.92 and California taxable income of \$10,536.92. Appellant attached a
12 substitute W-2 to her return entering \$7,684 in wages paid by Visalia Medical Group and \$356.33 in
13 California state income tax withheld. As a reason for changing the income and withholding amounts on
14 the form, appellant stated "records provided by payor and payee's records show these amounts are
15 correct for payee's wages and status". As a reason for why her employer did not furnish a substitute W-
16 2, appellant stated: "Unknown. Contacted payor but issue was not resolved in time."

17 FTB subsequently reviewed appellant's return and determined she had significantly
18 underreported her 2002 income by reporting wages of only \$7,684. FTB accordingly issued an NPA
19 asserting that appellant received California taxable income of \$140,466 in the 2002 tax year. The FTB
20 based its computation on taxable income of \$140,466 (the sum of income appellant reported on her
21 return, \$10,537, plus the additional wages reported by Visalia Medical Clinic, Inc., \$129,929.
22 "Additional wages" of \$129,929 = total wages reported of \$137,614 minus appellant's reported wages of
23 \$7,684.)

24 FTB issued the 2002 NPA on October 14, 2008. Appellant timely protested the NPA
25 and attended a protest hearing on March 5, 2009. At the hearing, appellant disagreed with the NPA for
26 2002 tax year; however, after considering appellant's arguments, the FTB affirmed its assessment for the
27 2002 tax year in an NOA issued on March 23, 2009. Appellant then filed this timely appeal.

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1 2003

2 On or about April 15, 2007, appellant filed a 2003 California income tax return, reporting
3 a federal AGI of \$11,487.29 and California taxable income of \$5,347.29. Appellant attached a
4 substitute W-2 to her return entering \$8,505.68 for wages from Visalia Medical Clinic, Inc., and \$655.96
5 in California withholding. As a reason for changing the income and withholding amounts on the form,
6 appellant stated “records provided by payor and payee’s records show these amounts are correct for
7 payee’s wages and status”. As a reason for why her employer did not furnish a substitute W-2, appellant
8 stated: “Unknown. Contacted payor but issue was not resolved in time.”

9 FTB subsequently examined appellant's 2003 California income tax return and
10 determined that appellant significantly underreported her 2003 income. Specifically, the FTB asserts
11 that it received information from various reporting sources, showing that appellant received total wages
12 of \$164,081 in the 2003 tax year. Respondent determined taxable income of \$160,922 based on the sum
13 of income appellant previously reported on her return (\$5,347.29) plus the additional wages from Visalia
14 Medical Clinic, Inc. (\$155,575, which is the total reported \$164,081 minus the \$8,505.68 in wages
15 appellant reported on her return).

16 FTB issued the 2003 NPA on October 14, 2008. Appellant timely protested the NPA for
17 the 2003 tax year, and she attended a protest hearing on March 5, 2009. At the hearing, appellant
18 disagreed with the NPA for the 2003 tax year; however, after considering appellant’s arguments, the
19 FTB affirmed its assessment for the 2003 tax year in an NOA issued on March 23, 2009. Appellant then
20 filed this timely appeal.

21 2004

22 Having received information from various reporting sources that appellant received
23 sufficient income to trigger the tax year 2004 filing requirement, the FTB issued a notice dated
24 January 13, 2006, demanding that appellant file a return or explain why no return was required. When
25 appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA
26 (first NPA for 2004). Appellant timely protested the first NPA; however, the FTB later affirmed its
27 assessment in a NOA (first NOA for 2004). Appellant then filed a timely appeal with this Board;
28 however, appellant subsequently filed a 2004 California income tax return, reporting a federal AGI of

1 \$10,236.29 and a California taxable income of \$3,906.29. Because appellant filed her 2004 California
2 tax return, the FTB requested that the appeal be dismissed. The Board dismissed the appeal on
3 September 17, 2007.

4 FTB subsequently examined appellant's return and determined that appellant had
5 significantly underreported her 2004 income because she had only reported \$8,614.29 of the \$162,222
6 total wages reported by Visalia Medical Clinic. Appellant attached a substitute W-2 to her return
7 entering \$8,614 in wages paid by Visalia Medical Group and \$734.66 in California state income tax
8 withheld. As a reason for changing the income and withholding amounts on the form, appellant stated
9 "records provided by payor and payee's records show these amounts are correct for payee's wages and
10 status". As a reason for why her employer did not furnish a substitute W-2, appellant stated: "Unknown.
11 Contacted payor but issue was not resolved in time."

12 FTB determined that appellant had California taxable income of \$157,514 in the 2004 tax
13 year, the sum of the additional wages reported Visalia Medical Clinic, Inc. of \$153,608 (\$162,222 total
14 wages minus \$8,614 reported wages). FTB accordingly issued a second NPA on October 14, 2008.
15 Appellant timely protested the second NPA for 2004, and she attended a protest hearing on March 5,
16 2009. At the hearing, appellant disagreed with the second NPA for 2004; however, after considering
17 appellant's arguments, the FTB affirmed its assessment for the 2004 tax year in an NOA (second NOA
18 for 2004) issued on March 23, 2009. Appellant then filed this timely appeal.

19 2005

20 Having received information from various reporting sources that appellant received
21 sufficient income to trigger the tax year 2005 filing requirement, the FTB issued a notice dated
22 January 16, 2007, demanding that appellant file a return or explain why no return was required.

23 On or about April 15, 2007, appellant filed a 2005 California income tax return, reporting
24 a federal AGI of \$8,819.09 and California taxable income of \$2,311.09. Appellant attached a substitute
25 W-2 to her return showing \$8,516.88 in wages paid by Visalia Medical Clinic, Inc., and \$781.11 in
26 California withholding. As a reason for changing the income and withholding amounts on the form,
27 appellant stated "records provided by payor and payee's records show these amounts are correct for
28 payee's wages and status". As a reason for why her employer did not furnish a substitute W-2, appellant

1 stated: “Unknown. Contacted payor but issue was not resolved in time.”

2 FTB subsequently examined this return and determined that appellant had significantly
3 underreported her 2005 income because she reported only \$8,516.88 of the total \$143,385 in wages
4 Visalia Medical Clinic, Inc., reported paying appellant. FTB determined taxable income of \$137,179
5 based on the sum of income appellant reported on her return (\$2,311) plus the additional wages reported
6 by Visalia Medical Clinic, Inc. (\$134,868 or the total of \$137,179 minus the reported \$2,311).

7 FTB issued its 2005 NPA on October 14, 2008. Appellant timely protested the NPA for
8 the 2005 tax year, and she attended a protest hearing on March 5, 2009. At the hearing, appellant
9 disagreed with the NPA for the 2005 tax year; however, after considering appellant’s arguments, the
10 FTB affirmed its assessment for the 2005 tax year in an NOA issued on March 23, 2009. Appellant then
11 filed this timely appeal.

12 Contentions

13 Appellant

14 Appellant makes the following arguments:

- 15 • The FTB’s assessments are arbitrary and baseless.
- 16 • In her California tax returns and substitute W-2s appellant swore under penalty of
17 perjury that the information provided therein was correct; thus, this Board should
18 accept her sworn evidence and reject the evidence submitted by the FTB.
- 19 • The FTB did not produce actual documents to substantiate the income assessments at
20 issue for each respective tax year (i.e., the FTB is merely relying on *income amounts*
21 allegedly reported by third parties but has not provided actual documents to support
22 those income amounts).
- 23 • None of the FTB's documents are signed by the FTB.
- 24 • Appellant was denied a protest hearing.
- 25 • A protest hearing was not provided because the FTB did not produce the evidence it
26 considered against appellant, and appellant was not given an opportunity to test,
27 explain, or refute such evidence.

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1 The FTB

2 The FTB contends that appellant should not prevail here because appellant has failed to
3 meet her burden of proof in demonstrating any error in the FTB's proposed assessments. The FTB
4 asserts that its use of income information from various sources to estimate appellant's taxable income is
5 a reasonable and rational method of estimating taxable income. The FTB also contends that the late
6 filing penalties were properly imposed and that appellant has not presented evidence of reasonable cause
7 to support abatement of those penalties. Finally, the FTB contends that appellant is maintaining
8 frivolous appeals and requests this Board impose a frivolous appeal penalty for each respective tax year.

9 Applicable Law

10 Proposed Assessments

11 Section 18501 requires every individual subject to the Personal Income Tax to make and
12 file a return with respondent "stating specifically the items of the individual's gross income from all
13 sources and the deductions and credits allowable" Sections 17071 and 17072 define "gross income"
14 and "adjusted gross income" by referring to and incorporating into California law Internal Revenue
15 Code (IRC) sections 61 and 62, respectively. IRC section 61 provides that unless otherwise provided
16 "gross income means all income from whatever source derived," including compensation for services.
17 Income includes any "accession to wealth." (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426,
18 431.) Wages are income. (*Grimes v. Commissioner* (9th Cir. 1986) 806 F.2d 1451, 1453; *Appeal of*
19 *Michael E. Myers*, 2001-SBE-001, May 31, 2004; *Appeals of Fred R. Dauberger, et al.*, 82-SBE-082,
20 Mar. 31, 1982.)⁵ Taxable income is gross income minus allowed deductions. (Rev. & Tax. Code,
21 § 17073; Int.Rev. Code, § 63.)

22 Section 17041 imposes a tax "upon the entire taxable income of every resident of this
23 state" and "upon the entire taxable income of every nonresident or part-year resident which is derived
24 from sources in this state." Section 17014 provides that a "resident" is one who is in California for other
25 than a temporary or transitory purpose.⁵ Section 19087 provides, in pertinent part:

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28 ⁵ Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

1 If any taxpayer fails to file a return, or files a false or fraudulent return with intent
2 to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may
3 require a return or an amended return under penalties of perjury or may make an
estimate of the net income, from any available information, and may propose to
assess the amount of tax, interest, and penalties due.

4 The FTB's initial burden is to show why its assessment is reasonable and rational. (*Todd*
5 *v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers, supra.*) Federal courts and this
6 Board have held that the taxing agency need only introduce some evidence linking the taxpayer with the
7 unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; *Leggett v.*
8 *Commissioner*, T.C. Memo. 2005-185; *Appeal of Michael E. Myers, supra.*)

9 Once the FTB has met its initial burden, the assessment is presumed correct, and
10 appellant has the burden of proving it to be wrong. (*Todd v. McColgan, supra; Appeal of Michael E.*
11 *Myers, supra.*) Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal*
12 *of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,
13 competent, and relevant evidence showing error in the FTB's determinations, they must be upheld.
14 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) Appellant's failure to produce
15 evidence that is within her control gives rise to a presumption that such evidence is unfavorable to her
16 appeals. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

17 Constitutional/Due Process Issues

18 With respect to appellant's arguments here that are either procedural⁶ or constitutional in
19 nature, this Board lacks the authority to decide those issues. In *Appeals of Fred R. Dauberger, et al;*
20 *supra*, the Board held that:

21 [T]he only power that this Board has is to determine the correct amount of an
22 appellant's California personal income tax liability for the appeal years. We
23 have no power to remedy any other real or imagined wrongs that taxpayers
believe they may have suffered at the hands of the Franchise Tax Board.

24 Further, the Board has held that it is precluded from determining the constitutional
25 validity of California statutes, and has an established policy of declining to consider constitutional
26 issues. (Cal. Const., art III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of*
27 _____

28 ⁶ The term "procedural" is used here to refer to appellant's dealings with the FTB during audit and/or protest.

1 *Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992.) In *Bailey*, the Board stated:

2 [D]ue process is satisfied with respect to tax matters so long as an opportunity
3 is given to question the validity of a tax at some stage of the proceedings. It
4 has long been held that more summary proceedings are permitted in the field
of taxation because taxes are the lifeblood of government and their prompt
collection is critical.

5 Late Filing Penalties

6 California imposes a penalty for the failure to file a return on or before the due date,
7 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
8 Code, § 19131.) To establish reasonable cause, the taxpayer “must show that the failure to file timely
9 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as
10 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
11 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

12 Frivolous Appeal Penalties

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

23 Appellant’s arguments have been previously rejected by the Board and courts. (See
24 *Grimes v. Commissioner, supra*; *Appeals of Robert E. Wesley, et al., supra*; *Appeal of Michael E. Myers,*
25 *supra*; *Appeal of Alfons Castillo*, 92-SBE-020, July 30, 1992; *Appeals of Walter R. Bailey, supra*; and
26 *Appeals of Fred R. Dauberger, et al., supra.*)

27 Appellant was notified that the Board may impose frivolous appeal penalties in the NOAs
28 and in a letter from Board staff dated May 22, 2009. As indicated above, this is appellant’s second

1 appeal of this nature.

2 STAFF COMMENTS

3 Appellant appears to argue that the amounts set forth by FTB in the proposed assessments
4 are incorrect. Appellant, however, has not yet produced objective documentary evidence (such as bank
5 statements, verification from her employer, etc.) that the wages information the FTB used is incorrect, or
6 that the partnership/interest/capital gain and other income information reported on appellant's own tax
7 returns is incorrect, for any of the appeal years.

8 Staff notes that in her previous appeal for 2000, appellant included her resume listing her
9 work experience as a pediatric doctor working for Visalia Medical Clinic, Inc. from July 1993 to
10 "present"; further, EDD records continue to show that appellant earned significantly more wages from
11 Visalia Medical Clinic, Inc, throughout the appeal years than the amounts asserted by appellant on her
12 substitute W-2's and returns. Thus far, appellant has not presented any evidence corroborating that she
13 received less wages than those her employer reported to the EDD. Appellant should be prepared to
14 demonstrate at the oral hearing that the FTB's estimates of her income are incorrect. Appellant may
15 wish to also address whether she had reasonable cause for the late filing of her returns.

16 In addition, the parties should be prepared to discuss whether a frivolous appeal penalty
17 should be imposed for this appeal. As discussed above, in appellant's first appeal (for 2000, Case ID.
18 269712), the Board imposed a frivolous appeal penalty against appellant of \$750. Appellant made
19 similar arguments in that appeal as in the instant appeal; i.e., no proper protest hearing was provided by
20 FTB and the FTB did not have sufficient evidence to demonstrate she had wages from the Visalia
21 Medical Clinic. (There, as here, the appeal record contained Integrated Nonfiler Compliance (INC)
22 Program reports showing EDD wages from Visalia Medical Clinic, Inc.). Appellant was notified that
23 the Board may again impose frivolous appeal penalties in this appeal up to \$5,000 in both the NOA's
24 and in a letter from Board staff dated May 22, 2009. It appears from the FTB demand notice for 2000
25 that appellant had an "excellent history" of filing tax returns every year prior to 2000.

26 Pursuant to California Code of Regulations, title 18, section 5523.6, the parties should

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1 provide any additional evidence exhibits to Board Proceedings at least 14 days prior to the oral hearing.⁷

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⁷ Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.