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

10 In the Matter of the Appeals of:

) **HEARING SUMMARY**
) **PERSONAL INCOME TAX APPEALS**
)
) **Case No. 523035**
) **Case No. 527234**
) **Case No. 518961**
) **Case No. 524781**

13 **MICHAEL CALDERON;**
14 **STEVEN ERTELT;**
15 **STEVEN OLMOS; AND**
16 **DEMERIS PARKS**

18 Representing the Parties:

20 For Appellants: Peymon Mottahedeh
21 For Franchise Tax Board: Suzanne L. Small, Tax Counsel III;
22 Mary Yee, Tax Counsel

23 CONSOLIDATED APPEALS

24 These consolidated appeals are made pursuant to section 19045 of the Revenue and
25 Taxation Code (R&TC) from the actions of the Franchise Tax Board (FTB or respondent) on each
26 appellant’s protest of the respective proposed assessment set forth in the exhibits below.

28 **QUESTIONS:** (1) Whether appellant has demonstrated error in his or her respective tax assessment.

1 (2) If a notice and demand penalty (demand penalty) and/or a late filing penalty was
2 imposed by the FTB in a particular appeal, whether there is reasonable cause for
3 appellant's failure to file upon the FTB's demand and/or failure to file a timely
4 return.

5 (3) If a filing enforcement fee was imposed by the FTB in a particular appeal,
6 whether we can grant relief from the filing enforcement fee.

7 (4) Whether the Board should impose a frivolous appeal penalty on a particular
8 appellant.

9 HEARING SUMMARY

10 Background

11 The facts for each appellant are set forth in a respective exhibit, all of which are attached
12 at the end of this Hearing Summary.

13 Contentions

14 Appellants

15 Each appellant sets forth the following contentions in his/her respective appeal:

- 16 • The FTB's assessment is arbitrary and baseless;
- 17 • Appellant was denied a protest hearing;
- 18 • A protest hearing was not provided because the FTB did not produce the evidence
19 it considered against appellant, and appellant was not given an opportunity to test,
20 explain, or refute such evidence; and
- 21 • The FTB violated the Information Practices Act (IPA) (Cal. Civ. Code, §§ 1798 et
22 seq.).¹

23 The FTB

24 In each respective appeal, the FTB contends that appellant should not prevail because
25 appellant failed to meet his/her burden of proof in demonstrating any error in the FTB proposed
26 assessment. The FTB also disputes each individual contention. In response to the claim that an
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28 ¹ In his reply brief, appellant Steven Olmos withdrew his IPA argument.

1 appellant was denied a protest hearing, the FTB contends that it was appellant's failure to appear that
2 resulted in appellant not presenting his/her arguments at the protest hearing for the matter. The FTB
3 also rejects appellant's claim that the proposed assessment is arbitrary and without factual foundation.
4 The FTB asserts that its use of information from various sources to estimate appellant's taxable income,
5 when appellant failed to file his/her own return, is a reasonable and rational method of estimating
6 taxable income. The FTB also rejects the claim that it violated the IPA by withholding documents from
7 an appellant, and the FTB asserts that the IPA does not apply to a determination of tax liability under the
8 Personal Income Tax Law. In addition, the FTB asserts that the Board has an established policy of
9 declining to decide constitutional/due process issues.

10 Next, the FTB contends that the late filing penalty and/or the demand penalty (if assessed
11 by the FTB in a particular case) were properly imposed and appellant has not presented evidence of
12 reasonable cause to support the abatement of those penalties. In addition, the FTB asserts that in each
13 case where the FTB assessed a filing enforcement fee, there is no language in the statutes that will
14 excuse the filing enforcement fee.

15 Finally, the FTB apparently asserts that (i) each appellant is maintaining a frivolous
16 appeal, and (i) the Board should impose a frivolous appeal penalty on each appellant.

17 Applicable Law

18 Proposed Assessment(s)

19 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every resident
20 of this state . . .” and upon the entire taxable income of every nonresident or part-year resident which is
21 derived from sources in this state.² R&TC section 18501 requires every individual subject to the
22 Personal Income Tax to make and file a return with the FTB “stating specifically the items of the
23 individual's gross income from all sources and the deductions and credits allowable” R&TC
24 section 19087, subdivision (a), provides:

25 If any taxpayer fails to file a return, or files a false or fraudulent return with intent to
26 evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a
return or an amended return under penalties of perjury or may make an estimate of the net

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28 ² It appears undisputed that each appellant resided in California during 2007—the respective tax year at issue for each appellant in this consolidated appeal.

1 income, from any available information, and may propose to assess the amount of tax,
2 interest, and penalties due.

3 In *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313, the court
4 stated that when a taxpayer fails to report any income, the FTB may reconstruct the taxpayer's income
5 based on statistics and the "evidentiary foundation necessary for the presumption of correctness to
6 attach is minimal."

7 If the FTB makes a tax assessment based on an estimate of income, the FTB's initial
8 burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89
9 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)³ Federal courts have held
10 that the taxing agency need only introduce some evidence linking the taxpayer with the unreported
11 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) The FTB's use of information from
12 various sources to estimate an appellant's taxable income, when the appellant failed to file his/her own
13 return, is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal*
14 *Revenue Service, supra*; *Andrews v. Commissioner*, T.C. Memo 1998-316; *Giddio v. Commissioner*,
15 (1970) 54 T.C. 1530, 1533; *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of R. and*
16 *Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

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

25 Information Practices Act

26 Arguments relating to the application of the IPA are not within the Board's jurisdiction.
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28 ³ Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

1 In the *Appeals of Fred R. Dauberger, et al.*, (82-SBE-082), decided on March 31, 1982, this Board
2 stated that “the only power that this Board has is to determine the correct amount of an appellant’s
3 California personal income tax liability for the appeal years.” The above-quoted language was a direct
4 response to similar arguments raised by each appellant. (See also *Appeals of Robert E. Wesley, et al.*,
5 2005-SBE-002, Nov. 15, 2005.)

6 In *Bates v. Franchise Tax Board* (2004) 124 Cal.App.4th 367, the court discussed
7 whether alleged IPA violations could be used to defeat a proposed tax assessment. The *Bates* court held
8 that the R&TC provisions governing the estimation of income for persons who do not file tax returns,
9 and the related provisions for the assessment and collection of taxes, are not superseded by the IPA.
10 (See also *Appeals of Robert E. Wesley, et al., supra.*)

11 Constitutional/Due Process Issues

12 The Board is precluded from determining the constitutional validity of California statutes,
13 and has an established policy of declining to consider constitutional issues. (Cal. Const., art III, § 3.5;
14 *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter R. Bailey, supra.*) In *Bailey*,
15 *supra*, the Board stated:

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

19 Late Filing Penalties

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

26 Demand Penalties

27 California imposes a penalty for the failure to file a return or to provide information upon
28 the FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the

1 demand. (Rev. & Tax. Code, § 19133.) The burden is on the taxpayer to prove that reasonable cause
2 prevented him/her from responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009,
3 Jan. 3, 1983.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current
4 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,
5 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for
6 Tax Return at any time during the four-taxable-years preceding the year for which the current Demand
7 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

8 Filing Enforcement Fees

9 R&TC section 19254 authorizes the imposition of a filing enforcement fee when the FTB
10 mails notice to a taxpayer that the continued failure to file a return may result in the imposition of the
11 fee. Once the fee is properly imposed, there is no language in the statute that excuses the fee under any
12 circumstances, including for reasonable cause. (See *Appeal of Michael E. Myers, supra.*)

13 Frivolous Appeal Penalties

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

24 Each appellant was notified that the Board may impose a frivolous appeal penalty in the
25 respective Notice of Action (NOA) that was issued to that appellant and/or in a letter from Board
26 Proceedings.

27 STAFF COMMENTS

28 The parties should be prepared to discuss whether the applicable assessment was

1 reasonable and rational and whether the applicable appellant has demonstrated a basis for abatement of
2 penalties and/or fees.

3 If a demand penalty was assessed in a particular case, the FTB should be prepared to
4 show that the particular appellant failed to timely respond to a Request for Tax Return or a Demand for
5 Tax Return during the four-taxable-years preceding the year for which the current Demand for Tax
6 Return was issued, and FTB subsequently issued an NPA for that preceding year. (Cal. Code Regs., tit.
7 18, § 19133, subd. (b).) Appeals Division staff (staff) notes that these requirements were apparently met
8 in each of the appeals at issue in this consolidated appeal.

9 Pursuant to California Code of Regulations, title 18, section 5523.6, if a party wants to
10 provide additional evidence to the Board, that party should submit the additional evidence to the Board
11 Proceedings Division at least 14 days prior to the oral hearing.⁴

12 Based on the facts and circumstances, including the frivolous nature of the arguments
13 presented by each appellant and the appeal and compliance history of each appellant (as set forth in the
14 exhibits), staff suggests that the parties may wish to discuss whether the imposition of frivolous appeal
15 penalties in the following amounts would be appropriate:

- 16 • **Michael Calderon, Case No. 523035, penalty \$750**
- 17 • **Steven Ertelt, Case No. 527234, penalty \$750**
- 18 • **Steven Olmos, Case No. 518961, penalty \$5,000**
- 19 • **Demeris Parks, Case No. 524781, penalty \$2,500**

20 Attachments: Exhibits 1-4.

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24 Calderon, et al._wjs

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28 ⁴ 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.

Exhibit 1 – Michael Calderon, Case No. 523035

Assessment: A proposed assessment in the amount of \$1,494.00 in tax, a \$373.50 late filing penalty, and a \$373.50 demand penalty for 2007.

Facts: Appellant has not filed a 2007 California income tax return. Having received information from reporting sources that appellant received sufficient income to trigger the filing requirement,⁵ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued a Notice of Proposed Assessment (NPA) on June 2, 2009. Appellant timely protested the NPA but failed to attend the October 27, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on January 6, 2010. Appellant then filed this timely appeal.

Filing History: This is appellant's first appeal of this nature. Appellant had filed a prior appeal (case no. 509356) for the 2007 tax year (the same tax year at issue in this current appeal), but the FTB withdrew its assessment for that appeal before this Board made a decision. According to the FTB, appellant has not filed a valid California income tax return for any tax year. Also, the FTB states that (i) it issued a demand to appellant for the 2006 tax year, (ii) appellant did not file an appeal for the 2006 tax year with this Board, and (iii) the 2006 liability is final and was fully paid.

⁵ For 2007, appellant's estimated income of \$43,509.35 is based on the following: (i) the FTB ascribed business income of \$28,669.35 to appellant based on his active sales permit from appellant's Board of Equalization sales tax return, which the FTB adjusted by the California Consumer Price Index percentage change for 2007 for appellant's type of business under Standard Industry Code (SIC) 7699 (i.e., "Repair Shops & Related Services, Not Elsewhere Classified."), (ii) a federal Form 1099 showing appellant received income of \$13,990.00 from St. John Bosco High School, and (iii) a federal Form 1099 showing appellant received income of \$850.00 from Noroo Mitsubishi.

Exhibit 2 – Steven Ertelt, Case No. 527234

Assessment: A proposed assessment in the amount of \$4,472 in tax, a \$1,118 late filing penalty, a \$1,118 demand penalty, and a \$119 filing enforcement fee for 2007.

Facts: Appellant has not filed a 2007 California income tax return. Having received information from the Employment Development Department (EDD) that appellant received sufficient income to trigger the filing requirement,⁶ the FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on May 18, 2009. Appellant timely protested the NPA but failed to attend the November 17, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on February 8, 2010. Appellant then filed this timely appeal.

Filing History: This appeal (for 2007, case no. 527234, filed on or about March 15, 2010) is appellant's first appeal of this nature. His second appeal (for 2006, case no. 547169, filed on August 16, 2010) has not yet been decided by the Board. According to the FTB, its records "do not indicate any California income tax return filed by appellant." A demand penalty was imposed for 2006.

⁶ For 2007, appellant's estimated income of \$76,260 is based on EDD records, which show that appellant received \$76,260 in income from Phillips Silage Harvesting Inc.

Exhibit 3 – Steven Olmos, Case No. 518961

Assessment: A proposed assessment in the amount of \$6,267.00 in tax, a \$1,566.75 late filing penalty, and a \$1,566.75 demand penalty for 2007.

Facts: Appellant has not filed a 2007 California income tax return. Through its Integrated Non-Filer Compliance (INC) Program, the FTB obtained information from a federal form 1098 that appellant paid mortgage interest of \$30,675 to Saxon Mortgage Services in 2007, which indicated income sufficient to trigger the filing requirement.⁷ The FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return nor demonstrated why a return was not required, the FTB issued an NPA on April 7, 2009, based on the information received on the federal Form 1098. Appellant timely protested the NPA but failed to attend the August 27, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an NOA issued on November 12, 2009. Appellant then filed this timely appeal.

Filing History: This is appellant’s fourth appeal of this nature. In his first appeal (for 2002, case no. 311772), the Board found against appellant and imposed a frivolous appeal penalty of \$750. Appellant then filed a petition for rehearing, which was denied. In his second appeal (for 2003, case no. 342009), the Board found against appellant and imposed a frivolous appeal penalty of \$1,500. Appellant filed a petition for rehearing, which was denied. In his third appeal (for 2004, case no. 441632), the Board found against appellant and imposed a frivolous appeal penalty of \$5,000. Appellant filed a petition for rehearing, which was denied. Appellant also filed an appeal for 2005 (case no. 469788), but the FTB withdrew its assessment before a decision was made by this Board. According to the FTB, its records “do not reflect any California income tax return filed by the appellant for any tax year.” Demand penalties were issued for the 2002, 2003, and 2004 tax years.

⁷ For 2007, the FTB estimated appellant’s income to be \$122,700 by multiplying the amount of mortgage interest by four (\$30,675 x 4). This calculation is the industry standard, which represents the minimum amount of income an individual would need to qualify for the mortgage.

Exhibit 4 – Demeris Parks, Case No. 524781

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2 Assessment: A proposed assessment in the amount of \$4,166.00 in tax, a \$1,041.50 late
3 filing penalty, a \$1,041.50 demand penalty, and a \$113.00 filing enforcement fee for 2007.

4 Facts: Appellant has not filed a 2007 California income tax return. Having received
5 information from various sources that appellant received sufficient income to trigger the filing
6 requirement,⁸ the FTB issued a notice demanding that appellant file a return or explain why no return
7 was required. When appellant neither filed a return nor demonstrated why a return was not required, the
8 FTB issued an NPA on July 27, 2009. Appellant timely protested the NPA but failed to attend the
9 December 29, 2009 protest hearing conducted by the FTB. The FTB later affirmed its assessment in an
10 NOA issued on January 25, 2010. Appellant then filed this timely appeal.

11 Filing History: This is appellant’s second appeal of this nature. In his first appeal (for
12 2004 and 2006, case nos. 476896 and 482907), the Board found against appellant and imposed frivolous
13 appeal penalties of \$375 for 2004 and \$375 for 2006. Appellant also filed an appeal for 2005 (case no.
14 462015), which was dismissed when appellant failed to supplement his appeal. According to the FTB,
15 its records “do not show any California income tax return filed by the appellant.” Demand penalties
16 were issued and imposed for 2004 and 2006.

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28 ⁸ For 2007, appellant’s estimated income of \$72,877 is based on federal Form 1099s, which show that appellant received
\$72,810 in income from Kern County Supt. of Schools; \$49 in interest income from ASC, a Division of Wells Fargo Bank,
NA; and \$18 in interest income from Washington Mutual Bank, F.A.