

1 William J. Stafford
Tax Counsel
2 Board of Equalization, Appeals Division
450 N Street, MIC: 85
3 PO Box 942879
Sacramento CA 95814
4 Tel: (916) 206-0166
Fax: (916) 324-2618
5

6 Attorney for the Appeals Division

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 **GEORGE DANIEL**¹)
13) Case No. 518507

14 Proposed
Assessment

	<u>Year</u>	<u>Tax</u>	<u>Penalties</u> ²
	2007	\$986.00	\$1,269.25

18 Representing the Parties:

19 For Appellant: George Daniel

20 For Franchise Tax Board: Jaclyn N. Appleby, Graduate Legal Assistant

21
22 **QUESTIONS:** (1) Whether appellant has demonstrated error in the underlying tax assessment.
23 (2) Whether appellant has shown reasonable cause for his failure to file a timely
24 return and failure to respond to FTB's demand for his tax return.

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27 ¹ For an address, appellant lists a post office box in Sonoma County, California.

28 ² The penalties consist of a \$246.50 late filing penalty and a \$1,022.75 notice and demand (demand) penalty.

1 (3) Whether the Board should impose a frivolous appeal penalty.³

2 HEARING SUMMARY

3 Background

4 Appellant has not filed a 2007 California income tax return. Having received information
5 from the Employment Development Department (EDD) that appellant received sufficient income to
6 trigger the filing requirement,⁴ the FTB issued a notice dated February 5, 2009, demanding that
7 appellant file a return or explain why no return was required. When appellant neither filed a return nor
8 demonstrated why a return was not required, the FTB issued a Notice of Proposed Assessment (NPA) on
9 April 20, 2009. Appellant timely protested the NPA, and he attended a protest hearing on October 7,
10 2009. The FTB subsequently affirmed its assessment in a Notice of Action (NOA) issued on November
11 10, 2009. Appellant then filed this timely appeal.

12 Contentions

13 Appellant

14 Appellant sets forth the following contentions:

- 15 • The FTB’s assessment is arbitrary and baseless;
- 16 • The NPA and/or NOA are invalid because they were issued without the name and
17 signature of an authorized agent or employee;
- 18 • Appellant is not a “taxpayer” and he never had any “income”;
- 19 • The FTB has shown no admissible evidence that 3M company is an “employer,” nor
20 any evidence that appellant received “wages.”
- 21 • The FTB has provided no proof that appellant is an “individual” subject to tax;
- 22 • The FTB violated appellant’s constitutional and due process rights;
- 23 • Appellant is assessing \$150,000 against FTB composed of a \$75,000 fee for the
24 “unsubstantiated” NPA and \$75,000 for the “unsubstantiated claims and dishonor
25

26 ³ This is appellant’s first appeal of this nature. According to the FTB, appellant has not filed a timely California income tax
27 return since the 1992 tax year.

28 ⁴ For 2007, appellant’s estimated income of \$72,089 is based on EDD records, which show that appellant received \$72,089 in
wages from 3M Company.

1 made during the [protest] Hearing”; and

- 2 • A protest hearing was not provided because the FTB did not produce the evidence it
3 considered against appellant, and appellant was not given an opportunity to test,
4 explain, or refute such evidence. In this respect, appellant might also be making
5 arguments based on the Information Practices Act (IPA) (Cal. Civ. Code, §§ 1798 et
6 seq.).

7 The FTB

8 The FTB contends that appellant should not prevail here because appellant has failed to
9 meet his burden of proof in demonstrating any error in the FTB’s proposed assessment. The FTB also
10 disputes each individual contention. The FTB rejects appellant’s claim that the proposed assessment is
11 arbitrary and without factual foundation. The FTB asserts that its use of information from the EDD to
12 estimate appellant’s taxable income, when appellant failed to file his own return, is a reasonable and
13 rational method of estimating taxable income. In addition, the FTB asserts that the Board has an
14 established policy of declining to decide constitutional/due process issues.

15 Next, the FTB contends that the late filing penalty and the demand penalty were properly
16 imposed and that appellant has not presented evidence of reasonable cause to support abatement of those
17 penalties.⁵ In addition, the FTB contends that appellant is maintaining a frivolous appeal and requests
18 the Board impose a frivolous appeal penalty.

19 Applicable Law

20 Proposed Assessment

21 Revenue and Taxation Code (R&TC) section 17041 imposes a tax “. . . upon the entire
22 taxable income of every resident of this state . . .” and upon the entire taxable income of every
23 nonresident or part-year resident which is derived from sources in this state.⁶ R&TC section 18501
24 requires every individual subject to the Personal Income Tax to make and file a return with the FTB

25 _____
26 ⁵ In its Opening Brief, the FTB states that it “issued demands for tax returns and filing enforcement Notices of Proposed
27 Assessments to appellant for the 2005 and 2006 taxable years on March 19, 2007 and April 14, 2008, respectively.” As such,
28 the FTB states that the requirements in California Code of Regulations, title 18, section 19133, subdivision (b), for imposition
of the demand penalty were met.

⁶ Appellant does not allege that he was a resident of any other state or country in 2007.

1 “stating specifically the items of the individual’s gross income from all sources and the deductions and
2 credits allowable”

3 R&TC section 19087, subdivision (a), provides:

4 If any taxpayer fails to file a return, or files a false or fraudulent return with intent to
5 evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a
6 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.

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.)⁷ Federal courts have
10 held 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 income
12 information from the EDD to estimate a taxpayer’s taxable income, when a taxpayer fails to file a return,
13 is a reasonable and rational method of estimating taxable income. (See *Appeals of Walter R. Bailey*, 92-
14 SBE-001, Feb. 20, 1992; *Appeals of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

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

23 Information Practices Act

24 IPA arguments are not within the Board’s jurisdiction. In the *Appeals of Fred R.*
25 *Dauberger et. al.* (82-SBE-082), decided on March 31, 1982, the Board stated that “the only power that
26 this Board has is to determine the correct amount of an appellant’s California personal income tax
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28 ⁷ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 liability for the appeal years.” (See also *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15,
2 2005.) In *Bates v. Franchise Tax Board* (2004) 124 Cal.App.4th 367, the court discussed whether
3 alleged IPA violations could be used to defeat a proposed tax assessment. The *Bates* court held that the
4 R&TC provisions governing the estimation of income for persons who do not file tax returns, and the
5 related provisions for the assessment and collection of taxes, are not superseded by the IPA. (See also
6 *Appeals of Robert E. Wesley, et al., supra.*)

7 Constitutional/Due Process Issues

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

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

15 Late Filing Penalty

16 California imposes a penalty for failure to file a return by its due date, unless the failure
17 to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.) To
18 establish reasonable cause, a taxpayer “must show that the failure to file timely returns occurred despite
19 the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary
20 intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard*
21 *G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Ignorance of a filing requirement or a misunderstanding
22 of the law generally does not excuse a late filing. (*Appeal of Diebold, Incorporated*, 83-SBE-002, Jan.
23 3, 1983.)

24 Demand Penalty

25 California imposes a penalty for the failure to file a return or provide information upon
26 the FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the
27 request. (Rev. & Tax. Code, § 19133.) The burden is on the taxpayer to prove that reasonable cause
28 prevented him from responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan.

1 3, 1983.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current
2 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,
3 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for
4 Tax Return at any time during the four-taxable-years preceding the year for which the current Demand
5 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)⁸

6 Frivolous Appeal Penalty

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

17 STAFF COMMENTS

18 Proposed Assessment

19 Appellant appears to argue that the amount set forth by FTB in the proposed assessment
20 is arbitrary and baseless. Appellant, however, has not yet produced objective documentary evidence
21 (such as verifications from his employer, etc.) that the wage information the FTB used is incorrect. As
22 noted above, unsupported assertions are not sufficient to carry appellant's burden of proof. (*Appeal of*
23 *Aaron and Eloise Magidow, supra.*) Pursuant to California Code of Regulations, title 18, section
24 5523.6, if either party wants to provide additional evidence to the Board, that party should submit the
25 additional evidence to Board Proceedings at least 14 days prior to the oral hearing in this matter.⁹
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27 ⁸ Regulation 19133 became operative on December 23, 2004.

28 ⁹ 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.

1 Information Practices Act/Constitutional and Due Process Issues

2 As noted above, IPA arguments are not within the Board's jurisdiction. (*Appeals of Fred*
3 *R. Dauberger et. al., supra.*) In addition, the Board is precluded from determining the constitutional
4 validity of California statutes, and has an established policy of declining to consider constitutional
5 issues. (Cal. Const., art III, § 3.5; *Appeal of Aimor Corp., supra*; *Appeals of Walter R. Bailey, supra.*)

6 Late Filing and Demand Penalties

7 At the oral hearing, the parties should be prepared to discuss whether appellant has
8 shown reasonable cause for relief from the late filing penalty and the demand penalty. As noted above,
9 the FTB states that, in the four taxable years preceding the appeal year, it issued demands for tax returns,
10 to which appellant did not reply, and issued NPAs to appellant for the 2005 and 2006 taxable years on
11 March 19, 2007, and April 14, 2008, respectively. As such, it appears that the demand penalty was
12 properly imposed.

13 Frivolous Appeal Penalty

14 The parties should be prepared to discuss whether a frivolous appeal penalty should be
15 imposed for this appeal. As indicated above, this is appellant's first appeal. Appellant was notified that
16 the Board may impose a frivolous appeal penalty in the NOA and in a letter from Board staff dated
17 January 5, 2010. According to the FTB, appellant has not filed a timely California income tax return
18 since the 1992 tax year.

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