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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

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10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **REGINALD D. DAVIS AND**) Case No. 534788
13 **REBECCA J. JOSLIN-DAVIS**)
14 _____)

	<u>Year</u>	<u>Late Filing Penalty</u>	<u>Demand Penalty</u>
	2006	\$100.00	\$16,717.25

17 Representing the Parties:

19 For Appellants: Randall Salter, Attorney
20 For Franchise Tax Board: Amanda F. Vassigh, Tax Counsel III

22 QUESTIONS: (1) Whether the Board has jurisdiction to hear this appeal;
23 (2) Whether appellants have demonstrated reasonable cause for the abatement of the
24 demand penalty; and
25 (3) Whether appellants have demonstrated reasonable cause for the abatement of the late
26 filing penalty (also known as the delinquent return penalty).

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1 HEARING SUMMARY

2 Background

3 Appellants did not file a California income tax return for 2006 until on or about
4 September 15, 2008. Prior to receiving that return, the Franchise Tax Board (FTB) received information
5 indicating that appellant-husband had received sufficient income to create a filing obligation.
6 Consequently, the FTB mailed appellant-husband a Demand for Tax Return on February 19, 2008. As
7 no response was received by the FTB's deadline of March 26, 2008, the FTB issued a Notice of
8 Proposed Assessment (NPA) on April 21, 2008. The NPA proposed to assess additional tax in the
9 amount of \$19,321.00, a late filing penalty of \$4,830.25, a demand penalty of \$21,490.75, a filing
10 enforcement cost recovery fee of \$122.00, and interest of \$2,038.19.¹ The NPA stated that the total
11 assessment of \$47,802.19 was due on June 30, 2008 and that appellant-husband must file a California
12 income tax return, if he had a filing requirement, even if he paid the amount assessed by the NPA.

13 On their 2006 tax return, appellants reported taxable income of \$764,799, a total tax
14 liability of \$66,869, tax withholding of \$66,642, and a balance due of \$227 (which was paid with their
15 return).² The FTB apparently accepted the return as filed, adjusted the penalties accordingly, and then
16 billed appellants for the unpaid interest, penalties, and fees.³ When there was no response to the billing
17 notices, the FTB issued a Tax Lien Notice that summarized the balance due. Appellants then made
18 several payments and the FTB applied overpayments from tax years 2007 and 2008 to satisfy the
19 balance due.

20 Appellants then filed a claim for refund, which the FTB denied. It is not clear when the
21 denial of the claim for refund was issued. The parties' assertions concerning this date are included

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23 ¹ The NPA was issued based upon income information relating to appellant-husband. The FTB determined that appellant-
24 husband had taxable income totaling \$947,217.78 for the year, including appellant-husband's wage income of \$769,879 from
25 Yahoo Inc. (FTB Brief, Exhibit B.)

26 ² According to the FTB, the reported balance due was \$227 and a payment for \$227 was remitted with appellants' 2006 tax
27 return. (FTB Brief, p. 2; Exhibit C; Exhibit E.) Appellants stated that the balance due was \$277 and a payment for \$277 was
28 remitted with their tax return. (Appeal Letter, p. 2; Appellants' Opening Brief, pp. 2, 4, 5, 6, 8; Exhibit A.) Appellants later
refer to the "\$227 tax liability" (Appellants' Reply Brief, p. 2), implying agreement with the FTB's figure. Appellants have
not filed a claim for refund for this payment and the actual payment amount is not an issue in this appeal.

³ The FTB revised the demand penalty to \$16,717.25 (25 percent of the \$66,869 total tax liability) and the late filing penalty
to \$100 (the lesser of \$100 or 100 percent of the \$227 tax due).

1 below in the Contentions section of this Hearing Summary. On May 7, 2010, appellants filed an appeal
2 of the FTB's denial of their claim for refund.

3 Contentions

4 Appellants

5 According to appellants, the FTB's letter denying their claim for refund was dated
6 April 26, 2010 and it instructed them to mail their appeal to the Board of Equalization by April 20, 2010.
7 (App. Opening Br., Exhibit B.) Appellants' representative states that appellants were told in a
8 January 27, 2010 telephone conversation that their claim for refund had been denied on January 20,
9 2010, but appellants received no such written notice. After several follow-up calls to obtain the denial
10 letter, appellants' representative asserts that, on April 29, 2010, they received a denial letter dated
11 April 26, 2010, instructing them to mail their appeal to the Board of Equalization by April 20, 2010.
12 (App. Opening Br., Exhibit B.)⁴

13 With regard to penalty abatement, appellants assert that they have a good record of filing
14 timely returns and paying taxes on time for twenty years, with the exception of 2006. They assert that
15 their tax debt for 2006 arose due to circumstances that were beyond their control. Appellant-husband
16 was working in Southern California and living in hotels, while appellant-wife and their young children
17 were living in the family home in Northern California. This caused logistical problems that prevented
18 the timely filing of the 2006 tax return. In addition, appellant-wife was suffering from debilitating
19 depression after the death of her friend in September 2005. This depression, for which she received no
20 treatment or counseling, affected her ability to file a timely tax return. Appellants also assert that the
21 late filing penalty and demand penalty were based on the FTB's initial proposed assessment and that
22 these penalties were not properly reduced when the FTB received appellant's 2006 tax return and their
23 payment of the balance due.

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27 ⁴ In addition, the file includes an unsigned letter dated January 29, 2010 (which is included as the first document in the appeal
28 file behind the tab for appellants' Appeal Letter), containing the same text as the FTB's denial letter dated April 26, 2010
(which is included as Exhibit B to Appellants' Opening Brief), but the January 29, 2010 letter does not appear on FTB
stationery and does not reference the FTB on its face or provide a return telephone number or address. It is not clear to staff
whether or when this January 29, 2010 letter was sent.

1 Respondent

2 According to the FTB, appellants' claim for refund was denied on January 29, 2010.
3 Appellants' representative contacted the FTB in April 2010 to request a copy of the denial letter and the
4 FTB provided a printed copy of the denial letter "on which the date of the letter and due date [for an
5 appeal] were inadvertently modified." (FTB Brief, p. 2.) The FTB does not contest the Board's
6 jurisdiction to hear this appeal. (FTB Brief, p. 3.)

7 With regard to the late filing penalty, the FTB asserts that the penalty of \$100 was
8 properly imposed and appellants have not shown reasonable cause for the abatement of the penalty. The
9 FTB states that appellants filed late returns in 2004 and 2005 as well as 2006. The FTB asserts that
10 "appellants chose this living arrangement to accommodate appellant-husband's work responsibilities in
11 Southern California and are responsible for any consequences resulting from this choice. A taxpayer's
12 inability to file a timely return because of the press of business affairs or work pressures is not
13 reasonable cause." (FTB Brief, p. 4.) The FTB also notes that appellants were reunited in June 2007
14 (four months before the extended due date of the 2006 tax return), but they did not have their tax return
15 prepared by a professional until August 2008. According to the FTB, appellants have not presented
16 evidence of appellant-wife's mental illness or its severity. Furthermore, the FTB asserts that reasonable
17 cause for penalty abatement requires evidence that both spouses were unable to file a timely return, not
18 just one of the spouses. (FTB Brief, p. 4.)

19 With regard to the demand penalty, the FTB asserts that the penalty of \$16,717.25 was
20 properly calculated and properly imposed, particularly because appellants failed to respond in a timely
21 manner to the Demand for Tax Return for the 2005 tax year. Because appellants' family had been
22 reunited in June of 2007, appellant's separate living arrangements were no longer an issue when the
23 Demand for Tax Return for 2006 was issued on February 19, 2008. Even if appellants were to
24 demonstrate that appellant-wife's depression prevented her from responding to the demand letter, the
25 FTB asserts that this would not constitute reasonable cause for penalty abatement because appellant-
26 husband could have responded to the letter. The FTB argues that appellant-husband "was able to
27 manage his business affairs and earn a sizeable income" during the period when the demand letter was
28 issued, so no reasonable cause has been shown for his failure to respond to the demand letter. (FTB

1 Brief, pp. 6-7.)

2 Applicable Law

3 Burden of Proof

4 The FTB's determination is presumed correct and an appellant has the burden of proving
5 it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,
6 2001-SBE-001, May 31, 2001.)⁵ In the absence of uncontradicted, credible, competent, and relevant
7 evidence showing an error in the FTB's determinations, respondent's proposed assessments must be
8 upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

9 Deadline for the Filing of Appeals

10 California Revenue and Taxation Code (R&TC) section 19324, subdivision (a), provides
11 that the FTB's denial of a claim for refund becomes final unless the taxpayer files an appeal with the
12 Board of Equalization within 90 days, as determined by the date the FTB denial letter is mailed. Once
13 the denial of a claim for refund becomes final, the matter can no longer be appealed to the Board.

14 The date that an appeal is considered filed is determined by the postmark date if the
15 document is mailed, the date of delivery to a "delivery service" (as defined in California Code of
16 Regulations, title 18, section 5511, subdivision (k)) if the taxpayer uses a delivery service, or the date of
17 receipt if the document is sent by facsimile or email. (Cal. Code Regs., title 18, § 5422, subd. (c).) The
18 filing deadline is extended by an additional five days when the FTB's notice is mailed to an address
19 within California or an additional ten days when the notice is mailed to an address elsewhere in the
20 United States. (Cal. Code Regs., title 18, § 5422, subd. (b).)

21 Demand Penalty

22 R&TC section 19133 imposes a penalty of 25 percent of the tax when a taxpayer fails to
23 furnish information or a valid tax return that is requested in writing by the FTB.⁶ The penalty does not
24 apply if it is shown that the failure to furnish the information or valid tax return is due to reasonable
25 cause and not due to willful neglect. The burden is on the taxpayer to prove that reasonable cause
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27 ⁵ Published decisions of the Board, such as *Appeal of Michael E. Myers, supra*, are generally available on the Board's
28 website: www.boe.ca.gov.

⁶ This penalty is commonly known as the Demand Penalty, the Notice and Demand Penalty, or the Failure to Furnish Penalty.

1 prevented him from responding to the notice and demand. (*Appeal of Howard G. and Mary Tons*, 79-
2 SBE-027, Jan. 9, 1979.) To overcome the presumption that the penalty was correctly imposed by the
3 FTB, the taxpayer must provide credible and competent evidence to support the claim of reasonable
4 cause; otherwise, the penalty will not be abated. (*Appeal of Winston R. Schwyhart*, 75-SBE-035,
5 Apr. 22, 1975.) To establish reasonable cause, a taxpayer must demonstrate that he exercised ordinary
6 business care and prudence. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.)

7 The FTB does not impose this penalty unless the taxpayer has not only failed to timely
8 respond to a current Demand for Tax Return, but also failed to timely respond to another Demand for
9 Tax Return during the previous four tax years. (Cal. Code Regs., title 18, § 19133, subd. (b).)

10 Late Filing Penalty

11 R&TC section 19131 imposes a penalty when a taxpayer fails to file a return on or before
12 the due date of the return, or the due date as extended by the Franchise Tax Board, unless it is shown
13 that the failure is due to reasonable cause and not due to willful neglect.⁷ The penalty is specified as 5
14 percent of the tax due for each month that a valid tax return is not filed after it is due, not to exceed 25
15 percent of the tax. The minimum amount of the penalty is \$100 or 100 percent of the outstanding tax
16 liability. Unlike the demand penalty, the late filing penalty is based on a taxpayer's outstanding tax
17 liability, not the taxpayer's total tax liability.

18 To establish reasonable cause for penalty abatement, the taxpayer "must show that the
19 failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that
20 cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under
21 similar circumstances." (*Appeal of Howard G. and Mary Tons, supra.*) The burden is on the taxpayer to
22 prove that the difficulties experienced prevented him from filing a timely return. (*Appeal of Kerry and*
23 *Cheryl James*, 83-SBE-009, Jan. 3, 1983.)

24 STAFF COMMENTS

25 Appellants argue that the Board has jurisdiction to hear this appeal, and the FTB does not
26 contest the Board's jurisdiction to hear this matter. Staff notes that the Board's jurisdiction is a statutory
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28 ⁷ This penalty is commonly known as the Late Filing Penalty or the Delinquent Return Penalty.

