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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **ALFRED DING AND JOCELYN DING¹**) Case No. 592135
13)

14 Year Claim
15 2009 For Refund
16 \$26,742.50²

16 Representing the Parties:

17 For Appellants: R. Ryan Shain, Esq.
18 For Franchise Tax Board: Anne Mazur, Specialist

20 QUESTION: Whether appellants have shown reasonable cause for a refund of a late filing penalty.

21 HEARING SUMMARY

22 Background

23 Appellants did not file a 2009 California income tax return by the original due date of
24 April 15, 2010, or by the extended due date of October 15, 2010. (FTB opening brief (FTB OB), p. 1.)

26 ¹ Appellants currently reside in San Mateo County, California.

27 ² Although appellants' appeal letter lists a claim for refund amount of \$33,771.08, appellants' reply brief dated
28 November 19, 2012, clarifies that the only amount still in dispute (and for which appellants are seeking a refund) is \$26,742.50, which represents a late filing penalty.

1 Later, appellants filed a joint 2009 California return late on January 27, 2011. (*Id.*) Appellants filed
2 their return at the Franchise Tax Board's (FTB or respondent) Bay Area office.³ Appellants' return
3 reported, among other things, a California taxable income of \$3,337,694. (*Id.*, Ex. A.) The FTB
4 accepted appellants' return as filed and imposed, among other things, a late filing penalty of
5 \$26,742.50. (*Id.*, pp. 1-2.) Appellants paid all of the sums due (i.e., taxes, penalties, and interest)⁴ at
6 the time they filed their return. (*Id.*, p. 2.)

7 *Claim for Refund*

8 Subsequently, appellants filed a timely claim for refund dated March 3, 2011, asserting,
9 among other things, that the late filing penalty should be abated on the basis of reasonable cause.
10 (Appeal Letter (AL), Ex. H.) In their claim for refund, appellants asserted that (i) they filed their 2009
11 state and federal returns online using Turbo Tax, (ii) they had a reasonable belief that their 2009 state
12 and federal returns had been submitted properly to the FTB and the Internal Revenue Service (IRS)
13 respectively, as appellants had successfully utilized Turbo Tax to submit their returns online in
14 previous tax years, (iii) at the time they filed their returns, they elected to pay the balances due by direct
15 deposit and they submitted their bank account and routing information via Turbo Tax, (iv) they did not
16 receive any notice from Turbo Tax that any transmission errors occurred when they directed the Turbo
17 Tax online interface to submit their 2009 state and federal returns, and any such transmission errors
18 were not reasonably foreseeable by appellants, (v) not until they received a notice dated December 27,
19 2010, from the IRS did they realize that (A) their state and federal returns had not been filed, and (B)
20 their tax payments had not been debited from their bank account, (vi) on January 27, 2011 (i.e., less
21 than a month after receiving the IRS's notice), appellant-husband and/or appellant-wife appeared at the
22 FTB's Bay Area office, where appellants submitted their joint 2009 California return, including the
23 payment of all of the amounts allegedly due (i.e., taxes, penalties, and interest), and (vii) their tax
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25 _____
26 ³ The FTB's opening brief states that appellants filed their 2009 California return at the FTB's San Francisco field office.
27 However, appellants' claim for refund and appeal letter state that appellants filed their 2009 California return at the FTB's
28 Oakland field office.

⁴ The FTB also imposed an estimated tax penalty of \$3,588.45, which the FTB later reduced to \$2,225.00. The FTB already
refunded the difference, including interest thereon. As noted in footnote 2 above, the only amount remaining in dispute (and
for which appellants are seeking a refund) is \$26,742.50, which represents the late filing penalty.

1 compliance history is impeccable—specifically, prior to the 2009 tax year, they always complied with
2 their state and federal tax obligations, including promptly paying tax liabilities, and neither the IRS nor
3 the FTB ever previously assessed penalties against appellants. (*Id.*) With their claim for refund,
4 appellants enclosed a printout of the electronic filing instructions that Turbo Tax provided to appellants
5 for the 2009 tax year. (*Id.*) The Turbo Tax electronic filing instructions state, in part:

6 Your California state tax return (Form 540) shows you have elected to pay your balance
7 due of \$107,802.00 by Direct Debit. Your tax payment of \$107,802.00 will be
8 withdrawn from this account: Account Number: [redacted]. Routing Transit Number:
[redacted]. Elected Date of Withdrawal: 04/15/2010. To inquire about the status of your
Direct Debit call the Franchise Tax Board directly at 1-916-845-0353. (AL, Ex. H.)

9 Based on the foregoing contentions and evidence, appellants asserted that their failure to file their 2009
10 California return occurred despite their exercise of ordinary business care, such that they were entitled
11 to, among other things, a refund of the California late filing penalty. (*Id.*) After reviewing the matter,
12 the FTB denied appellants' claim for refund on the basis that appellants had not shown, among other
13 things, reasonable cause for a refund of the late filing penalty. (*Id.*, Ex. N.) In response, appellants
14 filed this timely appeal.

15 Contentions

16 Appellants' Appeal Letter

17 In their appeal letter, appellants reassert the same arguments that they made in their
18 claim for refund. (AL, pp. 1-5 & Ex. H.) In addition, appellants assert that the IRS abated the 2009
19 federal late filing penalty based on the same (or substantially similar) facts. (*Id.*, p. 3.) Specifically,
20 appellants assert that, in a letter dated March 2, 2011, they requested that the IRS abate the 2009 federal
21 late filing penalty on the basis of reasonable cause. (*Id.* & Ex. I.) Appellants contend that, after
22 reviewing the matter, the IRS abated the 2009 federal late filing penalty based on reasonable cause.
23 (*Id.*, p. 3.) In support, appellants provide, among other things, (i) a copy of their March 2, 2011 letter
24 to the IRS, and (ii) a copy of their IRS transcript for the 2009 tax year, which appellants assert shows
25 that the IRS deleted the 2009 federal late filing penalty. (*Id.*, Exs. I & L.) Appellants emphasize the
26 following contentions in their appeal letter:

- 27 ➤ Appellants contend that they had a reasonable belief that their 2009 state and federal returns
28 (and payments) had been filed properly with the FTB and the IRS. (*Id.*, pp. 1-2.) Appellants

1 assert that they have substantial experience successfully utilizing Turbo Tax to prepare and
2 electronically filed their tax returns and that they submitted their 2009 state and federal returns
3 for electronic filing in the same manner as they had previously done for prior tax years. (*Id.*,
4 pp. 2-5.) As such, appellants assert that they legitimately believed that their 2009 California
5 returns had been transmitted successfully to the FTB and the IRS. (*Id.*)

- 6 ➤ Appellants assert that electronic filing instructions received from Turbo Tax contributed to the
7 reasonableness of appellants' misunderstanding. (*Id.*, p. 4 & Ex. H.) Appellants contend that
8 the electronic filing instructions led them to believe that their California return (along with their
9 payment) had been made in a timely manner. (*Id.*, p. 4 & Ex. H.)
- 10 ➤ Appellants assert that they did not receive any notice from Turbo Tax that any transmission
11 errors occurred when they directed the Turbo Tax online interface to submit their 2009 state and
12 federal returns, and any such transmission errors were not reasonably foreseeable by appellants.
13 (*Id.*) Appellants contend that, under the circumstances, an ordinary and intelligent
14 businessperson would have been under the impression that his/her return had been filed. (*Id.*)
- 15 ➤ Appellants assert that, not until they received a notice dated December 27, 2010, from the IRS,
16 did they realize that (i) their 2009 state and federal returns had not been filed, and (ii) their 2009
17 state and federal tax payments had not been debited from their bank account. (*Id.*, Ex. H.)
- 18 ➤ Appellants contend that an equitable analysis of the facts in this appeal favors a refund of the
19 2009 California late filing penalty. (*Id.*, p. 4.) Specifically, appellants contend that, on
20 January 27, 2011 (i.e., less than a month after receiving the IRS's notice), appellants appeared at
21 the FTB's Bay Area office, where appellants submitted their joint 2009 California return,
22 including the payment for all of the amounts allegedly due (i.e., taxes, penalties, and interest).
23 (*Id.*, p. 4 & Ex. H.) In addition, appellants contend that their compliance history is impeccable,
24 arguing that (i) prior to the 2009 tax year, they always complied with their state and federal tax
25 obligations, including promptly paying their tax liabilities, and (ii) neither the IRS nor the FTB
26 ever previously assessed penalties against appellants. (*Id.*, Ex. H.)
- 27 ➤ Appellants assert that the FTB has approved a policy change regarding the imposition of
28 nonfiler penalties, whereby the FTB allegedly will refrain from imposing the 25 percent failure

1 to file penalty on taxpayers that have historically filed their returns on time. (*Id.*, p. 4.)

2 Appellants contend that they are entitled to such relief, as they could not have reasonably
3 anticipated the event that caused their return to not be filed with the FTB. (*Id.*)

- 4 ➤ Appellants contend that, in a letter dated March 2, 2011, they requested that the IRS abate the
5 2009 federal late filing penalty on the basis of reasonable cause. (*Id.*, p. 3 & Ex. I.) Appellants
6 assert that, after reviewing the matter, the IRS abated the federal late filing penalty based on
7 reasonable cause. (*Id.*, p. 3.) In support, appellants provide, among other things, a copy of their
8 IRS transcript for the 2009 tax year, which appellants assert shows that the IRS deleted the 2009
9 federal late filing penalty. (*Id.*, Ex. L.)

10 Appellants' Supplemental Appeal Letter

11 Appellants reassert their argument that the IRS abated the 2009 federal late filing
12 penalty based on the same (or substantially similar) facts that are present in this appeal. (App. Supp.
13 AL, pp. 1-2.) With their supplemental appeal letter, appellants provide an IRS letter dated
14 September 29, 2011. (*Id.*, Ex. attached thereto.) Appellants assert that this letter was issued by the IRS
15 in response to appellants' letter dated March 2, 2011, wherein appellants requested that the IRS abate
16 the 2009 federal late filing penalty on the basis of reasonable cause. (*Id.*, pp. 1-2.) Even though this
17 IRS letter does not expressly state that the IRS abated the 2009 federal late filing penalty on the basis of
18 reasonable cause, appellants argue that, because the letter was issued in response to appellants' request
19 for an abatement of the federal late filing penalty on the basis of reasonable cause, the letter is evidence
20 that the IRS accepted appellants' position that their failure to file was based on reasonable cause. (*Id.*)

21 The FTB's Opening Brief

22 The FTB makes four arguments. The FTB first argues that its imposition of the late
23 filing penalty is presumed correct and that appellants have the burden of showing reasonable cause for
24 a refund of that penalty, citing to the *Appeal of David A. and Barbara L. Beadling* (77-SBE-021),
25 decided on February 3, 1977.⁵ (FTB OB, p. 3.)

26 Second, the FTB asserts that the late filing penalty is computed as five percent of the tax
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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 due, after allowing for timely payments, for every month that the return is late, up to a maximum of
2 25 percent. (*Id.*, p. 3.) The FTB argues that appellants' payments to the FTB for the 2009 tax year
3 were made after the April 15, 2010 due date and, therefore, appellants' payments cannot be considered
4 for purposes of determining the base amount upon which the California late filing penalty is calculated.
5 (*Id.*)

6 Third, the FTB argues that each taxpayer has a personal, non-delegable, obligation to
7 file their tax return, citing the *Appeal of Thomas K. and Gail G. Boehme* (85-SBE-134), decided on
8 November 6, 1985. (*Id.*) The FTB asserts that (i) it was appellants' obligation to ensure that they
9 timely filed their return, and (ii) even though appellants allegedly used Turbo Tax to file their return,
10 appellants needed to take the necessary steps to ensure that their return was submitted timely. (*Id.*,
11 pp. 3-4.) The FTB contends that the electronic filing instructions provided by Turbo Tax expressly
12 state that (i) appellants need to "sign and date Form 8453-OL within one day of acceptance," and (ii) to
13 inquire about the status of appellants' payment to the FTB, appellants should contact the FTB directly.
14 The FTB asserts that Form 8453-OL states that the form "does not serve as proof of filing an electronic
15 return" and that a separate "acknowledgment" from the FTB (which will contain a "date of
16 acceptance") is proof that the FTB accepted a return. (*Id.*, p. 4.) The FTB asserts that software
17 providers, such as the maker of Turbo Tax, electronically transmit numerous tax returns to the FTB in a
18 single batch, and that the FTB then electronically transmits an acknowledgement back to the provider
19 identifying each return within the batch as either accepted or rejected. (*Id.*, fn. 7.) The FTB contends
20 that it is then up to the software provider to notify the taxpayer, typically via email, of the acceptance or
21 rejection. (*Id.*) As for the facts at hand, the FTB contends that it has no record of an electronically-
22 transmitted 2009 return (either accepted or rejected) for appellants. (*Id.*) In addition, the FTB asserts
23 that the exercise of ordinary business care in this appeal (not to mention appellants' alleged prior
24 experience in filing returns electronically using Turbo Tax) would have put appellants on notice that an
25 acceptance/rejection from the FTB should have been issued and, if not, then appellants should have
26 made the necessary inquiry as to why an acceptance/rejection was not issued. (*Id.*, p. 4.) Furthermore,
27 the FTB asserts that appellants acknowledge in their letter dated January 27, 2011, to the FTB that (i)
28 they did not notice that the tax balance due of over \$100,000 was not debited from their bank account,

1 and (ii) they ultimately had the obligation to file their return. (*Id.*, pp. 4-5.) Specifically, appellants'
2 letter dated January 27, 2011, states, in part:

3 After consultation with Turbo Tax we have been unable to determine what processes
4 might have compromised the electronic transmission of the return. [We have submitted
5 prior years returns using Turbo Tax and electronic transmission without encountering any
6 problem]. Apparently during the final steps in submitting the return it was either not
7 transmitted properly, or recorded as received by your organization on or before April 15,
8 2010.

9 Ultimately it was our responsibility to ensure that you received the return, and payment
10 of tax due in a timely fashion. We should have noticed that the funds were not debited
11 from our investment account. However, due to the size of the investment account, the
12 complexity of the banking statement, and the time constraints imposed upon us by our
13 professions, we simply relied too much on technology to guarantee completion of this
14 process. We apologize for not taking the time to audit the submission of the return to
15 completion. (AL, Ex. G.) (Emphasis supplied.)

16 In short, the FTB asserts that, if appellants acted reasonably, they would have reviewed their bank
17 statements, recognized their tax liabilities had not been debited, and called the FTB to inquire about the
18 status of their returns. (*Id.*, p. 4.)

19 Fourth, the FTB argues that appellants have not shown that the IRS abated the 2009
20 federal late filing penalty on the basis of reasonable cause. (*Id.* pp. 4-5.) The FTB notes that the IRS
21 letter dated September 29, 2011, does not state that the IRS abated the 2009 federal late filing penalty
22 based on reasonable cause. (*Id.*, p. 4 & AL Ex. K.) Moreover, the FTB asserts that appellants' federal
23 transcript indicates that the 2009 federal late filing penalty was abated on the basis of a first-time
24 abatement, based on appellants' good filing history, as indicated by the IRS code designations "ARC",
25 "065", and "020"—and the absence of code "062." (FTB OB, pp. 4-5.) The FTB asserts that the
26 absence of code "062" generally indicates that the IRS did not abate a penalty on the basis of
27 reasonable cause. (*Id.*) The FTB states that, under Internal Revenue Manual (hereinafter sometimes
28 "IRM") section 20.1.1.3.6.1, the IRS can grant an administrative waiver for a first-time abatement of a
penalty on the basis of a taxpayer's good filing history. (*Id.*, p. 3-5 & fn. 5.) In comparison, the FTB
asserts that it does not have such authority. (*Id.*, p. 5.)

Appellants' Reply Brief

Appellants reiterate their assertions that (i) they had no reason to suspect that their
returns had not been filed, and (ii) after discovering that their returns had not been filed, they

1 immediately sought to rectify the situation. (App. Reply Br., pp. 1-2.) After reiterating those
2 assertions, appellants then repeat and/or make the following additional arguments.

3 First, appellants argue that the actions they took after discovering their tax problem
4 (i.e., driving to the FTB's field office and making payment there) along with their impeccable filing
5 history, can be used as basis for determining whether appellants acted reasonably and/or the
6 appropriateness of the late filing penalty, citing the *Appeal of David A. and Barbara L. Beading, supra*.
7 (*Id.*, p. 2.) Appellants assert that the FTB's opening brief takes the erroneous position that such factors
8 cannot be considered. (*Id.*)

9 Second, appellants argue that the Board should take into account appellants' "sincerely
10 held belief" that their tax return and payment had been received, citing the *Appeal of Dorothy Chandler*
11 (79-SBE-087), decided on May 9, 1979. (*Id.*) Appellants assert that in the foregoing appeal, the Board
12 exercised its authority to reverse a late filing penalty based on the taxpayer's sincerely held belief that
13 her return had been filed, despite the Board's finding that the record did not necessarily support the
14 taxpayer's belief. (*Id.*)

15 Third, appellants note that, in support of the FTB's assertion that appellants' conduct
16 was not reasonable, the FTB provides an overview of the mechanics of electronic return filing. (*Id.*, p.
17 2.) Appellants assert that the FTB's argument regarding the mechanics of electronic return filing is
18 "misplaced" because ordinary and intelligent businesspersons (such as appellants) would not have
19 working knowledge of such technical matters. (*Id.*, pp. 2-3.)

20 Fourth, appellants assert that the FTB recently has been engaged in an aggressive
21 campaign to encourage taxpayers to utilize electronic filing of their returns, citing R&TC section
22 19011.5. (*Id.*, p. 3.) Appellants argue that the Board should not permit the FTB to first promote
23 e-filing and then severely punish early adopters of the technology (such as appellants) for good faith
24 transmission errors. (*Id.*)

25 Fifth, appellants note that, in the FTB's opening brief, the FTB asserts that it is a
26 well-settled rule that a taxpayer's duty to timely file its return is a non-delegable obligation. (*Id.*)
27 Appellants argue, however, that the FTB's reliance on this principle is misguided in that appellants did
28 not delegate the responsibility of filing their return to any third party, such as an accountant or assistant.

1 (*Id.*) Rather, appellants assert that they were under the mistaken impression that they had submitted
2 their return for electronic filing through the internet. (*Id.*) In short, appellants assert that it was never
3 their impression or understanding that they delegated this responsibility to Turbo Tax. (*Id.*)

4 Sixth, even though the IRS letter dated September 29, 2011, does not expressly state that
5 the IRS abated the 2009 federal late filing penalty on the basis of reasonable cause, appellants argue
6 that because that IRS letter was issued in response to appellants' request for abatement of the 2009
7 federal late filing penalty on the basis of reasonable cause, then the IRS letter is evidence that the IRS
8 accepted appellants' position that their failure to file a timely 2009 federal return was based on
9 reasonable cause. (*Id.*, pp. 3-5.)

10 Seventh, appellants argue that the Internal Revenue Manual supports appellants'
11 argument that the IRS abated the 2009 federal late filing penalty on the basis of reasonable cause. (*Id.*,
12 pp. 4-5.) Specifically, appellants make the following contentions:

- 13 ➤ Appellants contend that IRM section 20.1.1.3.6.1.7 provides that where the IRS abates a penalty
14 based on the first-time waiver, the notification letter mailed to the taxpayer automatically will
15 include a paragraph stating that the penalty is being abated solely on the basis of the taxpayer's
16 good filing history. (*Id.*, p. 4.) Appellants assert that the correspondence it received from the
17 IRS does not contain such language. (*Id.*)
- 18 ➤ Appellants contend that IRM section 20.1.1.3.6.1.7 provides that where a penalty is abated
19 under the first-time administrative waiver, the IRS correspondence will contain an explanation
20 to educate the taxpayer on how to be compliant in the future. (*Id.*) Appellants assert that the
21 correspondence it received from the IRS does not contain such language. (*Id.*)
- 22 ➤ Appellants contend that IRM section 20.1.1.3.6.2.1 provides that penalty code 018 is used when
23 removing a penalty on the basis of a first-time abatement, based on an appellant's good filing
24 history, where reasonable cause is not available. (*Id.*) Appellants assert that the correspondence
25 it received from the IRS does not contain a penalty code 018. (*Id.*)

26 The FTB's Reply Brief

27 The FTB makes six arguments. First, it reiterates that appellants' federal transcript
28 states that the 2009 federal late filing penalty was abated on the basis of a first-time abatement, based

1 on appellants' good filing history, as indicated by IRS code designations "ARC", "065", and "020"—
2 and the absence of code "062." (FTB Reply Br., pp. 1-3.) The FTB reasserts that the absence of IRS
3 code "062" generally indicates that the IRS did not abate a penalty on the basis of reasonable cause.
4 (*Id.*)

5 Second, the FTB acknowledges that IRM section 20.1.1.3.6.1.7 provides that where a
6 penalty is abated under the first-time administrative waiver, the IRS correspondence should contain an
7 explanation to educate the taxpayer on how to be compliant in the future—and that such language does
8 not appear on the IRS's penalty abatement letter. (*Id.*) The FTB asserts, however, that appellants'
9 federal transcript is an official transcript and unambiguously indicates the 2009 federal late filing
10 penalty was abated on the basis of a first-time abatement, based on appellants' good filing history. (*Id.*,
11 p. 3.) Furthermore, the FTB asserts that IRM section 20.1.1.3.6.1.4 provides that the IRS must first
12 determine whether a first-time abatement based on a good filing history applies and, if the first-time
13 abatement applies, then it is unnecessary to perform a reasonable cause analysis. (*Id.*, pp. 2-3.) In any
14 event, the FTB asserts that appellants' federal transcript (and the designations listed therein) are
15 conclusive. (*Id.*)

16 Third, the FTB argues that, even if the IRS abated the 2009 federal late filing penalty on
17 the basis of reasonable cause, the FTB is not bound by the IRS's determination, citing the *Appeal of*
18 *Der Wienerschnitzel, Inc.* (79-SBE-063), decided on April 10, 1979. (*Id.*, p. 3.) In addition, the FTB
19 argues (in a general manner) that the "facts and circumstances" in the appeal at hand do not
20 demonstrate reasonable cause. (*Id.*)

21 Fourth, the FTB clarifies that the actions appellants took after allegedly discovering their
22 tax problem (i.e., driving to the FTB's field office and making payment there) along with their filing
23 history, can be used as basis for determining whether appellants had reasonable cause and lacked
24 willful neglect for the late filing of their return. (*Id.*) The FTB asserts, however, that appellants have
25 not shown reasonable cause, as evidenced by their failure to confirm the successful transmission of
26 their return and the failure to notice that a tax payment of over \$100,000 had not been debited from
27 their account. (*Id.*) The FTB reiterates that, when calculating the late filing penalty, payments made
28 after the original due date cannot be considered for purposes of determining the base amount upon

1 which the late filing penalty is computed, citing R&TC section 19131. (*Id.*)

2 Fifth, the FTB asserts that appellants erroneously cite R&TC section 19011.5 for their
3 contention that “in some instances, electronic filing has become mandatory.” (*Id.*, pp. 3-4.) The FTB
4 argues, however, that R&TC section 19011.5 relates to mandatory electronic payments under certain
5 conditions. (*Id.*) In comparison, the FTB asserts that mandatory electronic filings only apply to certain
6 tax return preparers, citing R&TC sections 18621.9 and 19170. (*Id.*, p. 4.)

7 Sixth, the FTB argues that appellants’ criticism that the FTB should not be allowed to
8 aggressively promote electronic filing “and then to severely punish early adopters of the technology
9 (such as Appellants) for sincere, good faith transmission errors” is misplaced, in that the FTB has not
10 imposed any penalties for appellants’ transmission error. (*Id.*) Rather, the FTB asserts that it has
11 imposed a late filing penalty for appellants’ failure to file a timely 2009 California return, and the law
12 requires that appellants show that their failure to timely file their 2009 California return occurred
13 despite the exercise of ordinary business care and prudence, which the FTB asserts appellants have not
14 shown. (*Id.*)

15 Applicable Law

16 California imposes a penalty for the failure to file a return by its due date, unless the
17 failure to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.)
18 The late filing penalty is computed as five percent of the tax due, after allowing for timely payments,
19 for every month that the return is late, up to a maximum of 25 percent. (*Id.*)

20 To establish reasonable cause, a taxpayer “must show that the failure to file timely
21 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as
22 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
23 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Ignorance of a
24 filing requirement or a misunderstanding of the law generally does not excuse a late filing. (*Appeal of*
25 *Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.) The FTB’s determination is presumed to be
26 correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509;
27 *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)

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1 STAFF COMMENTS

2 As indicated above, appellants assert, among other things, that (i) they filed their 2009
3 state and federal returns online using Turbo Tax, (ii) they had a reasonable belief that their 2009 state
4 and federal returns had been submitted properly to the FTB and the IRS respectively, as appellants
5 successfully utilized Turbo Tax to submit their returns online for previous tax years, (iii) at the time they
6 filed their returns, they elected to pay the balances due by direct deposit and they submitted their bank
7 account and routing information via Turbo Tax, (iv) they did not receive any notice from Turbo Tax that
8 any transmission errors occurred when they directed the Turbo Tax online interface to submit their 2009
9 state and federal returns, and any such transmission errors were not reasonably foreseeable by
10 appellants, (v) not until they received a notice dated December 27, 2010, from the IRS did they realize
11 that (A) their state and federal returns had not been filed, and (B) their tax payments had not been
12 debited from their bank account, (vi) on January 27, 2011 (i.e., less than a month after receiving the
13 IRS's notice), appellant-husband and/or appellant-wife appeared at the FTB's Bay Area office, where
14 appellants submitted their joint 2009 California return, including the payment for all of the amounts due
15 (i.e., taxes, penalties, and interest), and (vii) their tax compliance history is impeccable.

16 Staff notes that in a letter dated January 27, 2011, appellants state, in part:

17 We should have noticed that the funds were not debited from our investment account. However,
18 due to the size of the investment account, the complexity of the banking statement, and the time
19 constraints imposed upon us by our professions, we simply relied too much on technology to
guarantee completion of this process. (AL, Ex. G.) (Emphasis supplied.)

20 With this, Board staff notes that \$157,469 in tax was due with appellants' 2009 federal return and
21 \$107,802 in tax was due with appellants' California return. As such, appellants did not notice for over
22 eight months (i.e., from April 15, 2010, until December 27, 2010 (when contacted by the IRS)) that
23 more than \$250,000 had not been debited from their investment account.

24 At the oral hearing, the parties should further elaborate on whether appellants have shown
25 reasonable cause for a refund of the late filing penalty. In the *Appeal of Dorothy Chandler, supra*, for
26 example, the Board abated a late filing penalty, stating:

27 The burden of proof is on the taxpayer. . . . In this regard, we were impressed at the oral
28 hearing with appellant's firm conviction that she paid her 1972 tax liability. While we
recognize that the record herein does not support that belief, appellant's account of her
circumstances combined with other factors made apparent at the hearing, has convinced

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us that the failure to file was due to reasonable cause and not willful neglect. Therefore, we conclude that the penalty imposed herein should be cancelled.

Accordingly, at the oral hearing, the parties should be prepared to discuss whether appellants' circumstances show a reasonable cause for a refund of the late filing penalty.

If appellants have any further evidence that they wish to submit, pursuant to California Code of Regulations, title 18, section 5523.6, appellants should provide their evidence to the Board Proceedings Division at least 14 days prior to the oral hearing.⁶

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Ding_wjs

⁶ Exhibits should be sent to: Mr. Khaaliq Abd'Allah, Associate Governmental Program Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879, Sacramento, California, 94279-0081.