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10 **BOARD OF EQUALIZATION**  
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
 13 )  
 14 ) **CORPORATION FRANCHISE TAX APPEAL**  
 15 )  
 16 **EPICENTER COMMUNICATIONS**<sup>1</sup> ) Case No. 568608<sup>2</sup>

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	<u>Years</u> <sup>3</sup>	<u>Claim For Refund</u> <sup>4</sup>
	2007	\$1,417.20
	2008	\$1,899.83

17 Representing the Parties:

18  
 19 For Appellant: Jacqueline Amrikhas, C.P.A.  
 20 For Franchise Tax Board: Jane Perez, Tax Counsel III  
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23 <sup>1</sup> Appellant is located in Sausalito, Marin County, California.

24 <sup>2</sup> This appeal was originally scheduled for the January 11, 2012 oral hearing calendar. The matter was pulled pending a  
 25 proposed regulation regarding penalty relief which was being considered by respondent. That regulation was not adopted,  
 26 and the matter was reactivated and scheduled for the March 12-14, 2013 oral hearing calendar. The matter was then  
 27 postponed to the May 22-24, 2013 Sacramento oral hearing calendar due to appellant's scheduling conflicts.

28 <sup>3</sup> Appellant's 2007 and 2008 tax years both ended on December 31 of the respective year.

<sup>4</sup> These amounts represent the payment made by appellant on June 22, 2010, and total the \$3,317.03 refund amount claimed  
 in appellant's appeal letter.

- 1 QUESTIONS: (1) Whether appellant has established reasonable cause so that the late payment  
2 penalties for 2007 and 2008 should be abated;  
3 (2) Whether appellant has shown the estimated tax penalties for 2007 and 2008  
4 should be abated;  
5 (3) Whether appellant has shown error in respondent's imposition of the collection  
6 cost recovery fee and lien fee for 2008; and  
7 (4) Whether appellant has shown respondent erred in not abating interest.

8 HEARING SUMMARY

9 Background

10 2007 Tax Year

11 Appellant filed its 2007 California tax return on August 5, 2008, within the extended due  
12 date. Appellant reported net income of \$1,452,892, a total tax of \$21,793, payments totaling \$800,<sup>5</sup>  
13 self-assessed interest of \$20, and a total amount due of \$21,013 which appellant remitted with its  
14 return. (Resp. Op. Br., p. 1 & exhibit A.) Respondent accepted the self-assessed tax due amount and  
15 imposed a late payment penalty in the amount of \$1,514.48. Respondent issued notices requesting  
16 payment to appellant at its P.O. Box in Sausalito, as listed on its 2007 and 2008 returns.<sup>6</sup> (See App.  
17 Op. Br., attachments.) Respondent indicates none of these notices were returned as undeliverable.  
18 Appellant made a payment on June 22, 2010, satisfying the amount due at that time of \$1,417.20  
19 (including \$701.50 in accrued interest). Appellant filed a claim for refund which was subsequently  
20 denied by respondent. This timely appeal followed.

21 2008 Tax Year

22 Appellant filed its 2008 California tax return on September 15, 2009, within the  
23

24 <sup>5</sup> This payment amount is listed as estimated tax payments. (Resp. Op. Br., exhibit A, p. 1, ln. 32; see also *Id.* at exhibit A,  
25 p. 39, ln. 5a.) Respondent states that appellant made an estimated tax payment in the amount of \$800 on August 14, 2007,  
26 and an additional payment for 2007 of \$800 on March 15, 2008. (*Id.* at p. 1.) Respondent further states that appellant did  
27 not remit any estimated payments for 2008; however, appellant's 2008 return lists a first quarter estimated payment of \$800.  
(*Id.* at p. 2 and exhibit D, p. 38, ln. 5a; see also *Id.* at exhibit D, p. 1, ln. 32.) It appears, as discussed *infra*, that respondent  
applied an estimated payment made in 2008 and intended for the 2008 tax year as an estimated payment for 2007.

28 <sup>6</sup> These notices reported a penalty amount for the 2007 tax year of \$1,535.70, comprised of the \$1,514.48 late payment  
penalty and an estimated tax penalty of \$21.22. (See App. Op. Br., attachments.) Respondent's denial of appellant's claim  
for refund also confirms the imposition of an estimated tax penalty for the 2007 tax year. (Resp. Op. Br., exhibit C, p. 1.)

1 extended due date. Appellant reported net income of \$347,603, a total tax of \$5,214, payments totaling  
2 \$800,<sup>7</sup> self-assessed interest of \$151, and a total amount due of \$4,565 which appellant remitted with  
3 its return. (Resp. Op. Br., p. 2 & exhibit D.) Respondent accepted the self-assessed tax due amount  
4 and imposed a late payment penalty in the amount of \$449.57 and an estimated tax penalty in the  
5 amount of \$201.19. Respondent subsequently imposed a collection cost recovery fee in the amount of  
6 \$413 and a lien fee in the amount of \$13. Respondent issued notices requesting payment to appellant at  
7 its P.O. Box in Sausalito, as listed on its 2007 and 2008 returns. (See App. Op. Br., attachments.)  
8 Respondent indicates none of these notices were returned as undeliverable. Appellant made a payment  
9 on June 22, 2010, satisfying the amount due at that time of \$1,899.83 (including \$172.63 in accrued  
10 interest). Appellant filed a claim for refund which was subsequently denied by respondent. This timely  
11 appeal followed.

### 12 Contentions

13 Appellant asserts the interest and penalties in the total amount of \$3,317.03 for both  
14 years should be abated because respondent did not mail the tax assessment notices to the taxpayer's  
15 last-known address. Appellant contends it became aware of tax delinquency after the corporation was  
16 suspended from conducting business in California and it contacted FTB. Appellant asserts it complied  
17 with its tax obligation by remitting a check to FTB on June 23, 2010, in the amount of \$3,317.03.  
18 (App. Op. Br., p. 1.) Appellant says it exercised ordinary business care and prudence by contacting the  
19 FTB upon learning of its suspension and paying the tax deficiency. Therefore, appellant contends it has  
20 established reasonable cause to abate the penalties. Appellant asserts the notices were not sent to the  
21 last-known address because the notices were returned to respondent by the United States Postal Service  
22 (USPS). Appellant contends it finally received copies of the notices from respondent by facsimile on  
23 September 10, 2010, after making several requests over the phone beginning on June 23, 2010. (*Id.* at  
24 p. 2.)

25 Respondent asserts appellant has not established reasonable cause for its failure to pay  
26 the full amount of its taxes by the payment due dates, and the late payment penalty is therefore properly  
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<sup>7</sup> This payment amount is listed as estimated tax payments made in the first quarter of 2008. (Resp. Op. Br., exhibit D, p. 38, ln. 5a.) Respondent contends appellant did not remit any estimated payments for 2008. (*Id.* at p. 2.)

1 imposed as calculated under Revenue and Taxation Code (R&TC) section 19132. Respondent  
2 acknowledges appellant's contention that the penalty should be abated because it never received  
3 respondent's notices which were returned as undeliverable by the USPS, but asserts the notices were  
4 not returned as undeliverable, the penalty is based on a failure to pay timely, and since there is no  
5 notice requirement the last-known address rule does not apply here. Regardless, respondent asserts the  
6 notices were sent to the address listed on appellant's 2007 and 2008 tax returns. Respondent contends  
7 the estimated tax penalty is also properly imposed, since appellant failed to make all the required  
8 estimated tax payments for 2007 and 2008.<sup>8</sup> Respondent asserts there is no reasonable cause exception  
9 to the penalty and appellant does not meet any of the limited exceptions to the penalty.

10 Respondent asserts the collection cost recovery fee and lien fee for 2008 were properly  
11 imposed pursuant to R&TC section 19254. Respondent contends the fees must be imposed since it sent  
12 the Corporation Final Notice Before Levy and the subsequent Notice of State Tax Lien to appellant and  
13 appellant was advised that the fees will be imposed if a timely payment was not received, and appellant  
14 did not respond timely by paying its tax liability. Respondent asserts there is no provision in the R&TC  
15 to abate the fees. Respondent contends the imposition of interest is mandatory, and appellant has not  
16 met the limited circumstances that would allow for the abatement of interest.

### 17 Applicable Law

#### 18 Burden of Proof

19 The FTB's determination is presumed to be correct, and a taxpayer has the burden of  
20 proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,  
21 2001-SBE-001, May 31, 2001; *Appeal of Robert E. and Argentina Sorenson*, 81-SBE-005, Jan. 6,  
22 1981.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of*  
23 *Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

#### 24 Late Payment Penalty

25 Pursuant to R&TC section 19132, a late payment penalty is imposed when a taxpayer  
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27 <sup>8</sup> Respondent applied appellant's two \$800 payments to 2007 and no payments to 2008. As discussed in staff comments  
28 below, the parties should be prepared to discuss at the hearing whether this allocation of the estimated payments is correct.  
(See also footnote 4 above.)

1 fails to pay the amount shown as due on the return on or before the due date of the return. However,  
2 the penalty may be abated if an appellant can show the failure to make a timely payment of tax was due  
3 to reasonable cause and in the absence of willful neglect. (Rev. & Tax. Code, § 19132, subd. (a).) The  
4 taxpayer bears the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*,  
5 83-SBE-244, Oct. 26, 1983; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) To establish  
6 “reasonable cause” for late payment of tax, the taxpayer must show that its failure to make a timely  
7 payment of the proper amount of tax occurred despite the exercise of ordinary business care and  
8 prudence. (*Id.*; see also *Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986.)

9 R&TC section 19001 provides that, generally, the corporate franchise tax imposed “shall  
10 be paid at the time and place fixed for filing the return (determined without regard to any extension of  
11 time for filing the return).” The complexity and problems in accumulating the information necessary to  
12 complete a return does not constitute reasonable cause for the failure to make a timely payment of the  
13 tax due. (*Appeal of Incom International, Inc.*, 82-SBE-053, Mar. 31, 1982.) Further, a taxpayer’s  
14 difficulty in determining income with exactitude does not negate the requirement to make a timely  
15 payment based upon a reasonably accurate estimate of its tax liability. (*Appeal of Roger W. Sleight*,  
16 *supra*; *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9, 1979.)

#### 17 Last-known Address

18 The Board has long recognized a presumption in favor of respondent arising from the  
19 “last-known address rule.” Under this rule, the Board presumes respondent’s mailing of a statutory  
20 notice to taxpayers provides notice to the taxpayers of the tax due, so long as respondent mailed the  
21 notice to the taxpayers’ last-known address, even if the taxpayers did not actually receive the notice.  
22 (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Jon W. and Antoinette O.*  
23 *Johnston*, 83-SBE-238, Oct. 26, 1983.) The taxpayers’ last-known address is the address shown on the  
24 taxpayers’ most recently filed return, unless respondent is given clear and concise notice of a different  
25 address. (*King v. Commissioner* (9th Cir. 1988) 857 F.2d 676, 679; *Wallin v. Commissioner* (9th Cir.  
26 1984) 744 F.2d 674, 676.) If respondent has reason to believe that an address is the most current  
27 address for the taxpayers, then that address shall be the last-known address. (Rev. & Tax. Code,  
28 § 18416, subd. (c).) Respondent must exercise reasonable care and due diligence in determining the

1 correct address for mailing of a notice, and the relevant inquiry is to respondent's knowledge of  
2 appellants' last-known address, rather than what may in fact be appellants' most current address.  
3 (*Reding v. Commissioner* (1990) 59 T.C. 793.) The purpose of this rule is to protect the taxing agency  
4 and the statutory scheme of assessment and appeal from a failure by the taxpayers to inform the taxing  
5 agency of a change in address. (*Delman v. Commissioner* (3rd Cir. 1967) 384 F.2d 929, 933.) The  
6 presumption in the last-known address rule in favor of respondent is not absolute. Appellants may  
7 overcome the presumption by proving by a preponderance of the evidence that respondent failed to  
8 send the required notices to appellants' last-known address. (See Cal. Code Regs., tit. 18, § 5080.)

#### 9 Estimated Tax Penalty

10 R&TC section 19142 provides for an addition to tax when there is a failure to timely  
11 make an estimated tax payment that is essentially equal to the interest that would have accrued on the  
12 required estimated payment had it been timely made. (See Rev. & Tax. Code, §§ 19142 et. seq., and  
13 19023 through 19027). This addition to tax is referred to as the underpayment of estimated tax penalty  
14 and is properly imposed where the taxpayer's estimated payments are less than the amounts due at the  
15 end of the installment periods. (*Appeal of Bechtel Incorporated*, 78-SBE-052, July 26, 1978.) The  
16 imposition of this penalty is mandatory upon a finding of a failure to make an estimated tax payment  
17 and it cannot be abated for reasonable cause. (*Appeal of Weaver Equipment Company, supra.*)

#### 18 Collection Cost Recovery Fee

19 When a taxpayer fails to pay a tax after proper notice, R&TC section 19254 directs the  
20 FTB to impose a recovery fee on the taxpayer for the actual cost of collecting the tax. Once the fee is  
21 properly imposed, there is no language in the statute that will excuse the fee under any circumstances,  
22 including for reasonable cause. (See *Appeal of Michael E. Myers, supra.*)

#### 23 Lien Fee

24 R&TC section 19221 provides for the imposition of a lien fee on a taxpayer. R&TC  
25 section 19221, subdivision (a), provides that any amount due from a taxpayer shall become an  
26 enforceable state tax lien if the taxpayer fails to pay the amount due at the time it becomes due and  
27 payable. Government Code section 7174 allows the FTB to collect the various fees associated with  
28 recording and releasing the state tax lien. Once the fee is properly imposed, there is no language in the

1 statute that will excuse the fee under any circumstances, including for reasonable cause.

2 Interest Abatement

3 The Board has held interest is not a penalty, but is simply compensation for a taxpayer's  
4 use of money after the due date of the tax. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)  
5 The imposition of interest is mandatory. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977;  
6 *Appeal of Audrey C. Jaegle, supra.*) There is no reasonable cause exception to the imposition of  
7 interest. (*Appeal of Audrey C. Jaegle, supra.*)

8 Respondent may abate interest accrued on a deficiency when the aggrieved taxpayer  
9 identifies an unreasonable error or delay which (1) occurred after respondent contacted the taxpayer in  
10 writing about the particular deficiency or overpayment underlying the disputed interest; (2) is not  
11 significantly attributable to the taxpayer; and (3) is attributable to a ministerial or managerial<sup>9</sup> act  
12 performed by respondent. (*Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999; see  
13 also Rev. & Tax. Code, § 19104, subs. (a)(1) & (b)(1).) Respondent's determination not to abate  
14 interest is presumed correct, and the burden is on appellant to prove error. (*Appeal of Michael E.*  
15 *Myers, supra.*) The R&TC grants the Board jurisdiction to review respondent's refusal to abate interest  
16 for abuse of discretion and to order an abatement of interest if it determines that such an abuse  
17 occurred. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B); *Appeal of Ernest J. Teichert*, 99-SBE-006,  
18 Sept. 29, 1999.) To show an abuse of discretion, appellant must establish that the FTB exercised its  
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20 <sup>9</sup> In the *Appeal of Michael and Sonia Kishner* (99-SBE-007), decided September 29, 1999, the Board adopted the language  
21 from Treasury Regulation section 301.6404-2 (b)(2), which defines a "ministerial act" as:

22 A procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs  
23 during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review  
24 by supervisors, have taken place. A decision concerning the proper application of federal law (or other  
25 federal or state law) is not a ministerial act.

26 Further, as we did in the *Appeal of Michael and Sonia Kishner*, we turn to Treasury Regulation section 301.6404-2 (b)(1)  
27 for the definition of a "managerial" act. The regulation defines a managerial act as:

28 [A]n administrative act that occurs during the processing of a taxpayer's case involving the temporary or  
permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A  
decision concerning the proper application of federal tax law (or other federal or state law) is not a  
managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize  
the processing of tax returns or its delay in implementing an improved computer system, is not a  
managerial act for which interest can be abated . . . .

1 discretion arbitrarily, capriciously, or without sound basis in fact or law by refusing to abate interest.  
2 (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.)

3 STAFF COMMENTS

4 Appellant's contentions are based upon respondent not mailing notices to its last-known  
5 address; however, the copies of the notices provided by appellant bear the address used on appellant's  
6 2007 and 2008 returns and appear to be the proper address. Regardless, there is no notice requirement  
7 attached to the late payment penalty, and appellant should be prepared to demonstrate reasonable cause  
8 for its late payment of tax. Appellant will want to show that it attempted to pay the tax timely, i.e.,  
9 when the tax liabilities were due on or about March 15, 2008, and March 15, 2009, but was unable to  
10 do so despite exercising reasonable cause and not because of willful neglect. Appellant's assertions in  
11 its brief offers reasons for why it failed to comply with the tax liabilities starting from September 1,  
12 2009 (date of the first notice), but do not address why it did not timely pay the tax due for each year.  
13 Appellant will also want to address the estimated tax penalty, however, there is no reasonable cause  
14 exception to the imposition of the estimated tax penalty.

15 The collection cost recovery fee is properly imposed as long as respondent mails notice  
16 to collect payment owed and advises that fees will be imposed if payment is not made. The notices  
17 provided with appellant's brief appear to satisfy this requirement. Appellant should present any  
18 evidence to show these notices were not mailed to the last-known address or were returned by the  
19 USPS. It does not appear that the Board has jurisdiction to abate the lien fee. Appellant should provide  
20 any evidence showing an unreasonable error or delay resulting from a ministerial or managerial act by  
21 respondent to support its claim for interest abatement. Interest abatement is also only potentially  
22 available for periods after appellant has been contacted by respondent regarding the deficiency (e.g.,  
23 after appellant has received a notice of tax due), and if no unreasonable error or delay is attributable to  
24 the taxpayer.

25 The briefing shows appellant made two estimated payments for the 2007 and 2008  
26 years. Appellant made an \$800 payment on August 14, 2007, and another \$800 payment on March 15,  
27 2008. The first \$800 payment is listed as an estimated tax payment for appellant's third quarterly  
28 payment for the 2007 tax year on its return and is treated as such by respondent. (Resp. Op. Br., p. 1

1 and *Id.* at exhibit A, p. 1, ln. 32 & p. 39, ln. 5a.) The second \$800 payment was treated by respondent  
2 as an additional payment for appellant's 2007 tax year, and included as an estimated tax payment. (*Id.*  
3 at p. 1.) However, appellant treated the payment on its returns as a first quarter estimated tax payment  
4 for the 2008 tax year. (*Id.* at exhibit D, p. 38, ln. 5a & p. 1, ln. 32.) Respondent should discuss why it  
5 treated this payment as an additional estimated tax payment for 2007 when this payment was made on  
6 March 15, 2008, within the first quarter payment period for the 2008 tax year yet after the close of the  
7 2007 estimated tax payment period, and reported as a 2008 estimated tax payment by appellant. The  
8 parties should be prepared to discuss whether this payment should be applied as an estimated tax  
9 payment for 2007 or 2008, and provide any changes to the liability calculations should it be determined  
10 the payment applies to the 2008 tax year.

11 Appellant filed its claim for refund with respondent for the amount of \$3,317.03, the  
12 amount of the last payment made to satisfy the outstanding liabilities for both 2007 and 2008 tax years.  
13 This appeal is based on the denial of the claim for refund of that amount. Respondent indicates this  
14 amount may not accurately reflect the penalties, fees, and interest appellant is contesting here.<sup>10</sup>

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28 <sup>10</sup> The total amount of penalties, fees, and interest as reported by respondent and listed herein total \$3,486.59 (including for  
2007 the late payment penalty of \$1,514.48, estimated tax penalty of \$21.22, and interest of \$701.50, and for 2008 a \$449.57  
late payment penalty, an estimated tax penalty of \$201.19, interest of \$172.63, a collection cost recovery fee of \$413.00, and  
a lien fee of \$13.00). The parties should clarify any adjustments they wish to make to this calculation.