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

12 In the Matter of the Appeal of:) **HEARING SUMMARY**
 13)
 14) **LIMITED LIABILITY COMPANY TAX**
 15) **APPEAL**
 16) **EXTRA INNING EVENTS, LLC¹**
 17) Case No. 577047
 18)
 19)
 20)

	Claims For Refund				
Years	Late Payment Penalties	LLC Late Filing Penalties	Late Filing Penalties	Interest	
2004	\$52.00	\$ 50.00	\$ 0.00	\$ 25.89	
2005	\$ 0.00	\$ 50.00	\$ 0.00	\$ 0.00	
2006	\$ 0.00	\$ 50.00	\$ 225.00	\$275.20	
2007	\$ 0.00	\$ 50.00	\$ 225.00	\$160.49	
2008	\$ 0.00	\$ 50.00	\$ 25.00	\$ 8.69	
2009	\$88.00	\$ 0.00	\$ 0.00	\$ 39.38	

21 Representing the Parties:

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 23 For Appellant: Sanford J. Poger, CPA, JD
 24 For Franchise Tax Board: Nancy E. Parker, Tax Counsel III

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 28 ¹ Appellant lists an address in Los Angeles County, California. However, the California Secretary of State’s website currently lists appellant’s legal status as “cancelled.” This appeal was originally scheduled for the Board’s April 24-26, 2013 oral hearing calendar. At appellant’s request, this appeal was rescheduled for the Board’s July 17-19, 2013 oral hearing calendar.

- 1 QUESTIONS: (1) Whether appellant has demonstrated reasonable cause for the refund of the late
2 payment penalties under Revenue and Taxation Code (R&TC) section 19132.
3 (2) Whether appellant has demonstrated reasonable cause for the refund of the LLC
4 late filing penalties under R&TC section 19172.
5 (3) Whether appellant has demonstrated reasonable cause for the refund of the late
6 filing penalties under R&TC section 19131.
7 (4) Whether appellant has shown that interest must be refunded.

8 HEARING SUMMARY

9 Background

10 Appellant, a California limited liability company (LLC), was formed on May 7, 2004.
11 (FTB opening brief (FTB OB), p. 2.)

12 2004

13 Appellant paid the \$800 annual minimum LLC tax late on November 3, 2004. (*Id.*) On
14 January 14, 2011, appellant filed a California LLC tax return (Form 568) for the 2004 tax year,
15 reporting zero income and self-assessing an \$800 annual minimum LLC tax. No LLC fee was due
16 (based on appellant's income). (*Id.*)

17 2005

18 Appellant timely paid the \$800 annual minimum LLC tax on March 31, 2005. (*Id.*,
19 pp. 2-3.) On January 14, 2011, appellant filed a California LLC tax return for the 2005 tax year,
20 reporting zero income and self-assessing an \$800 annual minimum LLC tax. (*Id.*) No LLC fee was
21 due (based on appellant's income). (*Id.*)

22 2006

23 Appellant timely paid the \$800 annual minimum LLC tax on April 15, 2006. (*Id.*, p. 3.)
24 On October 15, 2010, appellant filed a California LLC tax return for the 2006 tax year, reporting
25 income of \$459,573 and self-assessing an \$800 annual minimum LLC tax and a \$900 LLC fee (based
26 on appellant's income). (*Id.*) Appellant remitted payment of \$900 with its return. (*Id.*)

27 2007

28 Appellant timely paid the \$800 annual minimum LLC tax on April 15, 2007. (*Id.*, p. 4.)

1 On October 15, 2010, appellant filed a California LLC tax return for the 2007 tax year, reporting
2 income of \$494,775 and self-assessing an \$800 annual minimum LLC tax and a \$900 LLC fee (based
3 on appellant's income). (*Id.*) Appellant remitted payment of \$900 with its return. (*Id.*)

4 2008

5 Appellant timely paid the \$800 annual minimum LLC tax on April 15, 2008. (*Id.*,
6 pp. 4-5.) On October 15, 2010, appellant filed a California LLC tax return for the 2008 tax year,
7 reporting income of \$498,187 and self-assessing an \$800 annual minimum LLC tax and a \$900 LLC
8 fee (based on appellant's income). (*Id.*) Appellant remitted payment of \$900 with its return. (*Id.*) On
9 April 15, 2009, the FTB received a payment of \$800, which the FTB applied to the 2008 tax year as
10 directed by the appellant on a 2008 tax voucher (Form 3522). (*Id.*)

11 2009

12 As discussed further below, appellant asserts that it paid its 2009 taxes in a timely
13 manner, but it incorrectly used a 2008 tax voucher (Form 3522) instead of a 2009 tax voucher and,
14 thus, the payment was not applied to appellant's 2009 tax year. On September 15, 2010, appellant filed
15 a California LLC tax return for the 2009 tax year, reporting income of \$111,353 and self-assessing an
16 \$800 annual minimum LLC tax. (*Id.*, pp. 5-6.) No LLC fee was due (based on appellant's income).
17 (*Id.*) The FTB states that after reviewing appellant's 2009 return, it applied a credit from appellant's
18 2007 tax year to appellant's 2009 tax year, which the FTB asserts satisfied the amount due for the 2009
19 tax year. The FTB does not state when it applied the credit from appellant's 2007 tax year to
20 appellant's 2009 tax year.

21 FTB Review

22 After reviewing appellant's LLC tax returns, the FTB assessed the penalties and interest
23 described below. (*Id.*, pp. 1-10)

24 For 2004, the FTB imposed a late payment penalty of \$52.00, an LLC late filing penalty
25 under R&TC section 19172 of \$50.00, and interest of \$25.89.

26 For 2005, the FTB imposed an LLC late filing penalty under R&TC section 19172 of
27 \$50.

28 For 2006, the FTB imposed an LLC late filing penalty under R&TC section 19172 of

1 \$50.00, a late filing penalty under R&TC section 19131 of \$225.00, and interest of \$275.20.

2 For 2007, the FTB imposed an LLC late filing penalty under R&TC section 19172 of
3 \$50.00, a late filing penalty under R&TC section 19131 of \$225.00, and interest of \$160.49.

4 For 2008, the FTB imposed an LLC late filing penalty under R&TC section 19172 of
5 \$50.00, a late filing penalty under R&TC section 19131 of \$25.00, and interest of \$8.69.

6 For 2009, the FTB imposed a late payment penalty of \$88.00 and interest of \$39.38.

7 In response, appellant paid the penalties and interest in full and filed timely claims for
8 refund. (*Id.*) When appellant's claims for refund were denied, appellant filed this timely appeal. (*Id.*)

9 Contentions

10 Appellant's Appeal Letter

11 Appellant asserts that (i) it consulted with a tax attorney regarding its reporting
12 requirements, (ii) the tax attorney allegedly stated that appellant did not have to file a special tax return
13 (such as a California LLC tax return), and (iii) the tax attorney allegedly stated that appellant's income
14 and expenses would flow through to the managing member's individual tax return. (Appeal Letter
15 (AL), pp. 1-3.) Appellant argues that there is reasonable cause to refund the "penalties" in this appeal
16 based on appellant's reliance on the advice of its tax attorney, citing to, among other sources, *United*
17 *States v. Boyle* (1985) 469 U.S. 241. (*Id.*) Finally, appellant argues that because the FTB applied
18 payments to earlier tax years (and not the tax year corresponding with a particular payment), extra
19 interest was created and at least half of the interest assessed by the FTB, which appellant asserts totals
20 \$509.14,² should be refunded. (*Id.*)

21 FTB's Opening Brief

22 The FTB asserts that (i) appellant has not shown reasonable cause for refund of the late
23 payment penalties imposed for 2004 and 2009, and (ii) appellant has not shown reasonable cause for
24 refund of late filing penalties imposed for 2004-2008. (FTB OB, pp. 6-9.) The FTB contends that a
25 taxpayer may, under certain circumstances, show reasonable cause to abate penalties where the
26 taxpayer relies on improper advice from an accountant or tax attorney as to a matter of tax law, such as
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28 ² The FTB states that the interest assessed was \$509.65.

1 whether the taxpayer had a tax liability, citing to *United States v. Boyle, supra*. (*Id.*) The FTB asserts,
2 however, that (i) appellant has failed to identify the name of the tax professional who allegedly advised
3 appellant that it did not have a California filing requirement, (ii) appellant has not provided information
4 to indicate that the tax professional had competency in the preparation of California LLC returns,
5 (iii) given that appellant paid the \$800 annual minimum LLC tax in 2004, it is unlikely that a tax
6 professional would advise appellant to pay the 2004 minimum LLC tax but not to file LLC returns, and
7 (iv) appellant's appeal letter does not show how its tax professional is responsible for appellant making
8 late payments for the 2004 and 2009 tax years. (*Id.*) The FTB notes that in *United States v. Boyle*,
9 *supra*, the Supreme Court stated that "one does not have to be a tax expert to know that tax returns have
10 fixed filing dates and that taxes must be paid when they are due." (*Id.* at p. 9, citing *United States v.*
11 *Boyle, supra*, at 251.)

12 As for interest, the FTB asserts that (i) appellant does not specify a tax year in which it
13 believes payments were incorrectly applied, and (ii) appellant has not shown how it reached its
14 conclusion that "at least half" of the interest should be abated. (*Id.*, pp. 9-10.) In addition, the FTB
15 contends that according to R&TC section 19301, subdivision (a), the FTB is authorized to transfer
16 overpayments to earlier tax years. (*Id.*, p. 10.) The FTB also contends that (i) interest abatement is
17 only allowed in specified circumstances (citing to R&TC section 19104), and (ii) appellant has not
18 shown unreasonable error or delay by the FTB in the performance of a ministerial or managerial act.
19 (*Id.*, pp. 9-10.)

20 Appellant's Reply Brief

21 Late Payment Penalties

22 As for the late payment penalties (which were assessed for tax years 2004 and 2009),
23 appellant makes the following arguments:

24 In relation to the 2004 late payment penalty, appellant states (1) its attorney did not
25 advise appellant as to the payment of the \$800 annual minimum LLC tax, (2) appellant was aware of
26 the requirement to pay the \$800 annual minimum LLC tax, and (3) its tax attorney merely advised
27 appellant that "no additional tax was due for a single member LLC/disregarded entity."

28 In relation to the 2009 late payment penalty, appellant asserts that it filed and paid its

1 2009 taxes in a timely manner, but it incorrectly used a 2008 tax voucher (Form 3522) instead of a
2 2009 tax voucher and, thus, the payment was not applied to appellant's 2009 tax year.

3 Late Filing Penalties (R&TC § 19172) and (R&TC § 19131)

4 As for the LLC late filing penalties imposed under R&TC section 19172 and the late
5 filing penalties imposed under R&TC section 19131, appellant asserts that (i) it reasonably relied upon
6 the advice of its tax attorney (Sanford J. Poger, Esq.) in relation to the requirement to file California
7 LLC returns, (ii) the California statute that provides for the filing of an LLC tax return (i.e., R&TC
8 section 28633.5) is ambiguous, (iii) unlike the situation in *United States v. Boyle, supra*, where the
9 requirement to file an individual income tax return was clear, the obligation to file a California LLC
10 return is not clear under R&TC section 18633.5, and (iv) the reasonable cause defense does not require
11 that appellant's professional be an expert in California tax law. (*Id.*, pp. 1-2.) Appellant's reply brief is
12 signed under penalty of perjury by appellant's tax attorney and representative, Sanford J. Poger, Esq.,
13 to the best of his knowledge and belief. (*Id.*, p. 2.)

14 FTB's Supplemental Brief

15 The FTB makes four arguments. First, the FTB asserts that a taxpayer's reliance on an
16 agent, such as an accountant or tax attorney, to file a return by the due date is not reasonable cause,
17 citing to *United States v. Boyle, supra*. (FTB supplemental brief (FTB Supp. Br.), p. 1.)

18 Second, the FTB argues that, "[t]o date, appellant has not provided copies of the
19 information it provided to its tax professional or of the advice the professional provided in response to
20 this information." (*Id.* p. 2.)

21 Third, the FTB contends that "appellant's reply brief does not indicate that the tax
22 professional advised appellant that it did not have a filing obligation, only that no additional tax was
23 due." (*Id.*)

24 Fourth, the FTB asserts that appellant should have known that it had an obligation to file
25 LLC tax returns in light of express instructions that the FTB mailed to appellant regarding appellant's
26 duty to file a return. (*Id.*, p. 2.) Specifically, the FTB asserts that on August 25, 2004, it mailed
27 appellant a notice titled *Requirements For Limited Liability Companies*, indicating, among other things,
28 that for each year appellant is organized or doing business in California appellant must pay an \$800

1 annual minimum LLC tax and file a California Form 568 (*Limited Liability Company Return of*
2 *Income*).³ (*Id.*) The FTB asserts that its notice dated August 25, 2004, clearly sets forth appellant’s
3 duty to file its LLC returns and pay its annual minimum taxes. (*Id.*)

4 Appellant’s Supplemental Brief

5 Appellant asserts that (i) it never received the FTB notice dated August 25, 2004, and
6 (ii) the FTB has not provided a copy of that notice on appeal. (Appellant’s supplemental brief
7 (App. Supp. Br.), p. 1.)

8 Appellant also asserts that “[a]ll other filings and payments were timely with the
9 Franchise Tax Board” and “taxpayer always had sufficient funds to timely pay their taxes . . .” (*Id.*)

10 Appellant concludes with the assertion that “[i]f it is so obvious that form 568 is due
11 why did it take Franchise Tax Board in excess of five years to inquire what to do with the yearly \$800
12 annual Limited Liability Company payments paid with form(s) 3522?” (*Id.*)

13 Applicable Law

14 *Burden of Proof—In General*

15 The FTB’s determination of tax is presumed to be correct, and a taxpayer has the burden
16 of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Aaron and Eloise*
17 *Magidow, supra.*)⁴ Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof.
18 (*Appeal of Aaron and Eloise Magidow, supra.*)

19 *Proper Notice*

20 In general, a notice sent by the FTB to a taxpayer’s last-known address is presumed to
21 be an effective notice, since it is a taxpayer’s responsibility to take reasonable steps to ensure that it
22 receives its mail. (See *Appeal of Ronald A. Floria*, 83-SBE-003, Jan. 3, 1983.) If a taxpayer claims
23 that he or she did not receive a notice, the taxpayer bears the burden of proving that the notice was not
24 mailed to the taxpayer’s last-known address. (See *Grancewicz v. Commissioner*, T.C. Memo.
25 1990-597.)

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28 ³ On appeal, the FTB does not provide a copy of the notice. However, the FTB’s records indicate that the notice was mailed
on August 25, 2004. As discussed below, appellant asserts that it did not receive this notice.

⁴ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 Late Payment Penalties

2 R&TC section 19132, subdivision (a)(1)(A), imposes a late payment penalty when a
3 taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of
4 that tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without
5 regard to extensions of time for filing). (Rev. & Tax. Code, § 19001.) The late payment penalty does
6 not apply when the failure to pay is due to reasonable cause and not due to willful neglect. The
7 taxpayer bears the burden of proving “reasonable cause,” which means the taxpayer must show that the
8 failure to pay the tax in a timely manner occurred despite the exercise of ordinary business care and
9 prudence. (*Appeal of M. B. and G. M. Scott*, 82-SBE-249, Oct. 14, 1982.)

10 Late Filing Penalties

11 R&TC section 19172 imposes a late filing penalty when a partnership (or an LLC
12 treated as a partnership or as a disregarded entity) fails to file a return at the time prescribed unless it is
13 shown that the failure was due to reasonable cause. The late filing penalty under R&TC section 19172
14 is computed at \$10 per partner per month, or fraction thereof, that the return is late, up to a maximum
15 of five months.

16 R&TC section 19131 imposes a penalty for the failure to file a return on or before the
17 due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.
18 (Rev. & Tax. Code, § 19131.) The late filing penalty under R&TC section 19131 is computed at five
19 percent of the tax due, after allowing for timely payments, for every month that the return is late, up to
20 a maximum of 25 percent. (*Id.*)

21 To establish reasonable cause for late filing, a taxpayer “must show that the failure to
22 file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause
23 existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar
24 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979; *Appeal of Stephen*
25 *C. Bieneman*, 82-SBE-148, July 26, 1982.)

26 United States v. Boyle

27 In *United States v. Boyle*, *supra*, the Supreme Court stated that it is reasonable for a
28 taxpayer to rely on the advice of an accountant or attorney when that accountant or attorney advises a

1 taxpayer as to a matter of tax law; however, the Supreme Court also stated that one does not need to be
2 a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.*, at
3 251-252.) In addition, the Supreme Court stated that a taxpayer's reliance on an accountant or attorney
4 cannot be a substitute for compliance with an unambiguous statute. (*Id.*)

5 Relief of Interest

6 Interest is required to be assessed from the date when the payment of tax is due, through
7 the date that it is paid. (Rev. & Tax. Code, § 19101.) The imposition of interest is mandatory; it is not
8 a penalty, but is compensation for an appellant's use of money after it should have been paid to the
9 state. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) There is no reasonable cause
10 exception to the imposition of interest. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

11 To obtain the relief from interest, an appellant must qualify under one of three statutes:
12 R&TC sections 19104, 19112, or 21012. R&TC section 21012 is apparently not applicable because
13 there has been no reliance on any written advice requested of the FTB. R&TC section 19112 requires a
14 showing of extreme financial hardship caused by a significant disability or other catastrophic
15 circumstance. In contrast to R&TC section 19104, which provides the Board with jurisdiction to
16 review interest abatement determinations under that provision, there is no provision in R&TC section
17 19112 that gives the Board jurisdiction to determine whether R&TC section 19112 applies.

18 Under R&TC section 19104, for tax years beginning on or after January 1, 1998,⁵ the
19 Board may only abate or refund interest on appeal.

20 [T]o the extent that interest is attributable in whole or in part to any unreasonable error or
21 delay by an officer or employee of the Franchise Tax Board (acting in his or her official
capacity) in performing a ministerial or managerial act.

22 (Rev. & Tax. Code, § 19104, subd. (a)(1).)

23 Further, the error or delay can be taken into account only if no significant aspect is
24 attributable to the taxpayer, and the error or delay occurred after the FTB contacted the taxpayer in
25 writing about the underlying deficiency. (Rev. & Tax. Code, § 19104, subd. (b)(1).) In the *Appeal of*
26 *Michael and Sonia Kishner* (99-SBE-007), decided by the Board on September 29, 1999, the Board
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28 ⁵ For years prior to January 1, 1998, managerial acts were not included as a reason for abatement of interest.

1 adopted the language from Treasury Regulation section 301.6404-2 (b)(2), defining a “ministerial act”
2 as:

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

8 Treasury Regulation section 301.6404-2 (b)(1) defines a “managerial act” as:

9 [A]n administrative act that occurs during the processing of a taxpayer’s case involving
10 the temporary or permanent loss of records or the exercise of judgment or discretion
11 relating to management of personnel. A decision concerning the proper application of
12 federal tax law (or other federal or state law) is not a managerial act.

13 STAFF COMMENTS

14 It appears that appellant is arguing that the late filings and late payments were caused by
15 its reasonable reliance on the advice of its tax professional. Appellant will want to provide any
16 available supporting documentation and detail to substantiate the general assertions made by its
17 representative regarding what he advised appellant. Appellant will want to demonstrate that any such
18 advice was given, and reasonably relied upon, prior to the applicable due dates for the 2004 to 2009 tax
19 years. In this connection, staff notes that the filing and payment deadlines are clearly set forth in the
20 instructions for the applicable tax return.⁶

21 Interest

22 There is no general reasonable cause exception to the imposition of interest. If appellant
23 intends to argue for interest abatement he should be prepared to identify an unreasonable error or delay
24 by the FTB in performing a ministerial or managerial act and that no significant aspect of any such
25 error or delay is attributable to the taxpayer.

26 Additional Evidence

27 If appellant has any further evidence that it wishes to submit, pursuant to California
28 Code of Regulations, title 18, section 5523.6, appellant should provide its evidence to the Board

⁶ See, e.g., https://www.ftb.ca.gov/forms/2004/04_568bk.pdf (p. 4, stating that the annual tax “is due and payable on or before the 15th day of the 4th month after the **beginning** of the taxable year [emphasis in original]” and that “[a] LLC must file Form 568, pay the LLC fee . . . by the 15th day of the 4th month (fiscal year) or April 15, 2005 (calendar year), following the close of its taxable year[]”).

1 Proceedings Division at least 14 days prior to the oral hearing.⁷

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5 Extra Inning Events, LLC_wjs

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⁷ Evidence exhibits should be sent to: Claudia Madrigal, Staff Services Manager II, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.